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ROBERT L. RABIN*

Beginning with *Goldberg v. Kelly*,[1] the Supreme Court has entertained a wide range of questions about the safeguards necessary to satisfy the constitutional right to procedural due process in cases involving individual claims to various kinds of governmental largess.[2] Admittedly, these cases raise very difficult issues, requiring the matching up of a variety of possible procedural models with a highly diverse array of government programs. But the discussion in these cases is unsatisfying for reasons that go beyond the difficulty in achieving a good fit between procedural protections and substantive programs.

The Court consistently talks about the "elements of a fair hearing"—the requirement of notice, the right to confrontation and cross-examination, the need for an impartial presiding officer, and so on—as if these safeguards were the basic values at stake in the right to hearing cases. In fact, they are not. Rather, these safe-

* Professor of Law, Stanford Law School. B.S., 1960; J.D., 1963; Ph.D., Northwestern University, 1967.

1. 397 U.S. 254 (1970).

2. The cases before *Goldberg*—frequently relying on a distinction between "rights" and "privileges"—are discussed in K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.11-.13 (1958 & Supp. 1970).

guards are means of implementing a set of more fundamental values that underlie and give meaning to the concept of procedural due process. Unfortunately, these values have received very little attention from any source: Like the judicial opinions on the subject, the voluminous law review literature largely disregards this level of concern.[3]

While I can only be suggestive here, it does seem to me essential that more discussion be addressed to the aims of procedural due process. Otherwise, we are certain to experience a continuing sense that something is amiss in cases dealing with the need for some element or other of a fair hearing before benefits are finally terminated. Initially, then, I will discuss the values that seem central to procedural due process. Afterwards, I will turn to the model that includes the most extensive set of safeguards: the adversary, or trial-type, model. I will try to indicate some of the problems in using that model as a prelude to a brief concluding effort to demonstrate that the fundamental due process values can be protected through more modest safeguards.

I. Fundamental Values and Procedural Due Process

Let me suggest three values that seem fundamental to the notion of procedural due process. Although these values are not necessarily exhaustive, they do express what I would regard as the essence of the concerns embodied in procedural due process. The first is the interest in achieving a rational result. The interest in rational treatment anticipates safeguards that accrue principally to the benefit of the individual threatened by governmental action. While society at large, as well as the agency itself, may have vital interests that are protected by procedural due process safeguards, the principal beneficiary of safeguards that insure rational treatment is the party with an immediate interest at stake—an interest either in receiving or in retaining some form of governmental largess.

Rational treatment, as I define it, has two elements. It anticipates a governmental determination based on a correct factual predicate; in other words, a decisionmaking process that is likely to be effective in getting at the truth. And, it requires a tenable connection between the facts and the government action taken

3. *But see* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 46-57 (1976); O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 Sup. Ct. Rev. 161, 184-90; Saphire, *Specifying Due Process Values: Toward a More Responsible Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111 (1978) (published while this article was at press).

under the applicable legal standard. Both these elements are indispensable checks against the arbitrary exercise of discretion.

A second value that seems to me critical is accountability. The interest in accountability anticipates safeguards primarily designed to insure "good government" rather than to protect individual rights. By accountability, I mean some sense of assurance that decisions are being reached in an impartial and rational fashion; that is, that a disinterested observer could examine the administrative record and determine that the agency is acting consistently with its legal mandate.

Finally, a third vital aspect of procedural due process is the assurance of an adequate explanation of the basis for the agency's decision. Like the interest in a rational result, this value expresses a primary concern for protection of the individual as a claimant, and for satisfying his justifiable expectations when governmental largess is at stake. Because this interest may initially sound less familiar than the more traditional legal concerns about rational decisionmaking and accountability, it may be worth spelling it out in slightly more detail.[4]

Assuring an adequate explanation can be viewed as a dignitary interest. It is an important aspect of the concern expressed by Kafka, and the writers who follow in his genre, depicting the dehumanizing effects of a modern bureaucratic state.[5] It is the concern that the state make known why it is treating the individual in a certain way; a dominant concern as we come to depend on government in countless ways—to provide an education, to assure the means of maintaining a livelihood, to satisfy our needs for recreational activity, and so on.[6]

I am suggesting that when an important determination of individual rights is being made by the government, a citizen in a democratic society has a critical interest in having his status taken seriously. An indispensable element in demonstrating that the state in fact has taken account of the individual's claim to relief—irrespective of whether it has merit—is an adequate explanation of the agency's decision.

