[3]*See, e.g.*, Tex. Fam. Code Ann. § 1.91 (Vernon 1992).

[4]Melton, *supra* note 2, at 571.

[5]543 N.E.2d 49 (N.Y. 1989).

[6]*Id.* at 49.

[7]9 N.Y. City Rent Reg. §2204.6(d).

[8]*Id.* at 53.

[9]*Id.* at 55.

[10]Austin, Tex., Res. 42 (Sep. 2, 1993).

[11]Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal Analysis of Domestic Partnership Ordinances*, 92 Colum. L. Rev. 1164, 1187 (1992).

[12]*E.g., Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

[13]*Id.* at 116.

[14]*Id.* at 121.

[15]*But see Hewitt v. Hewitt*, 394 N.E.2d 1204 (1979) (holding that implied contracts should not be found in cohabitation relationships).

[16]*Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987).

[17]*Id.* at 315.

[18]*Id.* at 316.

[19]Bowman & Cornish, *supra* note 11, at 1182.

[20]*Id.* at 1182.

[21]*Id.* at 1183.

Court Involvement in Administering Public Assistance Benefits

by M. Raphael Levy

TEXAS LAW CURRENTLY provides absolutely no right of judicial review to individuals denied benefits by the Department of Human Services (DHS).

The Administrative Procedure and Texas Registration Act provides for judicial review of most administrative remedies, but excludes decisions regarding benefits provided by DHS.[1] Thus, no statute specifically states whether decisions regarding DHS benefits should be judicially reviewed. Courts have determined that administrative decisions may be reviewed only when a statute provides for judicial review or when a constitutional right may have been violated.[2]

Recent Texas decisions in this area have found that determinations by DHS regarding benefits do not fall within either of these categories. In 1971 the Austin Court of Appeals decided, in *Hackney v. Meade*,[3] that an applicant for welfare assistance had no vested right in the requested benefits. The *Hackney* court based its decision on opinions which were over thirty years old and written before the concept of "vested property rights" had been established.[4] The decision in *Hackney* conflicts with modern interpretations of property rights as set by the Supreme Court.[5]

More recently, in *Blair v. Texas Department of Human Services*,[6] the Texas Third Court of Appeals found that no appeal should be permitted from a DHS "fair hearing," because such administrative procedures satisfy all due process requirements. In addition, the *Blair* decision failed to include a proper calculus of the level of due process that should be afforded under the given circumstances, as the Supreme Court requires.[7]

Because of the discrepancy between Texas practice and Supreme Court mandates for how states must interpret federal constitutional rights, the cases concerning Texas public assistance benefits should be reconsidered.

CONTINGENCY OF JUDICIAL REVIEW

The Supreme Court of Texas has decided that, when no statute specifically provides for judicial review of administrative decisions, review should be denied unless the administrative action violates a constitutional right.[8] *City of Amarillo v. Hancock* is the basis for modern Texas decisions requiring administrative action to infringe upon a constitutional right before judicial review is granted.[9]

However, the *Hancock* rule is based upon questionable logic and outdated legal concepts and should therefore be reconsidered. The *Hancock* decision

based its analysis on the following proposition: when a statute specifically denies judicial review, no review will be permitted unless a state or federal constitutional issue exists.

Based on this proposition, the *Hancock* court concluded that, when a statute remains silent on whether judicial review should be granted, a constitutional violation must also be demonstrated.[10] The court did not explain why such silent statutes should be limited in such a manner.[11] As support for this decision, the court cited a 1941 Delaware case, *Darling Apartment Co. v. Springer.*[12] In *Darling,* the Supreme Court of Delaware required no due process when declining to issue a license for the sale of liquor.[13] Since this decision was handed down, the United States Supreme Court found that decisions involving licenses and franchises require some modicum of due process.[14]

The *Hancock* court also mentioned two cases directly adverse to its final ruling without adequately explaining its departure from them. The case which *Hancock* cites for the proposition that a statute *may* provide judicial review of an administrative action actually states that judicial review *should* be available for all administrative decisions.[15] In addition, the *Hancock* opinion attempts to distinguish *White v. Bolner*[16] by stating that *White* was decided on separate constitutional grounds.[17] However, the *White* decision actually states that the right to judicial review is required for all acts of administrative agencies.[18] Because *Hancock* conflicts with prior Texas case law and has little legal support, courts may wish to reconsider the rule of law used to determine the availability of judicial review for administrative actions.

