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The End of Welfare and Constitutional Protections for the Poor: 
A Case Study of the Wisconsin Works Program and Due Process Rights

Melissa Kwaterski Scanlan†

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I. INTRODUCTION

By ending welfare as an entitlement on the federal level, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the “Welfare Reform Act”) has made due process rights for welfare recipients uncertain. Prior to 1996, the U.S. Supreme Court interpreted the welfare laws as creating an entitlement that was tantamount to a property interest in receiving government benefits. This property interest, in turn, was constitutionally protected by the Due Process Clause of the Fourteenth Amendment, thus ensuring that people received notice and a hearing before losing their benefits.\(^2\) In the absence of a federal entitlement requirement, states can choose whether they will create a property interest in receiving welfare benefits. If states choose to end welfare as a property interest, they may also be able to excuse themselves from fair hearings, appeals, and other due process protections imposed to prevent the arbitrary actions or incompetency of agencies.

A state cannot end welfare as a property interest merely by proclaiming that its program is not an “entitlement” when the balance of the state’s welfare laws create the opposite expectation. Regardless of a state’s “no entitlement” declaration, a state creates a property interest in

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continued receipt of benefits when its welfare program is rule-based rather than discretionary. A rule-based statute ensures that: (1) anyone who meets the eligibility requirements will be accepted into the program; and (2) once a person begins participating in the program, she will receive benefits for a certain amount of time unless dismissed "for cause."

Irrespective of the rule-based versus discretionary analysis, some due process protections may also obtain based on the fact that the new emphasis on work requirements for welfare recipients makes public benefits programs look more like government employment. Some government employees have liberty interests in continued employment when dismissal will effectively foreclose all future employment opportunities. This liberty interest entitles employees to constitutionally sufficient process before dismissal. Therefore advocates could argue that working welfare recipients are, in effect, government employees and thus are protected.

Welfare advocates in states that are still shaping their welfare statutes should try to influence the legislature to include features in these statutes that will make the programs rule-based rather than discretionary, thus preserving the due process rights of welfare recipients. Advocates in other states will need to look carefully at the legislation already in place to determine whether or not the totality of the statute creates property and liberty interests.

To demonstrate how a statute might be interpreted to require due process, I will discuss the structure of Wisconsin's new welfare law, "Wisconsin Works" or "W-2." Wisconsin's deconstruction of welfare was one of the most dramatic attempts a state had made to reform the federal welfare program, Aid to Families with Dependent Children ("AFDC"), prior to the 1996 Welfare Reform Act. In many ways W-2 was a precursor to federal welfare reform and is seen as a model for other states' implementation of Temporary Assistance for Needy Families ("TANF"), thus raising W-2 to national significance.

An important feature of W-2 is its move to privatize welfare delivery by allowing non-profits and for-profits to partake in a competitive bidding process to administer the program as W-2 agencies. The effects of merging private interests with public purpose are still unknown; nevertheless, with the introduction of competition, W-2 agencies may be under

3. TANF is the federal program established under the 1996 Welfare Reform Act. It replaces AFDC and represents a significant change from that program. Under TANF, each state receives a block grant and is allowed to design its own benefit package. See Welfare Reform Act § 103, 110 Stat. at 2124–27. States may provide welfare benefits in non-cash form, such as vouchers, or contract with private organizations to deliver services. See § 103, 110 Stat. at 2161–63. Most significantly, TANF requires all recipients to work after two years of welfare receipt. See § 103, 110 Stat. at 2113, 2129. Finally, TANF does not permit a recipient to receive benefits for a total of more than five years, and it allows states to set an even shorter time limit. See § 103, 110 Stat. at 2137. Despite the increased work requirements and short time limits that TANF imposes, child care is no longer a guaranteed part of welfare. See § 103, 110 Stat. at 2283. See generally Elspeth K. Deily, Working with Welfare: Can Single Mothers Manage?, 12 Berkeley Women's L.J. 132 (1997).
greater pressure to exclude persons who are the most difficult to place in unsubsidized employment, and hence, are the most expensive to serve.

One tool agencies may use to cleanse their caseloads of people who are hard to place is called a "sanction." W-2 agencies can sanction participants for certain undesirable behavior and remove them from the caseload. Sanctions are necessary to ensure that participants are accountable for their actions; however, without the constitutional protections of due process, agencies will not be similarly accountable. Due process is one way to help agencies avoid the temptation to abuse the power of sanctions in order to keep program costs down.

Part II of this paper will discuss the goals and structure of Wisconsin Works, the characteristics of the W-2 caseload, and the use of sanctions in the months leading up to W-2 implementation. Part III will analyze the theory and practice of privatizing the provision of government services. This section will discuss the role of non-profits and for-profits, as well as the introduction of competition into W-2 administration. Part IV will survey constitutional due process protections. It will evaluate the legal effect of statutes that purport to end the entitlement to welfare and will propose a legal framework in which the poor can assert constitutional protections against unjust exclusions from government benefits. Finally, this constitutional theory will be applied to analyze W-2's right of review and hearing process for its constitutional sufficiency.

II. OVERVIEW OF THE WISCONSIN WORKS PROGRAM

A. Goals of Welfare Reform in Wisconsin

Some believe welfare reform in the United States was shaped largely by public perception of welfare as a system that created dependency and rewarded women for staying home and having children out of wedlock. Although cutting government spending on programs for the poor was one rationale offered for welfare reform during consideration of the 1996 Welfare Reform Act, the statute's official title, "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," indicates that welfare reform was really about changing the lifestyle of welfare recipients.

Likewise, one need only look at the structure and fiscal impact of the Wisconsin Works program to see that lifestyle, not fiscal savings, was the primary goal of reform. The Wisconsin legislature passed W-2 despite estimates that it would cost $66 million more than AFDC in 1997-98.5


5. See Wis. Legis. Fiscal Bureau, Paper #45: Wisconsin Works: W-2, at 27, 61–72 (1997) <http://www.legis.state.wi.us/lfb/ftb45.pdf> [hereinafter Paper #45]. When Wisconsin Works was passed, the legislature estimated that the first year of implementation would cost more than
Indeed, some polls show that the public supports continuing to provide some aid to those in need, but only with assurances that aid will be contingent upon "good behavior."

The public rhetoric around welfare reform echoes this theme: the primary goal of reform is to mobilize members of a "dependent" culture so they will honor the individualist ethos of the United States, an ethos based on work. The Governor of Wisconsin, Tommy Thompson, played on public support for a compassionate reform that would increase participants' economic mobility when he promoted W-2 as a program that would allow former welfare recipients to "pursue the American Dream." He denounced AFDC as a system that "held people down," and stressed that W-2 was a system that "builds people up." Similarly, in another speech Thompson claimed, "[w]e know that the overwhelming majority of welfare recipients really do want to work," and ending welfare as an entitlement is an opportunity to "help those trapped in the welfare system regain their sense of freedom and self-sufficiency through meaningful work. . . . Wisconsin needs these workers and it is good to feel needed."

This characterization of Wisconsin Works is clearly appealing to the public, but when one sifts through the rhetoric to the realities of the program and the characteristics of the caseload with which the welfare system must deal, attaining the "American Dream" looks a little less than certain. Moreover, unless changes are made to W-2's sanctions and hearing process, even the time-limited benefits that are available under W-2 could be unjustly denied to those who are the most difficult to employ.

B. The Structure of Wisconsin Works

W-2 is a radical program to end cash assistance to the poor. In an attempt to move away from the "undesirable incentives" popularly thought to be perpetuated by AFDC, Wisconsin Works provides time-limited, work-conditioned support. It also provides subsidized child and health care. Designed to replicate the "real world," W-2 support, like wages, does not increase with family size, and every recipient with chil-

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6. See Mead, supra note 4, at 18.
7. See id.
8. See Governor Tommy G. Thompson, Speech at Pooh Bear Center (visited Mar. 12, 1997) <http://www.dwd.state.wi.us>.
9. Id.
Children over twelve weeks old is required to work or to be involved in work-related activities.13

W-2 has three employment components for those unable to find unsubsidized work: trial jobs, community service jobs ("CSJs"), and transitional placements. In theory, each tier of work provides participants with the skills to eventually move up to unsubsidized employment.

Trial jobs are employment positions provided by employers in exchange for a government wage subsidy.14 Participants who cannot find trial jobs are placed in CSJs. Those who are in CSJs ideally have access to work experience and training designed to enable them to gain the necessary skills for trial jobs or unsubsidized employment.15 Participants receive a monthly grant in exchange for up to thirty hours per week of work combined with up to ten hours per week of training and education.16 One can participate in a community service job for six months, with an opportunity for a three-month extension under circumstances approved by the department.17 One may participate in more than one CSJ, but CSJ participation may not exceed a total of twenty-four months, unless the agency grants an extension.18

The final employment tier consists of transitional placements for those who are incapacitated for at least sixty days, are needed in the home because of an illness or incapacity of another member of the Wisconsin Works group,19 or are deemed incapable of performing a trial or community service job.20 Participation in a transitional placement is also limited to twenty-four months, unless the agency (with departmental approval) grants an extension.21 Like CSJs, transitional placements require work activity in exchange for a monthly grant.22

13. See id. Although requiring all women with children over 12 weeks old to work is supposed to pattern the "real world," in Wisconsin only 35.3% of all mothers worked full time in 1990. In this same year, only 43.3% of all women in Wisconsin were in the workforce. The work participation rate declined when a mother had both low education and young children. Less than 7% of women without a high school diploma and with a child under two worked full time in 1990. See Maria Cancian & Daniel R. Meyer, A Profile of Wisconsin Welfare Recipients: Baseline Data, 18 Focus 58, 61 (1996) <http://www.ssc.wisc.edu/irp/focus.htm>.
16. See Greenberg, supra note 12.
18. See id.
19. "'Wisconsin works group' means an individual who is a custodial parent, all dependent children with respect to whom the individual is a custodial parent and all dependent children with respect to whom the individual's dependent child is a custodial parent. 'Wisconsin works group' includes any nonmarital coparent or any spouse of the individual who resides in the same household as the individual and any dependent children with respect to whom the spouse or nonmarital coparent is a custodial parent. 'Wisconsin works group' does not include any person who is receiving benefits under [the statute]." Wis. Stat. Ann. § 49.141(1)(s).
C. Reductions in Caseloads: Employed or Sanctioned?

