The Unrealized Promise of Goldberg v. Kelly

Introduction

A Call to Arms

In 1965, Charles Reich issued a rallying cry to the legal community, or at least to The Yale Law Journal's readers. "The time has come," he said, "for lawyers to take a major interest in social welfare, and for the welfare profession to concern itself with the rapidly growing relevance of law." [1] These words were published about a year after "The New Property" was released in the same journal.[2] Immediately, the reader senses Reich's urgency. This call to arms is the first sentence of the article entitled, "Individual Rights and Social Welfare: The Emerging Legal Issues." Reich's language demands to be felt, because he uses such phrases as, "[t]he time has come," "take a major interest," and "rapidly growing relevance."[3]

Some lawyers of the mid-1960s were taking a "major interest" in welfare issues.[4] In 1965, they lacked a definite strategy. That would soon change.

A student heeds the call

Two years after Reich's article, a Yale law student highlighted one area of the welfare system that might be ripe for a challenge.[5] The student, Christopher May, argued that welfare recipients "should have a constitutional right to a hearing before his welfare

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[1] Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).
[2] Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).
[3] *See* Individual Rights and Social Welfare: The Emerging Legal Issues *supra* note 1.
[4] *See generally* Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361 (1965).
[5] Christopher May, Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 YALE L.J. 1234 (1967).

payments are discontinued."[6] He acknowledged that "[w]elfare payments are regarded as largesse."[7] However, the article made a strong case for treating welfare recipients with the same respect as any other person. May said, "[b]ut while the country has come to recognize its obligations to the needy, it has yet to accept the correlative duty to treat fairly the individual recipients."[8]

May's "Withdrawal of Public Welfare: The Right to a Prior Hearing," was just a student note, but it managed to find some important readers. By the end of the decade, the district court judge in Kelly v. Wyman cited the article in support of his pro-welfare plaintiff opinion.[9] Years later, a phrase from the article would become the title of a book about poverty law in the 1960s and 1970s.[10] "Finally, the *brutal need* of the recipient erroneously denied assistance will make him all the less able to pursue the subsequent hearing now available." (emphasis added)[11]

Lawyers in the field heed the call

During the late months of 1967, it became clear that Reich and May's thoughts were not limited to the academic community. Lawyers at a pioneering legal aid center in New York City were anxious to challenge the government's ability to cut off welfare benefits without a pre-termination hearing.[12] They just needed a deserving and willing client. In, January 1968, a young lawyer found this client after hearing an intriguing story of welfare woes. The client, John Kelly, was a 29-year-old homeless New Yorker

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[6] *Id*. at 1245.
[7] *Id*. at 1234.
[8] *Id*.
[9] Kelly v. Wyman, 294 F. Supp. 893, 900 (S.D.N.Y. 1968).
[10] MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (Yale U. Press 1993).
[11] May *supra* note 5 at 1244.
[12] *See* Davis *supra* note 10 at 86.

who had recently had his welfare payments terminated.[13] Within the next three years, these lawyers, Mr. Kelly, and several other plaintiffs would become part of a landmark 20th century U.S. Supreme Case and Mr. Kelly's name would be forever linked to due process and welfare rights.

Mr. Kelly's lawyers wanted welfare benefits to qualify as property under the due process clause. They thought that if they were successful in doing so, constitutional demands would require a hearing before any recipient could be stripped of welfare payments.[14] On paper, Kelly and his supporters won this battle in the courts.[15]

Erosion and Disappointment

In addition to the goal of securing due process rights for welfare recipients, some attorneys involved with Goldberg v. Kelly hoped their case would be a stepping-stone in the welfare rights movement. These attorneys wanted Goldberg to advance the "right to live" theory, an idea about a guaranteed minimum income.[16] Goldberg did very little to advance the theory, and the Supreme Court issued another 1970 welfare opinion that was a clear loss for the entire welfare rights movement.[17] Ultimately, Goldberg would be the high legal point for the movement.[18] Over two decades later, Congress would pass major welfare reform legislation and legal scholars like Richard Pierce were predicting that the due process revolution of Goldberg would be reversed by the end of the 21st century.[19]

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[13] *Id.* at 86-87.
[14] *Id.*
[15] Goldberg v. Kelly, 397 U.S. 254 (1970).
[16] *See* Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11, 20 (2004).
[17] Dandridge v. Williams, 397 U.S. 471 (1970).
[18] *See* Davis *supra* note 10 at 144.
[19] Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996).