Some of the major arguments against judicial review of administrative decisions were addressed in the cases preceding *Hackney.* In response to the concern that judicial review would violate the separation of powers, the *White* opinion stated that judicial review would actually help maintain the desired balance between the branches.[19] Without judicial supervision, administrative discretion could easily supercede the law itself. In addition, the concern that the judges could assume the role of administrators is countered by the use of the substantial evidence standard of review, specified in *Fire Dept. of Fort Worth v. City of Fort Worth.*[20] Under this standard, the judiciary could only reverse and remand decisions not supported by the evidence, leaving the administrative agency with the decision-making authority.

DUE PROCESS CONSIDERATIONS

Under the Fourteenth Amendment of the United States Constitution, states may not deprive individuals of property without due process of law.[21] Although the Texas court in *Hackney* refused to acknowledge a property right in welfare benefits, the Supreme Court has ruled differently. The Court in *Goldberg v. Kelly* rejected the distinction between rights and privileges with regard to welfare benefits. Justice Brennan, speaking for the majority, wrote that "welfare benefits . . . are a matter of statutory entitlement for persons qualified to receive them."[22] Later, the Court stated that an individual must possess a legitimate interest in a benefit for that benefit to be considered a property right.[23] Referring to *Goldberg,* however, the Court, in *Board of Regents of Statet Colleges v. Roth,* found that due process should be granted *before* eligibility has been determined, in order to give claimants an opportunity to prove such eligibility.[24]

The criteria whereby an interest may be classified as a property right was defined by the Court in *Perry v. Sindermann.*[25] The *Perry* court stated: "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."[26]

Texas courts have adopted this definition of property rights for governmental benefits.[27] Therefore, benefits in Texas which are distributed through fixed rules, rather than at the discretion of an administrator, provide a right to due process. Public assistance benefits fall within the category of entitlements with due process rights under the rule adopted in *Martine v. Board of Regents, State*

Senior Colleges of Texas.[28]

Additionally, the federal rules authorizing funds for the benefits which DHS issues do not allow for discretionary decision-making, but instead require that benefits be awarded to all applicants meeting the specified criteria.[29] Thus, the rules regarding disbursements, and federal caselaw regarding public assistance benefits, require that due process be afforded to claimants attempting to prove their eligibility under these programs.

DUE PROCESS REQUIREMENTS

After determining that an individual possesses a property right in a benefit, the courts must determine what procedures are required to afford due process of the law. The balancing test laid out in *Matthews v. Eldridge* identifies the procedural requirements under the Fourteenth Amendment. Under this test, courts must consider: (1) the private interest of the individual affected; (2) the change in the risk of erroneous deprivation which substitute or additional procedures could provide; and (3) the public interests and costs of providing additional or substitute procedures.[30] After considering the value and costs of permitting judicial review of the benefits in question, the courts should find that due process requires this additional procedure.

Recipients of public assistance benefits possess very strong interests in receiving these entitlements. Generally, the individuals applying for benefits depend upon such support for their basic needs. As stated in *Goldberg*: "[T]ermination of aid . . . may deprive an eligible recipient of the very means by which to live. . . . Since he lacks independent resources, his situation becomes immediately desperate."[31] Thus, regardless of the actual dollar figures, the value of these benefits to the individuals affected is enormous.

The risk of deprivation would be greatly reduced by permitting judicial review. A certain percentage of improper decisions will result from any decision-making process. An opportunity to have a separate decision-maker review the results in question would provide the fairest method for determining whether the initial decision was within legal discretionary limits. With the faith we place in our court system, no better forum exists for reviewing any questionable DHS decisions.

Unlike some procedural safeguards, whose value to the interested parties may be questioned, the value of judicial review cannot be questioned without undermining our entire court system.