While intended to bring the welfare population into the mainstream working community, W-2 may have the opposite effect of driving the wedge even further between the haves and the have-nots. Approximately eighty percent of those who previously subsisted on support from AFDC in Wisconsin were single parent households, primarily headed by women between the ages of eighteen and thirty-nine, with twelve years of education or less, and caring for young children.23 This population faces tremendous barriers to finding and keeping jobs that pay wages above the poverty level.24 There are no assurances that this population will be able to find unsubsidized work, and indeed, although W-2 provides grants in exchange for work activities, it does not guarantee employment.

Yet in the years preceding the Welfare Reform Act, Wisconsin reduced the number of people on AFDC dramatically under its experimental work programs,25 leading some to cite the state as an illustration of the capacity of work programs to reduce dependency on public assistance. From 1989 to 1993, the United States experienced a welfare boom, with average AFDC case loads growing thirty-five percent, while Wisconsin experienced a three percent decline.26 The results are even more significant when viewed over a longer period. From 1986 to 1994, AFDC cases declined twenty-three percent in Wisconsin.27

In April of 1996, Wisconsin passed the Wisconsin Works program into law and set an explicit goal to reduce AFDC caseloads even further prior to implementing the W-2 program. For example, the state required Milwaukee County to reduce its AFDC caseloads another twenty percent by September 1, 1996.28

While reducing the number of cases does reduce dependency on government assistance, it does not necessarily accomplish the goal of moving people into self-sufficient employment; when reductions result in more families living in poverty, reducing caseloads should be recognized as a failure rather than a boon for the state and for the country. The ample

23. See Cancian & Meyer, supra note 13, at 58. The researchers' calculations are based on a 10% sample of all AFDC cases headed by women.


25. In 1988, Congress established the Jobs Opportunity and Basic Skills Training Program. Under this program and Wisconsin's own experimental programs, such as Work First and Work Not Welfare, the reductions in the number of welfare recipients were accomplished. See Mead, supra note 4, at 23-28.

26. See id. at 23.

27. See id.

research on the economic well-being of those who have exited AFDC indicates that many remain poor after exiting AFDC.  

An even more fundamental issue is whether or not the reduction in AFDC rolls reflects an increase in employment or merely an increase in the use (or abuse) of sanctions which cut people off from the government benefits, job search assistance, and training to which they are entitled by law. The Milwaukee-based Employment Training Institute ("ETI") projected that agencies will meet caseload reduction goals by using stricter sanctions for "refusal to participate" in work or child support programs. As of April 1996, there were approximately 4400 cases in Milwaukee County in sanction status, and ETI projected that sanctions would cause a 13.1% reduction in the AFDC caseload prior to implementation of W-2.  

Under prior AFDC policies, a sanction was a financial burden placed on the head of the household, but it did not exclude such a person from participation in AFDC. However, in the interim before W-2 begins full implementation, and continuing after W-2 is in operation, sanctions will cause a participant to be denied all government benefits. The effectiveness of sanctions as a means to reduce caseloads prior to implementation of W-2 is evident, and under W-2 the pressure on agencies to use sanctions will increase. The use of sanctions will be discussed further in Part III.

D. Characteristics of the Caseload

The Legislative Fiscal Bureau estimates that only fifteen percent of the 53,000 state residents expected to participate in W-2 will get unsubsidized jobs. The remainder of the caseload will consist of those who are the most difficult to employ: women with small children, little or no work experience, and drug or alcohol addictions.

A University of Wisconsin-Madison ten-year study analyzed the characteristics of Wisconsin women who headed AFDC cases from 1983 to 1993. This research indicated that the current caseload includes a greater proportion of individuals who face barriers to full-time work than it did only a few years earlier. The caseload increasingly contains people with low levels of education, larger families, and younger children.

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29. See Daniel R. Meyer and Maria Cancian, The Economic Well-Being of Women and Children Following An Exit From AFDC, INST. FOR RESEARCH ON POVERTY (Discussion Paper No. 1101-96, Aug. 1996); see also Judith M. Gueron & Edward Pally, FROM WELFARE TO WORK (1991) (discussing studies of welfare to work programs and their effects).
30. See Pawasarat, supra note 28, at iv.
31. See id.
32. See id.
33. See Johnson-Elie & Dresang, supra note 24, at 1.
34. See id.
35. See Cancian & Meyer, supra note 13, at 58.
36. See id.
percentage of recipients who lacked a high school diploma rose from 35% to 42%, the percentage of those with more than one child rose from 50% to 57%, and the percentage of those with at least one preschool child rose from 62% to 72% percent. 37

Although most employers require a high school diploma and consistent job attendance, 38 which is made more difficult when a single parent has young children, the combination of having no young children along with a high school diploma is very rare among the current caseload. In 1993, 57.0% of the heads of AFDC households had graduated from high school, but only 5.7% of them had no children under age twelve. 39 Of those women with high school diplomas, 82.4% have a child who is under six. 40 For the women who lack a high school diploma, 86.0% have a child who is under six. 41 Although W-2 establishes a subsidized child care program, 42 the quantity and quality of care may not be sufficient. This problem will likely lead to numerous factual disputes about the availability of child care that may in turn lead to sanctions and the ultimate denial of benefits to many needy families.

If the Legislative Fiscal Bureau’s projection is correct, only fifteen percent of current welfare recipients will find unsubsidized work. With the majority of the remaining caseload needing substantial investments in education, training, and child care, it will be increasingly difficult for W-2 agencies to successfully and inexpensively move people into unsubsidized work. We have already seen how agencies have used sanctions to reduce caseloads prior to the implementation of W-2. Faced with increasingly problematic caseloads, the pressure to use sanctions even more frequently will intensify.

III. PRIVATIZING THE PROVISION OF GOVERNMENT BENEFITS

A. Privatization Theory: Merging Public Purpose with Private Profit

There is growing political support for “reinventing government” by turning to an entrepreneurial model of providing public services, one in which the government sets standards and buys services, while competitive

37. See id.
38. In a University of Wisconsin-Madison survey, 85% of employers said they prefer or require employees to have both a high school diploma and work experience. See Johnson-Elie & Dresang, supra note 24, at 2.
40. See id.
41. See id.
The partial privatization of government benefits in Wisconsin has obviously been influenced by this entrepreneurial model, as it opens up the provision of W-2 benefits to private organizations.

One of the architects of Wisconsin Works, David Riemer, has written on this model of privatized government in the context of benefits provision. He theorizes that under an entrepreneurial model, one he calls the Employment Maintenance Model, the poor would be lifted out of poverty by competitively selected, risk-taking, private vendors, rather than by government employees. Relying heavily on results over process, the government would only pay private vendors for actually lifting the poor out of poverty and, in some cases, into jobs. In order for a vendor to make a profit, it would have to place most of its participants in steady jobs, paying above poverty level wages. The underlying assumption of this model is that "virtually all of the poor can be lifted out of poverty and into private sector jobs, at the fastest pace and the lowest cost, if private organizations are given full responsibility, put at risk, and offered powerful financial incentives."

Under Riemer’s model, private vendors would have only two requirements and would be free to meet those requirements any way they saw fit. First, they would have to guarantee that 100% of their participants are brought above and kept above the poverty line for a specified number of years. Second, private vendors must guarantee that 100% of their participants would be enrolled in an adequate health insurance plan.

Vendors would be able to meet the obligation to keep participants above the poverty level in a variety of ways, including: placing a participant in a private sector job; paying wages for community service jobs; making cash payments; providing education and training; providing or facilitating child care; and aiding participants with transportation, housing, and clothing. The state would compensate the vendor for three services: making cash payments, paying wages for community service, and placing a participant in private sector employment. The commissions on the private sector placement would be the most profitable.

43. See, e.g., Mike Nichols, City Tests Privatization Waters; Move with MMSD Means Mayor’s Record is Catching Up with His Reputation, MILWAUKEE J. SENTINEL, Nov. 24, 1997, at 1 (detailing privatization efforts in Milwaukee, Wisconsin over the past decade).
45. See id. In other words, the assumption is that it is possible to have almost full employment in jobs that pay above the poverty level.
46. See id. at 26.
47. Id. at 24.
48. See id. at 25.
49. See id.
50. See id.
51. See id. at 26.
52. See id.
These financial incentives would cause private vendors to lose money by paying cash to bring a participant above the poverty line and lose or make a little money by paying wages for CSJs. On the other hand, vendors would make money by placing a participant in a private sector job, with profits increasing by placing people as quickly as possible and by avoiding any training costs.

This model merges public purpose with private profit, two goals which tend to be incompatible. For instance, if a vendor makes the highest profit by placing people in private sector jobs, there is a built in incentive to avoid having people in the caseload who are difficult to place. It will be more profitable to exclude hard-to-place people by determining that they are ineligible for the program or sanctioning them for not abiding by all of the program’s rules. These profit motives do not promote the public interest in improving the lives of the most marginalized people in our society. Hence, when joining private profit with public purpose, it is essential to create a system that either prohibits or makes unprofitable activities that are contrary to the public interest.

Foreseeing this weakness in the privatization model, Riemer argues for the following protections of the public interest. The entire eligible population should be assigned to a vendor, making it impossible to neglect any segment of the population. The vendor should be required to bring all of its participants out of poverty, even if that means, in the absence of a job placement, paying them the necessary amount of cash to bring them above the poverty line. This requirement would also be a profit incentive to provide adequate training and counseling to move participants into the private sector, as the vendor would lose money by failing to place people in private sector jobs.

Even if a vendor is obligated to take the hard-to-place participants, there is still an obvious incentive to sanction the more costly participants by claiming that they violated some rule, such as refusing to accept a job or missing a job interview. Riemer suggests that the way to avoid this con-

53. See id.
54. See id.
55. See id.
56. See id.
57. Another option, not discussed by Riemer, for structuring financial incentives to ensure that the most difficult clients are served is to categorize new participants on a scale from easy to place in subsidized work to more difficult to place. The initial categorization should be influenced by a number of factors, including work history, education level, proximity to available jobs, number of young children, etc. The agency would then be compensated at a much higher level for placing someone categorized as difficult to place in an unsubsidized job. This system would lessen the pressure to rid an agency’s caseload of difficult to place participants by giving even larger financial incentives for finding unsubsidized jobs for “difficult” placements. One problem with this structure, however, is that agencies would attempt to put more people in the “difficult” category in order to reap greater financial gains after placing them in jobs. This could be partially avoided by a state regulation that attached strict numerical criteria to each feature considered to make one more difficult to place, thus lessening the agencies’ discretion in this regard.
lict is to require independent arbitrators to determine whether or not the sanction is legitimate and to require vendors to keep the participant in the program until an independent decision has been rendered. As discussed in detail below, this is precisely the problem that the drafters of Wisconsin Works have failed to address. The W-2 agencies have incentives to keep program costs down or make a "profit," but they do not have the checks in place, such as independent arbitrators, to ensure that the public interest is protected.

