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EXPERIMENTS IN AGENCY JUSTICE: INFORMAL ADJUDICATORY PROCEDURES IN ADMINISTRATIVE PROCEDURE ACTS

The 1961 Revised Model State Administrative Procedure Act and most state administrative procedure acts ("APAs") provide for only one type of agency adjudication: a formal, trial-type hearing.¹ The 1981 Model Act and five state APAs have departed from this approach by providing additional, more informal² adjudicatory procedures.³

This Comment examines the developments since 1961 that prompted the drafters of these acts to include informal procedures. The major impetus for the change was the "due process explosion," which extended hearing rights to interests that had been considered too minor for formal hearings.⁴ The Comment then compares the 1981 Model Act and the five state acts that contain informal procedures. The acts vary on three major issues that determine their effectiveness in dealing with the due process explosion. These three issues are: (1) the way that the act determines whether there is a right to a hearing, (2) the choice between formal and informal procedures, and (3) the procedural elements required at each level of proceeding. The Comment concludes that the 1981 Model Act is the most effective of the acts because it strikes the best balance between individual rights and the need for agency efficiency.

I. THE NEED FOR VARIABLE DUE PROCESS

Most state APAs are based at least in part on the 1961 Model Act,

1. MODEL STATE ADMIN. PROC. ACT §§ 9-16 (1961) (revised 1981) (hereinafter cited as 1961 MODEL ACT). See, e.g., IOWA CODE ANN. §§ 17A.12-.18 (West 1978 and Supp. 1982); MINN. STAT. ANN. §§ 15.0418-.0422 (West 1977 and Supp. 1982); N.Y. STATE ADMIN. PROC. ACT, §§ 301-501 (McKinney Supp. 1981); OR. REV. STAT. §§ 183.413-.470 (1981); WASH. REV. CODE §§ 34.04.090-.120 (1981).

2. The word "informal" is used in this Comment to refer to hearings that have less procedural detail than a full formal hearing. Professor Bonfield, reporter for the 1981 Model Act, thinks that "informal" is a troublesome term when describing hearings of less than "full contested case" complexity. He feels that "informal" carries excess conceptual baggage and that a more accurate characterization of alternative schemes of adjudicatory procedures would be "ascending/descending levels of complexity." Telephone interview with Arthur E. Bonfield, Reporter, Uniform Law Commissioners' Model State Administrative Procedure Act (1981), Professor of Law, University of Iowa (April 26, 1982) (notes of the interview on file with the *Washington Law Review*).

3. MODEL STATE ADMIN. PROC. ACT §§ 4-401 to 4-506 (1981) (hereinafter cited as 1981 MODEL ACT); DEL. CODE ANN. tit. 29, § 10123 (Supp. 1980); FLA. STAT. ANN. § 120.57(2) (West Supp. 1982); MONT. CODE ANN. § 2-4-604 (1981); VA. CODE § 9-6.14:11 (Michie 1978); WIS. STAT. ANN. §§ 227.01(2), 227.07-.13 (West Supp. 1982).

4. See *infra* notes 6-20 and accompanying text.

which does not include informal adjudicatory procedures.⁵ The inclusion of uniform informal procedures in the 1981 Model Act and the five state acts is a response to three recent developments: (1) the “due process explosion” that has broadened the range of issues requiring a hearing; (2) the recognition that uniform informal procedures are important to ensure fairness in agency actions; and (3) the weakening of resistance to less-than-formal adjudicatory procedures.

A. *The “Due Process Explosion”*

Under the 1961 Model Act and the majority of state acts, formal hearing requirements are triggered whenever a hearing is “required by law.”⁶ This formal hearing requirement extends to hearings required by the due process clause of the fourteenth amendment.⁷ The “due process explosion” has greatly expanded this class of cases. The “explosion” began in *Goldberg v. Kelly*,⁸ when the United States Supreme Court held that the fourteenth amendment requires that a state provide a hearing before it can terminate welfare benefits. Since *Goldberg*, courts have held that hearings are required before termination of Medicare benefits,⁹ eviction from a public housing project,¹⁰ debarment of a contractor from further government contracts,¹¹ and deprivation of a prisoner’s “good time” credit.¹²

As the Court expanded the reach of the fourteenth amendment,¹³ it rec-

5. The 1961 Model Act adjudicatory provisions apply only to “contested cases,” which are defined as “proceeding[s] . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” 1961 MODEL ACT, *supra* note 1, § 1(2).

The procedure mandated by these provisions is a formal hearing. Parties must receive notice and an opportunity to present evidence and argument. A full record is required, and the findings of fact must be based exclusively on that record. Cross-examination is allowed and civil rules of evidence apply, except that hearsay is admissible. Ex parte consultations between an agency decisionmaker and a party to the case are not allowed. *Id.* §§ 9–13.

6. 1961 MODEL ACT, *supra* note 1, § 1(2). *See, e.g.*, CONN. GEN. STAT. ANN. § 4–166(2) (West Supp. 1982); N.J. STAT. ANN. § 52:14B–2(b) (West Supp. 1982); WASH. REV. CODE § 34.04.010 (1981).

7. Hearings “required by the Constitution” are clearly among the hearings “required by law.” Hearings required by the Constitution trigger the federal APA adjudicatory provisions even though that statute reads only “required by statute.” *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

8. 397 U.S. 254 (1970).

9. *Martinez v. Richardson*, 472 F.2d 1121 (10th Cir. 1973).

10. *Escalera v. N.Y.C. Housing Authority*, 425 F.2d 853 (2d Cir. 1970).

11. *W.G. Cosby Transfer and Storage Corp. v. Froehlke*, 480 F.2d 498 (4th Cir. 1973).

12. *Wolff v. McDonnell*, 418 U.S. 539 (1974). *But see* *Leis v. Flynt*, 439 U.S. 438 (1979) (right of out-of-state lawyer to appear pro haec vice in an Ohio court is not protected by due process).

13. Prior to the 1970’s, the Court used the right/privilege distinction to determine whether a person was entitled to a hearing. Under this analysis, no hearing was required if the interest at stake was deemed a mere privilege. In *Goldberg*, the Court refused to apply the right/privilege distinction

ognized that due process requirements are flexible. In *Goss v. Lopez*,¹⁴ the Court held that, for public high school students facing a ten-day suspension, due process was satisfied by notice of the charges and an opportunity to respond informally.¹⁵ In *Mathews v. Eldridge*,¹⁶ the Court approved a similar informal procedure to determine continuing entitlement to Social Security disability payments.¹⁷ The “variable due process” concept recognized in *Goss* and *Mathews* is a logical corollary of the expansion of hearing rights.¹⁸

The “due process explosion” and the Supreme Court’s recognition of variable due process leave the 1961 Model Act and the similar state acts in a peculiar position. Because the adjudicatory provisions apply whenever due process requires a hearing, the state acts mandate formal, trial-type hearings in inappropriate circumstances.¹⁹ Although the Supreme Court recognizes that the procedural requirements of these hearings are

to welfare benefits. 397 U.S. at 262. The Court later formally rejected the privilege concept in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The *Roth* Court restricted due process protection, however, by requiring a showing that the interest at stake comes within the meaning of “liberty” or “property” as used in the fourteenth amendment. 408 U.S. at 576–77. It has been suggested that this method is in fact a return to the privilege concept. See, e.g., B. SCHWARTZ, ADMINISTRATIVE LAW § 81, at 232 (1976); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11:4, at 207 (2d ed. Supp. 1982) (“the privilege doctrine . . . is not only alive but hale and hearty”). Further discussion of what interests are protected by due process is beyond the scope of this Comment. It is sufficient to note that, although the breadth of due process protection remains uncertain, the due process explosion has extended it beyond previous limits. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10:1 (2d ed. 1979).

