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finds its way into the public sector for its best interests, it may be reasonably presumed the Court would examine closely any statute taxing the churches.

Charlotte Rolston

Due Process of Law—Welfare Recipient's Right to Pre-termination Hearing

A New York City Department of Social Services procedure allowed welfare officials to discontinue assistance to welfare recipients without a hearing prior to the termination of benefits.\(^1\) If a caseworker questioned a recipient's continued eligibility, he discussed the matter with the recipient. The caseworker could then recommend termination to a unit supervisor, who, if he concurred, forwarded a letter to the recipient stating the justification for the proposed termination. The recipient was then permitted to request review by a higher official and to support this request with a written statement. If the reviewing official affirmed the action assistance stopped immediately, and the recipient was informed by letter of the reasons for the action. Twenty New York City welfare recipients challenged the constitutionality of these procedures on the grounds they violated due process in that the procedures lacked any provision for personal appearance or oral presentation of evidence before the reviewing official and denied the recipient the right to confront and cross-examine adverse witnesses. A three-judge federal district court held that only a pre-termination evidentiary hearing would satisfy the requirements of due process.\(^2\)

On appeal,\(^3\) the United States Supreme Court in Goldberg v. Kelly\(^4\) and its companion case Wheeler v. Montgomery\(^5\) held, in a 5-3 decision,\(^6\) that due process of law requires an adequate hearing

\(^1\) New York City Department of Social Services Procedure No. 68-18, implementing N. Y. Social Welfare Law § 351.26(b) (McKinney 1966).


\(^5\) 397 U.S. 280 (1970). In Wheeler a three-judge federal district court in California held that the opportunity for an informal conference with a caseworker before termination of benefits, coupled with a trial-type hearing subsequent to termination, satisfied due process.

prior to termination of welfare benefits. Without this hearing an eligible recipient might be deprived of the means to survive while seeking legitimate redress from the welfare bureaucracy.

The Goldberg v. Kelly decision has three areas of tremendous significance: First, it tolls the death knell for right-privilege analysis as a valid test for determining whether governmental benefits can be terminated without a prior administrative hearing and adopts a more sophisticated balancing of interests test to determine the necessity for this prior hearing; second, it applies this balancing test to cases of welfare termination or reduction to conclude that due process of law requires a prior hearing consonant with certain procedural due process requirements; third, it could have far-reaching impact in analogous areas of administrative action as precedent for the requirement of a prior hearing in the termination of governmental benefits.

I. The Old and New Tests of Administrative Due Process

A. The Old Right-Privilege Analysis

The venerable right-privilege analysis was the test used by the courts in determining whether governmental benefits could be terminated without a prior administrative hearing. If the court found a right to be involved then due process required an administrative hearing prior to termination. On the other hand if the court found a mere privilege to be involved then due process did not require an administrative hearing prior to termination. Mr. Justice Holmes, speaking for the Massachusetts Supreme Court in 1892, tersely expressed the prevalent attitude of the courts in dismissing a policeman's petition to force the city of New Bedford to reinstate him following his dismissal for violation of a rule prohibiting members of the force from becoming members of a political committee: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." In this environment "[t]he law of social welfare grew up on the theory that welfare is a 'gratuity' [synonymous with 'privilege' in right-privilege analysis] furnished by the state, and thus may be


made subject to whatever conditions the state sees fit to impose.”

This rationale expanded to encompass a wide area of governmental activity and to serve as justification for the summary termination of a whole spectrum of government-dispensed “privileges”.

In Goldberg v. Kelly the Court finally placed aside the right-privilege dichotomy, saying “the constitutional challenge cannot be answered by an argument that public assistance benefits are a ‘privilege’ and not a ‘right’.” If a person is qualified for welfare benefits, “[s]uch benefits are a matter of statutory entitlement” and “relevant constitutional restraints apply . . . to the withdrawal of public assistance benefits . . .” Several prior cases have discarded the right-privilege doctrine in determining the relevant constitutional restraints in other areas of government activity by rejecting the distinction in cases dealing with tax exemptions, public employment, a license to practice law, social security benefits, unemployment compensation, and public housing. Right-privilege thus meets its ultimate rejection in the instant case and in Shapiro v. Thompson, both dealing with public assistance. The majority

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10 397 U.S. at 262. The Court here was directly quoting the often cited footnote six of Shapiro v. Thompson, 394 U.S. 618, 627 (1969). Shapiro v. Thompson declared the residency requirements for qualification for public assistance unconstitutional.
11 397 U.S. at 262.
18 See note 10 supra. See also Sherbert v. Verner, 374 U.S. 398 (1963). The Court in Sherbert v. Verner decided that the disqualification of appellant for unemployment compensation benefits, solely because of her refusal to
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opinion further intimates that, even if right-privilege analysis did apply, welfare assistance would be more akin to property [a right] than a gratuity [a privilege].