B. Privatization Practice: Wisconsin Works, Competition, and Performance-Based Standards

In the months leading up to implementation of W-2, Wisconsin required government agencies to meet AFDC caseload performance standards in order to have priority in administering Wisconsin Works in their county. If the agency did not meet the performance standards, private organizations could enter a competitive bidding process to receive the contract to administer that county's Wisconsin Works program. Of the seventy-two counties in Wisconsin, approximately sixty-two earned the right of first selection and so did not compete with private agencies to administer W-2. Although, by these numbers, the role of the private sector appears quite small, in actuality it is not. Milwaukee County, which contains the largest population of welfare recipients, did not meet the AFDC performance standards, and thus faced competition from private sector providers. Milwaukee County's welfare population is currently being served by the private sector.

Regardless of an agency's public or private status, each W-2 contract requires the W-2 agency to meet certain performance-based standards. These standards, combined with competition from the private sector, create a system in which public agencies respond to the same incentives as private agencies. Thus, Riemer's concerns about maintaining the public spirit of the program extend to public agencies which are operating in a competitive environment.

58. See id.
59. Non-profit agencies will get financial bonuses for meeting certain performance standards that the agencies can reinvest in their programs. Although this is "profit," it is not distributed. See Telephone Interview with John Bauer, Deputy of the Wisconsin Department of Economic Support (Mar. 31, 1997).
62. See Telephone Interview with John Bauer, supra note 59.
63. See id.
64. See id.
65. See id.
66. See Wis. Stat. Ann. § 49.143(3) (stating that failure to meet these standards results in the withholding of partial or total payments from the state to the W-2 agency).
In addition to requiring W-2 agencies to meet performance-based standards, the contracts must require the W-2 agency to accomplish all of the following: (a) establish a community steering committee,67 (b) establish a children's services network,68 (c) employ at least one financial and employment planner,69 (d) work with the county to ensure that W-2 recipients are most effectively served,70 (e) certify eligibility for and issue food coupons to eligible Wisconsin Works participants,71 and (f) determine eligibility for child care assistance.72 The latter two requirements give the W-2 agency discretion to determine eligibility for two benefits that are vital to the inclusion of single mothers in the work force: child care and food.

These requirements have the potential to create an impressive benefits package. Ideally, W-2 participants will be able to utilize W-2 agencies for everything from employment counseling and placements to assistance with obtaining adequate child care. There are, however, serious concerns about how the combination of performance-based standards, privatization, and compensation will create incentives for agencies to issue unjustified sanctions. At the time of this writing, the full force of these incentives is still unknown.73 In the face of these incentives, the Due Process Clause of the U.S. Constitution is one way to encourage W-2 agencies to maintain the public spirit of their programs.

IV. THE FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS:
IMPORTANT ISSUES IN THE ERA OF BLOCK GRANTS AND THE PRIVATIZATION OF WELFARE

The Welfare Reform Act, by ending the entitlement to welfare, has called into question welfare recipients' due process rights. In the past, the U.S. Supreme Court interpreted the entitlement to welfare as a property interest in receiving government benefits that was constitutionally protected by the Due Process Clause of the Fourteenth Amendment, thus ensuring that one would receive notice and a hearing before losing

67. See Wis. Stat. Ann. § 49.143(2)(a) (requiring the W-2 agency to create the community steering committee within 60 days from the date that the contract was awarded).
68. See Wis. Stat. Ann. § 49.143(2)(b) (requiring the children's services network to provide information about community resources available to the dependent children, including: charitable food and clothing centers; subsidized and low-income housing; transportation subsidies; the state supplemental food program for women, infants, and children; and child care programs).
73. The author has called several W-2 agencies in Milwaukee County and the Department of Workforce Development for information on the contracts and performance-based standards, and has been told that this information is not available.
government benefits. Since states are no longer required to create an entitlement to welfare, these due process protections are now threatened.

This section of the article will argue that because many state welfare programs will be able to be characterized as rule-based rather than discretionary, recipients will continue to be entitled to due process protections. This argument will follow the two-part procedural due process inquiry: Has the individual been deprived of a protected interest in life, liberty, or property? If so, what type of procedural due process is required?

A. Part One of the Due Process Inquiry: Is There a Constitutionally Protected Interest at Stake?

The first part of the due process inquiry determines whether or not an interest fits within the categories of protected interests recognized by the courts. Liberty and property are "broad" and "majestic" terms that have purposely been left to be interpreted according to society's whole domain of social and economic experience. Although the range of interests protected by procedural due process is not infinite, the protected property interests extend well beyond actual ownership of real estate, personal property, or money, and protected liberty interests extend beyond freedom from deprivations imposed by the criminal process.

1. Property interests

Property interests are not defined by the Constitution or the federal government, but are left to the domain of the states. Property is created and defined by state law "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." The Supreme Court has established that one can have a property interest in government benefits. In Goldberg v. Kelly, the Court's rationale for this holding was influenced by Charles Reich's theory of property and focused on the fact that much of the wealth in the United States stems from rights that do not fall within traditional common law concepts of property. As the court stated:

75. Even if the Due Process Clause does not apply, a state's Administrative Procedure Act ("APA") may be utilized to prevent arbitrary and capricious action by state agencies that will likely occur in the absence of a fair hearing process. Making a case under the APA is, however, much more difficult because courts are usually highly deferential to agency decisions reviewed under a state's APA. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 (1971).
76. The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.
77. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972) (quoting National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).
78. See Roth, 408 U.S. at 571-72.
79. Id. at 577.
Society today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.\(^{81}\)

In *Board of Regents of State College v. Roth*, the Court followed the reasoning in *Goldberg* and further articulated an expansive idea of property:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.\(^{82}\)

The Court has found that a "legitimate claim of entitlement" can be statutorily created. In *Goldberg*, the welfare recipients had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for benefits.\(^{83}\) The Court held that welfare recipients had a right to a hearing at which they might attempt to show that they were within the statutory terms of eligibility because the statute explicitly stated that it was creating an entitlement.\(^{84}\)

a. Discretionary versus rule-based programs

After *Goldberg*, the lower courts emphasized the issue of whether the statute defining eligibility for state benefits is rule-based or discretionary when determining the applicability of due process guarantees. If a program has specific eligibility requirements, it is by definition rule-based and anyone who meets the criteria can expect to receive the benefits.\(^{85}\) By contrast, discretionary programs offer no such assurances.\(^{86}\) Only in

\(^{81}\) *Id.* at 262 n.8 (quoting Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965)).

\(^{82}\) Roth, 408 U.S. at 577.

\(^{83}\) See *Goldberg*, 397 U.S. at 261–62.

\(^{84}\) See Roth, 408 U.S. at 577.


\(^{86}\) See id.
rule-based cases will courts hold that a property interest in welfare benefits was created.\textsuperscript{87} The distinction between rule-based and discretionary programs is particularly important in light of the Welfare Reform Act, which gives states block grants, the ability to define their own public benefits programs, and the freedom to use either a rule-based or discretionary program.

The importance of the rule-based versus discretionary distinction is brought out more fully in the context of federal housing programs. The Seventh Circuit distinguished its decision in \textit{Eidson v. Pierce} from that in \textit{Goldberg} by focusing on the rule-based distinction. The \textit{Eidson} Court reasoned that "[i]n \textit{Goldberg} and numerous other public benefit cases, the law established eligibility criteria, and any person who satisfied those factual criteria was \textit{entitled} to the benefits."\textsuperscript{88} The Section 8 housing subsidies involved in \textit{Eidson}, by contrast, were not available for everyone in the eligible population, and were given out on a discretionary basis to whoever a landlord deemed "acceptable" among the eligible population.\textsuperscript{89} This gave the landlord enough discretion over who would receive Section 8 subsidies that a property interest was not created.\textsuperscript{90}

The \textit{Eidson} plaintiffs were eligible for Section 8 housing, but their applications had been rejected by private owners of housing. Upon rejection, plaintiffs sued, claiming that the landlords violated their due process rights by failing to maintain and apply uniform, ascertainable standards for the selection of tenants.\textsuperscript{91} In holding that Section 8 did not create a property interest in receiving public housing, the court found conclusive that Section 8 allowed private landlords to use their discretion in determining both eligibility \textit{and} whether to accept eligible applicants.\textsuperscript{92}

Section 8 and its accompanying regulations directed the government to give landlords the right to determine eligibility and tenancy acceptance.\textsuperscript{93} For instance, the landlord could determine that a "family is eligible and ‘otherwise acceptable,’ or... reject an application based on statutory criteria or for ‘other reasons.'"\textsuperscript{94} The court interpreted this as giving the landlord broad discretionary power in determining acceptable tenants. However, the court also noted that the landlord's discretion was not unfettered; it was circumscribed by, among other things, the requirements of income, family size, and the preference for serving families in

\begin{itemize}
\item[87.] See id. at 104–05.
\item[88.] \textit{Eidson v. Pierce}, 745 F.2d 453, 461 (7th Cir. 1984) (emphasis added).
\item[89.] See id. at 459.
\item[90.] See id. at 462.
\item[91.] See id. at 455–56.
\item[92.] See id. at 458–61; see also \textit{Hill v. Group 3 Housing Development Corp.}, 799 F.2d 385, 388 (8th Cir. 1986); \textit{Phelps v. Housing Authority of Woodruff}, 742 F.2d 816, 822–23 (4th Cir. 1984).
\item[93.] \textit{See Eidson}, 745 F.2d at 457–58.
\item[94.] Id. at 459.
\end{itemize}
substandard housing. The law did not, however, tell the landlord how to choose between two eligible individuals.\textsuperscript{95}