Governmental interests should not outweigh the combination of the applicant's interest in receiving benefits and the decreased risk of erroneous deprivation. Also, the cost of permitting judicial review would be relatively small. Only a fraction of claims which DHS denies will proceed to court. Many disputants will not be interested in proceeding further after being denied benefits through the administrative process. Those who wish to pursue judicial action will need to file pro se or obtain legal representation. Between the complexity of our legal system and the low educational level of many applicants, pro se filing will rarely be a viable option. Access to legal representation will determine, for most interested complainants, whether judicial review will actually be available.

In general, only those applicants with meritorious claims will be able to get legal representation. A private attorney will not accept a case from a client unable to pay or without a claim likely to produce a contingency fee. In addition, the meager resources of legal aid societies, such as those representing Hackney and Blair, must be rationed to meet as much of the legal needs of their communities as possible; therefore, these societies are forced to screen applicants carefully before accepting cases. Thus, attorneys specializing in the area of public benefits would screen out the vast majority of applicants denied by DHS, before the district courts came into contact with such cases. Practical considerations would therefore prevent most non-meritorious claims from reaching the court system.

Overall, the cost of permitting judicial review would be small compared to the value of the benefits conferred. In addition to the value to the

recipients, the public may have an interest in a fair administration of these benefits. The Supreme Court has noted: "Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'"[32] Governmental interests in promoting a fair distribution of benefits, helping people to return to productive lifestyles, and preventing social unrest may outweigh the financial costs, *without considering the individual's interest.*[33] Because the private interest of the individual is greatly affected, because judicial review provides the only mechanism for reducing the risk of erroneous deprivation, and because the public interest outweighs the costs involved, the *Matthews v. Eldridge* test is met. Thus, applying the *Matthews* balancing test, judicial review should be required under the Fourteenth Amendment.

According to one article written on the subject, Texas is but one of three states which does not provide judicial review for public assistance decisions.[34] However, Texas caselaw may provide for an automatic right to appeal administrative decisions as long as no statute expressly forbids such an appeal. As stated by the Tyler Court of Appeals: "[T]he denial of [a vested property right] gives [the holder] an inherent right of appeal to the courts despite lack of both consent by Legislature and of specific statutory provisions allowing judicial review of decisions by the Board."[35]

This decision was supported by four other Texas cases, stating that vested property rights could not be infringed upon without providing a right to judicial review.[36] Under Texas cases, therefore, the determination that a property right exists should provide a right to judicial review, without requiring the due process balancing test.

The denial of public assistance benefits requires a right to judicial review. The public assistance benefits issued by DHS are vested property rights for anyone who meets the eligibility criteria. Under Texas law, a denial of a vested property interest may produce an automatic right to an appeal. Additionally, application of the *Matthews* balancing test to public assistance benefits weighs strongly in favor of providing a right to appeal. Finally, these appeals should be allowed because the precedent set by Texas courts in *Blair* and *Hackney* contradicts other Texas law and violates the United States Constitution. ❖

M. Raphael Levy is a third-year student at the University of Texas School of Law.

ENDNOTES

[1]Tex. R. Civ. Stat. Ann. Art. 6252-13a § 21(b) (Vernon 1989).

[2]*Sells v. Roose,* 769 S.W.2d 641, 643 (Tex. App. — Austin 1989, *no writ*).

[3]466 S.W.2d 341, 342 (Tex. App. — Austin 1971, *writ ref'd n.r.e.*).

[4]*Id.*

[5]*Perry v. Sinderman,* 408 U.S. 593, 60 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.").

[6]837 S.W.2d 670, 671-72 (Tex. App. — Austin 1992, *writ denied*).

[7]*Matthews v. Eldridge,* 424 U.S. 319, 334-35 (1976).

[8]*City of Amarillo v. Hancock,* 239 S.W.2d 788, 790 (Tex. 1951).