19 This line of reasoning has been espoused by Yale law professor Charles Reich, a leading proponent of the theory that governmental largess should be treated as a kind of "new property". Professor Reich believes that much of today's wealth results from government-dispensed largess (subsidies, licenses, pensions, contracts, employment, public assistance, etc.), and to the recipients of these benefits, they are not luxuries or privileges, but are essentials to aid in the security and independence of the individual receiving them. Moreover, to Reich these entitlements should "be governed by a system of regulation plus civil or criminal sanctions, rather than a system based upon denial, suspension and revocation."20

Although not going so far as to hold government-dispensed largess a "new property", lower federal courts, in certain kinds of cases, had also rejected the right-privilege distinction as the determinant of whether relevant constitutional restraints apply to the termination of reduction of governmental benefits.21

Although the Federal courts seem to have rejected right-privilege analysis, the West Virginia Supreme Court continues to use it to differentiate between those state dispensed benefits which will or will not be protected by a hearing prior to termination. In Densmore v. County Court of Mercer County,22 a 1928 case in-

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20 Reich, The New Property, 73 Yale L.J. 733, 785 (1964). Mr. Justice Black, in his dissent, was critical of this property right argument. "It somewhat strains credulity to say that a government's promise of charity to an individual is property belonging to that individual when the Government denies that the individual is honestly entitled to receive such a payment." Goldberg v. Kelly, 397 U.S. 254, 275 (1970).
21 E.g., Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (qualified applicant for liquor license entitled to notice and a hearing to determine reason for refusal); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied 368 U.S. 930 (1961) (due process requires a notice and some opportunity for hearing before a student at a tax-supported college can be expelled for misconduct); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), aff'd, per curiam 399 F.2d 638 (4th Cir. 1968) cert. denied, 394 U.S. 905 (1969) (students entitled to hearing prior to dismissal from college for violently protesting college policies); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961) (student entitled to notice and an opportunity to be heard before dismissal for misconduct).
22 Densmore v. County Court of Mercer County, 106 W. Va. 317, 145 S.E. 641 (1928).
volving an appeal from the summary termination of a mother's pension (the forerunner of the present AFDC program), the Court noted that "[i]t is an established rule that a pension, such as the one here, is a mere gratuity [privilege] in which the pensioner has no vested legal right, and which is terminable without notice, at the will of the state." 23

Two other West Virginia cases neatly illustrate how the court has employed the right-privilege doctrine to determine whether due process of law requires a hearing prior to termination. When a "right" is the subject of adjudication, due process requires a hearing; when a privilege is involved, due process does not require a hearing. *Nutter v. State Road Commission* 24 held that a license to drive cars was a "privilege" and could be revoked "without notice or an opportunity to be heard," while *State ex rel. Ellis v. Kelly* 25 held that a license to sell cars was a "right" entitled to the protections of a hearing "consistent with due process."

As recently as 1969, the West Virginia Court availed itself of right-privilege analysis to dismiss an appeal from members of a teachers' retirement system in *Taylor v. Cabell County Board of Education.* 26 The Court upheld a decision by the defendant Board of Education to change a formula by which the plaintiffs had previously been paid retirement benefits from a noncontributory supplemental pension plan. Under the new formula the payment of benefits from the fund would be completely discontinued or greatly reduced in amount. In classic right-privilege fashion the Court upheld the new formula, stating: "[A]ccording to the clear weight of authority, a pensioner in a noncontributory pension or retirement plan or system, as here, has a vested right only to payments which have accrued and which can not be changed or diminished but does not have a vested right to future payments which may be changed or diminished in amount at any time." 27 *Taylor* cited *Densmore* and other precedent holding that a pension is a bounty [read "privilege"] granted by the state and terminable as it sees fit. However, the decision would probably have been the same had the court rejected the simplistic right-privilege analysis in favor of a more sophisticated balancing of interests test.

