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V. Camp Cuthrell III

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WELFARE, DUE PROCESS, AND THE NEED FOR CHANGE

V. CAMP CUTHRELL, III

One of the duties of the State is that of caring for those of its citizens who find themselves the victims of such adverse circumstances as make them unable to obtain even the necessities of mere existence without the aid of others.

In broad terms, I assert that modern society, acting through its Government, owes the definite obligation to prevent the starvation or dire want of any of its fellow men and women who try to maintain themselves but cannot. To these unfortunate citizens aid must be extended by the Government—not as a matter of charity but as a matter of social duty.

—Franklin D. Roosevelt¹

This country was in the grip of a great economic and social disaster when Mr. Roosevelt spoke of this “social duty” of the government. Although everywhere terrible personal need cried for satisfaction, “social duty” remained undefined. The nature of “social duty” was shadowed by ambiguity then and remains unclarified today. The failure to clarify its nature is responsible for much of the confusion surrounding welfare law. Resolving this confusion is not a purely legal problem because, as the pragmatics have taught us, the law is but evidence of our social and philosophic interests at work.²

This confusion has resulted in a complete lack of judicial continuity regarding the weight and placement to be afforded the recipient’s interest in the welfare payment. This is evidenced by judicial decisions that, at one extreme, state that the interest might be sufficient to enjoin the Secretary of Health, Education, and Welfare from freezing state funds,³ and, at the other extreme, state that this interest is not subject to the minimal protection of due process of the law.⁴ It is this point, the need for due process protection, that is the office of this comment.

WELFARE PAYMENTS: RIGHT OR PRIVILEGE

The right of an individual to have notice and the opportunity to be heard before property is taken from him is axiomatic in our system of

¹ *Roosevelt Calls for Federal Responsibility, Radio Campaign Address* (Oct. 13, 1932) in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE GENESIS OF THE NEW DEAL, 1928-1932*, 787 (S. Rosenmas, ed., 1938).

² “I am content to think of law as a social institution to satisfy social wants . . .” ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 47 (1922).

³ See *Essex County Welfare Board v. Cohen*, 299 F. Supp. 176 (D.N.J. 1969).

⁴ See *Wheeler v. Montgomery*, 296 F. Supp. 138 (N.D. Cal. 1968) *prob. juris. noted*, 394 U.S. 971, 89 S. Ct. 1469, 22 L. Ed. 2d 2275 (1968) (No. 634, 1968 Term; renumbered No. 14, 1969 Term).

law.⁵ However, there are over seven million citizens⁶ in this country whose basic, life-supporting needs may be terminated without due process of law. The majority of the seven million are children and their mothers, who are now receiving state Aid to Families with Dependent Children under the Social Security Act. It is a legal anomaly that this area of administrative law has remained void of the minimum procedural protection afforded by the Constitution.

The absence of due process protection to the welfare recipient is the result of a distinction between protected individual rights and unprotected governmental privileges.⁷ The discrepancy evolves when a governmental branch offers a largess and an individual partakes and, as a consequence, waives the ordinary protection afforded him by the Constitution. This distinction extends to any field where there is governmental regulation or funding.⁸ Thus, a privilege may take the form of a license to do business⁹ or to practice a profession.¹⁰ It is applicable to the field of public education,¹¹ public welfare,¹² and social security.¹³ Whatever form the privilege may take, it is given as a gratuity and may be removed at the pleasure of the government.¹⁴ There can be little doubt that the operation of such a distinction can and does cause hardship and that consequently there have arisen a number of exceptions that have eroded its application.¹⁵

EROSION OF THE GENERAL CONCEPT OF PRIVILEGE

Professor W. Van Alstyne in the Harvard Law Review article, *The Demise of the Right-Privilege Distinction in Constitutional Law*, set out six exceptions to the operation of the distinction and then proceeded to show the theoretic sterility of the distinction when applied today.¹⁶ However, the existent right-privilege distinction continues

⁵ *Garfield v. Goldsby*, 211 U.S. 249, 29 S. Ct. 62, 53 L. Ed. 168 (1908).

⁶ WELFARE IN REVIEW, U.S. Dept. of Health, Education, and Welfare 41 (Nov.—Dec. 1968).

⁷ W. Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440 (1968).

⁸ *Id.*

⁹ *Hornstein v. Illinois Liquor Control Comm'n*, 106 N.E.2d 354 (Ill. 1952) liquor license; *CIO v. City of Dallas*, 198 S.W.2d 143 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.).

¹⁰ *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963).

¹¹ *Dixon v. Alabama*, 294 F.2d 150 (5th Cir. 1961) cert. denied, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961).

¹² *Westberry v. Fisher*, 297 F. Supp. 1109, 1115 (D. Me. 1969); *Camerena v. Dept. of Public Welfare*, 449 P.2d 957 (Ariz. App. 1969).

¹³ *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).

¹⁴ *Id.* at 611, 80 S. Ct. at 1373, 4 L. Ed. 2d at 1444. "This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint."

¹⁵ W. Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

¹⁶ *Id.* at 1460-1464.

to create problems whenever an administrative agency confronts an individual's interest.

In the field of public assistance, the courts are now facing the problem of whether the recipient's welfare payment is protected by due process of law.¹⁷ If minimal constitutional due process protection is to be afforded the recipient, then the right-privilege distinction must be abandoned or another exception must be created.

THE RIGHT-PRIVILEGE DISTINCTION: ITS OPERATION IN WELFARE LAW

The courts have generally refused to acknowledge any legal duty on the part of the state to grant welfare; instead, they have continued to classify it as a privilege.¹⁸ In 1960 the United States Supreme Court, in *Flemming v. Nestor*,¹⁹ held that a Social Security payment was a privilege and that as such it was not subject to the constitutional protection of due process of the law. The effect of that decision, as Mr. Justice Black pointed out in his dissent, was simply that the government was giving the Social Security recipient something for nothing and that it could be removed whenever the government pleased.²⁰

Thus, if Social Security, which is partially made up of funds paid by the recipient, is a gratuity, then welfare can be no different. This would seem to settle the problem. However, the great need that a welfare recipient evidences has caused the courts to create an exception to the right-privilege distinction.