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4. For a more extensive treatment of this particular interest, see Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 74-87 (1976).

5. *See, e.g.*, F. KAFKA, THE TRIAL (1925).

6. An excellent treatment of the consequences of our growing dependency on governmental largess is Reich, *The New Property*, 73 YALE L.J. 733 (1964).

Having identified what I regard as the fundamental values underlying procedural due process, two further observations need to be made. First, anticipating my later discussion, almost any set of safeguards implementing one of these values is bound to do double or triple duty, to some extent. For example, insuring an adequate explanation, through a requirement of a detailed statement of reasons that explains why benefits are being denied or terminated, also promotes accountability and rational decisionmaking. A statement of reasons promotes accountability because a requirement that the agency explain its decisions puts the agency on the line, insuring a certain amount of visibility. If its reasons are unsupportable, the agency is, at a minimum, potentially open to public criticism. Assuming judicial review, it is exposed to possible reversal as well. Requiring a statement of reasons also promotes rational decisionmaking because the process of explaining in some detail why a particular decision was reached has a "purifying" effect: It generally insures a decision that is arrived at only after a certain degree of deliberation and verification of premises.

Other illustrations of the point could be offered. I am suggesting that, as a practical matter, actual safeguards which implement these values are likely to have a multiple impact.

My second point is cautionary. Real costs are involved in promoting any or all of these values. This is no small matter. Even the most modest procedures to safeguard these fundamental values bear a variety of costs—not to speak of the burdens imposed by the most extensive set of safeguards, the trial-type hearing.

The costs I have in mind are familiar ones. First, there is the cost of the administrative machinery that must be established to implement the safeguards. If any kind of "hearing" is involved, it is virtually certain that a trial examiner will be needed to serve as presiding officer, and that agency staff will be required to provide needed expertise in gathering and interpreting factual information. Building an adequate formal record may require outside experts, reports, field inspections, and, in a contested proceeding, an adequate opportunity for the grievant to cover the same ground from his perspective. Each of these measures can be quite expensive.

A second consideration, directly related to the formal deliberation associated with a hearing model, is the cost of delay. Obviously, the more extensive the safeguards, the greater the time required to reach a decision. When an agency's resources are tied up, it can process fewer cases, and it takes more time to resolve each one.

Finally, there is a less directly observable cost that, as a consequence, sometimes goes unnoticed by outsiders. In some cases, an agency, frustrated by potential delay and disruption as well as by the sheer expense of implementing effective termination procedures, will simply conclude, "It's not worth it." If the agency must go through an expensive proceeding in order to make a termination stick, and if even then judicial review is available where the grievant may prevail on a variety of grounds—not all of which are substantive by any means—then it may be the wisest course simply to "live with" regulatory transgressions. Let the questionable recipient continue to receive benefits, and forget about the costly termination proceeding. Grant tenure to the employee of dubious merit, whatever may be the case, to avoid unnecessary trouble. In this manner, procedural safeguards may foster excessive timidity and consequent waste.

Thus, there are real costs associated with implementing these fundamental values; costs in the form of bureaucratic growth, delay, and waste that may be largely unavoidable.

II. PROCEDURAL SAFEGUARDS: SHORTCOMINGS OF THE ADVERSARY MODEL

This brief discussion of the fundamental values underlying procedural due process will have to suffice for present purposes. A key issue is how we go about safeguarding these values. While the Supreme Court has ignored explicit discussion of these or other values, it has developed a two-step inquiry for dealing with the question of safeguards.

The threshold determination is whether the due process clause is triggered at all. Safeguards are invoked only if sufficiently important interests are at stake to warrant constitutional protection. Thus, the courts look in the first instance for a "property interest"—often called an "entitlement."[7] Working out a comprehensive definition of entitlements is no easy matter, but I put this issue aside because it requires more extensive discussion than is possible here.