Other scholars, including Cynthia Farina, argued that Pierce was overreacting, but did admit that Goldberg did relatively little for poor people.[20]

What exactly has Goldberg meant for poor people over the past thirty-five years, especially in this age of "welfare reform?" Was John Kelly's long trip to the U.S. Supreme Court beneficial for other welfare recipients? It would be a stretch to say that Goldberg v. Kelly has hurt welfare rights over the past three and a half decades, but it is fair to say that the decision has not helped poor people as much as may have been hoped by Mr. Kelly's attorneys.

Getting to the Supreme Court

Edward V. Sparer and Poverty Law

The attorneys who would take the issue of pre-termination hearings to the U.S. Supreme Court were part of a relatively new legal movement.[21] If a John Kelly-like potential plaintiff had tried to find attorneys in 1958 instead of 1968, he probably would not have found any willing legal help.

In 1963, federal grants were made available to new legal offices in New Haven, Connecticut and New York City. Over the next eight years, the number of attorneys for poor people increased by 650 percent.[22] One of the persons largely responsible for this

[20] Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591 (1998).
[21] *See* Davis *supra* note 10, at 10.
[22] *Id.*

massive growth in poverty law was Edward V. Sparer. The life of Sparer is a very interesting subject in its own right.[23]

Unlike many famous lawyers, Sparer did not graduate from an elite law school. He was a college dropout who decided to start law school when he was 27. He enrolled at Brooklyn Law School, because it was the only New York City law school that would accept him without having a college degree.[24] His lack of an undergraduate degree was not the only blemish on his pre-law school life. When he graduated at the top of his Brooklyn Law class, he was not given the chance to be the graduation speaker.[25] A decade earlier, Sparer and his fiancée had joined the communist party.[26] He resigned from the party (after reading Nikita Khrushchev's speech to the 20th Congress of the Communist Party, which went into detail about the Stalin-endorsed massacres) during the same year that he started law school, but his political past remained a liability.[27] For instance, Sparer had to obtain a favorable letter of recommendation from a noted anticommunist Socialist, David Dubinsky, in order to satisfy the New York State Bar's Committee on Character Fitness.[28] It also seems that some of his early struggles as an attorney may have had something to do with his political baggage.[29]

In 1963, Sparer landed a dream job at the brand new Mobilization for Youth (MFY) Legal Unit.[30] MFY was the product of ambitious social workers, helpful

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[23] *See* Richard P. Weishaupt, *Edward V. Sparer: Some Thoughts about His Work and Life*, U. PA. L. REV. 433 (1984).
[24] Davis *supra* note 10, at 24.
[25] *Id*. at 25.
[26] *Id*. at 23.
[27] *Id*. at 24.
[28] *Id*. at 26.
[29] *Id.*
[30] *Id*. at 27.

businessmen, Lloyd Ohlin, Richard Cloward and political backing. Cloward and Ohlin were academics connected to the Columbia School of Social Work. "In contrast with the prevailing academic view that delinquency could be remedied through psychiatric casework, Cloward and Ohlin argued that the social organization of ghetto communities created delinquency."[31] To help cure this delinquency, young people needed "genuine opportunities to behave differently."[32] In support of the MFY project, Ohlin and Cloward expressed their opportunity theory research with a 617-page "Proposal for Prevention and Control of Delinquency by Expanding Opportunities." This research design helped get MFY a $2.1 million grant from President Kennedy's Committee on Juvenile Delinquency. With that cash and additional public and private funding, MFY was able to open in the fall of 1962.[33]

The early proposals for MFY did not suggest a legal arm.[34] This changed in 1961, but the suggestions were tame ideas in the Legal Aid tradition.[35] Sparer was not interested in working along those lines. As soon as the MFY Legal Unit hired him, he made it known that he wanted to see the Legal Unit used to "change the institutional structure that created and sustained poverty."[36] His arguments in favor of such a Legal Unit won support and the pieces were in place for clients such as John Kelly to challenge the culture of welfare and poverty.