In 1969, in *Shapiro v. Thompson*,²¹ the United States Supreme Court struck down as unconstitutional a state residence requirement for Aid to Families with Dependent Children and in the process nonchalantly avoided the right-privilege argument by stating: "This constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right.'"²² In the *Shapiro* decision, the Court cited *Sherbert v. Verner*²³ as authority for this statement. In 1963 the Court in the *Sherbert* case found a South Carolina unemployment compensation regulation constitutionally de-

17 *Machado v. Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969), *appeal docketed*, 38 U.S.L.W. 3166 (U.S. Sept. 3, 1969) (No. 553); *Wheeler v. Montgomery*, 296 F. Supp. 138 (N.D. Cal. 1968) *prob. juris. noted*, 394 U.S. 971, 89 S. Ct. 1469, 22 L. Ed. 2d 751 (1968) (No. 634, 1968 Term; renumbered No. 14, 1969 Term); *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968) *prob. juris. noted sub nom.*, *Goldberg v. Kelly*, 394 U.S. 971, 89 S. Ct. 1469, 22 L. Ed. 2d 751 (1968) (No. 1120, 1968 Term; renumbered No. 64, 1969 Term).

18 *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 YALE L.J. 1237 (1967).

19 363 U.S. 603, 611, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435, 1444 (1960).

20 *Flemming v. Nestor*, 363 U.S. 603, 623, 80 S. Ct. 1367, 1379, 4 L. Ed. 2d 1435, 1451 (1960).

21 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

22 394 U.S. 618, 627 n.6, 89 S. Ct. 1322, 1327 n.6, 22 L. Ed. 2d 600, 611 n.6 (1969).

23 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

fective because it required the claimant to work on Saturday, which was against her religious beliefs.²⁴

The *Sherbert* case deals completely with first amendment rights, and the *Shapiro* case deals with the right to travel, which is closely akin to first amendment rights. It should be noted that first amendment rights have traditionally been afforded a great degree of protection.²⁵ It is evident that the problem presented by the welfare recipient's need for constitutional due process of law does not fall within the first amendment rights.²⁶ However, the extension of the protection of due process of the law has not been stymied by the right-privilege distinction. In this field the courts have traditionally made use of the "balance of interest" theory, or "essential interest," to afford due process when necessary.²⁷ It is highly probable that by combining the *Shapiro* case's statement regarding privileges with the balancing doctrine, the courts may create a new exception to the right-privilege doctrine and in the process finally define the "interest" a welfare recipient has in his payment. The courts have also circumvented the right-privilege doctrine regarding due process protection by another means: they find due process protection encompassed within the statutes creating welfare.²⁸

However, all these means of traversing the right-privilege distinction would never have come into existence had the Court been content to follow the decision in *Garfield v. Goldsby*.²⁹ In this case the Court was faced with the need for extending due process of law protection to an administrative problem not unlike welfare. The Supreme Court stated that the procedural protection of due process of the law should be afforded an individual when his property or his previously legally authorized rights or privileges are placed in jeopardy by any administrative or judicial branch of government.³⁰ However, as pre-

²⁴ *Id.*

²⁵ See *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964); accord, *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958).

²⁶ *Sherbert v. Verner*, 374 U.S. 398, 406-408, 83 S. Ct. 1790, 1795-1796, 10 L. Ed. 2d 965, 972-973 (1963).

²⁷ See *Dixon v. Alabama*, 294 F.2d 150, 159 (5th Cir. 1961), cert. denied, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961). An interest of great value was sufficient to invoke constitutional due process of law protection. See also *Kelly v. Wyman*, 294 F. Supp. 893, 904-905 (S.D.N.Y. 1968). The court used the essential interest or balancing doctrine when they declared:

The stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.

²⁸ *Machado v. Hackney*, 299 F. Supp. 644, 647 (W.D. Tex. 1969), appeal docketed, 38 U.S.L.W. 3166 (U.S. Sept. 3, 1969) (No. 553).

²⁹ *Garfield v. Goldsby*, 211 U.S. 249, 29 S. Ct. 62, 53 L. Ed. 168 (1908).

³⁰ *Id.* at 262, 29 S. Ct. at 66, 53 L. Ed. at 175. This was an administrative problem surrounding eligibility of an Indian for a federal grant of land. The Indian had been found eligible for the land grant, however, for some reason his grant was summarily removed from the rolls. The Court unanimously declared:

. . . [I]t has always been recognized that one who has acquired rights by an adminis-

viously mentioned, there still exists a problem regarding the application of due process protection to a welfare recipient. It therefore becomes necessary to recount briefly the history of welfare, and consequently to take cognizance of the legislative intent which implemented the welfare interest.

WELFARE: RESPONSE TO A SOCIAL NEED

The average pre-depression American firmly believed that thrifty saving and hard work would provide for old age and be sufficient to protect against any economic misfortune that might occur.³¹ The depression provided ample evidence of the shortcomings of this economic theory.³² One of the many results of the depression was a movement to insure some form of stability in personal income. The Social Security Act of 1935 evidenced this movement.³³ The Act presented a wide range of programs as an aid in insuring the economic essentials of existence. The federal government had exclusive administration over only one program, Old Age Insurance. The remaining programs were optional to the individual states under cooperative administration and were financed by a matching formula between the state and federal governments.³⁴ The Act offered different programs that could be adopted by the states in order to meet their duties to their citizens who fell within the various classifications of need.³⁵

STATES SUBSCRIBE TO WELFARE PROGRAM

Most states reacted to the Social Security Act by establishing appropriate plans in order that they might meet their duties. Texas, for example, enacted amendments to its constitution that enabled its participation in the program.³⁶ The Texas Constitution of 1876 pro-

trative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court.