Although the court mentioned that the \textit{Eidson} result was influenced by the fact that there were not enough housing units to accommodate the entire eligible population, the decision places more weight on the discretionary aspect of the Section 8 program.\textsuperscript{96} For instance, the court cited with approval \textit{Davis v. Ball Memorial Hospital Association},\textsuperscript{97} where the Seventh Circuit held that indigent hospital patients had property interests created by the Hill-Burton Act even though "there were probably more eligible indigent patients than the hospitals would be required to treat on an uncompensated basis."\textsuperscript{98}

Significantly, the court distinguished its holding in \textit{Davis} by focusing on the different methods of allocating scarce government benefits and the practical consequences of those methods for possible due process hearings. Entitlement to Hill-Burton benefits in \textit{Davis} was established on essentially a first-come, first-served basis, while Section 8 created no guidelines for determining who among the eligible population would receive Section 8 housing.\textsuperscript{99} The \textit{Eidson} court was careful to point out that it did not "mean to suggest that any element of discretionary judgment in determining the receipt of public benefits would defeat an asserted property interest."\textsuperscript{100}

Only in instances, such as in \textit{Eidson}, where there are no legal criteria limiting the decision about who gets scarce government benefits is the discretion so great that it undermines any claim of entitlement.\textsuperscript{101}

Along these lines, the Seventh Circuit reasoned that the principal problem in determining whether a statute entitles a recipient to benefits is whether, at a due process hearing, plaintiffs would be able to establish facts which would \textit{entitle} them to Section 8 benefits rather than merely confirming their eligibility.\textsuperscript{102} To illustrate, at a due process hearing, even if a plaintiff were able to establish the falsity of the information that caused the landlord to reject her application, she still would not be entitled to Section 8 housing. Under Section 8, one is \textit{entitled} to housing, as opposed to \textit{eligible} for it, only after a private owner accepts one's application.\textsuperscript{103}

If a decision-maker can exercise discretion over entitlement, albeit within very loose guidelines, one who is subject to her discretion does not

\textsuperscript{95} See id. at 460–61.

\textsuperscript{96} "It is important to note that our conclusion does not rest solely on the fact that there are not enough Section 8 benefits to aid all who are eligible." \textit{Id.} at 461.

\textsuperscript{97} 640 F.2d 30 (7th Cir. 1980).

\textsuperscript{98} \textit{Eidson}, 745 F.2d at 461–62.

\textsuperscript{99} See id.

\textsuperscript{100} \textit{Id.} at 462.

\textsuperscript{101} See id.

\textsuperscript{102} See id. at 459.

\textsuperscript{103} See id. at 460.
have a claim of entitlement that in turn requires respect for due process of law. The level of decision-makers' discretion, however, is a factual question about which reasonable minds can differ, as is evident in the divergent decisions found in the Seventh Circuit's Eidson case and the Ninth Circuit's Ressler v. Pierce case. Both cases involved the same Section 8 program, but came to opposite conclusions based on their interpretation of the facts, and to a lesser extent, the law. Where the Eidson Court found broad discretion, the Ressler Court found that the owner's discretion was limited and held that the eligibility regulations, by creating a significant, substantive restriction on the discretion of those determining eligibility, created a property interest in members of the class that Congress intended to benefit by creating the program. Unlike Eidson, the Ressler Court did not consider whether the regulations determining who would and would not receive public housing were a conclusive factor in determining whether the law was too discretionary to create a property interest.

It is important to note that most of the discussion in Eidson about rule-based programs centered around the issue of determining whether an applicant, as opposed to a participant, had a property interest in government benefits. In fact, the court distinguished between those eligible for Section 8 and those accepted as tenants, and held that those who have not been accepted as tenants do not have the same property interest as those who have been receiving the government benefit. This reasoning follows an earlier Seventh Circuit decision that also involved Section 8 housing subsidies. In Holbrook v. Pitt, the court held that people already living in Section 8 housing had protected property interests.

b. Is Wisconsin Works a discretionary or rule-based program?

Wisconsin Works is a rule-based program with defined eligibility requirements. If one meets the requirements, one will be accepted as a W-2 participant and will be entitled to receive the benefits of the program for a fixed period of time. The only ways that a participant can be dismissed from the program before the end of the time limit are by no longer meeting the eligibility requirements or by receiving sanctions for undesirable behavior, as specified by statute.

104. If a decision maker had "unfettered" discretion in the allocation of scarce public benefits, this system would arguably offend the concepts of fairness and nonarbitrariness that are at the heart of the constitutional requirement of due process of law, as well as at the heart of legitimate agency action. See id. at 464.
105. See Ressler v. Pierce, 692 F.2d 1212, 1215–16 (9th Cir. 1982).
106. See Eidson, 745 F.2d at 460.
i. Eligibility requirements for W-2 participants

The Wisconsin state legislature established financial and non-financial requirements to determine eligibility for W-2 programs. Once accepted to the program, the eligibility inquiry does not end, however, and one can lose eligibility by rising above the income level, for example. The requirements are clear and an individual is not able to participate in the W-2 program unless she meets all of the eligibility requirements.

The financial eligibility requirements are quite simple. The assets of the entire W-2 “group” must not exceed $2500, and the gross income of the entire group must be at or below 115% of the poverty line. The non-financial eligibility requirements, by contrast, are many and can be increased by rule of the department or discretion of the W-2 agency. Allowing agencies to add to non-financial eligibility requirements could seriously undermine the rule-based nature of W-2. If any additional agency-created requirements were applied uniformly to all applicants, the requirements would simply be added to the already existing body of rules defining eligibility for W-2. By contrast, if the agency created ad hoc requirements as it processed applications, its practice could weaken the property expectations of applicants.

The non-financial eligibility criteria include the following. The applicant must be a custodial parent who will fully cooperate in establishing the paternity of her child, at least eighteen years old, a citizen of the United States, a state resident for at least sixty days, and the only one in her W-2 “group” that is participating in a W-2 employment position. She also must provide or apply for a social security number and she may not be a recipient of Supplemental Social Security Income (“SSI”).

These eligibility requirements are fairly objective and leave the decision-maker minimal discretion. Additional eligibility requirements, although similarly limiting of the decision-maker’s discretion, are a bit more susceptible to abuse. For instance, the applicant must provide any information requested by the W-2 agency. In theory, the W-2 agency is limited in that it may only request information that is “consistent with rules promulgated by the depart-

108. The W-2 agency reviews eligibility “periodically” and determines whether one can continue receiving the benefits from the program. See Wis. Stat. Ann. § 49.145(4) (West 1997).
112. This seemingly arbitrary administration of public benefits, however, would offend expectations of rational and fair agency action, thereby strengthening a claim under the state’s APA. See Eidson v. Pierce, 745 F.2d 453, 464 (7th Cir. 1984).
This requirement obviously limits an agency’s discretion, bringing this requirement within the rule-based category. It also calls into question, as a possible abuse of discretion, any request that goes beyond that which is “consistent with” departmental rules. However, in practice, it is unlikely that a W-2 applicant would feel she was in the position to challenge an overly intrusive request for information.

Another rule susceptible to abuse is the rule that a W-2 agency can determine that one is ineligible to participate in W-2 if, within the 180 days immediately preceding application, the applicant has refused any bona fide offer of employment and if the applicant has not “made a good faith effort . . . to obtain employment . . . .” This determination may include a requirement to search for unsubsidized employment during the period in which one’s application is being processed. While this is also a fairly concrete guideline, it does give the agency the power to decide what constitutes a “good faith effort” to obtain employment.

Any element of subjective judgments in determining eligibility for public benefits does not automatically defeat a property interest. Although rules that require subjective interpretations of the facts are easily abused, they are distinguishable from programs that are wholly discretionary. For instance, the Section 8 program was discretionary because it allowed the decision-maker to reject an applicant based on “other reasons.” Other reasons could encompass virtually anything. By contrast, although W-2 requires agencies to make subjective determinations of certain facts, such as what constitutes a good faith effort to obtain employment, the statute limits what an agency can consider when deciding eligibility. Unlike the applicants for Section 8 housing in *Eidson*, who were rejected despite meeting eligibility requirements, once one meets the eligibility requirements, one should be accepted as a W-2 participant.

**ii. W-2 and sanctions**

W-2 participants are entitled to continue receiving W-2 benefits for a specific time period, absent cause for sanctions. Since the sanctions are prescribed by statute and since the W-2 agencies have only limited discretion to determine whether an individual deserves a sanction or has a “good cause” explanation for engaging in the prohibited activity, the availability of sanctions under W-2 does not alter the conclusion that W-2

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116. *Id.*
119. See *Eidson v. Pierce*, 745 F.2d 453, 462 (7th Cir. 1984).
121. See Telephone Interview with John Bauer, *supra* note 59. Mr. Bauer stated that anyone who met the eligibility requirements would be able to participate in W-2 unless they refused to participate, thus giving the agency grounds for sanctions.
is a rule-based system. The W-2 agency can sanction someone for: (a) refusing to participate, or (b) intentionally violating the program’s rules and regulations.\textsuperscript{122} Sanctions have two primary effects: they put a W-2 participant in a precarious position in which she may be excluded from the program at any time, and they set up a legal framework that only allows exclusion from the program “for cause.”

The “refusal to participate” sanction follows the three strikes and you are out policy that is so popular in criminal law.\textsuperscript{122} A recipient of aid who refuses to participate three times in any W-2 employment component (i.e., unsubsidized jobs, trial jobs, CSJs, and transitional placements) will no longer be eligible to participate in that component of W-2.\textsuperscript{124}

Although the statute states that three sanctions do not bar a recipient from participating in another W-2 employment component, in practice, if a recipient is in the transitional component and gets sanctioned, she will effectively be excluded from the entire W-2 program. Presumably, one in a transitional placement is unable to perform at the higher level demanded by CSJs, trial jobs, and unsubsidized work, and thus is not able to participate in the other components. Likewise, if someone in the community service component of W-2 gets sanctioned, she will effectively be dismissed from the entire W-2 program; if there had been an appropriate trial job she would not have been placed in community service in the first place, and the agency would need to find that she is “incapacitated” or “incapable” of performing at the other levels in order to move her into a transitional placement. Thus, for many, three sanctions in one component of W-2 will truly mean three strikes and you are out.