> The aggressive, affirmative use of "law as an instrument of social change," patterned after the methods of the NAACP and the American Civil Liberties Union, became the MFY Legal Unit's credo. Sparer only half

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[31] *Id.*
[32] *Id.* at 28.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 29.

> echoed the statements of Arthur Von Briesen and Reginald Heber Smith when he wrote in November 1965 that "ultimately, it is hoped that the poor will come to look upon the law as a tool which they can use on their own behalf to vindicate their rights and their interests- in the same way that law is used by other segments of the population.[37]

His hope that poor people would be able to use the law "on their own behalf to vindicate their rights and their interests" was realized when John Kelly came to MFY in 1968. However, Sparer was not at MFY at that point. After only two years with the MFY Legal Unit, Sparer set up a "backup center," called the Center on Social Welfare Policy and Law. The Center became housed at the Columbia School of Social Work, because of Sparer's relationship with Cloward and because Columbia Law School refused to host a controversial Legal Services group designed to sue the government.[38] Sparer did not fully abandon MFY, though. In Sparer's mind, the Center was for coordinating nationwide welfare strategy and MFY was for doing the groundwork.[39] This would be the case with the Kelly litigation. Kelly came to MFY with his story, and MFY and the Center jointly proceeded with the litigation.

John Kelly

In many respects, John Kelly was the ideal lead plaintiff for the pre-termination issue. He stood in stark contrast to the common conception of the welfare recipient. He wasn't a single mother and he wasn't a substance abuser. He also had a compelling story. A hit-and-run driver injured Kelly in 1966. As a result of the injury, Kelly became disabled and qualified for New York's home relief program. This was his only income,

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[37] *Id*. at 30.
[38] *Id*. at 34-35.
[39] *Id*.

so the loss of his bi-weekly checks placed Kelly in a helpless, impoverished position.[40] The need was clear. Almost as clear, was that Kelly was being deprived of his checks without much good cause.[41]

In late 1967, Kelly's welfare caseworker wanted him to move from the Broadway Central Hotel to the Barbara Hotel (both were on the Lower East Side). Even though he was opposed to the move, he felt like he had to obey her because she controlled his checks. He tried to stay in the new hotel, but found the place full of drug addicts and alcoholics. Since the Barbara Hotel was unsuitable for him, Kelly moved in with a friend. He kept his address as the Barbara Hotel and went there on January 8, 1968 to pick his mail up from the front desk clerk. Unfortunately for Kelly, the clerk had contacted Kelly's caseworker about his move and the caseworker had decided to terminate his benefits as a result of Kelly's noncompliance.[42] He tried to sort this out with the caseworker, but she refused to talk to him. Without any income, Kelly was forced to borrow some money from friends. When he couldn't pay the friend who he was living with his share of the rent, Kelly began sleeping on the streets. Frustrated with what he deemed an unfair situation, Kelly decided to go to MFY.[43]

What MFY wanted to accomplish with Kelly

Why did MFY care so much about this sort of termination? MFY attorneys felt like termination threats were a method of coercion. So long as it was legal for individual

[40] *Id*. at 87.
[41] *See id*. at 88.
[42] *Id*. at 87.
[43] *Id*. at 88.

caseworkers to terminate welfare benefits, MFY believed that welfare would have too much of a coercive element. [44]