14. 419 U.S. 565 (1975).

15. *Id.* at 577–84.

16. 424 U.S. 319 (1976).

17. The *Mathews* Court developed a test to determine when a less rigorous procedure will satisfy due process, once it is decided that the interest at stake is constitutionally protected. The test requires a balancing of three factors: the individual’s interest, the government’s interest, and the risk of erroneous deprivation of the individual’s interest under the procedure in question. *Id.* at 335.

Professor Davis finds these factors “far from satisfactory” because they do not consider the kind of question to be decided, e.g., whether there are factual or only policy issues involved. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13:12 (2d ed. Supp. 1982).

18. “Variable due process” is needed to lighten the agencies’ burden of providing the increased number of required hearings. The Supreme Court has considered a formal hearing unnecessary for a wide range of interests. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (termination of disability payments); *Goss v. Lopez*, 419 U.S. 565 (1975) (ten-day suspension from high school); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (prison discipline); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation).

19. *Goss* provides a good example of this tendency. Under most state APAs, a student facing a ten-day suspension from high school is entitled to a formal hearing. Agencies previously were free to handle such minor cases informally because the provisions of the APA did not apply. Because the “due process explosion” makes APA provisions applicable to lesser interests, the agencies can no longer use informal disposition. Although the parties may waive the formal hearing, see, e.g., 1961 MODEL ACT, *supra* note 1, § 9(d), the agency cannot unilaterally choose to dispose of the case informally.

flexible, the state acts lack the informal procedures necessary to implement variable due process and accommodate the additional cases.²⁰

B. *Extending Uniformity*

A recent issue in American administrative law has been the extension of procedural uniformity to informal agency action that is now beyond the reach of APAs.²¹ Professor Davis has been the strongest advocate of this effort.²² He argues that, because over ninety percent of agency action is informal,²³ standardizing informal agency procedures will significantly

20. Professor Bonfield has suggested a strategy to enable an APA with only one adjudicatory procedure to accommodate variable due process. Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 IOWA L. REV. 285, 360-63 (1977). He proposed using piecemeal legislation to exempt specific proceedings from the formal hearing provisions. Thus, interests that are now protected by the fourteenth amendment but are too minor for formal hearings could be individually exempted.

Bonfield considered this approach advantageous because requiring the legislature to perform an affirmative act provides an opportunity for careful scrutiny of each potential relaxation of procedure. The protections afforded by a formal hearing would continue until the legislature granted an exemption. This is a perceived advantage, however, only if one accepts the premise that too much protection can never hinder the rights of the individual. Professor Davis has questioned that premise; in his opinion, informal procedures are more effective in certain situations. For example, Davis considers an informal procedure preferable for welfare hearings because in more than 98% of the welfare cases the recipient is unrepresented and therefore cannot take advantage of formal procedures such as cross-examination. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13:8 at 497 (2d ed. 1979).

Bonfield's proposal would place the burden upon the agencies to convince the legislature of the need for a particular exemption. This burden should deter agencies from seeking to exempt cases that call for a formal hearing because of the difficulty in persuading the legislature that the exemption is warranted. Thus, agency tendencies to increase efficiency at the cost of individual protection are checked.

The disadvantages of this approach are that it requires individual legislation for minor situations and forces agencies to provide unnecessary and potentially undesirable formal hearings until the legislature acts. Moreover, once these proceedings are statutorily exempted there is no uniform procedural guarantee. This increases agency discretion and the danger of arbitrary action. See *infra* notes 21-25 and accompanying text.

Professor Bonfield himself ultimately concluded that the piecemeal approach was an inadequate method for one-hearing APAs to cope with variable due process. In the last pages of his article, he suggested that several different levels of procedure would be more workable and sensible. Bonfield, *supra*, at 364-65. His position on this issue is confirmed because he was one of the two Reporters of the 1981 Model Act, which includes three adjudicatory procedures.

21. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:5 (2d ed. 1978).

22. See K. DAVIS, DISCRETIONARY JUSTICE (1971). Professor Davis' recommendations extend beyond procedures for informal agency adjudication: "Not many questions for discretionary justice ever reach the stage of adjudication, whether formal or informal. Discretionary justice includes initiating, investigating, prosecuting, negotiating, settling, contracting, dealing, advising, threatening, publicizing, concealing, planning, recommending, supervising." *Id.* at 22.

23. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8:1 at 158 (2d ed. 1979). See also Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741 (1976) ("the phrase 'informal adjudication' describes about 90 percent of what the government does with respect to the individual").

improve the quality of American justice.²⁴ Without a prescribed procedure, agencies have unchecked discretion over informal action. For example, an agency may act arbitrarily if it does not need to disclose the grounds for its decision.²⁵ Uniform procedures that impose a duty on agencies to listen and respond ensure at least a minimum of fairness for informal actions.

C. *Subsiding Resistance to Informal Procedures*

The American legal community has traditionally equated fairness with a full trial-type hearing complete with cross-examination, a written record, and other formal requirements.²⁶ This position is unsound as a practical matter. Some controversies are too minor to warrant the expense of a formal hearing. Because a party to a minor controversy is unlikely to hire an attorney, many of the procedural elements of a formal hearing will go unused.²⁷ Further, when the only option is a trial-type hearing, minor controversies may be excluded from the formal hearing requirements and may lose all procedural protection.²⁸

In recent years, however, the bias for trial-type hearings has decreased. This trend is illustrated by the 1981 Model Act and by the state acts that include informal adjudicatory procedures.²⁹ Effective use of these informal procedures will lessen the bias further. As informal procedures are structured and standardized, attorneys may be more willing to trust their clients' interests to less formal procedures. The shift is apparent in other areas of the law as well. Alternative methods of dispute resolution such as private binding arbitration are becoming more prevalent as formal litigation becomes more expensive and time consuming.³⁰

24. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8:1 at 158 (2d ed. 1979): "The strongest need and the greatest promise for improving the quality of justice to individual parties in the entire legal and governmental system are in the areas where decisions necessarily depend more upon discretion than upon rules and principles and where formal hearings and judicial review are mostly irrelevant."

25. K. DAVIS, DISCRETIONARY JUSTICE 111-16 (1971).

26. The all-or-nothing bias has been noted by respected commentators. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13:2 at 477 (2d ed. 1979); K. DAVIS, DISCRETIONARY JUSTICE 118 (1971) ("[t]he tendency of courts, aided and abetted by practitioners, has been to refuse to recognize any middle position between requiring a trial-type hearing and not requiring it"); Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1316 (1975).

27. See, e.g., 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13:8 at 497 (2d ed. 1979) (in 98% of the welfare termination cases, the recipient is unrepresented by counsel).

28. See *supra* note 20.

29. See *supra* note 3.

30. See, e.g., WASH. REV. CODE ch. 7.06 (1981) (authorizing mandatory arbitration for cases in which the sole relief sought is a money judgment and no claim exceeds \$10,000); Burger, *Isn't There a Better Way*, 68 A.B.A. J. 274 (1982); Stanley, *Minor Dispute Resolution*, 68 A.B.A. J. 62 (1982).

II. CONTRAST OF EXISTING MODELS OF VARIABLE DUE PROCESS

Although the utility of informal procedures is now generally recognized, putting the idea into practice is still in the experimental stage. Only the 1981 Model Act and the APAs of Florida, Wisconsin, Virginia, Delaware, and Montana provide an alternative to the formal hearing procedure.³¹ These six acts incorporate variable due process with varying degrees of effectiveness.