Due to the serious effects that sanctions can have on the poor, it is important to look closely at how sanctions are given out and by whom. The W-2 agency makes the determination that one has refused to participate.\textsuperscript{125} While the definition of what constitutes refusing to participate is limited by state statute, the W-2 agency has been given the authority to apply the law to individuals and decide whether or not one has refused to participate, an exercise that will typically involve factual disputes. One “refuses to participate” by doing any of the following:

(a) Expresses verbally or in writing to a Wisconsin works agency that she or he refuses to participate.

(b) Fails to appear for an interview with a prospective employer or, if the participant is in a Wisconsin works transitional placement, fails to appear for an

\textsuperscript{122} See Wis. Stat. Ann. §§ 49.151(1)–(2).
\textsuperscript{124} See Wis. Stat. Ann. § 49.151(1).
\textsuperscript{125} See Wis. Stat. Ann. §§ 49.151–49.152.
assigned activity, including an activity under s. 49.147(5)(b)(1.a. to e.), without good cause, as determined by the Wisconsin works agency.

(c) Voluntarily leaves appropriate employment or training without good cause, as determined by the Wisconsin works agency.

(d) Loses employment as a result of being discharged for cause.

(e) Demonstrates through other behavior or action, as specified by the department by rule, that he or she refuses to participate in a Wisconsin works employment position.

Participants can avoid receiving a sanction for prohibited activities if they have a "good cause" explanation. "Good cause" is not defined by statute, but there is a section entitled "Good Cause for Unexplained Absences" in the Wisconsin Works, W-2, Policy Document for Pilot Counties. This section does not provide extensive guidance, however, as it essentially states that Financial Employment Planners (i.e., case workers) in each W-2 agency will make the "good cause" determination on a case-by-case basis. As of the initial start-up period for W-2 agencies, some did not have a written policy on what could constitute "good cause." While this amount of discretion is not enough to bring the entire W-2 program into the category of discretionary programs, it does create enough ambiguity that a case worker could apply the rules discriminatorily in order to facilitate giving sanctions to hard-to-place individuals.

Sanctions may be useful tools for an agency to encourage desirable behavior among W-2 participants, but they are also susceptible to abuse by an agency that is trying to cleanse its caseload of hard-to-place (and

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126. Sections 49.147(5)(b)(1)(a)–(e) refer to activities that may be required of an individual in a transitional placement. In addition to time spent at work and in training, an individual may be required to participate in an alcohol and other drug abuse evaluation, assessment and treatment program; mental health activities; counseling or physical rehabilitation activities; and any other activities that the W-2 agency determines are consistent with the capabilities of the individual.

127. Wis. Stat. Ann. §§ 49.151(1)(a)–(e). Also note that criterion (e) allows the department to expand the list of what behavior will be considered "refusal to participate."


130. See Telephone Interview with Mario Marti, Pre-hearing Specialist for UMOS, a Milwaukee County W-2 agency (Mar. 26, 1997).

131. See id.

132. See supra Part IV.A.1.a.

133. Sanctions for intentional program violations work a bit differently and do not present the basic due process concerns expressed in this article because they are handled in a court or administrative hearing. If a court finds, or if it is determined after an administrative hearing, that a W-2 applicant or participant has intentionally violated, on three separate occasions, any provision in sections 49.141–49.161 (or any rule promulgated under those sections), for the purpose of establishing or maintaining eligibility for those benefits or for the purpose of increasing the value of those benefits, the W-2 agency may permanently deny benefits under the W-2 program. See Wis. Stat. Ann. § 49.151(2).
consequently expensive) participants. In situations where one’s livelihood may be endangered by decisions influenced by issues other than the facts of the individual’s actions, it is extremely important to ensure that procedural due process is followed.

c. The impact of W-2’s eligibility requirements and sanctions on creating a protected interest

Wisconsin Works is a rule-based welfare program that limits decision-makers’ discretion enough to create a property interest in receiving the benefits of the W-2 program. Not only does it have eligibility requirements, but it also only allows exclusion from the program for limited reasons. Sanctions are rule-based because they are clearly prescribed by statute and limited to five categories of behavior constituting “refusal to participate” and one category of behavior constituting “intentional” violations.

Agency discretion enters into the equation with the statutory exemptions of “good cause” for behavior that would otherwise be considered “refusal to participate,” and in making decisions on issues that often involve factual disputes, such as whether a participant has refused to participate. Yet this discretion is limited enough that it does not undermine the rule-based quality of the statute.

Applying the test established in Eidson aptly illustrates this: would plaintiffs be able to establish facts that would entitle them to W-2 benefits at a due process hearing? Put another way, if a plaintiff were able to establish that she met all of the eligibility requirements or was unreasonably sanctioned, would she be entitled to participate in W-2, as opposed to simply eligible for acceptance?

Although the W-2 statute claims that it is not an entitlement, it in fact establishes a time-limited property interest in W-2 benefits once an applicant meets all of the eligibility requirements. Unlike Eidson’s plaintiffs, a W-2 applicant who could show that she met all of the eligibility requirements would be entitled to receive W-2 benefits as opposed to simply being eligible for them. If, for example, an agency determined that an applicant was ineligible because she had not made a “good faith effort” to find unsubsidized work, and the applicant could show at a due process hearing that she in fact had made a “good faith effort,” she would be enti-
tled to participate in W-2. Once accepted, the W-2 agency must provide the participant with job search assistance, access to trial jobs, and, if appropriate, CSJs or transitional placements.

In these early stages of W-2, it is uncertain whether the agencies will successfully find enough trial jobs, CSJs, and transitional placements to fill the needs of their participants. This fact, however, does not undermine the participants' property interest in W-2 benefits. The potential that there may be more participants than jobs in the W-2 context is similar to the situation in Davis, which Eidson cited with approval. In Davis, the Seventh Circuit held that indigent hospital patients had property interests created by the Hill-Burton Act, even though there were more eligible indigent patients than the hospitals would be required to treat on an uncompensated basis, because entitlement was established on a first-come, first-served basis. Similarly, participants in W-2 have a property interest in W-2 benefits even though there may be more participants than available placements.

The final factor indicating that W-2 creates property interests is that once a participant is sanctioned or determined ineligible for W-2, she has access to statutorily prescribed procedures to review the agency action. This creates an expectation that the property interest will not be infringed upon without constitutionally satisfactory due process.

In short, the W-2 statute has created a property interest for those accepted into the program, although the procedures for reviewing dismissals, as discussed below, do not satisfy the constitutional requirements of due process.

d. Rule-based programs in the employment context

With the rise of work requirements in exchange for government benefits, programs that formerly looked exclusively like welfare now appear more similar to government employment. It is thus important to review a few of the important due process cases involving government employment. These cases typically involve claims of deprivation of both property and liberty interests, the latter of which will be discussed in Part IV.A.2.

In Roth, the Court relied on the State’s rules defining the property interest at stake, namely Roth’s untenured employment with the University of Wisconsin, to determine whether Roth had a property interest in

140. See id. Note, however, that there are no U.S. Supreme Court cases that require due process hearings for applicants to government programs.
142. See Eidson, 745 F.2d at 461–62.
143. See id. at 462 (discussing Davis).
Because Roth's employment did not ensure contract renewal absent "sufficient cause," the terms of Roth's employment created no interest in rehiring after the year ended, and did not give Roth an entitlement to getting rehired. Under Wisconsin statutory law, a state university teacher who is a "permanent" employee, by contrast, can only be discharged for cause, pursuant to certain procedures. This law gave rise to a protected property interest. Likewise, in Loudermill, the Court found that an Ohio statute that gave civil service employees the right to retain their positions absent sufficient cause plainly gave employees a property right in continued employment.

Wisconsin's welfare program offers participants assistance in finding employment or a position in community service instead of simply giving cash aid. As noted earlier, Wisconsin Works has three employment components for those unable to find unsubsidized work: trial jobs, CSJs, and transitional placements. Trial jobs are employment positions provided by private or public employers in exchange for a government wage subsidy. Due to the wage subsidy, employees in trial jobs could be seen as de facto government employees. However, the argument that participants are government employees carries more force for employees in the other two work components because they are employees of a W-2 agency instead of a private company.

Participants placed in CSJs and transitional placements are employees of the W-2 agency for a specified period of time and can only be dismissed from the program before reaching the end of that time limit if sanctioned "for cause." Similar to the type of government employees described in Roth and Loudermill who could retain their positions absent sufficient cause for dismissal, these W-2 participants have a property interest in continued W-2 participation.

Unlike the statute at issue in Roth that did not provide employment for the plaintiff absent cause for dismissal, W-2 provides very specific program rules that can result in a sanction if broken. Taken together, these rules give rise to the assumption that once accepted into the W-2 program, an individual is entitled to receive the benefits of the program.

145. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972).
146. See id.
147. See id. at 566–67.
149. See WIS. STAT. ANN. § 49.147. A CSJ participant "is an employee of the Wisconsin works agency for purposes of worker's compensation coverage." WIS. STAT. ANN. § 49.147(4)(c). Similarly, a transitional placement participant "is an employee of the Wisconsin works agency for purposes of worker's compensation coverage." WIS. STAT. ANN. § 49.147(5)(c).
150. See supra Part IV.A.1.b.ii.
151. See id.
within the specified time limits, absent cause for sanctions or a significant change in circumstances that would invalidate one's eligibility.

Despite these indications that W-2 participants are government employees entitled to due process protections, using government employment as the ground on which to base due process rights is a somewhat difficult case to make. First, the fact that employment is time-limited may be a problem. The author is unaware of any cases upholding a property interest in time-limited government employment. Moreover, applying the government employment argument may lead to a bifurcated system in which applicants do not have a property interest, but participants do. It would be further divided between participants in trial jobs and those who are in CSJs and transitional placements, with only those in the latter two types of positions considered government employees. This would be far more confusing than simply using the discretionary versus rule-based distinction to determine whether or not every W-2 applicant and participant has a property interest in W-2. Nonetheless, the fact that at least some W-2 participants can be characterized as government employees strengthens the conclusion that W-2 participants have a property interest in W-2 benefits.

2. Liberty interests

While the Court has not defined the outer boundaries of the liberty interest, there is no doubt that the meaning of liberty must be broad. In Roth, the Court drew the boundaries around what type of minimum liberty interests were protected by the Fourteenth Amendment. "Without doubt" the following interests are protected:

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his [or her] own conscience, and generally to enjoy those privileges long recognized... as essential to the orderly pursuit of happiness by free men [and women].