> According to former MFY attorney David Diamond, the threat of termination was used to control recipients: "Termination was the device that the welfare department used to shake people up. The feeling that you can get terminated any time for anything makes you much more subservient and pliable to whatever caseworkers want."[45]

Some welfare rights activists had wider ambitions than merely making it unconstitutional to terminate benefits without a pre-termination hearing, but the main goal of accepting John Kelly's case was simple- eliminate coercive threats and ensure that poor people cannot be made completely destitute without a fair hearing. It was believed that success in the John Kelly case would be mean good things for poverty law. It might even mean that every person would have a "right to live."[46] The Edward Sparer notion of a "right to live" meant that every American would have a "fundamental opportunity" to "have enough resources to feed, clothe, and house herself."[47]

MFY needed to start somewhere in order to get acceptance for Sparer's right to live theory. So long as welfare caseworkers could use the threat of termination to coerce clients, there was no way that any welfare recipients would have a true opportunity to take care of themselves. "MFY's lawyers reasoned the first step in creating a right to live was to have procedural safeguards in place to prevent improper termination of welfare

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[44] *See id*. at 86.
[45] *Id*.
[46] *See* Cantrell *supra* note 16, at 20-23.
[47] *Id*. at 19.

benefits."[48] This goal of creating a right to live was the ultimate goal of having Kelly and other plaintiffs take New York State and City to court.[49]

The Defendants

As far as welfare was concerned, New York City was a generous and liberal municipality. But, they did not have endless funds. Just as John Kelly was a sympathetic plaintiff, New York State and City were relatively sympathetic defendants, considering that they were occasionally in the business of terminating the benefits of extremely poor people.[50] Justice Brennan would later say that, "In many respect, the New York system for managing welfare terminations was a model of rationality."[51]

The defendants actually "conceded that welfare benefits were protected by the due process clause and that, as providers, they were required to grant a review before benefits were terminated."[52] Also, the defendants did not "attempt to argue that welfare benefits are a 'privilege.'"[53] But, the defendants did not want to give welfare recipients as much review as the plaintiffs wanted. This was especially true of New York City, because New York City had fiscal problems and had a very high proportion of welfare recipients.

> In 1968, about 14 percent of the population of New York received welfare. In 1967-68, recipients claimed $839,155,551 from the city, up from $587,807,056 in 1966-67. The city was already in dire financial straights, and city officials were concerned that the state's fair hearing regulations would result in still more welfare expenses.[54]

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[48] *Id*. at 20.
[49] *Id*.
[50] *See* Davis *supra* note 10, at 93-94.
[51] William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law," The Forty-Second Annual Benjamin N. Cardozo Lecture*, 42 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, reprinted in 10 CARDOZO L. REV. 3, 20 (1988).
[52] Davis *supra* note 10, at 93.
[53] Kelly v. Wyman *supra* note 9, at 898.
[54] Davis *supra* note 10, at 93-94.

These numbers help explain one key difference between the city and state. After the Kelly lawsuit was filed, state officials proposed new welfare regulations.[55] These new regulations offered seven days' notice of termination, allowed recipients to request a prior review of the termination, allowed the recipients to present their own defense and have an attorney at the review, and ensured that the recipient could still have a complete post-termination hearing if the benefits were terminated. The city did not want to adopt these regulations and came up with a cheaper alternative, a "paper" review.[56] It was this "paper" review that was deemed unconstitutional at the trial level in Kelly v. Wyman.[57]

Kelly v. Wyman

Before Goldberg v. Kelly, there was Kelly v. Wyman, the United States District Court opinion. Judge Wilfred Feinburg of the Second Circuit Court of Appeals wrote the opinion and it represented a major victory for the plaintiffs.[58]

The first sentence of the opinion explains the current state of welfare law. "These consolidated actions present another in the increasing number of attacks on prevailing state welfare practices."[59] That introduction makes it clear that the present case has considerable relevance and importance, as it is the most recent of a steady stream of "increasing" welfare litigation.

