CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

To: Civil Procedure Section A
From: Professor Rothschild
Re: First class meetings and readings
Date: August 11, 2025

Our first Civil Procedure class meeting will be on **Wednesday, August 20th** in **Room 206**.

This is the Casebook for the class.

For the first assignment, please read:

Rethinking Fairness – Perspectives on the Litigation Process, and

Goldberg v. Kelly (1970)

Comments

Rethinking Fairness: Perspectives on the Litigation Process

Jon O. Newman†

INTRODUCTION

For decades critics of the litigation system have bemoaned the delays and costs of courtroom encounters while working mightily to refine the system in ways that make it even slower and more expensive. This paradoxical approach reflects the strengths and weaknesses of legal training. Skillful in analysis and advocacy, lawyers have recognized those aspects of trial procedure that can be changed to increase the likelihood of achieving better results and then engrafted well-intentioned changes onto an already complex system. At the same time, lawyers' preoccupation with results and their inadequate appreciation of the need to evaluate the system in which they function cause them to ignore the adverse consequences of the litigation process they have constructed. They know that the system is slow and costly. But they fail to recognize that the solutions they have developed over the years are a large part of the problem.

The paradox will continue until we realize that constructive change requires not simply adjustments in what we do in the courtroom but fundamental rethinking about what we are trying to accomplish there. In my judgment such rethinking should begin with the concept that underlies so much of our procedural and substantive law—the concept of fairness. My premise is that the way we think about fairness, and not any specific result of our thinking, is a root cause of many of the undesirable aspects of our modern process of litigation. Our narrow emphasis on perfecting re-

† U.S. Circuit Judge, U.S. Court of Appeals for the Second Circuit. This Comment was originally presented in somewhat different form as the Benjamin N. Cardozo Lecture of the Association of the Bar of the City of New York on November 8, 1984, and printed in *The Record*, Jan.-Feb. 1985 at 12.

sults in the case at hand stems directly from our narrow perception of fairness. A broadened concept of fairness—one that includes fairness not only toward litigants in an individual case but also to all who use or wish to use the litigation system and to all who are affected by it—can lead to changes that directly confront the challenges of delay and expense. Rethinking the concept of fairness can produce a litigation system that broadly achieves fairness.

I. Defects in the Litigation Process and the Difficulty of Making Changes

The common perception that the litigation process is marred by undue delays and costs is correct. The list of those who suffer from the system's inadequacies most obviously includes the litigants who wait years for their day in court. It also includes the unwilling participants in the system—jurors who wait for hours that turn into weeks, witnesses who give up days of work to testify to facts of slight dispute and often less relevance, business executives who endure days of deposition questioning that yield little to the resolution of disputes in some of which their companies are not even involved. Perhaps the major impact is on the citizenry in general, whose attitude toward law and the legal system cannot help but be profoundly and negatively influenced by a litigation system that voraciously consumes time and money.

I recognize that there is a lively and increasingly informed debate as to the appropriate dimensions of our litigation system. Though the popular position has been to decry the amount of litigation and the time and expense needed to handle it, strong voices have been raised to assert that our litigiousness as a society is over-advertised. These voices contend that we submit fewer matters to court than we did at an earlier time and fewer than citizens of other countries. Emphasizing the virtues of litigation, they urge us to facilitate the resolution in court of more disputes to bring the promise of justice closer to reality.[1]

It is not my purpose to assess the quantity of our litigation. The object of my inquiry is the way we structure our litigation system, not its size. Whether we have too many cases or too few, or even, miraculously, precisely the right number, there can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike. No one should

1. *See, e.g.*, Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 Iowa L. Rev. 871, 896-927 (1983); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983).

have to wait five years for a case to come to trial, but many litigants in this country face this reality.[2] Legal expenses should not exceed damage awards, yet in the asbestos litigation morass, for example, those expenses total $1.56 for every $1 provided to a victim.[3] If long delays and high litigation costs were aberrational, systemic change could safely be avoided. But we know the problem is more serious. Even if the modern defenders of our current litigation level are right, systemwide averages should not obscure the long delays and high costs imposed upon hundreds of thousands who use or participate in the litigation process and the losses endured by those who are deterred from seeking redress in court.

Proposals to reduce delays and costs are generally of three types. Some say we should provide more resources. More courts with more judges and more court personnel will enable the litigation system to keep pace with the growth in both population and the legitimate demands to resolve additional categories of disputes by the judicial process. Others point us in the opposite direction. They urge us to reduce the volume of cases permitted to enter the court system. There are two routes to that objective, each with costs not always acknowledged. The number of court cases can be reduced either by decreeing that some disputes are no longer to be adjudicated anywhere, with losses lying where they fall, or by devising alternative mechanisms for dispute resolution such as arbitration or mediation. Alternative mechanisms, of course, do not reduce volume; they only rechannel it, and the new channels will increasingly claim more resources and develop their own delays and expenses. The third broad approach is to alter the way we litigate, to make changes in both the substantive and the procedural law so that a dispute may still be brought into a court but resolved more quickly and less expensively.

As our litigation system has evolved, we have pursued all three courses in varying degrees. We have added judges. We have withdrawn categories of disputes by abolishing causes of action and by diverting cases to less formal forums. In the hope of saving time and money, we have amended our substantive and procedural law. Yet for all our efforts, the litigation system retains its flaws.[4]

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2. Grossman, Kritzer, Bumiller & McDougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts,* 65 JUDICATURE 86, 96 (1981).

3. Calculation derived from figures published by the Rand Institute for Civil Justice. *See* J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM & M. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 89, Table 9.3 (1984).

4. Concern about the shortcomings of our litigation process is not a recent phenomenon; Roscoe Pound, for example, called the problem to our attention in 1906. *See* Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 40 AM. L. REV. 729 (1906), *reprinted in* 35 F.R.D. 273 (1964). The example of Pound offers a striking illustration of the gap between calling attention to a problem and achieving a remedy: His original concerns were echoed seventy years later at the Pound Conference. *See Addresses Delivered at the National Conference on the Causes of*

Why is it that the earnest efforts of so many well-intentioned reformers yield such minor alterations? There are several answers plainly in view. One is the institutional resistance to fundamental change. Most institutions are inhospitable to change, and the institutions of the law are especially so. Since so much of law serves to maintain the strength of established arrangements, it is not surprising that the institutions of law tend to resist innovation, and that the key figures in these institutions fear the uncertain outcomes that bold changes might bring. In addition, the litigation system is primarily in the hands of judges and lawyers, whose professional training has made them experts in minutiae, but left them woefully ill-equipped to contemplate and implement institutional change. The inherent complexity of the litigation system tends to make the system resistant to the influence of outsiders. Nonlawyers, no matter how well-informed, find it difficult to penetrate the intricacies of the system, and those who try are frequently rebuffed and reproached by the high priests of the law. "That's an interesting idea," they are told, "but, of course, it will not work for reasons too complicated for you to appreciate." And then, alas, there is the obstacle of pure greed. High litigation costs are fees to the clients, but they are income to the lawyers. Delays benefit at least one side in every litigation and sometimes both. Those who profit from the present system are unlikely to lead the assault on the citadel.

