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I. INTRODUCTION

Since the Supreme Court's decision in *Goldberg v. Kelly*,[1] states have generally been required[2] to provide recipients of public assistance benefits with adequate notice and the opportunity for a "fair hearing"[3] before terminating or suspending[4] those benefits. The issue, however, of whether, and to what extent, the notice and hearing requirements also apply to reductions of welfare benefits remains largely unresolved. The Supreme Court has never answered definitively, or even addressed directly, this question,[5] and the lower courts that have examined the matter have issued confusing and conflicting opinions.[6] The most vigorous debate over the reduction issue focuses on the right of recipients to due process in the form of a prior hearing when a state implements state-wide, across-the-board reductions.

The Department of Health and Human Services (HHS)—formerly the Department of Health, Education, and Welfare

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1. 397 U.S. 254 (1970).

2. *See generally* Brudno, *Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants*, 25 HASTINGS L.J. 813 (1974); Dolzer, *Welfare as Property Interests: A Constitutional Right to a Hearing and Judicial Review*, 29 AD. L. REV. 525 (1977); O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161; *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 100-08 (1970); Note, *AFDC: The Right to a Hearing Before Termination*, 10 J. FAM. L. 166 (1970); 49 J. URB. L. 186 (1971); 16 VILL. L. REV. 587 (1971); 73 W. VA. L. REV. 80 (1970-1971). *See also* Rothstein, *Business as Usual?: The Judicial Expansion of Welfare Rights*, 50 J. URB. L. 1 (1972); 50 N.C. L. REV. 673 (1972).

3. *See* A. LAFRANCE, M. SCHROEDER, R. BENNETT & W. BOYD, LAW OF THE POOR 370-76 (1973); Dolzer, *supra* note 2; Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975); Note, *California Welfare Fair Hearings: An Adequate Remedy?*, 5 U.C.D. L. REV. 542 (1972).

4. Daniel v. Goliday, 398 U.S. 73 (1970). *See* Part V *infra*.

5. *See* Daniel v. Goliday, 398 U.S. 73 (1970); Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); Part III *infra*.

6. *See* Part V *infra*.

(HEW)—has defused part of the welfare reduction/prior hearing controversy by issuing regulations that set forth guidelines concerning when a state must provide the opportunity for a hearing before reducing benefits.[7] The regulations, however, have also contributed to the confusion surrounding the issue by excepting from the general hearing requirements a reduction resulting from a state-wide, automatic adjustment of welfare grants. This exception has provided an escape hatch through which states have avoided the procedural specifications that should otherwise attach in a state-wide reduction.[8]

Although the federal regulations enable a state to avoid prior hearings for across-the-board reductions,[9] they nevertheless serve only to define the *statutory* obligations imposed upon the states.[10] The regulations do not delineate the parameters of the *constitutional* requirement of a prior hearing. In some ways the regulatory procedures are broader than those articulated by the courts as representing the constitutional minimum.[11] In other respects, however, the regulations may fall below minimum constitutional requirements. With regard to across-the-board reductions that originate in broad "policy" decisions by the states, the regulations provide exceptions to the prior hearing requirement that actually run counter to the requirements of procedural due process.

This Note examines the right of welfare recipients to request a prior hearing in the context of state-wide, across-the-board benefit reductions by a state. After reviewing the due process requirement of a pretermination hearing articulated by the Supreme Court in *Goldberg v. Kelly,* the Note examines the standard for reductions established by the HHS regulations. The Note also considers the various approaches taken by the courts in attempting to determine the constitutional and statutory requirements of a prior hearing in

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7. 45 C.F.R. § 205.10 (1979). For a discussion and critique of the history and content of these regulations, see Cooper, Goldberg's *Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised Is a Question of Law?*, 64 MINN. L. REV. 1107, 1107-46 (1980).

8. *See* notes 80-109 *infra* and accompanying text.

9. 45 C.F.R. § 205.10(a)(5) (1979).

10. Any state electing to participate in the federally funded Aid to Families with Dependent Children (AFDC) program must comply with the requirements set forth in the Social Security Act. *See* 42 U.S.C. §§ 601-610 (1976).

11. For example, the regulations require states to notify recipients at least ten days in advance of a discontinuation, termination, reduction, or suspension of their benefits. 45 C.F.R. § 205.10(a)(4)(i)(A) (1979). In Goldberg v. Kelly, 397 U.S. 254 (1970), however, the Supreme Court found an advance notice of only seven days to he constitutionally sufficient. *Id.* at 268.

a state-wide reduction. The Note argues that the standard delineated by the HHS regulations and by some courts fails to provide the full procedural protection necessary to safeguard the benefits of impoverished individuals from wrongful reduction. Observing that the Supreme Court has declined to recognize a substantive due process right to welfare, the Note points out that recipients must depend upon the requirements of procedural due process to protect their very means of economic survival. The Note contends that *Goldberg* dictates that states be extremely cautious in reducing benefits and that consequently, because a wrongful reduction would subject recipients to a condition of "brutal need," due process requires that states provide the opportunity for a fair hearing[12] even when the intended reduction is due to a policy of wholesale cutbacks. Because the regulations have in fact encouraged blanket denials of requests for prior hearings in across-the-board reductions, the Note concludes that, in order to reconcile the statutory requirements for prior hearings with the constitutional imperatives, HHS must either rewrite or eliminate the provision of the federal regulations concerning automatic, state-wide reductions.

II. Procedural Protection for Welfare Recipients

A. Goldberg v. Kelly

During the late 1960s the Supreme Court seemed ready to recognize that welfare recipients possess a substantive due process right to public assistance benefits.[13] Although the Court subsequently backed away from such a dramatic declaration,[14] it did acknowledge that welfare recipients, while not possessing a *substantive* right to benefits, are nevertheless entitled to certain *procedural* due process safeguards before the state may take away

12. This Note addresses only the issue of whether states must provide the opportunity for a prior hearing in state-wide reductions. It does not attempt to discuss the specifics of any such prior hearing. For several discussions of the various forms that "fair hearings" have taken, see the authorities cited in note 2 *supra*. *See also* Project, *Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin*, 1978 Wis. L. Rev. 145 [hereinafter cited as *Wisconsin Hearing Study*].

13. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 329 U.S. 309 (1968). *See also* Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969); O'Neil, *supra* note 2.

14. *See* Dandridge v. Williams, 397 U.S. 470 (1970); Rosado v. Wyman, 397 U.S. 397 (1970).

their benefits.[15] These procedural protections have become increasingly important as states have attempted to terminate or reduce recipients' benefits because of budget cutbacks and shrinking state treasuries.[16] These procedural safeguards are the recipients' only protection from wrongful, adverse action by the states.

The Supreme Court set forth the basis for these procedural due process protections in *Goldberg v. Kelly*.[17] In *Goldberg* the Court declared invalid certain procedures utilized by the New York Department of Social Services permitting the state to terminate a recipient's benefits without first providing an opportunity for a "fair hearing."[18] Although the state procedures enabled a recipient to challenge the agency's decision in a post-termination hearing,[19] the Court concluded that this procedure fell far short of the minimum protection required by the Constitution.[20] In the Court's opinion, "[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."[21]

In articulating its strict procedural due process requirements, the Court placed primary emphasis on the special role that welfare plays in the lives of those who receive it. As the Court related, "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care."[22] The Court argued that a state must continue benefits until a decision is reached in a pretermination hearing, since immediate termination would "deprive an *eligible* recipient of the very means by which to live . . . ."[23] In distinguishing welfare from other forms of governmental benefits that could be terminated without a prior hearing,[24] the

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15. Goldberg v. Kelly, 397 U.S. 254 (1970). *See* authorities cited in note 2 *supra*.

16. The states typically seek to cut back on their welfare payment levels in times of conservation, since welfare is the most readily available and politically acceptable area in which to reduce funding. As one author has observed,

> [T]he payment standard is the one factor the states can manipulate fairly easily. A review of month-by-month reports in changes in state welfare policies reveals that payments often are reduced as the state nears the end of the fiscal year . . . . By lowering welfare payments the states can save money and avoid conflicts . . . .

K. GRONBJERG, MASS SOCIETY AND THE EXTENSION OF WELFARE 47 (1977).

17. 397 U.S. 254 (1970).

18. *Id.* at 264.

19. *Id.* at 259.

20. *Id.* at 264.

21. *Id.*

22. *Id.*

23. *Id.*

24. The Court argued that welfare was different from "the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied an exemp-

Court emphasized the desperate, dependent condition of welfare recipients.[25] The Court agreed with the district court's[26] declaration that

> 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.[27]

As the Court concluded, "The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it."[28]

In reaching its decision, the Court noted that traditional due process analysis required a balancing of the private interest affected against the government's interest in summary adjudication.[29] The Court observed that although some governmental benefits could be terminated administratively without a prior hearing,[30] these benefits are of far less significance to recipients than welfare.[31] Given the exceptional importance of welfare, the Court rejected defendant's argument that the state had an overriding interest in preserving the public treasury.[32]

While the Court concluded that only a pretermination hearing affords recipients the requisite procedural due process, the Court declined to specify the exact contours of such a hearing,[33] noting only that the prior hearing need not take the form of a full-scale judicial or quasi-judicial trial. The Court's primary concern was that any type of hearing serve the basic objective of procedural due process—"to provide an initial determination of the validity of the welfare department's grounds for discontinuance of payments in

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tion, or virtually anyone else whose governmental entitlements are ended . . . ." *Id.*; *see* Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation); Speiser v. Randall, 357 U.S. 513 (1958) (tax exemption); Slochower v. Board of Higher Education, 350 U.S. 551 (1956) (public employment).

25. 397 U.S. at 264-65.