Feinburg takes this litigation seriously and demonstrates an understanding for the desperate situation of welfare recipients. He goes to considerable lengths to summarize the facts of two plaintiffs and considers their situation to be grave. "By hypothesis, a

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[55] *Id.* at 93.
[56] *Id.*
[57] *See generally* Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968).
[58] *See id.*
[59] *Id.* at 895.

welfare recipient is destitute, without funds or assets. The case of Angela Velez, one of the proposed intervenors, makes the point starkly."[60] With such statements, Feinburg shows honest concern for welfare recipients. After outlining the facts surrounding Mrs. Velez and Mrs. Lett, Judge Feinburg quotes Christopher May's Yale Law Journal student note. "Suffice it to say that to cut off a welfare recipient in the face of this kind of 'brutal need' without a prior hearing is unconscionable, unless overwhelming considerations justify it."[61] At this point in the opinion, it is pretty clear that Feinburg will at least partially agree with Kelly's side.

He does. The judges "hold that a pre-termination hearing for welfare recipients is constitutionally required."[62] Kelly didn't quite get a full victory, though. Even though the city's "paper review" alternative was found inadequate, the state's new procedures were found to be constitutional.[63] The state was content with the decision, but New York City appealed to the Supreme Court (actually, the state stayed with the litigation for a couple of months before dropping out).[64]

Goldberg v. Kelly

Framing the argument

Now that MFY had succeeded at the lower court level, they had to devise a good argument for the City's appeal to the U.S. Supreme Court. There were two schools of thought about how they should proceed. Some of the attorneys wanted to stick to the

[60] *Id*. at 899.
[61] *Id*. at 900.
[62] *Id*. at 908.
[63] *Id*.
[64] Davis *supra* note 10, at 102.

facts and play the case conservatively. Others were more concerned with the overall welfare rights movement and wanted to argue for more in hopes that Kelly's case could get their foot in the door, so to speak.[65]

Sparer and his "right to live" theory led the more ambitious side. Sparer wanted to use Goldberg v. Kelly as a vehicle for his theory and believed that the theory was starting to gain legal acceptance.[66] Less than a year after Kelly v. Wyman, came another positive case for welfare rights activists, Rothstein v. Wyman.[67] This was a class action filed by blind and disabled welfare recipients living in Nassau and Westchester Counties in New York. They were using the equal protection clause of the Fourteenth Amendment to demand that they receive the same payments as New York City residents, who received higher welfare checks than non-city residents.[68] Although it wasn't part of the ruling, the judge made comments that might lead men like Sparer to believe that the right to live idea could be near fruition. "It must not be forgotten that in most cases public assistance represents the last resource of those bereft of any alternative. Equity (the state or quality of being equal, derived from the latin aequitas), should least of all be denied the poor."[69] These sentences assume that the government has an obligation to the poor. They show an understanding of the hopelessness associated with dire poverty. If those words weren't enough, the reference to the Constitution's purpose of promoting the "general welfare" in the same paragraph spelled things out more clearly.[70] Judge Mansfield says that the nation's recent leaders have expressed a desire "to insure that

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[65] *See id*. at 102-106.
[66] *Id*. at 104.
[67] Rothstein v. Wyman, 303 F. Supp. 339 (S.D.N.Y. 1969).
[68] *Id*. at 341.
[69] *Id*. at 347.
[70] *Id*. at 346.

indigent, unemployable citizens will at least have the bare minimums required for existence."[71] The talk about having "the bare minimums required for existence" understandably excited Sparer. He wanted to capitalize on this legal climate.

Regardless of the sympathetic tone espoused in Rothstein, other attorneys were not convinced that right to live was going to gain any mainstream acceptance. Lee Albert, another attorney with the Center on Social Welfare Policy and Law, led the more conservative side. The more conservative attorneys thought that right to live "was a kooky idea that would never be adopted the Supreme Court."[72]

The two camps compromised on this issue and others. It was decided that they should downplay Charles Reich because his new property idea was too broad. But, Albert's side agreed that they should at least make reference to "right to live in case one of the justices chose to address the theory."[73]

The opinion

"I believe that the decision can be seen as an expression of the importance of passion in government conduct, in the sense of attention to the concrete human realities at stake."[74] Justice Brennan made this comment 17 years after his Goldberg v. Kelly opinion was published.