II. The Role of Fairness and the Need for New Perspectives

There is another, more fundamental explanation for the time-consuming and expensive nature of our litigation system: the centrality of fairness as our governing standard. Fairness is the fundamental concept that guides our thinking about substantive and procedural law. Fairness provides the measure by which we gauge the virtues of familiar arrangements and the risks of innovation. We strive continually to reach the fair outcome, by which we usually mean our best approximation of the correct outcome—the one in which the facts have been correctly found and the law correctly applied. We strive to provide each side with a fair opportunity to achieve that outcome, by which we mean the chance to initiate and pursue any plausible claim or defense, the availability of elaborate means for producing and testing evidence, and the assurance of appellate review to enforce the rules of the present system. All of this we do in the name of fairness.

And so we should! It is assuredly not my purpose to suggest that we should shift our sights toward unfairness. But it is my contention that our efforts to reform the litigation process will rarely yield more than spo-

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Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79 (1976).

radic, limited, and transient success until we change to some extent the way we think about that fundamental concept of fairness. The rethinking I have in mind concerns perspective. As lawyers we think about fairness in narrow terms. We need to broaden our perspective in three ways. First, we must learn to evaluate the fairness of each step in the litigation process not only in the narrow context of its own discrete contribution to the result, but in the broader context of its incremental value in promoting fairness compared to the inevitable risks of an unfair outcome. Second, we must include in our assessment of fairness not only fairness of result in the dispute at hand, but fairness in the broader context for all who use and wish to use the litigation process. Third, we must think about fairness of result not only in the familiar context of losses compensable within the legal framework, but in the broader context of all similar losses that occur across the whole spectrum of human activity.

A. *The Perspective of Trial Fallibility*

As lawyers we are trained to focus intently on precise facts and precise issues. We tend to think about one thing at a time. Professor Thomas Reed Powell is believed to have said: "If you can think about one thing that is inextricably related to another thing without thinking about the thing to which it is related, you will have learned to think like a lawyer." An elegant conception, to be sure, and a skill well learned by the best of our craft! Such narrow thinking usefully promotes habits of careful analysis, but it is a distinct handicap for making value judgments about the intrinsic worth of each item being examined. When we think about the fairness of each step in the litigation process, such narrow thinking is a substantial barrier to reform.

Whenever we consider procedural rules, we tend to think only of their supposed virtue in helping to achieve a fair result. We have a conception of attainable fairness, and so we are persuaded to accept all sorts of devices that hold any prospect of enhancing the likelihood of a fair outcome. I will assume for the moment that our procedures promote fairness or at least tend to do so. But their true worth cannot be soundly assessed unless we acknowledge the inherent limitations on our ability to achieve fairness in the course of litigation. That process is largely an exercise in determining facts, and the blunt reality is that our ability to tell where the truth resides in any disputed matter is always limited. Versions of the truth come from witnesses who err in their perceptions. Even what they perceive correctly, they sometimes fail to remember accurately. What they remember accurately, they sometimes are unable to report clearly. What they are capable of reporting clearly is sometimes tinged with subtle bias or wholly distorted by deliberate perjury. When accurate testimony is

presented, it is sometimes misperceived by juries and judges. Finally, even the most conscientious juries and judges, hearing and perceiving the most fairly presented versions of the facts, will on occasion reach the wrong conclusions. Anyone who has had to choose between two conflicting versions of the facts will admit, at least to himself, that sometimes he had no sound basis for deciding whom to believe. Trials are not clinical investigations, performed under laboratory conditions. They are human confrontations, subject to all the normal risks of human error and with the risks compounded by the dramatic intensity of the event, the contentiousness of the adversary process, and the distortions that sometimes arise from disparity in talent and resources of the contending sides.

I point out these shortcomings not in despair. The courtroom trial is a marvelous invention, yielding in most instances a useful approximation of the truth and adjusting disputes peacefully and with a vital aura of legitimacy. But its fallibility is inevitable, and we ought to have that fallibility in mind when we decide what facets of the trial process are needed to achieve the degree of fairness we want.

The risk of fallibility can lead us in either of two opposite directions. We could say, as do many in our profession, that the risks of fallibility should make us more determined than ever to insist upon the most meticulous trial procedures, especially those designed to guard against the very factors that contribute to the risk of unfair outcomes. It is a powerful argument, and it ought to carry the day for some procedures, regardless of their time and cost. But the opposite argument deserves our attention as well. Since the trial outcome will not always be fair, we need not insist upon time-consuming and costly procedures simply because they offer some slight chance of promoting fairness, especially when the virtue of the procedure is a matter of faith and not demonstration. If we are trying to determine the depth of the snowfall in our backyard, it makes sense to use a yardstick, even though our measurement might be distorted because the wind might have blown some extra snow to the spot we measured or blown a little away. But it would not make sense to purchase an elaborate device to count the snowflakes. Too often when we think about achieving fairness through procedural devices, we are counting the snowflakes—refining our practices in an endeavor that at best can only approximate the ultimate determinations we wish to make.

Of course, the risk of error in fact-finding is more than the risk of missing the right answer by a slight degree; in some cases the risk is reaching the absolutely wrong answer. The person who should win something may receive nothing; the person who deserves nothing may receive something; the innocent person may be convicted; the guilty person may go free. Of all these risks, the one we properly strive the hardest to avoid

is the risk of convicting the innocent. Yet even in guarding against this most dreadful prospect, we ought to assess the worth of our procedures in the context of trial fallibility. The celebrated collections of cases where the innocent were convicted are not filled with examples of failure to comply with elaborate procedures. The innocent are convicted primarily because eyewitnesses were mistaken. Some are convicted because a key witness deliberately lied. A few are convicted because incriminating circumstances led to a conclusion about the defendant's knowledge or intent that was simply incorrect.[5] Our procedures offer very little prospect of diminishing these risks. That does not mean the procedures are without merit in criminal and civil trials. They play some part in minimizing some risks of error. My point is simply that an assessment of their worth—their real contribution to fairness—ought to be made in the context of the inevitable and significant causes of trial fallibility.

B. *The Perspective of System Fairness*

A second critical flaw in the way we think about fairness is that, although we scrupulously strive to achieve a fair outcome in the individual dispute, we rarely consider how to be fair to all who use or would like to use the litigation system. Not only do we focus on fairness of result, we assess procedural devices only for their *tendency* to affect the result, with little or no inquiry as to their incremental benefit. Even when we come to some considered assessment that a procedural device provides a significant benefit, we do not pursue the more searching inquiry into whether the benefit to be achieved in promoting fairness of result is worth the loss of system fairness, with its attendant social cost upon all who use or would like to use the litigation system.