Under certain circumstances, courts have interpreted liberty interests to encompass employment when termination has the effect of foreclosing future opportunities; this was the issue presented in the Roth case. In finding that Roth's liberty interest was not jeopardized by state action, the Court found it significant that the state, in declining to rehire Roth, did not make any charge against him that might seriously damage his standing and associations in his community, nor did it impose a disability

153. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572–75 (1972).
154. Id. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
that foreclosed his freedom to pursue other employment.\textsuperscript{155} Although the district court found that the state’s refusal to rehire Roth imposed “practical difficulties” in obtaining another teaching position, the Supreme Court rejected this as not enough of a foreclosure to deprive Roth of a liberty interest. “Mere proof . . . that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of ‘liberty.’”\textsuperscript{156}

The Roth Court recognized, however, that if a State refused to re-employ a person under certain circumstances, interests in liberty would be implicated.\textsuperscript{157} The circumstances that implicate liberty include those present when government action puts a “person’s good name, reputation, honor, or integrity” at stake.\textsuperscript{158} “In such a case, due process would accord an opportunity to refute the charge before University officials.”\textsuperscript{159}

Roth did not take liberty into new domains, but merely reiterated prior rulings of the Court. In Joint Anti-Fascist Refugee Committee v. McGrath, Justice Jackson reasoned that “[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity.”\textsuperscript{160} The plaintiffs in this case were deprived of government employment, among other things, because the Attorney General had designated groups with which they were associated as “subversive.”\textsuperscript{161} Significantly, most of those who were deprived of government employment actually left voluntarily while they were under investigation by the Loyalty Board.\textsuperscript{162} Even so, the designation of “subversive” was seen as so seriously foreclosing the plaintiff’s employment opportunities as to rise to the level of a violation of liberty requiring due process of law.\textsuperscript{163} The designations had been applied without notice, without the disclosure of any justifications, without the opportunity to dispute the undisclosed evidence, and without the opportunity to show that the aims and acts of the organization were innocent.\textsuperscript{164} Justice Douglas found the gravity of the

\begin{footnotes}
\item [155] See Roth, 408 U.S. at 573.
\item [156] Id. at 574 n.13 (emphasis added).
\item [157] See id. at 573.
\item [159] Roth, 408 U.S. at 573.
\item [160] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185 (1951) (Jackson, J., concurring).
\item [161] See id. at 129.
\item [162] See id. at 185 n.4 (Jackson, J., concurring).
\item [163] See id. at 185–86 (Jackson, J., concurring).
\item [164] See id. at 161 (Frankfurter, J., concurring).
\end{footnotes}
impact on those labeled as "subversive" determinative in requiring proce-
dural due process.\textsuperscript{165}

The Joint Anti-Fascist Refugee Committee line of reasoning was also
followed in \textit{Loudermill}, where the plaintiff argued that he had been un-
constitutionally deprived of liberty as a result of the accusation of dishon-
esty that plagued him during the administrative proceedings concerning
his termination.\textsuperscript{166} The Court did not find a violation of liberty, however,
because the plaintiff failed to allege that the reasons for his dismissal were
published.\textsuperscript{167} Presumably, the dismissal would not deprive the plaintiff of
liberty unless his reputation was damaged in the press and he was thereby
rendered unable to find other employment.

In the age of work requirements for welfare recipients, state benefit
programs look more like government employment than ever before, and
people who are dismissed from these programs have few or no avenues for
obtaining employment on their own. An agency decision to exclude a par-
ticipant from W-2, either through an ineligibility determination or sanc-
tions, effectively forecloses other opportunities for employment, thus
infringing that participant's liberty interests.

One of the laudable goals of W-2 is to make welfare a community
responsibility. The state legislature attempted to codify this responsibility
into law by requiring each W-2 agency to create a steering committee
with the task of breaking down the basic barriers to employing the poor.\textsuperscript{168} The committee should attempt to provide solutions to problems with
child care, transportation, and work readiness training.\textsuperscript{169} Effective W-2
agencies will also have job developers to find employers who will agree to
employ W-2 participants.\textsuperscript{170} One W-2 agency in Milwaukee, YW Works,
has gotten employers to commit to providing 2400 jobs to W-2 partici-
pants.\textsuperscript{171}

W-2 job developers have an increased chance of success because em-
ployers have built-in incentives to hire from the W-2 pool of applicants
rather than from the general population of low-wage workers. For in-
stance, employers that provide trial jobs will be able to spend less on
wages for W-2 participants than for other employees because the state
will pay a wage subsidy of up to $300 per month for full-time employ-
ment of W-2 participants.\textsuperscript{172} Similarly, employers taking on W-2 partici-

\begin{footnotesize}
\textsuperscript{165} \textit{See id.} at 178 (Douglas, J., concurring). "The condemnation may in each case be wholly justi-
\textsuperscript{166} \textit{See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 n.13 (1985).}
\textsuperscript{167} \textit{See id.}
\textsuperscript{168} \textit{See Wis. Stat. Ann. § 49.143(2)(a) (West 1997).}
\textsuperscript{169} \textit{See id.}
\textsuperscript{170} \textit{See Telephone Interview with George Leuterman, Vice President of Maximus, a Milwaukee
County W-2 agency (Mar. 27, 1997).}
\textsuperscript{171} \textit{See YW Works for Everyone!, YW WORKS EXECUTIVE SUMMARY (YW Works, Milwaukee, Wis.),
at 3 (on file with author).}
\textsuperscript{172} \textit{See Wis. Stat. Ann. § 49.147(3)(a).}
\end{footnotesize}
pants for a community service job or transitional placement will not have to spend anything on wages, as the participants are paid by monthly grants from the state.\footnote{See Wis. Stat. Ann. §§ 49.148(1)(b)–(c).} The job developer is perhaps one of W-2’s most useful tools for accomplishing its goal of moving welfare recipients into unsubsidized employment.

These positive features of W-2 will have the negative effect of creating at least two tiers of people in the low-wage employment pool: the general low-wage job seeker and the W-2 participant. Under this system, a person who has been excluded from W-2 and has become a general low-wage job seeker will clearly be in a much worse position vis-a-vis the job market than a W-2 participant. In addition to the tremendous barriers to work (i.e., child care, health care, and transportation) faced by poor parents, usually single mothers, employers will be unlikely to hire from the general pool of low-wage job seekers when they have agreed to hire from the W-2 pool and can spend less on wages by doing so.

This two-tiered system presents a much more significant foreclosure of opportunities for the person excluded from W-2 than that found in \textit{Roth} and \textit{Loudermill}, both of which involved employees who were not as competitively disadvantaged as those excluded from W-2 employment positions. The \textit{Loudermill} Court reasoned that the state would not infringe on the employee’s liberty interest unless the employee’s reputation was damaged by the state’s publication of its reasons for dismissal;\footnote{See Cleveland Bd. of Educ. v. \textit{Loudermill}, 470 U.S. 532, 547 n.13 (1985).} presumably, the importance of publication is that it informs the analysis of whether the dismissal foreclosed future employment opportunities.

Future employment opportunities are foreclosed to a greater extent in the W-2 context than in the \textit{Loudermill} context. Regardless of whether the state publishes its reasons for an individual’s exclusion from W-2, employers have greater incentives to hire W-2 participants than non-participants. Hence, excluding a recipient from participation in W-2 will effectively foreclose future employment opportunities for the majority of welfare recipients, thus depriving such recipients of a recognized liberty interest. The deprivation that results is serious and should not occur without constitutionally sufficient due process to ensure that a recipient is not excluded arbitrarily and unjustly.

It is important to note that establishing due process hearings for W-2 participants, at best, will only enable people to stay on W-2 for the full time allotted to them under the applicable state statute.\footnote{See Welfare Reform Act § 103, 110 Stat. at 2137 (stating that while maximum amount of time that recipients can receive benefits is five years, states may set a shorter time limit).} This legal strategy will not prevent those who have truly violated the program rules or who have come to the end of their time limit from falling into the bot-
tom tier of low-wage workers. The poverty that families in this category are certain to face must be alleviated through other means.176

B. Part Two of the Due Process Inquiry: What Type of Procedure Is Required by the Constitution?

A basic principle of our democratic society is that one has the right to be heard before being condemned to suffer the loss of any constitutionally protected right.177 "The heart of the matter is that democracy implies respect for the elementary rights of men [and women], however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." Avoiding procedural due process may at times be expedient and seem to serve noble aims, but by avoiding a fair process we harm our society. "When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension."179

1. State law cannot undermine the Due Process Clause

Although state law defines property interests, it cannot undermine constitutional protections of due process by prescribing less than constitutionally adequate procedures.180 The Wisconsin Works statute, along with departmental rules, creates a review process for contesting a W-2 agency’s inaction on an application or the reduction or discontinuance of benefits.181 This process must be analyzed in light of Supreme Court due process jurisprudence.