26. The appeal was from a three-judge panel. Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968).

27. 397 U.S. at 261 (citing 294 F. Supp. at 899-900).

28. 397 U.S. at 265.

29. *Id.* at 262-63.

30. *Id.* at 263-64.

31. *Id.*; *see* note 24 *supra*.

32. The Court recognized that the provision of a prior hearing and the continuation of benefits would involve expense for the state. The Court, however, declared that the state could minimize these costs through more efficient and skillful administrative procedures. 397 U.S. at 266.

33. *Id.* at 266-67.

order to protect a recipient against an erroneous termination of benefits."[34] Accordingly, the most important consideration was simply that a recipient have the opportunity to present his case before his benefits are adversely affected by the state. Thus, the Court did specify that, at a minimum, the recipient must receive timely and adequate notice detailing the reasons for the proposed termination and must have an effective opportunity to challenge the action by confronting any witnesses and by presenting his evidence orally.[35]

Although on first examination the Court's articulation of the due process requirement in *Goldberg* seems straightforward, there has been significant controversy concerning the true nature of that requirement. Emphasizing the applicability of the above procedures to the particular facts of *Goldberg*, the Court declared that the requirements of due process were especially important in cases like *Goldberg* "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."[36] In an accompanying footnote, however, the Court pointed out that the facts of *Goldberg* presented no need to determine whether due process requires only an opportunity for the submission of a written statement by the recipient, or an opportunity for both a written statement and an 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."[37] Because the Court has never clarified the meaning of this footnote, the actual extent of the Court's requirement of a prior hearing in welfare cases remains uncertain. Some courts have argued that the Court intended to create a distinction between terminations involving the resolution of factual questions by the welfare agency and terminations entailing questions of law or policy.[38] These courts argue that a prior

34. *Id.* at 267.

35. *Id.* at 267-68. In a companion case to *Goldberg*, the Court ruled in Wheeler v. Montgomery, 397 U.S. 280 (1970), that the requirement of a pretermination hearing applied to terminations of old age benefits as well. In *Wheeler*, a three-judge district court had held that California's pretermination procedures were constitutionally sound because they provided recipients with prior notice, the opportunity to meet with their caseworkers, and assurances of "prompt restoration" of payments upon the recipient's renewed eligibility. *Id.* at 281. The Supreme Court, however, ruled the procedures unconstitutional since they did not provide a recipient with the opportunity for at least an oral prior hearing with the right to confront any adverse witnesses. *Id.* at 282.

36. 397 U.S. at 268.

37. *Id.* at n.15.

38. Whitfield v. King, 364 F. Supp. 1296 (M.D. Ala. 1973), *aff'd mem. sub nom.* Whit-

hearing should be required only in the former cases. Other observers, however, contend that the Court intended no such distinction and that the fact-law dichotomy is both inapplicable and unworkable in the context of welfare benefits.[39]

The controversy over the scope of *Goldberg* has been transferred by analogy to the consideration of the reduction of welfare benefits. The debate surfaces not only in numerous judicial opinions that discuss the constitutional requirements in the reduction situation,[40] but also in regulations[41] promulgated by HEW that address the prior hearing issue and in the judicial interpretation of those regulations.[42] Therefore, it is useful to inspect briefly the requirements set forth in the relevant federal regulations.

B. The HHS Regulations

The regulations affecting a welfare recipient's right to a prior hearing are set forth at 45 C.F.R. § 205.10. These regulations are intended to address all the ways in which an agency's action could affect a recipient's benefits; they apply not only to reductions but also to suspensions, discontinuances, and terminations.[43] HEW promulgated the initial set of regulations prior to the Supreme Court's decision in *Goldberg*,[44] but altered them after the issuance of the *Goldberg* opinion.[45] The regulations now state explicitly that any procedures employed by the states must conform both to the specifics of the regulations and to the Supreme Court's edict in *Goldberg*.[46] In attempting to implement *Goldberg*, however, HEW gave the decision an interpretation that appears unwarranted. The Department read the Court's aforementioned footnote to create a

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field v. Burns, 431 U.S. 910 (1977); Rochester v. Ingram, 337 F. Supp. 350 (D. Del. 1972), *rev'd sub nom.* Rochester v. Baganz, 479 F.2d 603 (3d Cir. 1973); Provost v. Betit, 326 F. Supp. 920 (D. Vt. 1971); Riggins v. Graham, 20 Ariz. App. 196, 511 P.2d 209 (1973); State *ex rel.* Ellis v. Heim, 83 N.M. 103, 488 P.2d 1207 (1971).

39. *See, e.g.*, Cooper, *supra* note 7; Dooley & Goldberg, *The Search for Due Process in the Administration of Social Welfare Programs*, 47 N.D. L. REV. 209, 219-23 (1971); Note, *California Welfare Fair Hearings: An Adequate Remedy?*, 5 U.C.D. L. REV. 542, 558-71 (1972).

40. *See* cases discussed in Part III *infra*.

41. 45 C.F.R. § 205.10 (1979).

42. *See* cases discussed in Part III *infra*.

43. 45 C.F.R. § 205.10(a)(4) & (5) (1979).

44. 34 Fed. Reg. 1144 (1969). HEW actually proposed the regulations shortly after, but not in response to, the district court decision. *See* 33 Fed. Reg. 17,853 (1968). For a discussion of the history and development of the regulations, see Cooper, *supra* note 7.

45. Cooper, *supra* note 7, at 1116.

46. 45 C.F.R. § 205.10(a)(1)(ii) (1979).

fact-law distinction[47] and assumed that the footnote permitted state welfare agencies to terminate, suspend, or reduce benefits without a prior hearing whenever there was no "factual" issue involved.[48] Consequently, as related below, the regulations create an overly broad distinction concerning when a state can deny a prior hearing based on the fact-law question.[49]

In addressing the right of a recipient to a prior hearing in a state-wide reduction, the regulations distinguish between particularized agency actions that affect individual recipients' benefits and broadly sweeping decisions that apply to large numbers of beneficiaries. Specifically, section 205.10(a)(5) provides:

> An opportunity for a hearing shall be granted . . . to any recipient who is aggrieved by agency action resulting in suspension, reduction, discontinuance, or termination of assistance. *A hearing need not be granted when either State or Federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.* (emphasis added).

Subsection 205.10(a)(5)(v) provides further that "[t]he agency may deny or dismiss a request for a hearing . . . where the sole issue is

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47. Cooper, *supra* note 7, at 1115.

48. Cooper criticizes this conclusion and argues that "[b]oth the text of the footnote and the context in which it was placed . . . more strongly support a conclusion that the Supreme Court was not concerned with whether due process required a prior hearing for these cases, but rather what kind of prior hearing would be required." *Id. See also id.* n.43.

49. The fact-policy distinction also extends to the regulations' notice requirements. 45 C.F.R. § 205.10(a)(4) provides that with certain enumerated exceptions, state and local welfare agencies must provide "timely and adequate notice" to all affected recipients "in cases of intended action to discontinue, terminate, suspend, or reduce" welfare assistance. "Timely" is defined to mean that the notice must be mailed at least ten days before the date on which the intended action would be effective. To be "adequate" the notice must be written and must contain a statement of the following elements: first, the action to be taken; second, the reasons for the intended action; third, the specific regulations supporting the action; and last, an explanation of the recipient's right to request a hearing and the circumstances under which assistance is continued if a hearing is granted. *Id.* at § 205.10 (a)(4)(i)(A)-(B) (1979)..

While the above requirements are generally applicable to all agency actions that adversely affect a recipient's continued receipt of benefits, there are certain exceptions to their application. The prominent exception is section 205.10(a)(4)(iii), relating to across-the-board reductions, which provides:

> When changes in either Stete or Federal law require automatic grant adjustments for classes of recipients, timely notice shall be given which shall be "adequate" if it includes a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

As the text relates, the circumstances under which a prior hearing may be obtained in an across-the-board reduction are extremely limited. Consequently, many states have construed this provision as granting them the authority to reduce benefits immediately once notice has been given to recipients — if notice is even given.

one of State or Federal law requiring automatic grant adjustments for classes of recipients. . . ." Thus, a recipient affected by a broad policy decision, such as an across-the-board reduction or some similar action, is entitled to request a hearing only if he alleges that the state has not properly computed his grant. Moreover, even if the recipient alleges an incorrect grant computation, the state may still deny a hearing if some designated agency official decides that the actual issue is one of fact or law. Although this process may not at first seem overly severe, its significance becomes apparent when one considers the effect of the agency determination on a recipient's continued receipt of benefits. Section 205.10(a)(6) provides generally that if a recipient requests a hearing within the timely notice period, the state will not adversely affect his benefits until a decision is rendered at the hearing. Despite this apparent protection afforded recipients, the state may nevertheless immediately alter a recipient's benefits if a determination is made at the hearing that the sole issue raised by the appeal is "one of . . . law or policy, or change in State or Federal law and not one of incorrect grant computation."[50] Even more disturbing is the fact that a recipient's failure to allege properly an "incorrect grant computation" gives the state the right to reduce his benefits immediately after notice without even beginning a hearing.

Welfare recipients whose benefits are reduced as a result of wide-spread adjustments or across-the-board changes implemented by a state thus receive little aid from the present regulations governing prior hearings. In fact, the regulations severely handicap these recipients. The regulations do not simply present an initial obstacle to the effort to obtain procedural due process protections. As the subsequent discussion of the relevant case law shows, the regulations actually encourage state agencies to reduce benefits summarily and to seek ways to avoid complying with even the most minimal procedural requirements.