[9]*Hancock* established the requirement that there be a statutory provision or a constitutional violation before judicial review is granted. With two exceptions, modern case law in this area is derived from the rule in *Hancock.* The two exceptions are *Richardson v. Alsup,* 380 S.W.2d 923, 924 (Tex. Civ. App. — Eastland 1964, *writ ref'd*) and *Armstrong v. Harris,* 669 S.W.2d 323, 327 (Tex. App. — Houston [1st Dist] 1983, *writ ref'd n.r.e.*). In these two cases courts reached decisions similar to that in *Hancock* without ever citing *Hancock.* The court in *Alsup* used language almost identical to *Hancock* and its progeny, presumably relying on the *Hancock* rule without specifying its origin. Similarly, the languge in *Armstrong* paralleled that of *Hancock* without ever referring to *Hancock* directly. *Armstrong* identified the right to appeal administrative judgments as a constitutional right to protect oneself against deprivation of property without due process. This case presumes that a benefit must be "vested" to be entitled to review, without explaining why this requirement must be met. Except for these

two cases the modern rule can be traced directly to *Hancock. Brazosport Savings & Loan Ass'n v. American Savings & Loan Ass'n,* 161 Tex. 543, 342 S.W.2d 747, 750-751 (1961), *Mason v. City of San Antonio,* 324 S.W.2d 90, 91 (Tex. Civ. App. — 1959, *no writ*) and *Crawford v. City of Houston,* 600 S.W.2d 891, 894 (Tex. App.—Houston [1st Dist] 1980, *writ ref'd n.r.e.*) cite *Hancock* as their only support for this rule. *Stone v. Texas Liquor Control Board,* 417 S.W.2d 385, 386 (Tex. 1967), cites *Brazosport, Hancock, Richardson;* and *Mason H. Tebbs Inc. v. Silver Eagle Dist.,* 797 S.W.2d 80, 89 (Tex. App. — Austin 1990, *no writ*) (Powers, J. dissenting) and *Sells v. Roose,* 769 S.W.2d at 643, both cite *Hancock* and *Stone. Hackney,* 466 S.W.2d 341, cites *Stone, Brazosport, Hancock,* and *Richardson.* These cases constitute the sole authority preventing review of administrative cases.

[10] *Hancock,* 239 S.W.2d at 790.

[11] *Id.*

[12] 22 A.2d 397 (Del. 1941).

[13] *Id.* at 401.

[14] *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970).

[15] *Hancock,* 239 S.W.2d at 790, *citing Fire Dept. of Fort Worth v. City of Fort Worth,* 217 S.W.2d 664, 666 (Tex. 1949).

[16] 223 S.W.2d 686 (Tex. Civ. App. — San Antonio 1949, *writ ref'd*).

[17] *Hancock,* 239 S.W.2d at 791.

[18] *White,* 223 S.W.2d at 689.

[19] *Id.* at 688.

[20] 217 S.W.2d at 666.

[21] U.S. Const. amend XIV, § 1.

[22] *Goldberg,* 397 U.S. at 261-62.

[23] *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972).

[24] *Id.*

[25] 408 U.S. 593 (1972).

[26] *Id.* at 601.

[27] *Martine v. Board of Regents, State Senior Colleges of Texas,* 578 S.W.2d 465, 470 (Tex. App. — Tyler 1979).

[28] *Id.*

[29] Government assistance to states requires that benefits be provided to "all eligible individuals." 42 U.S.C.A. §302(a)(8) (old age assistance grants); 42 U.S.C.A. §602 (a)(10)(A) (Aid for Families with Dependent Children); and 42 U.S.C.A. §1396a(a)(8) (Medicare).

[30] *Matthews,* 424 U.S. at 335.

[31] *Goldberg,* 297 U.S. at 364.

[32] *Id.* at 265.

[33] *Id.*

[34] Christopher Alleen Stump & Jill A. Hanken, *Virginia Should Open Its Courthouse Doors to Review Administrative Decisions Involving Public Assistance,* 21 U. Rich. L. Rev. 161, 177 (1986).

[35] *Martine,* 578 S.W.2d at 470.

[36] *Id.* at 471-472, *citing Brazosport,* 161 Tex. 543, 342 S.W.2d 747 (1961); *Chemical Bank & Trust: Co. v. Falkner,* 369 S.W.2d 427 (Tex. 1963); *Board of Ins. Comm'n v. Title Ins. Ass'n,* 272 S.W.2d 95 (Tex. 1954); *Texas Optometry Board v. Lee Vision Center, Inc.* 515 S.W.2d 380 (Tex. Civ. App.—Eastland 1974, *writ ref'd n.r.e.*).