Viewed at in Brennan's "importance of passion" terms, Goldberg can be viewed as a triumph of heartbreaking stories over fiscal concerns. As Sylvia Law, who worked on the case, said, "The case was grounded in the real lives of ordinary poor people and

[71] *Id*.
[72] Davis *supra* note 10, at 103.
[73] *Id*. at 104.
[74] Brennan *supra* note 51, at 20.

the pervasive meanness and incompetency of an ordinary bureaucracy. The facts sang."[75] It is easy to view the opinion in this way, because it appears to be a big victory for poor people. Brennan quotes Reich's "New Property" in a footnote.[76] He also seems to cite Cloward's "opportunity theory." "Welfare, by meeting the basic demands of subsistence, can bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."[77]

However, even Brennan admits that the opinion does not have to be viewed in terms of what it may say about passion. "I certainly have no regrets about the extent to which Goldberg may have made the welfare system more rational."[78] Goldberg certainly did make the welfare system more rational because it provided protection for recipients who could lose benefits at the whim of a caseworker. Actually, some scholars believe the case was all about rationality and had nothing to do with human-interest stories and passion.

> Goldberg v. Kelly is a great case, and fully worthy of this celebration, but I believe that no part of its grandeur derives from the possibility that some of the justices were emotionally responding to the so-called "human stories" of Angela Velez, Esther Lett, Pearl Frye and Juan DeJesus. The issue before the Court was whether the welfare system as a whole was being operated in accordance with the ideal of procedural fairness, and in reaching judgment, the justices were guided by reason and reason alone.[79]

Either way, the opinion was a major one for poverty law. But, the rational approach to the opinion helps explain why the victory for poor people was so narrow and perhaps pyrrhic. If cases like Goldberg were mostly about emotions, the stories of deeply

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[75] Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 807 (1990).
[76] *Goldberg*, 397 U.S. at 261 n. 8.
[77] *Id*. at 265.
[78] Brennan *supra* note 51, at 20.
[79] Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 804 (1990).

impoverished people would likely stir more momentum for right to live and not simply help create a right to a hearing before termination. After all, Goldberg in no way makes terminations unconstitutional. There just has to be a provable basis for the termination. Goldberg also does not promise an elaborate process. The opinion only requires enough to meet a minimal standard of process.[80] It is basically all about equity.

Brennan's opinion is not very long and appears to be simple. "This deceptively simple decision turned out to be a critically important one," said current Supreme Court Justice Stephen Breyer.[81] But its importance may have much more to do with what it has done for procedural fairness than for what it has done for the poor. At the time though, poverty lawyers thought they had made very significant gains in their ultimate goal of creating a right to live.[82]

What the opinion meant for welfare recipients

Goldberg didn't create a right to live, but it did establish some basic standards of due process for welfare recipients. New York City's paper review was definitely not sufficient process. But what was? The basic Goldberg due process requirements included: "a right to an appeal before an independent adjudicator, a right to present oral evidence, and a right to cross-examine witnesses."[83] All of this meant that welfare recipients could not be threatened with termination in the same way that they were pre-Goldberg. It also meant that their welfare benefits were akin to property, and warranted due process rights. Without a doubt, this was a victory for poor people who relied on the

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[80] *See Goldberg*, 397 U.S. at 266-271.
[81] Stephen G. Breyer, Goldberg v. Kelly: *Administrative Law and the New Property*, *in* REASON AND PASSION 245, 246-247 (E. Joshua Rosenkranz and Bernard Schwartz, eds., 1997).
[82] *See* Cantrell *supra* note 16, at 22.
[83] Davis *supra* note 10, at 118.

government for basic subsistence. It didn't guarantee poor people welfare money, but it did guarantee that poor people on welfare could not be taken off of welfare without a fair hearing.