Although the HHS regulations do not require the states to provide victims of across-the-board adjustments with the opportunity for a fair hearing and continued benefits, it is important to realize that they also do not mandate that a state *cannot* provide such procedures. Although the regulations in fact encourage states not to provide these procedures, they represent only statutory requirements that do not necessarily define the scope of procedural due process articulated in *Goldberg*. Consequently, before examin-

50. 45 C.F.R. § 205.10(a)(6)(i)(A) (1979).

ing the way in which the courts have dealt specifically with the restrictive provisions of the federal regulations, it is helpful to review the case law generally addressing the reduction issue to determine the dimensions of constitutional due process and to understand better the impact of the federal regulations.

III. Prior Hearings and State-wide Reductions

A. *Background:* Daniel v. Goliday

As discussed earlier, the Supreme Court's decision in *Goldberg v. Kelly* requires that a state provide a welfare recipient with the opportunity for a hearing before the state can terminate benefits. While it is thus clear that the procedural due process requirements imposed in *Goldberg,* apply to a complete withdrawal of benefits, courts have disagreed on the extent to which *Goldberg* applies to the *reduction* of an individual's welfare benefits. The HHS regulations[51] statutorily extend *Goldberg*'s requirements of a prior hearing and continued benefits to some reduction situations. Whether those same or even greater protections are constitutionally required, however, has been the focus of much debate.[52] Numerous courts have argued that the reasons for requiring a hearing before termination of benefits are equally applicable when "only" a reduction of payments is involved. Others, however, have argued that a reduction of benefits is factually and theoretically distinct from termination. Advocates of this view allege that the due process requirements attaching to each procedure are likewise distinct, and that a prior hearing is required for reductions only under highly specialized circumstances.

Although the Supreme Court has never directly addressed the question whether states must hold a hearing before reducing welfare benefits, the Court has not infrequently demonstrated that it is at least aware of the many issues raised and left unresolved by its decision in *Goldberg.* In fact, in his dissenting opinion in *Wheeler v. Montgomery,*[53] a companion case to *Goldberg,* Chief Justice Burger[54] argued that the majority's opinion in the twin cases opened the door to just such a *Goldberg*-type constitutional

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51. *See* Part II, section B *supra.*

52. The regulations do go beyond the minimal requirements of due process in some respects. The ten-day notice requirement in 45 C.F.R. § 205.10(a)(4)(i)(A) is one example. *See* note 11 *supra.*

53. 397 U.S. 280 (1970). *See* note 35 *supra.*

54. The Chief Justice was joined in dissent by Justice Black.

challenge to welfare reductions. The Chief Justice contended:

> [T]he Court should also he cognizant of the legal precedent it may be setting. The majority holding raises intriguing possibilities concerning the right to a hearing at other stages in the welfare process which affect the total sum of assistance, even though the action taken might fall short of complete termination. For example, does the Court's holding embrace welfare reductions . . . as opposed to terminations . . . ?[55]

Although the Supreme Court has at times been presented with the opportunity to answer Chief Justice Burger's question, it has declined to make a definitive ruling on the issue.[56]

The Court was specifically confronted with the question of prereduction hearings in *Daniel v. Goliday*.[57] In *Daniel* the Court reviewed a district court decision[58] invalidating an Illinois statute that permitted reductions in benefits without a prior hearing. The lower court ruled that the due process protections of the fourteenth amendment extend to reductions of benefits, in addition to terminations and suspensions.[59] The Supreme Court upheld that portion of the district court's decision concerning termination and suspension of welfare benefits,[60] but it declined to judge the merits of the portion regarding reductions. Instead, because the district court's ruling came before the *Goldberg* decision, the Supreme Court remanded to the lower court for preparation of a better factual record to determine whether the circumstances of plaintiff's claim brought it within the ambit of *Goldberg* and *Wheeler*.[61]

The Supreme Court's steadfast avoidance of the reduction is-

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55. 397 U.S. at 284-85 (Burger, C.J., dissenting).

56. *See, e.g.*, Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972). A major reason for the Court's avoidance of the reduction issue has been the presence of the HHS regulations. The Court has shown a preference to have the regulations govern when possible. *See* Richardson v. Wright, 405 U.S. 208 (1972).

57. 398 U.S. 73 (1970).

58. Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969). The appeal was from a three-judge panel.

59. Weighing the competing interests involved in welfare reductions, the district court had concluded that "the government's interest in its welfare program in protecting its administrative costs against losses is insufficient to justify a procedure of summary termination, suspension, or reduction of a recipient's benefits prior to notice and a hearing no matter how adequate an appeal procedure may be." The court contended that because of the overriding importance of welfare to its recipients, due process protections should attach as a matter of course. Indeed, the court rejected outright any suggestion that judicial protection of welfare beneficiaries should be tempered by any notion that recipients do not have an entitlement to their benefits. 305 F. Supp. at 1226.

60. 398 U.S. at 73.

61. *Id.* On remand, the case was settled. *See Wisconsin Hearing Study, supra* note 12, at 165. For a brief discussion of *Goliday* and the early status of reductions vis-á-vis terminations, see Dooley & Goldberg, *supra* note 39, at 226-28.

sue in *Daniel* has left the lower courts essentially on their own to thrash out the specifics of the procedural due process requirements in the reduction situation. In the absence of guidance from the Court, the lower courts have disagreed sharply on a number of issues, particularly with regard to state-wide, across-the-board reductions. Although most courts seem to agree that a hearing must be held at some point, whether that hearing must come before the state reduces a recipient's benefits often depends upon whether the court's analysis focuses on the nature of the reduction itself or on the reduction's impact on the individual recipient.

B. *Setting up the Problem:* Merriweather v. Burson

Merriweather v. Burson,[62] decided shortly after *Goldberg,* illustrates the general approach taken by the lower courts in addressing the reduction issue. In *Merriweather* plaintiffs alleged that certain regulations promulgated by the Georgia Public Welfare Administration permitting the reduction of individuals' welfare grants without a prior hearing violated the due process requirements of *Goldberg.*[63] In reviewing plaintiffs' contentions, the district court focused on two questions that exemplify the general debate surrounding the reduction issue. First, "Does the *Goldberg* requirement of pre-termination hearings apply to both reductions and terminations of welfare benefits: is every *reduction* a *termination* of those benefits no longer to be received?" Second, "Is the *Goldberg* requirement of pre-termination hearings limited to terminations which are based on the particular factual circumstances of an individual recipient or interest group, or must there also be hearings before terminations resulting from across-the-board changes applicable without regard to the circumstances of individual recipients?"[64] The court's first question represents the threshold issue—answered in part by the HHS regulations—of whether *Goldberg*'s protections extend at all to reductions. The second inquiry reflects the general confusion—encouraged by both the *Goldberg* footnote[65] and the regulations—concerning the role that any alleged fact-policy distinction should play in the reduction situation.

In response to the first question, the *Merriweather* court con-

62. 325 F. Supp. 709 (N.D. Ga. 1970), *remanded,* 439 F.2d 1092 (5th Cir. 1971).
63. 325 F. Supp. at 710.
64. *Id.*
65. *See* notes 37-42 *supra* and accompanyng text.

tended that any distinction between a termination and a reduction of benefits was insufficient to warrant a differentiation between the kinds of due process protection afforded recipients in either situation.[66] The court pointed out that the Supreme Court's decision in *Goldberg* was a product of its concern that an eligible recipient might be wrongfully deprived of the very means of subsistence if benefits could be terminated without a hearing. Concluding that "an extreme reduction of benefits may be the substantial equivalent of termination,"[67] the court declared that the state must provide a hearing before reducing benefits.[68]

Although the court held that *Goldberg* requires a prereduction hearing, it expressed concern over the potential impact of such a proclamation. Consequently, in addressing the second of its two questions — whether a prior hearing is required even in across-the-board reductions — the court distinguished cases involving individualized reductions from those related to basic policy decisions made by the state.[69] The court urged that a "common-sense view" of *Goldberg* indicated that the Supreme Court's desire was to prevent a unilateral factual determination by welfare officials that a particular recipient is ineligible for benefits, given the possibility that this determination could be disputed or proven erroneous.[70] Arguing that *Goldberg* was essentially inapplicable to wide-spread welfare reductions, the court declared that

> where a reduction or termination is not thus grounded on particular facts relating to an individual recipient or assistance group, there is no need for an evidentiary hearing. Thus, where across-the-board cuts in funding necessitate wholesale reductions in benefits or changes in other programs such as social security benefits result in "automatic" reductions or terminations, it would be a useless expenditure of money to hold hearings at the request of any number of recipients opposed to reductions dictated by the state or federal legislature, rather than by the facts governing eligibility of particular recipients.[71]

The district court in *Merriweather* thus established a dichotomy that made the right to a prereduction hearing contingent

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66. 325 F. Supp. at 710.

67. *Id.*

68. *Id.*

69. Noting that the state's procedures already provided welfare recipients with a post-termination hearing as part of the review process, the court declared in dicta that a prior hearing should be required only when the welfare agency bases its decision to terminate or reduce benefits on the particular circumstances of the recipient. The court argued that the real purpose of a prior hearing is to make certain that the stated reason for the agency's decision has "a sound basis in fact." *Id.* at 711.

70. *Id.*

71. *Id.*

upon the nature of the reduction effort itself. Although reducees in the court's view were essentially equal in stature to terminees, the due process protections to which they would normally be entitled could be rendered inapplicable in cases of broad-scale reductions originating from policy decisions by the state. In so characterizing the due process-reduction relationship, the court seemed to conclude that the line between questions of "fact" and those of "policy" was sufficiently clear to provide a proper basis for denying due process to individuals who face the very real possibility of "brutal need." Moreover, the court seemed to reject the possibility that factual questions could ever arise in wholesale reductions resulting from policy.