Accord, Willner v. Comm. on Character and Fitness, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963); *Opp Cotton Mills v. Adm'r*, 312 U.S. 126, 61 S. Ct. 524, 85 L. Ed. 624 (1941); *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

³¹ R. Leach, *The Federal Role in the War on Poverty Program*, 31 LAW & CONTEMP. PROB. 18 (1966).

³² See *Helvering v. Davis*, 301 U.S. 619, 641-644, 57 S. Ct. 904, 908-910, 81 L. Ed. 1307, 1315-1317 (1937).

³³ *Id.*

³⁴ *Helvering v. Davis*, 301 U.S. 619, 641, 57 S. Ct. 904, 908, 81 L. Ed. 1307, 1315 (1937).

³⁵ Old Age Assistance (O.A.A.), 42 U.S.C.A. §§ 301, *et seq.* Aid to Families with Dependent Children (A.F.D.C.), 42 U.S.C.A. §§ 601, *et seq.* Aid to the Blind (A.B.), 42 U.S.C.A. §§ 1201 *et seq.* Aid to Permanently and Totally Disabled (A.P.T.D.), 42 U.S.C.A. §§ 1351, *et seq.*

³⁶ In 1935, section 51(b) of article III of the Texas Constitution was enacted to authorize

hibited any welfare grants, and the provision remains in effect to date.³⁷ In Texas, therefore, all provisions for payments of welfare to needy individuals have been made by amendments to its constitution in the form of exceptions to the prohibition. The Social Security Act was created with the hope that it would be fluid enough to solve the evolving economic problems of our society.³⁸ As a result, there has been a huge amount of legislation, both state and federal, which has amended and altered the operation of the Act.³⁹ Naturally, the courts have been called upon to interpret and at times to strike down these changes. Recently, the frequency of this judicial activity has increased, and the courts are now the site of a large volume of welfare reform cases.⁴⁰

This increase in judicial activity is the result of at least four factors: (1) the establishment of federal jurisdiction in *King v. Smith*;⁴¹ (2) the broad sweeping authority of the states in the administration of the program;⁴² (3) the confusion at the lower state levels regarding policy, due to the volume of regulations and changes coming from the Depart-

payment for Old Age Assistance. In 1937 section 51(c) was adopted to provide for assistance to needy blind, and section 51(d) was adopted to authorize grants of assistance "to destitute children under the age of fourteen." In 1945 sections 51(b), (c), and (d) were consolidated into 51(a) of article III and in 1956 section 51(b)(1) was adopted to grant Aid to the Permanently and Totally Disabled. These amendments authorized the legislature to enact appropriate legislation that is found in article 695 of the Texas Revised Civil Statutes Annotated (1964). These amendments contain various categories of individuals who will be given welfare payments and set up a total dollar ceiling for the program.

³⁷ TEX. CONST. art. III § 51 provides that the legislature ". . . [S]hall have no power to make any grant or authorize the making of any grant of public money to any individual . . . whatsoever."

³⁸ *Flemming v. Nestor*, 363 U.S. 603, 610, 80 S. Ct. 1367, 1372, 4 L. Ed. 2d 1435, 1444 (1960); *Helvering v. Davis*, 301 U.S. 619, 641-644, 57 S. Ct. 904, 908-910, 81 L. Ed. 1307, 1315-1317 (1937).

³⁹ Cf. J. Tenbrock, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (Part I-II), 16 STAN. L. REV. 257, 900 (1964); (Part III) 17 STAN. L. REV. 614 (1965); Bell and Norvell, *Texas Welfare Appeals: The Hidden Right*, 46 TEXAS L. REV. 223 (1967).

⁴⁰ See *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968), substitute father regulation; *accord*, *Machado v. Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969), *appeal docketed*, 38 U.S.L.W. 3166 (U.S. Sept. 3, 1969) (No. 553). *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), residency requirements for welfare; *accord*, *Morrison v. Vincent*, 300 F. Supp. 541 (S.D. Va. 1969); *Westberry v. Fisher*, 297 F. Supp. 1106 (D.M. 1969), maximum grant. *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968) *prob. juris. noted sub nom.*, *Goldberg v. Kelly*, 394 U.S. 971, 89 S. Ct. 1469, 22 L. Ed. 2d 75 (1968) (No. 1120, 1968 Term; renumbered No. 64, 1969 Term), due process; *accord*, *Machado v. Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969), *appeal docketed*, 38 U.S.L.W. 3166 (U.S. Sept. 3, 1969) (No. 553). *But see Wheeler v. Montgomery*, 296 F. Supp. 138 (N.D. Cal. 1968) *prob. juris. noted*, 394 U.S. 971, 89 S. Ct. 1469, 22 L. Ed. 2d 751 (1968) (No. 634, 1968 Term; renumbered No. 14, 1969 Term). *Lampton v. Bonin*, 299 F. Supp. 336 (E.D. La. 1969), per cent payment of A.F.D.C.; *contra*, *Rosado v. Wyman*, 414 F.2d 170 (2d Cir. 1969), *cent. granted*, 38 U.S.L.W. 3114 (U.S. Oct. 13, 1969) (No. 540). *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), requiring name of father of illegitimate child.

⁴¹ 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). See also *Domico v. California*, 389 U.S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647 (1967), need not exhaust all remedies.

