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Fairness And Bureaucracy: The Demise of Procedural Due Process For Welfare Claimants

By BARBARA BRUDNO*

Two major types of issues underlie the debate over the application of the Fourteenth Amendment's due process procedural safeguards to welfare law: the constitutionality of denying and the politi-

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1. For a summary of the meaning of the term "welfare law" as used herein see text accompanying note 7 infra.

Most of the income redistribution programs lumped together under the term “welfare” derive from the 1935 federal Social Security Act, 49 Stat. 620 (1935). As explained in B. BRUDNO, CASES AND MATERIALS ON THE LAW AND THE POOR 511-13 (3d ed. 1972) [hereinafter cited as BRUDNO]: “[T]he 1935 Act placed primary emphasis on alleviating the risks of economic insecurity resulting from old age and temporary loss of employment, and adopted a form of social insurance as the basic wealth transfer mechanism. Public assistance [what is typically referred to as “welfare” as opposed to those programs known as “Social Security”], on the other hand, was added as a residual program to transfer income [from the taxpaying public] to statutorily defined categories of persons [e.g., the “dependent child” under the AFDC program] based on individual need . . . . Beginning with the 1935 Act, the federal government has increasingly assumed responsibility for the problem of economic insecurity . . . . [C]urrent [income] transfer [or redistribution] programs . . . consist of three basic types, differentiated according to their approach to the problem of insufficient income: (1) income-in-kind programs, which provide subsidies for such things as food, housing, and medical care (e.g., Medicaid, Food Stamps, Public Housing); (2) social insurance programs, which provide wage-substitutes on the basis of past employment (e.g., Old Age, Survivors, and Disability Insurance, Unemployment Insurance); and (3) public assistance programs which provide income payments to specified categories of needy individuals and families (e.g., OAA, AFDC, AB, APTD).” See generally THE PRESIDENT’S COMMISSION ON INCOME MAINTENANCE PROGRAMS, POVERTY AMID PLENTY: THE AMERICAN PARADOX 4-7, 45-46, 90 (1969) [hereinafter cited as INCOME MAINTENANCE]; S. RIESENFELD & R. MAXWELL, MODERN SOCIAL LEGISLATION 10-15, 461-66 (1950); Wodemeyer & Moore, The American Welfare System, 54 CALIF. L. REV. 326, 329-34, 343-51 (1966). See also R. O’NEIL, THE PRICE OF DEPENDENCY ch. IX

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cal wisdom of mandating the safeguards of procedural due process. For a discussion of the "withering-away fallacy" underlying the public assistance provisions of the 1935 Act see G. Steiner, Social Insecurity 18-47 (1966).

Income-in-kind programs differ from social insurance and public assistance programs primarily on the basis of the nature of the transfer payment: specific goods or cash payments limited to obtaining those goods versus direct cash payments with no built-in spending limitations. See Brudno, supra note 1, at 513-14.

Social insurance and public assistance programs differ primarily on the basis of two economic factors: (1) the former are financed by taxes on employers and/or employees (future beneficiaries), while the latter are financed out of general revenues, and (2) eligibility and benefit-level criteria for the former are based primarily on past employment, while eligibility and benefit-level criteria for the latter are based primarily on present life circumstances (e.g., the family structure, age, or health of the claimant) and financial need. See Brudno, supra note 1, at 514-16.


4. "Due Process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. Due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular [procedural] right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." Hannah v. Larche, 363 U.S. 420, 442 (1960). See also Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); cf. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 954-60 (1971) (Black, J., dissenting from denial of certiorari); The Supreme Court, 1972 Term, 87 Harv. L. Rev. 55, 64 & n.42 (1973).

The phrase "safeguards of procedural due process" is intended to include, in addition to the basic requirements of notice and a (fairly structured) hearing, other procedural safeguards more specifically guaranteed by, e.g., the Fourth Amendment's search and seizure requirements, which are incorporated within the Fourteenth Amendment's due process clause and which perform similar functions in the context of an individual facing a government bureaucracy which dispenses benefits on which that in-
for welfare claimants.

Before proceeding to analyze these two issues, a brief description of the terms "welfare claimant" and "welfare law" is necessary. As here used, the designation "welfare claimant" includes first, initial applicants and second, current recipients facing: (a) complete termination; (b) reduction in the dollar amount of assistance; (c) loss of or exclusion from nonfinancial or "income-in-kind" assistance (for example, access to job-training programs, child care, rent subsidies, food stamps); and, (d) imposition of additional conditions on continued eligibility (for example, cooperation with or acquiescence in "home visits" by welfare caseworkers which are conducted outside the strictures of the Fourth Amendment's search and seizure safeguards).

The term "welfare law," as used here, includes both those direct cash transfer programs typically referred to as "welfare"—the categorical assistance programs (Old-Age Assistance [OAA], Aid to the Blind [AB], Aid to the Permanently and Totally Disabled [APTD], and Aid to Families with Dependent Children [AFDE]), established by the 1935 federal Social Security Act—as well as those direct cash
transfer programs called "insurance" programs—Unemployment Insurance and Old-Age, Survivors, and Disability Insurance (OASDI), generally called "Social Security."

The two major types of issues underlying the procedural due process debate in welfare law—the constitutional-doctrinal type and the political wisdom type—differ in that they raise, or focus upon, two fundamentally disparate questions. The first, the constitutional-doctrinal type of issue, asks: What do the relevant case law precedents, the trends and changes in the way the United States Supreme Court has interpreted and applied the constitutional provision at issue, and the legal-social policies underlying those constitutional adjudications, tell us about, or how can they be utilized to obtain, the constitutional safeguards to which a welfare claimant is, or should be, entitled? The second, the political wisdom type of issue, asks, on the other hand: Will providing procedural due process or other constitutional safeguards in fact matter for the individual welfare claimant; that is, will it provide greater financial security or enhanced personal dignity? In more collective terms, will providing such safeguards for welfare claimants ultimately improve the welfare system (including alleviating poverty in general) from the vantage point of either welfare claimants generally or society at large? And, finally, assuming that the answer to either of these latter two questions is affirmative, will the benefits to be gained justify the cost of implementation?

The most fruitful way to understand and evaluate the case law of procedural due process for welfare claimants is to recognize that the first type of issue is decided on the basis of considerations of the second type. That is, as the following discussion of the United States ownership, limitation and recruitment provisions, which heretofore varied considerably among the several states. For a comprehensive critical summary of the new federal adult categorical assistance program, see Recent Developments, Welfare Law—1972 Social Security Act Amendment—Supplemental Income for the Aged, Blind, and Disabled, 58 CORNELL L. REV. 803 (1973).

8. Discussion here is limited to the major procedural due process decisions of the United States Supreme Court. Decisions of lower federal courts and of state courts are not included. At the time of the Goldberg v. Kelly, 397 U.S. 254 (1970), decision only Chief Justice Burger, among the four Nixon appointees, was on the Court. Justice Blackmun was on the Court during the entire period in which the four post-Goldberg decisions were decided, and, by the time of the Ortwein v. Schwab, 410 U.S. 656 (1973), decision, all four Nixon appointees were on the Court. The crucial shift in the composition of the Court which resulted in what I here refer to as the "Burger Court majority" in welfare procedural cases occurred when Justice Blackmun joined Chief Justice Burger on the Court. Three of the four remaining members of the Goldberg majority—Justices Brennan, Douglas, and Marshall—then became the minority, and, with the one exception of Justice Stewart's vote in Ortwein, see text accompanying
Supreme Court's five major decisions in this area will demonstrate, the doctrinal resolutions of the constitutional issues are, in large part, phrased in terms of and justified on the basis of arguments which fall into the political wisdom category. This is equally true of the first and leading case, *Goldberg v. Kelly*, which held basic procedural due process safeguards applicable to loss of welfare benefits, and of the subsequent Burger Court majority decisions which eroded that holding.\(^9\)

The demise of procedural due process for welfare claimants is best illustrated by considering four post-*Goldberg* decisions by the Burger Court majority. (1) *Richardson v. Perales*,\(^11\) authored by Justice Blackmun, held that a hearsay physician's medical report was sufficient evidence to support an administrative finding of nondisability, and, therefore, ineligibility,\(^12\) even where the claimant objects to the admissibility of the report, alleging denial of confrontation and cross-

\(^9\) See the discussion of the growth and composition of the "Burger Court majority" in note 8 *supra*.

\(^10\) Eligibility for disability insurance, which was not added to the OASDI program until 1956 and which did not cover persons under 50 years old until 1960, also requires that the claimant be insured within the meaning of 42 U.S.C. § 423(c)(1) (1970), as well as being disabled within the meaning of 42 U.S.C. § 423(d) (1970). If the claimant cannot establish the requisite "disability" or "insured status," then the only income redistribution program which is potentially available, other than some form of county administered and financed "general relief," is the APTD categorical assistance program.
examination of adverse witnesses—which rights were included within the due process procedural safeguards held minimally necessary in *Goldberg v. Kelly*—and, where the only live testimony, including that of other examining physicians, favors the claimant and conflicts with the hearsay report. (2) *Richardson v. Wright,* a per curiam, six-three decision, refused to adjudicate the procedural rights of disability insurance recipients facing suspension or termination of benefits because of a pending HEW regulation liberalizing the procedural rules governing Social Security Administration disability hearings. This holding was contrary to the *Goldberg* Court's refusal to postpone such adjudication merely because of a pending HEW regulation enlarging the procedural safeguards in termination of categorical assistance “fair hearings.”

(3) *Ortwein v. Schwab,* another per curiam decision like *Wright,* upheld a $25 filing fee for obtaining judicial review of an adverse administrative finding, to which welfare claimants are statutorily entitled, against both procedural due process and First Amendment access-to-court challenges, even where the appellants are admittedly too poor to pay the fee. This decision, unlike *Wright,* had only a five (rather than six) man majority, with Justice Stewart joining the three dissenters, Justices Brennan, Douglas, and Marshall, in *Wright* and *Wyman v. James.* (4) *Wyman v. James,* also authored by Justice Blackmun, held that an AFDC mother is not entitled to the procedural safeguards of the Fourth Amendment. The decision upheld a New York law which conditioned eligibility for AFDC on

13. The court in *Cohan v. Perales,* 416 F.2d 1250, 1251 (5th Cir. 1969) held “that mere uncorroborated hearsay evidence as to the physical condition of a claimant, standing alone and without more, in a social security disability case tried before a hearing examiner ... is not substantial evidence that will support a decision of the examiner adverse to the claimant, if the claimant objects to the hearsay evidence and if the hearsay evidence is directly contradicted by the testimony of live medical witnesses and by claimant who [testifies] in person before the examiner, as was done in the case at bar.”
15. 405 U.S. 208 (1972).
17. 410 U.S. 656 (1973); see *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 56, 57 n.3 (1973).
18. 405 U.S. at 209-27.
19. 400 U.S. at 326-47.
the adult recipient's allowing "home visits" by welfare caseworkers who, in most instances, had no reason to believe either that there was any welfare fraud, or that there was anything about the home which would make it harmful for the AFDC children in the family, but who nonetheless were required to report any evidence of welfare fraud to their superiors.

Although Wyman v. James\(^2\) technically is not a due process decision, but rather a Fourth Amendment decision, discussion of this case is included because it is an extremely important and clear example both of the doctrinal differences between the Goldberg Court majority and the Burger Court majority in the four post-Goldberg cases, and, most importantly, of the differences in how the majority of each Court views welfare claimants, welfare officials, and the beneficence of governmental bureaucracies in general. This change in attitude, occasioned by the post-Goldberg shift in the composition of the majority in welfare procedural cases, toward welfare recipients, welfare officials, and the welfare system in general, is typified by Justice Blackmun's opinion in James. And, it is this attitudinal change which is the major explanation for the erosion of the doctrinal and underlying policy approach of Goldberg.

One reason why this attitudinal change and resulting doctrinal erosion are particularly clear in James is the unusual line-up of the parties before the Supreme Court in that case. The local Social Service Employees Union submitted an amicus brief on behalf of Mrs. James, the AFDC recipient. In that brief the welfare caseworkers argued that the home visit rule should be held unconstitutional because their understaffing, rapid turnover, and burdensome caseloads made it impossible to achieve the rehabilitative purposes which allegedly justified excluding the home visit from the probable cause and warrant requirements of the Fourth Amendment.\(^2\) What may be even more unusual about the posture of the Court in James, is the way in which Justice Blackmun treats the arguments of the welfare caseworkers. In effect, Justice Blackmun refuses to believe that those who administer the home visit rule have a better understanding of the way in which it operates than he does. Armed with his own view of the welfare system, of those who administer it, and of those who are dependent upon it, Justice Blackmun refuses to follow the time-honored, well-estab-

\(^{20}\) 400 U.S. 309 (1971).

\(^{21}\) The amicus brief submitted on behalf of the welfare caseworkers in James is excerpted in BRUDNO, supra note 1, at 988-93. See text accompanying notes 177-79 infra.
lished principle that in construing state administrative regulations, the Supreme Court should give great deference to the interpretation of those who administer it. *James*, as will be discussed in more detail below, is thus one of the clearest examples of why the doctrinal stance and underlying political philosophy of *Goldberg* no longer holds sway with a majority of the Burger Court when passing upon the constitutionality of the procedures utilized, and the conditions imposed upon recipients, by the welfare bureaucracy.