On appeal[72] the Fifth Circuit refined the district court's opinion to focus the prior hearing question more closely on the condition of the recipients themselves. Although the court of appeals implicitly condoned the fact-policy distinction articulated by the district court, the panel declined to judge the dispute on its merits. Instead, the court argued that the Supreme Court's intervening decision in *Daniel* had changed the "posture" of the case.[73] According to the Fifth Circuit, *Daniel* indicated that, contrary to the district court's conclusion, reducees and terminees were not necessarily equivalent. Consequently, the appellate court vacated the lower court's initial decision.

While the court favored a restrictive reading of the *Daniel* opinion, it went on to articulate a due process standard that could require some form of prior hearing in almost every reduction case.[74] The Fifth Circuit interpreted the Supreme Court's action in *Daniel* as requiring the district court to "determine from an evidentiary hearing whether reducees . . . were subjected to the potential burdens found in *Goldberg* to require a pretermination hearing."[75] In other words, the Fifth Circuit construed the Court's

72. Merriweather v. Burson, 439 F.2d 1092 (5th Cir. 1971).

73. *Id.* at 1093. *See* notes 57-61 *supra* and accompanying text.

74. It is unclear exactly how the Fifth Circuit intended its impact test to be utilized. It seems unlikely, however, that the court felt that a hearing would be necessary in all cases simply to determine the impact of a reduction on a recipient. In reaffirming its holding in *Merriweather*, the Fifth Circuit in Gonzalez v. Vowell, 490 F.2d 475 (5th Cir. 1974), declared that "when welfare benefits are reduced rather than discontinued, the *Goldberg* requirements apply only to that limited class of cases in which the effect of reduction closely approximates that of complete termination." *Id.* at 477. The court, however, has not articulated a standard by which to decide which recipients are to be included in the "limited" class.

75. 439 F.2d at 1093.

opinion to mean that if reducees would be subjected to a condition of brutal need because of the proposed reduction, then they would be in substantially the same position as terminees. Such a position would entitle them to a prereduction hearing. On the other hand, if an examination of the reducees' financial situation revealed that their post-reduction status would be above this sub-minimum level, they would not face the same hardships as terminees and thus would not be entitled to a hearing. Because the district court in *Merriweather* had not conducted a hearing to determine whether plaintiffs faced potential hardships comparable to those of the recipients in *Goldberg*, the court remanded the case for further proceedings to be focused on that determination.[76]

In the aftermath of the two *Merriweather* opinions, the lower courts have developed two distinct perspectives concerning the benefit reduction issue. Particularly with regard to across-the-board reductions, the courts are divided over whether states must grant a hearing before implementing the reduction for any family or individual. A number of courts have followed the district court's path in *Merriweather* and have ruled that no prior hearing is required when a state applies welfare cutbacks uniformly to all recipients. Other courts, however, have applied the Fifth Circuit's test in varying ways and have required an initial hearing to determine the impact of the planned reductions on individual recipients.

Those courts that have denied a hearing have based their decisions on a fact-policy distinction similar to that articulated by the district court in *Merriweather*[77] and embodied in the pertinent federal regulations. On the other hand, those courts that have mandated prior hearings have rejected that distinction as essentially invalid.[78] These latter courts have focused more on the result

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76. *Id.* While a prime concern of the Fifth Circuit in evaluating the reduction issue was the financial status of the affected recipients, it is unclear whether the court intended this consideration to replace or supplant the district court's fact-policy determination. One can surmise from the tone of the opinion that the court imposed the financial condition test as a second factor intended to follow an initial fact-policy determination. Nevertheless, because the Fifth Circuit did not address the fact-policy issue in its opinion, the relationship between the financial status test and the question of either "fact" or "policy" is confused. Indeed, a concern of many courts has been the degree of hardship that an intended reduction would have on its targeted recipients.

77. *See, e.g.*, Whitfield v. King, 364 F. Supp. 1296 (M.D. Ala. 1973), *aff'd mem. sub nom.* Whitfield v. Burns, 431 U.S. 910 (1977); Rochester v. Ingram, 337 F. Supp. 350 (D. Del. 1972), *rev'd on other grounds sub. nom.* Rochester v. Baganz, 479 F.2d 603 (3d Cir. 1973); Provost v. Betit, 326 F. Supp. 920 (D. Vt. 1971); Riggins v. Graham, 20 Ariz. App. 196, 511 P.2d 209 (1973); State *ex rel.* Ellis v. Heim, 83 N.M. 103, 488 P.2d 1207 (1971).

78. *See, e.g.*, Viverito v. Smith, 474 F. Supp. 1122 (S.D.N.Y. 1979); Yee-Litt v. Rich-

of the intended reductions than on the nature of their origin.[79] While in some cases — depending on the financial condition of the affected recipients — the mode of analysis will not be determinative, in many others the choice of perspective could be crucial. Indeed, if a family is sufficiently impoverished, the choice of analysis is effectively outcome-determinative. If a court uses the fact-policy distinction as the basis for at least the initial determination whether a prior hearing should be provided, it will automatically deny a large number of reducees the opportunity to be heard when the state effects widespread reductions in welfare programs. Conversely, if a court employs an impact analysis to address this issue, many of these otherwise-denied reducees will be provided with at least the option to request a hearing. As the Fifth Circuit in *Merriweather* implied, the crucial question at such a hearing would be whether, given the recipient's particular financial situation, the reduction would have an impact of the sort prohibited by *Goldberg*. Because of the drastic differences between the end results produced by each method, it is important to examine the decisions employing each method of analysis to understand better the reasoning behind them and to ascertain the true requirements of due process.

C. *The "Anti-Hearing" Courts*

One of the first post-*Merriweather* decisions to deny the right to a prior hearing in uniform reductions programs was *Provost v. Betit*.[80] In *Provost* the state of Vermont had implemented statewide changes in its basic welfare program[81] that decreased the payments made to approximately four percent of the recipient population.[82] Plaintiffs, members of that group of individuals whose benefits were reduced, contended that the reductions violated their due process rights because the state had failed to afford them the opportunity for a prereduction hearing.[83] In reviewing the substan-

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ardson, 353 F. Supp. 996 (N.D. Cal. 1973), *aff'd mem. sub nom.* Carleson v. Yee-Litt, 412 U.S. 924 (1973).

79. *See, e.g.*, Viverito v. Smith, 474 F. Supp. 1122 (S.D.N.Y. 1979).

80. 326 F. Supp. 920 (D. Vt. 1971).

81. In Vermont, the basic program is called Aid to Needy Families with Dependent Children (ANFC). *Id.* at 921.

82. Vermont actually increased its total welfare payments and increased individual payments from 89.5% to 100% of the estimated need. Reductions nevertheless occurred in plaintiffs' payments because the state excluded certain items from consideration in the standard of need. *Id.*

83. *Id.* at 922.

tive issues, the court rejected plaintiffs' reliance on *Goldberg v. Kelly,* arguing that *Goldberg* implicitly distinguished actions involving factual determinations from those resulting from state policy.[84] Because the government had reduced plaintiffs' benefits pursuant to a state-wide welfare policy decision that "impartially affect[ed] all welfare recipients,"[85] and not because of some change in their financial circumstances, the court concluded that the state's interest in regulating the distribution of its welfare monies outweighed plaintiffs' interest in continuous benefits.[86] Thus, no prior hearing was required. In support of its conclusion, the court cited the *Merriweather* district court's discussion of across-the-board reductions,[87] but it did not mention the Fifth Circuit's impact test.

The argument that an opportunity for a prior hearing must be given for state-wide reductions was also rejected, albeit indirectly, in *Rochester v. Ingram.*[88] Delaware had implemented an across-the-board 11.7% reduction in all welfare benefits. Rather than challenging the reductions directly, plaintiffs in *Rochester* argued that the state had violated their due process rights by giving insufficient notice of the planned reduction.[89] The court rejected plaintiffs' contention, finding that the state's interest in avoiding undue administrative burdens outweighed plaintiffs' interest in adequate

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84. *Id.* at 923.

85. *Id.* at 922. In support of its conclusion the court noted that the federal regulations made a similar distinction in their requirement of a prior hearing. Although the court did not base its decision on the content of the regulations, the court relied heavily upon them to justify its ruling. *See id.*

86. *Id.* at 924. The court cited dicta from both King v. Smith, 392 U.S. 309 (1968), and Dandridge v. Williams, 397 U.S. 471 (1970), in support of the proposition that the federal government has afforded states great leeway in allocating their welfare resources. In *King* the Supreme Court had stated that "[s]tates have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." 392 U.S. at 313-19 (footnotes omitted). In *Dandridge* the Court had noted that "[t]he Constitution may impose certain procedural safeguards upon systems of welfare administration. 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." 397 U.S. at 487. The *Provost* court is correct in its view that *King* and *Dandridge* advocate leniency in reviewing a state's method of paying welfare benefits. At stake in *Provost,* however, were the procedural safeguards that attach to recipients' benefits after the state has exercised its initial discretion and decided its basic payment structure.

87. 326 F. Supp. at 923 n.3.

88. 337 F. Supp. 350 (D. Del. 1972), *rev'd sub nom.* Rochester v. Baganz, 479 F.2d 603 (3d Cir. 1973).