⁴² LEGAL ACTION SUPPORT PROJECT, *LIVING COSTS AND WELFARE PAYMENTS*, (Draft for O.E.O. 1969) 1; "Third, under the phrase 'so far as practicable' virtually complete latitude is accorded the states to restrict the commitment of their resources to the care of dependent children."

ment of Health, Education, and Welfare, and state commissioners;⁴³ and (4) the establishment of free legal services for the poor.⁴⁴

Congress probably anticipated the likelihood of judicial activity regarding interpretation of the Act. In an attempt to reduce the volume of this activity they set out certain basic requirements to be met by each state plan before the state's participation in the program was allowed.⁴⁵ Their obvious goal was to create a relatively uniform program of public assistance bound by certain basic prerequisites found in every state.⁴⁶ This uniformity was to be further insured by the necessity that every state plan be initially approved by the Secretary of Health, Education, and Welfare; and that once approved, the state plans would remain constantly subject to H.E.W. rules, regulations, and changes.⁴⁷

Each state determines what specific requirements are necessary in order to place a person within a welfare classification, and upon investigation and determination, if a person is found to meet these requirements, he is certified to receive welfare payment.⁴⁸ The state retains the authority to terminate or alter the payment of an individual if it finds that the recipient's status has so changed as to render him no longer a member of the previously determined classification.⁴⁹ The decision that a change has occurred is an inherently difficult one. It is the product of both law and fact, and its ultimate effect can have grave consequences upon the welfare recipient. Taking notice of this, the drafters of the Social Security Act made the recipient's right to a "fair hearing" a basic and essential requirement in every state plan.⁵⁰

⁴³ V. Rosenblum, *Controlling the Bureaucracy of the Antipoverty Program*, 31 LAW & CONTEMP. PROB. 187, 204-210 (1966).

⁴⁴ W. Samore, *Legal Services for the Poor, Law and Poverty: Some Areas for Legislative Reform in New York*, 32 ALB. L. R. 509 (1968). See also W. Stringfellow, *The Representation of the Poor in American Society*, 31 LAW & CONTEMP. PROB. 142 (1966).

⁴⁵ FEDERAL HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part I-IV (1969) (hereinafter cited as HANDBOOK).

⁴⁶ Hubert H. Humphrey, *The War on Poverty*, 31 LAW & CONTEMP. PROB. 6 (1966). LEGAL ACTION SUPPORT PROJECT, LIVING COSTS AND WELFARE PAYMENTS, (Draft for O.E.O. 1969) "... [A]nd this, as we shall see, has not resulted in any substantial uniformity among the states, at least with respect to size of grant." at 1.

⁴⁷ See 42 U.S.C.A. §§ 301-1394 and HANDBOOK, Parts I-IV.

⁴⁸ In Texas, art. 695(c) § 17, TEX. REV. CIV. STAT. ANN. (Supp. 1967) is representative of ordinary state A.F.D.C. requirements. When there is a "Dependent Child" as defined by the statute, the Commissioner of Public Welfare of the State of Texas is required to furnish A.F.D.C. assistance, until there is a change in the status of the child sufficient to remove him from the definition.

⁴⁹ See, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 YALE L.J. 1234 n.7, 1236 n.8, for a comparison of different state termination plans.

⁵⁰ The provision found in 42 U.S.C.A. § 602(a)(4) (1964) states that the requirement for a fair hearing in state A.F.D.C. programs is basically the same for all other categories: "a state plan for aid and services to needy families with children must . . . (4) provide for granting an opportunity for a fair hearing before the state agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness." This requirement can also be found in 42 U.S.C.A. § 1202(a)(4) for State Aid to Blind plans; 42 U.S.C.A. § 1352(a)(4) for State Aid to Permanently and Totally Disabled plans, and 42 U.S.C.A. § 1382 (a)(4) for State Old Age plans.

If the recipient wishes to request a fair hearing to determine the correctness of a state agency ruling, the process usually takes from one to three months.⁵¹ Since a welfare recipient is by definition an individual who is destitute, without funds or without assets, tampering with his life-supporting welfare payment might cause extreme hardship. Therefore, where a state plan allows an agency's adverse *ex parte* determination of eligibility to take effect prior to any fair hearing,⁵² the recipient is placed in extreme jeopardy.⁵³ The constitutionality of this type of summary proceeding has come under attack in a number of states.⁵⁴ It is at this point that the recipient's need of protection by due process of law comes into conflict with the traditional distinction surrounding the welfare payment.

When the very *existence* of the welfare recipient is at stake, the court can have no choice but to cast off the distinction of "privilege" and invoke that degree of due process protection which will insure justice to both the state and the welfare recipient.⁵⁵

DUE PROCESS REQUISITE IN THE FAIR HEARING

It should be remembered that due process, by its very nature, is flexible and will be altered to protect the interests of the individual in whatever manner necessary to insure fair play.⁵⁶

It would seem essential to procedural protection that there must have been a pre-termination hearing,⁵⁷ and that, before the agency's determination affects the recipient's payments, the decision of the hearing officer must have sustained the agency's position.⁵⁸ In *Machado v. Hackney*,⁵⁹ the district court declared:

⁵¹ *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968).

⁵² *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 *FORD. L.J.* 604, 605 (1969).

⁵³ For an example of the effect of termination prior to hearing see Circuit Judge Feinberg's case histories in *Kelly v. Wyman*, 294 F. Supp. 893, 899-901 (S.D.N.Y. 1968).

⁵⁴ *Machado v. Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969), *appeal docketed*, 38 *U.S.L.W.* 3166 (U.S. Sept. 3, 1969) (No. 553); *Wheeler v. Montgomery*, 296 F. Supp. 138 (N.D. Cal. 1968) *prob. juris. noted*, 394 *U.S.* 971, 89 S. Ct. 1469, 22 *L. Ed. 2d* 751 (1968) (No. 634, 1968 Term; renumbered No. 14, 1969 Term); *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968) *prob. juris. noted sub nom.*, *Goldberg v. Kelly*, 394 *U.S.* 971, 89 S. Ct. 1469, 22 *L. Ed. 2d* 751 (1968) (No. 1120, 1968 Term; renumbered No. 64, 1969 Term).

⁵⁵ *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 *YALE L.J.* 1234, 1243-1245 (1967).

⁵⁶ See *Cafeteria Workers v. McElroy*, 367 *U.S.* 886, 895, 81 S. Ct. 1743, 1748, 6 *L. Ed. 2d* 1230, 1236 (1961). See also *Hanna v. Larche*, 363 *U.S.* 420, 80 S. Ct. 1502, 4 *L. Ed. 2d* 1307 (1960); *Federal Communication Commission v. W.J.R.*, 337 *U.S.* 265, 69 S. Ct. 1097, 93 *L. Ed.* 1353 (1949).