The decision to include informal procedures raises several crucial issues. Most crucial is the determination of the right to "some kind of hearing."³² The availability of informal procedures allows for more generous hearing rights because hearings will be less burdensome on agencies. Some of the acts, however, restrict hearing rights to limit the use of the formal hearing.³³ This undermines the effectiveness of informal procedures by excluding appropriate cases.

The next important issue is the method of choosing the cases that are to be handled by the informal procedure. The choice must strike a balance between protecting individual rights and promoting agency efficiency. Informal procedures cannot be used when due process requires full procedural protection. If the availability of informal procedures is too severely restricted, however, agencies will be required to hold formal hearings in inappropriate situations.³⁴

The final issue involves defining the procedural elements of the informal hearing. The possibilities range from a limited formal hearing to a very informal proceeding with only the minimum requirements of notice and opportunity to respond. Alternatively, an act could include both types of informal procedure. A scheme with more than one informal procedure

31. The federal APA remains unchanged although amendments to include informal procedures have been proposed. See, e.g., S. 2147, 96th Cong., 1st Sess., 125 CONG. REC. S 19039 (1979); S. 1663, 88th Cong., 2d Sess. (1964), reproduced in *Administrative Procedure Act, 1964: Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 1 (1964), reprinted in 24 AD. L. REV. 497 (1972); S. 1070, 86th Cong., 1st Sess. § 1004 (1959), reprinted in 24 AD. L. REV. 412 (1972). See also AMERICAN BAR ASSOCIATION COMM. ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 95 (1979) (recommending the addition of a "modified" procedure to the federal APA); Gardner, *The Procedures By Which Informal Action Is Taken*, 24 AD. L. REV. 155 (1972) (proposing an "Informal Procedure Act"); Hahn, *Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation*, 31 AD. L. REV. 31, 47-49 (1979) (sample legislation for administrative regulation that provides for less formal adjudication); *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 AD. L. REV. 389, 409 (1972) (recommending a new section for the federal APA that would provide some procedural basics for informal adjudications and require agencies to establish by rule the full procedural detail to be followed in those cases).

32. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

33. See *infra* notes 39-41 and accompanying text.

34. See *infra* part II B5.

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seems preferable because it can better accommodate the variety in agency actions. The inclusion of additional informal procedures, however, is limited by practical considerations. Several levels of procedure introduce complications in choosing between levels and determining the procedural elements of each.³⁵

These three issues interrelate to a large extent. The approach taken on one issue can determine the approach taken on another. For example, if the method of choosing between procedures is inefficient, inclusion of more than one informal procedure would unduly complicate the scheme by increasing the necessary choices.³⁶ Analysis of each issue therefore requires a consideration of how it fits into an entire adjudicatory scheme.

A. Right to “Some Kind of Hearing”

The threshold requirements for a right to a hearing determine whether a party gets any hearing at all. The 1961 Model Act and the older state acts determine hearing rights by external law.³⁷ In contrast, the 1981 Model Act and recent state APAs determine hearing rights in the APA.³⁸ This change is made possible by the additional adjudicatory procedures: because hearings for minor cases will be less burdensome on agencies, hearing rights can be more generously provided. This change also facilitates the use of informal hearings by making hearing rights more broadly available and easier to establish.

1. External Law as the Source of Hearing Rights

The drafters of the early APAs believed that the formal adjudicatory procedure was too inflexible to accommodate the diversity of agency actions.³⁹ Therefore, to control the use of formal hearings, they made hearing rights dependent upon law external to the APA. Making external law the source of hearing rights gave the primary decision on hearing rights to the legislature and restricted the role of the courts.

The Montana Act retains this older approach. The hearing provisions are triggered whenever a hearing is “required by law.”⁴⁰ Informal pro-

35. See *infra* notes 117 & 122 and accompanying text.

36. See *infra* note 117 and accompanying text.

37. Under the 1961 Model Act, an agency must apply the act’s adjudicatory provisions whenever a hearing is “required by law.” 1961 MODEL ACT, *supra* note 1, §§ 1(2), 9–13.

38. See *infra* notes 42–44 and accompanying text.

39. See Bonfield, *supra* note 20, at 302–04 (summary of the “great controversy” over administrative procedure acts in the 1940’s).

40. MONT. CODE ANN. § 2–4–102(4) (1981): “‘Contested case’ means any proceeding before

cedures are only available when the parties waive a formal procedure.⁴¹ Because the Act itself does not restrict formal hearings to cases that warrant a full trial-type hearing, the legislature must limit the use of the formal hearing.

2. *Hearing Rights Created by the APA*

An alternate approach is to determine hearing rights by terms in the APA itself. This makes hearing rights dependent on statutory language rather than external law. The 1981 Model Act requires a hearing whenever a party's "legal rights, duties, privileges, immunities, or other legal interests" are affected by agency action.⁴² The Florida Act requires a hearing whenever a person's "substantial interests" are affected.⁴³ The Virginia and Delaware acts are more specific. Both require a hearing whenever an agency will determine whether a party is in violation of law or eligible for a right or a benefit such as a license.⁴⁴

3. *The APA and External Law as Sources of Hearing Rights*

A third approach uses both the APA and external law as sources of hearing rights. The Wisconsin Act has adopted this approach. Its adjudi-

an agency in which a determination of legal rights, duties, or privileges of a party is *required by law* to be made after an opportunity for hearing." (Emphasis added).

41. *Id.* § 2-4-603.

42. 1981 MODEL ACT, *supra* note 3, § 1-102(5): "'Order' means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons."

43. FLA. STAT. ANN. § 120.57 (West Supp. 1982): "The provisions of [the adjudicatory] section shall apply in all proceedings in which the substantial interests of a party are determined by an agency."

44. DEL. CODE ANN. tit. 29, § 10102(3) (Supp. 1980):

"Case" or "case decision" means any agency proceeding or determination that a named party as a matter of past or present fact, or of threatened or contemplated private action, is or is not in violation of a law or regulation, or is or is not in compliance with any existing requirement for obtaining a license or other right or benefit.

VA. CODE § 9-6.14:4(D) (Michie Supp. 1982):

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

The Delaware Act is analyzed in this Comment because it contains the procedural innovations under discussion. It should be noted, however, that "although [the Delaware] Administrative Procedures Act has been in place for four-five years it is rarely used or referred to." Letter from Jack Gibbons, Research Analyst, Legislative Council of Delaware, to author (Feb. 5, 1982) (on file with the *Washington Law Review*). Therefore, there is no available authority from which to draw conclusions about the Delaware Act's application or workability.

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atory provisions are triggered whenever a hearing is “required by law.”⁴⁵ External statutes and judicial determinations of due process thus form the primary source of hearing rights. A supplementary provision also provides limited hearing rights in situations where they are not provided by statute.⁴⁶ To qualify for a hearing under the supplementary provision, a party must show: (1) that her substantial interests are affected by agency action; (2) that no evidence exists of legislative intent not to protect the interest; (3) that her injury is different in kind and degree from injury to the general public; and (4) that there is a disputed issue of material fact.⁴⁷ These requirements are to be construed narrowly. The provision is intended to supplement rather than supplant other statutes that provide hearing rights.⁴⁸

4. Comparison

If an APA includes informal adjudicatory procedures, the act itself is the most effective source of hearing rights. Dependence on legislative determinations of hearing rights is unnecessary if an APA uniformly applies

45. WIS. STAT. ANN. § 227.01(2) (West Supp. 1982):

“Contested case” means a proceeding before an agency in which, after hearing *required by law*, substantial interests of any party to such proceeding are determined or adversely affected by a decision or order in such proceeding and in which the assertion by one party of any such substantial interest is denied or controverted by another party to such proceeding.

(Emphasis added).