It is not that we fail to understand the elements of cost-benefit analysis. When the issue is the worth of some rule that promotes important values at the risk of impairing others, we normally recognize the need to make an assessment of the overall impact of the rule. The exclusionary rule is defended by those who believe that its deterrent effect on police misconduct outweighs the significance of some number of unprosecuted crimes;[6] it is opposed by those who weigh the competing concerns differently.[7] Although both sides have scant basis for measuring either the deterrence the

5. Professor Borchard's well-known collection of 65 trials that convicted an innocent person illustrates the point that erroneous convictions are usually produced by erroneous testimony. In these trials, an eyewitness was honestly mistaken in 35 instances, and a key witness deliberately lied in 19 cases. *See* E. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE xiii, xxv (1932).

6. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3437, 3443–44 & nn.13, 14 (1984) (Brennan, J., dissenting).

7. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 498–500 (1976) (Burger, C.J., concurring).

rule achieves or the extent of crime it tolerates,[8] they at least purport to make the balance. With procedural steps that affect the time and cost of the litigation process, however, we not only make little effort to quantify the benefits, we too often fail to recognize the need to balance the benefits for particular outcomes and the social costs for the system as a whole. Fairness of result monopolizes our attention.

Once again, the narrowness of our thinking stems from the nature of our legal training. As lawyers we are taught to consider the dispute at hand and not the operation of the legal system in which the dispute arises and is resolved. Legal training from the first day in law school throughout a lawyer's career focuses on discrete controversies. We learn the facts of a particular case. We learn the principles applicable to a particular set of facts. We analyze the merits of a particular result. We examine the reasoning in a particular opinion. But always our focus is on a dispute and not on the consequences for the litigation process.

Furthermore, our training in the law rarely includes exposure to the rudimentary measurement arts of the social sciences. The rewards of practice and too often of the academy are bestowed almost exclusively on those who excel in the traditional fields of legal inquiry. There is an army of litigators for every trained legal administrator. There is a battalion of constitutional scholars for every serious student of the litigation system. Although we were all taught the intricacies of civil procedure, we seldom examined the volume of litigation, its social cost, or the techniques for examining the litigation process and determining the effects of change.

My concern is not with the pros and cons of any particular procedural devices, but with the way we think about their virtue. Nevertheless, a few aspects of procedure are worth mentioning, not to demonstrate that they are dispensable, but simply to invite thinking about them in a different light—thinking about the fairness they achieve, first, in the context of the inevitable fallibility of the trial process, and second, in the context of the operation of the litigation system as a whole.[9]

I doubt that we should retain our current rule that a pleading should remain in court if any conceivable set of facts might support its allegations. We need not return to the days of Chitty's pleadings, but we could insist that complaints contain assertions of the essential facts. When the claim survives dismissal, I doubt that discovery should be routinely per-

8. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 709 (1970) (noting absence of "empirical substantiation or refutation of the deterrent effect of the exclusionary rule").

9. For a recent analysis of the litigation system that calls for systemic reform but that does not consider the fairness question, see Miller, *The Adversary System: Dinosaur or Phoenix,* 69 MINN. L. REV. 1 (1984).

mitted.[10] Where discovery is needed, I doubt that depositions should be permitted beyond two or three, limited to one hour, that interrogatories should be permitted beyond five or ten, and that any but precisely identified documents need be searched for and produced. Once discovery is complete, I doubt that we should confine the use of summary judgments as rigidly as we now do. In a case that proceeds to trial, I doubt that jury selection should be the elaborate process it is in most state courts. I doubt that witnesses must always be examined through question and answer techniques; a narrative would often be more informative, more readily understood, and quicker. I doubt that trial witnesses are needed at all in some cases; juries could decide some disputes simply from the contending claims of the lawyers, as in the non-binding summary trials now being experimented with in the Northern District of Ohio.[11] Once a verdict has been reached, I doubt that appeals as of right must be available in all civil cases. Indeed, I doubt that the adversary process itself needs to be used uniformly across the entire spectrum of civil litigation.

There are risks in all of these suggestions. A conclusory complaint, if allowed to remain in court, might prevail upon full discovery and trial. One document disclosed in a search of scores of filing cabinets may be important. For lack of one more deposition, a witness might not be effectively cross-examined. A case rejected on summary judgment might, upon trial, prove successful. A venireman not subjected to elaborate voir dire might enter the jury box with insurmountable bias. Narrative testimony might include impermissible facts. Live testimony might be decisive. An appeal might result in a retrial with a different outcome. Of course, these possibilities exist. Our litigation procedures are not vulnerable because they are useless; they deserve reexamination because they may not be worth having.

In many cases, the lack of these additional safeguards will not affect the result. The extra document may have no real bearing on an outcome determined by all the vagaries and occasional venalities of witnesses. The impermissible fact mentioned in narrative testimony may be lost in the welter of pertinent information. Some procedural protections may even be detrimental to a fair result. The time spent to interrogate potential jurors may weed out the conscientious ones who admit to bias and would strive mightily to lay it aside, but send into the jury box the artful perjurers whose biases were undetected by the amateur psychoanalysis we call voir dire.

But what of the instances when abandoning or revising a procedure

10. For a more detailed reexamination of current discovery practices, see *id.* at 22–24.

11. For a discussion of the procedures used in these trials, see Lambros & Shunk, *The Summary Jury Trial,* 29 CLEVE. ST. L. REV. 43 (1980).

would alter the outcome? If our focus is only on fairness of outcome, the inquiry is easy. We retain any procedure that could conceivably increase the likelihood of obtaining a fair result. That principle has been the foundation on which we have built the present structure of our litigation system. But if our sense of fairness extends beyond the outcome, then additional analysis is necessary. We should not, for example, retain extensive jury voir dire simply because many lawyers are convinced that it has some benefit in promoting fairness of outcome in their cases. We must first make some serious assessment of its real worth in ferreting out bias. We must then determine whether that incremental benefit to the litigants in each case justifies the delays and consequent loss of fairness to all others affected by the litigation process—including those incarcerated in pretrial detention awaiting their chance to have a trial.

Fairness of system is not some abstraction competing against the flesh and blood claims of fairness of outcome. Fairness of system reflects the aggregate impact of the litigation process upon the lives of all actual and potential litigants. It is concerned with the money each person is obliged to spend to achieve an outcome, with the time each person must invest until an outcome is reached, and with losses uncompensated because the litigation process is rightly perceived as involving too much time and money to justify its use.

C. *The Perspective of Those with Losses Outside the System of Legal Liability*

A third deficiency in the way we think about fairness is our tendency to consider fairness solely in the context of matters amenable to litigation instead of in the broader context of similar events of the real world. This aspect of thinking about fairness implicates substantive standards, rather than procedural devices. Some substantive standards seem eminently fair when viewed within the context of the litigation process. Though we recognize that it takes time and money to determine whether a given legal standard has been met, we instinctively conclude that the benefit is worth the costs because we are looking at the standard as it applies only to those within the framework of actual or potential litigation. But if we look beyond that framework, the intrinsic fairness of some standards might seem less compelling and their benefits might not always seem worth the social costs of the litigation.