In Loudermill, the Supreme Court rejected the argument that a statute that creates a property right in continued employment and also specifies the procedures for discharge affords the discharged employee all the process that is due.182 Loudermill involved an Ohio statute that created a property interest in civil service employment by ensuring continued employment unless there was cause for discharge.183 The statute did not allow

176. Although this subject is extremely important, it cannot be analyzed adequately within the confines of this article on procedural protections.
177. See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).
178. Id. at 170 (Frankfurter, J., concurring).
179. Id. at 179 (Douglas, J., concurring). "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." Id.
182. See Loudermill, 470 U.S. at 540–42.
183. See id. at 538–39.
any pre-termination procedures, but did create post-termination review procedures.\textsuperscript{184} It required the state to provide the dismissed employee with a copy of the order of removal, which would state the reasons for dismissal.\textsuperscript{185} The employee was then given the right to file a written appeal for a full administrative review.\textsuperscript{186}

Proponents of the termination procedures followed by the state argued that a "property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation."\textsuperscript{187} Since the statute specified the grounds for termination and set out procedures by which termination could take place, and the state followed those procedures in this case, the Cleveland Board of Education argued that "[t]o require additional procedures would in effect expand the scope of the property interest itself."\textsuperscript{188}

The Cleveland Board of Education appealed to the "bitter with the sweet" approach articulated in \textit{Arnett v. Kennedy}, in which the Court reasoned that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."\textsuperscript{189} The \textit{Loudermill} Court, however, renounced this position, reminding the Cleveland Board of Education that this view was similarly rejected by six justices in \textit{Arnett}.\textsuperscript{190}

As in \textit{Loudermill}, the Supreme Court concluded in \textit{Vitek v. Jones} that minimum procedural requirements are a matter of federal law and are not diminished by the fact that the state may have specified its own procedures that it deems adequate for determining the preconditions to adverse official action.\textsuperscript{191} The Supreme Court followed and elucidated its position in \textit{Loudermill}:

The Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct . . . . "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not con-

\begin{flushright}
\textsuperscript{184}. See \textit{id.} at 539–40 n.6.
\textsuperscript{185}. See \textit{id.}
\textsuperscript{186}. See \textit{id.}
\textsuperscript{187}. See \textit{id.} at 539.
\textsuperscript{188}. See \textit{id.} at 540.
\textsuperscript{190}. \textit{See Loudermill}, 470 U.S. at 540.
\textsuperscript{191}. \textit{See Vitek v. Jones}, 445 U.S. 480, 491 (1980); \textit{see also} \textit{Logan v. Zimmerman Brush Co.}, 455 U.S. 422, 432 (1982) (reversing the lower court's holding that because the entitlement arose from a state statute, the legislature could define the procedures to be followed to protect that entitlement).
stitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."192

Hence, a state legislature cannot specify procedures for deprivation of life, liberty, and property that undermine the minimal constitutional guarantees of due process. Once the first part of the due process test is satisfied, namely, that there has been a deprivation of life, liberty, or property, then the courts must look to the U.S. Constitution, not to the state statute, to determine what process is due.193

Since the state cannot undermine constitutional protections of due process when it is depriving someone of a protected interest in property, liberty, or life, one cannot simply assume that Wisconsin Works' review process is adequate, and therefore must analyze it in light of Supreme Court jurisprudence on this issue.

2. The Due Process Clause requires pre-termination notice and hearing

The root requirement of the Due Process Clause is that an individual must be given notice and an opportunity for a hearing before being deprived of any protected interest.194 Only "extraordinary situations, where some valid governmental interest is at stake" will justify postponing the hearing until after the event.195 Further, the "hearing must be 'at a meaningful time and in a meaningful manner.'"196 This pre-termination hearing requirement evolved out of a balancing test that weighed the private interests in retaining one's rights to life, liberty, or property; the risk of an erroneous termination; and the governmental interest in avoiding administrative burdens.197

a. Pre-termination hearings in government benefits cases

In Goldberg, the Supreme Court affirmed the lower court's balancing of interests, which emphasized the disruptive effects of denying government benefits. The "one overpowering fact which controls" is that a welfare recipient, by definition, is destitute, without funds or assets.198 "Suffice it to say that to cut off a welfare recipient in the face of... 'brutal need' without a prior hearing of some sort is unconscionable, un-

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192. Loudermill, 470 U.S. at 541 (quoting Arnett, 416 U.S. at 167 (Powell, J., concurring in part and concurring in result in part)).
193. See Loudermill, 470 U.S. at 541.
194. See id. at 542.
197. See Goldberg, 397 U.S. at 267.
198. See id. at 261.
less overwhelming considerations justify it." While the Court acknowledged the problem of additional administrative expense, it rejected the argument that the need to protect the public’s tax revenues supplied the requisite overwhelming consideration to trump the recipient’s interests in a pre-termination hearing.

The Court distinguished the process required to deprive one of welfare from that which is required to terminate other government benefits, such as government contracts and employment, by focusing on the significant private interests of welfare recipients:

[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Included in the Court’s rationale for requiring a pre-termination evidentiary hearing for welfare recipients was the assertion that the government benefitted from these procedures because they foster the dignity and well-being of all persons within a state’s borders. Thus, the Court combined the interest of the eligible recipient in uninterrupted receipt of public assistance with the state’s interest that its payments not be erroneously terminated, and found that these “clearly outweighed” the state’s competing concern to prevent any increase in its fiscal and administrative burdens.

Clearly, the Goldberg rationale continues to accurately weigh the competing interests at stake. As noted earlier, the majority of people who previously subsisted on AFDC in Wisconsin were single mothers, primarily women between the ages of eighteen and thirty-nine, with twelve years of education or less, and caring for young children. The prospects for these women of finding unsubsidized employment and childcare without the aid of a W-2 agency are bleak, and the hardship that they would endure if their benefits were cut off is great. By definition, women eligible for W-2 do not have sufficient assets to carry themselves and their children through long periods of unemployment. Moreover, under the incentive structure of W-2, the probability for erroneous termination of benefits is great. The W-2 agencies are under pressure to keep the costs of the program down, and these pressures may lead them to unjustifiably dismiss those who have followed all of the program’s rules, but cost the

199. Id.
200. See id.
201. Id. at 264.
202. See id. at 264–65.
203. See id. at 266.
204. See Cancian & Meyer, supra note 13, at 58.
program too much money because they are hard to place in unsubsidized employment.

The other consideration weighed by the Goldberg Court—the state’s interest in preventing erroneous terminations—needs more protection under W-2 than under former welfare benefits statutes. W-2 involves the privatization of government services. The introduction of the private sector into the distribution of public benefits is a significant experiment, the results of which are still unknown. Thus, it is even more important for the state to have procedures in place that ensure that private agencies are maintaining the public spirit of Wisconsin Works. Under these circumstances, the balance of equities weighs heavily in favor of following Goldberg’s pre-termination notice and hearing process.

b. Pre-termination hearings in government employment cases

Since the W-2 statute transforms traditional government benefits into work-conditioned grants, cases involving the due process rights of government employees are instructive. Once government employment is determined to be a property or liberty interest, the state cannot dismiss an employee without first giving notice and a hearing. In crafting this rule, the Court balanced the private interests in continued employment against the state’s interest in expeditious removal of unsatisfactory employees. The Court’s decision in Loudermill turned on its recognition of the importance of one’s private interest in maintaining one’s livelihood, and the significant harm to an individual that can result from dismissal. Furthermore, since dismissals for cause will often involve factual disputes, the Court saw an obvious benefit in allowing one to present one’s defense prior to the actual dismissal, in order to avoid erroneous deprivations of property or liberty.

The employee’s private interests outweigh the state’s interest in immediate termination. “[A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.” Moreover, this procedural requirement is in the best interest of the state. The Loudermill Court reasoned that “a governmental employer...has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls.”

206. See id. at 542–43.
207. See id. at 542–44.
208. See id. at 543–44.
209. See id.
210. Id. at 544.
211. Id.
Since W-2 is the equivalent of *Loudermill's* "welfare rolls," the government has an even stronger interest in keeping its citizens employed under W-2 rather than erroneously forcing them out of the government safety net. Thus, notice and a hearing are required prior to termination of government employment.

3. The contours of a constitutionally sufficient pre-termination hearing

In order for the state to deprive one of a property or liberty interest in welfare benefits or employment, it must give notice and a pre-termination hearing.\(^2\) However, the type of notice and opportunity for pre-termination hearing required by the Constitution is not identical in every case; it must be appropriate to the nature of the case.\(^3\) In general, the Constitution does not require a full evidentiary hearing prior to adverse administrative action.\(^4\) The determination of what kind of hearing is required is made by weighing the government's interest in avoiding administrative delays and expenses against the employee's or recipient's interest.\(^5\)

The *Loudermill* Court noted that the Supreme Court has required a full adversarial evidentiary hearing prior to adverse governmental action in only one case, *Goldberg.* *Loudermill* distinguished cases that involved public employment from those that involved public benefits, the subject of *Goldberg,* because the latter cases implicate a much greater private interest in being free from erroneous deprivations of livelihood and much greater personal disruption.\(^6\) This distinction may not apply to employ-

\(^5\) See *Loudermill,* 470 U.S. at 544–46. In determining what type of pre-termination hearing was mandated, the *Loudermill* Court indicated a desire not to require so much procedure prior to termination as "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546.
\(^6\) See *id.* at 545–46. Although this view is controlling, Justice Marshall's concurring opinion in *Loudermill* expresses a far more protective view of the private interests of government employees. He would require a full evidentiary hearing prior to termination of employment:

To my mind, the disruption caused by a loss of wages may be so devastating to an employee that, whenever there are substantial disputes about the evidence, additional pre-deprivation procedures are necessary to minimize the risk of an erroneous termination . . . . By limiting the procedures due prior to termination of wages, the Court accepts an impermissibly high risk that a wrongfully discharged employee will be subjected to this often lengthy wait for vindication, and to the attendant and often traumatic disruptions to his personal and economic life.

Considerable amounts of time may pass between the termination of wages and the decision in a post-termination evidentiary hearing . . . . During this period the employee is left in limbo, deprived of his livelihood and of wages on which he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered, either because of the nature of the charges against him, or because of the prospect that he will return to his prior public employment if permitted. Similarly, his access to unemployment benefits might seriously be constrained, because many States deny unemployment compensation to workers discharged for cause. Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as
ment under W-2, however, since participants in the program are in the same financially precarious situation as were the traditional welfare recipients in Goldberg.

Goldberg held that a state that terminates public assistance payments to a recipient without affording her the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. New York City's procedure, which was at issue in Goldberg, created the following scenario:

A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. The letter does inform the recipient that he may request a post-termination "fair hearing." This is a proceeding before an independent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld.

The constitutionally fatal flaw in New York City's procedure was that it lacked any provisions for the personal appearance of the recipient, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses, prior to termination of benefits. Stressing that proposed terminations may rest on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases, the Court held in Goldberg that a recipient must have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse

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footnote

217. See Goldberg, 397 U.S. at 254.
218. Id. at 258–60 (emphasis added). Interestingly, New York City's procedure was in effect at the same time that the Social Security Act required states to afford a "fair hearing" to any recipient of aid under a federally-assisted program before termination became final. The Court could have simply decided Goldberg on a statutory basis. Yet, it declined to review the validity or construction of the Social Security Act and its implementing regulations, and instead focused on the constitutionality of New York City's procedure. See id. at 258 n.3. This laid the groundwork for the position later advanced in Loudermill that constitutional requirements of due process cannot be abridged by statute or regulations.
219. See id. at 268.
witnesses and by presenting her own arguments and evidence orally. In addition, the evidence used to prove the government's case must be disclosed to the individual so that she has an opportunity to show that it is untrue. "While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy."