46. WIS. STAT. ANN. § 227.064 (West Supp. 1982).

47. *Id.* Section 227.064 reads as follows:

(1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:

(a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;

(b) There is no evidence of legislative intent that the interest is not to be protected;

(c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

(d) There is a dispute of material fact.

(2) Any denial of a request for a hearing shall be in writing, shall state the reasons for denial, and is an order reviewable under this chapter. If the agency does not enter an order disposing of the request for hearing within 20 days from the date of filing, the request shall be deemed denied as of the end of the 20-day period.

(3) This section does not apply to rulemaking proceedings or rehearings, or to actions where hearings at the discretion of the agency are expressly authorized by law.

48. See Judicial Council explanatory notes, adopted to accompany the text of Assembly B. 163, 1975 Leg., Reg. Sess., 1975 Wis. Laws 1306 [hereinafter cited as Judicial Council notes]:

The position of the council is that since this is not the basic statute establishing hearing rights but is a supplementary device for curing situations for which there should be a hearing but none is provided, the provision should be drawn somewhat more narrowly than standing provisions in specific cases. . . . A supplementary statute, such as this one, need not be so broad and should not be because of the risk of overburdening some agencies with unnecessary hearings.

informal procedures for minor cases.⁴⁹ The act can accommodate the diversity of agency action by its range of procedures, and legislative intervention is no longer required. This shifts the legislature's role to deciding what procedure to apply in various circumstances.⁵⁰

Moreover, the use of external law to determine hearing rights may reduce the effectiveness of informal procedures. When the legislature fails to provide a right to a hearing, the effort required to establish a due process right to a hearing may exceed the parties' stake in a minor controversy. Use of external law therefore detracts from the availability of the informal procedures by making hearing rights difficult to establish for minor cases that are more appropriately handled by an informal procedure.

The Wisconsin mixed scheme tries to cure these defects. Hearing rights that the legislature overlooked can be asserted under the supplementary section. This section provides a more certain test than is used for due process claims.⁵¹ It avoids the narrow construction and uncertainty that arises when states use external law to determine hearing rights while retaining the benefits of legislative participation.

In practice, however, the Wisconsin supplementary section has been ineffective.⁵² To avoid overburdening the agencies, the Wisconsin Court of Appeals has narrowly construed the section to provide a right to an adjudicatory hearing only when the legislature has already provided a right to a legislative-type hearing similar to a rulemaking.⁵³ Although this

49. This dependence is necessary under the Montana Act because informal procedures are not available for all minor controversies. They can only be used if the parties waive a formal hearing; otherwise, a formal hearing is required. MONT. CODE ANN. § 2-4-603 (1981).

The restricted use of the informal procedure is the major flaw of the Montana scheme, because it does not use informal procedures to their best advantage. The increase of hearings required by the fourteenth amendment has not been accommodated by providing less burdensome procedures. A student threatened with a ten-day suspension from school would be entitled to a formal hearing, under the Montana Act, unless the right is waived. *See supra* notes 14-20 and accompanying text. Unnecessary and sometimes undesirable formal hearings are unavoidable if a party desires a formal hearing.

50. *See infra* notes 54, 66-67 and accompanying text.

51. *See* Judicial Council notes, *supra* note 48: "Some 'standing' cases in the appellate courts based on a denial of due process of law would have been avoided if there were a general residual right to hearing provision such as the one proposed here."

52. The section may also be superfluous in some settings. An attorney for the Wisconsin Department of Regulation and Licensing recalls no instances of individuals invoking § 227.064. He contends, however, that his department may be "more enlightened in the area of procedural due process than some other State agencies." Letter from Wayne R. Austin to the author (March 1, 1982) (on file with the *Washington Law Review*).

53. *Town of Two Rivers v. Wisconsin Department of Natural Resources*, 315 N.W.2d 377 (Wis. App. 1981). The court construed the words "[i]n addition to any other right provided by law" to state unambiguously that there must be another right provided by law for the statute to apply. 315 N.W.2d at 381. *See supra* note 49 (text of § 227.064). Under this construction, § 227.064 would provide an adjudicatory hearing in lieu of a legislative-type hearing if the requirements in the section were met, but no hearing rights would be provided where none previously existed. This interpretation is anything but clear and is contrary to the interpretation given in the Judicial Council explanatory notes.

interpretation is strained, the controversy illustrates that the supplementary approach can be defeated when courts are overly concerned with agency pleas for efficiency.

The act itself should establish hearing rights. It is unnecessary to restrict the application of hearing rights if appropriate procedures are available for all cases, even the most minor.

One concern with using the act itself to determine hearing rights is that this shifts the decision from the legislature to the courts.⁵⁴ Even if preservation of the legislature's role is a major concern, however, that role can be retained by giving the legislature a voice in deciding whether a formal or informal procedure applies.⁵⁵

If the act itself determines hearing rights then the standard used to describe what interests are affected is crucial. When construing this language a court will attempt to balance administrative efficiency against the individual's interests. Although the language should allow courts to grant hearings freely when the informal procedures offset agency burdens, it should not require courts to protect every trivial interest. The language of the 1981 Model Act⁵⁶ and the language of the Florida Act⁵⁷ seem to accomplish this. Both acts use the word "interest" rather than "right," indicating a legislative intent that a court should have discretion in granting hearings. But the "interest" must be more than trivial, so a court has some discretion to refuse hearings.⁵⁸ The Virginia and Delaware acts de-

See supra note 48. The court apparently interpreted the act narrowly to save the Department of Natural Resources from having to hold hearings at each of three stages of a waste landfill site approval process.

54. Bonfield, *supra* note 20, at 304–07.

55. *See, e.g.*, 1981 MODEL ACT, *supra* note 3, § 4–201; *infra* notes 66–67 and accompanying text. Professor Bonfield, Reporter for the 1981 Model Act, characterizes the role of the legislature under that act as "primary" even though the 1981 Model Act determines hearing rights without reference to external law. Professor Bonfield contrasts the Model Act with a scheme that determines hearing rights by its own terms but has only one adjudicatory procedure. Under the latter scheme, the only decision is whether the person has a right to a hearing. Because the courts make that decision, the APA causes significant "buck-passing" from the legislature to the courts. Under the 1981 Model Act, a court's decision that a person is entitled to a hearing has less significance because the legislature makes the crucial decision on the form of that hearing. Telephone interview with Arthur E. Bonfield, Reporter, Uniform Law Commissioners' Model State Administrative Procedure Act (1981), Professor of Law, University of Iowa (April 26, 1982) (notes of the interview on file with the *Washington Law Review*). *See also* Bonfield, *supra* note 20, at 304–06 (criticizing the 1974 North Carolina APA, which was similar to the hypothetical scheme discussed above but which has since been amended, *see* N.C. GEN. STAT. § 150A-2(2) (Michie 1978)); Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833, 869–70 (1975) (discussing the earlier North Carolina scheme).

56. 1981 MODEL ACT, *supra* note 3, § 1–102(5). *See supra* text accompanying note 42.

57. FLA. STAT. ANN. § 120.57 (West Supp. 1982). *See supra* text accompanying note 43.

58. The relative merits of "substantial interests" and "legal interests" is a fine point that may be rendered insignificant by judicial interpretation. The breadth of either phrase depends on the courts'

lineate a more specific test for hearing rights. A hearing is provided only if the agency is determining whether a party has violated a law or is eligible for a particular benefit.⁵⁹ This specificity makes hearing rights easier to determine but may deprive a court of the flexibility it needs in certain situations. It may also leave some due process interests, like the "right" to stay in school in *Goss*, completely outside the statutory scheme.