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23 *Id.* at 319, 145 S.E. at 641.
24 119 W. Va. 312, 193 S.E. 549 (1937).
27 *Id.* at 773, 166 S.E.2d at 157 (emphasis added).
B. The New Test of Administrative Due Process—Balancing of Interests

The Court in Goldberg v. Kelly abandoned the traditional confines of right-privilege analysis in which the denomination of "right" or "privilege" controlled the protections afforded the individual from summary termination of government-dispensed benefits. A more realistic balancing test requiring an examination of the relative interests of the parties involved was adopted. The eligible recipient's interests in continued welfare were identified by the court and weighed against the state's interest in summary adjudication.

Welfare assistance provides the very means of survival; it means food, clothing, shelter, medicine, and a change for participation in community life. "At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." When the state terminates the aid of an eligible recipient, "[H]is 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."

The state interest advanced to counterbalance those of the recipient is that summary termination procedures aid in "conserving fiscal and administrative resources." Less time, money and manpower are required to administer a system based on the automatic termination of benefits upon discovery of a reason to believe that a recipient is no longer eligible for aid than it does to accord that individual a pre-termination hearing. The Court agreed that the balance swings toward summary adjudication in a very narrow line of cases where the circumstances disclose a compelling state interest. This involves cases where "[d]rastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings." Usually in these cases the state interest involved is the protection of the health and welfare of the citizenry. Thus the courts have approved the summary seizure of a mislabeled vitamin product, adoption of wartime price

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28 Under most state welfare assistance programs eligible recipients are also entitled to free medical service and medicine.
29 397 U.S. at 265.
30 Id. at 264.
31 Id. at 265.
controls, seizure and destruction of food not fit for human use, and the revocation of a doctor's surgical privileges for the safety of a patient.

In this balancing process between the interest of the welfare recipient and the interest of the state, there is no such compelling state interest present to outweigh the eligible recipient's interest in the uninterrupted receipt of welfare. The recipient's survival pending outcome of his appeal outweighs the state's need to conserve and guard the fisc.

II. The New Test Applied

Applying the newly adopted balancing test, the Court concluded that the recipient was entitled to a hearing prior to termination of welfare benefits. The Court relied upon analogous precedent as well as a definitive survey of the respective interests of the parties.

The Court first noted that in the case of Londoner v. City & County of Denver an abutting landowner had a right to be heard prior to the assessment of a street improvement tax becoming irrevocably fixed. Likewise Opp Cotton Mills, Inc. v. Administrator upheld a minimum wage order on the grounds that the demands of due process were met by an administrative hearing held before the final order became effective. The eligible recipient's destitute situation distinguishes him from the landowner in Londoner and the corporation in Opp Cotton Mills, Inc. When welfare is discontinued, only a hearing prior to termination provides the recipient with procedural due process, the crucial factor being that termination 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.

In addition to stating that the hearing must be prior to termination, the Court particularized the essential elements of procedural

37 Goldberg v. Kelly, 397 U.S. 254, 265 (1970). Mr. Justice Black, in dissent, argued that the balancing test proposed by the majority is unrealistic and could lead to further governmental expense ("full judicial review") since in any weighing process between the government's pocketbook and the recipient's survival the balance must always tip in favor of the individual. 397 U.S. at 278.
39 312 U.S. 126 (1941).
due process. These were: (a) timely and adequate notice detailing the reasons for the proposed termination; (b) an effective opportunity to defend by confronting any adverse witnesses with oral arguments and evidence; (c) disclosure of the evidence used to prove the state's case; (d) the right to be heard by counsel retained by the recipient; (e) a decision resting solely on the legal rules and evidence brought forth at the hearing; and (f) an impartial decision maker. The Court expressly stated that the hearing need not take the form of a judicial or quasi-judicial trial and that minimal procedural safeguards would suffice. Not required were: (a) a complete record or a comprehensive opinion; (b) a particular order of proof or mode of offering evidence; (c) absence of prior involvement in some aspects of the case by the decision maker; and (d) counsel provided for the recipient by the welfare agencies.

Pursuant to the guidelines established by Goldberg v. Kelly, the West Virginia Department of Welfare has promulgated the new West Virginia Hearings and Appeals Procedures. The new procedures appear to be in accord with the procedural due process particulars required in the pre-termination hearing. However, in a few of these regulations revision would make the protection afforded the claimant more in accord with the spirit of the Goldberg v. Kelly decision.

