ARTICLE

ADAPTABLE DUE PROCESS

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The requirements of procedural due process must adapt to our constantly changing world. Over thirty years have passed since the Supreme Court in Goldberg v. Kelly *and* Mathews v. Eldridge *adopted what appears to be a dynamic, fact-intensive approach to determining the procedures required by the Due Process Clause. Federal, state, and local government agencies responded by establishing new procedural safeguards, many of which are virtually identical to those in use today. Yet, for public benefits programs such as welfare, the intervening decades have brought striking changes. The 1996 federal welfare law created new and powerful incentives to trim the rolls. Work requirements increased the proportion of recipients holding jobs, forcing many to choose between forgoing their due process rights and jeopardizing their employment by missing work to attend a hearing. Technological advances enabled welfare agencies to cut off benefits based on automated eligibility determinations that are difficult for recipients to challenge. Cuts in funding for legal services made the prospect of legal representation at fair hearings remote.*

These new facts and circumstances undermine the effectiveness of existing procedures and may require reweighing the Mathews *factors to determine what process is due to welfare recipients. Such changes are not unique to welfare; the facts and circumstances relevant to many of the procedural safeguards estab-*

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lished since the due process revolution will evolve in the years to come, if they have not already. Although the Supreme Court has not addressed whether or how existing procedures should be adapted to such changes, adapting the demands of due process to new facts and circumstances is faithful to constitutional doctrine and necessary to ensure that existing procedures continue to provide due process of law. It also provides an opportunity to reinvigorate a conversation about procedural justice that went silent many years ago.

INTRODUCTION

Will due process keep up with our rapidly changing world? Can procedures that satisfied due process at one point in time become unconstitutional when the facts and circumstances change? The answer would seem to be yes. As the Supreme Court has emphasized in case after case, "due process is flexible and calls for such procedural protections as the particular situation demands."[1] Yet, in the thirty-five years since adopting a fact-intensive balancing approach to procedural due process in *Mathews v. Eldridge*,[2] the Court has not assessed whether changed circumstances can render unconstitutional a set of procedural protections that it previously held to satisfy the dictates of due process.

Whether the *Mathews* approach can account for changes over time is not a mere footnote to the due process guarantee contained in the Constitution's Fifth and Fourteenth Amendments.[3] The world has

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[1] Morrissey v. Brewer, 408 U.S. 471, 481 (1972). As the Court explained in *Morrissey*, this proposition "has been said so often by this Court and others as not to require citation of authority." *Id.* The Court has quoted this langugage in numerous decisions since *Morrissey*. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 224 (2005); Gilbert v. Homar, 520 U.S. 924, 930 (1997); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 15 n.15 (1978); Mathews v. Eldridge, 424 U.S. 319, 334 (1976); *see also* Connecticut v. Doehr, 501 U.S. 1, 10 (1991) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (internal quotation marks omitted)); Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.").

[2] 424 U.S. at 334-35. In *Mathews*, the Court held that three factors must be considered when determining the "specific dictates" of due process: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

[3] The Fifth and Fourteenth Amendments to the United States Constitution guarantee that no person shall be deprived of "life, liberty, or property, without due process of law" either by the states (through the Fourteenth Amendment) or by the federal government (through the Fifth Amendment). U.S. CONST. amends. V, XIV.

changed in ways unimaginable to the judges, government officials, and advocates responsible for shaping the procedural protections currently in place, and the future is certain to bring changes of unforeseeable variety and magnitude. Unless existing procedural safeguards are adapted to whatever changes the future will bring, individuals facing governmental deprivations will be threatened with violations of their right to due process of law.

An example spanning twenty-three years, three federal lawsuits, and the evolution of one state's debt collection procedures reveals what can be at stake when courts consider the adaptability of due process:

In July 1983, Cynthia McCahey, a mother of three children and a recipient of welfare benefits, discovered that her checking account had been frozen pursuant to New York's debt collection procedures.[4] McCahey's account was frozen even though it contained only her welfare benefits, which state law exempted from seizure by debt collectors.[5] Left with only post-seizure remedies, McCahey was not able to regain access to her account until four-and-a-half months had passed.[6] During that time, "she fell behind in her rent and utility payments" and "skimped on food and clothing" for her family.[7]

McCahey brought suit in federal court arguing that New York's debt collection procedures violated due process because they lacked pre-seizure procedural protections. The case reached the Second Circuit, which applied the *Mathews* balancing test to the freezing of bank accounts that contained only money exempt from seizure and concluded that New York's procedures struck "a fair balance between the competing interests" and therefore satisfied due process.[8] The pre-seizure process sought by McCahey was not mandated by due process, the court explained, because of the risk that debtors would conceal assets.[9] As a result of the *McCahey* decision, recipients of sub-

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[4] McCahey v. L.P. Investors, 774 F.2d 543, 545 (2d Cir. 1985).

[5] *See* N.Y. SOC. SERV. LAW § 137 (McKinney 2003) ("All moneys or orders granted to persons as public assistance . . . shall be inalienable by any assignment or transfer and shall be exempt from levy and execution under the laws of this state.").

[6] *McCahey*, 774 F.2d at 546.

[7] *Id.*

[8] *Id.* at 549-50. According to the Second Circuit, New York's procedures satisfied due process because they provided debtors with post-seizure notice including, notice of exemptions to which they may be entitled, and a prompt opportunity to challenge the seizure and assert their exemptions. *Id.* at 549 (citing Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1187-88 (S.D.N.Y. 1982)).

[9] *Id.* at 550.

sistence benefits were left with no choice but to wait until their money was seized before trying to reclaim it, even though state law exempted the funds from ever being seized in the first place.

Seventeen years later, on October 27, 2000, Bernie Huggins's bank account was frozen pursuant to the same debt collection procedures held to be constitutional in *McCahey*.[10] The only funds in Huggins's account were his monthly Social Security disability benefits,[11] which, like McCahey's welfare benefits, were exempt from seizure.[12] Huggins brought a federal lawsuit claiming that New York's procedures violated due process. Not surprisingly, the defendants immediately moved to dismiss the case, arguing that *McCahey* controlled and that Huggins's due process claim failed as a matter of law.[13]

Huggins contended that *McCahey* was not dispositive because the facts and circumstances had changed in ways that altered the *Mathews* balancing undertaken by the Second Circuit in 1985.[14] Unlike the paper welfare checks deposited by McCahey, Huggins's benefits were deposited directly into his bank account and electronically tagged in a manner that clearly identified the funds as disability benefits.[15] According to Huggins, this shift tipped the balance in favor of an additional procedural safeguard: requiring the bank to determine whether an account contained electronically deposited exempt benefits before freezing it.[16] Tracing the source of funds in a bank account would have been overly burdensome in 1985, but Huggins argued that the advent of direct deposit enabled banks to quickly and easily determine if an account contained only exempt money.

The district court refused to reevaluate the *Mathews* factors in light of the changed circumstances.[17] Although it acknowledged that Huggins raised "valid concerns about the advisability" of the challenged procedures and that the Second Circuit "may be inclined to reconsider"

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[10] Huggins v. Pataki, No. 01-CV-3016, 2002 WL 1732804, at *1 (E.D.N.Y. July 11, 2002).

[11] *Id.* In fact, Huggins maintained the account solely for the purpose of receiving his disability benefits via electronic transfer from the Social Security Administration. *Id.*

[12] *See* 42 U.S.C. § 407(a) (2006) ("[N]one of the moneys paid or payable or rights existing under this subchapter [Social Security benefits] shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.").

[13] *Huggins*, 2002 WL 1732804, at *3.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at *4.

McCahey, the court concluded that "*McCahey* is binding authority, and I am obliged to apply that authority."[18] Huggins appealed to the Second Circuit, but he died before oral argument and the case was dismissed on August 18, 2003.[19]

The issue did not stay out of the courts for long. On November 19, 2003, Dennis Mayers brought another challenge to the law, making virtually the same argument as Huggins.[20] Mayers, who was later joined by two other plaintiffs,[21] filed his case in the same courthouse where Huggins's case was heard, but it was assigned to a different district judge. This time, the district court held that *McCahey* did not mandate dismissal.[22]

Invoking the Supreme Court's pronouncement that due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances,"[23] the district court took up the *Mathews* balancing anew and concluded that the procedures approved by *McCahey* no longer satisfied due process in light of subsequent technological and policy developments.[24] In particular, the court emphasized that the additional procedural safeguard sought by the plaintiffs—requiring banks to determine, prior to freezing an account, that the account does not contain only electronically deposited exempt

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[18] *Id.* The court also presciently remarked that "[p]erhaps arguments directed to the state legislature will produce a change in the law." *Id.*

[19] Stipulation for Voluntary Dismissal, Huggins v. Pataki, No. 02-7950 (2d Cir. Aug. 18, 2003).

[20] Mayers v. N.Y. Cmty. Bancorp, Inc., No. 03-CV-5837, 2005 WL 2105810, at *1 (E.D.N.Y. Aug. 31, 2005). Mayers's bank account contained his Social Security disability benefits, which were exempt from seizure pursuant to 42 U.S.C. § 407(a). *Id.* at *2-3. In the interest of full disclosure, I was one of the attorneys representing the plaintiffs in *Mayers*.

[21] The two additional plaintiffs were Nancy Ciccone and Elba Quinones, both of whom had their bank accounts frozen even though those accounts contained only benefits that were exempt from seizure pursuant to 42 U.S.C. § 407(a). *Mayers*, 2005 WL 2105810, at *3-4.

[22] *Id.* at *12-13.

[23] *Id.* at *13 (quoting Connecticut v. Doehr, 501 U.S. 1, 10 (1991)).

[24] *Id.* at *14. As to the second *Mathews* factor, the risk of erroneous deprivation, the court found that two post-*McCahey* changes increased the potential for risk: the Social Security Administration's 1998 requirement that benefit recipients receive payments electronically, and technological developments that made it easier for creditors to serve restraining notices on banks. *Id.* at *13-14. As to the third *Mathews* factor, the government's interest, the court found that the additional procedural protections sought by the plaintiffs implicated the government's interest because the procedures would reduce the number of costly proceedings initiated in state court and "promote a more efficient use of judicial resources." *Id.* at *14.

funds—would impose only a "negligible" cost relative to the benefit it would produce.[25] The case proceeded in the district court until November 26, 2008, when it was mooted by statutory amendments to New York's debt collection procedures that effectively prevented banks from freezing accounts containing only exempt funds.[26]

The *McCahey-Huggins-Mayers* example involves a narrow issue arising out of one state's debt collection procedures, but it exposes important questions about the adaptability of due process. What types of changes can undermine the constitutionality of procedures previously deemed to satisfy due process? How should courts respond to claims that new facts and new circumstances affect the constitutionality of existing procedures? As the *Huggins* and *Mayers* decisions demonstrate, judges considering identical due process claims based on identical facts can arrive at conflicting answers, with very different consequences for the individuals and government agencies whose interests are under consideration.

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This Article examines the adaptability of due process through the lens of the most commonly used—and perhaps the most iconic—procedural safeguard in existence today: the right to a fair hearing. Since 1970, when the Supreme Court ruled in *Goldberg v. Kelly* that welfare recipients must be given notice and an opportunity to be heard at a fair hearing prior to termination of their benefits,[27] the right to a fair hearing has served as the central element of due process when an individual's eligibility for public benefits is at issue. Indeed, in the years following *Goldberg*, federal, state, and local agencies established fair hearing systems for a wide range of public benefits in addition to welfare, including food stamps,[28] Medicaid,[29] and Supplemental Security

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[25] *Id.* at *13.

[26] *See* Exempt Income Protection Act of 2008, § 3, 2008 N.Y. Laws 4085, 4088 (codified as amended at N.Y. C.P.L.R. § 5222(h) (MCKINNEY Supp. 2012)) (directing that "if direct deposit or electronic payments [are] reasonably identifiable as statutorily exempt payments," then banks shall not restrain $2500 in the account, and if there is less than $2500 in the account, the "account shall not be restrained" at all).

[27] 397 U.S. 254, 267-68 (1970).

[28] *See* 7 U.S.C. § 2020(e)(10) (2006) (establishing a right to a fair hearing to challenge adverse food stamp eligibility determinations); 7 C.F.R. § 273.15 (2011) (detailing the food stamp program's fair hearing mandate).

Income,[30] among others.[31] For the millions of individuals who have received public benefits since the 1970s, the fair hearing system established in the wake of *Goldberg* and *Mathews* represents the real-world legacy of the Supreme Court's due process revolution.

The emergence of the right to a fair hearing effectively halted further evolution of what a public benefits recipient's "opportunity to be heard" entails. Today, decades after *Goldberg*, the fair hearings available to public benefits recipients look almost identical to those put into place in the 1970s.[32] Not all aspects of public benefits programs have remained frozen in time, of course. But even where the statutes and regulations underlying a benefits program have been radically altered or simply discarded and rewritten—as was the case with the 1996 federal welfare law[33]—the procedures for challenging terminations of those benefits remain virtually indistinguishable from those put into place many years ago.

Scholarly interest in the due process rights of public benefits recipients has followed a similar arc over the past forty years. After the Supreme Court's decision in *Goldberg*, procedural due process and the right to a fair hearing captured the attention of scholars of constitutional law, administrative law, and the then-emerging field of poverty law. The years between *Goldberg* and *Mathews* saw lively debates over which administrative procedures satisfied due process, while post-*Mathews* the conversation turned toward critiques of the *Mathews* approach and the procedures it required.[34] This spike in interest sub-

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[29] *See* 42 U.S.C. § 1396a(a)(3) (mandating state provision of "an opportunity for a fair hearing . . . to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness"); 42 C.F.R. §§ 431.220–.223 (detailing the right to a hearing).

[30] *See* 42 U.S.C. § 1383(c) (establishing a right to a fair hearing to challenge benefit eligibility or amount determinations "in whole or in part unfavorable" to the applicant); 20 C.F.R. §§ 416.1429–416.1461 (detailing the hearing process).

[31] Other public benefits programs with fair hearing requirements include the Women, Infants, and Children (WIC) supplemental nutrition program. *See* 42 U.S.C. § 1786(f)(8)(a) (granting fair hearing rights to aggrieved parties); 7 C.F.R. § 246.9 (describing the hearing right).

[32] Although the contours of "the opportunity to be heard" have remained fixed for public benefits recipients since *Goldberg*, other aspects of recipients' due process rights continued to evolve during the 1970s and early 1980s. *See infra* note 116.

[33] In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended primarily in scattered sections of 42 U.S.C.), lawmakers brushed aside the existing welfare law and replaced it with an entirely new program. *See infra* Section II.A.

[34] *See infra* Section I.C.

sided in the 1980s: having registered their views on *Goldberg*'s fair hearing right and *Mathews*'s cost-benefit approach to procedural due process, legal academics shifted their focus elsewhere as this intersection of constitutional law and administrative procedure was no longer undergoing the dramatic developments of the prior decade.

With a stable legal doctrine, an ossified set of procedural protections, and a lack of recent attention from legal scholars, it might appear that there is little left to say about procedural due process and the right to a fair hearing. Yet public benefits programs have evolved in unanticipated ways since the Supreme Court ruled on the due process rights of welfare recipients decades ago.[35] The 1996 federal welfare law fundamentally altered the administration of welfare, introducing strong incentives to trim the rolls, a new emphasis on discretionary decisionmaking, and new opportunities for privatization.[36] Technological advances have enabled welfare agencies to process applications and issue benefits more quickly, while at the same time increased reliance on automation has led to erroneous terminations that are difficult to challenge.[37] Welfare work requirements have increased the proportion of recipients holding jobs while collecting benefits, forcing many to choose between forgoing their due process rights and potentially jeopardizing their employment by missing work to appear at a hearing.[38] Cuts in funding for legal services have made the prospect of free legal representation at fair hearings remote.[39] By undermining many of the factual assumptions that originally justified the right to a fair hearing, these changes in the facts and circumstances of welfare programs and welfare recipients have increased the risk that benefits will be erroneously terminated.

This Article argues that the demands of due process must adapt to changing facts and circumstances. Importantly, I do not suggest that the *Mathews* approach be abandoned in favor of some other method of determining whether specific procedures satisfy due process of law. Numerous scholars have proposed alternatives to the *Mathews* approach, and many of those proposals remain compelling today.[40] Instead, by examining changes in the context of welfare, this Article considers

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[35] *See infra* Part II.

[36] *See infra* Section II.A.

[37] *See infra* Section II.C.

[38] *See infra* subsection II.B.1.

[39] *See infra* subsection II.B.2.

[40] *See infra* Section I.C.

when such changes require a reweighing of the *Mathews* factors, which in turn may result in due process dictating a different set of procedures.

The notion that changes in facts and circumstances could require reevaluation of the *Mathews* factors may seem obvious, but the Supreme Court has not directly addressed whether or how such a reevaluation should take place. Nor have legal scholars examined how to apply *Mathews* when procedures that once satisfied due process may no longer do so. It is almost as if a procedural regime that has been established in accordance with *Mathews* is considered final and no longer worthy of constitutional scrutiny. Indeed, aside from the *Huggins* and *Mayers* decisions discussed above, due process challenges based on changing facts and circumstances appear to be absent from the post-*Mathews* case law.

This Article's examination of the adaptability of procedural due process provides an essential supplement to the due process analysis adopted by the Supreme Court in *Mathews*. By identifying changes relevant to the due process calculation and by providing a doctrinal basis for taking these changes into account when determining whether existing procedures continue to satisfy due process, this Article outlines an approach to procedural due process that is faithful to current doctrine and adaptable to changes that arise in the years and decades after a procedural system is put into place.

Part I of this Article outlines the current state of procedural due process doctrine and the right to a fair hearing. It begins by providing an overview of the Supreme Court's due process jurisprudence as it relates to government benefits programs, with a focus on the due process revolution of the 1970s and the Court's decisions in *Goldberg* and *Mathews*. It then explains how local, state, and federal agencies responded to these doctrinal developments, with particular emphasis on the evolution of the welfare fair hearing system. Finally, Part I reviews the scholarly critiques of *Goldberg*'s right to a fair hearing and *Mathews*'s cost-benefit approach to procedural due process, as well as recent legal scholarship on procedural due process in the administrative state.

Part II identifies aspects of welfare that have undergone significant changes since the Supreme Court established the right to a fair hearing in 1970. This Part examines (1) changes in incentives to terminate benefits, including new funding mechanisms, shifts toward discretionary decisionmaking, and the rise of privatization; (2) changes in the circumstances of welfare recipients, including the increased proportion of recipients holding jobs while collecting benefits and the decreased availability of legal representation at fair hearings; and

(3) changes in technology, including the rise of automated eligibility determinations and computerized case management systems. For each of these categories, the changes represent a significant departure from the facts and circumstances in existence (or understood to be in existence) in the 1970s, and those changes have created procedural needs that did not exist when *Goldberg* was decided. Furthermore, because these changes affect one or more of the *Mathews* factors, they call into question whether the procedural safeguard demanded by due process in 1970—the right to a fair hearing—continues to satisfy due process today.