89. 337 F. Supp. at 357.

notification.[90]

While the *Rochester* court was specifically concerned with the notification issue, it discussed generally the state's prerogative to implement widespread welfare reductions without prior hearings. Citing *Provost v. Betit*,[91] the court declared that "[t]he notice and fair hearing requirement of *Goldberg* and *Wheeler* has no application where a reduction of payments is effected not because of the individual circumstance of a particular recipient but as a result of statewide welfare policy which impartially affects all welfare recipients alike."[92] Like the court in *Provost*, the *Rochester* court argued that both *Goldberg* and *Wheeler* stood only for the proposition that a state cannot *terminate* assistance to a recipient based upon his *individual* eligibility without providing him with advance notice and the opportunity for a hearing.[93] In further support of its conclusion, the court pointed to the *Merriweather* dicta regarding across-the-board reductions,[94] but it only alluded without comment to the Fifth Circuit's consideration of that case.[95]

The judicial deference to the policymaking function of state welfare agencies articulated in *Provost* and *Rochester* also served as the basis for denying prior hearings in *Whitfield v. King*.[96] In *Whitfield* the state of Alabama altered the method by which it calculated the percentage of need to be paid to its welfare recipients.[97] The effect of the new procedure was to reduce the benefits of virtually all recipients.[98] Plaintiffs argued that the procedure violated their due process rights because the state had not provided either notice or the opportunity for a hearing before implementing the reductions.[99] The court rejected this argument, concluding that

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90. *Id.* at 358.

91. *See* notes 80-87 *supra* and accompanying text.

92. 337 F. Supp. at 355.

93. *Id.*

94. *Id.* at 356.

95. *Id.*

96. 364 F. Supp. 1296 (M.D. Ala. 1973), *aff'd mem. sub nom.* Whitfield v. Burns, 431 U.S. 910 (1977).

97. 364 F. Supp. at 1298. Under its old system of payment, Alabama subtracted "outside nonexempt income" from a recipient's need standard and then paid a percentage of the remaining amount of need. Under the new system, Alabama first calculated the percentage of the need standard to be paid and then subtracted any outside nonexempt income from that dollar sum. The result was a reduction in many recipients' benefits, since under the new system the whole amount of outside income was subtracted from the actual calculated payment, whereas under the old system it had been subtracted only from the estimated need standard. *See id.* at 1299.

98. *Id.* at 1299.

99. *Id.* at 1301.

Goldberg v. Kelly) required a prior hearing only when an agency exercised its "adjudicative" function and when the situation involved "factual issues relevant to the eligibility of individual recipients."[100] As the court related: "The terminations which occurred in the instant case were produced by state-wide policy changes in welfare programs implemented pursuant to the agency's legislative rulemaking function. *Goldberg* does not compel prior notice and hearing under those circumstances."[101] In an attempt to emphasize the validity of its conclusion, the court noted that the HEW regulations also utilized this fact-policy distinction.[102]

As evidenced by the *Provost, Rochester,* and *Whitfield* decisions, courts that have denied prior hearings in the context of state-wide welfare reductions have relied heavily upon a distinction between benefit changes that allegedly entail individualized factual issues and those that revolve around policy determinations by the state. Instead of examining the circumstances of the individual recipient, the courts have focused on the nature of the state's activity. If the reduction originated in a generalized policy decison by the state, the courts have concluded that challenges to the reduction may address only policy issues that ought to be addressed, if at all, in a post-reduction hearing. Implicit, or perhaps explicit, in the courts' conclusion is the assumption that individualized factual questions can never arise in the context of generalized welfare reductions. As the subsequent discussion[103] of decisions mandating prior hearings for state-wide reductions demonstrates, that assumption is highly questionable.

Moreover, implicit in the decisions of the "anti-hearing" courts is an interesting and also questionable perspective on the

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100. *Id.*

101. *Id.* at 1302.

102. *Id.* At least two state courts have agreed with the analysis offered in *Provost, Rochester,* and *Whitfield.* In State *ex rel.* Ellis v. Heim, 83 N.M. 103, 488 P.2d 1207 (1971), New Mexico implemented an across-the-board reduction in its payment level from 90% of estimated need to 88%. The court rejected plaintiff's claim that a prior hearing was required for recipients. The court hased its decision on its observation that "[i]n this case the reduction is not based on a factual determination to reduce an individual's payment, but is a statewide reduction affecting a whole class of recipients, a legislative action, in order to meet budgetary limitations." *Id.* at 104, 488 P.2d at 1208. In Riggins v. Graham, 20 Ariz. App. 196, 511 P.2d 209 (1973), the court reached a similar conclusion. The Arizona State Board of Public Welfare reduced its percentage payment level from 75% to 70% of estimated need. The court ruled that prior hearings were not required since the Board's decision represented "a plain exercise of [its] rule-making function." The court distinguisbed such decisionmaking from the "adjudicative" action, which would require a prior hearing. *Id.* at 199-200, 511 P.2d at 212-13.

103. *See* Part III, section D *infra.*

nature of welfare dependency. For example, in reaching its conclusion that Delaware's reduction did not require a prior hearing, the *Rochester* court ruled that the state's interest in fiscal conservation outweighed plaintiffs' interest in having their benefits continued until a hearing.[104] In support of its finding that Delaware's notice was adequate, the court argued that all recipients had had sufficient time "to make adjustments to their living standards to conform to the reduction."[105] With particular regard to plaintiffs, the court emphasized that "irreparable harm . . . [had] not been demonstrated."[106] If, however, a crucial factor in the due process analysis is the ability of welfare recipients to adjust their living standards in response to a benefit reduction, it seems logical that a necessary subfactor in that analysis is whether a given recipient is financially capable of making that adjustment. An individual or family whose financial status is so precarious that a reduction of benefits would, in effect, equal a termination would probably be unable to "adjust" from its present level of minimal subsistence to some lower standard of living. The failure of a state to provide at least the opportunity for an affected recipient to demonstrate this fact, regardless of the intended reduction's impetus, runs counter to the mandate of *Goldberg* and the dictates of procedural due process, which require that all relevant factors be considered before a state adversely affects a recipient's means of existence.[107]

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104. 337 F. Supp. at 358. *See* note 90 *supra* and accompanying text.

105. 337 F. Supp. at 358.

106. *Id.*

107. The resolution of *Rochester* on appeal further demonstrated the inherent inconsistency in the reasoning utilized by the *Provost* and *Rochester* courts. As an alternative basis for its ruling, the district court in *Rochester* had given a "liheral" interpretation to the requirement of adequate notice imposed by the federal regulations on a state before reductions can he implemented. The regulations provided at that time that "timely and adequately advance notice" of the intended reduction be given to affected recipients fifteen days prior to the action. The district court reasoned tbat even thougb Delaware had provided only seven days notice, it had complied with the spirit of the regulations. The court bolstered its reasoning by concluding that the recipients had had ample time to adjust to the impending reduction of their payments. The Third Circuit reversed the district court's decision, Rochester v. Baganz, 479 F.2d 603 (3d Cir. 1973), declaring that the state of Delaware had to comply literally with the requirements of the relevant federal regulations. In reaching its conclusion, however, the court of appeals demonstrated the same overly broad perspective on the fact-policy distinction and the same misunderstanding of welfare dependency that the district court had shown in its evaluation of the issue. The Third Circuit argued that the state must give fifteen days advance notice, even in across-the-board reductions, to ensure "the orderly administration of welfare programs." The court emphasized that

> in a program desigued to meet subsistence needs recipients ought to be informed in advance if their payments are to be cut for any reason, so that they may be able to plan

Additionally, the *Rochester-Provost-Whitfield* line of cases exhibits a tendency to discount the degree of deprivation that recipients will suffer because of a reduction. As the above discussion indicates, these courts have decided that the governmental interest in administrative efficiency and fiscal conservation outweighs the recipients' interest in the continued receipt of welfare benefits. In reaching this conclusion, the courts have failed to pay sufficient heed to *Goldberg*'s emphasis on the incredibly dependent state of almost all recipients,[108] and to its ruling that the fiscal and administrative concerns of the state paled tremendously when compared to the potential brutal need of recipients erroneously deprived of

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for the cut, and to the extent possible adjust to it. . . . [I]t was well within the range of the Secretary's rulemaking authority to insist, as a condition for state participation in the AFDC program, that each state manage its fiscal affairs so as to be able to provide at least this minimum advance warning to beneficiaries about to be deprived of benefits upon which they may have been counting heavily.

479 F.2d at 606-07. Thus, because some recipients may exist in an extremely precarious financial state, sufficient notice is important to inform them of their impending misfortune. The court's logic, however, did not lead it to conclude that a prereduction hearing should accompany that notice. Instead, the court pointed to that provision of the federal regulations that permits the states to deny a fair hearing if the state agency determines that the only issues involved concern state law or policy. Concluding, like the district court, that plaintiffs' complaint involved only "policy" issues, the Third Circuit stated that "an across-the-board reduction based on state law or policy may be put into effect prior to a fair hearing, but only after fifteen days notice, after a state agency determination that only such law or policy issues are involved. . . ." *Id.* at 606. The court, however, also noted that the regulations provided for a post-reduction hearing, "even for general reductions based on law or policy," to insure that the reduction of benefits, when applied to an individual case, was not erroneous. *Id.* at 606.

The Third Circuit's decision in *Rochester* shows clearly the ironies implicit in the present use of the fact-policy distinction to deny prior hearings to victims of widespread welfare benefit reductious. The distinction conveniently enables a court to permit a state to reduce benefits wholesale, while at the same time insisting that an individualized reduction somehow deserves greater scrutiny. Nevertheless, as the Third Circuit observed, there could be problems with the application of an across-the-board reduction to any particular family or individual. While the Third Circuit felt that any such difficulties could be remedied by a post-reduction appeal, its conclusion ignores completely the question of the impact of the reduction on the affected recipients. If a reduction would truly deprive a family or individual of the very means of their existence, it makes little sense to relegate their claims to a post-reduction hearing simply because their newly imposed deprivation results from a "policy" decision of the state rather than some mistake by a welfare bureaucrat. *Goldberg*'s requirement of a prior hearing was intended to prevent eligible recipients from being deprived of their means of existence—their welfare benefits. Requiring only a post-reduction hearing permits just such a deprivation and offers only a limited prospect for relief after much damage has already been inflicted.