⁵⁷ *Garfield v. Goldsby*, 211 *U.S.* 249, 29 S. Ct. 62, 53 *L. Ed.* 168 (1908).

⁵⁸ "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills v. Adm'r*, 312 *U.S.* 126, 152-153, 61 S. Ct. 524, 536, 85 *L. Ed.* 624, 639-640 (1941).

⁵⁹ 299 F. Supp. 644 (W.D. Tex. 1969), *appeal docketed*, 38 *U.S.L.W.* 3166 (U.S. Sept. 3, 1969) (No. 553).

[A]dequate protection to the recipient can only be accorded, in situations such as those presented in the instant case, by a continuation of the assistance during the period of the appeal and through the end of the month in which the final decision, after the hearing, is reached.⁶⁰

The very nature of the interest in question calls for the most stringent protection from government intervention possible.⁶¹ Consequently, any confrontation between the recipient and the agency in the form of a fair hearing should strictly adhere to the fundamental elements of fair play⁶² that have become essential to due process of law.⁶³

The Federal Handbook of Public Assistance Administration sets out the requirements of confrontation and cross-examination in Part IV sec. 6200(i)(6). The courts have many times stated the basic need for confrontation and cross-examination to insure due process of the law.⁶⁴ The essence of the fair hearing and due process also requires that a claimant have the opportunity to present evidence in support of his position and to make any "argument without undue interference."⁶⁵

The rights to notice and pre-hearing discovery are essential to due process, and as such are found in the Handbook as requirements for every state plan.⁶⁶ The term "fair hearing" connotes an impartial tribunal, and the Handbook provision contains five distinct statements to

⁶⁰ *Id.* at 647.

⁶¹ The courts have found certain areas of human endeavor to be so essential, that constitutional protection is imperative. *See* *Dixon v. Alabama*, 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961). When such interests have been found, the courts have enforced the most stringent protection possible. *Snidach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

⁶² The HANDBOOK, Part IV, § 6100 requires that every state plan offer a "fair hearing." §§ 6000-6400 state the basic requirements of a fair hearing, and § 6400(a) specifically requires that "due process of law" be observed.

⁶³ *See* *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963), *cert. denied*, 374 U.S. 957, 84 S. Ct. 446, 11 L. Ed. 2d 315 (1963), right to full-blown administrative hearing; *Dixon v. Alabama*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961). *See also* THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, LEGAL SERVICES AND PROCEDURES, A REPORT TO THE CONGRESS 1955, 71-72 "Recommendation 42: In adjudication, as distinguished from formal rule making, required under the Constitution or statute, to be made after hearings, the rules of evidence and requirements of proof as found in civil nonjudicial cases in the United States district courts shall be applied, as far as practical"

⁶⁴ *See* *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Rios v. Hackney*, 294 F. Supp. 885 (N.D. Tex. 1967), right to cross-examine in welfare fair hearing; *Kelly v. Herak*, 252 F. Supp. 289 (D. Mont. 1966), *aff'g* 391 F.2d 216 (9th Cir. 1968).

⁶⁵ The HANDBOOK, Part IV, § 6200(i)(4, 5) requires the state plan to provide that the claimant or his representative will have the opportunity to establish all pertinent facts and circumstances, and to advance any argument without undue interference. § 6300(n) provides that the claimant or his representative have adequate opportunity to examine material that will be introduced into evidence prior to the hearing, and to present all evidence without undue interference; *See also* *Cohen v. Perales*, 412 F.2d 44 (5th Cir. 1969).

⁶⁶ The HANDBOOK, Part IV, §§ 6200(i)(l), 6300(n, o), deal with the requirement of pre-hearing discovery, while §§ 6200(g), 6300(j, l) deal with adequate notice. *See* *Roller v. Holly*, 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed. 520 (1900) (notice); *Kelly v. Herak*, 252 F. Supp. 289 (D. Mont. 1966), *aff'g* 391 F.2d 216 (9th Cir. 1968) (discovery).

insure it.⁶⁷ "The hearing officer's recommendation shall be based exclusively on evidence and other material introduced at the hearing."⁶⁸ The Handbook requirement assures that only evidence introduced in the correct manner⁶⁹ and made a part of the verbatim transcript of the hearing will be considered by the hearing officer.⁷⁰

The fair hearing is an informal trial where the facts and circumstances come into contact with legalistic requirements.⁷¹ It is adjudicative in nature.⁷² The legal requirements that must be satisfied to show eligibility tend to be vague in language and difficult in application.⁷³ Requiring a poorly educated individual to understand and apply vague legal definitions to the circumstances surrounding his day-to-day life is not fair play.⁷⁴ It would seem essential to a truly fair hearing that competent assistance be available if requested.⁷⁵ Without such protec-

⁶⁷ The HANDBOOK, Part IV, §§ 6200(d), 6300(h, g), 6400(g, f). See *Coyle v. Gardner*, 298 F. Supp. 609 (D. Hawaii 1969).

⁶⁸ The HANDBOOK, Part IV, § 6200(l). See *Cohen v. Perales*, 412 F.2d 44 (5th Cir. 1969), uncorroborated hearsay or rumor not controlling; *accord*, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1969). *Contra*, *Mackatunas v. Finch*, 301 F. Supp. 1289 (C.D. Penn. 1969). *But see* *Rios v. Hackney*, 294 F. Supp. 885 (N.D. Tex. 1967).

⁶⁹ See *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937), where a failure to observe substantive evidence rule denied due process of law in a fair hearing. See also *Cohen v. Perales*, 412 F.2d 44 (5th Cir. 1969), cross-examination essential to due process; *Rios v. Hackney*, 294 F. Supp. 885 (N.D. Tex. 1967), hearsay testimony not admissible.