Instead, I want to assume that the due process clause is triggered in order to reach the second half of the procedural due

7. For a more detailed discussion of the two-step method of analysis, see Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 74-77 (1976).

process inquiry: the search for appropriate safeguards for protection of the recognized entitlement. Because of their training, lawyers turn quite naturally to the adversary process as a model for articulating necessary safeguards. *Goldberg v. Kelly* reflects this inclination. After determining that a welfare recipient had an entitlement to Aid to Families with Dependent Children (AFDC) benefits, Justice Brennan went on to spell out the requisites at the pretermination hearing: notice, an evidentiary presentation, confrontation and cross-examination of adverse witnesses, an impartial tribunal, a decision based on the evidence of record, a statement of reasons, and so on—virtually the full panoply of procedural rights that we associate with a judicial trial.[8]

For a brief period, the Supreme Court remained faithful to the approach taken in *Goldberg*. Succeeding cases applied the trial-type adversary model to a variety of revocation situations, ranging from parole[9] to teacher tenure cases. In the latter instance, the Court entertained two cases that appeared to fall on opposite sides of the "entitlement" line. As a result, the teacher who had an entitlement was given the right to a trial-type hearing,[10] and the teacher without a ripened property interest was held to be entitled to no procedural safeguards at all.[11] While paying lip service to the necessity for "flexibility," the Court in fact seemed committed to an all-or-nothing approach.

Soon, however, the Court began a gradual process of isolating *Goldberg* and treating a trial-type proceeding as an extraordinary requirement. The Court has moved in this direction for a variety of reasons that require some exploration. If *Goldberg* does set unrealistic standards, it is time to take a harder look at whether the goals of procedural due process can be implemented in other, less formal ways.

First, the *Goldberg* approach was doomed to failure because the costs of implementing trial-type procedures are almost always excessive. It is no secret, of course, that trials are expensive and time-consuming. In addition, however, the judicial model is inapposite because it understates the costs of using adjudicatory procedures in the administrative system. The fact is that the courts have developed techniques for resolving significant numbers of cases without recourse to formal adversary procedures—tech-

8. Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970).

9. The parole revocation case, Morissey v. Brewer, 408 U.S. 471 (1972), applied the *Goldberg*-type due process analysis to a "liberty" interest.

10. Perry v. Sindermann, 408 U.S. 593 (1972).

11. Board of Regents v. Roth, 408 U.S. 564 (1972).

niques that simply are not available to administrative agencies in contested application and revocation cases.

The courts resolve informally more than ninety percent of criminal and tort cases because there is an incentive for both parties to compromise. In criminal cases, plea bargains clear the prosecutors' dockets—as well as the courts'—and lessen the defendants' sentences. In tort cases, settlements avoid delay and litigation expense for insurance companies and provide assured cash in hand for injury victims. No similar incentives operate in a benefit-revocation case. Consider the AFDC recipient in a case like *Goldberg*. There is no incentive for the aggrieved claimant to stop short of exhausting every available administrative remedy, assuming benefits cannot be terminated prior to a final disposition of the case. In addition, the government has no fall-back position; either the recipient is entitled to continuing benefits or none at all—there is no room for compromise.

Generally speaking, in cases involving interests in governmental largess, there is no means of relieving pressure on the formal system through the development of informal settlement processes. To make matters worse, many of the programs in which issues of individual due process arise are so-called mass claims systems—disability, food stamp, AFDC, government employment, and the like—which are characterized by tremendous turnover on the rolls. As a result, time-consuming, formal processes create a particularly grim spectre of skyrocketing costs and bureaucratic overloads.