108. Several commentators have argued that the brutal need of welfare recipients distinguishes actions affecting welfare benefits from those involving other government benefits and therefore necessitates prior hearings when reductions occur. *See, e.g.*, Dooley & Goldberg, *supra* note 39, at 232-33.

benefits.[109] The courts that have denied a prior hearing have at best paid lip service to *Goldberg*'s balancing test and its heavy emphasis on the financial condition of the recipients. This result is not an unexpected consequence of an approach to due process that focuses on the source of the administrative action rather than on the nature of the action's impact.

Those courts that have granted prereduction hearings have been acutely aware of the problems and hardships faced by welfare recipients. Similarly, these courts have been sensitive to *Goldberg*'s emphasis on exceptional judicial caution when a family's very means of existence hangs in the balance. *Goldberg* indicated that any error on the part of the courts should be on the side of overprotectiveness in affording due process to welfare recipients, and the "pro-hearing" courts have been conscious of this concern. These courts have also rejected the fact-policy distinction as either unworkable in the welfare context or too vague to be applicable. The courts have thus ruled that, even in policy-originating reductions, there are factual issues that necessitate the provision of a prior hearing to welfare recipients. In order to achieve a better understanding of the courts' perspective and to understand more

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109. 397 U.S. at 266. *See* notes 29-32 *supra* and accompanying text. The Supreme Court expanded the *Goldberg* balancing test into a generalized test for due process requirements in Mathews v. Eldridge, 424 U.S. 319 (1976). In *Eldridge* the Court rejected the argument that a prior hearing was required for the termination of Social Security disability benefits. In reaching its conclusion, the Court set forth the following factors that a court must consider in determining the due process required in any particular case:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. After weighing these factors, the Court concluded that because a recipient of disability benefits has access to other sources of revenue, whether public or private, his interests are outweighed by the government's interest in summary adjudication.

Commentators have debated considerably the impact that the *Eldridge* test will have in the welfare context. *See, e.g.*, Cooper, *supra* note 7; Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); 60 MARQ. L. REV. 129 (1976); 30 SW. L.J. 647 (1976); 45 U. CINN. L. REV. 672 (1976). Those courts that have considered the applicability of *Eldridge* to reductions or terminations of welfare benefits, however, have distinguished the relative hardships facing welfare recipients vis-á-vis recipients of disability benefits. Because the brutal need of welfare recipients is so overwhelming and the risk involved in erroneously depriving recipients of benefits so great, the recipients' interests have prevailed. Whether one distinguishes *Eldridge* as inapplicable to the welfare context or whether its factors render the recipients' interest predominant, the result is identical to that reached under *Goldberg*'s balancing test. *See* Viverito v. Smith, 474 F. Supp. 1122, 1131-32 (S.D.N.Y. 1979); Hurley v. Toia, 432 F. Supp. 1170, 1175-76 (S.D.N.Y. 1977).

fully the shortcomings of the "anti-hearing" decisions and the federal regulations, this second group of cases should be examined.

D. The "Pro-Hearing" Courts

1. Rejection of the Fact-Policy Distinction

A major premise of the "pro-hearing" courts is that the fact-policy distinction made by the "anti-hearing" courts is too broad and unworkable to be of any value. The "pro-hearing" courts argue that the degree of overlap between questions of "fact" and "policy" in welfare issues is too great to permit the drawing of any acceptable, determinative distinction. Moreover, the incorporation of the fact-policy dichotomy into the pertinent HHS regulations only encourages state welfare agencies to ignore any consideration of minimal due process requirements when they seek to implement sweeping reductions in an effort to conserve state treasuries. Consequently, not only have the pro-hearing courts had to articulate the constitutional parameters of the prior hearing requirement in the absence of guidance from the Supreme Court, but they have also had to provide innovative interpretations of the ambiguous fact-policy distinction embodied in the federal regulations and frequently asserted by the state agencies.

Yee-Litt v. Richardson[110] is the most renowned case to reject the fact-policy distinction. In *Yee-Litt* plaintiffs challenged several California regulations that permitted the reduction or termination of welfare benefits without a prior hearing. The regulations authorized the state welfare agency to reduce benefits immediately if the agency determined that a recipient's appeal raised only policy issues and not fact or judgment questions.[111] Plaintiffs argued that the regulations were invalid on three grounds. First, plaintiffs contended that due process requires a hearing in all cases prior to the termination or reduction of welfare benefits.[112] Second, they alleged that the requirement that welfare recipients plead facts on appeal placed an unfair burden on a class of people unable to meet that burden and therefore deprived them of their right to a hear-

110. 353 F. Supp. 996 (N.D. Cal. 1973), *aff'd mem. sub nom.* Carleson v. Yee-Litt, 412 U.S. 924 (1973).

111. 353 F. Supp. at 998. Plaintiffs also challenged the HEW regulations, since California had implemented its regulations under their general direction. The court, however, focused its attention only on the state regulations and subsequently dismissed the federal defendant from the litigation. *Id.* at 1001 n.3.

112. *Id.* at 998.

ing.[113] Finally, plaintiffs argued that the vagueness of the fact-policy distinction resulted in arbitrary decisions by the agency regarding appeals and that recipients were therefore deprived of a hearing in violation of their due process rights.[114]

In reviewing plaintiffs' contentions, the court noted that California had implemented its regulations on the assumption that the Supreme Court in *Goldberg* had approved of prehearing agency action when only policy issues were involved.[115] The court had revoked a prior injunction in order to permit the state to implement these regulations, because the state had argued that they would prevent erroneous decisions and demonstrate the viability of the fact-policy distinction.[116] The court, however, concluded that the "inherent difficulties" in the fact-policy distinction only worked to deny hearings to recipients who raised factual issues on appeal.[117]

In the court's view, the problems experienced by plaintiffs resulted not only from simple mistakes by the state, but also from the state's "misuse" of the regulations.[118] Although many recipients raised what appeared to be factual issues on appeal, the state still summarily reduced or terminated their benefits.[119] In the court's view, the fact that the state could take such actions "vividly demonstrates the danger of making critical decisions concerning the eligibility of welfare recipients on the basis of the fact-policy distinction,"[120] which the court considered "unclear and unmanagable" in nature.[121] Consequently, the court concluded that "the fact-policy distinction is not viable in the welfare context for making the critical determination of whether aid will be paid pending a hearing"[122] and enjoined the state from further use of the regulations to deny prior hearings.[123]

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113. *Id.*

114. *Id.*

115. *Id.* For criticism of HEW's "assumption" and incorporation of the fact-policy distinction into its regulations, see Cooper, *supra* note 7. *See also* Dooley & Goldberg, *supra* note 39, at 219-23.

116. 353 F. Supp. at 999.

117. *Id.*

118. *Id.* at 1000.

119. *Id.*

120. *Id.*

121. *Id.* at 1001.

122. *Id.* at 1000.

123. *Id.* at 1001. The Seventh Circuit reached a similar conclusion prior to *Yee-Litt* in Mothers' and Children's Rights Organization v. Sterrett, 467 F.2d 797 (7th Cir. 1972). In *Sterrett* the court held invalid Indiana regulations that allowed the reduction or termination of welfare benefits without a prior hearing in cases in which the state welfare department determined that children resided with their stepfathers. Although the court felt that

Yee-Litt demonstrates inherent difficulties with the application of the fact-policy distinction in the context of welfare cases. The greatest problem is the lack of a reasonable, consistent standard by which to classify the issues as "fact" or "policy,"[124] especially when the dispute centers on the question of welfare eligibility and dependency. Almost as problematic is the fact that the distinction encourages administrative discretion that is at odds with *Goldberg*'s emphasis on the overwhelming need for caution in the welfare context. Permitting a state to reduce welfare benefits without a hearing simply because the reduction originates in a policy decision ignores the overwhelming brutal need of recipients and enables the states to do on a wholesale basis what they could not do on an individual basis—deprive recipients of their means of existence.

Because of the paradox created by using the fact-policy distinction in welfare cases, a number of courts have argued that the distinction cannot be used to deny a prior hearing in across-the-board reductions. The fundamental premise of these decisions is that the "policy" label is too sweeping to be determinative. Instead of rejecting the fact-policy distinction entirely, however, some courts have attempted to use it to the advantage of welfare recipients. Recognizing that the federal regulations governing welfare reductions lend the fact-policy distinction a legitimacy that plaintiffs and even courts cannot easily overcome, these courts contend that even in wholesale reductions there are important "factual" issues at stake that the parties can adequately address only at a prior hearing. Under this view, recipients should not suffer reductions in their benefits at least until the hearing has been held and in some

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no full-scale evidentiary hearing was required when the state could demonstrate that the recipient's appeal involved no question of fact, the court emphasized the need for a hearing when factual issues are intertwined with questions of law. Moreover, the court declared that even when appeals allegedly involve only legal or policy issues, a state must not reduce or terminate benefits until the recipient has been afforded "an adequate opportunity for argument." The court argued that "[t]he overwhelming consideration of the recipient's 'brutal need' requires that his benefits not be terminated or reduced without the opportunity to present his objectious based on points of law at a hearing." *Id.* at 799 n.5.

The use of the fact-policy distinction as a basis to deny a prior hearing was also rejected in Burlingame v. Schmidt, 368 F. Supp. 429 (E.D. Wis. 1973). In *Burlingame* the court ruled that Wisconsin regulations that enabled the state welfare agency to reduce, terminate, or suspend recipients' benefits without a prior hearing violated the recipients' due process rights. Specifically, the court condemned the state's practice of distinguishing between appeals "raising issues of fact or judgment, as opposed to those raising ouly issues of law or policy." *Id.* at 433. The court rejected any use of a fact-policy distinction to affect benefits before a recipient has had an opportunity to present his case. *See id.* at 434.