Part III explores how courts should respond to claims that changing facts and circumstances undermine the constitutionality of procedural safeguards previously deemed to satisfy due process. After noting the lack of clear precedent on this point, this Part revisits the *McCahey-Huggins-Mayers* example and identifies different paths that could be taken in response to such challenges. Then, through a close examination of the Supreme Court's procedural due process case law, this Part argues that an approach to procedural due process that accounts for new facts and circumstances is faithful to established doctrine. Returning to the welfare context, this Part identifies procedural innovations that respond to the new needs of welfare recipients identified in Part II. This Part then considers the limits of the right to a fair hearing and suggests alternative approaches to achieving procedural fairness in the administration of welfare programs. I conclude by arguing that adapting the demands of due process to changing facts and circumstances is not only necessary to ensure that existing procedures continue to withstand constitutional scrutiny, but it also provides an opportunity, four decades after the due process revolution, to reinvigorate procedural due process for a rapidly changing world.

I. FROM REVOLUTION TO STAGNATION: *GOLDBERG*, *MATHEWS*, AND THE RIGHT TO A FAIR HEARING

Two Supreme Court decisions in the 1970s altered the reach and requirements of due process in fundamental ways. In *Goldberg v. Kelly*, the Court expanded the scope of what counts as "property" under the Due Process Clause and held that welfare recipients have a right to a fair hearing before the government terminates their welfare benefits.[41]

[41] *See* 397 U.S. 254, 262 n.8 (1970); *see also id.* at 264 ("[O]nly a pre-termination evidentiary hearing provides the recipient with procedural due process.").

Goldberg touched off a "due process explosion" in which procedural due process requirements were extended to cover many types of government action unrelated to welfare terminations.[42] Then, six years after deciding *Goldberg*, the Court in *Mathews v. Eldridge* adopted what remains the general approach for determining what process is due when the government seeks to deprive an individual of a constitutionally protected interest.[43]

This Part outlines the current state of procedural due process and the right to a welfare fair hearing. Beginning with the Court's decisions in *Goldberg* and *Mathews*, it traces the evolution of due process doctrine in the context of welfare terminations. It then explains how local, state, and federal agencies responded to these doctrinal developments, with particular emphasis on the evolution of the welfare fair hearing system. Finally, this Part reviews the scholarly critiques of *Goldberg*, *Mathews*, and the right to a fair hearing, as well as the more recent legal scholarship on procedural due process in the administrative state.

A. Goldberg v. Kelly *and* Mathews v. Eldridge

The due process revolution of the 1970s began with the Supreme Court's decision in *Goldberg v. Kelly*.[44] With Justice Brennan writing for the seven-member majority, the Court first held that welfare benefits are a form of property subject to due process protections.[45] This hold-

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[42] Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1268 (1975); *see also id.* ("[T]he Court has carried the hearing requirement from one new area of government action to another."). This explosion led to a sharp increase in due process litigation. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 9-10 (1985) (noting that "federal court complaints of procedural due process deprivation in the 1970s showed a 350 percent increase over the 1960s," compared to a seventy percent increase in federal civil litigation of all kinds).

[43] *See* 424 U.S. 319, 335 (1976) (listing three factors to be considered in deciding what due process requires in a given situation).

[44] *See* MASHAW, *supra* note 42, at 33 ("[B]y most accounts the due process revolution began with the Supreme Court's opinion in *Goldberg v. Kelly* . . . .").

[45] *Goldberg*, 397 U.S. at 262. In reaching this conclusion, the Court invoked the concept of "new property." *See id.* at 262 n.8 (advocating recognition of "welfare entitlements as more like 'property' than a 'gratuity'" despite the fact that they "do not fall within traditional common-law concepts of property" (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965))); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)). The idea that welfare recipients have a "right" to benefits was initially promoted by social workers and lawyers working within the federal social welfare bureaucracy in the years immediately following passage of the Social Security Act of 1935. *See* Karen M. Tani, *Welfare and*

ing represented a significant expansion of the definition of "property," as that term is used in the Constitution.[46] *Goldberg* thus provided support for extending due process protections previously afforded only to deprivations of traditional forms of property to many other governmental actions.[47]

After ruling that welfare was a constitutionally protected property interest, the Court proceeded to hold that recipients are entitled to a hearing before, not after, their benefits are terminated.[48] The Court justified its demand for pretermination procedures by highlighting the importance of welfare benefits to recipients[49] and to society at large.[50] Turning to the contours of the hearing, the Court emphasized that the procedures must be "adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved,"[51] and that the hearing "must be tailored to the capacities and circumstances of those who are to be heard."[52] Mindful of these considerations, the Court held that, in the welfare context, due pro-

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Rights Before the Movement: Rights as Language of the State, 122 YALE L.J. (forthcoming 2012) (manuscript at 17-25) (on file with author).

[46] Although the government defendant and the United States as amicus did not dispute that due process applied in *Goldberg*, "because Justice Brennan goes beyond the parties' concession to explain why due process applies to welfare termination, the opinion is now read as setting the Court on the path of modern due process doctrine." PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 791 (10th ed. rev. 2003).

[47] *See supra* note 42 and accompanying text; *see also* Albert H. Meyerhoff & Jeffrey A. Mishkin, *Application of* Goldberg v. Kelly *Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549, 550-51 (1974) ("Once [due process] protections . . . were extended to the deprivation of welfare benefits, there were other obvious targets.").

[48] *Goldberg*, 397 U.S. at 264.

[49] According to the Court, the "crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 264. The Court recognized that "welfare provides the means to obtain essential food, clothing, housing, and medical care." *Id.* (footnote omitted). It further noted that without benefits, a recipient must "concentrate upon finding the means for daily subsistence, [which] adversely affects his ability to seek redress from the welfare bureaucracy." *Id.* (footnote omitted).

[50] The Court explained that uninterrupted provision of welfare benefits to eligible recipients serves important governmental interests, including enabling the poor "to participate meaningfully in the life of the community" and guarding against "the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." *Id.* at 265.

[51] *Id.* at 267.

[52] *Id.* at 268-69 (footnote omitted).

cess requires a pretermination hearing consisting of the following minimum procedural safeguards: notice detailing the reasons for the proposed termination;[53] the opportunity at the hearing to confront and cross-examine witnesses, to present oral arguments, and to be represented by counsel;[54] and adjudication by an impartial decisionmaker.[55]

Six years after *Goldberg*, the Court decided a case that looked in many respects quite similar. In *Mathews v. Eldridge*, the plaintiff relied on *Goldberg*'s pretermination hearing requirement to argue that the discontinuation of his Social Security disability benefits without a pretermination hearing violated the Due Process Clause.[56] The Court rejected the claim, distinguishing disability benefits from welfare benefits and holding that the post-deprivation procedures available to recipients of disability benefits were sufficient to satisfy due process.[57]

In reaching its holding in *Mathews*, the Court adopted a new approach to determining what procedures are required by the Due Process Clause when the government seeks to deprive an individual of a constitutionally protected interest:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[58]

The *Mathews* Court's cost-benefit approach to procedural due process represented a significant departure from the analysis used in *Goldberg*. Yet *Mathews* left untouched *Goldberg*'s central holding, and it quoted with approval *Goldberg*'s view that procedures must be "tailored . . . to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to pre-

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[53] *Id.*

[54] *Id.* at 269-70.

[55] *Id.* at 271.

[56] 424 U.S. 319, 324-25 (1976).

[57] The Court identified the following differences as relevant to its determination: eligibility for disability benefits is not based upon financial need, *id.* at 340; other forms of government assistance are available when the termination of disability benefits places an individual or his family below the subsistence level, *id.* at 342; and the risk of error is substantially lower than in the welfare context, *id.* at 344-45.

[58] *Id.* at 335 (citing *Goldberg*, 397 U.S. at 263-71).

sent their case."[59] And despite fears that the *Mathews* decision laid the foundation for a disavowal of *Goldberg*'s right to a pretermination fair hearing, the Court has continued to cite *Goldberg* in decisions involving due process claims.[60]

B. *Implementation of the Due Process Revolution and the Right to a Fair Hearing*

In response to the Supreme Court's rulings in *Goldberg* and *Mathews*, federal, state, and local administrative agencies adjusted existing procedures and created new ones in order to satisfy the requirements of due process. In the context of welfare benefits, agencies adopted procedures matching those articulated in *Goldberg*. For other types of property interests, agencies looked to *Goldberg*, and later to *Mathews*, to design the requisite procedural safeguards. The hallmark of those procedures was the fair hearing.

Government agencies were not altogether unfamiliar with fair hearings prior to *Goldberg*. Indeed, some public benefits programs made hearings available to individuals challenging benefit terminations well before *Goldberg*.[61] The Social Security Act of 1935 included a provision requiring states to offer hearings to beneficiaries of Aid to Dependent Children[62] (later renamed Aid to Families with Dependent Children[63]). Congress included similarly worded hearing requirements when it

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[59] *Id.* at 349 (quoting *Goldberg*, 397 U.S. at 268-69).

[60] See, for example, *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 60 (1999), which cites both *Goldberg* and *Mathews* in determining whether an individual has a property interest in state medical benefits.

[61] *See* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1191 (2000) ("[T]he idea of using hearings in public benefit programs as a means of correcting errors in individual cases long predates the decision in [*Goldberg*].").

[62] *See* Pub. L. No. 74-271, § 402(a)(4), 49 Stat. 620, 627 (1935) (repealed 1996) (requiring that state plans for the Aid to Dependent Children program to "provide for granting to any individual, whose claim with respect to aid to a dependent child is denied, an opportunity for a fair hearing before such State agency"); *see also* A. Delafield Smith, *Public Assistance as a Social Obligation*, 63 HARV. L. REV. 266, 268 (1949) ("All three of the federal [public assistance] titles require the state, as one of the conditions of the federal grants, to give the applicant the opportunity of a fair hearing before the state administrative agency." (footnotes omitted)). *See generally* Tani, *supra* note 45 (manuscript at 21-25) (describing discussions during 1935 and 1936 among lawyers working within the federal social welfare bureaucracy concerning the meaning of the Social Security Act's fair hearing provision).

[63] *See infra* note 124.

established the Medicaid program in 1965[64] and modified the food stamp program in 1977.[65] Yet public benefits recipients rarely requested fair hearings until the late 1960s,[66] when hearings became a focal point for the nascent welfare rights organizing movement and federally funded legal services attorneys began representing significant numbers of welfare applicants and recipients.[67]

The welfare fair hearing systems that arose during the 1970s hewed closely to the guidelines set forth by the Supreme Court in *Goldberg*.[68]

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[64] *See* Grants to States for Medical Assistance Programs Act, Pub. L. No. 89-97, 79 Stat. 343 (1965) (codified as amended at 42 U.S.C. § 1396a(a)(3) (Supp. III 2010)) (requiring that state plans for medical assistance "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness").

[65] *See* Food Stamp Act of 1977, Pub. L. No. 95-113, § 11(e)(10), 91 Stat. 913, 972 (codified as amended at 7 U.S.C. § 2020(e)(10) (2006)) (requiring that a state plan of operation provide for a "fair hearing and prompt determination thereafter to any household aggrieved by the action of the State agency").

[66] *See* FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 70 (2007) ("Fair hearings were rarely used by clients of public assistance in the thirty years after passage of the Social Security Act."); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 173 (2d ed. 1993) ("In 1964, when the over-all welfare rolls stood at about 500,000 persons in New York City, *a mere fifteen appeals were taken in an entire year.*"); *see also* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1857 (2001) (noting that the fair hearing provisions of the Social Security Act of 1935 "had been dormant for the Act's first thirty years"); Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. ON POVERTY L. & POL'Y 13, 31-32 (2005) (discussing the extremely limited use of fair hearings prior to *Goldberg*).

[67] *See* KORNBLUH, *supra* note 66, at 73 (stating that in the mid-1960s, "[f]air hearings became an integral part of the strategy of the [New York City] and national welfare rights movements"). The number of fair hearings held per year in New York State reflects the growing use of fair hearings. There were 188 fair hearings in New York State in 1964, that number rose to 650 in 1966, and 4233 in 1967, when requesting fair hearings became a central element of the welfare rights strategy in New York City. *Id.*

[68] *See, e.g.*, Robert E. Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725, 733 (1972) (explaining that the federal hearing requirements adopted shortly after *Goldberg* "incorporate[d] the *Goldberg* guidelines by providing the claimant with the opportunity to present his position orally, to confront and cross-examine adverse witnesses, [and] to be represented by counsel or other spokesmen," and also established "the necessity for an impartial decision maker" (footnotes omitted)); *see also* Cesar A. Perales, *The Fair Hearings Process: Guardian of the Social Service System*, 56 BROOK. L. REV. 889, 889-96 (1990) (discussing New York State's implementation of *Goldberg*'s fair hearing requirement). *But see* DANIEL J. BAUM, THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE 18-23 (1974) (noting that some jurisdictions resisted the new fair hearing requirements).

The hearings were adversarial and were presided over by an impartial decisionmaker. Both welfare recipients and representatives of the welfare agency had the opportunity to present documentary and testimonial evidence. Judges based their decisions on the record created at the hearing. Fair hearings therefore resembled mini-trials, with a written decision that parties typically could appeal to some higher level of authority.

Goldberg's influence extended well beyond welfare fair hearings, as its rationale for classifying welfare benefits as a property right was extended to other benefits conferred by the government.[69] Thus, a wide range of benefits programs administered by federal, state, and local agencies were understood to be "new property" and subject to *Goldberg*'s fair hearing requirement.[70] Some statutory and administrative regimes even mandated fair hearing–like procedures in areas where due process may not have required them to do so.[71]

So too has *Mathews* had an impact far beyond the narrow question presented in that case. According to the Supreme Court, *Mathews* offers "a general approach" for testing challenged procedures under a due process claim.[72] The Court has subsequently applied *Mathews*'s three-factor analysis in a variety of contexts unrelated to public bene-

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[69] *See, e.g.*, Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1977-78 (1996) ("In a single opinion the Court transformed welfare, and potentially all other forms of government benefits, from a mere privilege completely unprotected by due process to a property right subject to the most stringent procedural safeguards available in the United States legal system.").

[70] *See* JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 21 (1986) ("*Goldberg v. Kelly* struck a responsive chord and was picked up in many statutory and administrative schemes—welfare, Social Security, disability, mental health, education."); *see also supra* notes 28-31.

[71] *See, e.g.*, Diller, *supra* note 61, at 1191 ("The reliance on hearings is so ingrained that Congress has provided for pretermination hearings even in situations in which the Court has concluded that they are not required by due process."). For example, "Congress provided for [a right to a pretermination hearing] in the context of Social Security disability benefits, even though the Court in *Mathews v. Eldridge* held that the Due Process Clause did not prohibit the Social Security Administration from terminating benefits prior to holding a hearing." *Id.* at 1191 n.365 (citations omitted); *cf.* HANDLER, *supra* note 70, at 21 ("Many areas of relationships between clients and agencies are governed by statutory and administrative procedural schemes that were adopted during the *Goldberg v. Kelly* era, but are now no longer constitutionally required.").

[72] Parham v. J.R., 442 U.S. 584, 599 (1979). *But cf.* Dusenbery v. United States, 534 U.S. 161, 167-68 (2002) (declining to use the *Mathews* approach to evaluate a due process challenge to the adequacy of a method of giving notice, and observing that "we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims").

fits terminations, including terminations of parental rights,[73] involuntary civil commitments to mental hospitals,[74] civil forfeitures,[75] detention of citizens as enemy combatants,[76] immigration deportation proceedings,[77] and terminations of public employment.[78] The Court has even used the *Mathews* balancing approach to analyze claims under the Constitution's Suspension Clause.[79]

C. *Praise and Criticism of the Right to a Fair Hearing*

While federal, state, and local agencies assessed their obligations under the Court's evolving understanding of procedural due process, legal scholars began to consider the changes to due process doctrine ushered in by *Goldberg* and *Mathews*. Between 1970 and 1990, scholars of constitutional, administrative, and poverty law explored many aspects of *Goldberg*'s right to a fair hearing, including its effect on the welfare rights movement, its ability to protect individual rights, and its capacity to change the behavior of welfare agencies and caseworkers. This debate over procedural justice remains relevant today.

The Supreme Court's recognition of the right to a fair hearing was initially hailed as a major victory for welfare recipients and the welfare rights movement.[80] Securing the right to a pretermination fair hearing was an important element of the organizing campaign around poverty issues in the late 1960s and early 1970s.[81] At its most basic level, the fair hearing right provided protection for claimants who talked back to

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[73] *See* Santosky v. Kramer, 455 U.S. 745, 758-68 (1982).

[74] *See* Addington v. Texas, 441 U.S. 418, 425-27 (1979).

[75] *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 53-61 (1993).

[76] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 528-35 (2004).

[77] *See* Landon v. Plasencia, 459 U.S. 21, 34-37 (1982).

[78] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543-45 (1985).

[79] *See* Boumediene v. Bush, 553 U.S. 723, 781-82 (2008).

[80] *See, e.g.*, Edward V. Sparer, *The Right to Welfare* (characterizing *Goldberg* as the "leading judicial advance with regard to welfare procedures," and explaining that "*Goldberg* can be a major tool in aiding organized recipients to deal boldly with the welfare departments without fear (or with less fear) of retaliation by cutoff"), *in* THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 63, 71-72 (Norman Dorsen ed., 1971).

[81] Taking the *Goldberg* case to the Supreme Court was "part and parcel of the organizing strategy of the welfare rights movement, designed to amplify the organized forces—particularly the organized welfare recipient forces—of the movement." Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 562 (1984) (emphasis omitted).

and resisted welfare caseworkers.[82] Many in the movement also believed that fair hearings would be a pressure point for securing more generous benefits and a stronger safety net for low-income individuals and communities.[83] According to historian Felicia Kornbluh, "[F]air hearings were a form of 'legal civil disobedience,' which was safer than a public sit-in or a march on the state welfare office."[84]

On an individual level, the Court's fair hearing requirement marked a shift in the manner in which many welfare recipients interacted with the government and the legal system. As Sylvia Law observed, poor people in the 1960s not only had "no process . . . but, in a fundamental sense, they had no law."[85] *Goldberg* altered this dynamic. Fair hearings enabled welfare recipients to have their demands for material aid taken seriously, to claim standing in the legal and political life of the postwar United States, and to force their caseworkers to listen.[86] By allowing welfare recipients to challenge the evidence pre-

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[82] *See id.* at 563 ("[T]he particular legal right involved a recognition of the fundamental human right of the recipient to dissent and resist . . . ." (emphasis omitted)).

[83] *See* KORNBLUH, *supra* note 66, at 70-87 (describing how fair hearings can "help resource-poor social movement groups" and allow "participat[ion] in a respectful public forum"). However, any hope that the legal system could help recipients obtain more generous benefits was dashed two weeks after *Goldberg* was decided, when the Court handed down its decision in *Dandridge v. Williams*, 397 U.S. 471 (1970). According to the Court:

> [T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487 (internal citations omitted); *see also* Forbath, *supra* note 66, at 1867 ("[I]n *Dandridge v. Williams*, the Court made plain that generous, justice-seeking statutory constructions and formal and procedural protections were as far as it would go in 'promoting the general Welfare' with welfare rights . . . .").

[84] KORNBLUH, *supra* note 66, at 66. The fair hearing strategy, and the welfare rights movement in general, faded by the early 1970s, when "[t]he rising conservative and antiwelfare mood called into question the idea that poor people could gain justice and protect their 'human rights' by going to court." *Id.* at 175; *see also id.* at 174 (explaining that by the mid-1970s, "women and men who participated in welfare rights battles were increasingly conscious of the weaknesses of legal strategies such as fair hearings").

[85] Sylvia A. Law, *Some Reflections on* Goldberg v. Kelly *at Twenty Years*, 56 BROOK. L. REV. 805, 806 (1990).

[86] *See* KORNBLUH, *supra* note 66, at 76 ("When they sought and pursued fair hearings, welfare recipients expressed their desires for material aid and for recognition as members of the society in which they lived." (citing Nancy Fraser, *From Redistribution*

sented by the government and to produce their own evidence to oppose the termination of benefits, fair hearings provided an opportunity for recipients to participate in the decisionmaking process in a way that was not previously available.[87] Moreover, requiring a government agency to prove its case before terminating a recipient's benefits showed respect for the humanity and dignity of welfare recipients.[88]

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to Recognition?: Dilemmas of Justice in a "Postsocialist" Age, *in* JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 11, 39 (1997))); David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 288 (1998) ("For many benefit recipients, the fair hearing is the only time their claim is treated with any seriousness by any state official."); *cf.* KORNBLUH, *supra* note 66, at 79 ("The fair hearing campaign gave many poor people a taste of the negotiating power that wealthier individuals typically gained from raising the threat of litigation and settling their cases without going to court.").

[87] *See* KORNBLUH, *supra* note 66, at 80 (explaining that fair hearings created an opportunity for individual recipients to "participate in a respectful public forum that recognized their rights"). Many scholars have argued that fair hearings provide a valuable opportunity to participate in administrative decisionmaking. *See, e.g.*, Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 888-93 (1981) (emphasizing the importance of an individual's right to participate in decisions affecting her in important ways); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process* (explaining the importance of "process values" such as participation in administrative decisionmaking), *in* DUE PROCESS: NOMOS XVIII 126, 127-28 (J. Roland Pennock & John W. Chapman eds., 1977); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 148-51 (1978) (suggesting a process evaluation method that would grant independent significance to due process itself); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 13 (1974) (noting that legal processes should be evaluated for such factors as "process value efficacy" in addition to "good result efficacy").

As Frank Michelman has explained:

> The individual may have various reasons for wanting an opportunity to discuss the decision with the agent. Some pertain to external consequences: the individual might succeed in persuading the agent away from the harmful action. But again a participatory opportunity may also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.

Michelman, *supra*, at 127-28.

[88] *See* Kennedy, *supra* note 86, at 287 (noting that hearing rights "are significant . . . because they fulfill dignitary values"); Mashaw, *supra* note 87, at 886-98 (discussing analyses of due process that focus on "the degree to which decisional processes preserve and enhance human dignity and self-respect"); Perales, *supra* note 68, at 892 (stating that the "*Goldberg* promise" is to "afford[] the dignity of being listened to, of being taken seriously"). *See generally* Diller, *supra* note 61, at 1203 n.418 (summarizing the "extensive literature arguing that fair process is a fundamental form of respect for humanity").

The Court's fair hearing requirement was also lauded for its potential to promote government accountability. Following *Goldberg*, welfare caseworkers knew that their decisions were no longer without oversight. Recipients could challenge the decisions and compel the agency to identify and turn over the evidence supporting its determinations. In this sense, the right to a fair hearing was seen as creating incentives to improve accuracy in agency decisionmaking.[89] In the words of Robert Rabin, *Goldberg* served as "a strong declaration that a search for the Right Answer was paramount, and that agencies would be required, whatever the literal terms of their statutory mandates, to establish processes reducing the risk of error to an absolute minimum."[90]

Yet despite the short-term victory and long-term promise represented by *Goldberg*, the right to a fair hearing was subject to considerable criticism.[91] Some scholars believed the Court's view of procedural due process was unduly narrow. For example, Judge Henry Friendly assailed the hearing requirement for imposing inflexible standards on welfare administrators and foreclosing experimentation with other forms of procedural safeguards.[92] For public benefits such as welfare, Judge Friendly argued that the Court too quickly adopted an adversarial hearing model rather than allowing welfare administrators to experiment with more investigative or inquisitorial approaches to adjudication.[93]

Other scholars exposed the limits of the fair hearing right. Arguing that merely making fair hearings available does not guarantee that erroneous deprivations of property rights will be overturned, Joel Handler identified the many conditions that must be satisfied before a welfare recipient can successfully challenge an erroneous decision at a

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[89] *See* Kennedy, *supra* note 86, at 287 (arguing that fair hearing rights are significant because, inter alia, they "improve the accuracy of agency determinations"); David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1065 (2005) ("[O]ne advantage of the adversarial system may be its accuracy . . . .").

[90] Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1314 (1986).

[91] *See generally* Forbath, *supra* note 66, at 1856 ("The right to a hearing has not been treated kindly by critical legal scholars looking back on *Goldberg v. Kelly* and the welfare rights movement.").

[92] *See* Friendly, *supra* note 42, at 1269 (criticizing "the tendency to judicialize administrative procedures").

[93] *See id.* at 1316 ("There is need for experimentation, particularly for the use of the investigative model, for empirical studies, and for avoiding absolutes.").

fair hearing. According to Handler, the recipient must know that a wrong has been committed, know that there is a remedy, have the resources to pursue the remedy, and calculate that the benefits of victory will outweigh the costs of trying.[94] If any one of these conditions is not met, the right to a fair hearing is useless and the erroneous deprivation will stand.[95]

Scholars also criticized the Court's reliance on fair hearings as the exclusive means for welfare recipients to exercise their due process rights. As Lucie White explained, even when recipients request a fair hearing, feelings of intimidation and fear of retaliation can prevent recipients from speaking freely and participating fully in the hearing process—especially when they lack economic security and independence.[96] Relatedly, White questioned whether the right to a fair hearing actually compelled the government to treat welfare recipients with dignity[97] or addressed recipients' feelings of subordination or oppression.[98]

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[94] HANDLER, *supra* note 70, at 22; *see also id.* at 22-34 (noting internal and external barriers that may prevent an average person from successfully asserting a due process claim).

[95] *See id.* at 22. According to Handler, "It seems self-evident that the poor, minorities, the poorly educated, the newcomer, the frightened, the mentally ill, the sick, and other disadvantaged are not only more likely to suffer distress and injustice than those better off, but are also less likely to negotiate the antecedents of disputes." *Id.* at 24 (internal citation omitted).

[96] *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, 54 (1990). As White notes:

> In order to feel safe to speak out at a hearing, . . . [the recipient] needs more than *post hoc* remedies against overt acts of retaliation. She also needs to feel economically secure, economically independent. . . . The social policies that might create such conditions are vigorously contested, and the political will that might enact them is not apparent. Without such economic security, however, *post hoc* measures to deter retaliation will never fully dismantle the barrier that intimidation imposes to her speech.

Id.; *see also id.* at 52 ("[R]emoving formal barriers to participation is not enough in our stratified society to achieve procedural justice, even in the modest sense of enabling all persons to participate in the rituals of their self-government on an *equal* basis.").

[97] *See* Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 887 (1990) ("Constitutionalizing welfare procedures has not done very much to imbue the welfare system with the norms of human dignity that the *Kelly* decision rhetorically endorsed.").

[98] *See id.* at 872 (arguing that lawyer-engineered remedies like *Goldberg* "still do not challenge the lived experience of subordination—the experience, that is, of other people controlling the terms of one's life"); *see also* William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777, 787 (1990) (claiming that, with respect to the dignity of welfare beneficiaries, the *Goldberg*

Looking beyond the hearing room, scholars disputed the extent to which the right to a fair hearing could prevent erroneous deprivations of benefits from happening in the first place. Fair hearings do not address barriers that prevent eligible individuals from applying for welfare in the first instance.[99] But scholars also contended that even after an individual submits an application, fair hearings provide "a very unsystematic check on the quality of initial adjudications of claims,"[100] and do not sufficiently deter improper or illegal welfare policies.[101] And, of course, "fair hearings are virtually useless where a claimant was denied in technical compliance with the agency's own rules."[102]

Somewhat counterintuitively, the fair hearing right was also attacked for harming welfare recipients. After *Goldberg*, some welfare administrators attempted to streamline fair hearing procedures in ways that resulted in less, not more, procedural protection for recipients.[103]

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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").

[99] *See* Simon, *supra* note 98, at 786 ("[S]ome eligible beneficiaries do not even make it into the administrative sphere because they lack the information or resources needed to file an application."); White, *supra* note 97, at 868-69 ("[T]he [*Goldberg v.*] *Kelly* remedy does not even reach the front end of the [welfare application] process, where a variety of tactics are used to screen out income-eligible applicants on procedural grounds, and to discourage others from seeking welfare at all." (footnotes omitted)).

[100] Jerry L. Mashaw, *The Management Side 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, 787 (1974).

[101] *See id.* at 776-91 (arguing that fair hearings are unable to ensure accurate, fair, and timely adjudications of welfare benefit claims); Super, *supra* note 89, at 1086 ("Over time, the fair-hearing system has shown significant limitations in policing eligibility workers' behavior."); White, *supra* note 97, at 868 (arguing that fair hearings are a "weak deterrent against illegal welfare policies" and that "[a] trickle of fair hearings will not deter a welfare agency from systematically misreading the law, particularly when the error will reduce welfare costs"). According to William Simon, in places with high appeal rates like New York City, the fair hearing system "seems to have the perverse effect of reducing pressure for general administrative reform . . . . Rather than correcting errors or trying to get their superiors to do so, the workers tell the beneficiaries to take their claims to hearing." Simon, *supra* note 98, at 787.

[102] David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 835 n.57 (2004). For example, fair hearings are of little value to a recipient "if a broken-down city bus prevents [her] from arriving at an interview and the program's rules make no provision for rescheduling" or "[i]f [she] misunderstood the eligibility worker or an agency form and missed a deadline." *Id.*

[103] *See* KORNBLUH, *supra* note 66, at 176 (observing that post-*Goldberg* "[f]air hearings were routinized and sped up, making it more difficult for recipients to

William Simon and Jerry Mashaw argued that the Supreme Court's focus on fair hearings prompted systemic changes in welfare administration that ultimately threatened the interests of recipients,[104] while others claimed that *Goldberg*'s right to a fair hearing has masked injustices that plague the administration of welfare benefits.[105]

Lastly, the welfare recipients' victory in *Goldberg* did not have the effect sought by members of the welfare rights movement. In one sense, the right to a fair hearing came too late—by the early 1970s, the fair hearing campaigns of the 1960s had mostly run their course and the welfare rights movement was in retreat.[106] Indeed, *Goldberg* was soon

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challenge the bureaucracy by asserting their rights to appeal" (citing BAUM, *supra* note 68, at 39-40)).

[104] Mashaw described the post-*Goldberg* situation—in particular, the collision of rapidly increasing welfare rolls and states' unwillingness to provide more funding for hearings or benefits—as follows:

> A strategy was needed that would preserve fiscal integrity and produce defensible decisions.
>
> A number of tactical moves ultimately comprised the grand design. One was to tighten up and slow down the initial eligibility determination process. Another was to generalize and objectify the substantive eligibility criteria so that messy subjective judgments about individual cases would not have to be made and defended. This move led to the realization that professional social welfare workers were no longer needed. Costs could be reduced further by lowering the quality of the staff and by depersonalizing staff-claimant encounters. If these reactions were not sufficient to restore fiscal balance, then payment levels could be reduced or allowed to remain stable in the face of rising prices. . . . Moreover, because hearings presumably protected the claimants' interests, internal audit procedures were skewed to ignore nonpayment and underpayment problems and concentrate on preventing over-payments and payments to ineligibles.

MASHAW, *supra* note 42, at 34.

According to Simon, the "administrative changes that accompanied the emergence of the hearing system severely threaten beneficiary interests. At worst, they encourage denials of benefits to eligible beneficiaries. . . . 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." Simon, *supra* note 98, at 786; *see also* William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1201-19 (1983) (describing the shift toward a more formalistic administration of welfare programs).

[105] *See* Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 708-09 (1980) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)) (claiming that *Goldberg* deflected advocates "into a fruitless struggle against a bureaucracy that readily swallowed the Court-prescribed dose of due process without any change in symptoms, and . . . bolster[ed] the idea that fairness was not far away in the American welfare state").

[106] *See* KORNBLUH, *supra* note 66, at 176 ("From the perspective of welfare rights activists, Justice Brennan's affirmation of the right to a pre-termination fair hearing

derided for gaining little of substance for welfare recipients and, even worse, diverting energy from the movement.[107]

Turning briefly to *Mathews*, scholars from across the political spectrum questioned the Court's adoption of a utilitarian balancing approach to determine how much process is due in a particular situation. Conservative scholars argued that it was inappropriate for judges to determine what process is due.[108] Under the positivist view of procedural due process, for example, Judge Easterbrook claimed that the procedures required by the Due Process Clause must be limited to those procedures specified by existing state and federal laws.[109] Similarly, Richard Epstein argued that court-ordered fair hearings and

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came too late to do the work that they had planned for it. Although the hearings were a longstanding demand, [*Goldberg*] was overwhelmed by defeats that came at virtually the same moment."). The welfare rights movement depended on society's responding liberally to pressure on welfare agencies. *See* Richard A. Cloward & Frances Fox Piven, *The Weight of the Poor: A Strategy to End Poverty*, NATION, May 2, 1966, at 510, 510 (describing a welfare rights strategy that involved, inter alia, using fair hearings to overwhelm the welfare system and prompt antipoverty legislation). However realistic that might have been in the mid- or late-1960s, the election and reelection of President Nixon showed that such a response was unlikely. Indeed, by the time Nixon's Family Assistance Plan was defeated in 1971, it was clear that any changes to the existing welfare system would be to make welfare less, not more, generous. *See generally* KORNBLUH, *supra* note 66, at 148-60 (discussing the Nixon Administration's shift toward a more conservative welfare policy).

[107] *See, e.g.*, Forbath, *supra* note 66, at 1856 (arguing that the right to a fair hearing has become "a quintessential lawyer's process-based reform, easily routinized within the welfare bureaucracy, its pursuit sapping movement energy and gaining nothing of substance").

[108] *See, e.g.*, Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 109-19 (discussing different approaches to determining what process is due).

[109] *See id.* at 125 ("Giving judges this power of revision may be wise or not. The Court may design its procedures well or poorly. But there is no sound argument that this is a legitimate power or function of the Court."). This argument has been referred to as the "bitter with the sweet" approach to procedural due process. *Id.* at 86. It first arose in the plurality opinion in *Arnett v. Kennedy*. *See* 416 U.S. 134, 153-54 (1974) ("[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."). However, this approach was specifically rejected by six Justices. *See id.* at 166-67 (Powell, J., joined by Blackmun, J., concurring); *id.* at 177-78, 185 (White, J., concurring in part and dissenting in part); *id.* at 211 (Marshall, J., joined by Douglas and Brennan, JJ., dissenting). The Court ultimately rejected the approach in *Cleveland Board of Education v. Loudermill*. 470 U.S. 532, 541 (1985); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457-68 (1986) (challenging the positivist view of procedural due process).

other such procedures resulted from a misguided effort to micromanage administrative agencies.[110]

At the same time, more liberal scholars assailed the instrumentalist tendencies of the *Mathews* cost-benefit approach to procedural due process. They argued that *Mathews* placed too much emphasis on efficiency,[111] disregarding "process values,"[112] and focusing on "subsidiary issues rather than the essence of the due process guarantee."[113] They also charged the *Mathews* approach with being impractical[114] and easy to manipulate.[115]

D. *Doctrinal Stability, Procedural Ossification, and Critical Silence*

The flurry of activity following *Goldberg* and *Mathews* did not last for long. Once local, state, and federal agencies brought their administrative procedures in line with the Court's new interpretation of procedural due process, there was little more to be done. Aside from minor alterations in response to lawsuits targeting procedural flaws in partic-

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[110] *See* Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 770-75 (1990) ("Surely it is not possible to say here that the political process has failed utterly, even from Justice Brennan's perspective, given the level of procedural protection that it did generate. Why then ask the courts to micromanage the difference?").

[111] *See, e.g.*, Redish & Marshall, *supra* note 109, at 473 ("An efficiency-oriented balancing test, therefore, weighs an inevitable and immediately recognizable administrative cost against a largely prophylactic interest in the use of specific procedural protections.").

[112] *E.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976) ("The *Eldridge* Court conceives of the values of procedure too narrowly: it views the sole purpose of procedural protections as ensuring accuracy, and thus limits its calculus to the benefits or costs that flow from incorrect decisions. No attention is paid to 'process values' . . . ."); *see also supra* note 87 and accompanying text.

[113] Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1138 (1984).

[114] *See id.* at 1136-44; *see also id.* at 1138 ("This reliance upon 'weight,' which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned."); Mashaw, *supra* note 112, at 48 (criticizing the *Mathews* approach for "ask[ing] unanswerable questions").

[115] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 674 (2d ed. 1988) (arguing that the *Mathews* balancing approach to procedural due process "not only overlooks the unquantifiable human interest in receiving decent treatment, but also provides the Court a facile means to justify the most cursory procedures by altering the relative weights to be accorded each of the three factors" (footnotes omitted)).

ular situations[116] and some experimentation with additional procedural safeguards,[117] the fair hearing procedures available today look virtually identical to those established in the wake of *Goldberg* and *Mathews*.[118]

The attention paid by scholars to procedural due process followed a similar arc. After a rich debate over the Supreme Court's approach to procedural due process in *Goldberg* and *Mathews* during the 1970s and 1980s, most scholars shifted their focus to other areas of law. Although the 1996 federal welfare law caused a spike in scholarly attention to procedural due process,[119] that interest quickly subsided. By 1998,

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[116] Challenges to welfare fair hearing procedures began immediately following *Goldberg*. *See, e.g.*, Almenares v. Wyman, 453 F.2d 1075, 1078 (2d Cir. 1971) (challenging fair hearing procedures adopted by New York City after *Goldberg* and stating that "this case begins where *Goldberg v. Kelly* ends" (citations omitted)). Some post-*Goldberg* lawsuits involved due process challenges to rules granting eligibility workers virtually unlimited and unreviewable discretion. *See, e.g.*, Carey v. Quern, 588 F.2d 230, 231 (7th Cir. 1978) (challenging rule concerning recipients' entitlement to a clothing allowance); White v. Roughton, 530 F.2d 750, 751 (7th Cir. 1976) (challenging termination of general assistance grants based on administrator's own unwritten personal standards). Others challenged the adequacy of notices used to reduce or discontinue various types of public benefits. *See, e.g.*, Cosby v. Ward, 843 F.2d 967, 969 (7th Cir. 1988) (unemployment insurance); Ortiz v. Eichler, 794 F.2d 889, 890 (3d Cir. 1986) (Aid to Families with Dependent Children (AFDC)); Alexander v. Polk, 750 F.2d 250, 252 (3d Cir. 1984) (WIC); Dilda v. Quern, 612 F.2d 1055, 1055 (7th Cir. 1980) (per curiam) (AFDC); Eder v. Beal, 609 F.2d 695, 696 (3d Cir. 1979) (Medicaid); Banks v. Trainor, 525 F.2d 837, 838 (7th Cir. 1975) (food stamps); Vargas v. Trainor, 508 F.2d 485, 486 (7th Cir. 1974) (Aid to the Aged, Blind, and Disabled).

[117] *See infra* Section III.B.

[118] *See* Telephone Interview with Jane Greengold Stevens, Dir. of Litig., N.Y. Legal Assistance Grp. (Mar. 26, 2012) (discussing her experiences representing individuals at fair hearings held during the 1970s, 1980s, 1990s, 2000s, and 2010s).

[119] Scholars offered some initial thoughts on the status of welfare recipients' due process rights after the enactment of the 1996 federal welfare law. *See, e.g.*, Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL'Y 89, 125-32 (2002) (discussing the status of welfare recipients' procedural due process rights after 1996); Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 618-23 (1998) (arguing that the 1996 law's anti-entitlement provision, 42 U.S.C. § 401 (2006), is directed at recipients' ability, accepted by the Supreme Court in *King v. Smith*, 392 U.S. 309 (1968), to enforce statutory terms and conditions against state programs, rather than individual recipients' due process rights); Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevoution*, 75 DENV. U. L. REV. 9, 36 (1997) (suggesting that, after 1996, "welfare beneficiaries may no longer be constitutionally entitled to pre-termination hearings, or to any other due process protections"); *see also infra* notes 129-31 and accompanying text.

Later, scholars examined the effect of welfare privatization on recipients' due process rights. *See, e.g.*, Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1307-10 (2003) (discussing impact of welfare privatization on due process rights); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized*

Cynthia Farina accurately referred to this silence as "a long dry spell" in the debate over procedural due process.[120]

In the meantime, *Goldberg*'s right to a fair hearing remains good law and welfare agencies continue to act accordingly. Indeed, despite the radical changes wrought by the 1996 federal welfare law, as well as new facts and circumstances that have come with the passage of time, welfare recipients' procedural due process rights are the same today as they were over forty years ago.

II. POST-*GOLDBERG* CHANGES TO THE FACTS AND CIRCUMSTANCES OF WELFARE PROGRAMS AND WELFARE RECIPIENTS

When the Supreme Court held in *Goldberg v. Kelly* that welfare recipients have a due process right to a fair hearing before their benefits are terminated, the Court chose the required procedural safeguards based on its careful consideration of the facts and circumstances as they existed in 1970.[121] The Court reaffirmed this fact-intensive approach to procedural due process six years later in *Mathews v. Eldridge*, when it adopted the three-factor balancing framework for evaluating due process claims that remains in use today.[122] During the decades since *Goldberg* and *Mathews*, welfare programs have changed in a variety of ways that affect the facts as the *Goldberg* Court understood them and that bear upon one or more of the *Mathews* factors.

The most obvious and consequential change to welfare since *Goldberg* occurred when President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[123] PRWORA abolished the open-ended, federal matching funding structure of the Aid to Families with Dependent Children

Welfare, 89 CALIF. L. REV. 569, 603-23 (2001) (discussing the enforcement of due process rights in a privatized welfare system); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1383-88 (2003) (describing the expansion of welfare privatization and how such systems may undermine constitutional accountability). *See generally* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1259 (2003) (describing privitization's struggle with maintaining accountability).

[120] Farina, *supra* note 119, at 591.

[121] Goldberg v. Kelly, 397 U.S. 254, 268-71 (1970).

[122] Mathews v. Eldridge, 424 U.S. 319, 339-49 (1976).

[123] Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended primarily in scattered sections of 42 U.S.C.).

(AFDC) program[124] and replaced it with the Temporary Assistance for Needy Families (TANF) program's fixed block grants.[125] Among its most consequential programmatic changes, PRWORA shifted significant policymaking authority from the federal government to the states,[126] instituted a five-year limit on an individual's receipt of federal cash benefits,[127] and imposed work requirements on recipients of welfare benefits.[128]

PRWORA's enactment cast doubt on the procedural due process rights that had been afforded to welfare recipients since *Goldberg*. The statute declared an end to any statutory entitlement to federal assistance,[129] sparking debate over whether welfare benefits still qualified as property interests subject to due process protection. Numerous scholars made the case for why recipients retained the right to a fair hearing established by *Goldberg*,[130] while others sought to expose the harmful consequences of weakened due process protections.[131]

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[124] The first incarnation of AFDC, Aid to Dependent Children, was created by the Social Security Act of 1935. Pub. L. No. 74-271, §§ 401–406, 49 Stat. 620, 627-629 (repealed 1996). The law was amended and renamed Aid to Families with Dependent Children in 1962. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 104(a)(1)–(5), 76 Stat. 172, 185 (codified as amended in scattered sections of 42 U.S.C.).

[125] *See* 42 U.S.C. §§ 601–619 (2006).

[126] *See id.* § 604(a)(1) (providing that states can use the TANF block grant "in any manner that is reasonably calculated to accomplish the purpose of this part"); *see also* Diller, *supra* note 61, at 1147 ("PRWORA largely permits states to design their own programs . . . ."); Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 593 (2004) (stating that in passing PRWORA, Congress "relinquished unprecedented programmatic responsibility over welfare to the states").

[127] *See* 42 U.S.C. § 608(a)(7)(A) ("A State . . . shall not use any part of the grant to provide assistance . . . for 60 months (whether or not consecutive) after the date the State program funded under this part commences . . . .").

[128] *See id.* § 607(a)(1) (establishing minimum work participation rates).

[129] *See id.* § 601(b) ("This part [§§ 601–619] shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."). Despite this anti-entitlement language, the statute also included a vague requirement that states provide a process that sounds like a fair hearing. *See id.* § 602(a)(1)(B)(iii) (requiring states to "provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process").

[130] *See, e.g.*, Cimini, *supra* note 119, at 125-32; Farina, *supra* note 119, at 618-23; Rebecca E. Zietlow, *Two Wrongs Don't Add Up To Rights: The Importance of Preserving Due Process In Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111, 1139-49 (1996) (identifying approaches to preserving due process rights after welfare reform).

[131] *See, e.g.*, Randal S. Jeffrey, *The Importance of Due Process Protections After Welfare Reform: Client Stories from New York City*, 66 ALB. L. REV. 123, 125-27 (2002) (documenting the impact of weakened due process protections on welfare recipients in New York City); *cf.* Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker*

More than fifteen years after the passage of PRWORA, however, fears about the demise of the fair hearing right appear to have been overstated. Very few welfare agencies have disputed recipients' right to a fair hearing, and the only state court to consider whether such a right remains after PRWORA held that, under the laws of that state, recipients are still entitled to the due process protections mandated by *Goldberg*.[132]

Although welfare recipients' right to a fair hearing has survived the major changes to welfare in the mid-1990s,[133] whether fair hearings provide recipients with meaningful procedural safeguards against erroneous deprivations is far from clear. Many aspects of welfare and the circumstances of welfare recipients have changed since the Court decided *Goldberg* in 1970, and some of these changes bear upon one or more of the *Mathews* factors.

As this Part will show, these changes can be organized into three categories. First, welfare administrators now contend with new and powerful incentives to shrink the welfare rolls. Second, the circumstances in which welfare recipients find themselves have changed in ways that undermine recipients' ability to exercise their right to a fair hearing in a meaningful way. For example, recipients who are able to hold jobs often must choose between exercising their right to a fair hearing and keeping their job, and all recipients are much less likely to secure free legal representation at fair hearings. Third, technological advancements have streamlined aspects of welfare administration and created opportunities for additional procedural safeguards at little extra cost. At the same time, welfare administrators' increased reliance on automation has exposed recipients to new risks of erroneous deprivations. Finally, this Part distills the new procedural needs welfare recipients face in light of some or all of these changes.

A. *New Incentives to Terminate Welfare Benefits*

Welfare administrators today are subject to powerful incentives—incentives that that did not exist in the 1970s—to reduce the welfare

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Support Towards Black and White Welfare Clients, 4 HARV. J. AFR. AM. PUB. POL'Y 23, 27-31 (1997) (describing differences in discretionary treatment of white and black welfare recipients in Virginia).

[132] *See* Weston v. Cassata, 37 P.3d 469, 477 (Colo. App. 2001) ("[W]e conclude that because plaintiffs had a property right . . . in continued receipt of welfare benefits, plaintiffs were constitutionally entitled to procedural due process.").

[133] *See* Lens, *supra* note 66, at 30 (stating that, even after the 1996 law "[a]ll states . . . provide some form of administrative hearings").

rolls. The primary source for these new incentives is the 1996 federal welfare law, which restructured the welfare system in ways that rewarded states for reducing the number of individuals receiving welfare benefits.[134] At the same time, the legislation's rollback of federal statutory and regulatory rules granted states more welfare policymaking authority than they had enjoyed since the early 1960s,[135] while undercutting preexisting means of holding administrators and caseworkers accountable for their decisions.[136] This new discretionary regime[137] has created opportunities for the caseload-cutting incentives to affect the routine handling of welfare cases,[138] placing more pressure on the fair hearing system to weed out erroneous terminations.[139]

Incentives to cut people off welfare are not new. Five years before the Supreme Court decided *Goldberg*, Edward Sparer argued that welfare administrators are subject to strong incentives to reduce costs, and that those incentives are rarely balanced by pressure to achieve the substantive purposes of welfare programs.[140] The federal government

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[134] *See infra* subsection II.A.1.

[135] *See* Diller, *supra* note 61, at 1134-40, 1145-48 (identifying different paradigms of welfare administration).

[136] *See id.* at 1186-212 (arguing that the current welfare regime "has the potential to render existing mechanisms for establishing public accountability largely ineffective or irrelevant"); *see also* Super, *supra* note 102, at 869-80 (noting the challenges facing advocates trying to promote accountability).

[137] *See* Diller, *supra* note 61, at 1145-63 (describing the return to discretion following passage of the 1996 federal welfare law).

[138] *See* Michaels, *supra* note 126, at 598 (noting that states "may exploit their discretionary authority and under-provide services in ways that leave hundreds of thousands of individuals materially far worse off than even a fiscally conservative Congress might have intended"); *cf.* REBECCA GORDON, APPLIED RESEARCH CTR., CRUEL AND USUAL: HOW WELFARE "REFORM" PUNISHES POOR PEOPLE 18 (2001) (finding that the post-1996 welfare system was "overwhelmingly arbitrary" in determining eligibility for benefits); Gooden, *supra* note 131, at 23 (describing differences in the discretionary treatment of white and black welfare recipients).

[139] These new incentives have also greatly increased the risk that welfare agencies will turn away eligible applicants in order to limit their welfare caseloads. *See* Diller, *supra* note 61, at 1152 (discussing states' adoption of "'diversion' policies—that seek to dissuade potentially eligible individuals from applying for benefits."). These types of front-end decisions are very difficult to challenge at a fair hearing. *Id.* at 1201 ("Diversion activities are generally beyond the reach of the hearing process as individuals who are diverted are not formally denied benefits and thus have no determinations from which to appeal."); *see also supra* notes 99-100 and accompanying text.

[140] *See* Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361, 375 (1965) (explaining that "[v]irtually no pressure . . . is ordinarily exerted on behalf of the welfare client," while welfare administrators must contend with "many inhibiting factors").

contributed to this imbalance in the 1970s when it adopted a "quality control"[141] regime for AFDC that punished states for overpayments and payments to ineligible recipients, but not for underpayments or exclusions of eligible beneficiaries.[142] Despite the existence of the fair hearing right, fair hearings did not exert a "counterbalancing influence."[143] Thus, even before 1996, welfare administrators and caseworkers were pressured to deny, reduce, or terminate benefits with little fear of repercussion.

Yet the incentives at work prior to 1996 pale in comparison to those created by PRWORA. Since its passage, welfare administrators have faced new and powerful financial incentives to reduce the number of individuals receiving welfare benefits. At the same time, states and localities have been given the freedom to contract out the administration of welfare programs, which has introduced additional incentives to reduce welfare caseloads. These new incentives, together with increased ground-level discretion and a political atmosphere that is deeply hostile to welfare programs,[144] have revolutionized the administration of welfare benefits in ways that have greatly increased the risk of erroneous deprivations.

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[141] In the context of public benefit programs, quality control or quality assurance systems "typically take the form of specialized audits in which an independent unit examines a subset of cases in which benefits were granted to check for errors." Super, *supra* note 89, at 1098-99.

[142] *See* EVELYN Z. BRODKIN, THE FALSE PROMISE OF ADMINISTRATIVE REFORM: IMPLEMENTING QUALITY CONTROL IN WELFARE 9-11, 94-100 (1986) (discussing incentives created by AFDC's quality control mechanisms); Timothy J. Casey & Mary R. Mannix, *Quality Control in Public Assistance: Victimizing the Poor Through One-Sided Accountability*, 22 CLEARINGHOUSE REV. 1381, 1385 (1989) (explaining that the welfare quality control system caused denials of eligible families to skyrocket); Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 N.Y.U. REV. L. & SOC. CHANGE 231, 245-47 (1990) (linking quality control systems with the phenomenon of overdenial of benefits); *cf.* Super, *supra* note 89, at 1109-10 (detailing the perverse incentives created by the food stamp program's quality control system). These types of quality control mechanisms have been called "counter-entitlements." *See id.* at 1073 ("Even before PRWORA, the counter-entitlement balancing the entitlement to [AFDC] was far stronger than the entitlement, influencing agencies' behavior far more powerfully.").

[143] Diller, *supra* note 61, at 1142. Indeed, even when eligibility workers' decisions to deny, reduce, or terminate benefits were overturned at a fair hearing, the "workers were not held accountable." *Id.*

[144] *See id.* at 1183 ("Political leaders now compete for the largest declines in welfare enrollment. Where enrollment has not plummeted as quickly as elsewhere, welfare reform is deemed a failure. In fact, TANF caseload reduction is the most common performance measure used by local agencies."(footnote omitted)).

1. Changes in Welfare Funding Create New Incentives to Terminate Welfare Benefits

PRWORA redesigned the way the federal government funds the provision of welfare benefits. Prior to 1996, the AFDC program required the federal government to provide matching funds equal to a portion of a state's expenditures on welfare.[145] Since then, however, the federal government has provided annual block grants in a fixed amount.[146] Under this system, states receive the same amount of federal funding whether their welfare caseloads increase, decrease, or stay the same. And if a state does not exhaust its block grant funds in a particular year, it is not required to return all of the unspent money to the federal government.[147]

The post-1996 block-grant–funding mechanism creates powerful new financial incentives for the states. By reducing the number of individuals receiving welfare benefits, states can reallocate federal welfare funds to support more popular programs, even programs unrelated to the provision of social welfare services.[148] In other words, paying welfare benefits to the poor now competes with the rest of a state's budgetary priorities.[149] For example, in 1998, Wisconsin spent $98 million less on welfare than it received in its block grant for that year.[150] Rather than returning the money to the federal government,

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[145] *See* 42 U.S.C. § 603(a) (Supp. II 1996) (establishing the method of computing federal payments to states).

[146] A state's block grant amount is based on the amount it received from the AFDC program in the mid-1990s, with states exercising some choice over three alternative base periods. *See id.* § 603(a)(1) (2006) (describing how a state's block grant is calculated).

[147] *Id.* § 604(d)–(e).

[148] *See* Super, *supra* note 89, at 1131 ("[The] simultaneous conversion of states' former AFDC funding into a fixed block grant gave states a further fiscal incentive to reduce participation since they could use any resulting savings in other programs."); *see also* Michaels, *supra* note 126, at 613 ("[States] may use their legally granted discretion to free up federal dollars ostensibly earmarked for welfare provisions to support more popular projects."). This process has been referred to as "supplantation" and has been subject to criticism by Congress. *See* Letter from Rep. Nancy L. Johnson, Chairman, U.S. House of Representatives, Comm. on Ways & Means, to U.S. Governors (Mar. 15, 2000), *available at* http://www.fiscalpolicy.org/johnson00.htm (urging states to stop supplantation and warning that "if the savings from supplanted federal funds are used for purposes other than those specified in the TANF legislation, Congress will react by assuming that we have provided states with too much money").

[149] *See* U.S. GEN. ACCOUNTING OFFICE, GAO-01-828, WELFARE REFORM: CHALLENGES IN MAINTAINING A FEDERAL-STATE FISCAL PARTNERSHIP 6 (2001) (finding that states have "replaced, rather than supplemented, their own spending with federal TANF dollars thereby freeing up state funds for other budget priorities").

[150] Michaels, *supra* note 126, at 617.

spending the savings on welfare programs, or strengthening the social safety net in some other way, it used the unspent TANF money to fund education, tax relief, and other programs.[151] Other states have saved their unspent federal block grant funds for a "rainy day."[152] Thus, the more states can shrink their welfare caseloads, the more TANF block grant money they can use for other spending priorities.

This type of incentive has worked its way down to the county level. In Ohio, where each county negotiates its own plan for welfare administration with the state, the state offers financial rewards to counties that reduce the number of people receiving welfare benefits: counties that reduce their caseloads receive financial bonuses, and counties "that spend less than their allocated amounts can retain fifty percent of the difference."[153] Similarly, in California, the state passes along its TANF funding in the form of block grants to the counties, and counties are permitted to retain one-hundred percent of any savings that occurs when recipients leave the welfare rolls.[154] Thus, for cash-strapped counties in these states, welfare programs have become a tempting source of additional funds.

2. Federal Work Requirements Create New Incentives to Terminate Welfare Benefits

PRWORA's requirement that welfare recipients work in exchange for their benefits creates powerful incentives for states and localities administering welfare programs—but perhaps not the incentives one might expect. By establishing financial penalties[155] for states that do

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[151] *Id.* at 617. Other states have also used unspent TANF block grant funds to support programs unrelated to the social safety net. *See, e.g.*, Joshua Green, *The Welfare Shell Game* (describing Texas's intent to substitute federal funds for state funds and thus "launder[] federal welfare dollars to finance more politically popular programs"), *in* MAKING WORK PAY: AMERICA AFTER WELFARE 46, 46 (Robert Kuttner ed., 2002); Sewell Chan, *D.C. Welfare Funds to Go to Children; Critics Say $12 Million Shift Irresponsible*, WASH. POST, Aug. 10, 2000, at B1 (describing reallocation of TANF funds away from helping "move welfare recipients into the workforce" and toward youth initiatives); Jim McLean & Chris Grenz, *Use of Welfare Grant Debated*, TOPEKA CAPITAL-J., Aug. 30, 2000, at 7, *available at* 2000 WLNR 4302386 (describing Kansas's redirection of nearly half its TANF money to foster care programs).

[152] Michaels, *supra* note 126, at 617.

[153] Diller, *supra* note 61, at 1179-80.

[154] *Id.* at 1180.

[155] *See* 42 U.S.C. § 609(a)(3) (2006) (establishing penalties of up to twenty-one percent of a state's TANF grant for states that fail to comply with the work participation rate).

not meet statewide work participation rates,[156] the law obviously incentivizes states to demand that welfare recipients engage in some form of work. However, there is an even stronger set of incentives built into PRWORA's structure. A state can avoid being penalized for failing to satisfy its work participation requirement by reducing the size of its welfare caseload. For each percentage point that a state's average monthly caseload declines in comparison to a benchmark level set by statute, the state is granted a "caseload reduction credit" that reduces the state's work participation requirement by one percentage point.[157] Under this system, states that have aggressively cut their welfare caseloads since 1996 are rewarded with relaxed work participation requirements.

The availability of caseload reduction credits has created a strong incentive for states to push recipients off the welfare rolls.[158] Establishing workfare programs and helping recipients transition from welfare to work can be expensive,[159] while finding ways to close cases and reap caseload reduction credits is cheap and reduces costs in the long run. It is therefore not surprising that states have used caseload reduction credits to shield themselves from the full impact of PRWORA's work participation requirements. Indeed, from 2000 to 2005, caseload reduction credits rendered the federal statewide work requirements almost meaningless: despite a statutory minimum work participation rate of fifty percent, caseload reduction credits resulted in an adjusted rate

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[156] Mandatory statewide work participation rates started at twenty-five percent of welfare recipients in 1997 and peaked at fifty percent in 2002, where the rate remains today. *Id.* § 607(a)(1).

[157] *See id.* § 607(b)(3)(A)(ii) (setting the benchmark at the state's 2005 caseload). The caseload reduction credit benchmark was initially set at a state's 1995 welfare caseload. 42 U.S.C. § 607(b)(3)(A)(ii) (Supp. V 2005). But the Deficit Reduction Act of 2005 changed the benchmark to a state's 2005 caseload. Pub. L. No. 109-171, § 7102(a)(1)(B), 120 Stat. 4, 136 (2006).

[158] *See, e.g.*, Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 617-18 (1999) ("[T]he structure of the Act creates a strong incentive for state political actors to focus exclusively on achieving caseload reductions, regardless of the means or consequences, or to approach welfare reform merely as a means for achieving fiscal savings."); Diller, *supra* note 61, at 1179 (explaining that PRWORA's creation of caseload reduction credits "places a premium on achieving caseload reduction through means that make it more difficult for 'eligible' individuals to obtain benefits initially and to maintain eligibility once on the rolls"); *cf.* Super, *supra* note 102, at 848 ("[T]he TANF statute gives a strong preference to caseload reductions through informal means.").

[159] *See, e.g.*, JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 84, 117 (1995).

of zero percent for thirty-one states, with the remaining nineteen states facing requirements between one percent and twenty-eight percent.[160]

3. Opportunities for Privatization Create New Incentives to Terminate Welfare Benefits

The 1996 welfare law introduced an additional set of incentives to terminate benefits when it removed statutory limitations on the ability of states and localities to privatize the administration of welfare programs.[161] For the first time, private corporations were permitted to take over all aspects of welfare administration, including individual eligibility determinations.[162] The private entities that have since won contracts to administer welfare programs have brought new norms and motivations, resulting in additional pressure to reduce the welfare rolls.[163]

The contracting out of welfare services to for-profit entities is a relatively recent phenomenon. It began with contracts to run work programs, which became more commonplace after the Family Support Act of 1988 expanded federal work requirements.[164] Private entities were also enlisted to handle functions such as information management and data processing.[165] Prior to 1996, however, federal law

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[160] U.S. GEN. ACCOUNTING OFFICE, GAO-02-770, WELFARE REFORM: WITH TANF FLEXIBILITY, STATES VARY IN HOW THEY IMPLEMENT WORK REQUIREMENTS AND TIME LIMITS 11-12 tbl.2 (2002). The work participation requirements returned to prominence in 2006, after the Deficit Reduction Act of 2005 set a new benchmark for caseload reduction credits. *See supra* note 157. But states were later effectively excused from penalties for failing to satisfy the requirements by language contained in the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 2101(b), 123 Stat. 115, 448-69 (2009) (codified as amended at 42 U.S.C. § 607(b)(3)(A)(i) (Supp. III 2009)).

[161] In this context, the terms "privatize" and "privatization" refer to contracting out the administration of all or part of TANF programs to private contractors that are typically reimbursed and evaluated pursuant to performance measures that emphasize outcomes. *See* Diller, *supra* note 61, at 1181-82.

[162] *See* 42 U.S.C. § 604a(a)(1) (2006) (permitting states to "administer and provide services under the [TANF program] through contracts with charitable, religious, or private organizations" and to provide TANF beneficiaries with "certificates, vouchers, or other forms of disbursement which are redeemable with such organizations").

[163] *See* Wendy A. Bach, *Welfare Reform, Privatization, and Power: Reconfiguring Administrative Law Structures from the Ground Up*, 74 BROOK. L. REV. 275, 279 (2009) ("In the welfare-to-work area, privatization has been a major tool in a very effective campaign to significantly reduce the welfare rolls.").

[164] Pub. L. No. 100-485, § 201(a), 102 Stat. 2343, 2357 (requiring "all recipients of aid to families with dependent children . . . with respect to whom the State guarantees child care . . . to participate in the [job opportunities and basic skills training] program").

[165] Michaels, *supra* note 126, at 624-25.

expressly prohibited states from privatizing eligibility determinations and case management.[166] Thus, corporations did not decide whether to grant or deny welfare benefits or the amount of benefits that should be issued. In other words, government workers, not employees of private companies, were the only ones with authority to determine whether to deprive an individual of his or her constitutionally protected property interest.

PRWORA repealed AFDC's constraints on privatization, replacing them with TANF's broad grant of permission to states and localities to contract out some or all of their welfare programs.[167] Thus, since 1996, private corporations have been permitted to make eligibility determinations that result in the deprivation of welfare recipients' benefits.[168] This change in the law created an opportunity for both for-profit and not-for-profit corporations to win contracts to administer entire welfare programs.[169]

The privatization of welfare services has increased dramatically since the 1990s.[170] Many states eagerly turned over much of their newly gained authority to private corporations,[171] while the contracting opportunities created by the 1996 welfare law attracted for-profit corporations looking for new sources of revenue.[172] Within five years of PRWORA's passage, forty-nine states and the District of Columbia had contracted with private entities to provide at least some welfare ser-

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[166] *Id.* at 625-26.

[167] *See* 42 U.S.C. § 604a(a)(1)(A); *see also* Bach, *supra* note 163, at 279 ("Today, the full range of services, from eligibility determinations to welfare-to-work services, are being conducted not directly by government entities but by private, often large, for-profit corporate entities.").

[168] *See* Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1566 (2001) ("The Act now authorizes states to employ private entities to conduct intake and make eligibility determinations—traditional gate-keeping functions . . . most often identified with the legal [*Goldberg*] protections developed under AFDC." (footnotes omitted)). However, "[a]s a practical matter, [PRWORA's] allowance of the contracting out of eligibility determinations was limited, to a certain extent, by the federal government's refusal to allow the contracting out of eligibility determinations for food stamps and Medicaid." Bach, *supra* note 163, at 279 n.10.

[169] *See* Michaels, *supra* note 126, at 624 (observing that lifting the limits on privatization gave for-profit corporations "unparalleled and previously uncontemplated opportunities" to participate in the provision of welfare benefits).

[170] *See* Bach, *supra* note 163, at 278; *see also* Kennedy, *supra* note 86, at 256 ("All over the country, state governments are turning to private corporations to run their welfare systems.").

[171] Kennedy, *supra* note 86, at 232.

[172] Bach, *supra* note 163, at 279-80.

vices.[173] Of the $1.5 billion paid by states to private entities to operate TANF and TANF-related programs in 2001, for-profit entities collected approximately thirteen percent.[174]

The rise of privatization has introduced new incentives to terminate benefits and reduce welfare caseloads. As a general matter, for-profit private contractors are not merely motivated by profit; they have a fiduciary duty to their shareholders to maximize profits above all other considerations.[175] In the context of welfare privatization, this profit motive can affect the way welfare programs are administered, with potentially harmful consequences for welfare recipients.[176]

The incentives at work in welfare privatization are evident in the terms of payment included in contracts. Many welfare privatization contracts are "performance-based," meaning that payment on the contract is conditioned, in whole or in part, on the private company's satisfaction of some specified outcome or outcomes.[177] Different types of performance-based contracts create different incentives: contracts that base payments on the number of individuals served by the vendor incentivize "churn[ing] or divert[ing]" recipients; contracts that base payments on flat fees incentivize simply pushing recipients off the rolls; and contracts that base payments on outcomes, such as the number of recipients placed in a job, incentivize devoting the most resources to those already likely to get jobs while ignoring, underserving, or even closing the cases of individuals facing significant barriers to employment.[178]

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[173] *See* U.S. GEN. ACCOUNTING OFFICE, GAO-02-245, WELFARE REFORM: INTERIM REPORT ON POTENTIAL WAYS TO STRENGTHEN FEDERAL OVERSIGHT OF STATE AND LOCAL CONTRACTING 8 (2002).

[174] *Id.* Among the various services provided by contractors to states in 2001, the most common were "employment and training services, job placement services, and support services to promote job entry or retention." *Id.*

[175] *See* Kennedy, *supra* note 86, at 302.

[176] *See id.* (arguing that "the private provider will seek to maximize profits even if it means harming the needy"). The consequences go beyond unjustified terminations of benefits. *See* David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 455-56 (2008) (arguing that contracting out the administration of public benefits programs is "likely to result in some significant policy paralysis").

[177] Diller, *supra* note 61, at 1181-82.

[178] Michaels, *supra* note 126, at 631; *see also* Metzger, *supra* note 119, at 1387-88 ("[U]nder a performance-based system providing financial rewards for the number of successful job placements, private contractors have a visible incentive to try to serve only the most employable beneficiaries, or to dissuade hard-to-employ individuals from continuing in programs by means of onerous participation requirements and sanctions." (footnotes omitted)).

Although contracts for the provision of welfare services can be structured to incentivize the provision of high-quality services and to protect the rights of welfare recipients,[179] such contracts appear to be the exception and not the rule.[180] The privatization experience in Wisconsin is illustrative. There, in its first round of privatization after the 1996 welfare law, the state made extensive use of private contractors as part of its welfare-to-work program.[181] By permitting contractors to keep benefits they withheld from recipients as a result of case sanctions, the contracts created enormous incentives to withhold benefits and services from recipients.[182] And even when contracts are structured to minimize incentives to terminate benefits, the lack of a competitive market for comparable administrative services may reduce contractors' motivation to comply fully with their contracts.[183]

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[179] For example, in the wake of welfare reform in Florida, the state established payment systems that incentivized service provision: contractors were paid twenty percent of their payment when they placed an individual in a job, and the final ten percent if the individual kept the job for eight months. Diller, *supra* note 61, at 1182. Some scholars have noted that privatization could improve services currently provided by government agencies. *See, e.g.*, Freeman, *supra* note 119; Metzger, *supra* note 119; Minow, *supra* note 119.

[180] *See* Michaels, *supra* note 126, at 632 ("[A] shocking number of contracts already have been subject to abuse of discretion by corporations that have managed to achieve . . . super-profitable ends—under the noses of government contracting agents."); *see also id.* at 632-33 (discussing problems with welfare contracts in New York, California, Wisconsin, Connecticut, and Maryland).

[181] Karyn Rotker et al., *Wisconsin Works—For Private Contractors, That Is*, 35 CLEARINGHOUSE REV. 530, 533 (2002).

[182] *Id.*; *see also* SHEENA MCCONNELL ET AL., MATHEMATICA POLICY RESEARCH, INC., PRIVATIZATION IN PRACTICE: CASE STUDIES OF CONTRACTING FOR TANF CASE MANAGEMENT 48 (2003) (observing that Wisconsin's contracts created the "potential for serious unintended incentives"). Medicare and Medicaid managed care contracts have been criticized for creating similar incentives. *See, e.g.*, Metzger, *supra* note 119, at 1383 (acknowledging the "obvious hazards" and "strong financial incentives to deny coverage for medically needed but expensive treatments" that result from Medicare contractual provisions that give providers a share of savings from reducing recipients' cost of care); Jennifer L. Wright, *Unconstitutional or Impossible: The Irreconcilable Gap Between Managed Care and Due Process in Medicaid and Medicare*, 17 J. CONTEMP. HEALTH L. & POL'Y 135, 169-70 (2000) (arguing that Medicare and Medicaid managed care providers have financial incentives to refuse authorization where care exceeds a fixed rate of compensation per enrollee).

[183] *See* Super, *supra* note 176, at 418-21 ("[I]f an administrative services vendor is performing deficiently, the costs and disruption of selecting a new contractor and having that contractor build up the infrastructure required to operate the program may leave the state with no other alternative but to stay with its existing contractor." (footnotes omitted)).

To be sure, government bureaucracies also face incentives to reduce welfare caseloads.[184] Yet the incentives facing private companies are both stronger and more deeply rooted. Jon Michaels has distinguished the two types of incentives this way: "Corporations have a preexisting fiduciary commitment to shareholders that they are duty-bound to prioritize over any commitment to government service. . . . This core institutional characteristic far exceeds any discretionary motivation among public bureaucrats to cut costs."[185] Thus, the pressures on state agencies to reduce their welfare caseloads do not compare to the incentives that influence private corporations.[186] In addition, to the extent that norms of public service can be said to characterize the actions of government agencies and their employees, such norms are absent in the profit-seeking atmosphere of private corporations.[187] Accordingly, without contractual provisions that counteract incentives to cut recipients off the rolls, the post-1996 rise in privatization increases the risk that welfare benefits are erroneously terminated.

B. *New Circumstances Facing Welfare Recipients*

In *Goldberg*, the Supreme Court emphasized that due process required that the "opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[188] Since then, the circumstances facing welfare recipients have changed in countless ways, some of which bear directly on recipients' ability to

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[184] *See supra* subsections II.A.1-2.

[185] Michaels, *supra* note 126, at 629 (footnote omitted); *see also id.* at 628 (explaining that corporations have a "fiduciary *duty* to promote shareholder wealth, which goes well beyond a state or city's *incentive* to under-provide services"); *id.* at 629 ("No company can be expected to protect the interests of the needy at the expense of its bottom line, least of all a publicly traded company with a fiduciary duty to maximize shareholder profits." (quoting Nina Bernstein, *Giant Companies Entering Race to Run State Welfare Programs*, N.Y. TIMES, Sept. 15, 1996, at A1)).

[186] *See* Michaels, *supra* note 126, at 631-32 ("The incentive for state welfare agencies to [underprovide services] . . . does not rise to the level we would customarily associate with rent-seeking private corporations."). *But cf.* Minow, *supra* note 119, at 1258 (arguing that public failures support experimentation with privatization).

[187] *See* Bezdek, *supra* note 168, at 1606 (outlining the concern that "private vendors may lack the norms of public service and of professionalism, which characterize many public bureaucracies").

[188] Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (citing J.M. Wedemeyer & Percy Moore, *The American Welfare System*, 54 CALIF. L. REV. 326, 342 (1966)); *see also supra* Section I.A.

utilize the fair hearing process to defend against erroneous deprivations. Two changes in particular have rendered the fair hearing right almost meaningless in many situations: the higher proportion of welfare recipients who are holding a job while collecting benefits, and the lower proportion of recipients who are able to secure free legal representation at a fair hearing.

1. Work Requirements Undermine the Right to a Fair Hearing

One of the most visible differences in the circumstances of welfare recipients since the 1970s is the higher proportion of recipients who are employed in the low-wage workforce. Collecting benefits while holding a job presents new obstacles to welfare recipients seeking to exercise their right to a fair hearing. Although some welfare recipients held jobs prior to *Goldberg*, and those recipients faced similar problems,[189] the proportion of recipients in such a situation has increased considerably since 1970.[190]

Of all the substantive and symbolic changes to welfare caused by the 1996 welfare law, perhaps most significant was its focus on work requirements. The idea that recipients should work in exchange for their benefits was not unprecedented before 1996; indeed, the federal government formally established work requirements in the 1960s,[191]

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[189] *See, e.g.*, KORNBLUH, *supra* note 66, at 79 (noting that in the 1960s, in order for a welfare recipient to exercise her fair hearing right, "a mother had to get time off from her job, if she had paid work, or find a babysitter").

[190] *Compare* Mildred Rein, *Determinants of the Work-Welfare Choice in AFDC*, 46 SOC. SERV. REV. 539, 544 (1972) ("[T]he proportion of AFDC mothers who combine work and welfare has remained the same: from 13 to 14 percent from 1961 to 1971."), *with* U.S. DEP'T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM (TANF): EIGHTH ANNUAL REPORT TO CONGRESS, at IV-29 (2009), *available at* http://www.acf.hhs.gov/programs/ofa/data-reports/annualreport8/TANF_8th_Report_111908.pdf ("The employment rate of adults receiving TANF cash assistance . . . has also increased significantly, up from less than one in five adults in Fiscal Year (FY) 1991 to almost one of every three adults in FY 2006.").

[191] *See* HANDLER, *supra* note 159, at 57 ("Work requirements for welfare recipients were a state and local concern until late 1967, when the federal government enacted the Work Incentive Program."); MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE 64 (2008) ("In 1967, with the Work Incentive Program (WIN)—now known as workfare—the federal government revived work as a precondition of relief."); Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 478 (1997) ("Since 1967, Congress has required states to condition AFDC benefits upon compliance with work requirements." (footnotes omitted)). The Supreme Court upheld the use of mandatory work requirements in 1973. *See* N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 420-23 (1973) (holding that states are permitted to impose work requirements in addition to those imposed by federal law so

and the Family Support Act of 1988 placed additional emphasis on helping recipients transition from welfare to work.[192] Nonetheless, pre-1996 work requirements served largely symbolic functions without greatly affecting the experience of most recipients.[193]

Since 1996, states have faced financial penalties if a minimum percentage of adult recipients do not engage in "work activity"[194] for a federally specified minimum number of hours each year.[195] Although the availability of caseload reduction credits enabled states to dodge the full impact of the federal work requirements between 1996 and 2005,[196] almost every state established or strengthened its own requirements that welfare recipients work in exchange for their benefits.[197] And, because the caseload reduction credit benchmark was

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long as the additional requirements do not present a substantial conflict with the federal statute).

[192] *See* HANDLER, *supra* note 159, at 76-88 (discussing the Family Support Act's work program, Job Opportunities and Basic Skills Training Program (JOBS)); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 307-09 (rev. ed. 1996) (discussing the debate over and ultimate passage of the Family Support Act). Prior to 1996, the federal government also used the waiver process to indirectly express its growing preference for work requirements. *See* Joel F. Handler, *"Ending Welfare As We Know It"—Wrong For Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 3 (1994) ("Many states, under waivers from the Reagan, Bush, and . . . Clinton Administrations . . . instituted work requirements . . . .").

[193] *See generally* HANDLER, *supra* note 159, at 56-88 (surveying the history and impact of work requirements in American welfare policy).

[194] Federal law requires that recipients engage in one or more of twelve specified work activities. *See* 42 U.S.C. § 607(d) (2006) (defining "work activities" to include employment, work experience, on-the-job training, job search and job readiness assistance, community service programs, vocational educational training, job skills training, education directly related to employment, secondary education, and the provision of child care services); *see also* Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1138-48 (2006) (discussing how TANF defines "work").

[195] To be considered engaged in work for a particular month in fiscal year 2000 or thereafter, a recipient must participate in work activities for an average of at least thirty hours per week during that month. 42 U.S.C. § 607(c)(1)(A). If the recipient is a single parent with a child under age six, the participation requirement drops to an average of at least twenty hours per week. *Id.* § 607(c)(2)(B). A state may not reduce or terminate benefits if the recipient is a single parent with a child under six years old and the state determines that the recipient is unable to obtain needed child care. *Id.* § 607(e)(2).

[196] *See supra* subsection II.A.2.

[197] Indeed, approximately ninety percent of families receiving cash assistance through state welfare programs that are not governed by TANF's work requirements (i.e., "separate state programs") are nonetheless required by the state to work. *See* U.S. GEN. ACCOUNTABILITY OFFICE, *supra* note 160, at 15; *see also* Michaels, *supra* note 126, at 600-04 (arguing that state discretion over welfare policy is limited by the the substantive

reset beginning in 2006,[198] states are again facing meaningful federal work requirements.

As a result of PRWORA's work requirements and the growing consensus that welfare recipients should be required to work, the proportion of welfare recipients who hold a job while collecting benefits has risen significantly.[199] In its most recent report to Congress, the U.S. Department of Health and Human Services reported that 32.5% of all families receiving TANF benefits in 2006 satisfied the federal work requirements, with an additional 14.4% engaging in work activities but falling short of the required number of hours.[200] During this time period, state work participation rates ranged from a high of 79.2% to a low of 13.1%.[201] Of the families that met the work requirements, 55.1% did so through "unsubsidized employment"—in other words, they worked in paid employment while also receiving welfare benefits.[202]

Individuals who receive welfare while also holding a job face significant barriers to exercising their fair hearing right. Fair hearings are held on weekdays during regular business hours. Although the hearing itself may not last very long, much of the day can be spent traveling to and from the hearing and waiting for it to begin.[203] Because many low-wage workers have shifts that cannot be broken up, missing any part of the workday means that they lose their entire shift and wages they cannot afford to do without. In addition, employers in low-wage sectors are not typically sympathetic to requests for time off, nor do

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federal goals of PRWORA, including the goal of facilitating the transition from welfare to work).

[198] Beginning in 2006, the caseload reduction credit benchmark was changed from a state's 1995 caseload level to its 2005 caseload level. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7102(a)(1)(B), 120 Stat. 4, 136-37 (2006) (codified at 42 U.S.C. § 607(b)(3)(A)(ii)). However, as previously described, 2009 legislation effectively excused states from the penalties. *See supra* note 160.

[199] *See supra* note 190.

[200] *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 190, at 19. To count toward a state's work participation rate, a family must include an adult or minor head-of-household who is engaged in qualified work activities for at least thirty hours per week, or twenty hours per week if she has a child under the age of six. *Id.*

[201] *Id.* app. 360 tbl.3:2.

[202] *Id.* app. 368 tbl.3:8.

[203] *See, e.g.*, Vicki Lens, *Confronting Government After Welfare Reform: Moralists, Reformers, and Narratives of (Ir)responsibility at Administrative Fair Hearings*, 43 LAW & SOC'Y REV. 563, 573 (2009) (noting that the wait for hearings to begin in one county "is unpredictable and, depending on how long each hearing takes, can be short or very long").

they grant workers control over their schedules.[204] Even having to explain to an employer why the time off is necessary exposes recipients to the stigma associated with welfare recipiency, which could diminish the employer's confidence in the recipient and limit future employment opportunities.[205] Thus, employed recipients who want to challenge the termination of their benefits are likely to face a dilemma: attending a fair hearing will not only cost them a full day's pay and the expense of traveling to and from the hearing site,[206] but may also place their jobs in jeopardy. For many employed welfare recipients, these risks outweigh the value of whatever benefits they could win at the fair hearing.[207]

2. Reduced Access to Legal Services Undermines the Right to a Fair Hearing

The circumstances facing welfare recipients have also changed since the 1970s insofar as recipients now find it nearly impossible to obtain free legal representation for a fair hearing. *Goldberg* guaranteed that welfare recipients be permitted to appear with counsel at a fair hearing,[208] but not the right to be provided counsel by the govern-

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[204] *See* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 98 (2011) ("Since the jobs [welfare recipients] can obtain are marginal, they do not have control over what their schedules will be.").

[205] Super, *supra* note 102, at 853 ("Workers . . . may be more vulnerable to stigma if identified as recipients of means-tested benefits since they could face fairly immediate, concrete consequences: the loss of their employers' confidence and the opportunities that go with it.").

[206] *See id.* at 832-34 (positing a hypothetical to demonstrate the substantial costs associated with attending hearings).

[207] *See* Super, *supra* note 89, at 1088 ("Working claimants may lose more in wages (and their employer's good will) by attending [a fair hearing] than they would win from a successful result."). The value of the benefits recipients could win at the hearing has also diminished since *Goldberg* in light of the sharp decline in the real value of welfare grants. A recent report summarized the decline:

> In all but two states, [cash assistance] benefit levels are now below 1996 levels, after adjusting for inflation, and these declines came on top of even larger declines over the previous quarter century; between 1970 and 1996, cash assistance benefit levels for poor families with children fell by more than 40 percent in real terms in two-thirds of the states.

IFE FINCH & LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, TANF BENEFITS FELL FURTHER IN 2011 AND ARE WORTH MUCH LESS THAN IN 1996 IN MOST STATES 1 (2011) (emphasis omitted), *available at* http://www.cbpp.org/files/11-21-11pov.pdf.

[208] Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970).

ment.[209] Welfare recipients therefore generally have two options: attempt to secure free representation from a legal services office or appear pro se.[210] Although there was never a time when all welfare recipients who sought a lawyer were able to find one, the availability of free legal representation for fair hearings has diminished in recent decades, with major consequences for the effectiveness of the right to a fair hearing.

Goldberg held that due process was satisfied by an adversarial, legalistic procedural safeguard—the fair hearing—at a time when the availability of free legal services was increasing and fair hearing representation was considered central to the work of legal services lawyers.[211] Although the federal government had only begun funding legal services for the poor in 1965,[212] by 1970, the year *Goldberg* was decided, the Supreme Court could reasonably anticipate that legal services funding would continue to grow.[213] In fact, that is exactly what happened during the decade after *Goldberg*. Despite being subject to much political

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[209] *See id.* at 270 ("We do not say that counsel must be provided at the pretermination hearing, but only that the recipient must be allowed to retain an attorney if he so desires."). Justice Black, in his dissenting opinion in *Goldberg*, asserted that even though the majority decision "requires only the opportunity to have the benefit of counsel at the administrative hearing, . . . it is difficult to believe that the same reasoning process would not require the appointment of counsel." *Id.* at 278 (Black, J., dissenting). That prediction has not come true.

[210] It is exceedingly rare for private attorneys to handle welfare fair hearings, either for a fee or pro bono. *See* Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573, 1573 (2002) ("[L]awyers looking for a good profit margin dismiss the poor as potential clients."); Super, *supra* note 89, at 1094 n.191 ("Although a substantial number of lawyers and law firms engage in pro bono representation of low-income people, few are attracted to, or are immediately competent to handle, cases involving complex public-benefit programs.").

[211] *See* EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 188-89 (1974) (detailing the growth of legal services between 1965 to 1972). Despite this growth, at the time *Goldberg* was decided, the Nixon administration was seeking to cut funding for legal services. *See id.* at 278-79 (noting that "more money for poor people seems antithetical to the Nixon policies" and that the legal services movement had entered a new phase of "survival").

[212] *See id.* at 39-70 (tracing the origins of federal funding for legal services). The now-defunct Office of Economic Opportunity controlled the federal funding of legal services until 1974, when responsibility for coordinating the federal government's involvement in legal services was shifted to the Legal Services Corporation. *See* ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 19-22 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0158.pdf.

[213] *See* HOUSEMAN & PERLE, *supra* note 212, at 11 ("The legal services budget grew slowly but steadily from the initial $25 million in 1966 to $71.5 million in 1972.").

wrangling during the 1970s, legal services funding increased steadily until reaching its high-water mark in 1981, when the Legal Services Corporation (LSC) for the first time met its "minimum access" goal of two full-time lawyers for every 10,000 poor people.[214] Since then, federal legal services funding has fallen well below that goal,[215] with the deepest cuts occurring in 1982[216] and 1995.[217] The most recent appropriation was $404.2 million,[218] a far cry from the $750 million that would reflect the 1980 allocation adjusted for inflation,[219] and far less still than if the appropriation were adjusted for both inflation and the larger number of poor people living in the United States.

As the overall availability of free legal services has declined, legal services programs have shifted their resources away from representing welfare recipients at fair hearings and toward other legal issues affecting low-income individuals. In 1983, 5.4% of LSC programs' closed cases involved AFDC or "other welfare" programs;[220] that portion

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[214] *Id.* at 24. That year, Congress allocated a record $321.3 million to the LSC, funding 325 programs that operated in 1450 neighborhood and rural offices throughout all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Micronesia, and Guam. *Id.*

[215] Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131, 133 (2008) ("[F]ederal grants to provide civil legal services to low-income clients have been drastically reduced over the last twenty-five years . . . .").

[216] The decline in funding was most dramatic in 1982, when Congress's 25% cut to LSC's budget resulted in the closing of 285 legal services offices and layoffs of 1793 attorneys and 952 paralegals. *Id.* at 133 n.13 (citing LEGAL SERVS. CORP., 2003–2004 ANNUAL REPORT 18 (2004), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC_20032004_Annual_Report.pdf).

[217] *See* Super, *supra* note 89, at 1094 ("In 1995, the new Republican majority in Congress slashed legal services' funding . . . ."); Zietlow, *supra* note 119, at 39 (explaining that in the mid-1990s, "Congress ha[d] drastically cut funding to the LSC").

[218] Press Release, Legal Serv. Corp., House Proposal Would Cut Civil Legal Aid by $104 Million (July 6, 2011), http://www.lsc.gov/media/press-releases/house-proposal-would-cut-civil-legal-aid-104-million. The House Appropriations Committee recently announced a proposal that would cut LSC funding by 26% for Fiscal Year 2012, rolling back LSC funding to a level not seen since 1999. *Id.*

[219] Marcia Coyle, *For LSC, a 30-Year Funding Rollercoaster*, NAT'L L.J., Mar. 14, 2011, at 13. Despite the focus on LSC-funded legal services, it must be noted that overall funding for civil legal assistance has evolved since the 1970s. As of 2010, the nation's civil legal assistance system was funded at $1.5 billion, approximately two-thirds of which came from nonfederal sources. *See* ALAN HOUSEMAN, CTR. FOR AM. PROGRESS, THE JUSTICE GAP: CIVIL LEGAL ASSISTANCE TODAY AND TOMORROW 7 (2011) *available at* www.americanprogress.org/issues/2011/06/pdf/justice.pdf. However, very little of the nonfederal funding is used for welfare hearing representation. *See id.* at 3 (not including welfare among the major catagories of assistance providers of civil legal aid offer).

[220] LEGAL SERVS. CORP., 1984 FACT BOOK, at 17 (1984).

dropped to 3.5% in 1995,[221] and in 2010 only 1.9% of closed cases involved TANF and state and local income-maintenance-related programs.[222] And although already miniscule, the 2010 figure overstates the availability of free legal representation for welfare fair hearings: less than one-twelfth of the TANF cases closed during that year involved representation at a hearing or in court.[223] Thus, as David Super recently observed, the overall decline in legal services funding and the shifting priorities of legal services programs means that representation at welfare fair hearings has been "claiming a declining share of a shrinking pie."[224]

As a result of these changes in legal services funding and priorities, the proportion of welfare recipients who appear at fair hearings without a lawyer is higher than was anticipated in 1970.[225] This decline in the availability of legal representation at fair hearings undermines the effectiveness of the right to a fair hearing and weakens its capacity to serve as a meaningful procedural safeguard.[226] Although fair hearings are less formal than full-blown trials,[227] recipients who do not have access to legal counsel must overcome numerous barriers in order to successfully advocate for themselves at a hearing. For example, pro se recipients must navigate complex and opaque procedures[228] and make

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[221] LEGAL SERVS. CORP., FACTS 1996, at 15 (1997).

[222] *See* LEGAL SERVS. CORP., FACT BOOK 2010, at 24 (2011).

[223] *Id.* at 21. The vast majority of cases involved what LSC refers to as "counsel and advice" or "limited action," neither of which includes representation at a hearing. *Id.*

[224] Super, *supra* note 89, at 1095.

[225] *See* Brodoff, *supra* note 215, at 133 (asserting that cuts to legal services funding since 1980 have left welfare recipients "virtually without representation in the administrative hearing process"); *see also id.* ("The vast majority of clients who disagree with the state or federal agency's decision to cut, deny or eliminate benefits must face the agency alone, put on evidence, argue the law—in sum, make their case to the judge.").

[226] *Cf.* Jan L. Hagen, *Justice for the Welfare Recipient: Another Look at Welfare Fair Hearings*, 57 SOC. SERV. REV. 177, 184 (1983) ("Petitioners who retained counsel were more likely to use the available due process procedures, particularly cross-examination and the presentation of arguments." (citations omitted)).

[227] *Cf.* Friendly, *supra* note 42, at 1299 ("After the usual litany that the required hearing 'need not take the form of a judicial or quasi-judicial trial,' Mr. Justice Brennan proceeded to demand almost all the elements of one." (quoting Goldberg v. Kelly, 397 U.S. 254, 266 (1970))).

[228] *See, e.g.*, Brodoff, *supra* note 215, at 149 ("[T]he administrative hearing process is difficult for appellants to navigate. It can be a scary, intimidating, and complex process that involves court-like procedures, public speaking, motion practice, entry of exhibits, objections to evidence, and an understanding of complicated laws and procedures." (footnotes omitted)).

sense of an array of welfare laws, regulations, and policies.[229] At the same time, they must contend with the effects of poverty, including poor health or disability, lack of access to transportation or childcare, poor nutrition, little education, and inadequate housing.[230] Many post-*Goldberg* recipients also must overcome a lack of English language fluency.[231] Despite the resourcefulness and tenacity of many welfare recipients, it comes as no surprise that recipients who proceed without counsel at a fair hearing are much less likely to successfully challenge erroneous deprivations.[232]

C. *New Technology*

The changes in technology that have reshaped American society in so many ways since the 1970s have also affected the procedural safeguards available to welfare recipients. At the time *Goldberg* was decided, automation was not part of the day-to-day administration of welfare programs.[233] Caseworkers made eligibility determinations by hand and all records were kept in paper files. When welfare recipients challenged benefit terminations at fair hearings, the welfare agency could produce the relevant documents for review by the recipient or the judge prior to or during the fair hearing. If the documents did not

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[229] *See, e.g.*, *id.* at 153 ("[P]ublic benefits law is so complex that it is virtually unreadable by the lay person."); Lens, *supra* note 66, at 35 ("Welfare rules are complex, and unknotting bureaucratic mistakes out of the typical agency's mound of rules, directives, and manuals can be extremely difficult."); Super, *supra* note 89, at 1096 (stating that public benefits programs have become so complex and discretionary that "claimants are in no position to challenge [agency actions]").

[230] *See, e.g.*, Brodoff, *supra* note 215, at 150; Lens, *supra* note 66, at 35 ("Discrepancies may exist between clients' educational and literacy levels and the skills needed to navigate the fair hearing process."); *cf.* Mashaw, *supra* note 100, at 812 (arguing that is it unrealistic to imagine a claimant will be "prepared to fight city hall even when basic entitlement to benefits is at issue").

[231] *See, e.g.*, Brodoff, *supra* note 215, at 151-52 ("Even assuming excellent translation services, unrepresented non-English speaking applicants can have difficulty understanding the administrative hearing system, the law that applies, and how to present their case.").

[232] *See* Zietlow, *supra* note 119, at 39-40 ("Statistics show that poor people are more likely to prevail in hearings if they are represented by counsel . . . ." (citing Zietlow, *supra* note 130, at 1114 nn.13-15)). *But cf.* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. (forthcoming June 2012) (manuscript at 49-67), *available at* http://ssrn.com/abstract=1708664 (arguing that previous attempts to measure representation effects provide virtually no credible quantitative information on the effect of an offer or actual use of legal representation).

[233] Super, *supra* note 89, at 1123.

provide the necessary information, the recipient's caseworker or another agency representative could be called to testify in order to explain the challenged decision.

During the decades since *Goldberg*, new technologies have been integrated into many aspects of the administration of welfare programs.[234] Many state and local welfare agencies now use computer systems to streamline application procedures and eligibility determinations, improve fraud prevention and detection, and reduce the stigma associated with receiving welfare benefits.[235] In some welfare agencies, computers are not just assisting caseworkers with the processing of cases; they are actually deciding who receives benefits and in what amounts.[236]

Despite its many advantages, increased reliance on technology is also changing how welfare is administered in ways that threaten recipients' ability to successfully challenge erroneous terminations at fair hearings. Merely identifying the rules and policies that were applied in a given case can be difficult, as complex computer programming and coding may hide the legal basis for eligibility determinations. As a result, recipients, judges presiding over fair hearings and even the agency's own representatives may be unable to evaluate whether the determination was erroneous.[237]

In addition to obscuring the legal basis for welfare agency decisionmaking, highly automated welfare systems can also create new sources of factual errors. For example, New York City's welfare agency

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[234] *See, e.g.*, Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1267 (2008) (observing that "agencies today increasingly use computer systems to make decisions").

[235] *See, e.g.*, GUSTAFSON, *supra* note 204, at 40, 56-59 (discussing the use of technology for welfare fraud prevention); Kennedy, *supra* note 86, at 251 ("Technology . . . promises to transform the welfare system. Advocates of mass technological innovation promise foolproof fraud prevention mechanisms, accurate and uniform distribution of benefits through EBT systems, and faster and easier procedures to claim benefits."); Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 692-93, 708-09 (2005) (discussing use of "computer-matching" systems to verify welfare eligibility).

[236] *See* Super, *supra* note 89, at 1123 (stating that due to the adoption of highly automated systems, "eligibility workers [are] not in fact making most of the important decisions relating to claimants' eligibility").

[237] *See* Citron, *supra* note 234, at 1300 ("[A] system's design may create unreviewable problems for individuals."); *see also* Super, *supra* note 89, at 1124 ("Although policymakers and line staff may assume that the system is carrying out the same policies expressed in the program's state plan and manuals, deviations may be difficult to detect.").

uses a central computer system to track recipients' attendance at various appointments—if a recipient is found to have intentionally failed to appear at just one appointment, state law requires that he or she be penalized with a loss of benefits for a specified period of time.[238] Rather than having caseworkers record when recipients miss an appointment, however, the central computer system automatically deems recipients to have willfully failed to attend all appointments unless a caseworker affirmatively enters a note in the system that the recipient appeared as requested.[239] Pursuant to this method of administration, known as "autoposting," all errors in the system run against the recipient rather than the welfare agency, and recipients are often faced with losing benefits despite having attended an appointment, or having been excused by the caseworker, because the caseworker failed to record the attendance or excuse in the computer.[240]

The shift toward automated eligibility determinations undermines important assumptions that were central to the *Goldberg* Court's understanding of fair hearings.[241] Without clear articulation of the legal basis for an agency's decision to terminate benefits, it is difficult to see how a recipient can successfully challenge the decision at a hearing. Moreover, the veneer of rigor and precision associated with automated decisionmaking makes it exceedingly difficult for recipients to dispute the legal and factual determinations made by computer systems.[242] Thus, as Danielle Keats Citron has argued, "the procedural guarantees of the last century have been overmatched by the technologies of this one."[243]

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[238] N.Y. SOC. SERV. LAW § 342 (McKinney 2003).

[239] *Hearing on N.Y. State's TANF-Funded Welfare to Work Program Before the Assemb. Standing Comm. on Soc. Serv.*, 231st Sess. 4-5 (N.Y. 2008) (testimony of Susan Welber, Staff Att'y, Legal Aid Society), *available at* http://www.legal-aid.org/media/69500/finaltestimony11_20.pdf.

[240] *Id.*; *see also* Neil deMause, *Documents Reveal Gaps In City Welfare Data*, CITY LIMITS (Jan. 25, 2011), http://www.citylimits.org/news/articles/4278/documents-reveal-gaps-in-city-welfare-data (describing the risk of autoposting errors).

[241] Citron, *supra* note 234, at 1281-88.

[242] *See id.* at 1283 (arguing that "automation bias" may cause judges to be unduly deferential to determinations made by automated systems).

[243] *Id.* at 1258.

D. *New Facts and Circumstances Create Needs for Additional Procedural Protections*

The new facts and circumstances discussed in this Part, and their impact on the right to a fair hearing, give rise to four types of new procedural needs experienced by today's welfare recipients. First, there is a need for some kind of prehearing process that can identify and overturn proposed benefit terminations that are not supported by the facts or the law. This need emerges from the increased likelihood of erroneous terminations resulting from post-*Goldberg* incentives to shrink welfare caseloads.[244] In addition, by overturning erroneous terminations without a formal hearing, such prehearing processes would reduce the need for legal representation and ameliorate problems related to the inaccessibility of fair hearings for recipients who hold a job.

Second, there is a need for increased transparency with respect to welfare agency decisionmaking, particularly when the agency seeks to terminate benefits based on automated determinations.[245] Welfare agencies' increased reliance on computer systems to keep track of information about recipients and to make eligibility determinations generally occurs behind a veil of unintelligible computer codes and programming. Thus, when welfare agencies seek to terminate benefits based on the decisions of a computer system, clear explanations of the rules and policies underlying those decisions are necessary in order to ensure that the fair hearing right is a meaningful one.

Third, there is a need for flexibility with respect to the scheduling of fair hearings. With a higher proportion of welfare recipients holding jobs while collecting benefits, limiting fair hearings to regular business hours renders hearings inaccessible for many recipients who are dutifully complying with their welfare work requirements.[246] For these recipients, a meaningful procedure is one that does not force them to choose between attending a hearing and keeping their job.

And fourth, there is a need for modifications to the fair hearing process that will enable recipients to participate meaningfully without legal representation. With no real hope of a court-ordered right to

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[244] *See supra* Section II.A.

[245] *See supra* Section II.C.

[246] *See supra* subsection II.B.1.

counsel at welfare fair hearings,[247] and little reason to believe that legal services funding will increase to the extent necessary to enable most welfare recipients to be represented by counsel at fair hearings,[248] the vast majority of recipients facing benefit terminations will do so without the assistance of a lawyer. For the right to a fair hearing to be an effective procedural safeguard against erroneous deprivations, the fair hearing process must become more accessible to recipients who do not have access to legal counsel.

As a result of the various types of changes discussed in this Part, today's welfare recipients will likely experience some or all of the four needs identified above. The following Part examines the capacity of procedural due process to adapt to these changes and explores some possible procedural innovations that respond to the needs these changes have created.

III. ADAPTABLE DUE PROCESS: HOW DUE PROCESS CAN RESPOND TO CHANGING FACTS AND CIRCUMSTANCES

Despite numerous changes in the facts and circumstances related to welfare terminations since the 1970s, little attention has been paid to whether the demands of procedural due process should adapt to those changes. Considering the adaptability of due process raises two distinct questions. First, what does due process doctrine say about the viability of procedural due process precedents when the facts and circumstances related to a particular deprivation have changed? And second, what are possible additional or substitute procedural safeguards that might be appropriate if existing procedures must be adapted to new realities? This Part takes up those questions in turn and then concludes by considering the limits of procedural due process.

A. *Adaptation and Due Process Doctrine*

The world is constantly changing, and at least some of those changes are likely to be relevant to the fact-intensive *Mathews* balanc-

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[247] *See* Turner v. Rogers, 131 S. Ct. 2507, 2516-17 (2011); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 970 (2012) ("*Turner* dealt a death blow to hopes for a federal civil *Gideon*."). *But cf.* Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 307-12 (2009) (arguing that state legislatures have an independent constitutional duty to recognize and fund a qualified right to appointed counsel in welfare hearings).

[248] *See supra* subsection II.B.2.

ing approach to procedural due process. Yet the Supreme Court has not addressed the question of when procedures that satisfied the demands of due process in the past may be rendered unconstitutional by changes in the facts and circumstances related to a deprivation. Notwithstanding the existence of any such changes, the Court's due process precedents, however outdated, remain good law, and government agencies continue to regard them as binding.[249]

Because the Court has not been presented with challenges to existing procedural due process precedents based on changed facts and circumstances, due process case law does not address how courts should handle such challenges. Two recent district court decisions in New York expose this lack of guidance. As discussed in this Article's Introduction, *Huggins v. Pataki* and *Mayers v. New York Community Bancorp* involved due process challenges to New York State debt collection procedures that the Second Circuit had found constitutional approximately twenty years earlier in *McCahey v. L.P. Investors*.[250] The plaintiffs in both cases argued that the Second Circuit's decision in *McCahey* was no longer binding because intervening changes in facts and circumstances had altered the balance of the *Mathews* factors, and, therefore, the district court was required to redo the *Mathews* analysis and determine the constitutionality of the procedures based on the new information.[251] The district judge in *Huggins* refused to reevaluate the *Mathews* factors in light of the new facts and dismissed the case.[252] Three years later, however, the district judge in *Mayers* disagreed with his colleague and proceeded to engage in a full *Mathews* analysis, tak-

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[249] Continued adherence to procedures dictated by prior due process precedents might be explained by the existence of statutes or regulations that implemented those precedents. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, §§ 358-5.0 to 358-5.11 (West, Westlaw through 2011) (outlining welfare fair hearing procedures in New York). But it is also true that legislatures and agencies have not attempted to rewrite such statutes and regulations.

[250] *See supra* notes 10-26 and accompanying text.

[251] *See* Mayers v. N.Y. Cmty. Bancorp, Inc., No. 03-CV-5837, 2005 WL 2105810, at *12 (E.D.N.Y. Aug. 31, 2005) ("Plaintiffs contend that since the *McCahey* decision in 1985, changes in technology which have enabled the electronic transfer of funds allow banks 'to quickly and easily determine if an account contains only exempt money prior to restraining it,' without any kind of pre-seizure notice to the debtor."); Huggins v. Pataki, No. 01-CV-3016, 2002 WL 1732804, at *3 (E.D.N.Y. July 11, 2002) ("Huggins does not dispute this reading of *McCahey*. He argues, however, that intervening changes in technology have undermined the rationale for the *McCahey* decision, and that it is therefore distinguishable.").

[252] *See Huggins*, 2002 WL 1732804, at *4 ("*McCahey* is binding authority, and I am obligated to apply that authority.").

ing into consideration the changes alleged by the plaintiffs and holding that the plaintiffs stated a due process claim notwithstanding the existence of the *McCahey* decision.[253] The conflicting reasoning and outcomes in *Huggins* and *Mayers* underscore the need for guidance on whether and how procedural due process precedents should be adapted to our changing world.

Although the Supreme Court has not been faced with a similar type of due process challenge, the Court's general approach to procedural due process claims offers clues as to what due process would demand in such a situation. Indeed, as discussed below, current due process doctrine strongly suggests that requiring procedural safeguards to adapt to changing facts and circumstances is faithful to the Court's understanding of the dictates of procedural due process.

The notion that the requirements of due process may evolve over time has deep roots in Supreme Court jurisprudence. As early as 1884, the Court rejected the argument that the Framers' understanding of the Due Process Clause limits the scope of procedures required by the Clause.[254] As Justice Felix Frankfurter later explained, the concept of due process is, "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."[255] Indeed, procedural rules, "even ancient ones, must satisfy contemporary notions of due process."[256]

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[253] *See id.* at *13-14 (holding that the new facts alleged by the plaintiffs altered the second and third factors of the *Mathews* balancing test).

[254] *See* Hurtado v. California, 110 U.S. 516, 528-29 (1884) (expressing fear that establishing a fixed definition of due process "stamp[s] upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians").

[255] Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring in the judgment). According to Justice Frankfurter:

> "[D]ue process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

[256] Burnham v. Superior Court, 495 U.S. 604, 630 (1990) (Brennan, J., concurring in the judgment). Although history creates a strong presumption of continued validity, "the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid." *Id.* at 628 (White, J.,

Thus, "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[257]

More specifically, the Court has long held that "due process is flexible and calls for such procedural protections as the particular situation demands."[258] Consistent with this understanding of due process, the Court evaluates challenged procedures on a case-by-case basis, with the constitutionality of the procedures dependent on the facts of the situation.[259] Since 1976, the three-factor balancing approach adopted by the Court in *Mathews v. Eldridge* has supplied the framework for reviewing the constitutionality of particular procedural safeguards.[260] In addition to the three factors, the *Mathews* Court noted that due process requires procedures to be "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case."[261] Considered alongside the *Mathews* factors, the tailoring requirement further reinforces the fact-specific nature of the procedural due process inquiry.

Although the Court has not had an opportunity to reconsider post-*Mathews* procedural due process rulings in light of changing circumstances, it has addressed similar concerns in areas of due process that

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concurring in part and concurring in the judgment) (citing Shaffer v. Heitner, 433 U.S. 186, 206 (1977)); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) ("[The] constitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." (emphasis omitted)).

[257] Connecticut v. Doehr, 501 U.S. 1, 10 (1991) (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

[258] Morrissey v. Brewer, 408 U.S. 471, 481 (1972). As the Court noted in *Morrissey*, "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*; *see also supra* note 1.

[259] *See* Wilkinson v. Austin, 545 U.S. 209, 224 (2005) ("[W]e generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures.").

[260] 424 U.S. at 334-35 (1976). *But cf.* United States v. James Daniel Good Real Prop., 510 U.S. 43, 66 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) (stating that the Court did not adhere to "the notion that the *Mathews* balancing test constitutes a 'one-size-fits-all' formula for deciding every due process claim that comes before the Court" (citing Medina v. California, 505 U.S. 437 (1992))).

[261] 424 U.S. at 349 (quoting Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970)). The Court first recognized the need for tailoring in *Goldberg*, where it explained that procedures must be "adapted to the particular characteristics of welfare recipients." 397 U.S. at 267; *see also* White, *supra* note 97, at 878 (discussing the *Goldberg* Court's "willingness to probe beneath formalist assumptions, to inform itself about the realities of poor people's lives").

are not governed by *Mathews*. In the realm of personal jurisdiction, for example, the Court's precedent evolved from *Pennoyer v. Neff*[262] to *International Shoe Co. v. Washington*[263] based in part on the need to adapt personal jurisdiction rules to changes in the circumstances of litigants.[264] This evolution is likely to continue as the rise of Internet-based communication calls into question the ongoing constitutionality of decades-old personal jurisdiction rules.[265] Other changes in due process doctrine may also be understood as responses to changed circumstances rather than simple reversals of precedent.[266]

In sum, the Court's consistent invocation of the flexibility of due process provides strong doctrinal support for requiring that procedural safeguards adapt to changing facts and circumstances. To be sure, the Court's rejection of a one-size-fits-all approach to due process has come in the context of reaffirming the general proposition that due process can require different procedures for different types of deprivations. As such, the Court has left unaddressed whether due process

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[262] *See* 95 U.S. 714, 733 (1877). The Court held that a court can exert personal jurisdiction over a nonresident only if that party is served with process while physically present within the state or that party's in-state property had been attached at the beginning of the litigation. *Id.* The Court further explained that court proceedings "to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." *Id.*

[263] *See* 326 U.S. 310, 316 (1945) (stating that due process requires only that an individual have "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

[264] The Court explained this shift in *Hanson v. Denckla*:

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. State of Washington*.

357 U.S. 235, 250-51 (1958) (citations omitted).

[265] *See, e.g.*, Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice Over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1542 (2006).

[266] For example, one might explain the Court's reversal of its position on whether public employment is a property right protected by due process as influenced by the growth and regularization of public employment between 1961 and 1985. *Compare* Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 896 (1961) (holding that public employment can be revoked without a hearing), *with* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (holding that public employees possess a property right in continued employment).

can require different procedures for the same type of deprivation occurring at a different time under different circumstances.[267] Any uncertainty about how courts should handle such due process challenges will remain until the Court is asked to revisit one of its existing procedural due process precedents and reevaluate the *Mathews* factors based on changed facts and circumstances.[268] Until then, the Court's precedent concerning the flexibility of due process and the need for consideration of the "time, place and circumstances"[269] as well as the "capacities and circumstances of those who are to be heard,"[270] and its requirement that the opportunity to be heard be "at a meaningful time and in a meaningful manner,"[271] weigh in favor of an approach to procedural due process that requires adaptation to changed facts and circumstances.

B. *Identifying Forms of Additional or Substitute Procedural Safeguards*

Once due process is understood to require reconsideration of existing procedural due process precedents, courts must then determine what additional or substitute procedures would satisfy due process in the new, changed circumstances. In the welfare context, the changes

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[267] A related question is whether the requirements of procedural due process vary depending on the facts and circumstances of the particular person who is seeking to challenge a deprivation, or if those requirements ought to be standardized with respect to all persons challenging that deprivation. For an example of one answer, see Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 801-03 (1990), which argues that the Court's approach must systematically consider the welfare system as a whole. The Court's rulings have not answered this question in a consistent fashion. *Compare* Ingraham v. Wright, 430 U.S. 651, 677-78 (1977) (explaining that the level of process due is based on the typical case), *with* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24-25 (1981) (requiring analysis of the facts of each individual case to determine the requirements of due process).

[268] To the extent that revisiting procedural due process precedents may raise stare decisis concerns, such concerns do not appear to be particularly relevant in this context. Due process challenges of the type described here will be based on facts that are distinguishable from those previously considered. Furthermore, the Supreme Court has recognized that its decision to overrule a prior case may be informed by "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

[269] Connecticut v. Doehr, 501 U.S. 1, 10 (1991) (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

[270] Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

[271] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

identified in Part II of this Article suggest that the risk of erroneous termination has increased substantially since the 1970s, while at the same time welfare recipients now have a more difficult time using fair hearings to challenge those terminations. Thus, there appears to be a need for additional procedural safeguards that are tailored to the current realities of welfare programs and welfare recipients.

In order to respond directly to the new facts and circumstances discussed in Sections II.A through C, this Section is organized according to the new procedural needs created by those changes and identified in Section II.D. Although some of the procedures discussed below are likely beyond the scope of what a court could or would order as part of a *Mathews* analysis, nothing would prevent a welfare agency from adopting the procedures. Indeed, to the extent that the procedures reduce the risk of erroneous deprivation, they could insulate a state from liability in a future due process challenge.

1. Pre–Fair Hearing Procedures

Adoption of prehearing screening and informal dispute resolution procedures could relieve much of the pressure to overturn erroneous terminations that is currently borne by the fair hearing system.[272] Such procedures could involve the welfare agency affirmatively reaching out to the recipient after the agency decides to terminate benefits, rather than merely assuming that the basis for the termination is correct and then waiting to see if the recipient requests a fair hearing.[273] The pur-

[272] Despite the appeal of using prehearing informal dispute resolution procedures to screen out erroneous terminations, some scholars have argued that relying on such procedures to resolve disputes may disadvantage the poor. *See, e.g.*, Lens, *supra* note 66, at 53 ("[C]aution is warranted for using alternative and less formal procedures for resolving disputes within the welfare center. Such procedures may work against poorer and more disadvantaged clients, who may lose procedural protections that compensate for their lack of power."); *cf.* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1396 (describing how informal processes allow the state to exercise coercive power over the poor who would otherwise be protected in formal proceedings); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (arguing that poor litigants suffer from a power imbalance in negotiations).

[273] This has long been the general rule with respect to applications for food stamp benefits. *See* 7 C.F.R. § 273.2(d)(1) (2011) ("If there is any question as to whether the household has merely failed to cooperate, as opposed to refused to cooperate, the household shall not be denied, and the agency shall provide assistance . . . ."); *id.* § 273.2(c)(5) (defining the "assistance" required by 7 C.F.R. § 273.2(d)(1) to include a notice informing the household of, among other things, the state agency's "responsibility to assist the household in obtaining required verification").

pose of this contact would be twofold: to determine if the recipient in fact willfully failed to comply with the rules, and, if so, whether the recipient will agree to come into compliance immediately.

Such a prehearing procedure was implemented in Tennessee starting in January 1998. This process—known as Customer Service Review (CSR)—arose after Tennessee's welfare caseload shrank by almost thirty-eight percent in the year following enactment of the 1996 federal welfare law.[274] Concerned that this reduction was attributable to widespread caseworker error and recipient misunderstanding, lawyers at the Tennessee Justice Center contemplated legal action against the state welfare agency.[275] However, rather than bring a lawsuit, they negotiated with state officials to create the CSR process, which required each proposed welfare case closure or sanction to be subject to an independent review before the agency could withhold benefits from a recipient.[276] The goal of the CSR process was to avoid erroneous terminations of benefits, to better inform recipients of program rules, and to give recipients another opportunity to comply with the rules.[277]

Under the CSR process, impartial reviewers[278] first checked to see whether the case file included sufficient documentation to support the caseworker's recommendation that benefits be terminated.[279] If the file lacked sufficient documentation, the case remained open and was returned to the eligibility worker.[280] If the reviewer verified that the case file supported the termination of benefits, the reviewer then contacted the recipient in order to explain the reasons for the proposed case closure, find out from the recipient why she failed to comply with

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[274] Russ Overby, *Customer Service Review: Tennessee's Review Process Before Welfare Reform Cases Are Closed*, WELFARE NEWS (The Welfare Law Ctr., New York, N.Y.), Sept. 18, 1998, at 7.

[275] APPLIED RESEARCH CTR., WORTHWHILE WELFARE REFORMS 2 (2001).

[276] *Id.*

[277] *See* Overby, *supra* note 274, at 8.

[278] *Id.* The reviewers were initially Tennessee Department of Human Services supervisors, but the process was later turned over to "contract employees hired by four state universities in Tennessee on a regional basis, with overall training conducted by the School of Social Work at the University of Tennessee. Contract employees [were] not subject to the supervision of the local offices whose cases they review[ed]." *Id.*

[279] *Id.* Several types of proposed case closures were not included in the review process, including cases that were closed due to excess income or resources, recipients moving out of state or dying, children of recipients becoming too old to qualify, and children "already receiving cash assistance with another caretaker." *Id.* at 7.