The Party does not last for long

The excitement created by the Goldberg opinion was considerably tempered with the Dandridge v. Williams opinion.[84] Dandridge was also decided in the spring of 1970, but this time Brennan was part of the dissent and the welfare recipients lost their case. The Dandridge plaintiffs were large Maryland families challenging the State's maximum welfare caps. Their argument was that the maximum grant limitations violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against large families.[85] Justice Stewart, one of the three Goldberg dissenters, writes for the Dandridge majority and makes it clear that the Court is not in charge of fixing potentially unjust welfare policies. Even if a regulation seems unfair, it is constitutional so long as it has a rational basis and is "free from invidious discrimination."[86] The court determines that Maryland has legitimate economic and social reasons for its cap. Unlike Goldberg, the facts do not win the case. In a very disheartening closing paragraph, Stewart distinguishes Goldberg and basically says it is not the Court's business to ensure subsistence for everyone. It's very much a refutation of the spirit found in Brennan's Goldberg opinion.

> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might

[84] Dandridge v. Williams, 397 U.S. 471 (1970).
[85] *Id*. at 473-475.
[86] *Id*. at 487.

> ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.[87]

From the welfare rights perspective, the only good thing to be found in this paragraph is that it upholds the procedural safeguards provided in Goldberg. Otherwise, the language is catastrophic for anyone who thought that they had made serious welfare rights gains a month earlier. It almost closes out the possibility that the court would ever consider a right to live for every American. To be sure, the opinion essentially killed any hope Sparer and company may have had about succeeding beyond Goldberg.[88] Sparer was especially hurt by the decision and maintained that a different result "could have led to a different America."[89]

Even some of the basic gains from Goldberg were not as impressive as hoped. As early as 1974, it could be said that, "the level of protection actually afforded recipients facing termination because of intervening ineligibility or recoupment because of past overpayment is far less substantial than initial reaction to the Goldberg decision anticipated."[90] Some of the reasons for this had to do with recipients' low-level of education and an antagonistic welfare agency unwilling to better help and inform some

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[87] *Id.*
[88] *See* Davis *supra* note 10, at 132-134
[89] *Id.* at 133 (quoting Edward V. Sparer, *The Right to Welfare, in* THE RIGHTS OF AMERICANS 82 (Norman Dorsen, ed. 1971).
[90] Howard R. Reiss, Note, *Due Process and Statutory Limitations on AFDC Procedures*, 74 COLUM. L. REV. 1464, 1467 (1974).

clients.[91] Some of it also had to do with the Goldberg opinion's "limitation of the pre-termination hearing to minimal procedural safeguard."[92] Even by the mid-1970s, Goldberg supporters both realized that the Court was extremely unlikely to do anything with their right to live theory and that Goldberg did not necessarily work as well in practice as was hoped. The next twenty years would see more tepid success and serious disappoint for welfare rights.[93]

Where things stand today

All that said, before the welfare reform laws of the mid-1990s, some people considered Goldberg to be a serious aid for welfare recipients. In 1990, the Commissioner of New York State Department of Social Services was able to say that the "promise of Goldberg is fulfilled in New York State."[94] "In the twenty years since Goldberg, the concept of due process has been sewn into the fabric of social welfare policy and institutionalized so well that it permeates the practices and policies of the Department and local social services districts."[95] The Commissioner admits that the system is far from perfect, but he supports it. "The fair hearing system must work because in a very real sense, it is their lifeline."[96] Goldberg may not have done much to advance right to live ideas, but it has had a positive practical impact on the administration of welfare. At least it had before welfare reform.

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[91] *Id*. at 1468.
[92] *Goldberg*, 397 U.S. at 267.
[93] *See generally* Davis *supra* note 10, at 133-145.
[94] *See* Hon. Cesar A. Persales, *The Fair Hearings Process: Guarding of the Social Service System*, 56 Brook. L. Rev. 889 (1990).
[95] *Id*. at 892.
[96] *Id*. at 898.

The most obvious change in the welfare system since Goldberg has been the Personal Responsibility and Work Reconciliation Opportunity Act of 1996.[97] This Act repudiates Charles Reich and places serious limits on welfare benefits that had been taken for granted.[98] However, due process rights still apply to welfare benefits. PRWORA definitely signifies a major loss for welfare rights activists and it makes right to live sound like fantasy, but it does not mean that Goldberg is bad law. It's uncertain how long this will last.

Richard Pierce's analysis

Richard Pierce sees PRWORA as a precursor for a counterrevolution that will destroy whatever is left of Goldberg.[99] "Indeed, it is hard to imagine how the Court could support a reaffirmation of its holding in Goldberg, given the many provisions of the welfare reform act that negate any implication that it confers a property right on welfare beneficiaries."[100] The problem with his argument is that his predictions have not come true. He said that the Supreme Court would complete the due process counterrevolution by the end of twentieth century.[101] This hasn't occurred. It may be true that some Justices and many legislators wish Goldberg were completely irrelevant, but that does not make it so.

Cynthia Farina's analysis

Farina disagrees with Pierce and says that his concept of recent Supreme Court history is flawed. She believes that contemporary due process is much more complicated

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[97] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, PUB. L. NO. 104-193, 110 STAT. 2105.
[98] *See* Pierce *supra* note 19, at 1990.
[99] *See id*. at 1991.
[100] *Id*.
[101] *See id*. at 1995.

than the story presented by Pierce.[102] Her understanding is that Goldberg was nearly inevitable, because "the traditional approach to conceptualizing constitutionally-protected interests was patently wearing thin."[103] She believes the opinion was more of a compromise than it was some sort of socialist pronouncement. Since Goldberg, the Court has retreated a bit, but has not begun a radical counterrevolution.[104]

She doesn't think Goldberg is necessarily going to be overruled any time soon, but she believes that PRWORA proves how little Goldberg and due process protection does for poor people.

> The Personal Responsibility and Work Opportunity Act has forced us to confront how little due process actually does to protect those who dwell in the regulatory state. Perhaps now progressives will work harder at strategizing the kind of fundamental reform imagined in The New Property – that is, a transformation in how we conceive ourselves in relation to our fellow citizens and our government, and in how we use law and the political process to pursue some basic questions of secure independence for each citizen in recognition of our inescapable interdependence. Then, we would really be talking about revolution.[105]

Neither PRWORA's "abolition of federal eligibility criteria," nor "the possibility that fiscal constraints may now be interposed to deny benefits to otherwise eligible persons" eliminates Goldberg's procedural due process requirements.[106] PRWORA actually gives rise to due process entitlements. "So long as there is money to distribute, state officials are bound to exercise their discretion according to the 'objective criteria for . . . eligibility' mandated by section 402."[107] Due process doesn't guarantee that welfare recipients will

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[102] *See* Farina *supra* note 20, at 600.
[103] *Id*. at 601.
[104] *See id*. at 615.
[105] *Id*. at 634.
[106] *Id*. at 618.
[107] *Id*. at 623.

receive any money; it only guarantees that they have access to procedural due process. Process isn't any good without the money to provide it.

Conclusion

Goldberg v. Kelly was an important case for welfare rights lawyers. It unquestionably gave them something to cheer about because it ensured that people like John Kelly could not lose their welfare benefits because of a caseworker's whim or anger. After Goldberg, people like John Kelly could still lose their benefits, but only after they were given a fair hearing.

Since Goldberg, there have not been many victories for welfare rights lawyers. The right to live idea was never adopted and Goldberg's due process requirements did not always mean much in reality. However, even in the age of PRWORA, Goldberg still lives. It may not mean as much as was hoped, but it is still part of a framework that gives welfare recipients more process than they were given before 1970.