Let me explore an example from the field of compensation for injury. When lawyers think about the operation of our system for compensating injuries, they tend to think only about those misfortunes compensable according to the rules of law—primarily the rules of tort liability. The very topic conjures up images of the accident victim. Because we are used to

the substantive rules of liability, we assume that the victim who suffers physical impairment should receive a significant sum of money to compensate for various consequences of injury. A victim should receive money for medical costs, for lost wages, for the fact of disability, and for pain and suffering. I distinguish the fact of disability from pain and suffering for reasons that will shortly become apparent.[12] Even to suggest that some of these elements are inappropriate for compensation is to venture onto heretical ground. But if disbelief might be suspended for just a moment, the process of reexamination could begin by first broadening the context in which the appropriateness of compensation is to be assessed.

Suppose we broaden the context to include not just those whose impairments stem from tortious wrongs but all persons who have physical impairments regardless of the cause of their disability. We include those injured by their own carelessness, those accidentally injured through no one's fault, those whose impairments stem from birth defects or disease or war. In that universe of persons, each with an equivalent degree of serious physical impairment, what is an appropriate measure of compensation? As a general matter, our society has agreed to pay a portion of a person's medical expenses if he is poor or elderly.[13] If the impairment is so serious that the person is totally incapable of work, we are also willing to provide some wage earners with a modest disability payment,[14] compensating for a portion of lost wages and perhaps, to a very limited extent, for the fact of disability. If the disability arises from military service, even if the person is not totally disabled, we provide medical care and a scheduled level of disability payments.[15] And as to those in this broader universe, whether or not eligible for medical or disability benefits, what compensation do we afford for their pain and suffering? The answer of course is none. Yet if pain and suffering are fit subjects for compensation, how can we so blithely fail to compensate the pain and suffering of millions who have the double misfortune of a serious physical impairment and no basis for a lawsuit that falls within traditional notions of legal liability?

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12. Though courts sometimes speak of pain and suffering damages as including disability, *e.g.*, Gretchen v. United States, 618 F.2d 177, 180 (2d Cir. 1980), the distinction between an award for pain and suffering and an award for the fact of disability has been recognized in cases that distinguish between pain and suffering and impairment of enjoyment of life, *e.g.*, Petition for U.S. Steel Corp., 436 F.2d 1256, 1265-67 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), or between pain and suffering and permanent injuries, *e.g.*, Traylor v. United States, 396 F.2d 837, 839-40 (6th Cir. 1968). Juries are frequently instructed to consider damages both for an injury and for pain and suffering. *See, e.g.*, NEW YORK PATTERN JURY INSTRUCTIONS —CIVIL 2:280 (1974) (allowing jury to make an award for "injury" and for "conscious pain and suffering"); *id.* at 2:280A (Supp. 1984) (authorizing award "for the injury and for the conscious pain and suffering caused by the injury").

13. *See* 42 U.S.C. §§ 1395-1396p (1982) (federal health insurance for aged and disabled).

14. *See id.* § 423 (federal disability insurance benefits).

15. *See* 38 U.S.C. §§ 314, 610 (1982) (federal health care and disability compensation for veterans injured in line of duty).

No doubt it seems bizarre even to suggest that all those with serious impairments that cause them to endure pain and suffering ought to receive some compensation on that account. I am not urging that their pain and suffering should be compensated. On the contrary, I raise the point only to provide a perspective on the correlative suggestion I do make, namely, that pain and suffering arising within the traditional context of tort liability should *not* be compensated. I make this suggestion as an example of the type of fundamental rethinking that I believe is necessary. The pertinence of this example stems from the effect of pain and suffering damages on the frequency of jury trials.

I strongly suspect that, of all the compensable elements of traditional torts, the element of pain and suffering is often the most significant determinant of whether a negligence case will be settled or tried. Even if unsure of what the jury will do in a particular case, lawyers are frequently in remarkable agreement in estimating the probability of a plaintiff's verdict on liability and hence in providing a mathematical basis for determining a fair settlement once the likely damage award has been fairly estimated. When they turn to that likely award, they can reach agreement fairly easily on medical costs already incurred and even on a reasonable estimate of future medical expenses. Past wages are rarely in dispute. Future wages are sometimes in dispute, but few settlement negotiations break down on that point. Lawyers frequently agree even upon the likely award for a disability. What propels many litigants past the settlement table and into the courtroom is the high stakes game of pain and suffering damages. To be sure, uncertainty as to whether the jury will award five thousand or five hundred thousand sometimes *promotes* a settlement because neither side wants to take the chance that its worst fears will be realized. But in other cases the parties go to trial because they have determined that the risk of a disappointingly low (or high) award of pain and suffering damages is worth the chance of obtaining a successful outcome.

If only *their* time and money were at stake, the choice should be theirs. But if it could be demonstrated, as I suspect, that the availability of pain and suffering damages induces litigants in a significant number of instances to try a case they would otherwise settle, then the burdens on the litigation process must be carefully assessed and balanced against the interests of individual plaintiffs. That balancing will be incomplete if all we think about is the traditional entitlement of tort victims to damages for pain and suffering. But if we expand the context and think about all who suffer similar misfortune, we may begin to wonder whether a payment for pain and suffering, which goes only to tort victims, is really as fair as we have always assumed. At least if we think about all those with a similar impairment, we will make a more dispassionate assessment of the worth

of pain and suffering damages. We will then be in a position to judge whether fairness requires this component of a tort recovery at all or perhaps only up to some specified limit,[16] and whether it makes sense to impose on our litigation system the costs of deciding which plaintiffs should receive such damages and in what amounts.

We should also take a hard look at lost future income. In the context of tort litigation, we assume that it is only fair to give the injured executive full compensation for the loss of his high salary, while awarding the injured tradesman only his more modest lost wages. But the executive would have been just as deprived of his income if the cause of his disabling injury had not been a negligent, fully-insured motorist, but instead a fall in his own bathtub or a crippling disease. We might not think that fairness requires an award of all lost income for the injured executive if we thought about him in the context of all persons with a similar impairment. And we might well conclude that a ceiling on recoverable future wages would be appropriate in all tort cases if it were shown to reduce the number of trials. Similar considerations might justify scheduled awards for the fact of disability, or at least ceilings on this component of damages.

Of course, more is at stake in assessing the components of tort recovery than fairness to the injured person and burdens upon the litigation process. The elements of a damage award may play some part in the deterrent effect of tort law, especially in products liability. But in many contexts deterrence is unlikely. I doubt, for example, that many motorists take an extra measure of care because the damages a jury is permitted to award the victim of their negligence can include a generous sum for pain and suffering. Even where the possibility of deterrence is realistic, it should not automatically outweigh other considerations. We should not impose heavy burdens on our litigation system without some basis for estimating whether these burdens are justified by whatever reduction in accidents results from the prospect of high damage awards.