### The Constitutional-Doctrinal Debate

The underlying doctrinal debate in the Supreme Court decisions adjudicating the extent to which welfare claimants are entitled to procedural safeguards revolves around the appropriate role, if any, of the "right-privilege" distinction. This distinction derives from an aphorism of Justice Holmes to the effect that, while a policeman may have a right to engage in political speech, he certainly has no right to be a (government-paid) policeman. The "right-privilege" distinction was theoretically rejected by the Court in 1960, in *Flemming v. Nestor*, which involved the constitutionality of conditioning eligibility for Old Age and Survivor's Insurance on nonmembership in the Communist Party. This distinction was expressly rejected by Justice Brennan,
writing for the majority in *Goldberg*. As delineated by Justice Brennan, "[t]he constitutional issue to be decided . . . is the narrow one whether the Due Process Clause requires that the [welfare claimant] be afforded an evidentiary hearing before termination of benefits"; and this issue "cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'" That is, even though one has no right to receive financial assistance from the government in the absence of any welfare program, once the govern-

September 1, 1954 (the date of the enactment of the section), is deported [by reason of] any one of certain grounds [including membership in the Communist Party] specified in [the challenged section here upheld]." 363 U.S. at 604-05. "We must conclude that a person covered by the [Social Security] Act has not such a right in [OASDI] benefit payments [as] would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment." *Id.* at 611.

Justice Harlan, author of the majority opinion in *Flemming*, articulated the following standard of review on the basis of which Nestor's due process challenge was rejected: "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rationale justification." *Id.* at 611 (emphasis added).

Justice Harlan also rejected Nestor's arguments that the challenged section constituted an ex post facto law and a bill of attainder. *Id.* at 612-21. *Contra, id.* at 621-28 (Black, J., dissenting). Justice Brennan's majority opinion in *Keyishian* v. Board of Regents, 385 U.S. 589 (1967), held that the standard established in *Scales v. United States*, 367 U.S. 203 (1961), for the kind of political membership which can be criminally sanctioned consistently with the First Amendment, applies to determine the constitutionality of conditions on public employment (in *Keyishian*, faculty positions at a state university) which regulate the political association of the employee. The basic principle of *Keyishian*, under which the First Amendment tests for criminal sanctions on speech and assembly apply to determine the constitutionality of conditions imposed on eligibility for government benefits, regardless of their classification as rights or privileges, was recently re-affirmed in *Perry v. Sinderman*, 408 U.S. 593 (1972). But see *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), upholding the constitutionality of § 9(a) of the Hatch Act, 5 U.S.C. § 7324(a) (1970), which prohibits federal employees from taking an "active part in political management or in political campaigns," and thus re-affirming the basic holding of *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), which up until then appeared to be undermined completely by the *Keyishian* principle. The 1973 decision upholding the Hatch Act, like all the post-*Goldberg* decisions here discussed, with the exception of *Ortwein*, see text accompanying notes 17-19 supra, was a six-three decision, the majority consisting of all four Nixon appointees plus Justices Stewart and White (the author of the majority opinion). *See generally The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 55, 141-53 (1973).

26. 397 U.S. at 260.
27. *Id.* at 262.
28. See the discussion in *Brudno*, supra note 1, at 631-39, of the ambiguity of the term "right" as utilized by advocates of the "entitlement" theory of government largesse, *e.g.*, *Jones, The Rule of Law and the Welfare State*, 58 Colum. L. Rev. 143, 154-55 (1958); *Reich, The New Property*, 73 Yale L.J. 733, 785-87 (1964); Sparer,
ment sets up a welfare program it cannot do so on any conditions it chooses. In particular, it cannot impose conditions on receipt of its benefits if the conditions are such that their imposition on citizens generally would violate the Constitution.

The Justices' attitude toward the "right-privilege" distinction determines, to a large degree, the standard of review which is applied to resolve the constitutional-doctrinal issue at stake, as well as the threshold issue of whether to review the constitutionality of the challenged administrative rule at all. That there is a one-to-one correlation between this attitude and the standard of review applied or the outcome of the decision to review at all, is made clear by comparing the standard adopted in Goldberg, with the standards utilized by the Burger Court majority in Perales, Ortwein, and James; and, by comparing the Goldberg Court's judicial review posture with the no-review decision in Wright. As pointed out by Justices Douglas and Marshall in their dissents in James, the "right-privilege" distinction has been resurrected, in effect, so that the reasonableness, or the "any rational basis" test of Flemming v. Nestor again prevails. This standard of review, which is the same standard developed by the Court in the post-1935 economic regulation cases, is in sharp contrast to

The Role of the Welfare Client's Lawyer, 12 U.C.L.A.L. REV. 361, 362-65 (1965), and the two different, but never delineated nor distinguished, meanings of the terms "right" and "entitlement." That there are two different but nondifferentiated concepts operative here is the most readily perceivable in Professor Reich's discussion of "entitlement" in Individual Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255-56 (1965). In this article, as pointed out in Bruhno, supra note 1, at 637-38: "[C]ompressed into the term 'entitlement' are two very different notions of legal right. The first is the statutory right concept discussed above [at 631-33], which is, basically, as summarized at 633, 'that the acquisition rules for government largess should assimilate those for private property' in terms of the rules' (1) substantive objectivity, (2) susceptibility to additional conditions, and (3) administrative procedures, so that practically and legally speaking, 'the interest of one who satisfies the eligibility criteria for a given form of largess would be a matter of right in the same way in which the private property owner's is.' The [second] notion, which rests on the same normative and structural premises, is that rights to certain forms of largess are prior to, rather than dependent upon, a statutory scheme dispensing that largess. That an individual has a right or is entitled to such largess means that society is under an affirmative obligation to provide it. [With this second notion, unlike the first— the statutory right—notion, then,] the issue . . . is not removal of restraints [on the recipient of the largess], but provision of the necessities of life without which liberty is impossible."

32. See McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34, 36-40. See also Karst, Invidious Discrim-
that adopted in Goldberg:

The extent to which procedural due process must be afforded the [welfare claimant facing termination of benefits] is influenced by the extent to which he [or she] may be "condemned to suffer grievous loss" . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 33

The Goldberg Court's standard, unlike the Flemming reasonableness test which implies a presumption of constitutionality, places the burden of proof on the government. Moreover, in balancing the competing interests under this standard, Justice Brennan finds a governmental interest in common with that of the welfare claimant. He argues that providing welfare assistance to those unable to support themselves serves the interest not only of the individual recipients, but also of the government and society generally. He then argues that "[t]he same governmental interest that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pretermination evidentiary hearings are indispensable to that end." 34 The governmental interest which conflicts with that of the recipient, on the other hand, is primarily that of conserving fiscal and administrative resources. Given the grievous loss which an eligible recipient may suffer if benefits are terminated prior to a hearing, along with the governmental interest which is furthered by providing due process safeguards for welfare claimants, the government's interest in preserving fiscal and administrative resources can never be overriding in the welfare context under the Goldberg balancing standard. 35

The standard of review adopted in Goldberg applies to the issue of the nature of the notice and hearing required by the due process clause, as well as to the threshold issue of whether a pretermination hearing with notice is necessary at all. Applying that standard to the former issue, the Goldberg majority holds that the pre-termination


33. 397 U.S. at 262-63. Compare Goldberg's balancing test with that proposed by Justice Marshall dissenting in Dandridge v. Williams, 397 U.S. 471, 521 (1970); contrast the standards adopted by the majority (per Justice Stewart) in Dandridge, supra, 397 U.S. at 485-86. See note 52, infra, and accompanying text.

34. Id. at 265. See text accompanying notes 76-78 infra.

35. "Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." Id. at 266.
hearing need not take the form of judicial, or quasi-judicial, trial. Instead, what is required are the minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, which best serve the function of a pre-termination hearing. The function of such a hearing is "to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." The minimum procedural safeguards necessary to perform this function include the requirements that the pre-termination hearing be held at a meaningful time, in a meaningful manner, and that a recipient have timely and adequate notice detailing the reasons for a proposed termination, an effective opportunity to defend by confronting any adverse witnesses, and the right to present the recipient's own arguments and any evidence orally, rather than merely in writing. The guarantee of oral presentation of evidence is one of the minimal procedural safeguards required by due process because

[written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations . . . . Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally.]

Finally, Goldberg requires as the last minimally necessary procedural safeguard, that

[T]he decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing . . . . To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential.

In Richardson v. Perales, the Court purports both to apply the

36. Id. at 267.
37. Id. at 269. See also note 41 infra.
38. Id. at 271.
due process standard of *Goldberg* and to distinguish the two cases. In holding that the denial of disability insurance eligibility solely on the basis of a hearsay medical report contrary to the live medical testimony at the hearing does not deny the claimant due process of law, Justice Blackmun, writing for the majority, distinguishes *Goldberg* on several grounds. First of all, Justice Blackmun says that this case, unlike *Goldberg*, does not involve termination of benefits. Secondly, this case, unlike *Goldberg*, does not involve a change of status without notice, since the claimant had in fact been given notice and also was represented by an attorney at the administrative hearing. And, thirdly, apparently on the basis of his unqualified belief in the competency and honesty of doctors, especially when compared with welfare caseworkers and hearing officers, Justice Blackmun asserts:

[[the specter of questionable credibility and veracity is not present [as it was in the welfare context in *Goldberg*]; there is professional disagreement with the medical conclusions, to be sure, but there is no attack here upon the doctor's credibility or veracity.]

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40. *See* 402 U.S. at 406-07. Chief Justice Burger in his dissent in *Goldberg* stated: "Aside from the administrative morass that today's decision could well create, the Court should also be cognizant of the legal precedent it may be setting. The majority holding raises intriguing possibilities concerning the right to a hearing at other stages in the welfare process . . . . [D]oes the Court's holding embrace welfare reductions or denial of increases as opposed to terminations, or decisions concerning initial applications or requests for special assistance? The Court supplies no distinguishable considerations and leaves these crucial questions unanswered." *Id.* at 284-85.


41. *Id.* at 407. Justice Blackmun's explicit reliance on the good faith and competency of the medical profession, so obvious, and so obviously unexplained in *Perales*, also accounts in large part for his decision, as well as the tenor of his majority opinion, in the abortion cases, *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). However, compare his attitude toward the honesty and competency of welfare caseworkers in his majority opinion in *Wyman v. Jones*, 400 U.S. 309, 322-23 & n.11. See text accompanying notes 170-77 and 181-82 *infra*. Apparently, then, the difference between the administrative context in *Goldberg* and that in
The fourth way, and in my view the only sensible way, in which Goldberg is distinguishable from Perales, is on the basis of the particular facts in Perales. The claimant in Perales failed to exercise a statutory right to subpoena the doctor who wrote the adverse medical report; and, most importantly in this context, the claimant was represented by an attorney, although this latter fact does not appear to be stressed by the majority. Goldberg, therefore, can be distinguished from Perales very easily because the Perales claimant had legal representation at the hearing and notice of the hearing was provided in a reasonable manner and amount of time. Thus the claimant in Perales in effect waived his right to have a decision based on evidence stronger than that of the one hearsay medical report, even in the context of this case where all the live testimony supported the claimant. However, it is not at all clear from Justice Blackmun's opinion that this distinguishing waiver factor is decisive, especially when considered in light of his emphatic confidence in the reliability of doctors com-

Perales and Wright, at least for Justice Blackmun and the other three Nixon appointees and Justices Stewart and White who joined his opinion in Perales and the per curiam opinion in Wright, is due to the difference in reliability of doctors and welfare caseworkers!

Justice Blackmun emphasized the assumed lack of credibility and veracity problems in the disability insurance administrative context, as compared with the Goldberg majority's assumption of the presence of such problems in the welfare categorical assistance administrative context. See 397 U.S. 254, 269; see text accompanying note 37 supra. This assumption in Goldberg should be compared with Justice Brennan's "empirical observation" of the presence of such problems in Richardson v. Wright, 405 U.S. 208, 221 (1972) (quoted below).

Moreover, Justice Blackmun also relies on the over-all "fairness of the system" in Perales, which he believes is attested to by the 44.2 percent reversal rate for all federal disability hearings in cases in which the prior state administrative decision has rejected the applicant's claim of eligibility. See 402 U.S. at 410.

Statistics such as reversal rate percentages, however, can be used to demonstrate the absence, as well as the presence, of "fairness of the system." Justice Brennan, dissenting in Richardson v. Wright, 405 U.S. 208, 211 (1972) argues: "Finally, the post-termination reversal rate for disability [insurance] determinations makes the asserted 'objectivity' [claim of the HEW Secretary—namely, that disability insurance benefits are discontinued 'only on the basis of an objective consideration—that the previous disability has ceased—and that conclusion rests on reliable information.' Id. at 219] even more doubtful. According to the Secretary's figures for 1971, 37% of the requests for reconsideration resulted in reversal of the determination that disability had ceased. Moreover, 55% of the beneficiaries who exercised their right to a hearing won reversal. While as the Secretary says, these figures may attest to the fairness of the system, Richardson v. Perales, supra, at 410, they also appear to confirm that the Court's reference in Goldberg to 'the welfare bureaucracy's difficulties in reaching correct decisions on eligibility,' 397 U.S. at 264 n.12, is fully applicable to the administration of the disability program."