⁷⁰ The HANDBOOK, Part IV, § 6200(l); *Cohen v. Perales*, 412 F.2d 44 (5th Cir. 1969); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1969).

⁷¹ The HANDBOOK, Part IV, § 6400.

⁷² The HANDBOOK, Part IV, § 6300(c)(2) states that a fair hearing is the application of law and regulations to the facts presented by the circumstances surrounding each recipient's situation. Cf. *Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 69, 53 L. Ed. 150, 158 (1908). The court declared:

. . . [A] judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

⁷³ See William Samore, *Legal Services for the Poor, Law and Poverty: Some Areas for Legislative Reform in New York*, 32 ALB. L. R. 509 (1968).

⁷⁴ It is difficult to appreciate the position in which a welfare recipient finds himself when he appears to present his case at a fair hearing. The ordinary recipient is poorly educated and usually a member of a minority group. He is frightened by the unfamiliar nature of the proceedings and the importance that the hearing's outcome will have upon his wellbeing. He is then expected to present evidence to rebut some rather vague regulations that he has never even read. Such a situation begs for an unhappy ending with the welfare recipient departing with a feeling that he has been cheated. The author has spoken to a number of welfare officials and the consensus is that, second only to a correct decision in the hearing, the priority should be aimed at giving the recipient a better understanding of what has happened to him. It is essential that the individual realize that there are two sides to every rule or law and what today works against him could work for him tomorrow. See W. Samore, *Law and Poverty: Some Areas for Legislative Reform in New York*, 32 ALB. L.R. 509, 513 (1968).

⁷⁵ See The HANDBOOK, Part IV, §§ 6200(f), 6400(a), which allow representation of the claimant by attorney or layman. However, none make the presence of an attorney mandatory when one is requested. An individual receives welfare because he cannot afford the essentials of life; therefore he certainly cannot afford an attorney to represent him. When the burden of proving eligibility is placed upon the recipient, there is need for some form of educated assistance. § 6400(a) of the HANDBOOK, Part IV, urges the states to pro-

tion the rights of the claimant are no better assured than those of a criminal defendant who is not provided an adequate defense.⁷⁶ All the procedural protection in the world cannot insure an individual a "fair hearing" if the individual is ignorant of this protection. The courts' recognition of this problem can be seen in those criminal cases that demand presence of legal counsel for the indigent defendant.⁷⁷ This is evidence of a new awareness in the courts of the need for equal protection and due process of the law to be extended to all segments of society regardless of financial status. This movement can be seen in all facets of the poverty problem.

THREE DEGREES OF DUE PROCESS PROTECTION

Recently three cases have been decided that, in varying degrees, attempt to alleviate the lack of due process of law found in welfare hearings. These three cases interpret similar hearing procedures in New York,⁷⁸ California,⁷⁹ and Texas.⁸⁰

In California the procedure for the termination or alteration of a payment to a welfare recipient is twofold.⁸¹ First, there must be at least three days' notice prior to the effective date of the termination. This notice must contain a statement setting forth the proposed action and the grounds for such action, as well as any specific evidence that would be sufficient to re-establish eligibility. The notice should also contain an invitation to meet informally with some employee of the agency for an explanation of the action of the agency and to afford the recipient an opportunity to re-establish his eligibility if possible. There is also a provision for a post-termination fair hearing if the recipient requests one.⁸² The California court found that the notice and "informal conference" were sufficient to "comport with the due process clause of the Fourteenth Amendment of the United States Constitution."⁸³

vide payment for services of attorneys in welfare hearings. The free legal aid associations created by the Economic Opportunity Act of 1966 cannot physically represent all of the poor. Therefore the legal profession should realize its duty to this segment of the population before they are forced to by some form of legislation. See William Samore, *Legal Services for the Poor, Law and Poverty: Some Areas for Legislative Reform in New York*, 32 ALB. L. R. 509, 517 (1968).

⁷⁶ *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

⁷⁷ *Id.*

⁷⁸ *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968) *prob. juris. noted sub nom.*, *Goldberg v. Kelly*, 394 U.S. 971, 89 S. Ct. 1469, 22 L. Ed. 2d 751 (1969) (No. 1120, 1968 Term; renumbered No. 64, 1969 Term).

⁷⁹ *Wheeler v. Montgomery*, 296 F. Supp. 138 (N.D. Cal. 1968) *prob. juris. noted*, 394 U.S. 971, 89 S. Ct. 1469, 22 L. Ed. 2d 751 (1969) (No. 634, 1968 Term; renumbered No. 14, 1969 Term).

⁸⁰ *Machado v. Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969), *appeal docketed*, 38 U.S.L.W. 3166 (U.S. Sept. 3, 1969) (No. 553).

⁸¹ 44 CAL. DEPT. OF SOC. WELF. MAN. §§ 325.43-325.434 (1968).

⁸² CAL. WELF. AND INST. CODE, §§ 10950-10956. See the HANDBOOK, Part IV, §§ 6000-6400.

⁸³ *Wheeler v. Montgomery*, 296 F. Supp. 138, 140 (N.D. Cal. 1968).