B. Choice Between Informal and Formal Procedures

The manner of choosing between formal and informal procedures can determine whether the latter are used effectively. If informal hearings are overly restricted, agencies may have to provide formal hearings when informal ones would suffice. If informal hearings are available in too many cases, due process may be violated.

Several alternative methods exist for choosing between formal and informal procedures. The choice could be left up to the parties. Alternatively, the act itself could specify when each procedure is applicable, or the choice would be made in advance by agency rulemaking that specified the appropriate procedure for particular categories of cases.

1. Option of the Parties

One method of determining whether formal or informal procedures apply is to allow the parties to choose. Montana and Delaware have adopted this approach, limiting informal procedures to situations where the parties have waived a formal hearing.⁶⁰ The existence of uniform informal procedures assures parties of some procedural protection and may encourage them to choose informal disposition.

generosity with hearing rights, and this generosity depends in part on the efficiency of the informal procedures provided. See 1981 MODEL ACT, *supra* note 3, § 4-201 comments.

59. DEL. CODE ANN. tit. 29, § 10102(3) (Supp. 1980); VA. CODE § 9-6.14:4(D) (Michie Supp. 1982). See *supra* note 44 (quoting the statutory language).

60. DEL. CODE ANN. tit. 29, § 10123 (Supp. 1980): "Where a formal hearing is not required by law and where the parties agree in advance to proceed in such manner, the agency shall acquire the information upon which it bases its decision by means of informal conference or consultation among the parties" MONT. CODE ANN. § 2-4-603 (1981): "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default. . . . [P]arties to a contested case may jointly waive in writing a formal proceeding"

The 1961 Model Act also permitted parties to waive formal hearings. 1961 MODEL ACT, *supra* note 1, § 9(d). The two state acts differ from the 1961 Model Act only by providing basic procedural rudiments if a waiver occurs.

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2. *Preliminary Fact-finding*

An alternative approach is to make the informal procedure available to the agency as a preliminary fact-finding hearing. Virginia has adopted this approach, allowing informal procedures in all cases unless formal evidence-taking is required by law.⁶¹ An agency apparently may conduct a formal hearing instead of an informal proceeding,⁶² or in addition to an informal proceeding which fails to resolve the case.

3. *Choice Made by the Terms of the Act*

Another approach is to use the act itself to determine which procedures apply. Florida and Wisconsin have adopted this method, although each uses different criteria. Under the Florida Act, a formal hearing applies unless there are no disputed issues of material fact.⁶³ Because the distinction is clear there should be little dispute over which procedure applies in a given case.

The Wisconsin Act bases the choice between formal and informal procedures on criteria that resemble the distinction between legislative and adjudicative facts.⁶⁴ Proceedings are divided into three classes: class 1 proceedings involve matters of general public interest, class 2 proceedings are primarily concerned with rights of a particular party, and class 3

61. VA. CODE §§ 9-6.14:11, :12(A) (Michie Supp. 1982). Section 9-6.14:11 reads, in part: "Save to the extent that case decisions are made as provided by § 9-6.14:12 [the formal hearing section], agencies shall, unless the parties consent, ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings." Therefore, unless the case is disposed of by consent or a formal hearing is held, the agency is required to hold an informal fact-finding hearing.

Section 9-6.14:12(A) states:

The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures . . . have not been had or have failed to dispose of a case by consent.

The last phrase is ambiguous. However, if the phrase "informal procedures . . . have not been had" is interpreted to refer to cases when the agency chooses not to hold the informal hearing, the agency does have statutory authority to choose the formal hearing instead of the informal hearing.

62. See *supra* note 61.

63. FLA. STAT. ANN. § 120.57 (West Supp. 1982): "Unless waived by all parties, [the formal hearing] shall apply whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, [the informal hearing] shall apply in all other cases."

64. WIS. STAT. ANN. § 227.01(2) (West Supp. 1982). See Judicial Council notes, *supra* note 48.

Adjudicative facts are the facts of a particular case of concern only to the parties, and legislative facts are those which relate to the lawmaking process and therefore have general, far-reaching application. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942); see *Bi-Metallic Inv. Co. v. Colorado Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. Denver*, 210 U.S. 73 (1908); see also FED. R. EVID. 201(a) advisory committee's note (discussing fully the difference between adjudicatory and legislative facts).

proceedings are cases not clearly within class 1 or class 2.⁶⁵ The formality of the proceeding depends on the extent that it involves individual rights, with class 2 proceedings being the most formal and class 1 proceedings the least formal.

4. 1981 Model Act

The 1981 Model Act uses a complex scheme to determine whether formal or informal procedures are to be used in a particular case. Both the legislature and the agency are involved in the choice of procedure. Formal hearing provisions apply unless a statute or agency rule provides otherwise.⁶⁶ Informal procedures are unavailable if their use under the circumstances violates any provision of law.⁶⁷ The legislature can thus mandate formal procedures for particular classes of cases. If the legislature takes no action, the agency is free to promulgate a rule that makes informal procedures applicable.⁶⁸

The Act lists specific categories of cases for which informal procedures are acceptable.⁶⁹ There are two lists of categories because the Model Act

65. WIS. STAT. ANN. § 227.01(2) (West Supp. 1982):

There are 3 classes of contested cases as follows:

(a) A "class 1 proceeding" is a proceeding in which an agency acts under standards conferring substantial discretionary authority upon the agency. Class 1 proceedings include, but are not restricted to: rate making; price setting; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; and the grant or denial of licenses.

(b) A "class 2 proceeding" is a proceeding in which an agency determines whether to impose a sanction or penalty against one or more parties. Class 2 proceedings include, but are not restricted to, suspensions of, revocations of, and refusals to renew licenses because of an alleged violation of law. Any proceeding which could be construed to be both a class 1 and 2 proceeding shall be treated as a class 2 proceeding.

(c) A "class 3 proceeding" is any contested case not included in class 1 or 2.

66. 1981 MODEL ACT, *supra* note 3, § 4-201:

All adjudicative proceedings are governed by this chapter, except as otherwise provided:

(1) by a statute other than this Act;

(2) by a rule that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this Act for those proceedings;

(3) by Section 4-501 pertaining to emergency adjudicative proceedings; or

(4) by Section 2-103 pertaining to declaratory proceedings.

67. *Id.* §§ 4-401, 4-502.

68. The legislature may have another say in the matter if the particular state has legislative review of agency rules. See Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 81-83 (1982) (listing states which authorize legislative review); Comment, *Quis Custodiet Ipsos Custodes?: Gubernatorial and Legislative Review of Agency Rulemaking Under the 1981 Model Act*, 57 WASH. L. REV. 669, 673 (1982) (same).

69. 1981 MODEL ACT, *supra* note 3, §§ 4-401, 4-502. See *infra* notes 71 & 73 (text of these sections reprinted). The category lists are set off in brackets, indicating that they are optional provisions of the 1981 Model Act.

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has two informal procedures: the conference hearing and the summary hearing.⁷⁰ The more formal conference hearing is used either when there is no disputed issue of material fact, or when a factual issue exists but the controversy involves a minor sanction or less than one thousand dollars.⁷¹

The summary hearing is available only if the public interest does not require that notice and opportunity to respond be given to nonparties.⁷² It is used in monetary disputes of not more than one hundred dollars, purely verbal sanctions against a prisoner, student, public employee or licensee, and “any matter having only trivial potential impact upon the affected parties.”⁷³

70. *Id.* §§ 4–401, 4–502.