42. See 402 U.S. at 395-97, 404-05.
pared to that of welfare caseworkers.

The uncertainty of the importance in Perales of the waiver factor, as a way of distinguishing Goldberg, is based primarily on both the standard of review applied to delineate the minimal procedural safeguards required by due process, and also on the various nondoctrinal reasons, such as the absence of credibility and veracity problems with medical evidence, given for requiring fewer procedural safeguards here than in Goldberg. Thus, for example, in rejecting the claimant's arguments that the use of medical advisers in the disability hearing, and the lack of a truly independent hearing examiner, deny due process, in addition to the alleged denial of due process created by the reliance on hearsay, Justice Blackmun responds: "The matter comes down to the question of the procedure's integrity and fundamental fairness."44

Insofar as Richardson v. Perales adopts a "fundamental fairness" test for determining the procedural safeguards required by the due process clause in a disability insurance eligibility hearing, it constitutes a substantial departure from the balancing standard adopted in Goldberg. Despite the fact that we are here dealing with "insurance" benefits, which are in some sense "earned," unlike the categorical assistance benefits involved in Goldberg, which are based primarily on financial need rather than past earnings, the standard adopted in Perales gives less protection to the claimant than does Goldberg. This "fundamental fairness" test was developed by those Justices who, like

43. Id. at 408-10.

44. Id. at 410.

45. On the differences between social insurance and public assistance, or welfare, income redistribution programs, see BRUDNO, supra note 1, at 514-17, 521-28, for both the economic-political distinctions, summarized in note 1 supra, and also the psychological distinctions, especially in terms of the differences in attitudes of both the general public and legislators toward social insurance recipients compared to their attitudes toward those dependent on public assistance. See also tenBroek & Wilson, Public Assistance and Social Insurance—A Normative Evaluation, 1 U.C.L.A.L. Rev. 237, 244 (1954), cf., Diamond, The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions, 54 Calif. L. Rev. 357 (1966); P. Jacobs, America's Schizophrenic View of the Poor, in POVERTY: VIEWS FROM THE LEFT 39-57 (J. Larner & I. Howe eds. 1968). Paul Jacobs states that "[a]n ideological schizophrenia with a complex history characterizes the American view of poverty. On one hand, we believe achievement is related primarily to self-reliance and self-help; on the other, we have been forced to concede that failure cannot always be laid at the door of the individual." Id. at 39-40. Compare Jacobs' characterization of the typical American attitudes toward, or schizophrenia about, poverty, id., with Justice Brennan's statement in Goldberg that "[w]e have come to recognize that forces not within the control of the poor contribute to their poverty." 397 U.S. at 265. See text accompanying notes 76 and 107 infra.
the late Justice Harlan, author of the majority decision in *Flemming v. Nestor*, believed in a very limited scope of judicial review. Its readoption in *Perales* signals a return to the reasonableness approach, which puts a very heavy burden on the claimant challenging the constitutionality of bureaucratic procedures, and thereby constitutes a substantial erosion of *Goldberg*.

The other aspect of the *Perales* majority opinion which indicates a substantial erosion of the doctrines developed in *Goldberg*, are the nondoctrinal, political-institutional reasons given to support the *Perales* majority's attitude that very few judicial-type procedural safeguards are necessary or desirable in Social Security Administration hearings. This will be discussed further below.

Another possible reason for the Court's departure from the *Goldberg* approach in *Perales* is the typical judicial linedrawing concern, which is exemplified by Justice Black's dissent in *Goldberg*, although it is nowhere expressly articulated in *Perales*. Dissenting in *Goldberg*, Justice Black argues:

>[T]he inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. In the next case the welfare recipients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, termination of aid at that point may still "deprive an eligible recipient of the very means by which to live while he waits," *ante*, at 264, I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates . . . . Thus the end result of today's decision may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court.

Unfortunately, Justice Black in fact had very little to be concerned about. This is particularly evident in the 1973 per curiam de-

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47. See 402 U.S. at 400-01. See text accompanying note 150 infra.
48. 397 U.S. at 278-79 (Black, J., dissenting).
cision in *Ortwein v. Schwab*, which upheld a $25 appellate court filing fee, the practical effect of which is to preclude welfare claimants from obtaining judicial review of adverse administrative findings. The way in which the Court in *Ortwein* distinguishes both *Boddie v. Connecticut* and *Goldberg* is another strong indication that the Burger

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50. 401 U.S. 371 (1971). *Boddie* held that requiring indigent plaintiffs to pay filing fees and the cost of personal service of process, where the effect of the payment requirements is to exclude bona fide indigents from obtaining a divorce sought in good faith, deprives those plaintiffs of procedural due process, as if they were defendants denied a meaningful opportunity to be heard before deprivation of a significant property interest. See id. at 376-79 & nn.3 & 5, 380-81, citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (holding prejudgment wage garnishments violative of procedural due process).

*Boddie* does not make clear either (a) why the indigency must be bona fide and the divorce sought in good faith or (b) how these bona fide and good faith qualifications are to be defined, let alone applied. Moreover, *Boddie* also leaves open the extent of the class of plaintiffs who are sufficiently poor to have *Boddie's* access-to-the-divorce-courts protection. This is due in part to the fact that the individual plaintiffs and the class they represented were all welfare recipients, a class which obviously is sufficiently poor. It is also due to much more general problems involved in wealth discrimination cases. First, there is the problem of delineating who is poor and defining the meaning of poverty, including determining the type of assets and needs utilized in measuring poverty and deciding who fits within the class of poor persons. Over and above this typical judicial line-drawing problem is the question of deciding whether or not these concepts should be relative, depending on the nature, or the "fundamentalness," of the interest at stake. See B. BruDNO, CASES AND MATERIALS ON THE LAW AND THE POOR 66A-D, 97C-G (4th ed. 1974) for a discussion of the poverty-class definitional problems in wealth discrimination cases. See generally S. MILLER & P. ROBY, THE FUTURE OF INEQUALITY (1970).

That "who is poor" and "what is (sufficiently severe) poverty" are relative concepts, depending upon the interest at stake, is at least implicit in *Sniadach*, where Justice Douglas emphasizes the importance of wages, 395 U.S. at 340-42. Compare id. at 342-44 (Harlan, J., concurring), with *Boddie*, 401 U.S. at 376-77, where Justice Harlan emphasizes the importance of marriage and therefore the importance of divorce since it is a precondition to re-marriage. That the interest at stake in *Boddie* is critical, at least for Justice Harlan and those justices who joined the majority opinion but did not agree with the equal protection approach advocated by Justices Douglas, id. at 383-86, and Brennan, id. at 388-89, stands out clearly in the majority opinion. The "right to (re)marry" is emphasized both because of its doctrinal status and because of its alleged sui generis institutional status. Its doctrinal status was first recognized as a "fundamental right," see, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967), but now is considered a "constitutional" right under the due process-liberty clause. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34 n.76 (1973); *Roe v. Wade*, 310 U.S. 113, 152 (1973). In *Rodriguez* the Court characterized the "right of procreation" involved in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), the progenitor of both *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy) and *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry), as among the rights of personal privacy protected under the Constitution." 411 U.S. at 1297 n.76, citing *Roe v. Wade*, 410 U.S. 113 (1973). Concerning the sui generis institutional status of the "right to re-marry" the *Boddie* Court stated: "[W]e know of no instance where two
Court majority is moving, though not in words, back to the Flemming v. Nestor approach. That approach in effect makes welfare benefits, whether they be in the form of categorical assistance or social insurance, a "privilege" which may be provided on conditions and under procedures which, if applied to interests more akin to private property, would be held unconstitutional under the due process clause.

This "don't-press-your-luck-too-far" approach, contrary to the fears expressed by Justice Black in his dissent in Goldberg, is that of the majority in Ortwein. Viewing Ortwein as an adoption of this approach for welfare procedural cases helps explain how the majority can distinguish Boddie by characterizing a person's interest in welfare as much less significant than a welfare recipient's desire to get a divorce. And it also explains, but by no means justifies, the Court's distinguishing Boddie on the ground that the appellants in Ortwein have apparently had one hearing, which comports with Goldberg:

In United States v. Kras ... this Court upheld statutorily imposed bankruptcy filing fees against a constitutional challenge based on Boddie. We emphasized the special nature of the marital relationship and its concomitant associational interests, and noted that they were not affected in that case and that the objective sought by appellant Kras could be obtained through alternative means that did not require a fee. Boddie, of course, was not concerned with post-hearing review. We now conclude that Kras, rather than Boddie, governs the present appeal . . . .

A. In Kras we observed that one's interest in a bankruptcy discharge "does not rise to the same constitutional level" as one's ability to dissolve his marriage except through the courts . . . . In this case, appellants seek increased welfare payments. This interest, like that of Kras, has far less constitutional significance than the interest of the Boddie appellants . . . .

B. In Kras, the Court also stressed the existence of alternatives, not conditioned on the payment of the fees, to the judicial remedy . . . . The Court has held that procedural due process requires that a welfare recipient be given a pretermination evidentiary hearing. [Citing Goldberg v. Kelley.] These appellants have had hearings. The hearings provide a procedure, not condi-

consenting adults may divorce and mutually liberate themselves from . . . the prohibition against remarriage, without invoking the State's judicial machinery." 401 U.S. at 376 (emphasis added). However, Justice Brennan, dissenting in Boddie stated: "A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually 'the only forum effectively empowered to settle their disputes.'" 401 U.S. at 387 (Brennan, J., dissenting).

On the lack of realism, especially with respect to disputes involving the poor who have no bargaining power, of Justice Harlan's sui generis characterization of divorce litigation, see United States v. Kras, 409 U.S. 434, 454-56 (1973) (Stewart, J., dissenting); id. at 462-63 (Marshall, J., dissenting). See generally The Supreme Court, 1972 Term, 87 Harv. L. Rev. 55, 57-67 (1973).
tioned on payment of any fee, through which appellants have been able to seek redress. This Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellant system . . . . Under the facts of this case, appellants were not denied due process.51

In rejecting appellants' equal protection claim in Ortwein, as well as their due process claim, the Court cites Dandridge v. Williams.52 Ortwein, like Dandridge, according to the Ortwein majority, essentially involves an area of "economics and social welfare," and thus the "applicable standard [of review] is that of rational justification."53

This combination of "one hearing is enough, even though it's an administrative rather than a judicial proceeding," together with the return to the Flemming no-review standard,64 indicates a significant retreat from the Goldberg balancing approach which places the burden of justification on the government, rather than on the claimant alleging a denial of due process or equal protection. Moreover, the Court in Ortwein nowhere analyzes the State's interest in having the filing fee, nor the importance of that interest. The only apparent reason for such fees, other than the notion that they deter frivolous claims, is the State's interest in conserving its judicial resources. Thus, Ortwein also constitutes an overruling of, and not just a retreat from, at least one of the most critical aspects of the Goldberg approach—namely, that a state's interest in conservation of fiscal and administrative resources

51. 410 U.S. at 658-60.
52. 397 U.S. 471 (1970). Dandridge upheld the constitutionality of Maryland's maximum-per-family grant system under which large families could receive only maximum AFDC benefit payments per month even though under the state's graduated standard of need formula the AFDC family theoretically would be entitled to a larger family allotment because of the presence of additional children. The result of the maximum grant system, upon which the equal protection challenge was based, is that children in larger families receive less AFDC benefits per capita than children in families small enough to not be affected by the maximum grant amount. See text accompanying note 114 infra. The Dandridge majority, in an opinion authored by Justice Stewart, recognized that "public welfare assistance, by contrast [with businesses and industries, the regulation of which has been upheld under the no-review standard of the post-1935 substantive due process cases] involves the most basic economic needs of impoverished human beings;" and, that there is a "dramatically real factual difference," between cases involving business or industry regulations and the present case. 397 U.S. at 485 (emphasis added). Despite this, the majority could "find no basis for applying a different constitutional standard." Id. Therefore, since the Maryland maximum-per-family grant rule can be viewed as a resources allocation (among the total number of families eligible for AFDC) regulation, it is "in the area of economics and social welfare," an area in which laws are held constitutional as long as their classifications have some "reasonable basis." Id.
53. 410 U.S. at 660.
54. See note 25 supra.
cannot, as a matter of law, constitute in and of itself a sufficiently strong governmental interest to justify terminating or reducing welfare benefits for reasons or under procedures which would not be constitutional if the claimant's interest at stake were more akin to either private property as traditionally viewed, or to a "fundamental," and now apparently constitutional, right such as the right to re-marry in Boddie.\footnote{55}

Finally, Ortwein is a rejection of the principle of Griffin v. Illinois.\footnote{57} In Griffin the court held that regardless of a state's freedom to refuse to provide appellate review, even in criminal cases, once a state provides such a procedure, it must provide it equally to all, including paying for those appellate costs which would otherwise preclude an indigent from receiving appellate review at all. The rejection of this principle in Ortwein indicates a strong erosion, if not an implicit overruling, of Goldberg's rejection of the "right-privilege" distinction as a basis for adjudicating constitutional challenges to bureaucratic procedures for terminating, reducing or denying benefits which the government has no affirmative obligation to provide.\footnote{58}

Another example of the Burger Court majority's return to the

\footnote{55. It is not clear whether Goldberg applies to reductions, denials of extra non-financial assistance, or denials of claimed deductions which also in effect constitute reductions of the amount of assistance actually paid. See note 40 supra.}

\footnote{56. See the discussion of the doctrinal status of the right to re-marry in note 50 supra.}

\footnote{57. 351 U.S. 12 (1956). In Lindsey v. Normet, 405 U.S. 56, 77 (1972) the Court stated that: "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. [Citing, inter alia, Griffin v. Illinois, 359 U.S. 12 (1956)]." See generally Note on the Significance and Later Extensions of the Griffin Decision, in B. BRUDNO, CASES AND MATERIALS ON THE LAW AND THE POOR 23-38A (4th ed. 1974). The Griffin principle has been applied in nonjudicial as well as noncriminal contexts. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).}

\footnote{58. See text accompanying notes 22-24, and note 22 supra. See also note 2 supra.}

\footnote{59. But see Lindsey v. Normet, supra note 57, 405 U.S. 56, 77 (1972).}

\footnote{60. See note 40 supra.}

\footnote{61. Even though Chief Justice Burger in his dissent in Goldberg, see note 40 supra, lumps together the reduction and denial issues, the rationale of Goldberg, especially insofar as it focuses on the problem of "depriving an eligible recipient of the very means by which to live while he waits" until the post-termination procedure finally vindicates the recipient's claim of erroneous termination, see 397 U.S. at 264, applies much more readily to reduction of an eligible recipient's welfare grant than to an initial denial of eligibility. This is particularly true if the denial decision is made at the first administrative level rather than on appeal from an initial decision favorable to the welfare claimant. Cf. California Dep't of Human Resources Development v. Java, 402 U.S. 121 (1971).}

\footnote{62. See BRUDNO, supra note 1, at 637-38, quoted in note 28 supra.
philosophy of the "right-privilege" distinction, contrary to the doctrinal stance of Goldberg, is the no-review decision by a six-three majority in Richardson v. Wright. In Wright, the Court had noted probable jurisdiction to consider the constitutionality, under Goldberg, of the procedures for suspension and termination of disability insurance payments provided by the Social Security Act and the implementing regulations of the Department of Health, Education and Welfare (HEW). Shortly before oral argument, the Court was advised by the Secretary of HEW of the adoption of new regulations, effective December, 1971. The new procedural regulations provide that a recipient be given notice of a proposed suspension or termination, including the reasons therefore, plus an opportunity to submit rebuttal evidence. No provision is made, however, to guarantee a recipient facing suspension or termination the opportunity to appear personally at the Social Security Administration hearing, to present evidence orally, or to confront and cross-examine adverse witnesses. Thus, the new regulations do not provide all of the procedural safeguards required in Goldberg as minimally necessary under the due process clause. Despite these deficiencies, the Court decided to remand the case without reviewing the constitutionality of the new regulations, and without deciding whether recipients facing termination or suspension of disability insurance payments should be treated differently than the categorical assistance recipients in Goldberg in regard to the extent to which they are entitled to procedural safeguards under the due process clause. In remanding the case, in one paragraph, per curiam decision, the Court states:

In light of [the adoption of new regulations which include the requirement that a recipient be given notice and the reasons for a proposed suspension or termination, plus an opportunity to submit rebuttal evidence], we believe that the appropriate course is to withhold judicial action pending reprocessing, under the new regulations, of the determinations here in dispute. If that process results in a determination of entitlement to disability benefits, there will be no need to consider the constitutional claim that claimants are entitled to an opportunity to make an oral presentation. In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise.