The New York regulation provided for two different pre-termination programs⁸⁴ and a post-termination fair hearing with all the elements of due process.⁸⁵ One of the pre-termination programs, Plan (b), required notice to be given seven days prior to the agency's proposed action and allowed the recipient to submit a written statement to demonstrate why aid should not be discontinued.⁸⁶ If unsuccessful, the recipient could request a post-termination fair hearing. The New York court ruled that Plan (b) was constitutionally inadequate in that it did not meet the minimum requirements of due process.⁸⁷ The court then proceeded to set down the minimum requirements of due process of the law that must be present to render a welfare hearing constitutionally adequate. These requirements must be met by a hearing prior to the effective date of the agency's action.⁸⁸ The court declared that a pre-termination hearing must afford all the protection of due process of the law and, if it does not, the existence of a post-termination hearing that does afford such protection will not render the earlier hearing to be of any greater legal value.⁸⁹ This statement was completely contrary to the decision reached in California.⁹⁰

The Texas regulation provided for a post-termination fair hearing, but no pre-termination conference.⁹¹ It was possible under Texas procedure that an informal discussion with the caseworker might occur at the time notice was given, but there was no provision for this.⁹² The Texas court voiced its approval of the New York decision, declaring: "We agree with the result reached in the *Kelly* case, but our holding is predicated upon the statutory-regulatory aspects of this case, rather than on broad constitutional grounds."⁹³ The United States district court in the *Kelly* case took this statutory theory into consideration but chose to rule on the constitutional issue, and stated that:

By interpreting the statutory phrase "fair hearing" in the context of pre-termination procedures, we might have avoided the constitutional questions. However, the command of the federal statute does not apply to state and local general assistance, for which no federal funds are provided. Six of the original and

⁸⁴ 18 N.Y.C.R.R. § 351.26.

⁸⁵ 18 N.Y.C.R.R. § 842.23.

⁸⁶ 18 N.Y.C.R.R. § 351.26.

⁸⁷ *Kelly v. Wyman*, 294 F. Supp. 893, 905-906 (S.D.N.Y. 1968). The court stated that due process of law required, among other things, the right to appear in person, and plan (b) did not allow such a right. The court went on to note absurdity of a written statement in the case of a poorly educated welfare recipient.

⁸⁸ *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968).

⁸⁹ *Id.*

⁹⁰ *Wheeler v. Montgomery*, 296 F. Supp. 138 (N.D. Cal. 1968).

⁹¹ TEX. REV. CIV. STAT. ANN. art. 695c § 25 (Supp. 1968).

⁹² *Machado v. Hackney*, 299 F. Supp. 644, 646-647 (W.D. Tex. 1969).

⁹³ *Machado v. Hackney*, 299 F. Supp. 644, 647 (W.D. Tex. 1969).

intervening plaintiffs receive such assistance only; as to them the constitutional issue is squarely posed.⁹⁴

The problem that these three cases attempt to solve is not the obvious right to a fair hearing, but rather its placement in the schedule of events that surround an attempt to terminate or alter welfare payments. The question is not the determination of non-eligibility, but rather who shall determine this non-eligibility. The cases all deal with welfare recipients who previously were found eligible for welfare and now allegedly are no longer members of this class. In *Wheeler v. Montgomery*,⁹⁵ as a result of the court's decision that due process of the law does not require a fair hearing prior to termination, the caseworker is given the authority to determine non-eligibility. The *Kelly* case and the *Machado* case both stand for the proposition that, when a hearing is requested, due process of the law demands that non-eligibility be decided by an impartial tribunal presiding over a fair hearing in which minimum procedural protection is afforded the recipient. All three cases require some form of procedure, but each case evidences a different degree of protection.

The *Wheeler* case presents an "informal conference," combined with a post-termination hearing, which is held to be sufficient to protect the rights of the welfare recipient. To the statement that an incorrect termination can occur, the court answers that there is a right to a post-termination fair hearing.⁹⁶ However, this is contrary to the procedure in a majority of the administrative agencies when commercial interests are concerned.⁹⁷ The United States district courts' decisions in Texas and in New York present a more realistic approach to the problem. The *Kelly* case sets down certain basic requirements that must be met to protect the welfare recipient's constitutional rights.⁹⁸ The *Machado* case finds its basis not in constitutional due process, but rather in statutory due process as found in the Social Security Act, and the rules and regulations promulgated thereunder.⁹⁹

The language used in the *Machado* case can be interpreted to imply that the court felt that all the necessary requirements of constitutional due process of the law could be specifically found or could be specifically implied from the procedure set down in the Federal Handbook and from an interpretation of the term "fair hearing." The Federal Handbook mentions the existence of due process of law and fundamental

⁹⁴ 294 F. Supp. 893, 902 (S.D.N.Y. 1968).

⁹⁵ 296 F. Supp. 138 (N.D. Cal. 1968).

⁹⁶ *Wheeler v. Montgomery*, 296 F. Supp. 138, 140 (N.D. Cal. 1968).

⁹⁷ *See Opp Cotton Mills v. Adm'r*, 312 U.S. 126, 61 S. Ct. 524, 85 L. Ed. 624 (1941).

⁹⁸ *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 *FORD. L.J.* 604, 611-616 (1968) for a basic discussion.

⁹⁹ 299 F. Supp. 644, 647 (W.D. Tex. 1969).

fair play throughout the sections dealing with the fair hearing.¹⁰⁰ When the court accepted the "result reached in the *Kelly* case" they undoubtedly meant that they accepted the elements found to be essential to the term fair play. It is highly probable that the *Machado* court wished to present an alternative answer to the problem should an appellate court find the *Kelly* decision too broad.¹⁰¹

There are obvious deficiencies in the *Machado* decision. There is a possibility that the due process protection afforded the welfare recipient might be limited only to programs with federal money involved, and therefore all state and local programs would not be affected. Also, a strict interpretation of the *Machado* decision might jeopardize certain basic constitutional rights not expressed in the Social Security Act.¹⁰² Although the *Kelly* case tends to dispel the outmoded theory that the Constitution does not protect the payment of the welfare recipient, the *Machado* case avoids this problem.

THE PROBLEMS WHICH ARISE IN A PIECEMEAL DECLARATION OF DUE PROCESS PROTECTION

All three cases ignore at least three basic problems facing the recipient in his "fair hearing." The recipient must bear the burden of proving that he is still a member of the classification of individuals that may receive this particular form of welfare.