A second difficulty with the *Goldberg* approach is that it is far less universally applicable than is ordinarily thought. Apart from the cost considerations already discussed, the adversary process is simply inapposite in many cases. Consider, for example, the recent *Horowitz* case.[12] Horowitz, a student at a state medical school, was given an academic dismissal based on evaluation of her clinical performance. The medical school provided no "hearing." Instead it supplemented its annual review of her clinical performance by allowing her to work with seven physicians for a designated period of time. The physicians then submitted independent evaluations of her ability. The Court held that Horowitz received as much due process as was required, despite

12. Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

the absence of a "hearing."[13]

Justice Rehnquist, writing for the majority, argued that there is a distinction between determining whether academic standards have been met and deciding whether rules of conduct have been broken. He suggested that trial-type procedural requirements are not well-suited to the former situations.[14] Although there are bound to be hard cases, I think there is validity in this distinction between cases in which the issue is evaluation of performance and those involving determinations of misconduct—and I would argue that *Goldberg* has little if any relevance in the performance evaluation cases.

Consider a familiar situation: A person seeking a driver's license is told by the examiner, after taking the driving test, "Your parallel parking is terrible and you cut too sharply on left turns. You flunked the test." Does it make sense to review the examiner's decision through the use of trial-type procedures? One may even be skeptical about the utility of a more streamlined notice-and-comment hearing before an independent official. Perhaps in testing and inspection situations like *Horowitz* and the driver's license example, we ought realistically to consider the determination of competence itself as the counterpart of a "hearing." Admittedly, we then place considerable reliance on the good faith of the evaluator. But questions of competence often require subjective evaluations that simply cannot be effectively reviewed on a case-by-case basis by either adversary or inquisitorial means. The most effective safeguards in such cases may be care in the hiring and monitoring of administrative personnel, or resort to multiple evaluations. Again, the trial-type model has very little to recommend it.

A third difficulty with *Goldberg* is that it proposed, and purported to utilize, a decisionmaking approach that is virtually useless. The Court employed a balancing test that is supposed to determine the necessary procedural safeguards by weighing the potential loss to the recipient against the government's interest in a summary process.[15] Yet the Court never seriously examined aggregate data on the character and quantity of claims tendered by AFDC recipients in revocation cases. Without such an analysis, focusing on the actual impact of testimonial credibility and oral advocacy in contested AFDC cases, the Court had absolutely

13. I refer here to a formal hearing. The *Horowitz* Court split on whether an informal give-and-take hearing, along the lines of Goss v. Lopez, 419 U.S. 565 (1975), was required. *See* 435 U.S. at 97-99 (Marshall, J., concurring in part and dissenting in part).

14. 435 U.S. at 86-91.

15. 397 U.S. at 262-63.

no foundation for assessing the comparative benefits and costs of trial-type procedures.

In *Mathews v. Eldridge*,[16] a more recent case involving the procedural safeguards constitutionally required in Social Security disability terminations, the Court essentially restated the *Goldberg* test, making explicit the need to look at the risk of error under the existing procedures.[17] Again, the analysis is hopeless. A real effort to assign costs and benefits to various procedures would require gathering data on the number of disability termination cases and the number of appeals, and assigning quantitative values to the reasons for initial termination and the grounds for reversal. Without that data and analysis, it makes no sense to talk about costs and benefits as if some real effort at measurement has been made.

Because a court has neither the time nor the resources to undertake such an analysis, it resorts to the kind of reasoning found in *Mathews*. The Court held that a notice-and-comment type proceeding would suffice prior to termination of benefits; in other words, that a *Goldberg* trial-type proceeding was unnecessary. While I have no quarrel with the result, I find very little utility in the Court's use of its "balancing process" to distinguish between the safeguards required in AFDC and disability cases. The Court placed great weight, for example, on the fact that disability recipients are "less needy" than AFDC recipients—presumably because they need not be destitute to qualify for benefits. Yet it seems safe to say that disability recipients are not primarily drawn from the middle or upper-middle class. And the agency's backlog of cases at the time of *Mathews* resulted in a period of about eighteen months during which the claimant would be without benefits in a contested termination case; eighteen months in which a deserving claimant would be unable to work and would have to support himself—including the special needs created by his disability—in some way. Perhaps disability recipients are nonetheless less needy than welfare recipients, but one is entitled to be skeptical.