In addition to adequate notice and the opportunity to present oral arguments, the decision-maker's decision must rest "solely on the legal rules and evidence adduced at the hearing." The decision, however, does not need to amount to a full opinion or even formal findings of fact and conclusions of law; rather, the decision-maker needs only to state the reasons for her determination and to indicate the evidence upon which she relied. It is essential to have an impartial decision-maker. This does not bar a welfare official who has had prior involvement in some aspects of a case from acting as a decision-maker, unless she participated in making the determination under review.

By contrast to pre-termination procedures in welfare benefits cases, pre-termination procedures in employment cases are somewhat less stringent because they do not mandate an opportunity for the aggrieved to present her case orally. The procedures are required to provide for an initial determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. This essentially requires oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to present her side of the story.

4. Right of review under Wisconsin Works

A Wisconsin Works agency can deny an applicant or participant the full benefits of W-2 on the ground that the individual is either ineligible or has been sanctioned three times for "refusing to participate" in the program. Either of these findings result in an immediate reduction or termi-
nation of W-2 benefits prior to any independent review of the agency’s decision.230

An applicant who has not yet been accepted into the W-2 program can seek review of an agency’s failure to process the application with “reasonable promptness”231 if she petitions for review within forty-five days.232 An applicant or participant who is displeased with an agency’s decision to deny, reduce, or terminate benefits because of sanctions or determinations of ineligibility233 can likewise petition for review within forty-five days of the contested decision.234 There are two levels of review: the fact-finding level that takes place within the W-2 agency and the departmental review.235 Each W-2 agency must have at least one individual assigned to complete fact-finding reviews.236 That fact-finder must not be the person who made the initial decision in the case.237

Upon receiving a timely petition, the W-2 agency “shall give the applicant or participant reasonable notice and opportunity for a review.”238 In an effort to prevent harm from an agency error, the fact-finder must notify the petitioner of the details of the fact-finding meeting within three working days of receipt of the petition.239 The notice must include the time and place of the fact-finding meeting, and the meeting must take place within five working days of the date that the notice was mailed.240 The W-2 agency is required to deny the petition or to refuse to grant relief if the petitioner withdraws or abandons the petition.241 Withdrawal must be in writing and abandonment occurs when a petitioner fails to appear at a scheduled review without good cause.242

The fact-finding review is a process in which the petitioner can present information.243 She can bring someone to the fact-finding meeting to assist her with presenting her reasons for contesting the agency’s deci-

230. See Wisconsin Works, supra note 129, at IV-11. Interestingly, food stamp and medical assistance benefits must be continued pending the fact-finding review. See id.
231. “Reasonable promptness” is defined by the Department as “at least within 30 days” after the application has been filed. See id.
232. See Wis. Stat. Ann. § 49.152(1) (West 1997). There is some question about when the clock starts running on agency inaction, i.e., the agency not acting promptly on an application to the program.
233. Decisions of ineligibility can be upheld based on financial or non-financial factors. See Wisconsin Works, supra note 129, at IV-11.
235. See id.; see also Wisconsin Works, supra note 129, at IV-11–13.
236. See Wisconsin Works, supra note 129, at IV-11.
237. See id.
239. See Wisconsin Works, supra note 129, at IV-12.
240. See id.
243. See Wisconsin Works, supra note 129, at IV-12.
sion.244 The W-2 agency must also have a representative present who will present facts and documents that support the agency’s decision.245 The fact-finder is responsible for creating a fact-finding file and completing a thorough record of review that contains those present at the review, the contested agency action, the information presented by both parties, and the fact-finding decision.246

Once the fact-finder makes a decision on the petition for review, he or she “shall send a certified copy of its decision to the applicant or participant.”247 The decision must be issued within five working days of the review date and must include information about the petitioner’s right to appeal to the department.248 If the fact-finder decides in favor of the petitioner, the W-2 agency must either approve the application or restore the participant’s benefits by placing the petitioner in an employment position within ten days of the date of the decision.249 There is, however, no retroactive cash payment for the amount of money lost during the review process.250 If the issue is adequately resolved at this point, all told, the petitioner may have gone without government assistance for sixty-eight days.251

Petitioners who are displeased with the fact-finder’s decision can appeal to the second phase of review.252 For many, however, the fact-finder’s decision will be determinative of one’s W-2 status because unless the petitioner has been denied an application based solely on financial eligibility, the departmental review is discretionary.253 The departmental review may either be a desk review of the fact-finding case file or it may involve a teleconference to gather further information.254 This amounts to an appellate type of review where there is no cross-examination of

244. See id.
245. See id.
246. See id.
247. WIS. STAT. ANN. § 49.152(2)(a).
248. See WISCONSIN WORKS, supra note 129, at IV-12–13.
249. See id. at IV-11.
250. See id.
251. The maximum amount of time for the first phase of review is calculated by adding the following: 45 days from the date of decision to file a petition, 3 days for the fact-finder to give notice, 5 days from the date of notice until the meeting, 5 days from the meeting until the report is issued, and 10 days from the date of report to reinstatement in an employment position. See id. at IV-11–13.
252. See id. at IV-13.
253. See id.; see also WIS. STAT. ANN. §§ 49.152(2)(c)(1)–(2) (West 1997). For non-financial eligibility disputes, if the appeal is filed within 15 days of receiving the fact-finder’s decision, the department may review the agency’s decision. See WIS. STAT. ANN. § 49.152(2). The rationale behind this bifurcated system is unclear. Financial eligibility is the most objective part of the eligibility determination and so would seem to be easily and accurately decided at the fact-finder stage of review. The non-financial eligibility factors and the sanctions, by contrast, allow subjective and, at times, self-interested viewpoints to enter into the equation. If the state were to limit appellate-type review, it would be more reasonable to limit review of financial eligibility than to limit review of non-financial eligibility and sanctions.
witnesses and no opportunity for the parties to present their sides of the case. The department must complete its review within ten days and issue its written decision to the agency and the petitioner.\textsuperscript{255} If the department overrules the agency’s decision, it “may direct the W-2 agency to place the individual in an employment position or restore cash benefits.”\textsuperscript{256} The department’s decision is final.\textsuperscript{257}

5. Is Wisconsin Works’ review process constitutional?

Wisconsin Works’ “fair hearing” process does not meet the constitutional due process requirements for deprivations of government benefits or employment. Both deprivations require notice and a hearing prior to termination of benefits. Similar to the process established by New York City that was held unconstitutional in \textit{Goldberg}, W-2 allows agency actors to deny, reduce, or terminate benefits prior to giving notice and an opportunity for the petitioner to be heard. One who has been subject to an erroneous agency decision may go without benefits for up to sixty-eight days; since agencies often do not meet regulatory deadlines, this is probably a conservative figure. Forcing someone who is, by definition, without adequate assets to go without aid for over two months without due process is extremely disruptive. The Supreme Court has already recognized that this type of hardship is unacceptable in a constitutionally adequate review process.\textsuperscript{258}

While the timing of the hearing does not meet due process requirements, the format of the fact-finding hearing probably meets the standard for both government benefits and employment cases. As those cases require, the W-2 hearing gives the petitioner an opportunity to present her side of the dispute and allows her to bring an advocate to the hearing. Yet problems with the fact-finding hearings remain. The main issue is that, because review of the fact-finder’s non-financial or sanction-related conclusions is discretionary, there is no way to ensure fair process for those involved in disputes over non-financial eligibility requirements or sanctions. If the fact-finder does not follow the fact-finding hearing and unjustly upholds the agency’s decision to deny or reduce W-2 benefits, the department does not have to accept the appeal. This is particularly problematic where the fact-finder is an employee of the W-2 agency. Although arguably anyone who is an agent of the W-2 agency would be a biased reviewer, in \textit{Goldberg} the Court approved of a similar situation and reasoned that as long as the reviewer did not make the original decision,

\textsuperscript{255} See id.
\textsuperscript{256} Id.
\textsuperscript{257} See id. Likewise, the department’s decision to reject a petition for review should be considered final agency action.
the reviewer was sufficiently neutral.\footnote{See id. at 271.} Goldberg's reasoning did not anticipate a situation such as that found with W-2 where all employees of the W-2 agency may have financial incentives to free the agency's caseload of expensive participants. The assumption of neutrality is undermined by the merging of public and private interests under W-2.

\section*{V. Conclusion}

Wisconsin Works is one of the first attempts to implement welfare reform. Although Wisconsin has been successful in reducing the number of people receiving government assistance, it is unclear what percentage of this reduction has come from sanctions and ineligibility determinations, as opposed to successfully placing people in unsubsidized employment. In its reform efforts, Wisconsin has also attempted to merge the private sector with public services. W-2 is administered by public and private agencies that have competed for the opportunity to provide government benefits. During the implementation of Wisconsin Works, the pressure to make ineligibility determinations and utilize sanctions as a means to rid caseloads of hard-to-place participants will increase as the pressure on these agencies to meet performance-based standards increases. The combination of private sector competition, potential for profit, and performance-based standards has created a whole new set of incentives that may be detrimental to the public interest. One way to protect the public interest is by ensuring that constitutionally sufficient due process is followed when denying or reducing government benefits.

Wisconsin's statute claims that it does not create an entitlement, but the inquiry into whether the statute creates a property or liberty interest that is protected by the Due Process Clause does not stop with the statute. Property interests are created by state laws that are rule-based rather than discretionary. Wisconsin Works has an elaborate set of eligibility requirements and, once accepted into the program, a participant is entitled to receive W-2 benefits for a specified term, unless sanctioned for prohibited behavior. This is essentially a rule-based statute that creates a property interest in receipt of W-2 benefits. Additionally, W-2 provides special employment opportunities that the rest of the low-wage labor pool does not have. As such, exclusion from W-2 will likely foreclose other employment opportunities. This deprivation of liberty should not occur absent due process of law.

Wisconsin Works creates property and liberty interests, and as such, it must comply with the constitutional requirements of due process before deprivation of those interests occurs. Wisconsin Works fails to meet these requirements because it denies people government benefits prior to
giving any notice or pre-termination hearing. This denial of due process is significant and the statute should be amended to remedy it. The heart of a democracy is a system that ensures that no one is unjustly denied protected interests, regardless of her social status. In the words of Justice Douglas, "when we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone."