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William H. Simon
Columbia Law School, wsimon@law.columbia.edu

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THE RULE OF LAW AND THE TWO REALMS OF WELFARE ADMINISTRATION

William H. Simon*

INTRODUCTION

Although it was not the first case in which the Supreme Court upheld a welfare claim, *Goldberg v. Kelly*¹ is often thought of as the case that extended the rule of law to the welfare system. In doing so, it repudiated the "right/privilege" distinction that would confine procedural protections of economic interests to private law claims.

But *Goldberg* did not challenge basic assumptions about the nature of procedural fairness that the legal culture had developed principally in connection with private law claims. Its conception of fairness focused on claims initiated by individuals for relief for themselves, and on an adjudicatory process independent of and differentiated from the process of general or line administration. The Court had no occasion in *Goldberg* to adopt the perspective of "public law litigation" or "structural" relief that on occasion led the federal courts to assess and remake the administrative processes of schools, prisons, and mental health facilities,² and it has not applied this perspective to the welfare system since then. *Goldberg* imported to the welfare sphere an untransformed private law vision of procedure.

Goldberg's residual private law perspective has been an important limitation on its effect on the welfare system and its beneficiaries. That effect has not been merely negligible or cosmetic, but it has been erratic and fallen far short of providing generally reliable guarantees of fair treatment to beneficiaries.

I plan to offer a brief defense of *Goldberg's* basic rule-of-law premise against Richard Epstein's critique, and then to sketch my own critique of the limited way the premise has been

* Professor of Law, Stanford University. Several friends made helpful comments on an earlier draft; Frank Michelman was especially generous.

¹ 397 U.S. 254 (1970).

² Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); O. FISS & D. RENDLEMAN, *INJUNCTIONS* 523-827 (2d ed. 1984).

implemented.

I. REMEMBERING THE ANSWERS

William Phillips once responded in frustration to a leftist political disquisition that the argument was so old he had forgotten the answer to it.³ In case some liberals have a similar reaction to Richard Epstein's resurrection of the right/privilege distinction,⁴ let me recall one aspect of the answer that is particularly responsive to his approach.

There are many variations on the rule-of-law principle, but most people would interpret it to denote that the state in its dealings with citizens should act through rules that are publicly enacted and general in form.⁵ One purpose of the requirements of publicity and generality is to inhibit legislation that disregards the public interest; a related purpose is to constrain the acquisition of influence over public power disproportionate to the allocated legislative voting strength of the would-be acquirers.

It follows from this premise that there must be effective means of enforcement of enacted rules. The constraints of publicity and generality would not serve their purposes unless official conduct conformed to enacted rules. Additionally, the Anglo-American legal tradition has insisted that ultimate authority to enforce the rule of law should reside in courts substantially independent of the legislative and executive branches.⁶ Thus, a minimal statement of the rule-of-law principle would require court-supervised publicity and generality plus minimally effective enforcement procedures. *Goldberg* did no more than apply this minimal principle to the welfare system.

Richard Epstein believes statutory welfare rights illegitimate, but he also believes in the rule of law, and he interprets the due process clauses to express some such principle, rather than simply to protect what would today be an anachronistic collection of interests defined by the law in force at the time of their enactment.⁷ It would seem to follow inescapably that the

³ N. PODHORETZ, *MAKING IT* 319 (1967).

⁴ Epstein, *No New Property*, 56 *BROOKLYN L. REV.* 747 (1990).

⁵ A. DICEY, *INTRODUCTION TO THE LAW OF THE CONSTITUTION* 188-96 (1968).

⁶ *See id.*

⁷ Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56

rule-of-law principle applies to the welfare system unless there were some reason to believe that the abuses it safeguards against are not serious there. Since Epstein is usually pessimistic to the point of paranoia about the motivations of legislators and executive officials, I would have thought that he would have had to concede that, given a statutory system of substantive welfare rights, the rule-of-law applies and entails judicially mandated minimum enforcement procedures.⁸

To my surprise, however, Epstein has difficulty imagining reasons why legislators willing to create substantive welfare rights should not be trusted to create adequate procedures to enforce them. Let me suggest a few. They might hope to take the wind out of the sails of a movement for welfare rights by providing them substantively, while tacitly or covertly undercutting or nullifying them with ineffective enforcement. Or they might want to facilitate tacitly an allocation of benefits for which they could not win adequate support if provided explicitly. Or perhaps the legislature has been "captured" by an entrenched public bureaucracy that wants to control the program in its own interests rather than in those of its putative beneficiaries. The history of American welfare legislation contains many examples of such abuses.⁹

Epstein's focus on legislative ill will is somewhat misleading—even though such ill will is surely no harder to find in welfare than in the private rights area. But a more important part of the problem is the influence of the background distribution of wealth in undermining the distribution of political rights. The standard background enforcement procedures provided by the

GEO. WASH. L. REV. 149 (1987).

⁸ Given Epstein's stipulation for the purposes of argument of the substantive legitimacy of welfare benefits, I fail to see the relevance of his emphasis on the fact that the substantive elimination of welfare benefits would not amount to a "taking" requiring "just compensation." The Supreme Court has rejected the notion that the "property" protected by the takings doctrine is co-extensive with the "property" protected by due process, *Flemming v. Nestor*, 363 U.S. 603, 611 (1960), and conflating the two would be entirely alien to the rule-of-law principle.

⁹ *E.g.*, W. BELL, *AID TO DEPENDENT CHILDREN* (1965) (on the use of administrative discretion in the Aid to Families with Dependent Children ("AFDC") program to enforce illegitimate racist and moralistic administrative practices); D. MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS 1862-1872* 296-334 (1967) (on the subversion of the movement for an 8-hour workday by unenforceable and unenforced statutes).

legal system are typically more accessible to the relatively wealthy, well-educated and well-connected. Without procedures tailored to their circumstances, the disadvantaged are less likely to enforce their substantive entitlements. The need of the disadvantaged to secure special procedural accommodations, while the advantaged can rely on private resources for enforcement, means that the disadvantaged must spend greater political resources than the advantaged to achieve a comparable amount of substantive benefit. Enforceability is not something that the beneficiaries of substantive laws should have to struggle for each time a statute is passed; it is a baseline entitlement required by the rule-of-law principle.

The fact that the vindication of the rule-of-law principle in the welfare context requires difficult line-drawing or costs money does not distinguish *Goldberg* from most other situations in which courts are responsible for constitutional rights. I am not happy with where the Court has drawn the line in this area either, but I am bewildered at Epstein's suggestion that line-drawing or cost concerns are more severe here than with regard to procedures to enforce private rights. The standard American procedure for civil adjudication—widely available for private rights of all but the most trivial magnitude—is surely the most expensive such dispute resolution process known to humankind. Justice Rehnquist, who shares Epstein's concern about the expense of welfare procedures, expressed a "nagging sense of unfairness" a few years ago about the Court's application of collateral estoppel to deny a corporate defendant a *second* judicial trial on a fraud defense.¹⁰ *Goldberg's* lines have a nearly Euclidian rigor compared to many drawn in the private rights context.

Epstein also parades a superstition popularized by Justice Black and Judge Friendly—the idea that the cost of due process protection must be financed by reductions in benefits because the resources available to finance the welfare system are fixed.¹¹ This contention strongly resembles the "wage fund" doctrine of nineteenth century political economy, and its scientific basis is

¹⁰ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting).

¹¹ Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1303-04 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 277-79 (1970) (Black, J., dissenting).

comparable.¹² It would be impossible to show that any of the many judicial welfare expansions of the 1960s and 1970s came at the expense of other welfare interests. The size of public assistance expenditures increased enormously during this period in absolute terms, and it more than doubled as a percentage of Gross National Product.¹³ It seems likely that, by focusing attention on abusive practices and adding legitimacy to welfare interests, cases like *Goldberg* contributed to political pressure to increase the allocation of resources to the system.

Epstein, again seconding Justice Black, suggests that the procedures mandated by *Goldberg*, notably the requirement of a hearing prior to termination, are extravagant and unprecedented. He does not like the fact that the state is required to pay out money it denies is owed pending the hearing, even though such payments may prove unrecoverable if the state prevails. But *Goldberg* simply addressed the problem that courts have dealt with for centuries of who is going to bear the risk of loss occasioned by procedural delay, and it proceeded in a way for which there is ample precedent—by balancing hardships.¹⁴ Most people would probably agree that the fact that the payments are a matter of subsistence to many claimants alone warrants the balance struck. It is also worth considering that, since the welfare department has substantial control over the extent of hearing delay, *Goldberg* allocates costs to the cheapest cost avoider, and that Justice Black underestimated the probability that payments ultimately determined to be mistaken could be recovered.¹⁵

¹² See JOHN STUART MILL, *Thornton on Labor and Its Claims*, in V COLLECTED WORKS 633, 643-46 (J.M. Robson ed. 1967).

¹³ U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1990 350, 425 (110th ed.) (figures for GNP and "Public Aid" expenditures for, for example, 1960 and 1975 indicating increase of latter as percentage of former from less than one to more than two percent). See also *id.* at 352 (indicating increase in "social welfare" expenditures—including social insurance as well as public assistance—as a percentage of GNP between 1960 and 1975 from 10.3 to 19 percent).

¹⁴ See IV POMEROY'S EQUITY JURISPRUDENCE 1685 (2d ed. 1919).

¹⁵ If the claimant remains eligible or re-establishes eligibility after the hearing, the welfare department can recoup interim payments by reducing his grant; if the claimant has wages, the department can garnish them. The AFDC program recently has shown great enthusiasm for pursuing such remedies. See 45 C.F.R. § 233.20(a)(13) (1989).

II. THE PERSISTENCE OF PRIVATE LAW PREMISES

Goldberg recognized that the rule-of-law principle requires procedures that are practically accessible to the beneficiaries of the relevant substantive rights. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard,"¹⁶ the Court stated, and it applied this principle when it held that the hearing must precede the termination of benefits and that an opportunity for oral as well as written presentations must be provided.

Yet the Court has not applied this concern for the practical implementation of fairness ideals in the sphere of line administration. Perhaps the most extreme indication of the Court's indifference to procedural fairness in line administration is its 1981 decision in *Schweiker v. Hansen*.¹⁷ *Hansen* represents the tacit dark side of the *Goldberg* vision.

The claimant in *Hansen* had inquired of a field representative at her Social Security office as to whether she was eligible for Social Security "mother's insurance benefits."¹⁸ The representative erroneously told her she was not eligible and, in violation of applicable instructions, failed to advise her of the advantages of filing an application.¹⁹ The claimant left without filing and did so only more than a year later when she learned that she had been misinformed.²⁰ The Social Security Administration denied her benefits for the period between her first visit and the application on the basis of a statutory provision making the filing of an application a condition of eligibility.²¹

The issue was framed by the parties as whether the government was "estopped" to deny benefits on the basis of the earlier failure to apply.²² Putting the matter this way had the unfortunate consequence of invoking one of the Court's more casuistic bodies of case law—the "government estoppel" doctrine. Yet even in this otherworldly terrain the Second Circuit had no trouble concluding that procedural fairness required the award

¹⁶ 397 U.S. at 268-69.

¹⁷ 450 U.S. 785 (1981).

¹⁸ *Id.* at 786.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 787.

²² *Id.*

of benefits.²³ The Supreme Court, however, not only reversed, but in a rare gesture of contempt for the beneficiary's claims, did so summarily. The Court concluded that the field representative's conduct did not warrant estoppel, in part because the instruction he violated did not amount to a "law."²⁴

In discussing whether the field representative's misstatements violated a "law," neither the Court nor the dissent considered whether the substantive statutory provisions creating the "mother's" benefit program should be construed as "instinct with an obligation" on the part of the government to make reasonable efforts to implement the program.²⁵ Most remarkably, no one considered that, even if the statutes and the estoppel doctrine created no duty to assist the claimant, constitutional due process requirements did. No one considered that this case might be governed by *Goldberg*.

How would the Court have distinguished *Goldberg* if the issue had arisen? Perhaps it would have pointed out that *Goldberg* did not specify the provision of information about the law as among the requisites of due process. But it seems undeniable that procedural fairness requires some government effort to make information about the law accessible to citizens,²⁶ and *Goldberg* suggests that in the welfare area such efforts should be "tailored to the circumstances" of their beneficiaries. Without government-provided information, most beneficiaries could not begin to claim their rights. The need for officials to provide information and make other efforts to assist claimants has been recognized without controversy in the sphere of administrative adjudication, where hearing officers are reversed for misleading or failing to assist claimants.²⁷

Thus, one suspects that the critical distinction for the Court between *Goldberg* and *Hansen* would have turned, not on the duty to provide information, but rather on the distinction be-

²³ *Hansen v. Harris*, 619 F.2d 942 (2d Cir. 1980).

²⁴ 450 U.S. at 789-90.

²⁵ Cf. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917) (Cardozo, J.) (interpreting contract to imply promise to make reasonable efforts to effectuate the specified enterprise).

²⁶ See *Societe Internationale pour Participation Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); L. FULLER, *THE MORALITY OF LAW* 49-51, 63-65, 70-79 (rev. ed. 1969).