71. *Id.* § 4–401:

A conference adjudicative hearing may be used if its use in the circumstances does not violate any provision of law and the matter is entirely within one or more categories for which the agency by rule has adopted this chapter [; however, those categories may include only the following:

- (1) a matter in which there is no disputed issue of material fact; or
- (2) a matter in which there is a disputed issue of material fact, if the matter involves only:
 - (i) a monetary amount of not more than [\$1,000];
 - (ii) a disciplinary sanction against a prisoner;
 - (iii) a disciplinary sanction against a student which does not involve expulsion from an academic institution or suspension for more than [10] days;
 - (iv) a disciplinary sanction against a public employee which does not involve discharge from employment or suspension for more than [10] days;
 - (v) a disciplinary sanction against a licensee which does not involve revocation, suspension, annulment, withdrawal, or amendment of a license; or
 - (vi) . . .]

(brackets indicate optional language).

72. *Id.* § 4–502(2).

73. *Id.* § 4–502(3). Under this section, an agency may use summary adjudicative proceedings if: the matter is entirely within one or more categories for which the agency by rule has adopted this section and Sections 4–503 to 4–506 [; however, those categories may include only the following:

- (i) a monetary amount of not more than [\$100];
- (ii) a reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against a prisoner, student, public employee, or licensee;
- (iii) the denial of an application after the applicant has abandoned the application;
- (iv) the denial of an application for admission to an educational institution or for employment by an agency;
- (v) the denial, in whole or in part, of an application if the applicant has an opportunity for administrative review in accordance with Section 4–504;
- (vi) a matter that is resolved on the sole basis of inspections, examinations, or tests;
- (vii) the acquisition, leasing, or disposal of property or the procurement of goods or services by contract;
- (viii) any matter having only trivial potential impact upon the affected parties; or
- (ix) . . .]

(brackets indicate optional language).

5. Comparison

The choice between procedures is crucial. An informal procedure can only be used for cases where due process allows less than a full trial-type hearing. Therefore, the method used to choose the procedures must not make the informal hearing too available.⁷⁴ On the other hand, informal procedures should be used in all appropriate cases to maximize agency efficiency.

The state APAs have been too concerned with restricting the use of informal procedures. The Delaware, Montana, and Virginia acts all relegate informal procedure to a restricted role that neither ensures less formal procedures for minor cases, nor enables the agencies to improve their efficiency by controlling the use of informal procedures.

The Montana and Delaware acts, by allowing the parties to choose, limit the role of informal procedure to assuring procedural protection for parties who waive a formal hearing. The agencies derive no benefit except in those limited instances. Virginia's use of informal procedure for preliminary factfinding is similarly inefficient. Although it expedites some cases,⁷⁵ it prolongs the adjudicatory process in others.⁷⁶ It also increases the total number of hearings, because a formal hearing is still required when the informal hearing fails to resolve a case.⁷⁷ Neither approach uses informal procedure to its best advantage. Both agencies and parties would benefit from making informal procedures freely available when less serious interests are at stake. These procedures allow the agencies to function more efficiently and assure the parties of appropriate procedural protection.

Using the act itself to choose between procedures could make informal procedures available for minor controversies. Nevertheless, this approach has proven unsuccessful in Florida and Wisconsin because of difficulties with the criteria in both acts. The Florida criterion,⁷⁸ requiring a formal hearing if a disputed factual issue exists, is easy to apply; but the cost of

74. Constitutional questions could arise if an act sets the threshold for a formal hearing too high. For example, an act could make the formal hearing applicable only to controversies over \$10,000. A welfare termination case may arise that involves less than \$10,000 in potential benefits. According to the *Goldberg* Court, an agency must provide the full panoply of trial-type procedures before termination. *Goldberg*, 397 U.S. at 266-71; see B. SCHWARTZ, *supra* note 13, § 88 at 248. Under the hypothetical statute, however, the welfare recipient would not be entitled to a formal hearing even though due process requires it.

75. The informal hearings often result in the dismissal of an action against a party, probably because they are most often used when there is a predisposition to dismiss. Letter from Richard C. Kast, Virginia Assistant Attorney General, to the author (Feb. 3, 1982) (on file with the *Washington Law Review*).

76. Agencies sometimes use the informal procedure to postpone their decision. *Id.*

77. VA CODE § 9-6.14:12(A) (Michie Supp. 1982).

78. FLA STAT ANN § 120.57 (West Supp. 1982).

clarity is unnecessary formal hearings. Although a case may involve a factual issue, the insignificance of the dispute or the sanction may make a formal hearing unnecessary. Under the Florida Act, the case is nevertheless determined by a formal hearing because there is a factual issue. More significantly, the Florida criterion makes formal procedures so freely available that informal procedures are primarily used only when parties waive a formal hearing.⁷⁹ Thus, minor cases continue to receive a formal hearing under the Florida system.

The Wisconsin Act's criteria,⁸⁰ on the other hand, are too complex and conclusory. Although in some cases it is clear whether the major concern is public interest or private rights, the criteria gives little guidance in the borderline cases.⁸¹ The class 3 catch-all category is an inadequate solution because it fails to address the major problem, which is that the conclusory categories confer too much discretion on the agencies. In a close case, an agency can characterize the major concern of the case as the public interest and use a less formal procedure. Because agencies will usually prefer a less stringent procedure, it is unwise to give them too much discretion in deciding which procedure should be used.⁸²

The Model Act scheme makes the best use of informal procedures. It includes the legislature in the choice, requires the agencies to promulgate a rule to reduce procedural protection, and identifies when the agency may take that step.⁸³ This best balances the competing needs of agency efficiency and individual protection. The legislature's role and the initial rulemaking proceedings check the excessive application of the informal procedure. The category lists restrict agency use of informal procedures to appropriate cases.

79. Letter from Mary Clark, General Counsel, Florida Department of Environmental Regulation, to the author (Feb. 11, 1982) (on file with the *Washington Law Review*). Ms. Clark estimated the percentage of informal hearings to be as low as five to ten percent of all hearings, because most cases involve factual issues.

80. WIS. STAT. ANN. § 227.01 (2) (West Supp. 1982).

81. According to two major Wisconsin agencies, there are no problems of classification. Letter from David H. Schwarz, Administrator and Chief Hearing Examiner, Wisconsin Division of Natural Resources Hearings, to the author (Feb. 16, 1982) (on file with the *Washington Law Review*) [hereinafter cited as Schwarz letter]; letter from Wayne R. Austin, Office of Board Legal Services, Wisconsin Department of Regulation and Licensing, to the author (Mar. 1, 1982) (on file with the *Washington Law Review*). Classification is uncontroversial probably because there is very little difference in the procedures for each class. Mr. Schwarz agrees that the procedures are substantially similar: "It is my opinion that very few substantive differences flow from the designation of a matter Class II rather than Class I." Schwarz letter, *supra*.

82. The difficulty with using general criteria in the act is illustrated by Judge Frank's comment about legal concepts in general: although they may be enticingly clear on first glance, "[o]n close examination, [they] often resemble the necks of the flamingos in Alice in Wonderland which failed to remain sufficiently rigid to be used effectively as mallets by the croquet-players." *United States v. Rubenstein*, 151 F.2d 915, 923 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 326 U.S. 766 (1945).

83. See *supra* notes 66–73 and accompanying text.

The Model Act is also more flexible, efficient, and favorable to the public than the alternative acts, because it requires an agency to promulgate a rule before an informal procedure is available.⁸⁴ Thus, the procedure is chosen before an individual case arises rather than on a case-by-case basis using vague statutory language.⁸⁵ Potentially affected parties have an opportunity to participate in the initial decision to make informal procedures applicable. The primary selector is the agency, which knows what procedures are appropriate for its cases. If practice indicates that another procedure would be more appropriate than the one originally chosen, the agency can amend or repeal its rule.