Once we begin to think about fairness to those who suffer losses not in narrow terms of losses traditionally compensable in lawsuits, but of similar losses suffered by all, our thinking about the litigation process will

16. There is precedent for limiting pain and suffering damages. In 1972, New Zealand, as part of a comprehensive reform of its accident compensation scheme, limited such damages to $7500 in New Zealand currency. *See* Accident Compensation Act 1972, [1972] N.Z. Stat. No. 43, § 120. The limit was subsequently raised to $10,000. *See* Accident Compensation Act 1982, [1982] N.Z. Stat. No. 181, § 79. For a commentary on the pain and suffering provisions of the original act, see T. ISON, ACCIDENT COMPENSATION: A COMMENTARY ON THE NEW ZEALAND SCHEME 64–68 (1980). Similarly, in malpractice cases, California has statutorily limited pain and suffering awards to $250,000. *See* Medical Injury Compensation Reform Act of 1975, CAL. CIV. CODE § 3333.2 (West 1985). The California Supreme Court recently upheld the constitutionality of this measure. *See* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985).

produce significant changes. We may decide that certain losses or components of losses that we now assume must be the subject of litigation can be removed from litigation entirely. In some instances, the losses would simply lie where they fall, with the option of private insurance available. Alternatively, compensation for loss could be provided by social insurance at modest, scheduled levels of recovery.[17] Even if existing grounds of liability are not altered, we might consider placing ceilings on damages, ceilings that we candidly recognize would provide substantially less than the full recovery we have traditionally assumed should be awarded. We might also want to take a hard look at treble damages in antitrust law and punitive damages in general. What are the benefits of these recoveries and how many unnecessary trials do they stimulate? Limited awards might achieve sufficient benefits with fewer burdens.

My primary concern is not to argue the case for particular changes such as limiting pretrial discovery or eliminating damages for pain and suffering. Indeed, debate over any one change may too easily obscure my underlying point. My concern throughout is not what we should do about our procedural and substantive rules, but the way we should think about them, particularly the way we might think about the fairness they are designed to achieve.

III. A Limited Judicial Role

The rethinking I have suggested might profitably be undertaken by all concerned with the litigation system, legislators and judges, practitioners and academics. All contribute to the nature of the litigation process, and all have a significant role in diagnosing our current problems and formulating and reacting to proposals for change. Whether the ultimate implementation of change is more in the domain of the legislator or the judge, however, is another matter. For most changes, revision achieved by rule will be preferable to revision accomplished in the resolution of a particular lawsuit. Most basic standards ought to emanate from legislators, though rulemaking by judges sometimes plays a useful role. Revision accomplished in the decision of a case ought to occur infrequently. But changes that vitally affect the litigation system have been made in individual decisions and can legitimately be revised in the same way. It was the Supreme Court's decison in *Conley v. Gibson*[18] that authoritatively committed us to the proposition that a complaint must remain in court if any

17. We have already begun to venture into this mode of thinking: Through workers' compensation we have altered the traditional standards of tort recovery for those injured at the workplace, providing certainty of recovery in exchange for limits on the amount of recovery. Other losses are amenable to similar arrangements.

18. 355 U.S. 41, 45-46 (1957).

set of facts can conceivably be imagined that might support its allegations. It would be entirely within the judicial function for a subsequent decision to make some adjustment in that doctrine.[19]

The legitimate role of the judge in permitting considerations of fairness throughout the litigation system to influence the outcome of the case at hand was brought sharply into focus recently in a case from the Southern District of New York that found its way to the Second Circuit. In *Mallis v. Bankers Trust Co.*,[20] Judge Carter was asked to set aside a plaintiff's verdict and order a new trial on the ground that the verdict was against the weight of the evidence. Through no fault of the defendant, the case had been tried twice and was then seven years old. Judge Carter candidly acknowledged that the time and cost already devoted to the litigation was a substantial and perhaps decisive factor in his discretionary decision to deny the motion.[21] On appeal Judge Lumbard, expressed the view of the panel that "the passage of time, by itself, is a consideration which should not have been given any weight in denying the new trial motion."[22] I disagreed and endeavored to explain why, at least on a discretionary ruling such as this, the trial judge was entitled to weigh the time and resources already devoted to the case.[23] Interestingly, the panel unanimously affirmed the plaintiff's judgment, perhaps indicating that all of us in some fashion shared Judge Carter's view that a third trial would have been an unwarranted burden on the court system. Whether or not my view of the matter was sound, the case illustrates that concerns about the time litigation takes are not likely at present to receive explicit approval as the basis for decision of specific cases.

The views of the majority in *Mallis* are entirely understandable. They reflect a natural aversion to what may seem to be no more than arguments of expediency. They also reflect, I suspect, a tacit acceptance of the present state of our litigation system, or at least a view, common throughout the judiciary, that with the system already overloaded with so many cases, the additional time to try one more case, or to accord one more procedural step to one more litigant, will add only a drop of water to the flood. I urge the opposing point of view because I believe that what is at stake is far more than a matter of expediency. We must think hard about ways to save time and money in the litigation system so that the system can func-

19. Judges of the lower federal courts have already made some selective inroads on the doctrine. They have, for example, required substantial fact pleading in complaints alleging civil rights conspiracies. *E.g.*, Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); Powell v. Workmen's Compensation Bd., 327 F.2d 131 (2d Cir. 1964).

20. 717 F.2d 683 (2d Cir. 1983).

21. *See id.* at 696 (Newman, J., concurring) (discussing lower court opinion).

22. *Id.* at 692 (Lumbard, J.).

23. *Id.* at 695–700 (Newman, J., concurring).

tion properly and thereby provide justice for all who wish to use it or are affected by it. We need to rethink our conception of fairness not simply to save time and money but to distribute fairness more evenly. In this regard, each of us might find it useful to follow the approach of John Rawls and consider, from behind "the veil of ignorance,"[24] what type of a litigation system we would prefer to have if we did not know what our role in the system might be—whether litigant, witness, juror, lawyer, judge, or citizen. A view of the litigation system from that disinterested perspective would yield fresh insights into what we mean and ought to mean by fairness.

IV. Prerequisites for Change

Once we are willing to rethink the concept of fairness, three things must be done to enhance the likelihood of bold changes in the procedure and substance of litigation. First, we must vastly expand our efforts to gather the empirical data necessary for sound evaluations of the real worth of each component of our litigation system and for hard calculations of the burdens upon the entire system. Thus far we have made only the most rudimentary attempts to assess the value of what we do in the litigation process. We operate primarily by intuition, reenforced by the comfort of tradition. We need to know, for example, what degree of benefit is provided by extended voir dire examination of jurors and at what cost. We need to have a sense of how many complaints would be dismissed at the threshold if some degree of fact pleading were generally required and how many of these complaints would ultimately have been meritorious if not dismissed. We need to know how many trials are precipitated by the prospect of pain and suffering damages and what results would be achieved by substituting partially compensatory alternative arrangements.

In all areas of social endeavor, specific proposals for change are inadequately subjected to quantitative assessment. The litigation system is not unique in the paucity of available pertinent data. We have learned to count the cases, but we have wholly inadequate data for determining the worth and cost of each step in the litigation process. Although personal judgments will always play a part in even the most sophisticated of empirical evaluations, we need not rely solely on intuition and habit. Surely we can do better in finding out the value and the cost of what we are doing in our courtrooms.

Second, as our empirical data are assembled, we will need to take the further step of experimenting with changes. As law has been in the main inhospitable to change, it has been especially leery of experimentation.

24. J. Rawls, A Theory of Justice 136 (1971).

For those trained in the law, uniformity of procedure is a watchword, reenforced by ethical concerns and by the values, if not requirements, of the Equal Protection Clause. The appropriate bounds of experimentation in the law is a topic unto itself.[25] Without essaying the complexities, I simply note the irony that the medical profession has made enormous progress by experimenting with matters of life and death, while we in the law shun experimental ways of deciding matters of property.

Third, I suggest that fundamental rethinking about the nature of fairness in our litigation system will not progress very far until legal education decides to place these issues in the curriculum and to recognize them as subjects of serious scholarship. The next generation of lawyers will determine how profoundly we deal with the burdens of litigation. The law schools will determine whether that generation is interested in reform, creative in its thinking, and equipped to design and implement significant changes.

Conclusion

We need not wait for the combined effects of empirical research, experimentation, and academic attention to begin the reexamination of our legal process. Each of us has the capacity to rethink what our litigation system ought to be. The process of litigation is a product of the mind. Its improvement can emerge from creative thinking. The current condition of the litigation process demands that we think hard about the way we litigate and the matters worth litigating. Such thinking must include consideration of what we mean and ought to mean by "fairness," for our conception of fairness has significantly shaped our ideas about what should happen in our courtrooms. If we are to think anew about the litigation process, we must first be willing to rethink our conception of fairness. That task will be unsettling for some, but worthwhile for all.

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25. *See* Fed. Judicial Center Advisory Comm. on Experimentation in the Law, Experimentation in the Law (1981).

GOLDBERG, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK *v.* KELLY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 62. Argued October 13, 1969—Decided March 23, 1970

Appellees are New York City residents receiving financial aid unde the federally assisted Aid to Families with Dependent Childrer program or under New York State's general Home Relief program who allege that officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law. The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the welfare officials that the combination of the existing post-termination "fair hearing" and informal pre-termination review was sufficient. *Held:*

1. Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. Pp. 261–263.

2. The interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, 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. Pp. 264–266.

3. A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process. Pp. 264, 266–271.

(a) Such hearing need not take the form of a judicial or quasi-judicial trial, but the recipient must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting his own arguments and evidence orally before the decision maker. Pp. 266–270.

(b) Counsel need not be furnished at the pre-termination hearing, but the recipient must be allowed to retain an attorney if he so desires. P. 270.

(c) The decisionmaker need not file a full opinion or make formal findings of fact or conclusions of law but should state the reasons for his determination and indicate the evidence he relied on. P. 271.

(d) The decisionmaker must be impartial, and although prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as decision maker, he should not have participated in making the determination under review. P. 271.

294 F. Supp. 893, affirmed.

John J. Loflin, Jr., argued the cause for appellant. With him on the briefs were *J. Lee Rankin* and *Stanley Buchsbaum.*

Lee A. Albert argued the cause for appellees. With him on the brief were *Robert Borsody, Martin Garbus,* and *David Diamond.*

Briefs of *amici curiae* were filed by *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for the United States, and by *Victor G. Rosenblum* and *Daniel Wm. Fessler* for the National Institute for Education in Law and Poverty.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New

York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program.[1] Their complaint alleged that the New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law.[2] At the time

[1] AFDC was established by the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U. S. C. §§ 601–610 (1964 ed. and Supp. IV). It is a categorical assistance program supported by federal grants-in-aid but administered by the States according to regulations of the Secretary of Health, Education, and Welfare. See N. Y. Social Welfare Law §§ 343–362 (1966). We considered other aspects of AFDC in *King* v. *Smith*, 392 U. S. 309 (1968), and in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

Home Relief is a general assistance program financed and administered solely by New York state and local governments. N. Y. Social Welfare Law §§ 157–165 (1966), since July 1, 1967, Social Services Law §§ 157–166. It assists any person unable to support himself or to secure support from other sources. *Id.*, § 158.

[2] Two suits were brought and consolidated in the District Court. The named plaintiffs were 20 in number, including intervenors. Fourteen had been or were about to be cut off from AFDC, and six from Home Relief. During the course of this litigation most, though not all, of the plaintiffs either received a "fair hearing" (see *infra*, at 259–260) or were restored to the rolls without a hearing. However, even in many of the cases where payments have been resumed, the underlying questions of eligibility that resulted in the bringing of this suit have not been resolved. For example, Mrs. Altagracia Guzman alleged that she was in danger of losing AFDC payments for failure to cooperate with the City Department of Social Services in suing her estranged husband. She contended that the departmental policy requiring such cooperation was inapplicable to the facts of her case. The record shows that payments to Mrs. Guzman have not been terminated, but there is no indication that the basic dispute over her duty to cooperate has been resolved, or that the alleged danger of termination has been removed. Home Relief payments to Juan DeJesus were terminated because he refused to accept counseling and rehabilitation for drug addiction. Mr. DeJesus maintains that he

the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid. However, the State and city adopted procedures for notice and hearing after the suits were brought, and the plaintiffs, appellees here, then challenged the constitutional adequacy of those procedures.

The State Commissioner of Social Services amended the State Department of Social Services' Official Regulations to require that local social services officials proposing to discontinue or suspend a recipient's financial aid do so according to a procedure that conforms to either subdivision (a) or subdivision (b) of § 351.26 of the regulations as amended.[3] The City of New York

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does not use drugs. His payments were restored the day after his complaint was filed. But there is nothing in the record to indicate that the underlying factual dispute in his case has been settled.

[3] The adoption in February 1968 and the amendment in April of Regulation § 351.26 coincided with or followed several revisions by the Department of Health, Education, and Welfare of its regulations implementing 42 U. S. C. § 602 (a)(4), which is the provision of the Social Security Act that requires a State to afford a "fair hearing" to any recipient of aid under a federally assisted program before termination of his aid becomes final. This requirement is satisfied by a post-termination "fair hearing" under regulations presently in effect. See HEW Handbook of Public Assistance Administration (hereafter HEW Handbook), pt. IV, §§ 6200–6400. A new HEW regulation, 34 Fed. Reg. 1144 (1969), now scheduled to take effect in July 1970, 34 Fed. Reg. 13595 (1969), would require continuation of AFDC payments until the final decision after a "fair hearing" and would give recipients a right to appointed counsel at "fair hearings." 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 1356 (1969). For the safeguards specified at such "fair hearings" see HEW Handbook, pt. IV, §§ 6200–6400. Another recent regulation now in effect requires a local agency administering AFDC to give "advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance." *Id.*, pt. IV, § 2300 (d)(5). This case presents no issue of the validity or con-

elected to promulgate a local procedure according to subdivision (b). That subdivision, so far as here pertinent, provides that the local procedure must include the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date, with notice also that upon request the recipient may have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension, and, further, that the recipient may submit, for purposes of the review, a written statement to demonstrate why his grant should not be discontinued or suspended. The decision by the reviewing official whether to discontinue or suspend aid must be made expeditiously, with written notice of the decision to the recipient. The section further expressly provides that "[a]ssistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later."

Pursuant to subdivision (b), the New York City Department of Social Services promulgated Procedure No. 68–18. A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination

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struction of the federal regulations. It is only subdivision (b) of § 351.26 of the New York State regulations and implementing procedure 68–18 of New York City that pose the constitutional question before us. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 641 (1969). Even assuming that the constitutional question might be avoided in the context of AFDC by construction of the Social Security Act or of the present federal regulations thereunder, or by waiting for the new regulations to become effective, the question must be faced and decided in the context of New York's Home Relief program, to which the procedures also apply.

of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses.[4] However, the letter does inform the recipient that he may request a post-termination "fair hearing."[5] This is a proceeding before an inde-

[4] These omissions contrast with the provisions of subdivision (a) of § 351.26, the validity of which is not at issue in this Court. That subdivision also requires written notification to the recipient at least seven days prior to the proposed effective date of the reasons for the proposed discontinuance or suspension. However, the notification must further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at a time and place indicated before the official identified in the notice, who will review his case with him and allow him to present such written and oral evidence as the recipient may have to demonstrate why aid should not be discontinued or suspended. The District Court assumed that subdivision (a) would be construed to afford rights of confrontation and cross-examination and a decision based solely on the record. 294 F. Supp. 893, 906–907 (1968).

[5] N. Y. Social Welfare Law § 353 (2) (1966) provides for a post-termination "fair hearing" pursuant to 42 U. S. C. § 602 (a) (4). See n. 3, *supra*. Although the District Court noted that HEW had raised some objections to the New York "fair hearing" procedures, 294 F. Supp., at 898 n. 9, these objections are not at issue in this Court. Shortly before this suit was filed, New York State adopted a similar provision for a "fair hearing" in ter-

pendent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld.[6] HEW Handbook, pt. IV, §§ 6200–6500; 18 NYCRR §§ 84.2–84.23. A recipient whose aid is not restored by a "fair hearing" decision may have judicial review. N. Y. Civil Practice Law and Rules, Art. 78 (1963). The recipient is so notified, 18 NYCRR § 84.16.

I

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits.[7] The District Court held

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minations of Home Relief. 18 NYCRR §§ 84.2–84.23. In both AFDC and Home Relief the "fair hearing" must be held within 10 working days of the request, § 84.6, with decision within 12 working days thereafter, § 84.15. It was conceded in oral argument that these time limits are not in fact observed.

[6] Current HEW regulations require the States to make full retroactive payments (with federal matching funds) whenever a "fair hearing" results in a reversal of a termination of assistance. HEW Handbook, pt. IV, §§ 6200 (k), 6300 (g), 6500 (a); see 18 NYCRR § 358.8. Under New York State regulations retroactive payments can also be made, with certain limitations, to correct an erroneous termination discovered before a "fair hearing" has been held. 18 NYCRR § 351.27. HEW regulations also authorize, but do not require, the States to continue AFDC payments without loss of federal matching funds pending completion of a "fair hearing." HEW Handbook, pt. IV, § 6500 (b). The new HEW regulations presently scheduled to become effective July 1, 1970, will supersede all of these provisions. See n. 3, *supra*.

[7] Appellant does not question the recipient's due process right to evidentiary review *after* termination. For a general discussion of the provision of an evidentiary hearing prior to termination, see Comment, The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing, 68 Mich. L. Rev. 112 (1969).

that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination "fair hearing" with the informal pre-termination review disposed of all due process claims. The court said: "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." *Kelly* v. *Wyman,* 294 F. Supp. 893, 899, 900 (1968). The court rejected the argument that the need to protect the public's tax revenues supplied the requisite "overwhelming consideration." "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance . . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." *Id.,* at 901. Although state officials were party defendants in the action, only the Commissioner of Social Services of the City of New York appealed. We noted probable jurisdiction, 394 U. S. 971 (1969), to decide important issues that have been the subject of disagreement in principle between the three-judge court in the present case and that convened in *Wheeler* v. *Montgomery,* No. 14, *post,* p. 280, also decided today. We affirm.

Appellant does not contend that procedural due process is not applicable to the termination of welfare bene-

fits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.[8] Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro* v. *Thompson,* 394 U. S. 618, 627 n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert* v. *Verner,* 374 U. S. 398 (1963); or to denial of a tax exemption, *Speiser* v. *Randall,* 357 U. S. 513 (1958); or to discharge from public employment, *Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956).[9] The extent to which procedural due process

[8] It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that

"[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L. J. 733 (1964).

[9] See also *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); *Hornsby* v. *Allen,* 326 F. 2d 605

must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah* v. *Larche*, 363 U. S. 420, 440, 442 (1960).

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing.[10]

(C. A. 5th Cir. 1964) (right to obtain a retail liquor store license); *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (C. A. 5th Cir.), cert. denied, 368 U. S. 930 (1961) (right to attend a public college).

[10] One Court of Appeals has stated: "In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." *R. A. Holman & Co.* v. *SEC*, 112 U. S. App. D. C. 43, 47, 299 F. 2d 127, 131, cert. denied, 370 U. S. 911 (1962) (suspension of exemption from stock registration requirement). See also, for example, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950) (seizure of mislabeled vitamin product); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908) (seizure of food not fit for human use); *Yakus* v. *United States*, 321 U. S. 414 (1944) (adoption of wartime price regulations); *Gonzalez* v. *Freeman*, 118 U. S. App. D. C. 180, 334 F. 2d 570 (1964) (disqualification of a contractor to do business with the Government). In *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, at 896, summary dismissal of a public employee was upheld

But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.[11] Cf. *Nash* v. *Florida Industrial Commission*, 389 U. S. 235, 239 (1967). 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.[12]

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic

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because "[i]n [its] proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control," and because the case involved the Government's "dispatch of its own internal affairs." Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

[11] Administrative determination that a person is ineligible for welfare may also render him ineligible for participation in state-financed medical programs. See N. Y. Social Welfare Law § 366 (1966).

[12] His impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching correct decisions on eligibility. See Comment, Due Process and the Right to a Prior Hearing in Welfare Cases, 37 Ford. L. Rev. 604, 610–611 (1969).

commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.[13] This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. 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 uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

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[13] See, *e. g.*, Reich, *supra*, n. 8, 74 Yale L. J., at 1255.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. 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. As the District Court correctly concluded, "[t]he 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." 294 F. Supp., at 904–905.

II

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory "fair hearing" will provide the recipient

with a full administrative review.[14] Accordingly, the pre-termination hearing has one function only: 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. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 343 (1969) (HARLAN, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a

[14] Due process does not, of course, require two hearings. If, for example, a State simply wishes to continue benefits until after a "fair" hearing there will be no need for a preliminary hearing.

proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.[15]

We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient *per se*, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

The opportunity to be heard must be tailored to the

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[15] This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues. See *FCC* v. *WJR*, 337 U. S. 265, 275–277 (1949).

capacities and circumstances of those who are to be heard.[16] It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. 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; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. 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 secondhand 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. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence. Cf. HEW Handbook, pt. IV, § 6400 (a).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E. g., ICC* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93–94 (1913); *Willner* v. *Committee on Character & Fitness*, 373 U. S. 96, 103–104 (1963). What we said in

[16] "[T]he prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have." Wedemeyer & Moore, The American Welfare System, 54 Calif. L. Rev. 326, 342 (1966).

Greene v. *McElroy*, 360 U. S. 474, 496–497 (1959), is particularly pertinent here:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

"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." *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932). 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. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the

interests of the recipient. 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).

Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co.* v. *PUC,* 301 U. S. 292 (1937); *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274, 288–289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co.* v. *PUC,* 260 U. S. 48, 57–59 (1922), 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. Cf. *In re Murchison,* 349 U. S. 133 (1955); *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 45–46 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.

Affirmed.

[For dissenting opinion of MR. CHIEF JUSTICE BURGER, see *post,* p. 282.]

[For dissenting opinion of MR. JUSTICE STEWART, see *post,* p. 285.]

MR. JUSTICE BLACK, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most

affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter.[1] Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today.

The dilemma of the ever-increasing poor in the midst of constantly growing affluence presses upon us and must inevitably be met within the framework of our democratic constitutional government, if our system is to survive as such. It was largely to escape just such pressing economic problems and attendant government repression that people from Europe, Asia, and other areas settled this country and formed our Nation. Many of those settlers had personally suffered from persecutions of various kinds and wanted to get away from governments that had unrestrained powers to make life miserable for their citizens. It was for this reason, or so I believe, that on reaching these new lands the early settlers undertook to curb their governments by confining their powers

[1] This figure includes all recipients of Old-age Assistance, Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled, and general assistance. In this case appellants are AFDC and general assistance recipients. In New York State alone there are 951,000 AFDC recipients and 108,000 on general assistance. In the Nation as a whole the comparable figures are 6,080,000 and 391,000. U. S. Bureau of the Census, Statistical Abstract of the United States: 1969 (90th ed.), Table 435, p. 297.

within written boundaries, which eventually became written constitutions.[2] They wrote their basic charters as nearly as men's collective wisdom could do so as to proclaim to their people and their officials an emphatic command that: "Thus far and no farther shall you go; and where we neither delegate powers to you, nor prohibit your exercise of them, we the people are left free." [3]

Representatives of the people of the Thirteen Original Colonies spent long, hot months in the summer of 1787 in Philadelphia, Pennsylvania, creating a government of limited powers. They divided it into three departments—Legislative, Judicial, and Executive. The Judicial Department was to have no part whatever in making any laws. In fact proposals looking to vesting some power in the Judiciary to take part in the legislative process and veto laws were offered, considered, and rejected by the Constitutional Convention.[4] In my

[2] The goal of a written constitution with fixed limits on governmental power had long been desired. Prior to our colonial constitutions, the closest man had come to realizing this goal was the political movement of the Levellers in England in the 1640's. J. Frank, The Levellers (1955). In 1647 the Levellers proposed the adoption of An Agreement of the People which set forth written limitations on the English Government. This proposal contained many of the ideas which later were incorporated in the constitutions of this Nation. *Id.*, at 135–147.

[3] This command is expressed in the Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[4] It was proposed that members of the judicial branch would sit on a Council of Revision which would consider legislation and have the power to veto it. This proposal was rejected. J. Elliot, 1 Elliot's Debates 160, 164, 214 (Journal of the Federal Convention); 395, 398 (Yates' Minutes); vol. 5, pp. 151, 164–166, 344–349 (Madison's Notes) (Lippincott ed. 1876). It was also suggested that The Chief Justice would serve as a member of the President's executive council, but this proposal was similarly rejected. *Id.*, vol. 5, pp. 442, 445, 446, 462.

judgment there is not one word, phrase, or sentence from the beginning to the end of the Constitution from which it can be inferred that judges were granted any such legislative power. True, *Marbury* v. *Madison*, 1 Cranch 137 (1803), held, and properly, I think, that courts must be the final interpreters of the Constitution, and I recognize that the holding can provide an opportunity to slide imperceptibly into constitutional amendment and law making. But when federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people. That is precisely what I believe the Court is doing in this case. Hence my dissent.

The more than a million names on the relief rolls in New York,[5] and the more than nine million names on the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably in the officials' haste to make out the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full "evidentiary hearing" even

[5] See n. 1, *supra*.

though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the government's efforts to protect itself against making payments to people who are not entitled to them.

Particularly do I not think that the Fourteenth Amendment should be given such an unnecessarily broad construction. That Amendment came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves. Cf. *Adamson* v. *California,* 332 U. S. 46, 71–72, and n. 5 (1947) (dissenting opinion). The Court, however, relies upon the Fourteenth Amendment and in effect says that failure of the government to pay a promised charitable instalment to an individual deprives that individual of *his own property,* in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient. Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court "that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior

hearing of some sort is unconscionable," and therefore, says the Court, unconstitutional. The majority reaches this result by a process of weighing "the recipient's interest in avoiding" the termination of welfare benefits against "the governmental interest in summary adjudication." *Ante*, at 263. Today's balancing act requires a "pre-termination evidentiary hearing," yet there is nothing that indicates what tomorrow's balance will be. Although the majority attempts to bolster its decision with limited quotations from prior cases, it is obvious that today's result does not depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes "unfair," "indecent," or "shocking to their consciences." See, *e. g.*, *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Neither these words nor any like them appear anywhere in the Due Process Clause. If they did, they would leave the majority of Justices free to hold any conduct unconstitutional that they should conclude on their own to be unfair or shocking to them.[6] Had the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare

[6] I am aware that some feel that the process employed in reaching today's decision is not dependent on the individual views of the Justices involved, but is a mere objective search for the "collective conscience of mankind," but in my view that description is only a euphemism for an individual's judgment. Judges are as human as anyone and as likely as others to see the world through their own eyes and find the "collective conscience" remarkably similar to their own. Cf. *Griswold* v. *Connecticut*, 381 U. S. 479, 518–519 (1965) (BLACK, J., dissenting); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 350–351 (1969) (BLACK, J., dissenting).

laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost. In fact, if that view of due process is correct, the Due Process Clause could easily swallow up all other parts of the Constitution. And truly the Constitution would always be "what the judges say it is" at a given moment, not what the Founders wrote into the document.[7] A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content. I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable.

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party "owing" the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to

[7] To realize how uncertain a standard of "fundamental fairness" would be, one has only to reflect for a moment on the possible disagreement if the "fairness" of the procedure in this case were propounded to the head of the National Welfare Rights Organization, the president of the national Chamber of Commerce, and the chairman of the John Birch Society.

another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pre-termination evidentiary hearings or post any bond, and in all "fairness" it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the 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. Cf. *Gideon* v. *Wainwright,* 372 U. S. 335, 344 (1963). 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. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

For the foregoing reasons I dissent from the Court's holding. The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.