²⁷ E.g., *Gold v. Secretary of Health, Educ. and Welfare*, 463 F.2d 38, 43 (2d Cir. 1972); *Jagow v. Child*, 95 Idaho 830, 521 P.2d 654 (1974).

tween adjudication and administration. *Goldberg* requires an adequate system of adjudicatory review, but does not directly affect the underlying administrative process.²⁸

Goldberg should be assessed in the light of the qualification exemplified by *Hansen*. The two cases represent well the distinct spheres of adjudicatory and line administration that have emerged in the past twenty years. On the one hand, there is the realm of procedural fairness prescribed by *Goldberg*—a hearing system in which the claimant can participate, actively confront adverse witnesses, and speak directly to a decision maker with the authority and responsibility to determine her claims. Typically the decision maker will have some of the latitude of a common law judge to make decisions based on purposive understandings of the rules and to entertain claims based on implicit or unformulated norms. Many states have recruited lawyer decision makers and even provided them with the status of “administrative law judges” with exceptional civil service safeguards of autonomy.

Then there is the realm of *Hansen*—a line bureaucracy of personnel regulated by minutely specified rules and uniquely and pervasively accountable to hierarchical authority.²⁹ As the hearing system has become more professionalized, the adminis-

²⁸ The *Hansen* opinion supports its application of the estoppel doctrine with a point about the practical effect on the government of recognizing estoppel claims:

If Connelly's minor breach of . . . a manual suffices to estop petitioner, then the Government is put “at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the written application requirement which experience has taught to be essential to the honest and effective administration of the Social Security Laws.”

450 U.S. at 789-90 (quoting *Hansen v. Harris*, 619 F.2d 942, 956 (2d Cir. 1980) (Friendly, J., dissenting)).

The argument is contrary to the spirit of *Goldberg* in the contempt for the claimant implied in its characterization of an official wrong that has deprived a widow of a year's income as “minor” and in its refusal to balance the government interest in requiring timely written applications in these circumstances with the resulting harm to beneficiaries. It also ignores that private insurers, which handle a far larger volume of claims than the social insurance system, have operated for decades under legal regimes that impose the obligations the Court associated with “estoppel,” and in some states, considerably stricter ones. See, e.g., *Sparks v. Republic Nat'l Life Ins. Co.*, 123 Ariz. 529, 647 P.2d 1127, cert. denied, 459 U.S. 1070 (1982); *Safeco Ins. Co. v. Ellinghouse*, 223 Mont. 239, 725 P.2d 217 (1986).

²⁹ See Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1986); Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) [hereinafter *Legality, Bureaucracy*].

trative system has been proletarianized. The old ideal of frontline administration by professional social workers has been discarded, and the small but influential number of social workers in the system at the time of *Goldberg* have been expelled. The frontline administrative job has been redesigned as a clerical one, and educational qualifications have been lowered. The system is now staffed by people who lack both the power and the aspiration to assist claimants.

The two systems are radically segregated. Most states have carried *Goldberg's* prescription of an "independent" decision maker much farther than the case required. The hearing officers belong to separate administrative units with separate supervisory hierarchies that merge with the line administrative hierarchies only at the very top of the system. In some systems, frontline workers do not participate at all in hearings involving their decisions; full-time staff representatives do this work. Even where they do participate, line workers are taught that what happens in the hearing system should not influence their routine administrative work; in particular, they are not to regard a reversal at hearing as precedent to apply in like cases that arise in their routine administrative work. The personnel and quality control systems that evaluate administrative decisions involve distinct personnel and criteria from the *Goldberg* hearing system. What constitutes error for the purposes of recipient-initiated *Goldberg* hearing review may be quite different from what constitutes error for quality control or personnel purposes.

A claimant who enters the hearing system has a good chance of being treated with the respect and thoughtful attention contemplated by *Goldberg*. And he has a good chance of getting tangible relief; reversal rates at hearing in most programs are substantial.³⁰ Thus, it might be argued, as *Goldberg* apparently assumed, that the hearing system serves as an adequate check on the line administrative system. But there are problems with this contention.

First, as *Hansen* illustrates, not all bad administrative deci-

³⁰ For example, in AFDC in fiscal year 1988, more than two-thirds of the claims determined by hearing decision (about one-third of total claims filed) were decided in favor of the claimant; about twenty percent of claims withdrawn before hearing (two-thirds of total filings) were settled on terms involving relief to claimants. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, QUARTERLY PUBLIC ASSISTANCE STATISTICS: FISCAL YEAR 1988 105 (1990).

sions—decisions that would be reversed on appeal—actually are appealed. In order to pursue an appeal, a claimant needs either professional assistance or the information to identify that she has a claim as well as the ability to negotiate the appellate procedures and articulate her claim. *Goldberg* recognized that, in fact, beneficiaries often lack such resources.