64. 404 U.S. 819 (1971).
67. Id.
The majority in *Wright* nowhere mentions, let alone explains, the departure from *Goldberg*’s contrary holding on the propriety of reviewing the constitutionality of termination procedures in the face of a pending HEW regulation providing for greater procedural safeguards for welfare claimants facing termination than those provided by the regulations in effect at the time of the *Goldberg* litigation. Despite the Court’s silence in *Wright* on the inconsistency of its no-review decision with the *Goldberg* position on this issue, the Court in *Wright*, in effect, has adopted sub silentio the position advocated by Chief Justice Burger in his dissent in *Goldberg*. He there argued:

The procedures for review of administrative action in the “welfare” area are in a relatively early stage of development; HEW has already taken the initiative by promulgating regulations requiring that AFDC payments be continued until a final decision after a “fair hearing” is held. [Footnote by the Court][68] . . . Indeed, the HEW administrative regulations go far beyond the results reached today since they require that recipients be given the right to appointed counsel, a position expressly rejected by the majority[69] . . . . Against this background I am baffled as to why we should engage in “legislating” via constitutional fiat when an apparently reasonable result has been accomplished administratively.

That HEW has already adopted such regulations suggests to me that we ought to hold the heavy hand of constitutional adjudication and allow evolutionary processes at various administrative levels to develop . . . . I cannot accept—indeed I reject—any notion that a government which pays out billions of dollars to nearly nine million welfare recipients is heartless, insensitive, or indifferent to the legitimate needs of the poor.

The Court’s action today seems another manifestation of the now familiar constitutionalizing syndrome: once some presumed flaw is observed, the Court then eagerly accepts the invitation to find a constitutionally “rooted” remedy.[70]

Despite the critical differences in the administrative-constitutional posture of *Goldberg* and *Wright*—namely, that the pending HEW regulation governing procedures for terminating or suspending disability

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69. “We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires . . . . We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently HEW has reached the same conclusion. See 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 13595 (1969).” *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970).

70. 397 U.S. at 282-83 (emphasis added) (citations omitted).
insurance benefits in *Wright* provided less protection than that mandated by the due process clause according to the *Goldberg* majority—the only conceivable reason for the Court's refusal to decide the constitutional procedural issue in *Wright* is that given by Chief Justice Burger in his dissent in *Goldberg* quoted above.\(^{71}\) The new Burger Court majority, then, apparently feels that the most appropriate decision-making stance for the Court to take in welfare law cases in which administrative procedures are challenged as insufficient under the due process clause of the Fifth or Fourteenth Amendment, is to tailor its decision to review or not to review the challenged procedures so that administrative experimentation\(^{72}\) and maximum administrative fairness\(^{72}\) is encouraged. This judicial attitude is clearly contrary to that of the *Goldberg* majority's.\(^{74}\)

This conflict in attitudes toward judicial review underlies the contrary decisions in *Wright* and *Goldberg* on whether to review or not to review the constitutionality of challenged administrative procedures. This attitudinal difference rests on a difference in even more basic views between the *Goldberg* and *Wright* majorities. It is a difference of the "political wisdom" type, namely, the difference in views about the nature of the welfare bureaucracy and the fairness of its procedures, as will be discussed further below.\(^{75}\) This political wisdom type of difference also underlies the contrary resolutions of the basic doctrinal dispute in the two cases, that is, whether welfare benefits should be treated as a "privilege" which society bestows upon the "worthy poor" out of charitable impulses, or as more akin to a "right" to which those falling into the statutorily defined categories of eligible recipients are entitled as is any other citizen who has a contractual or any other more traditional type of legal claim enforceable against the government in its capacity as provider of government largesse. As long as

71. See text accompanying note 70 supra.


73. See note 2 supra.

74. See 397 U.S. at 257-58 & n.3.

welfare benefits are treated primarily as a "privilege," as the majorities in the post-*Goldberg* decisions appear to do, there need be no concern that some recipients may be denied benefits to which they would otherwise be entitled, while the Social Security Administration "experiments" with those procedures which *it* believes are the most appropriate, in terms of its own bureaucratic needs and resources, including the amount of available *money* which it chooses to spend for provision of procedural safeguards. This attitude, favoring bureaucratic experimentation over the immediate needs of those persons dependent upon the benefits which the bureaucracy administers, is, needless to say, the complete antithesis of the attitude of the *Goldberg* majority:

[W]hen welfare is discontinued, only a pretermination evidentiary hearing provides the recipient with procedural due process. . . . For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. [Footnote by the Court: "Administrative determination that a person is ineligible for participation in state-financed medical programs."]

Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—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. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy. [Footnote by the Court: "His impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching correct decisions on eligibility."]

Moreover, important governmental interests are promoted by affording recipients a pretermination evidentiary hearing. . . . We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. 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." The same governmental interests that counsel the provision of welfare, counsel as well its

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76. 397 U.S. at 264 n.11. See BRUDNO, supra note 1, at 533-41 for eligibility requirements for Medicaid, 42 U.S.C. §§ 1396-96g (1970). For the difference between Medicaid and Medicare see BRUDNO, supra note 1, at 542.

77. 397 U.S. at 264-65 n.12. On the inherent nature of the chances of erroneous decisions within the welfare bureaucracy, see Richardson v. Wright, 405 U.S. 208, 221 (1972) (Brennan, J., dissenting).
uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.\textsuperscript{78}

The Burger Court majority decision which constitutes the most serious erosion of both the doctrinal and the underlying legal-political policy aspects of \textit{Goldberg} is \textit{Wyman v. James}.\textsuperscript{79} In \textit{James}, the six-three majority, in another opinion authored by Justice Blackmun, explicitly treats welfare as a "privilege":

One who dispenses purely private \textit{charity} naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, \textit{rightly} expects the same. It might well expect more, because of the trust aspect of public funds  

In thus treating welfare—or at least public assistance like AFDC—as a "privilege," \textit{James} breaks with the long line of pre-\textit{Goldberg} "unconstitutional conditions" decisions,\textsuperscript{81} which rejected Justice Holmes' aphorism concerning the policeman who had a right to speak but no rights with respect to his job.\textsuperscript{82}

Under the New York "home visit" law challenged as violative of the Fourth Amendment in \textit{James}, a welfare recipient (in this case an AFDC mother) is required to submit to biannual visits by a welfare caseworker in the recipient's home as a condition of both initial and continued welfare eligibility. Most of these visits are preceded by some form of notice, usually in writing, and occur during the day. They are therefore not so clearly offensive as the midnight raids held unconstitutional in \textit{Parrish v. Civil Service Commission}.\textsuperscript{83} However, the New York home visits are routinely required of all welfare recipients, without any distinction between those recipients, on the one hand, for whom there may be probable cause to believe that they are engaged in some form of welfare fraud, or are maintaining a home

\textsuperscript{78} 397 U.S. at 264-65. See Paul Jacobs' "ideological schizophrenia" characterization of Americans' attitudes toward poverty and poor people in note 45 \textit{supra}.


\textsuperscript{80} 400 U.S. at 319 (emphasis added). For the view of Justice Marshall, \textit{id.} at 344-45, see text accompanying note 101 \textit{infra}.


\textsuperscript{82} See note 23 and accompanying text \textit{supra}.

unsuitable for the children in the welfare family, and, on the other hand, those welfare recipients for whom there is no reason to believe that any form of home visit or other rehabilitative services are needed. Thus, the only explanation for this lumping together of all AFDC recipients who are subject to the New York home visit requirement is the paternalistic notion that anyone dependent on welfare necessarily needs the type of assistance which a welfare caseworker theoretically provides, even though no other citizen is expected to request, let alone undergo, such assistance as a condition of receiving any other form of government largesse.  

Mrs. James, who was perfectly willing to go down to the welfare office and discuss any questions a welfare official might have about her continued eligibility, objected to the mandatory home visit on the grounds that without either a warrant based on probable cause, or a knowing, voluntary consent on her part, the home visit violated her Fourth Amendment rights. She therefore refused to allow a welfare caseworker into her home. As a result, her AFDC benefits were terminated, even though there was no other basis for finding Mrs. James ineligible. The majority, in rejecting Mrs. James' Fourth Amendment contentions, argued that the home visit is not a search within the meaning of the Fourth Amendment. Furthermore, the majority said that even if the visit is considered a search, such a search without a warrant is not unreasonable, and, therefore, it does not violate the Fourth Amendment rights of someone like Mrs. James. Moreover, there is even a suggestion in Justice Blackmun's opinion that by "choosing" AFDC, Mrs. James consented to the visit by waiving any Fourth Amendment rights she may otherwise have had.

In discussing why the home visit, even if considered a search, is not unreasonable and therefore not violative of the Fourth Amendment, Justice Blackmun discusses the significance of the means employed by the New York welfare bureaucracy and the individual caseworkers who actually carry out the home visits. Justice Blackmun points out that at least with respect to Mrs. James and the particular visit to which she refused to consent, that she received written notice,

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84. See 400 U.S. at 332 (Douglas, J., dissenting). For excerpts of Justice Douglas' dissenting opinion see text accompanying note 137 infra. For excerpts of Justice Marshall's dissenting opinion see text accompanying note 140 infra.

85. 400 U.S. at 317-18. Justice White, who concurred in the judgment and otherwise joined Justice Blackmun's majority opinion, expressly refused to join this particular part of the majority opinion. Id. at 326.

86. Id. at 318.

87. See id. at 324. See also text accompanying note 100 infra.
several days in advance. Furthermore, Justice Blackmun points out:

Privacy is emphasized. The applicant-recipient is made the primary source of information as to eligibility. Outside informational sources, other than public records, are to be consulted only with the beneficiary's consent. Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden . . . All this minimizes any "burden" upon the home owner's right against unreasonable intrusion.

Justice Blackmun's above statements about the privacy orientation of the home visit are made in spite of his acknowledgment that the record in the *James* case includes twelve affidavits, all of which contain claims that the AFDC-recipient-affiant is subjected to home visits without notice in many cases; that when the caseworker does arrive, the affiant's plans for that particular time cannot be carried out: that the visit is, in the words of one affiant, "very embarrassing to me if the caseworker comes when I have company"; and that the caseworker "sometimes asks very personal questions" in front of the affiant's children. It is not clear whether Justice Blackmun disbelieves these affidavits, or whether he believes that even if true they are an exception to a practice which in general and on most occasions is designed to, and in fact does, protect the privacy and dignity of the welfare recipient, at least as much as possible.

Moreover, Justice Blackmun continues, in this particular case Mrs. James has no specific complaint about any particular unreasonable intrusion of her home. He notes that, on this record, "nothing . . . supports an inference that the desired home visit had as its purpose the obtaining of information as to criminal activity." This is one of the ways in which the *James* majority distinguishes prior administrative search cases, particularly *Camara v. Municipal Court* and

88. *Id.* at 320-21.
89. *Id.* at 321.
90. *Id.* at 320-21 n.8.
91. See *id.* at 321. In *Smith v. Board of Commissioners*, 259 F. Supp. 423 (D.D.C. 1966), AFDC mothers complained about welfare caseworkers using harsh, oppressive, humiliating and illegal methods in conducting eligibility investigations. The court granted defendant's motion for summary judgment because, inter alia, the equitable relief sought by the plaintiffs was inappropriate since: the caseworkers engaged in the alleged illegal investigations were unnamed; the court could not instruct such officials how to perform their duties; and even if the court could so instruct them, and hold them in contempt if the instructions were not followed, the court has no means to supervise and determine whether there is daily compliance with the type of injunction sought.
See v. City of Seattle, which held the Fourth Amendment warrant requirement applicable. Justice Blackmun went on to say:

She complains of no proposed visitation at an awkward or retirement hour. She suggests no forcible entry. She refers to no snooping. She describes no impolite or reprehensible conduct of any kind. She alleges only, in general and nonspecific terms, that on previous visits and, on information and belief, on visitation at the home of other aid recipients, "questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility." Paradoxically, this same complaint could be made of a conference held elsewhere than in the home, and yet this is what is sought by Mrs. James.