The new West Virginia procedures provide for written notification to the recipient of the reasons for the proposed termination of his assistance and his right to a pre-termination hearing, but they leave the necessity for an oral explanation of these reasons to the discretion of the caseworker. Although this manner of notification is adequate, the Court in Goldberg v. Kelly implies that a letter and a personal conference ("the most effective method of communicating with recipients") would be preferable to the single letter, especially in view of the higher rate of illiteracy among the poor. Much of

41 Id. at 267-271.
42 Id. at 266-267.
43 Hearings and Appeals Procedures, West Virginia Department of Welfare (July 1, 1970). These procedures were issued by Commissioner Edwin F. Flowers to all administrative, supervisory, service and eligibility staff members of the West Virginia Department of Welfare in a letter dated June 29, 1970.
44 Id. at § 700.4. "It is the responsibility of the Worker to provide this information to the client in writing and if necessary for better understanding, in an oral manner. . . ."
45 397 U.S. at 268.
the welfare recipient’s confusion, doubt, reticence and fear of the
hearing procedure could be eliminated by a personal interview.

Under the new regulations a claimant may review his medical
records with the examining physician; however, this section ends
with the caveat that “[M]edical information shall not be shared with
the claimant without the physician’s approval”.\(^{46}\) In cases where
the medical information goes to the very determination of eligibility,\(^{47}\)
the refusal by (or the unavailability of) the physician to share the
information with the claimant would seem to conflict directly with
the Court’s mandate that the recipient be provided with disclosure
of “the evidence used to prove the Government’s case.”\(^{48}\)

One last feature provided by the new regulations, the right to
counsel, although completely in accord with Goldberg v. Kelly,
merits further examination. While the Supreme Court has upheld
the indigent’s right to appointed counsel in cases possibly resulting
in criminal sanctions involving incarceration, as in Gideon v. Wain-
wright,\(^ {49}\) Douglas v. California,\(^ {50}\) Mempa v. Rhay,\(^ {51}\) and In re
Gault,\(^ {52}\) it has been reluctant to extend this right to civil cases or
administrative proceedings. The Court feels that the requirements
of due process in civil cases and administrative proceedings are
satisfied by according the individual a right to counsel at his own
expense. Neither Goldberg v. Kelly nor the West Virginia hearings
regulations expands this right to appointed counsel to the pre-termi-
nation hearing, although both provide for a right to counsel.\(^ {53}\) The
Court in Goldberg v. Kelly recognized the importance of the right
to counsel and of counsel’s role to “[h]elp delineate the issues,
present the factual contentions in an orderly manner, conduct cross-
examination and generally safeguard the interest of the recipient.”\(^ {54}\)

\(^{46}\) Hearings and Appeals Procedures, West Virginia Department of

\(^{47}\) Certain welfare programs such as Aid to the Blind and Aid to the
Disabled require the applicant to prove by a physical examination that he is
qualified for the program.

\(^{48}\) 397 U.S. at 270.

\(^{49}\) 372 U.S. 335 (1963) (right to appointed counsel for felony cases).

\(^{50}\) 372 U.S. 335 (1963) (right to appointed counsel for appellate review).

\(^{51}\) 389 U.S. 128 (1967) (right to appointed counsel at revocation of
probation proceeding).

\(^{52}\) 387 U.S. 1 (1967) (right to appointed counsel at juvenile proceedings
which may result in commitment).

\(^{53}\) 397 U.S. at 267. Hearings and Appeals Procedures, West Virginia De-
partment of Welfare § 720.3(d)(1970). The claimant “[h]as the right to be
represented by counsel, legal or otherwise at his own expense. . . .”

\(^{54}\) 397 U.S. at 270-71.
Yet it seems to have disregarded its own observation in *Gideon v. Wainwright* that the right to counsel is a meaningless one for indigents since these people are too poor to hire their own advocates. Welfare recipients are receiving governmental assistance because they are destitute. Welfare provides the means to survive, not the means to retain counsel. An HEW regulation to be effective July 1, 1970, would have provided this free legal aid for the welfare hearing through legal service projects under OEO, Legal Aid, or other organizations making legal services available.\(^{55}\) Shortly after the *Goldberg v. Kelly* decision, however, this regulation was repealed.\(^{56}\) As Justice Douglas stated, dissenting in *Hackin v. Arizona*,\(^{57}\) "If true equal protection of the law is to be realized, an indigent must be able to obtain assistance when he suffers a denial of his rights. Today, this goal is only a goal."

The alternatives to a right to appointed counsel provide little hope for the indigent recipient in his welfare hearing. The claimant can be his own advocate and attempt to decipher the myriad departmental regulations, instructions and notices that often baffle even the well-trained expert. "[T]he prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have."\(^{56}\) The claimant may also rely on the state welfare agency to protect his interests (the same interests that the Supreme Court has seen fit to protect from the arbitrary and capricious action of the same welfare agency), or he may rely on the knowledge of self-ordained lay "experts." The lay "expert" often has at most a marginal grasp of the subject matter of the proceeding, and has little, if any, experience or training in adversary proceedings.

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\(^{55}\) 45 C.F.R. § 205.10, 34 Fed. Reg. 1144 (1969). *See also* Department of Health, Education and Welfare, Social and Rehabilitation Service, State Letter No. 1053 (November 8, 1968). This letter from Mary Switzer, Administrator of Social and Rehabilitation Service, contained principles for establishing legal services programs for public welfare clients by the states on a matching fund basis, with the state retaining the option of participation. Admitting that "[r]ural areas suffer from a particular dearth of free legal service for poor people" and that HEW is committed to the concept of "Equal Justice for All", the letter went on to urge the state agencies "to move ahead as quickly as possible to establish legal services programs. . . ."


\(^{57}\) 389 U.S. 143, 145 (1967).

III. Conclusion

Goldberg v. Kelly dealt the fatal blow to right-privilege analysis as a valid test for determining whether or not certain constitutional restraints apply to the termination of governmental largess and utilized a balancing of interests test as a more viable determination of the protections to be afforded an individual against arbitrary governmental action. This case has already been employed as precedent for an action to apply the right to a prior hearing to the termination of unemployment compensation, and it requires little imagination to envision further suits challenging the termination of other government benefits without a prior hearing. As a possible case in point for the application of the Court’s proposed balancing test, the recent incident involving the summary suspension of a state purchasing director might serve as an example. The purchasing director who was under Civil Service, was suspended from his job without a prior hearing because of a grand jury indictment on the charge of bribery, even though the indictment was subsequently dropped. The balance would be weighed on the one side by the individual’s interest in retaining his employment and salary and the state’s interest in not wrongfully suspending an employee, and on the other side by the state’s interest in the summary suspension of an alleged wrongdoer.

The interest of the individual would be loss of earnings and possible damage to reputation with resultant difficulty in obtaining other employment. Although probably not destitute, as is the welfare recipient, the employee would need to live on accumulated resources pending outcome of a later hearing. The interests of the state in not wrongfully suspending an employee are twofold: first, it tends to destroy the value of job security as a part of the total wage package in attracting qualified personnel into government service; second, it runs contrary to society’s abiding belief that a person is innocent until proven guilty. A grand jury indictment is in no way considered dispositive of guilt or innocence.

Against these interests must be weighed the counter-vailing interest of the state in the summary suspension of an alleged wrongdoer—conservation of fiscal resources. The amount of harm that can result to the state fiscal resources would be a factor of the

sensitivity of the position and the seriousness or type of charge alleged. The alleged malingering of a state road worker is not as serious as the alleged misuse of a high government position for personal gain. Another state interest would be the added expense necessary to pay the individual pending outcome of the hearing, although this can be minimized by increasing the efficiency of the hearing procedure, or by possible action to recoup any salary paid between notification of the hearing and the final determination that the suspension was justified. The Court would then have to weigh these conflicting interests to determine whether a hearing prior to suspension of government employment was required.

The Court's decision in Goldberg v. Kelly provided the welfare recipient with protection against the arbitrary and capricious discontinuance of welfare assistance by affording the recipient the constitutional right to a pre-termination evidentiary hearing entailing the right to timely and adequate notice, the right to confront adverse witnesses with oral arguments and evidence, the right to disclosure of the evidence used to prove the government's case, and the right to an impartial decision resting on the legal rules and evidence brought forth at the hearing. "To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure." Goldberg v. Kelly provided a measure of this shelter.

Michael A. Albert

Property—Right of Re-Entry—Descent and Alienability

On January 13, 1821, Noah Zane made a deed granting a certain parcel of land to the City of Wheeling, West Virginia. In the deed the grantor Zane reserved a right of re-entry if the city ceased to use the land as a "market house." In 1964 the City discontinued the use of the property as a "market house", at which time the heirs of Noah Zane exercised the right of re-entry and entered and took possession of the land. A short time later the city instituted a proceeding of eminent domain against the grantor's heirs and again acquired ownership of the property.

1 A power of termination (right of re-entry) is a future interest left in the transferor or his successor in interest on the transfer of