124. *See* Cooper, *supra* note 7; Dooley & Goldberg, *supra* note 39.

cases until after the court has rendered a decision. In order to understand how the courts have reconciled the fact-policy distinction and the HHS regulations with a more concerned view of procedural due process, these decisions must be examined.

2. Recognizing "Factual" Issues in "Policy" Decisions

Hunt v. Edmunds[125] epitomizes the basic analytical framework used by the "pro-hearing" courts.[126] Arguing that due process requires that a state give a welfare recipient the opportunity "to be heard on underlying evidentiary issues prior to an administrative decision that would adversely affect his ability to subsist by contemporary standards,"[127] the court set forth the following two criteria for determining when a prior hearing is required:

> This procedural requirement attaches whenever (1) the recipient is faced with the prospect of being relegated to a condition of "brutal need" which prospect justifies demanding a high degree of accuracy from the original decision-maker, and (2) the decision turns on the resolution of an issue on which the recipient himself may have something to add in an evidentiary way, so that the decision-maker will have a more complete array of information before him.[128]

Although the court in *Hunt* considered the reduction of an individual recipient's benefits, its two-pronged test is similar to the analysis used by those courts that have required prior hearings in across-the-board reductions. The first prong represents the tremendous concern with the precarious financial condition of welfare recipients and harkens back to the Fifth Circuit's standard in *Merriweather v. Burson.*[129] The second consideration, however, represents the major point of disagreement between the "pro-hearing" and "anti-hearing" courts. Whether one considers a recipient to have "something to contribute in an evidentiary way" depends greatly upon the point at which the consideration of that question begins. The "anti-hearing" courts conclude that the very nature of the reduction itself— its origin in a policy decision— precludes any useful contribution by the recipient to the decisional process. On

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125. 328 F. Supp. 468 (D. Minn. 1971).

126. *Hunt* dealt with the reduction of an individual recipient's benefits, and the court declined to decide whether a prior hearing would be required for across-the-board reductions. The court, however, did note the analysis and reasoning of the district court in *Merriweather v. Burson. Id.* at 476. For a discussion of the *Merriweather* decision, see notes 62-71 *supra* and accompanying text.

127. 328 F. Supp. at 475.

128. *Id.*

129. *See* notes 72-76 *supra* and accompanying text.

the other hand, the "pro-hearing" courts argue that there are any number of important questions about which the recipient can provide information even in the context of an across-the-board reduction. The "anti-hearing" courts believe that *Goldberg* warrants a restrictive approach to this issue. Conversely, the "pro-hearing" courts argue the thrust of *Goldberg* is great concern for the brutal need of recipients, and that this concern necessitates a greater deference toward recipients' appeals and their need for continued receipt of benefits until a hearing.[130]

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130. It is helpful to recognize that courts have applied these principles to actions by the federal government, as well as by state agencies. For example, in Cardinale v. Mathews, 399 F. Supp. 1163 (D.D.C. 1975), recipients of Supplemental Security Income (SSI) challenged three provisions in the governing HEW regulations that permitted the agency to reduce benefits without a prior hearing in certain circumstances. Of particular interest here is the provision that allowed HEW to ignore its usual notice and hearing requirements when "[a]mendments to Federal Laws or an increase in benefits payable under Federal Laws . . . require automatic suspension, reduction or termination of [SSI] benefits." 20 C.F.R. § 416.1336(a) (1974). This provision is closely analogous to the current welfare regulations, 45 C.F.R. § 205.10(a)(5) (1979), that permit reductions without a prior hearing when the benefit changes result from "automatic grant adjustments." The agency had reduced summarily the benefits of each of the plaintiffs in *Cardinale* because of their concomitant increase in other governmental benefits.

In holding the provision invalid, the court rejected the government's argument that the "automatic nature" of the reductions rendered the prior hearing requirement inapplicable. As the court stated:

> [T]he defendant's analysis contains a major flaw. Although defendant confidently asserts that an amendment to federal law may "automatically" require an adjustment of SSI benefits, he fails to recongize, or at least minimizes, the possibility that specific amendments to federal law may not apply to the person against whom defendant directs his adjustments.

399 F. Supp. at 1171. The court pointed out that the fact-policy distinction was of little utility in the welfare context, and that the broad-based character of the reductions alone could not call the distinction into play. The court noted that plaintiffs did not challenge HEW's power to issue the regulations but rather the manner in which those regulations impacted upon their individual situations. The court declared:

> [T]he defendant views the facts from his perspective only, *i.e.*, that he has a right to implement an across-the-board change in benefits without the administrative burden of explaining himself to every recipient. However, *what the plaintiffs demonstrate is that even across-the-board changes may raise factual issues in individual cases. . . .*

Id. at 1172 (emphasis added). As a result, the court enjoined HEW from reducing SSI benefits without notice and without providing the opportunity for some sort of prior hearing.

Cardinale illustrates the danger of emphasizing the origin of a reduction over the situation of the affected recipient. By relying on the characterization of sweeping reductions as across-the-board changes—and therefore as "policy"—welfare agencies and the "anti-hearing" courts ignore the possibility that "factual" questions, which they require so insistently, can arise even in "automatic" reduction efforts. Although the HHS regulations do provide an exception if a recipient can allege "incorrect grant computation," that proviso is extremely narrow. More often than not, the regulations have encouraged welfare officials to reject completely the notion that prior hearings may be necessary in broad-scale reductions. As a result, recipients frequently have had to engage in protracted litigation to secure their

Turner v. Walsh[131] illustrates dramatically the problem facing recipients in wide-spread reductions. The state of Missouri had enacted a statute requiring a new method of determining welfare benefits[132] that resulted in reduced benefits to many recipients.[133] In announcing the reductions, the state welfare department mailed a summary notice to all affected recipients.[134] Plaintiffs challenged this procedure as violative of due process and the governing federal regulations.[135] The specific question was whether 45 C.F.R. § 205.10(a)(5) required the provision of a prior hearing in this case.

The state argued that it had provided only perfunctory notice and had not granted recipients the opportunity for a prereduction hearing because it had interpreted the regulations to require no such procedures in this case.[136] Because state law required the reduction in benefits, the state continued, plaintiffs were not entitled to a prior hearing and continued benefits.[137] The state alleged that no question of fact could arise when the change was legally required and that plaintiffs could not challenge their grant computations as incorrect.[138] The state also urged that requiring it to provide hearings and continued benefits would "wreak havoc on the already over-burdened state welfare system."[139]

Rejecting each of the state's contentions, the court found that the notice to recipients was inadequate not only because it failed to set forth adequately the reasons for the reduction, but also because it did not relate the conditions under which a recipient could obtain a prereduction hearing and continued assistance.[140] More-

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due process rights.

131. 435 F. Supp. 707 (W.D. Mo. 1977), *aff'd*, 574 F.2d 456 (8th Cir. 1978).

132. 435 F. Supp. at 709. The state changed its method of computing benefits from a maximum grant method to a percentage of need standard. *Id.* at 710 n.3.

133. *Id.* at 709. The change in computation methods affected approximately 37,000 recipients. Because some recipients' Medicaid benefits depended on their status under the AFDC program, Medicaid payments were also affected. *Id.* at 709-10 & n.4.

134. *Id.* at 709 n.1.

135. *Id.* at 711.

136. *Id.* at 712.

137. *Id.*

138. In some cases recipients wanted to update their files with additional information that they felt would lead to a different grant award. The state argued that the absence of any such information was the result of the recipients' own failure to supply it prior to the reduction. Thus, since the recipients were "at fault," their claims should be heard only at a post-reduction hearing. *Id.*

139. *Id.*

140. *Id.* at 713. The primary reason for the failure to mention the right to a prior hearing is, of course, the fact that the state concluded that the recipients had no such right under the federal regulations. That the regulations encourage such unilateral and unreason-

over, the court pointed out that even when recipients did file timely appeals and questioned their grant computations under the federal regulations, the state denied their hearing requests.[141] The court emphasized that only a continuance of benefits until the time of the hearing would guarantee due process and protect the recipients from deprivation of their very means of existence.[142] The court noted that *Goldberg* had demonstrated that the recipients' interest in continued benefits vastly outweighed the state's fiscal considerations.[143]

In rejecting the state's argument that the recipients were not entitled to a prior hearing because the reduction resulted from a change in state law,[144] the court found that the state's actions constituted indiscriminate decisionmaking of the sort prohibited by *Goldberg*.[145] The basis for the court's conclusion was relatively simple and straightforward:

> [E]ven in across-the-board adjustments necessitated by a change in law, some mistakes are inevitable, and the obvious and irreparable injury which occurs when there is an erroneous termination or reduction can only be prevented where . . . the State is required "to pay aid pending in all cases where timely appeals are filed" from a proper notice.[146]

Thus, due process mandated that the state continue paying full benefits at least until the time of any requested hearing.

In *Becker v. Blum*[147] a New York district court also rejected the state's effort to circumvent recipients' due process rights by interpreting the federal regulations to support the denial of prior hearings. The state of New York had enacted a statute that altered its payment levels for medical assistance benefits. The new statute instituted a "co-payment" system that required recipients to pay a proportionate share of their incurred medical expenses.[148] The effect of this procedure, which the state implemented without any advance notice, was to reduce the state-paid medical assistance benefits of nearly all recipients.[149]

As in *Turner*, the state in *Becker* argued that the recipients

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able actions by state welfare departments is one criticism levied by this Note.