The Model Act categories are also best equipped to control agency discretion while making informal procedure widely available. The specificity of the categories⁸⁶ defines clear boundaries, ensuring sufficient procedural protection for each case. It would be more difficult under the Model Act than the Wisconsin Act⁸⁷ for an agency to manipulate categories to use a less formal procedure. A list of categories can be more comprehensive than a single distinction such as the Florida criterion.⁸⁸ The Model Act recognizes those cases that the Florida Act overlooks:⁸⁹ cases that involve factual disputes but where the interest is too minor to warrant a formal hearing.

C. *The Procedural Elements of Each Level of Proceeding*

An informal hearing can mean anything from a confrontation on the schoolyard to a relatively formal procedure with relaxed *ex parte* and evidentiary rules. The Model Act accommodates this range by providing two informal proceedings.⁹⁰ The Wisconsin Act also provides two alternatives to the formal hearing,⁹¹ but the Florida, Virginia, Delaware, and Montana acts contain only one informal procedure.⁹²

84. Cf. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:38 (2d ed. 1978) (discussing effectiveness of notice and comment rulemaking).

85. The language would be necessarily vague in order to apply to all administrative actions.

86. 1981 MODEL ACT, *supra* note 3, §§ 4-401, 4-502. See *supra* notes 69-73 and accompanying text.

87. See WIS. STAT. ANN. § 227.01(2) (West Supp. 1982); see *supra* notes 64-65 and accompanying text.

88. FLA. STAT. ANN. § 120.57 (West Supp. 1982). See *supra* note 63 and accompanying text.

89. See *supra* notes 78-79 and accompanying text.

90. 1981 MODEL ACT, *supra* note 3, §§ 4-401 to 4-506.

91. WIS. STAT. ANN. §§ 227.01(2), .07-.013 (West Supp. 1982).

92. DEL. CODE ANN. tit. 29, § 10123 (Supp. 1980); FLA. STAT. ANN. § 120.57(2) (West Supp. 1982); MONT. CODE ANN. § 2-4-604 (1981); VA. CODE § 9-6.14:11 (Michie 1978).

1. *Two Levels of Informal Procedure: the Model Act*

The Model Act provides two informal procedures, a conference hearing and a summary hearing.⁹³ The two procedures differ significantly and have different purposes. The conference hearing is a “peeled down” version⁹⁴ of a formal hearing and is intended to be used when not all of the formal procedural protections are required.⁹⁵ It differs from the formal hearing by omitting a prehearing conference, discovery, and testimony by nonparties.⁹⁶ In contrast, the summary hearing is a bare-bones procedure, providing only notice and an opportunity to respond, and is intended for controversies too minor to justify a trial-type hearing.⁹⁷ The summary hearing requires only that the presiding officer⁹⁸ notify the party of the agency’s view and allow the party to explain her position.⁹⁹ If the agency decides against the party, the presiding officer must briefly state policy reasons, findings of fact, and conclusions of law that justify the decision, and must notify the party of available administrative review.¹⁰⁰

These informal hearing provisions apply only if an agency has promulgated a rule that makes them applicable for such a case.¹⁰¹ Because the applicable procedure is determined before a case arises, the two levels of informal procedure do not increase the complexity of the scheme. An act with two or more informal procedures would be too complicated if it lacked a mechanism for advance determination of which procedure would be used. This problem would arise, for instance, if the choice between procedures was made by broad criteria on a case-by-case basis.¹⁰² Under such a scheme, the availability of alternative procedures could frustrate the related goals of efficiency, uniformity, and fairness.

2. *The Wisconsin Act*

The Wisconsin Act also has three classes of adjudicatory proceedings, including the formal hearing,¹⁰³ but the differences between the pro-

93. 1981 MODEL ACT, *supra* note 3, §§ 4-401 to 4-506.

94. *Id.* § 4-402 comment.

95. *See id.*

96. *Id.* § 4-402.

97. *See supra* notes 72-73 and accompanying text.

98. Unless prohibited by state law, a person exercising authority over the matter is deemed to be the presiding officer. 1981 MODEL ACT, *supra* note 3, § 4-503(a).

99. *Id.* § 4-503(b) (1).

100. *Id.* § 4-503(b) (2).

101. *Id.* §§ 4-401, 4-502.

102. Examples of the case-by-case approach in choosing between formal and informal adjudicative hearings are the Florida and Wisconsin acts. *See supra* notes 63-65 and accompanying text.

103. *See supra* notes 64-65 and accompanying text for explanation of the classification system.

cedures are minimal. All three procedures provide a discretionary prehearing conference, an opportunity to cross-examine witnesses, and a decision based exclusively on the record.¹⁰⁴ The requirements for the middle level, class 3 proceeding are the same as for a formal hearing, except that discovery is limited¹⁰⁵ and notice of the hearing need not refer to specific statutes and rules.¹⁰⁶ The requirements for the least formal, class 1 proceeding are also similar. The only additional procedural relaxations for the class 1 proceeding are that the prohibitions against ex parte communication are relaxed,¹⁰⁷ a record of oral proceedings is not made unless requested by a party,¹⁰⁸ and a decision made by less than a majority of agency decisionmakers can be final.¹⁰⁹

3. *One Informal Procedure: the Florida Act*¹¹⁰

The Florida Act's informal procedure was the model for the summary hearing in the 1981 Model Act.¹¹¹ Like the summary hearing, it provides only basic notice and opportunity to respond.¹¹² The opportunity to respond in a Florida informal hearing is more substantial, however, because the parties can present written or oral evidence and written argument¹¹³ against the agency's action. The Florida hearing's record is also more fully developed.¹¹⁴

4. *Comparison*

The procedural elements of a variable due process scheme raise two issues: (1) whether the formal and informal procedures vary sufficiently in complexity; and (2) whether the act should provide more than one informal procedure.

104. WIS. STAT. ANN. §§ 227.07(4), .07(9), .08(6) (West Supp. 1982).

105. *Id.* § 227.08(7).

106. *Id.* § 227.07(2) (b).

107. *Id.* § 227.13(1).

108. *Id.* § 227.07(8).

109. *Id.* § 227.09(2).

110. The informal procedures in the Delaware, Montana, and Virginia acts are similar to the Florida Act's procedure. Compare FLA. STAT. ANN. § 120.57(2) (West Supp. 1982) with DEL. CODE ANN. tit. 29, § 10123 (Supp. 1980); and MONT. CODE ANN. § 2-4-604 (1981); and VA. CODE § 9-6.14:11 (Michie 1978). Because the ways in which they differ are insignificant, the Delaware, Montana and Virginia informal procedures are omitted from further discussion.

111. 1981 MODEL ACT, *supra* note 3, § 4-503 comments.

112. FLA. STAT. ANN. § 120.57(2) (West Supp. 1982).

113. The omission of oral argument may have been accidental. Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617, 664 (1975).

114. It includes evidence received, all submitted written statements, all matters placed on the record after an ex parte communication, and an official transcript. FLA. STAT. ANN. § 120.57(2) (West Supp. 1982).

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If an APA provides more than a formal procedure, the procedures should range from a formal hearing to a very informal proceeding, to accommodate the *Goss-to-Goldberg*¹¹⁵ range of permissible procedures. The Wisconsin Act's procedures do not adequately cover this expanse. All three procedures are only variations of a formal hearing.¹¹⁶ Because there is no substantive difference between the procedures, the way that a case is classified has little effect on its subsequent handling. The three similar procedures only add unnecessary complexity without including more informal agency actions within the scope of the APA.