Justice Blackmun concludes his observations about the ingratitude and lack of any legitimate basis for Mrs. James' complaints about the home visit with what he perceives to be the real reason for her objection to the home visit: what Mrs. James is really after is to have AFDC benefits provided on her own conditions rather than upon those conditions deemed necessary or desirable by the provider of the benefits. We are here at the heart—or the guts—of the James majority's view of both the individual welfare claimant, especially the AFDC mother, and, derivatively, the doctrinal status of welfare benefits. One of the conditions upon which Mrs. James wanted to be able to exercise her own choice with respect to receiving AFDC is a condition which, as the three dissenting justices argue, involves her Fourth Amendment rights. Justice Blackmun, author of the James majority opinion, in effect answers her: "If you want to receive the government's 'charity,' then you take it on the conditions under which we choose to give it to you." Or as Justice Blackmun elsewhere puts it:

The only consequence of her [Mrs. James'] refusal [to allow the caseworker into her home pursuant to the "home visit" regulations] is that the payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from apply-

94. Id. at 541.
95. Compare 400 U.S. at 317, 324-25, with id. at 330-31 (Douglas, J., dissenting), and id. at 339-41 (Marshall, J., dissenting).
96. Id. at 321.
97. "What Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms . . . ." Id. at 321-22.
98. See id. at 330-33 (Douglas, J., dissenting); id. at 338-42 (Marshall, J., joined by Brennan, J., dissenting).
99. For Justice Blackmun's characterization of welfare assistance as charity see id. at 319. See text accompanying note 80 supra.
ing for AFDC benefits.\textsuperscript{100}  

Or, as Justice Marshall, in his dissent, argues:

Although the Court does not agree with my conclusion that the home visit is an unreasonable search, its opinion suggests that even if the visit were unreasonable appellee has somehow \textit{waived} her right to object. Surely the majority cannot believe that valid Fourth Amendment \textit{consent} can be given under the threat of the loss of one’s sole means of support. Nor has Mrs. James waived her rights. Had the Court squarely faced the question of whether the State can condition welfare payments on the waiver of clear constitutional rights, the answer would be plain. The decisions of this Court do not support the notion that a State can use welfare benefits as a wedge to coerce “waiver” of Fourth Amendment rights . . . . As my Brother Douglas points out, the majority statement that Mrs. James’ “choice [to be seached or to lose her benefits] is entirely hers, and nothing of constitutional magnitude is involved” merely restates the issue.\textsuperscript{101}  

Justice Douglas phrases the issue in his dissent:

The question in this case is whether receipt of largesse from the government makes the home of the beneficiary subject to access by an inspector of the agency of oversight, even though the beneficiary objects to the intrusion and even though the Fourth Amendment’s procedure for access for one’s house or home is not followed. The penalty here is not, of course, invasion of the privacy of Barbara James, only her loss of federal or state largesse. That, however, is merely rephrasing the problem. Whatever the semantics, the central question is whether the government by force of its largesse has the power to “buy up” rights guaranteed by the Constitution.\textsuperscript{102}  

The James majority’s answer to this last question is, of course, that the government can indeed “buy up” the Fourth Amendment rights of welfare recipients such as Mrs. James. This answer is based on both the doctrinal reasons discussed above—doctrinal reasons which constitute a serious erosion, if not an implicit overruling, of \textit{Goldberg} —and the underlying political-legal policy reasons discussed below.

\textbf{The Political Debate}

The doctrinal erosion of \textit{Goldberg v. Kelly} evidenced by the Burger Court majority’s approach in the four major welfare due process cases of 1971-1973—\textit{Perales, Wright, Ortwein} and \textit{James}—can best be explained and understood by comparing the attitude of the \textit{Goldberg} majority with the attitude of the majorities in these cases toward:

(1) The welfare recipient as an individual, in terms of the kind

\begin{itemize}
  \item \textsuperscript{100} \textit{Id.} at 325 (emphasis added).
  \item \textsuperscript{101} \textit{Id.} at 344-45.
  \item \textsuperscript{102} \textit{Id.} at 327-28.
\end{itemize}
of person he or she is, and the kind of reason(s) for the typical welfare claimant's dependence on government financial assistance;

(2) The group or societal interest in the welfare system, in terms of the purposes which are or should be served by that system; and,

(3) The nature of the welfare bureaucracy and those officials who administer it, especially in terms of the extent to which the bureaucracy and its officials are beneficent dispensers of government largesse or are perpetrators of a regulatory maze with inherent potential for abuse of power.

The way in which the Goldberg majority views the above three factors will be compared, in this part of the article, with the way in which these three factors are viewed by the new Burger Court majority, as evidenced by the majority opinions in Perales, Wright, Orteuwein and James. The following comparison of attitudes toward these factors explains why the Burger Court majority has undermined both the doctrinal stance and the political philosophy of Goldberg that it is in society's interest, as well as in the interest of the individual welfare claimant, to provide a "rule of law" for those persons dependent upon welfare assistance.

The Goldberg majority views the welfare recipient facing threatened termination of assistance as someone who is in a worse position, financially, legally, and politically, than are recipients of any other form of government largesse facing suspension, termination, or reduction of that largesse, such as government contractors, government employees, taxpayers claiming an exemption, or virtually anyone else whose governmental entitlements are ended ....104 Unlike claimants of other forms of government largesse, a welfare recipient facing termination without notice and a pre-termination hearing may be deprived "of the very means by which to live while he waits."105 More over, unlike the above examples of persons receiving or seeking other forms of government largesse, the welfare recipient facing termination

[1]acks independent resources, [and] his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.106

In addition to recognizing the sui generis position of a welfare

105. Id.
106. Id.
recipient facing termination of benefits, especially in terms of the increased desperateness of the situation facing that recipient caused by the lack of a pre-termination hearing, the majority in Goldberg explicitly recognizes that placing a welfare recipient in such a position further destroys the little, if any, power such a person may have to attempt to redress his or her situation legally. This awareness of the sui generis nature of the situation facing a welfare recipient threatened with loss of assistance without a pre-termination hearing flows from a very important threshold understanding of, or attitude towards, poverty in general. It is summed up in Justice Brennan’s statement: “We have come to recognize that forces not within the control of the poor contribute to their poverty.”

This attitude of the Goldberg majority toward the individual welfare recipient indicates an awareness of the precarious nature of the financial, legal and political situation of the welfare recipient. This awareness is evidenced by the Goldberg majority’s explicit recognition that poverty is not something which someone chooses.

The Goldberg majority’s attitude toward the first factor—the type of person who is typically a welfare recipient—coincides with its attitude towards the second factor—the group or societal interest in the welfare system. When Justice Brennan discusses the application of the balancing standard of review adopted in Goldberg, he places on the welfare recipient’s side of the scales a public interest in promoting a “rule of law” for the individual dependent on welfare. As pointed out above, Justice Brennan argues that:

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. 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.” The same governmental interest that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it. . . .

107. Id. at 265. See P. Jacobs, America’s Schizophrenic View of the Poor, in Poverty: Views From the Left 39-57 (J. Lerner & I. Howe eds. 1968). See also G. Myrdal, Challenge to Affluence, chs. 2-4 (1962).
108. 397 U.S. at 262-63.
109. Id. at 265. See also Report of the National Advisory Commission on Civil Disorders 283-88 (New York Times ed. 1968); P. Jacobs, Prelude to Riot 7-12 (1966); Wright, Poverty, Minorities, and Respect for Law, 1970 Duke L.J. 425-30, 439-40. For an analogous argument in the criminal law area, see Justice Frankfur-
Thus, the Goldberg majority views the presence of welfare as serving not only the interest of those individuals who may be recipients, now or in the future, but also as serving a societal interest. It views that societal interest as completely compatible with that of the individual recipient. That is, the Goldberg majority recognizes that it is in the self-interest of everyone, no matter how financially secure, to provide welfare assistance in a manner which allows the recipient to feel that he or she is part of society’s “rule of law.”

The Goldberg majority does not distinguish the group or class interest in welfare from the interest of the individual recipient and of society generally. The group interest of all those who are on welfare now or potentially seems to be viewed implicitly as being one which coincides with that of the individual recipient facing termination, as well as that of society generally: Everyone currently or potentially on welfare has a stake in having a welfare system which is administered fairly, which necessarily includes administrative methods grounded in a recognition of the particular plight and abilities of the individuals involved.

110. See Briar, Welfare From Below: Recipients’ Views of the Public Welfare System, 54 CALIF. L. REV. 370, 376-77 (1966), which discusses the importance of recognizing that recipients are entitled to their benefits as a matter of statutory right, see note 28 supra, especially so that welfare officials will “inculcate in recipients a conception of themselves as rights-bearing citizens.”

111. “The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.” 397 U.S. at 268-69. See text accompanying note 37 supra. However, Guerrero v. Carleson, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), held that welfare authorities need not, as a matter of procedural due process, send notices of proposed terminations, required by Goldberg’s due process holding in Spanish, even for those recipients, the plaintiffs, who are in fact, known by the welfare authorities to be unable to read English. The plaintiffs had alleged, and the court did not dispute, that sending such notices in English to the plaintiffs often resulted, and would continue to often result, in welfare recipients illiterate in English losing their opportunity to request a fair hearing to challenge the legality of the proposed termination, the pre-termination hearing held constitutionally required in Goldberg. See also Carmona v. Sheffield, 325 F. Supp. 1341 (N.D. Cal. 1971), aff’d, 475 F.2d 738 (9th Cir. 1973), relied upon by the majority in Guerrero. Carmona dismissed an action by Spanish speaking citizens alleging a denial of Equal Protection because the State unemployment insurance program is administered entirely in English. But, Castro v. California, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970), held that English literacy requirements applied to exclude citizens literate in Spanish with access to Spanish mass media from voting violated equal protection. Castro was relied upon by Justice Tobriner, dissenting in Guerrero. Justice Tobriner concludes his dissent with an express concern over the retreat of the majority from the principles of Goldberg and Castro: “In the long effort of the subgroups in our culture to attain recognition and participation the majority opinion can only be an unfortunate step
The only way in which the group or class interest involved in *Goldberg* can be construed as contrary to or somewhat inconsistent with the interest of either the individual welfare recipient facing termination or of society generally, is if *Goldberg* is expanded to the point suggested by Justice Black's "parade of horribles" in his dissent, and, such an expansion of procedural safeguards for welfare recipients facing termination, including those already mandated by *Goldberg*, are financed by the states out of resources which would otherwise be allocated to payment of welfare benefits to eligible claimants.

There is absolutely no authority, in the case law or elsewhere, to support an administrative resource allocation system whereby the costs of providing procedural safeguards for welfare recipients can be offset by reductions in the level of benefits paid to eligible welfare recipients. Not even *Rosado v. Wyman,* nor *Danderidge v. Williams,* the two United States Supreme Court decisions which dealt a severe blow to the legal progress of welfare recipients with respect particularly to the amount of assistance to which eligible claimants are entitled, justify, let alone counsel, such an aberrational notion. *Rosado* held that states need not increase the actual level of welfare benefits paid to recipients, but need only revise upward their "standards of need" which are used to determine financial eligibility, in order to comply with a 1967 congressional amendment requiring adjustments for cost-of-living increases. *Dandridge* upheld against challenges under both the federal AFDC statutes and the Fourteenth Amendment's equal protection clause, Maryland's maximum-per-family-grant rule under which children in large AFDC families receive lower welfare

backwards." Guerrero v. Carleson, 9 Cal. 3d 808, 843, 512 P.2d 833, 843, 109 Cal. Rptr. 201, 211 (1973) (Tobriner, J., dissenting). This represents a retreat similar to that evidenced by the four post-*Goldberg* United States Supreme Court decisions discussed here.


112. 397 U.S. at 278-79 (Black, J., dissenting). See text accompanying note 48 supra. See Justice Tobriner's dissent in Guerrero v. Carleson, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), on the use of a "parade of horribles" argument by the majority in *Guerrero* similar to that of Justice Black's dissent in *Goldberg*: "The parade of horribles here, as so often, is no more than a retreat into the irrational. Surely we do not suggest that defendants would necessarily be required to furnish notices [required under *Goldberg*] in Basque or Chippewa." 9 Cal. 3d at 822, 512 P.2d at 842, 109 Cal. Rptr. at 210.


payments per capita than children in a smaller AFDC family solely by reason of the size of the family with whom the AFDC child resides.

While Rosado and Dandridge make it very clear that the United States Supreme Court will not construe either the federal AFDC statutes or the Fourteenth Amendment in such a way as to require the states to allocate more money en toto either to maintain certain levels of welfare benefits, or to equalize benefit payments among various AFDC families, these two decisions cannot possibly be considered, individually or in combination, as precedent for allowing a state to divert whatever resources would otherwise be used to provide benefit payments to eligible welfare claimants in order to pay for the administrative costs of the procedure mandated in Goldberg or, for that matter, the costs of any further procedural safeguards which could have been, or conceivably still could be, required as an extension of Goldberg. To decide otherwise, the United States Supreme Court would be requiring individual eligible welfare claimants to pay, as a practical matter, by reduction from their own benefit allocations, for the procedural safeguards to which all welfare recipients are entitled as a matter of due process.

To uphold the legality of such a payment requirement, via welfare benefit grant reductions, for enjoyment of the procedural safeguards to which welfare recipients are constitutionally entitled under Goldberg, would be to allow the states to condition welfare eligibility on the giving up of the claimant's constitutional right to due process of law. Such a result, if sanctioned by the United States Supreme Court, would directly involve that Court in imposing an unconstitutional condition on the receipt of welfare assistance. That would clearly contravene what the Court said in Goldberg. It would also contravene a long line of Supreme Court decisions, perhaps epitomized by Harper v. Virginia Board of Elections, the 1966 poll tax case, and still recognized by the Burger Court—in cases such as Bullock v. Carter, involving campaign filing fees—holding that an individual may not be required to pay for government privileges by waiving constitutional rights to which the individual recipient would otherwise be entitled, and to which all other citizens remain entitled. While I agree with the dissenters in Wyman v. James that the majority's decision

115. See note 22 supra. See also text accompanying note 28 supra.
116. 397 U.S. at 262. See also text accompanying note 81 supra.
118. 405 U.S. 134 (1972).
constitutes a retreat to the early "right-privilege" distinction underlying the approach of Flemming v. Nestor. I also emphasize that the James decision in no way suggests that welfare recipients must pay, via grant reductions or otherwise, for the administrative costs of implementing constitutional rights to which they are entitled under decisions of the United States Supreme Court.

The last of the three factors, towards which the attitude of the Goldberg majority differs sharply from that of the majorities in Perales, Wright, Ortwein, and James, is the nature of the welfare bureaucracy and of the welfare officials with whom welfare claimants have individual contact, such as the caseworker conducting the home visit in James. The difference in attitudes between the Goldberg majority and the majorities in Perales, Wright, Ortwein, and James towards this third factor coincides with, or complements, the difference in attitudes toward the first two factors. This attitudinal difference also provides a crucial basis upon which to understand the doctrinal disparities between Goldberg, on the one hand, and these four major post-Goldberg decisions, on the other hand.

The attitude of the Goldberg majority towards the welfare bureaucracy as an institution, and towards the individuals who administer the welfare system, especially those who come into personal contact on a somewhat daily basis with recipients, is one of healthy skepticism. This healthy skepticism is evidenced both by the majority's refusal to defer consideration of the procedural due process claim until after the pending HEW regulation was implemented, and also by the type of procedural safeguards which the Court found necessary as minimum compliance with the due process clause.

The pending HEW regulation, as Justice Burger points out in his dissent, provided more protection for the recipient facing termination than was required under the Goldberg due process holding. The extra protection provided by the pending HEW regulation was assistance of counsel. Although Justice Brennan clearly recognizes the importance of counsel, particularly in cases in which the individual facing a government bureaucracy is poor and typically uneducated,

120. See note 22 supra and accompanying text.
122. 397 U.S. at 282-83 (Burger, C.J., dissenting). See also text accompanying note 68 supra.
123. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed
Goldberg holds that the due process clause, applied in the context of welfare pretermination hearings, requires only that the claimant is entitled to legal representation. That is, the government has no obligation to provide counsel for those who cannot afford to retain an attorney, which obviously would include the vast bulk, if not all, of welfare claimants facing termination of benefits. The Goldberg majority decided the constitutional issue raised by the welfare claimants even though its due process holding required fewer procedural safeguards than would have been provided by the pending HEW regulation. This decision to adjudicate the constitutional issue was necessary because prior HEW regulations expanding procedural safeguards for claimants in fair hearings had been adopted but then not implemented after several revised dates of effectiveness. Therefore, although the Goldberg majority nowhere suggests it considers any such factual or political assumption, it must have believed that HEW would promulgate and implement regulations providing sufficient procedural safeguards only if HEW knew the extent of the procedural safeguards which the Supreme Court would consider constitutionally required. Such a procedural posture on the part of the Supreme Court reflects a skepticism with respect to the willingness of HEW to implement regulations providing sufficient procedural safeguards. However, it also reflects a confidence that HEW would go forward with its pending regulation, and not turn around and provide only those safeguards specifically held to be constitutionally required.

This skepticism—plus a sufficient degree of confidence—towards HEW is also reflected in the particular procedural safeguards required by Goldberg. This is especially true of the requirement that “the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing,” and the requirement that “the decision maker . . . state the reasons for his determination and indicate the evidence he relied on . . . .” These requirements obviously reflect an attempt to ensure both fairness and compliance with the law in welfare pre-termination hearings by, inter alia, guaranteeing an adequate record for the claimant's use to retain an attorney if he so desires.” Id. at 270 (citations omitted); cf. State v. Jamison, 251 Ore. 114, 444 P.2d 15 (1968). See generally Carlin & Howard, Legal Representation and Class Justice, 12 U.C.L.A. L. Rev. 381 (1965); Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967). 124. 397 U.S. at 270. 125. See note 16 supra. 126. 397 U.S. at 271. 127. Id.
if he or she wishes to seek judicial review of an adverse administrative decision. Moreover, these two requirements are bolstered by the final one, namely, an impartial decisionmaker. However, the Court also takes pains to devise a pretermination hearing which explicitly falls short of a judicial adversary proceeding, in terms of both the safeguards to which the claimant is entitled, such as use of legal rules of evidence and assistance of an appointed attorney for those unable to afford their own representation, and the nature of the decision-making process and the person or official who makes that decision. Thus, although there is no requirement of a full opinion or formal findings of fact, but merely a requirement of a statement of reasons along with the requirement that the decision-maker's conclusion rest only on those reasons, the majority in Goldberg recognizes the essential requirement of an impartial decisionmaker. In order to satisfy this latter requirement the Court accepts the fact that prior involvement in some aspects of a case need not necessarily bar a welfare official from acting as a decision-maker. However, the official cannot be the same person who was involved in making the initial determination under review at the pretermination hearing.

The Goldberg majority's refusal to defer constitutional adjudication pending implementation of a new HEW regulation, along with the minimum procedural safeguards found necessary under the due process clause, indicate an awareness on the part of the Goldberg majority of the potential abuses of power, incompetence, and unfairness which are inherent in any large bureaucracy. These dangers inhere especially in a bureaucracy which dispenses welfare benefits, since those directly affected are totally dependent upon those benefits, and lack the resources to individually or collectively ensure that they receive the benefits and are accorded the procedural safeguards to which they are entitled. This awareness of the dangers inherent in bureaucracies, particularly those dealing with the underprivileged in our society, coincides with a general skepticism about any governmental agency which wields power over the daily lives of individuals reflected in many of the Warren Court decisions, such as Miranda v. Arizona and Greene.
v. McElroy.\textsuperscript{131}

The Goldberg majority's view of the welfare claimant, and its attitude toward society's interest in the welfare system, and the skepticism it displays toward the welfare bureaucracy as an institution, are all in sharp contrast with the attitude toward these three factors displayed in the majority opinions in Perales, Wright, Ortwein, and James. The difference in attitude towards the individual welfare recipient between the Goldberg majority and the majorities in the four post-Goldberg decisions is displayed most markedly in James. The various reasons given by Justice Blackmun for considering the "home visit" to be reasonable within the meaning of the Fourth Amendment, assuming it is considered a search within the meaning of that amendment, reflect distrust of the credibility and competency of the adult AFDC recipient, especially the AFDC mother, as well as a belief that such a recipient is trying to "get something for nothing."

Justice Blackmun, in discussing the public's interest in maintaining rules such as that requiring home visits, compares the legal and moral status of the AFDC child-recipient with that of the adult relative—usually the child's mother—who collects the AFDC assistance for both the child's and his or her own needs.\textsuperscript{132} Justice Blackmun cor-

\textsuperscript{131} 360 U.S. 474 (1959). In Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), the Court held that a state university or college teacher must have tenure, or an expectation in continued employment amounting to "de facto tenure," in order to have a sufficient property interest under the due process clause to be entitled to a statement of reasons and a hearing if the teacher is not to be rehired. Compare the majority opinion of Justice Stewart, who also authored the majority opinion in Roth and Perry, in Fuentes v. Shevin, 407 U.S. 67, 88-90 and n. 21 (1972), rejecting the Sniadach-Goldberg balancing approach as irrelevant for determining whether a pre-taking hearing is constitutionally required as opposed to the constitutionally required form of such a hearing.

Justice Douglas in his dissent in Wyman v. James discussing the dangers inherent in the ever growing bureaucracy of modern government stated: "The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It pries more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harassments of modern life." 400 U.S. at 335. See text accompanying note 166 infra.

\textsuperscript{132} Eligibility for AFDC is based on both financial need, which is determined primarily by state law, Dandridge v. Williams, 397 U.S. 471, 478 (1970), and on the presence of a minor in a family who is a "dependent child," as defined by federal law. See note 133 infra. Assuming that a woman and her child(ren) meet both the
rectly points out that the primary beneficiary of the AFDC program is the dependent child—a child in a family which lacks a "bread winner" because the father is either dead, absent from the home, or incapacitated. 133 The person who actually receives the AFDC benefits,

federal eligibility criteria and the state's financial need standard so as to qualify for AFDC assistance, the actual payments, the amount of which are also determined by state law, are made to the "responsible relative" with whom the child(ren) is (are) living, in this case the mother, and the benefit level to which that AFDC family unit is entitled, that is, the dollar amount of the AFDC family payment considered en toto, is based on the needs of the adult recipient as well as on the needs of the child(ren). See 42 U.S.C. § 606(b) (1970); Dandridge v. Williams, 397 U.S. 471, 479 (1970). These needs as well as the benefit level are determined, as is the financial-need (eligibility) standard, primarily by state law. See Rosado v. Wyman, 397 U.S. 408-09 (1970).

133. "Dependent child" is defined as: "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and . . . a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment." 42 U.S.C. § 606(a) (1970).

The leading Supreme Court case construing the term "dependent child," as well as the AFDC program, including its legislative history and purpose, is King v. Smith, 392 U.S. 309 (1968). See also Townsend v. Swank, 404 U.S. 282 (1971); Lewis v. Martin, 397 U.S. 552 (1970).

It should be noted that both the statutory definition of "dependent child" and the Supreme Court's interpretation in King v. Smith require the absence of a "breadwinner" in the traditional sense. That is, AFDC eligibility requires that the "family" with whom the needy child resides lacks a man to support the child, either because the child's father is physically and/or legally apart from the family, or because he is incapacitated, i.e., unemployable, so that his presence in the family adds to, rather than reduces, the financial need of the child.

If a child who is needy and who would otherwise be eligible for AFDC, except for the fact that the need is due to the father's unemployment, rather than his absence from the home or incapacity while he is present, then neither the family nor the needy child is eligible for public assistance under any federal program unless the state in which the family resides has opted, as only about half of the states have, to have an AFDC-UF program, 42 U.S.C. § 607 (1970). See Carroll v. Finch, 326 F. Supp. 891 (D. Alaska 1971) (upholding the optional-state discretion nature of the AFDC-UF program); Burr v. Smith, 322 F. Supp. 980 (W.D. Wash. 1971) (upholding the exclusion from AFDC-UF of families otherwise eligible where the father is eligible for state unemployment compensation, even though the latter provides lower benefits than the family as a unit would otherwise receive in AFDC-UF assistance). Macias v. Finch, 324 F. Supp. 1252 (N.D. Cal.), aff'd sub nom. Macias v. Richardson, 400 U.S. 913 (1970) held that the meaning of "unemployment" under the AFDC-UF program, includes some part time work, but excludes any non-part time work, as defined by HEW regulations, even if the work results in less money for the wage earner's family than the family would receive in AFDC-UF benefits if the father were partially or totally
on the other hand—the adult who fits within the class of enumerated relatives and in whose home the AFDC child resides—is at best only a derivatively intended beneficiary. However, this primary-derivative eligibility distinction created by the federal AFDC statutory scheme in no way justifies the James' view of the adult AFDC recipient, particularly the AFDC mother in her role as caretaker of the primary AFDC beneficiary. The AFDC child is seen as a potential victim, not of official lawlessness or carelessness, and not even of incompetency or lack of time on the part of the individual caseworkers, but, rather, as the potential victim of the AFDC mother. Thus Justice Blackmun pits the needs and care of the AFDC child against the constitutional rights of the AFDC mother, as if these two were necessarily incompatible with each other. So he makes statements like: "The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights."  

The above view of the AFDC mother and the pitting of her rights against the best interests of her child coincides with Justice Blackmun's view of the AFDC mother as someone who would try to abuse the system for her own personal gain by using the Fourth Amendment as a "wedge" to get welfare on her own terms. This attitude towards the AFDC mother obviously reflects a deep distrust of her integrity as an individual as well as her competency as a parent. Even more unfortunately, it reveals a type of disrespect which I doubt is ever implied, let alone explicitly revealed, with respect to persons who receive government largesse, not because they are poor, but because unemployed, as is the case with very large poor families, especially when the father is engaged in e.g., agricultural work. See also Note on the Decision in Macias v. Finch and the Exclusion of the Unemployed From Categorical Assistance, in BRUDNO, supra note 1, at 842-44.  

134. Cf. Brudno (then Rintala), Foreward: "Status" Concepts in the Law of Torts, 58 CALIF. L. REV. 80, 94, 111 (1970), on the difference between direct and derivative, or "privity"-based, rights of tort victims. For a particularly clear example of the latter, as well as for a very clear tort analog to the AFDC mother's eligibility for assistance, see Dillon v. Legg, 68 Cal. 2d 728, 733, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968). Dillon makes the mother's right to recover for injuries sustained through shock at witnessing, but not personally being in the "zone of danger" of, a car accident injuring her child a derivative of the child's right to recover, that is, dependent upon the defendant being legally liable for the injury, or death, of the child—the "primary" accident victim—alogous to the "dependent-child"-primary-beneficiary of the AFDC program.  


they provide some type of service for which the government pays them welfare by another name. As Justice Douglas states in his dissent in *James*:

> If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? Welfare in aid of dependent children, like social security and unemployment benefits, has an aura of suspicion. There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential. But constitutional rights . . . are obviously not dependent on the poverty or on the affluence of the beneficiary . . . .

Finally, the *James* majority, for no apparent reason, invades the personal privacy of Mrs. James and thereby further displays their lack of respect for AFDC mothers. In discussing why the AFDC child's needs have to be protected at the expense of the AFDC mother's constitutional rights, Justice Blackmun openly casts doubt on Mrs. James' competency and reliability as a parent. In the footnote to his statement that Mrs. James wants to use the Fourth Amendment "as a wedge . . . to avoid questions of any kind," Justice Blackmun says:

> We have examined Mrs. James’ case record with the New York City Department of Social Services, which, as an exhibit, accompanied dependent Wyman's answer. . . . The record is revealing as to Mrs. James' failure ever really to satisfy the requirement for eligibility; as to constant and repeated demands; as to attitude toward the caseworker; as to reluctance to cooperate; as to evasiveness; and as to occasional belligerency. There are indications that all was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite). The picture is a sad and unhappy one.