Considering the recipient's lack of education, the usual vagueness of the regulation, and the fact that after much investigation the agency had previously found the individual to be a member of this classification, it does not appear that fundamental fair play would be served by placing the burden of proof upon the recipient. This is especially true since none of the cases found the presence of a lawyer¹⁰³ important enough to require the state to furnish one.¹⁰⁴

The last problem ignored by the three cases is the very basis of the welfare turmoil. It deals with the nature of the relationship between poor citizens and the state. The courts have consistently held that

¹⁰⁰ The HANDBOOK, Part IV, § 2300(a) guarantees all constitutional rights; § 6400(a) hearing is to be subject to requirements of due process; 6400(b) there is "due process" in public assistance.

¹⁰¹ The language embraces the entire *Kelly* result, "we agree with the result reached in *Kelly* . . ." and seems to say, as an alternative, ". . . our holding is predicated upon the statutory regulatory aspects of the case, rather than on broad constitutional grounds." *Machado v. Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969).

¹⁰² *Lampton v. Bonin*, 299 F. Supp. 336 (E.D. La. 1969), per cent payment of A.F.D.C.; *Williams v. Dandridge*, 297 F. Supp. 456 (D. Md. 1969), *appeal docketed*, 38 U.S.L.W. 3115 (U.S. May 19, 1969) (No. 131), maximum grant.

¹⁰³ Even the new H.E.W. plan that became effective October 1, 1969, forces the recipient to present evidence to prove his eligibility. 34 Fed. Reg. No. 16 page 1144. *But cf.* *Coyle v. Gardner*, 298 F. Supp. 609 (D.C. Hawaii 1969).

¹⁰⁴ *Supra* note 75.

there is no duty upon the state to provide welfare for its poor. Whether actually stated or not, the welfare recipient is at the mercy of the state, and should a state choose to turn its back upon the poor and helpless members of its population, it may do so.

A state might decide that it no longer has any moral obligation to its poor citizens and that it no longer wishes to spend tax dollars on them, and since it has no legal duty to care for them, the legislature could decide not to continue participation in the welfare program.¹⁰⁵ The effect of such a move would be to force those on welfare to leave the state or starve, and it would obviously deter any poor or destitute persons from entering the state. Such an occurrence would be more effective than the California statute that was declared unconstitutional in the case of *Edwards v. California*,¹⁰⁶ because it would not be an infringement on the right to travel.

There are a number of possible answers to this problem; however, the majority of them lie within the realm of Congress or the citizenry as a whole. In the absence of action by either group, the courts will be faced with the problem of finding protection for the welfare recipient.

LIMITED PROTECTION

Mr. Justice Douglas, in his concurring opinion in *Thorpe v. Housing Authority*, asserted that the privilege idea would not stay the operation of the Court.¹⁰⁷ However, the Court may find itself hard pressed to protect a privilege that has been legally terminated. There exists a need to properly define the interest of the recipient in the welfare payment to afford it ample protection.

The obvious answer to this problem is to impose upon the state the burden of supplying welfare. This can be done by simply defining welfare as a property right. In *Flemming v. Nestor* the United States Supreme Court refused to accept the property right concept as applied to Social Security.¹⁰⁸ In the face of such action by the Supreme Court, there can be little doubt that welfare is not a property right in the traditional sense. For a welfare payment to be considered an accrued property right, Congress must designate it as such. Since Congress has not defined the nature of a welfare payment, it is the courts who must place the interest in its proper perspective.

¹⁰⁵ TEX. REV. CIV. STAT. ANN. art. 695c § 36:

All assistance granted under the provisions of this Act shall be deemed to be granted and to be held subject to the provisions of any amending or repealing Act that may hereafter be passed, and no recipient shall have any claims for compensation or otherwise by reason of his assistance being affected in any way by any amending or repealing Act.

¹⁰⁶ 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941).

¹⁰⁷ 386 U.S. 670, 678-680, 87 S. Ct. 1244, 1248-1249, 18 L. Ed. 2d 394, 399-400 (1967).

¹⁰⁸ 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).

There are a number of logical avenues open, any of which might temporarily solve the problem. The courts might choose the "unconstitutional condition theory"¹⁰⁹ as expanded in the *Shapiro*¹¹⁰ case and avoid the right-privilege distinction. This approach does not define welfare as a right, but simply evades that substantive problem by exception. The "balancing doctrine," or "essential interest" theory, as expanded by the *Dixon* case, is another exception that could be used.¹¹¹ This theory creates no right to welfare, but merely a right to have it protected from unjust government action.

The court might turn to the Social Security Act, and the rules and regulations promulgated under that Act, and there find protection for the welfare recipient.¹¹²

None of these solutions will actually define the interest of the recipient or the duty of the states to their poverty stricken citizens. If welfare law is to at last have some continuity, the courts must define this interest and its corresponding duty.

"I am content to think of law as a social institution to satisfy social wants. . . ." Roscoe Pound.¹¹³

The history of Social Security and Welfare is proof that Professor Pound's statement is an accurate description of their nature. They are laws which change and mature with the wants and needs of society. There existed no legal duty on the state to care for its poor prior to 1935; however, "social wants" arose, and the result was a social duty where none existed previously. The creation of this social duty brought to the payment a corollary right of possession, and this right should also be protected as the product of social need. The right is of such a nature that it continues as long as the possessor falls within the category which the social law created. The duty of the states is to finish the job they have begun.

¹⁰⁹ Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitution Law*, 81 HARV. L. REV. 1439, 1445 (1968).

¹¹⁰ 394 U.S. 618, 627 n.6, 89 S. Ct. 1322, 1327 n.6, 22 L. Ed. 2d 600, 611 n.6 (1969).

¹¹¹ *Dixon v. Alabama*, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961).

¹¹² *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 165, 71 S. Ct. 624, 645, 95 L. Ed. 817, 850 (1951). Mr. Justice Frankfurter stated in a concurring opinion:

The construction placed by this Court upon legislation confirming administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning.

Cf. *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959), statute will be interpreted to impliedly contain requisites of due process of law; *Yamataya v. Fisher*, 189 U.S. 86, 23 S. Ct. 611, 47 L. Ed. 721 (1903).

¹¹³ ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (1922).