Moreover, the administrative changes that have accompanied the emergence of the hearing system severely threaten beneficiary interests. At worst, they encourage denials of benefits to eligible beneficiaries. For example, personnel and quality control systems often impose substantial penalties for improper assistance but lesser or no penalties for improper failures to assist. More generally, the tendency of administrative change has been to reduce the availability of administrative advice and assistance to claimants at the same time as to increase claimants' need for them by making the process of establishing and maintaining eligibility more complex.³¹

We do not know the magnitude of erroneous denials of benefits that do not make it into the hearing system, but it seems likely to be very large. While reversal rates in welfare hearings are generally substantial, appeal rates tend to be small. For example, in AFDC on average only about one to two percent of application denials and benefit terminations are appealed.³² Even in the few programs and localities where appeal rates are high, reversal rates typically remain high. My impression is that high appeal rates correlate most strongly with the availability of advice and assistance outside the system rather than with the incidence of errors harmful to claimants.

Second, some eligible beneficiaries do not even make it into the administrative sphere because they lack the information or resources needed to file an application. The participation rate in AFDC has reached high levels in the years since *Goldberg*, but in other programs, such as Supplemental Security Income, the major cash assistance program for the indigent aged and disabled, it remains low.³³ Participation rates are functions of the

³¹ See *Legality, Bureaucracy*, *supra* note 29; Casey & Mannix, *Quality Control in Public Assistance: Victimizing the Poor Through One-sided Accountability*, 22 CLEARINGHOUSE REV. 1381 (1989).

³² Estimated from data in Department of Health and Human Services, cited at note 30, at 93, 104.

³³ See Menefee, Edwards & Brown, *Analysis of Nonparticipation in the SSI Pro-*

extent to which the system makes "outreach" efforts to provide information and assistance in the application process. Clearly, the hearing system is no remedy for deficiencies in outreach.

Third, if, as many have concluded, *Goldberg* is concerned not only with accurate decision making, but with the dignity of welfare beneficiaries, then the application of due process norms only through the hearing system has a further failing. This approach is unresponsive to the sense of oppression and degradation that the bureaucratized system engenders, as well as to the often gratuitous practical burdens of bureaucratic paper pushing and hoop jumping that the system imposes.

This experience is in part a function of the design of the line worker's job, which focuses her attention on policing the claimant's satisfaction of a gauntlet of often meaningless bureaucratic tasks and leaves her powerless either to respond to contingencies of need that escape the rigid eligibility categories or to mitigate the irrationality of the procedural requirements. In places like New York City, where appeal rates are high, the hearing system seems to have the perverse effect of reducing pressure for general administrative reform and helping workers and administrators rationalize irresponsible behavior. Rather than correcting errors or trying to get their superiors to do so, the workers tell the beneficiaries to take their claims to hearing.³⁴

At its best, the hearing system provides the beneficiary with the individualized, respectful attention contemplated by those who interpret *Goldberg* as an expression of "dignitary" or "process" values. But most beneficiaries never reach the hearing sphere and those who do reach it only rarely and briefly. The setting in which beneficiaries typically confront the welfare state is the line administrative one, and here their experience remains one of arbitrariness and indifference.

Obviously a contrary ruling in *Hansen* would not have been substantially responsive to any of these deficiencies. An estoppel remedy would only benefit people who ultimately secured access to information and resources to bring a claim to hearing. I focus

gram, Soc. SECURITY BULL. (June 1981); Bendick, *Failure to Enroll in Public Assistance Programs*, 25 Soc. WORK 268 (1980).

³⁴ See Barbanel, *Problems in New York's Welfare System: Judging an Agency's Mistakes and Decisions*, N.Y. Times, Aug. 29, 1988, at B1, col. 2.

on *Hansen* as an expression of the Court's general unwillingness to apply due process directly to line administration. Were the Court willing to apply due process more broadly, the most plausible approach would be through structural injunctive relief mandating reforms in the administrative process.³⁶ The federal courts have been backing away from structural relief in the areas in which it was pioneered for reasons that seem to have less to do with the practical success of prior experiments and more with the dogmatic reassertion of private law notions of entitlement.³⁷ But in welfare, structural relief never even got off the ground.

As long as the *Goldberg* doctrine means the enforcement of due process only through the hearing system, it must be regarded as at best a partial victory for procedural fairness in the welfare system.

³⁶ Mashaw, *The Management of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

³⁷ See Chayes, *The Supreme Court, 1981 Term: Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).