This exposure of personal "facts" about Mrs. James and her son and of evaluations of them by a welfare caseworker, contained in a theoretically private file, is wholly gratuitous because they have nothing to do with the constitutional issue in *James*. The gratuitousness of the exposure is another indication of the post-*Goldberg* majority's negative attitude towards welfare claimants, especially welfare mothers. AFDC mothers are somehow more suspect as a class than are any other category of parents. As Justice Marshall points out in his dissent:

> First, it is argued that the home visit is justified to protect dependent children from "abuse" and "exploitation." These are heinous crimes, but they are not confined to indigent households.

137. 400 U.S. at 332 (citations omitted) (Douglas, J., dissenting).
138. *Id.* at 322.
139. *Id.* at 322 n.9.
Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children.\textsuperscript{140}

This distrust and disrespect for those dependent on AFDC assistance, more than fifty percent of whom are non-white, and more than ninety percent of whom (the adult AFDC recipients) are women, is further revealed in another argument put forth by Justice Blackmun to justify treating the home visit as if it is not a search within the meaning of the Fourth Amendment. Justice Blackmun argues:

The emphasis of the New York statutes and regulations is upon the home, upon “close contact” with the beneficiary, upon restoring the aid recipient “to a condition of self-support,” and upon the relief of his distress. The federal emphasis is no different. It is upon “assistance and rehabilitation,” upon maintaining and strengthening family life, and upon “maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . .\textsuperscript{141}

Contrary to the implicit assumption in this argument, the fact that rehabilitation and self-support are two of the statutorily stated purposes of the AFDC program\textsuperscript{142} is in no way inconsistent, logically, doctrinally, or politically, with allowing an AFDC recipient to enjoy his or her Fourth Amendment rights. Justice Blackmun and the other five justices concurring in \textit{James}, however, seem to think that an AFDC recipient somehow needs to be rehabilitated in such a way that the recipient’s attempt to exercise his or her constitutional rights conflicts with or hampers this rehabilitation purpose. As Justice Marshall points out in his dissent, the majority opinion in \textit{James} reflects a paternalism toward AFDC recipients, particularly AFDC mothers, which the vast number of citizens not dependent upon welfare would never accept as applicable to themselves and, in most likelihood would never be required, let alone asked, to accept.\textsuperscript{143}

This distrust and disrespect which the post-\textit{Goldberg} majority bears toward the individual AFDC recipient, which is so blatantly revealed in Justice Blackmun’s opinion in \textit{James}, is also evident, but less vividly, in \textit{Perales}, \textit{Wright}, and \textit{Ortwein}. In all three of these

\begin{footnotesize}

\begin{enumerate}
\item \textsuperscript{140} \textit{Id.} at 341-42 (Marshall, J., dissenting).
\item \textsuperscript{141} \textit{Id.} at 319.
\item \textsuperscript{142} 42 U.S.C. § 601 (1970).
\item \textsuperscript{143} "Appellants offer [another] state interest [which] the court seems to accept as partial justification for this search. We are told that the visit is designed to rehabilitate, to provide aid. This is strange doctrine indeed. A paternalistic notion that a complaining citizen’s constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation’s philosophy.” 400 U.S. at 343 (Marshall, J., dissenting).
\end{enumerate}
\end{footnotesize}
cases, the Court, when faced with a choice between imposing new procedural rules on the welfare bureaucracy or letting the welfare claimant just proceed as best as possible within the current regulatory maze, always opts for the latter. This is due, not only to the Burger Court majority's attitude toward society's interest in the welfare system and toward the welfare bureaucracy, as will be discussed further below, but also to an attitude toward the individual welfare claimant which can be described as at best one of lack of concern and empathy.

In Richardson v. Wright, the Court essentially says to the petitioners, "Go back and complain using the existing administrative procedures; we will worry about your constitutional rights later, if you lose after exhausting your present administrative remedies." Comounding the difficulties imposed upon the welfare claimants by the decision in Wright, the Court in Ortwein v. Schwab says to the welfare claimants who lose at the administrative hearing, "We cannot help it if you cannot afford the $25 filing fee to seek judicial review of an adverse administrative determination; one hearing is enough for you, even if others who depend upon government largesse can obtain appellate review of adverse administrative rulings simply because they are not dependent on welfare." Finally, in Richardson v. Perales, the Court upholds an administrative finding of no disability insurance eligibility, even though that finding rested solely on the hearsay report of one doctor which conflicted with all the live testimony of the hearing, including that of examining doctors. Given the combination of these three cases and the procedural posture adopted by the Court therein, there appears to be little concern for protecting the individual welfare claimant.

The attitudes toward the individual welfare claimant displayed in the four major post-Goldberg decisions contrast sharply with that of the Goldberg majority. The latter views the welfare claimant as a rights-bearing citizen who, in most cases, is poor for reasons completely beyond his or her control, and whose interest in receiving both adequate and fairly administered welfare payments coincides with society's interest in alleviating poverty and providing a "rule of law," and thereby a "stake in the system," for all individuals dealing with any government bureaucracy. This disparity in attitudes toward the

144. See text beginning at note 148 infra.
148. 397 U.S. at 265. See text accompanying notes 108-10 supra; see notes 103, 107, 109-10 supra.
individual welfare claimant between the *Goldberg* majority and the majorities in *Perales, Wright, Ortwein* and *James* coincides with a similar disparity of attitudes toward the group interest or society's stake in the welfare system, and also toward the nature of the welfare bureaucracy and those officials who administer it.

The difference in attitudes between the Burger Court majority and the *Goldberg* majority toward these second and third factors is quite sharp. This sharpness further indicates the strong retreat to the "right-privilege" distinction as a legitimate basis upon which to adjudicate constitutional challenges to procedures or reasons for denying, terminating, reducing, or adding eligibility conditions for, welfare assistance or any other type of benefit which the government has no affirmative obligation to provide. It thereby also indicates a willingness on the part of the Burger Court majority to cut into the "unconstitutional conditions" doctrine developed by the Warren Court to protect the governed from the potential of abuses of power by those who govern.

The attitude of the Burger Court majority toward the second factor—the group interest or society's stake in the welfare system—is evidenced most clearly in Justice Blackmun's opinions in *Perales* and *James*. It also is implicit in the no-review and the affirmation of filing fees for judicial review decisions in *Wright* and *Ortwein*, respectively. That attitude, in summary, is: (a) insensitivity with respect to the interest of welfare claimants as a group, or, a "wishful-thinking" kind of unstated assumption that the group interest of welfare claimants magically coincides with that of society in general, and (b) cynical pragmatism with respect to society's interest or stake in the welfare system. This cynical pragmatism is reflected in several notions running throughout these four post-*Goldberg* decisions. Among them are the notions that the welfare system is primarily a problem for those who administer it, and not one for the courts; that the best thing to do in most welfare procedure cases is to leave well enough alone; and, that as long as the system seems to work fairly and competently over all, it is in everyone's interest, especially the taxpaying public's, to minimize the adversary or judicial aspects of welfare administration and, above all, to minimize costs.

In discussing the contention of the disability insurance claimant in *Perales* that the Social Security Administration's hearings lack basic procedural safeguards required by the due process clause, and in attempting to distinguish the case from *Goldberg*, Justice Blackmun

149. 402 U.S. at 406-07. See text accompanying notes 39-44 supra.
describes the nature and desirability of current Social Security Administrative hearings as follows:

The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. But, as the Government's brief here accurately pronounces, "Such a system must be fair—and it must work." 150

[S]trict rules of evidence, applicable in the courtroom, are not to operate at social security hearings . . . . [T]here emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. 151

With over 20,000 disability claim hearings annually, the cost of providing live medical testimony at those hearings, where need had not been demonstrated by a request for a subpoena, over and above the cost of the examinations requested by hearing examiners, would be a substantial drain on the trust fund and on the energy of physicians already in short supply. 152

A simple comparison of the above remarks of Justice Blackmun in Perales with statements of Justice Brennan in Goldberg, such as "welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," 153 welfare "is not mere charity, but a means to 'promote the general Welfare,'" 154 and, "the same governmental interest that counsels the provision of welfare, counsels as well its uninterrupted provision to those eligible to receive it," 155 make clear the sharp difference in attitude between the Goldberg majority and the Perales majority towards the second factor.

This attitudinal disparity toward the second factor between the Goldberg majority and the majority in the four post-Goldberg decisions is manifested just as clearly in the following remarks of Justice Blackmun in James:

1. The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family required such aid for that child. The focus is on the child and, further, it is on the child who is dependent. There is no more worthy object of the public's concern. . . .

150. Id. at 399-401, 406 (citations omitted).
151. Id. at 400-01.
152. Id. at 406.
153. 397 U.S. at 265. See text accompanying note 109 supra.
154. Id.
155. Id.
2. The [welfare] agency . . . is fulfilling a public trust. The State . . . has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses.

3. One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same. It might well expect more, because of the trust aspect of public funds . . . .

4. The emphasis of the New York statutes and regulations [governing the "home visit"] [is the same as the] federal emphasis . . . . It is upon "assistance and rehabilitation" . . . .

5. The home visit . . . is [at] "the heart of welfare administration" . . . .

According to Justice Blackmun in James, then, the primary interests of society, or of the taxpaying public, in welfare administration procedures are, not to ensure a "rule of law" for welfare recipients as well as for citizens generally, as the Goldberg majority viewed it, but rather to ensure: first, that the AFDC child's needs are made paramount insofar as they conflict with the AFDC mother's, second, that those who receive welfare assistance are those who really are entitled to it; third, that the public, or at least the responsible welfare officials, know how welfare recipients spend their charity; fourth, that welfare recipients are rehabilitated as well as provided financial assistance; and, fifth, that traditional methods of enforcing the first four interests—in this case, the home visit—are continued. Moreover, society, or the taxpaying public, also has a strong interest in ensuring that evidence of a crime observable by a welfare official during a home visit is in fact observed and seized, even though that visit should not be considered by the welfare recipient to be any sort of criminal investigation. Another societal interest is that the welfare recipient not get the advantage of both sides of the kind of choice to which all citizens seeking government largesse, such as taxpayers claiming a deduction, are put theoretically. Assurance of this latter interest is accomplished by requiring individual welfare claimants to either sub-

156. 400 U.S. at 318-20.
157. "The home visit is not a criminal investigation . . . and despite the announced fears of Mrs. James and those who would join her, is not in aid of any criminal proceeding . . . . And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow, then, even assuming that the evidence discovered upon the home visitation is admissible, an issue upon which we express no opinion, that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." Id. at 323.
mit to the welfare administration's methods for determining eligibility or give up their so-called "right" to receive assistance. And, as Justice Blackmun sees it, the choice is entirely that of the welfare claimant.\textsuperscript{158}

The \textit{James} majority thus views the societal interest in the welfare system, in terms of both its existence and its procedures, in basically the same light as the \textit{Perales} majority views it. In both \textit{James} and \textit{Perales}, the majority believes that the basic goal of the Court in welfare procedure cases should be to preserve traditional procedures still considered desirable by the welfare bureaucracy. That is, leave well enough alone so as not to disturb the \textit{status quo}; allow maximum administrative flexibility and conservation of resources; and assist welfare officials in their attempt to ensure that only those individuals in fact entitled to assistance receive it.

While the \textit{James} majority opinion suggests an even more restrictive or "protective" view of the societal interest in the welfare system than is suggested in the \textit{Perales} majority opinion, this difference is one of degree only. It is a difference which is due in large part to the fact that \textit{Perales} involves the Social Security disability insurance program, while \textit{James} involves the AFDC program—a program which provides financial assistance to protect dependent children by funneling that assistance through the most suspect category of welfare recipient for the Burger Court, namely, the AFDC mother. As discussed above,\textsuperscript{159} an AFDC mother such as Mrs. James is seen as seeking welfare assistance on terms of her own, and, therefore, terms which necessarily conflict with society's interest in supporting her child. Thus, at least in the AFDC context, society's greatest stake definitely is not in ensuring a "rule of law" for everyone as the \textit{Goldberg} majority saw it, but, rather, in ensuring that poor mothers who get the benefit of society's charity do not abuse that charity for their own individual advantage. This view of the societal stake in the welfare system is predicated upon the same attitudes toward welfare recipients

\textsuperscript{158} Id. at 324. "It seems to us that the situation is akin to that where an internal revenue service agent, in making a routine civil audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his 'rights' in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So here Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayers resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved." Id.

\textsuperscript{159} See text accompanying notes 132-43 supra.
that underlie treating welfare assistance as a "privilege" rather than as a "right", something which Justice Blackmun explicitly does in *James*, as seen above.¹⁶⁰

The attitude of the majority in the four post-*Goldberg* decisions towards the third factor—the nature of the welfare bureaucracy and those officials who administer it, especially those who have individual contact with welfare recipients—differs from that of the *Goldberg* majority in much the same way as the attitudes of the post-*Goldberg* and *Goldberg* majorities differ toward the second factor. Also, this attitudinal difference again is manifested most clearly in Justice Blackmun's opinions in *Perales* and *James*.

Unlike the healthy skepticism of the *Goldberg* majority,¹⁶¹ the majorities in *Perales* and *James* display an attitude of trust and confidence in the fairness and competency of both the welfare bureaucracy and the individual welfare official. Thus, for example, in concluding that the hearsay medical report constitutes sufficient evidence to support the hearing examiner's no-disability finding in *Perales*, Justice Blackmun makes the following arguments:

1. The identity of the five reporting physicians is significant. Each report presented here was prepared by a practicing physician who had examined the claimant. A majority [of these physicians] were called into the case by the state agency. Although each received a fee . . . [w]e cannot, and do not, ascribe bias to the work of these independent physicians . . . .