The optimum number of informal procedures depends on the method that an act uses to determine which procedure to apply. If the determination is made by statutory criteria on a case-by-case basis, it is preferable to have only one informal procedure. An additional procedure would require the agency to make an additional, difficult decision in each case.¹¹⁷ In practice, agencies would probably develop informal standards for cases that arise frequently. Persons dealing with the agencies would remain uncertain of their procedural rights, however, because the APA would not clearly identify those rights.

The Florida Act provides a good example of an act that copes effectively with a case-by-case determination of applicable procedure. The scheme is not overly complex because only one informal procedure is provided.¹¹⁸ The informal procedure provides critical procedural protections, including a substantial opportunity to respond and a full record, so it is appropriate for more than just the most minor cases.¹¹⁹ In practice, however, the case-by-case method of choosing procedures has proven ineffective because of the inadequacy of the Florida Act criterion.¹²⁰

If the choice of procedure is made in advance by rulemaking, as in the Model Act, the act can effectively include more than one informal procedure. Several levels of procedure are desirable to accommodate the wide range of agency action.¹²¹ Because the complexity of agency action is a

115. See *supra* notes 6–20 and accompanying text.

116. See *supra* notes 103–09 and accompanying text.

117. The decision would be difficult because criteria in the act used to determine what procedure applied would have to be vague to accommodate the diversity of agency action.

118. FLA. STAT. ANN. § 120.57(2) (West Supp. 1982); see *supra* notes 111–14 and accompanying text.

119. If only one informal procedure is provided, it should fall between the Model Act's conference and summary hearings in complexity. A scheme with only a formal hearing and a conference hearing would leave the lower range of agency actions outside its scope. In a scheme with a formal hearing and a very informal hearing, the formal hearing would be overworked because the informal procedure would only provide enough protection for the most minor cases.

120. See *supra* notes 78–79 and accompanying text. The same result has occurred in Wisconsin because the Wisconsin Act criteria confer too much discretion on the agencies. See *supra* text accompanying note 81.

121. See *supra* note 18.

matter of degree, an APA with several levels of procedure can best structure the administrative process.

The number of procedures must be limited, however. Numerous procedures increase the complexity of the administrative scheme. This added complexity is hard to justify if the number of procedures make the variation between formal and informal procedures insignificant. A better approach is to limit the number of procedures and allow each agency to adjust them to fit its particular needs. Because an APA should provide only the procedural basics,¹²² the Model Act scheme is ideal. Its provisions for formal, informal, and hybrid hearings provide a basic structure for agencies to work from.

Another potential problem with several levels of procedure is that the natural dividing points of adjudicatory procedures may not correspond to the natural dividing points of agency actions. This is particularly true for the wide range of minor cases. Although the serious cases form a rigid, indivisible class,¹²³ the minor cases are flexible and can receive varying degrees of informal procedure.¹²⁴

On the other hand, it is harder to add procedural elements to informal hearings than it is to delete them from formal hearings. This difficulty occurs because the framework of the informal hearing will not support some procedural devices. For instance, eliminating discovery from a formal hearing does not disturb the rest of the procedure. Adding discovery to an informal hearing, however, is unfeasible because notice is usually given just before the hearing is conducted, and because the issues involved are frequently too simple to require discovery.

Because agency actions are more divisible at the lower end of the *Goss-to-Goldberg* continuum and procedures are more divisible at the higher end, mid-range procedures may provide excessive and unnecessary protection for minor cases. The Model Act's conference hearing typifies this problem. Although the procedure is similar to a formal hearing, it extends to very minor cases. The Model Act's treatment of school suspensions is illustrative. The Supreme Court in *Goss* required only informal notice and opportunity to respond before a student's suspension.¹²⁵ Under the Model

122. See Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 200 (1948).

123. This is because due process requires full and formal protection whenever a crucial interest is affected.

124. See *supra* note 18.

125. 419 U.S. at 577-84.

Informal Adjudicatory Procedures

Act, however, the student has the right to a conference hearing,¹²⁶ which is a relatively formal, recorded procedure.¹²⁷

This lack of correlation between the procedural requirements of the middle category and agency demand for efficiency can be cured either by shifting cases to another category or by reducing the procedural complexity of the middle category. The former solution is impractical. It is impossible in practice to shift a relaxed procedural category to more significant interests without including rights that demand a full hearing.¹²⁸ Because the categories do not lend themselves to alteration, a better solution is to reduce the procedural complexity of the mid-range category. This would greatly improve the Model Act. Minor reductions could be made in the conference hearing, for example eliminating requirements that the hearing be recorded at agency expense or that the decision be made exclusively on the record. These changes would allow greater agency discretion in conference hearings. Given the minor nature of these cases, a reduction in procedure is appropriate.

IV. CONCLUSION.

The inclusion of informal adjudicatory procedures in APAs can significantly improve the administrative process for agencies and for the public. Agencies benefit because informal procedures allow them to implement the “variable due process” concept and thereby avoid holding unnecessary and burdensome formal hearings. The public benefits because uniform informal procedures increase fairness in minor cases, which constitute the majority of agency action.

To achieve these benefits, an APA should make informal procedures freely available for cases that involve insignificant interests or nonfactual issues. This requires that hearing rights be established in the act itself rather than by reference to external law. Using external law is undesirable

126. The conference hearing may be used when a case involves “a disciplinary sanction against a student which does not involve expulsion from an academic institution or suspension for more than [10] days.” 1981 MODEL ACT, *supra* note 3, § 4-401(2)(iii) (brackets indicate optional language). The summary hearing would not be available in this case, because it may be used only if the case involves “a reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against a prisoner, student, public employee or licensee.” *Id.* § 4-502(3)(ii).

127. *Id.* § 4-402. The only procedural reductions are that nonparties cannot testify, no pre-hearing conference is held, and discovery is limited.

128. For example, in the licensing context a conference hearing applies to any disciplinary sanction against a licensee which does not involve revocation, suspension, or alteration of the license. *Id.* § 4-401(2)(v). The status of licenses has historically received special treatment by APAs because of the potentially serious effect on the party’s livelihood. *See, e.g.*, 1961 MODEL ACT, *supra* note 1, § 14 (special section on licenses). Any reduction in procedure for cases that would materially affect a license would be unwise, both because it would meet with strong resistance and because licensees should be given all procedural opportunity to protect their livelihood.

because minor cases overlooked by the legislature will not get the protection of the uniform informal procedures. It is also unnecessary because the informal procedures will lighten the agencies' burden of providing hearings.

The availability of informal procedures also depends on the means that the act uses to choose between formal and informal hearings. This choice should be made prospectively. The Florida and Wisconsin acts show that using objective statutory criteria to choose the procedure on a case-by-case basis is impractical. The 1981 Model Act approach is more workable. Because the choice is made before a case arises, the criteria used to make the choice can be more flexible and comprehensive. Agency discretion is checked by the rulemaking procedure rather than by overly specific criteria which may inadvertently exclude appropriate cases.

Finally, the procedural elements of the informal hearing must be sufficiently informal to promote agency efficiency while protecting the individual's due process rights. Although an act may include more than one informal hearing, this is only feasible if the choice between procedures is made before cases arise. Otherwise, an additional procedure will increase complexity and uncertainty, thereby negating any increase in flexibility due to the additional procedure.

The ultimate function of an administrative procedure act is to strike a balance between serving agency efficiency and protecting the due process rights of persons who deal with the agency. Informal adjudicatory procedures serve this function by simultaneously extending procedural rights and reducing the agencies' burden of providing hearings. This balancing function must be considered at each stage of implementing a scheme with informal procedures. The procedures should be freely available, easy to apply, and with enough procedural relaxations to justify the additional complexity of having more than one adjudicatory procedure. On the other hand, the informal hearing must provide meaningful procedural protection for the individual in even the most minor case.

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