[280] *Id.* at 8.

the program requirements, and ask the recipient if she was willing to come into compliance with those requirements.[281] If the recipient complied with the rules within fourteen days, benefits were not terminated.[282] Recipients who still did not comply had their cases closed but were also sent a notice informing them of the reasons, how they could regain benefits, and the availability of emergency welfare assistance.[283]

Although Tennessee discontinued the CSR process in 2006,[284] it posted impressive results while it was operational. Based on a two-year sample, customer service reviewers were able to reach about half of all recipients threatened with case closure, and two-thirds of those recipients avoided the closure by coming into compliance with the rules.[285] Even when a reviewer could not reach the recipient, reviewers overturned one-third of the intended case closures because there was insufficient support for closure in the case file.[286]

New York has also adopted a prehearing procedure for certain welfare cases, but the procedure differs from Tennessee's approach in ways that undermine its ability to avoid erroneous terminations. Welfare agencies in New York must automatically begin an informal dispute resolution process called "conciliation" whenever they decide to reduce or terminate benefits due to a failure to comply with the work rules.[287] The agencies first mail a letter to the recipient informing her of the alleged violation and her right to participate in a conciliation meeting.[288] The meeting is then held at a central welfare office, and the goal is to determine whether the failure to comply with the work

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[281] *Id.*

[282] *Id.* This time period could be extended if it was "not possible to demonstrate compliance within 14 days." *Id.*

[283] *Id.*

[284] UNIV. OF TENN. COLL. OF SOC. WORK OFFICE OF RESEARCH & PUB. SERV., 2005–2006 ANNUAL REPORT 7 (2006). In its place, the Tennessee welfare agency created an in-house "Closure Review Team," which assumed some of the functions CSR staff previously performed. *Id.*

[285] Super, *supra* note 102, at 882 & n.197.

[286] *Id.*

[287] N.Y. SOC. SERV. LAW § 341 (McKinney 2003). The Family Support Act of 1988 required an attempt at conciliation prior to imposing a welfare sanction, but that requirement was repealed by PRWORA. *See* 42 U.S.C. § 682(h) (1994) (repealed 1996) ("Each State shall establish a conciliation procedure for the resolution of disputes involving an individual's participation in the [Job Opportunities and Basic Skills Program].").

[288] N.Y. SOC. SERV. LAW § 341.1(a).

rules was "willful and without good cause."[289] If the recipient establishes good cause and demonstrates that the failure was not willful, the sanction cannot be imposed; however, if good cause is not established or if the recipient does not attend the conciliation meeting, the agencies issue a notice informing the recipient that her benefits will be reduced or terminated due to the failure to comply with the rules.[290] In 2010, New York City's welfare agency claims that more than half of the conciliation meetings attended by the recipient resulted in resolution of the issue with no loss of benefits.[291] Without information about the recipients who do not attend their conciliation meetings,[292] however, it is difficult to evaluate the overall effectiveness of the process.

The prehearing procedures adopted by Tennessee and New York have the potential to counteract some of the features of today's welfare system that undermine the effectiveness of the right to a fair hearing. Yet these procedures have important differences that bear upon their capacity to reduce the risk of erroneous deprivations. In Tennessee's CSR process, the reviewer made contact with the recipient by telephone and provided information and asked questions in an attempt to resolve the problem. In contrast, the New York conciliation notice mailed to the recipient includes little information other than a recitation of the failure to comply and information about the recipient's right to conciliation. In addition, unlike the CSR process, conciliation meetings require in-person attendance, which makes it more difficult for recipients with jobs or childcare obligations to participate. The conciliation meetings also differ in the possible outcomes. Whereas the CSR process allowed for resolution based on a promise to comply immediately with the rules, conciliation meetings do not, excusing noncompliance only if good cause is shown. Finally, Tennessee's use of customer service reviewers who were independent from the welfare agency created a level of impartiality that is missing from New York's

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[289] *Id.*; *see also Fair Hearings: Overview*, COMMUNITY SERVICE SOC'Y, http://benefitsplus.cssny.org/pbm/advocacy/fair-hearings/203135#203137 (last visited Feb. 15, 2012) (describing New York City's conciliation process for resolving work-related welfare issues).

[290] N.Y. SOC. SERV. LAW § 341.1.

[291] *See* deMause, *supra* note 240 (quoting New York City Human Resources Administration Commissioner Robert Doar's statement that "in conciliation, during the course of the past year, the majority of [cases] resulted in the agency being able to settle the matter with no penalty to the client").

[292] According to the agency, it does not track the percentage of recipients that fails to attend the conciliation meeting. *Id.*

conciliation process, which is staffed by employees within the same agency that is seeking to terminate the recipient's benefits.

2. Transparency Regarding Automated Determinations

Decisions to terminate benefits made by welfare agencies' computer systems do not need to be shrouded in secrecy. Agencies could take an important step toward transparency simply by ensuring that their computer systems "generate audit trails that record the facts and rules supporting their decisions."[293] These audit trails could include a comprehensive history of all decisions made in the case, including the identities of the agency officials who created the factual record.[294] Providing audit trails to welfare recipients at the time they are notified of a decision to terminate their benefits would enable recipients to see the reasons supporting the automated determination, decide whether to challenge the determination, and prepare for a fair hearing. Audit trails would also make it easier for judges presiding over fair hearings to assess the legality of challenged decisions, and could potentially counteract the automation bias that can influence some judges.[295]

3. Flexible Scheduling of Fair Hearings

Accommodating working welfare recipients who are unable to exercise their right to a fair hearing because they are afraid of losing their jobs is fairly straightforward: change the way fair hearings are scheduled. There is no reason that all fair hearings must be held Monday through Friday, during regular business hours; indeed, some civil court systems have adopted evening or weekend sessions.[296] Allowing recipients to request evening or weekend hearings would enable some recipients to appear at fair hearings when they otherwise would

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[293] Citron, *supra* note 234, at 1305.

[294] *Id.*

[295] *See id.* at 1305-06 ("By providing a detailed map of a computer's decision-making process, audit trails would encourage [hearing] officers to critically assess the computer's specific findings."). Citron also proposed two strategies to combat automation bias more directly. "First, agencies should make it clear to hearing officers that automated systems are fallible." *Id.* at 1306. "Second, agencies should require hearing officers to explain, in detail, their reliance on an automated system's decision." *Id.* at 1307.

[296] For example, New York City's small claims courts are in session during evening hours one day a week. *See New York City Civil Court Small Claims Part: Civil Court Schedule and Service Changes*, N.Y. ST. UNIFIED CT. SYS., http://www.nycourts.gov/courts/nyc/smallclaims/courtservicechanges.shtml (last visited Feb. 15, 2012).

not be able to do so. And even if holding fair hearings outside the traditional workweek would be too administratively burdensome, permitting recipients to identify days or times they are unavailable and scheduling hearings accordingly would increase the likelihood they will appear at their fair hearings and take full advantage of their due process rights.

4. Procedures That Are Accessible to Pro Se Recipients

There are many ways that a welfare agency could make fair hearings more accessible to pro se recipients. An agency could ensure that recipients are provided user friendly information about the rules and procedures governing the proposed termination of their benefits and the fair hearing itself. Along those lines, an agency could designate ombudspeople to help recipients understand the reasons for the impending termination and how to navigate the fair hearing system.[297] A welfare agency could create materials for pro se recipients that provide much the same information,[298] or allow outside organizations to operate pro se help desks in welfare offices or at hearing sites.[299] Making such resources and information available would mitigate the need for recipients to consult with lawyers in order to figure out whether the

[297] *See* Diller, *supra* note 61, at 1216 (suggesting an ombudsman system); *cf.* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1816 (2001) ("All jurisdictions should have comprehensive services such as free or low-cost workshops, hotlines, court-house advisors, and walk-in centers that provide personalized multilingual assistance at accessible times and locations.").

[298] *See, e.g.*, RICHARD ZORZA, THE NAT'L CENTER FOR STATE COURTS, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 49 (2002), *available at* http://www.zorza.net/Res_ProSe_SelfHelp CtPub.pdf (advocating for provision of accessible, user friendly information to pro se litigants); Cantrell, *supra* note 210, at 1581 (discussing pro se assistance programs, including printed self-help manuals and web-based information centers).

[299] This type of pro se assistance for welfare recipients challenging terminations or reductions of benefits already exists in New York City. Since 2001, the state agency that administers welfare fair hearings has permitted Project FAIR, a coalition of legal services attorneys, community advocates, and law students, to staff a help desk at the sole hearing location in the city. *See History*, PROJECT FAIR, http://www.projectfair.org/history.html (last visited Feb. 15, 2012). Advocates had previously tried to establish help desks in the waiting rooms of New York City–run welfare offices, but the city barred the advocates from entry and a First Amendment challenge to the city's restrictions proved unsuccessful. *See* Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 139-40, 151 (2d Cir. 2004) (determining that welfare office waiting rooms are nonpublic fora and the exclusion of an organization without official business is reasonable).

agency's decision is correct and whether they should request a fair hearing.

Welfare agencies could take advantage of technological advances that have rendered some prehearing procedures far less costly than they were in the past. In jurisdictions that use electronic case file systems to store information pertaining to a welfare case, agencies could create an Internet-based mechanism for recipients to review information relevant to the agency's proposed termination of benefits.[300] Making this information available online would enable recipients to learn the basis for the termination and decide whether to request a fair hearing. This access would also enable recipients to better prepare for fair hearings, thereby reducing erroneous deprivations.

It is also possible to modify the fair hearing itself in ways that make it more accessible to pro se recipients. For example, the burden of proof on welfare agencies could be heightened in order to reduce the risk of erroneous deprivation.[301] When terminating benefits, agencies typically must prove that the decision is supported by a preponderance of the evidence.[302] In order to uncover deprivations that are not supported by the record, but which pro se recipients are unable to combat at the hearing, agencies could be held to a more stringent "clear and convincing" standard. Requiring the agency to prove each element of its case beyond the traditional "preponderance of the evidence" standard would place an extra burden on welfare agencies, thereby reducing the risk that benefits would be terminated erroneously.[303]

The federal food stamp program already uses this type of burden shifting in some situations. Federal law requires states to follow specific

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[300] Although many welfare recipients likely do not have Internet access in their homes, most can visit public libraries or other locations that offer free access. *See, e.g.*, SAMANTHA BECKER ET AL., OPPORTUNITY FOR ALL: HOW THE AMERICAN PUBLIC BENEFITS FROM INTERNET ACCESS AT U.S. LIBRARIES 19 (2010), *available at* http://www.imls.gov/pdf/OpportunityForAll.pdf ("Public library computers have become a critical resource for many underserved populations and for others who do not have access to the Internet and computers through other means.").

[301] Outside the welfare context, the *Mathews* balancing test has been used to strike down a "fair preponderance of the evidence" standard of proof and replace it with a "clear and convincing evidence" standard in proceedings to terminate parental rights for neglect. *See* Santosky v. Kramer, 455 U.S. 745, 768-70 (1982).

[302] *See, e.g.*, Brodoff, *supra* note 215, at 175 (explaining that the "traditional" level of proof required at welfare fair hearings is a "preponderance of the evidence").

[303] *See id.* (arguing that adopting a "clear and convincing" standard for welfare fair hearings would ensure that "only those who are clearly ineligible for benefits would lose them").

procedures when prosecuting "intentional [p]rogram violations," or food stamp fraud.[304] Included in these procedures is a fair hearing at which the presiding judge must make findings on each element using a standard that requires clear and convincing evidence.[305] This heightened standard of proof places an additional burden on agencies, but it serves as an extra safeguard against erroneous determinations.

The role of the judge at welfare fair hearings is another target for procedural reforms designed to assist pro se recipients. Rather than passively waiting for a pro se recipient to present his or her case or respond to the agency representative's presentation of the facts and the law, the judge could play a more inquisitorial role.[306] Such a role could take a variety of forms. For example, the judge could be required to explain to the recipient the basis for the termination and possible defenses, or to develop the record by asking the recipient a series of questions probing whether any defenses might be available or whether there is some other reason why the termination is erroneous.

The Supreme Court has already endorsed the idea that due process may require judges to assume an active role in legal proceedings involving unrepresented parties, albeit outside the context of welfare fair hearings. The Court has long required that judges in civil proceedings evaluate pro se parties' pleadings using a less stringent standard than

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[304] 7 C.F.R. § 273.16(e) (2011).

[305] *See id.* § 273.16(e)(6) ("The hearing authority shall base the determination of intentional [p]rogram violation on clear and convincing evidence which demonstrates that the household member(s) committed, and intended to commit, intentional [p]rogram violation . . . .").

[306] *See, e.g.*, Friendly, *supra* note 42, at 1289 (proposing experimentation with an investigative or inquisitorial system in which an impartial administrative law judge assumes "a much more active role with respect to the course of the hearing; for example, he would examine the parties, might call his own experts if needed, request that certain types of evidence be presented, and, if necessary, aid the parties in acquiring that evidence"); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2028 (1999) (identifying the need for a judge to be "as active as necessary" to ensure a just outcome in cases involving pro se litigants); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 977-78 (2004) (arguing that "judges should be active umpires," policing procedural errors that limit the court's access to relevant evidence and cogent arguments); *see also* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting* Pro Se *Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 670-76 (2006) (reviewing proposals to require active participation of judges to mitigate challenges faced by pro se litigants).

that applied to pleadings submitted by represented parties.[307] And the Court's most recent procedural due process ruling held that judges must take on new roles and responsibilities in order to protect the due process rights of unrepresented parties in particular situations.

In *Turner v. Rogers*, decided at the close of the 2010 Term, the Court, applying *Mathews*, rejected a claim that the Due Process Clause automatically requires the provision of counsel at civil contempt proceedings for an indigent individual facing incarceration for failing to pay child support to a child's unrepresented custodian.[308] In reaching this holding, the Court explained that due process does not require a categorical right to counsel as long as the state provides "'substitute procedural safeguards,' which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty."[309] In *Turner*, these alternative procedures included giving the pro se defendant more information about the "critical issue" to be decided at the hearing, using a form to collect information about that issue, giving the defendant an opportunity to respond to questions about the issue at the hearing, and requiring the judge to make an express finding on that issue.[310] Thus, the Court's reasoning in *Turner* provides new support for reconceptualizing the role of the judge at welfare hearings.[311]

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[307] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976) (stating that "a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers'" (quoting Haines v. Kerner, 404 U.S. 519, 520 (1972))); *cf.* FED. R. EVID. 614 (enabling a court to call and interrogate witnesses); *id.* 706 (enabling court to appoint an expert of its own selection).

[308] Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011).

[309] *Id.* at 2519 (citation omitted) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[310] The Court identified the following four alternative procedural safeguards:

> (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. (citation omitted).

[311] *Turner*'s reliance on judges to assure that individuals' due process rights are vindicated has prompted skepticism. *See, e.g.*, Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 159-61 (2011) (observing that "the *Turner* rule is oddly incomplete" because "enforcement depends on and returns contemnors to the very judges who dealt with them too hastily").

C. *Reckoning with the Limits of Procedural Due Process*

Even if welfare agencies were to implement each of the procedural innovations discussed above, the possibility remains that the resulting procedural safeguards would fail to prevent erroneous deprivations of benefits in the majority of cases. In other words, there might be no way to supplement the welfare fair hearing right in a way that effectively roots out erroneous deprivations. If that is the case, then it seems that the focus of procedural due process should shift to an earlier stage in the welfare termination process in order to prevent erroneous deprivations before they are even proposed.

To be sure, procedural due process is not usually concerned with the initial decision to deprive an individual of a constitutionally protected interest. This is based on the assumption that meaningful procedures exist for individuals to defend themselves against erroneous deprivations. But when no such procedures exist, as may turn out to be true in the current welfare context, due process arguably requires more. *Goldberg* itself lent support to such an expansive vision of due process when it emphasized that due process procedures must be "tailored to the capacities and circumstances" of welfare recipients.[312] As Jerry Mashaw has argued, "The logical and limited extension of that principle is that when due process cannot be assured by trial-type hearings, additional or different techniques for assuring fairness become appropriate."[313]

What such alternative techniques might look like could vary considerably. To address the types of technology-driven errors that arise in highly automated systems, Danielle Citron has suggested that due process should require agencies to regularly test a system's software.[314] Addressing caseworker errors would not be so straightforward. The procedural due process scholarship of the 1970s and 1980s is instructive on this point. Only a few years after *Goldberg* was decided, scholars began to argue that adversarial, trial-like procedural safeguards would never be effective, especially for beneficiaries of subsistence programs

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[312] Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

[313] Mashaw, *supra* note 100, at 810.

[314] *See* Citron, *supra* note 234, at 1310 ("Agencies should maintain testing suites that run expected and unexpected hypothetical scenarios designed by independent policy experts through decision systems to expose distorted policy. . . . Testing protocols should be run before a system's launch, during implementation, and every time policies change.").

such as welfare.[315] According to Jerry Mashaw, writing in 1974, what was needed was a management system for assuring accurate and timely processing and adjudication of welfare claims, sometimes called a quality control or quality assurance system.[316] For Joel Handler, writing twelve years later, the answer was an informal, cooperative system that would exist side by side with the traditional due process system.[317] Both of these approaches represent major shifts in our understanding of procedural due process. Depending on whether and how the requirements of due process adapt to the facts and circumstances of today's welfare programs and welfare recipients, as well as the success of such adaptation, it might be time to reconsider these approaches to procedural due process.

CONCLUSION

Change is inescapable and, in the context of procedural due process, change matters. By examining the evolution of welfare during the forty years since the Supreme Court announced the right to a fair hearing in *Goldberg v. Kelly*, this Article has shown how changes in the facts and circumstances of a property deprivation can affect the Court's fact-intensive approach to procedural due process. Such changes are not unique to welfare—the facts and circumstances of many of the procedural safeguards established since the due process revolution will evolve in ways that affect one or more of the *Mathews* factors in the years to come, if they have not already done so. Yet the Supreme Court has not addressed whether and how due process can

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[315] *See* HANDLER, *supra* note 70, at 7, 22 (arguing that procedural due process is "conceptually flawed" and that "reliance on the complaining client is virtually fatal"); Mashaw, *supra* note 100, at 775 (arguing that "the elements of fairness or fair procedure normally associated with due process of law in adjudicatory proceedings are inadequate to produce fairness in social welfare claims adjudications").

[316] Mashaw, *supra* note 100, at 810-11. Since Mashaw made this proposal, quality assurance systems have been adopted for the administration of food stamps, Social Security disability benefits, and veterans' benefits, among others. *See, e.g.*, Casey & Mannix, *supra* note 142, at 1383-87 (discussing the design and harmful effects of public benefit quality control systems used in the 1980s). More recently, states have experimented with new forms of diagnostic monitoring intended to improve agency performance by combining features of case-by-case adjudication with systemic review. *See, e.g.*, Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reforms*, 34 LAW & SOC. INQUIRY 523, 542-48 (2009) (describing Alabama's and Utah's use of a "Quality Service Review" process to monitor child protective services programs).

[317] *See* HANDLER, *supra* note 70, at 143-53.

adapt to these types of changes. This Article attempts to fill the gap by arguing that adapting the requirements of due process to new facts and circumstances is faithful to constitutional doctrine and necessary to ensure that existing procedural systems continue to provide due process of law. Adapting due process protections to our rapidly changing world also provides an opportunity, decades after the due process revolution, to restart a conversation about procedural justice that went silent many years ago.