2. The vast workings of the social security administrative system make for reliability and impartiality in the consultant reports. . . . We do not presume on this record to say that it works unfairly.

3. One familiar with medical reports and the routine of the medical examination . . . will recognize their elements of detail and of value . . . .

4. The reports present the impressive range of examination to which Perales was subjected. . . . It is fair to say that the claimant received professional examination and opinion on a scale beyond the reach of most persons and that this case reveals a patient and careful endeavor by the state agency and the examiner to ascertain the truth.

9. There is an additional and pragmatic factor which, although not controlling, deserves mention. [It is the fact that] over 20,000 disability claim hearings [are held] annually, [and] the cost of providing live medical testimony at those hearings, where need has not been demonstrated by a request for a subpoena . . .

¹⁶⁰. 400 U.S. at 319. See text accompanying note 80 supra.
¹⁶¹. See text beginning at note 121 supra.
would be a substantial drain on the trust fund and on the energy of physicians already in short supply.\textsuperscript{162}

An argument similar to those above is put forth by Justice Blackmun to show that the problems with the challenged procedures in \textit{Goldberg}, which required the procedural safeguards there mandated under the due process clause, do not arise in the administrative context of \textit{Perales}:

The \textit{Perales} proceeding is not the same [as that involved in \textit{Goldberg}]. [T]he specter of questionable credibility and veracity is not present; there is professional disagreement with the medical conclusions, to be sure, but there is no attack here upon the doctors' credibility or veracity.\textsuperscript{163}

In rejecting the claimant's contentions that the use of government paid medical advisers in the disability hearings and the multiple roles played by the hearing examiner in those hearings violate procedural due process, Justice Blackmun argues:

Inasmuch as medical advisers are used in approximately 13\% of disability claim hearings, comment as to this practice is indicated. We see nothing "reprehensible" in the practice . . . . The trial examiner is a layman; the medical adviser is a board-certified specialist. He is used primarily in complex cases for explanation of medical problems in terms understandable to the layman-examiner. He is a neutral adviser.

. . . .

Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts. The 44.2\% reversal rate for all federal disability hearings in cases where the state attorney does not grant benefits . . . . attests to the fairness of the system and refutes the implication of impropriety.\textsuperscript{164}

Comparing the above excerpts from Justice Blackmun's majority opinion in \textit{Perales} with Justice Brennan's majority opinion in \textit{Goldberg}, especially those portions delineating the reasons for selecting those procedural safeguards which are minimally necessary under the due process clause,\textsuperscript{165} and with the following excerpts from Justice Douglas' dissent in \textit{Perales}, reveals the sharp difference in attitude between the \textit{Goldberg} majority and the Burger-court majority toward the third factor—the nature of the welfare bureaucracy, and the fair-

\begin{itemize}
\item \textsuperscript{162} 402 U.S. at 402-04, 406 (citations omitted).
\item \textsuperscript{163} \textit{Id.} at 407. See text accompanying note 41 \textit{supra}.
\item \textsuperscript{164} \textit{Id.} at 408, 410.
\item \textsuperscript{165} 397 U.S. at 262-65, 267-71. See text accompanying notes 33-34, 36-38, 78, 106, 111 \textit{supra}.
\end{itemize}
ness and reliability of its procedures and of those individuals who administer or participate in them. Justice Douglas (joined by Justices Black and Brennan), dissenting in *Perales*, adheres to a view of the welfare bureaucracy and welfare officials which, like the view he espoused in his dissent in *James*, 166 is much more skeptical than the view manifested in Justice Blackmun's opinion in *Perales* and in the holdings of *Wright* and *Ortwein*. He describes the administrative situation in which the claimant in *Perales* is trapped as follows:

This case is minuscule in relation to the staggering problems of the Nation. But when a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone, for these days the average man can say: "There but for the grace of God go I."

Judge Spears who first heard this case said that the way hearing officers parrot "almost word for word the conclusions" of the "medical adviser" produced "nausea" in him....

Review of the evidence is of not value to us [in a case such as this]. The vice is in the procedure which allows it in without testing it by cross-examination. Those defending a claim look to defense-minded experts for their salvation. Those who press for recognition of a claim look to other experts. The problem of the law is to give advantage to neither....

The use of HEW of its stable of defense doctors without submitting them to a cross-examination is the cutting of corners—a practice in which certainly the Government should not indulge. 167

Two somewhat mutually contradictory attitudes toward welfare caseworkers expressed in *James* evidence the distance backwards—back to the era of *Flemming v. Nestor*, 168 with its, in Professor Charles Reich’s terms, feudal view of property rights 169—the Court has traveled since its 1970 decision in *Goldberg*. This is especially true when these two attitudes are considered together with the attitudes toward medical advisors, hearing examiners, and the welfare complex as a whole, displayed in the *Perales* majority decision.

Justice Blackmun in *James* views the welfare caseworker as both (a) an individual acting in good faith pursuant to prescribed welfare procedures for the benefit of the welfare claimant, and (b) an individual whose word, with respect to the ability of members of his or

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166. 400 U.S. at 335. See note 131 *supra*.

167. 402 U.S. at 413-14 (Douglas, J., dissenting).


her own profession to carry out the positive rehabilitative purposes of
the home visit, is not to be taken seriously or trusted. Justice Black-
mun displays these two contradictory attitudes towards the welfare
caseworker in the course of describing one of the factors he lists to
support James' conclusion that even if the home visit is a search within
the meaning of the Fourth Amendment, it is not unreasonable and
therefore not violative of that Amendment. Justice Blackmun as-
sumes for purposes of argument that the home visit is a search because
he recognizes, or purports to recognize, that "the home visit is . . .
both rehabilitative and investigative,"170 and "(perhaps because the
average [AFDC] beneficiary might feel she is in no position to refuse
consent to the visit)."171

One of the reasons for finding the home visit to be a reasonable
search within the meaning of the Fourth Amendment is: "The visit
is not one by police or [by anyone in] uniformed authority."172 In
thus attempting to distinguish the home visit from other types of ad-
ministrative searches which have been held subject to the warrant re-
quirements of the Fourth Amendment,173 Justice Blackmun focuses
upon the ability of and the function performed by the person conduct-
ing the search, and the appearance of that person to the individual
whose home is being visited. The caseworker conducting the home
visit is not like a police officer for the majority in James because the
former is "a caseworker of some training whose primary objective is,
or should be, the welfare, not the prosecution of the [welfare] recip-
ient,"174 and because "[t]he caseworker is not a sleuth but rather,
we trust, is a friend to one in need."175

The notion that the home visit need not be subjected to the pro-
cedural safeguards of the Fourth Amendment because the caseworker
conducting the visit is a friend as opposed to a sleuth is similar to
Justice Blackmun's explicit reliance in Perales on the competency and
good faith of both the medical advisers hired by HEW and the hearing
examiners. In the latter case, as in James, Justice Blackmun not only
believes in the facts about the welfare officials upon which he ex-

171. Id. at 318.
172. Id. at 322.
173. Justice Blackmun states that neither Camara v. Municipal Court, 387 U.S.
523 (1967), nor See v. City of Seattle, 387 U.S. 541 (1967), is "inconsistent with
our result here." 400 U.S. at 324-25. See note 95 and text accompanying notes 93-
96 supra.
174. 400 U.S. at 322-23.
175. Id. at 323.
plicitly relies, but also he uses these facts to justify upholding an eligibility procedure which falls far short of the type of hearing required in *Goldberg*.

Thus, in *James*, the fact that the welfare official conducting the home visit is or should be viewed by the welfare recipient as a friend providing assistance rather than an enemy looking for criminal evidence somehow means that a welfare recipient such as Mrs. James should not even object to a home visit, let alone suggest—and suggest to the point of bringing a lawsuit—that the home visit lacks constitutionally required procedural safeguards. While the logic of this argument escapes me, it makes sense when considered in the light of the other arguments and assumptions in Justice Blackmun’s decision in *James* and the majority opinions in *Perales*, *Wright*, and *Ortwein*. The way in which this non-sequiter most makes sense is to look at it in light of a feeling running throughout the four post-*Goldberg* majority opinions. That feeling—which is never made as explicit as some of the other attitudes toward the welfare claimant held by the Burger court majority, but which naturally flows from those other attitudes—is resentment toward the welfare claimant who takes his or her complaint against the welfare bureaucracy to court. Such a welfare claimant is obviously not sufficiently grateful for the charity which society is so benevolently providing. Thus, he or she is not a person worth protecting by allowing him or her to receive financial assistance without paying for it by selling his or her constitutional rights.

This resentment toward the individual welfare claimant who attempts to assert his or her constitutional right against the welfare bureaucracy, which is an undercurrent in the four post-*Goldberg* majority opinions, is obviously contrary to the *Goldberg* majority’s view of both the welfare claimant and the welfare bureaucracy. Moreover, the “friend rather than sleuth” reason for this resentment is a symptom of what I earlier described as “wishful thinking” on the part of the Burger Court majority with respect to both the group interest and society’s stake in the procedural characteristics of the welfare system. It is also factually inaccurate, as Justice Marshall points out in his dissent in *James*:

No one questions the motives of the dedicated welfare caseworker. Of course, caseworkers seek to be friends, but the point is that they are also required to be sleuths. . . . [A]ppellants have strenuously emphasized the importance of the visit to provide evi-

177. See text beginning at note 148 *supra.*
dence leading to civil forfeitures including elimination of benefits and loss of child custody.

Actually, the home visit is precisely the type of [administrative] inspection [which this Court has held to be a search subject to the warrant requirements of the Fourth Amendment in prior cases] except that the welfare visit is a more severe intrusion upon privacy and family dignity. . . . [T]he home visit, like many housing inspections, may lead to criminal convictions.

. . . [A]part from the issue of consent, there is neither logic in, nor precedent for, the view that the ambit of the Fourth Amendment depends not on the character of the governmental intrusion but on the size of the club that the State wields against a resisting citizen. Even if the magnitude of the penalty were relevant, which sanction for resisting the search is more severe? For protecting the privacy of her home, Mrs. James lost the sole means of support for herself and her infant son. For protecting the privacy of his commercial warehouse, Mr. See [the defendant who successfully challenged an administrative search as violative of the Fourth Amendment] received a $100 suspended fine.179

The other basis upon which Justice Blackmun distinguishes the welfare official conducting the home visit from a police officer conducting a typical search—that the former is "a caseworker of some training"—is inconsistent with the "friend not sleuth" notion. This inconsistency is due to Justice Blackmun's refusal to believe the statements about training, competency, personnel turn-over, time pressures, caseloads, and other factors about the actual job situation of those welfare officials conducting the home visit which are put forth in the amicus brief written on behalf of those very officials.180 In that amicus brief, the New York caseworkers argued that the home visit rule should be held unconstitutional because it was impossible, given the factors about training, caseload, etc., for the welfare officials charged with conducting the visits to actually fulfill the positive rehabilitative purposes which allegedly justify the intrusion into the AFDC mother's home in this kind of case. This disbelief on the part of the James majority is disconcerting, not only because it is inconsistent with other assumptions about the welfare officials conducting the visit, but also because it portrays a majority of the Supreme Court justices as wearing social blinders. Even worse, this disbelief evidences a willingness on the part of the Burger Court majority to select those facts about the welfare system and about the individuals who administer it which are favorable to the legal conclusion desired, rather than accepting or at least accurately perceiving all of them

178. See notes 93-95 and accompanying text supra.
179. 400 U.S. at 339-41.
180. See BRODNO, supra note 1, at 988-93, where the amicus brief is excerpted.
in reaching a legal conclusion.

This disbelief of the welfare caseworkers' characterization of their own ability to conduct the home visits and the manner in which the visits are actually conducted, is explicitly articulated by Justice Blackmun in *James*. As a footnote to the statement that the home visit "is made by a caseworker of some training," Justice Blackmun states:

The *amicus* brief submitted on behalf of the Social Services Employees Union Local 371, AFSCME, AFL-CIO, the bargaining representative for the social service staff employed in the New York City Department of Social Services, recites that "caseworkers are either badly trained or untrained" and that "[g]enerally, a caseworker is not only poorly trained but also young and inexperienced * * *." Despite this astonishing description by the union of the lack of qualification of its own members for the work they are employed to do, we must assume that the caseworker possesses at least some qualifications and some dedication to duty.181

This insistence on assuming that the caseworkers conducting the home visit are able to conduct it so that the presumed constructive, benign purposes of the mandatory visit rule are served, contrary to the caseworkers' own statements about how they actually conduct the home visits, reflects a judicial posture that is common to all four post-*Goldberg* decisions here discussed. That posture is an attitude of trust and confidence in the welfare bureaucracy and those who administer it along with a selective perception of the facts about the welfare bureaucracy and its officials and a selective confidence in, or reliance upon, the view of the functioning of the bureaucracy put forth by those who actually administer the challenged bureaucratic procedure. Such a combination of trust and confidence along with selective factual perception and belief is, needless to say, deadly for the individual welfare claimant, welfare claimants generally, and for society at large, especially if society's stake in the welfare system is that seen by the *Goldberg* majority. Insofar as society's stake in the welfare system diverges from that articulated in *Goldberg*, and insofar as the Supreme Court sees the societal stake differently and bases constitutional decisions on that difference, the loser is not only the individual welfare claimant facing the welfare bureaucracy with inadequate procedural safeguards; the loser is society generally, including all of those who pay taxes to support the welfare system. Without an even-handed application, the "rule of law" cannot survive for, and therefore cannot ultimately protect, anyone.

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181. 400 U.S. at 322.
182. *Id.* at 322-23 n.11.