Moreover, the Court is even less convincing when it suggests that the types of issues arising in disability cases are not as deserving of trial-type treatment as those in AFDC cases. Based ad-

16. 424 U.S. 319 (1976).
17. *Id.* at 335.

mittedly on casual analysis, I have the impression that many disability cases involve questions of malingering. If I am correct, it seems arguable that these cases raise precisely the kinds of questions that seem most apt for adversary treatment—questions of testimonial credibility. Similarly, the disputes among doctors in these cases are not easily resolved on a written record.

At a minimum, the balancing test would seem to require some analysis of these issues. The *Mathews-Goldberg* approach is futile because such analysis is never undertaken. If it were, it seems unlikely that the Court would know what to make of it, in any event. How does one translate into a common currency the costs of foregoing testimonial evidence and the exigencies of financial need? The point is that the use of the balancing approach is largely futile, and has consequently undermined the authority of the *Goldberg* case for the proposition that adversary proceedings were warranted there.

III. Protecting Fundamental Values Through Modest Procedural Safeguards

If we depart from the adversary model, can we still adequately safeguard the values that are fundamental to procedural due process?[18] In a sense, this question may be inextricably bound to the threshold issue of identifying and assigning weights to various entitlements.[19] For one could argue that some entitlements are sufficiently important to require maximal safeguards—trial-type procedures—whatever the cost. Depriving a person of his continuing right to practice a profession, for example, could be regarded as state action of sufficient gravity to call into play every possible safeguard necessary to insure a rational decision, accountability, and an adequate explanation. Again, however, I prefer to put aside the possibility that maximal safeguards may occasionally be needed, in order to emphasize a point of at least equal importance: The fundamental values underlying procedural due process can be promoted to a very considerable degree by less stringent safeguards than those required by the adversary model.

I will demonstrate the point by brief reference to two other models. Consider, initially, a notice-and-comment type proceeding, featuring an independent hearing examiner who provides the claimant with a documented statement of reasons and an opportunity to respond through written or oral arguments—after which the examiner is required to provide a written explanation for his

18. *See* text accompanying notes 3-6 *supra*.

19. As I suggested earlier, a full treatment of this issue is beyond the scope of my present concerns. *See* note 7 and accompanying text *supra*.

decision. The first point to be noted is that two of the fundamental values are safeguarded virtually as much by the notice-and-comment model as by an adversary model. Assuming adequate publication, the interplay among the notice of reasons, the claimant's response, and the examiner's subsequent justification provides the kind of record that allows for a dispassionate assessment of whether the agency is doing its job properly; in other words, it promotes accountability. The model also provides the opportunity to the claimant for participation and dialogue, and imposes the obligation on the examiner to justify—characteristics which are central to the notion of an adequate explanation.

Even with respect to the interest in a rational decision, the interplay between an impartial examiner required to make full disclosure of adverse facts—as well as to justify his subsequent determination—and a claimant bent on making the best case for maintaining his beneficial status, is likely to result in a substantial verification of factual accuracy and a good assurance of a reasonable basis for the outcome. In a teacher or student conduct inquiry, for example, if the examiner is dispassionate, surely the requirements of listening to the grievant and of writing an opinion responsive to the issues afford some safeguards against factual inaccuracy and conclusory analysis—even if not as extensive as the safeguards of confrontation, cross-examination, and other trial-type procedures.

As I discussed earlier in another context,[20] even the more limited procedural safeguard of a reasons requirement provides, in and of itself, a not insubstantial assurance that an examiner will sift through conflicting factual statements and consider whether there is a reasonable basis for his conclusions. Again, such a requirement, though modest, also provides a real measure of accountability and tangible evidence of individualized consideration—assuming it is stringently enforced.

The recent case law seems to indicate rather clearly that the courts regard adversary procedures as an excessively costly means of safeguarding claims to governmental largess. But until the discussion of costs and benefits is linked to a more articulate sense of the objectives that any set of procedural safeguards are meant to accomplish, it is difficult to evaluate the real significance of this doctrinal shift. To that end, I have attempted to sketch out

20. *See* p. 304 *supra*.

briefly some of the fundamental values underlying procedural due process and to suggest that it may be possible to promote those values in a meaningful way without recourse to the most extensive safeguards available.