141. 435 F. Supp. at 714.
142. *Id.* at 715.
143. *Id.*
144. *Id.* at 716.
145. *Id.* at 715-16.
146. *Id.* at 716 (citations omitted).
147. 464 F. Supp. 152 (S.D.N.Y. 1978).
148. *Id.* at 154.
149. *Id.* at 155.

were not entitled to a hearing because a change in state law had occasioned the reductions and because the implementing regulations provided for automatic grant adjustments.[150] In the state's view, the federal regulations did not require a hearing for automatic adjustments when, as in this case, the state concluded that there was no possibility that the recipient could obtain a hearing on any applicable ground.[151] The court, however, rejected the state's contention and observed that such reductions could involve numerous factual issues that could result in an incorrect grant computation. Consequently, the court ordered the state to provide all affected recipients with adequate notice and the opportunity to request a prior hearing.[152]

3. Overcoming the Federal Regulations

Because of the problems created for recipients by state efforts to interpret the federal regulations narrowly, some courts have begun to articulate their own interpretations of the regulations. The process, however, has not been an easy one. The courts have had to draw upon their creative resources to overcome the natural tendency of the states to utilize the ambiguity of the regulations to their own advantage by reducing benefits without a prior hearing. Despite the facially restrictive nature of the regulations, the courts have held that under section 205.10(a)(5) a wide variety of appeals can constitute an allegation of "incorrect grant computation" and entitle recipients to a prior hearing. The courts have felt that both the requirements of due process in the welfare context and *Goldberg*'s concern for the brutal need of recipients dictate this more expansive outlook. These courts have also supported the premise that "factual" questions may arise even in the context of across-the-board reductions. Consequently, they have "stretched" the meaning of the regulations to include claims that the "anti-hearing" courts would reject as based on "policy" considerations.

Indicative of the judicial effort to overcome the restrictive phraseology of the federal regulations is the decision in *Budnicki v. Beal*,[153] in which recipients challenged a reduction in the availability of orthopedic shoes and shoe accessories under Pennsylvania's

150. *Id.* at 156.

151. *Id.* & n.5. *See* note 140 *supra.*

152. 464 F. Supp. at 157. Because the court found sufficient statutory grounds on which to hase its decision, it did not reach the constitutional issues that plaintiffs raised. *Id.* at 155 n.2.

153. 450 F. Supp. 546 (E.D. Pa. 1978).

medical assistance program. The state of Pennsylvania had adopted a new regulation for its Medicaid program that greatly restricted the circumstances under which the state would pay for orthopedic shoes and accessories.[154] The state contended that "gross misutilization" of the program had placed a substantial financial burden on the state's medical assistance resources.[155] This new regulation caused a reduction in the medical allowance of many Medicaid recipients who used orthopedic devices, but it did not provide any prior notice of that result. Because of the hardships facing recipients who suffered and would suffer reductions under the new law, the court examined the state's action with special scrutiny.[156] Plaintiffs had alleged that Pennsylvania's failure to provide notice and the opportunity for a prior hearing violated both the federal regulations and the requirements of due process.[157] Addressing the regulations first, the court divided the issue into its notice and hearing components. As in *Turner* and *Becker,* the state in *Budnicki* argued that it was not obligated to provide notice because the recipients were not entitled to a prior hearing in the case of automatic grant reductions.[158] The court rejected this contention, noting that the right to adequate and timely notice under the regulations exists independently of the right to a prior hearing.[159] The court held that a state must provide adequate notice of the right to a prior hearing even in an across-the-board reduction.

Turning to the regulations' hearing requirement, the court noted that the classification of the reduction effort, whether as an automatic grant adjustment or otherwise, significantly affects the nature of the protections afforded.[160] Specifically, the requirement that recipients allege an incorrect grant computation is crucial in

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154. *Id.* at 549.

155. *Id.* at 549-50.

156. *Id.* at 552.

157. *Id.* at 550.

158. *Id.* at 551.

159. *Id.* The notice requirement has been the focus of much litigation, and many courts that have addressed the issue have considered it independently of the right to a prior hearing. *See, e.g.,* Dilda v. Quern, 612 F.2d 1055 (7th Cir. 1980); Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), *cert. denied,* 420 U.S. 1008 (1975).

160. 450 F. Supp. at 552. Plaintiffs had argued that the state's reduction effort was an attempt to reduce benefits under 45 C.F.R. § 205.10(a)(4) rather than an automatic grant adjustment under § 205.10(a)(5). Such a classification would ease somewhat plaintiffs' burden of arguing the facts. Rather than viewing the two classifications of reduction efforts as separate and distinct, however, the court concluded that automatic adjustments are simply a subset of the more general "action to reduce benefits" under § 205.10(a)(4). The court therefore declared that the elimination of the orthopedic shoe program was both a reduction in benefits and an automatic reduction. 450 F. Supp. at 552.

determining whether the recipient is entitled to a prereduction hearing under the regulations.[161] Recognizing the difficulties, the court contended that because the government had designed the regulations more for direct cash assistance programs, their terms could not be strictly construed in the Medicaid context.[162]

Addressing the substance of the regulatory provisions, the court noted that only those recipients who alleged an "incorrect grant computation" were entitled to a prior hearing when a statewide reduction occurred.[163] Having recognized the validity of such a restriction, the court then presented the following definition of "incorrect computation":

> Just as the term "automatic grant adjustment" must not be construed literally, so must "incorrect grant computation" be interpreted broadly. In the context of the Medicaid program . . . a challenge of incorrect grant computation arises whenever a recipient claims the misapplication of the new regulation to his or her individual situation. So interpreted, section 205.10(a)(5) requires that a pre-reduction hearing be provided for all recipients who assert that due to individualized factual questions the elimination of the orthopedic shoe program does not apply to them.[164]

Although the court's definition does deny a prior hearing to those recipients who can in no way challenge their grant computation, the requirement that the state allow recipients to present information on "individualized factual questions" effectively permits any recipient with any legitimate concern to obtain a hearing. In contrast to the "anti-hearing" courts' focus on the nature of the across-the-board reduction, the *Budnicki* court's perspective is oriented toward the individual recipient's situation. The *Budnicki* court's interpretation of the federal regulations thus concurs more with the Supreme Court's concerns in *Goldberg*.

The *Budnicki* court's view of the due process hearing requirement was as broad as its interpretation of the regulatory provision. The court stated that hearings would be required only for those recipients who could challenge the reduction "on the basis of some factual question or the misapplication of the regulation to their particular situation."[165] The court, however, again offered its own definition of terms, interpreting "factual" questions broadly

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161. *See generally* Part II, section B *supra*.

162. 450 F. Supp. at 552. As the court recognized, however, the regulations cover Medicaid as well as direct cash assistance programs. The efforts expended by the court to side-step the regulations' restrictions are simply indicative of the problems created by the regulations.

163. *Id.* at 553.

164. *Id.*

165. *Id.* at 556.

enough to make them assertable by many recipients.[166] The court rejected the state's argument that across-the-board reductions involved only questions of law or policy.[167] Instead, the court agreed with the approach taken by "those courts which have found that an individual hearing is necessary even when there is an across-the-board change in a state program as a result of state or federal law so long as a program recipient might have individual questions to raise."[168] Although the court criticized the fact-policy distinction used by the "anti-hearing" courts to deny prior hearings,[169] it accepted the validity of the distinction "if correctly applied."[170] Because Pennsylvania had issued a blanket denial of prior hearings due to the across-the-board nature of the reduction, the court found that the state had abused the distinction in this case.[171]

While *Budnicki* thus demonstrates the extremes to which courts have gone in order to overcome the federal regulations, one recent decision, *Viverito v. Smith,*[172] offered an equally, if not more, expansive interpretation of both the regulations and the requirements of due process. In *Viverito* revisions instituted by New York City in its welfare regulations altered the city's method of allocating shelter allowances[173] and resulted in reduced benefits for many recipients.[174] The relevant city welfare regulations permitted the city to reduce benefits without a prior hearing when the city based the change in aid on a change in law or policy.[175] Plaintiffs argued that these regulations, and the city's actions taken pursu-

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166. *Id.* at 554.

167. *Id.*

168. *Id.*

169. *Id.* at 555. *See* Part III, section C *supra.*

170. 450 F. Supp. at 556.

171. The court concluded that courts had not totally discredited the fact-policy distinction, but rather had rejected its application when

> either (1) the recipients demonstrated that there were factual questions involved in the resolution of the question of law or (2) the court concluded that a general regulation which exempted the hearing requirement when only policy questions arose was unworkable since there were inevitable mistakes made by the hearing officer in deciding when questions of fact or only policy would be involved in a recipient's request for a hearing.

Id. The court, however, did not explain exactly how a court should determine when actual "factual" questions have been raised by recipients and when the state has simply abused the distinction.

172. 474 F. Supp. 1122 (S.D.N.Y. 1979).

173. Interestingly enough, the allowances were allocated under New York's Home Relief Program, the same welfare program that had been at issue in *Goldberg. Id.* at 1123.

174. *Id.* The city switched its grant allocation system from one based on individual need to one utilizing fixed maxima for each social services district based on family size. *Id.*

175. *Id.*

ant to them violated both the due process clause and the HHS regulations.[176]

Although the city had sent timely notice of the reduction to all recipients, the notice had made no mention of the recipients' right to a hearing and continued benefits. The city argued that recipients were not entitled to a prior hearing because the reduction raised only issues of law.[177] In rejecting the city's contention and holding the regulations invalid, the court offered a broad perspective on the requirements of both the federal regulations and due process. The court noted section 205.10(a)(5)'s seemingly stringent requirement that recipients affected by automatic adjustments assert an incorrect grant computation before being entitled to a prior hearing.[178] The court, however, argued that the recipients in this case had presented three types of allegations that actually raised factual matters relevant to grant computation, although the city characterized them as "policy" issues. The court classified the recipients' assertions as focusing on questions of estoppel, hardship, and erroneous computation of family size.[179] While the last category seems consistent with the traditional analysis of "factual" issues, the first two subjects represent new twists to an old theme and warrant greater examination.[180]

According to the court, the estoppel question would arise whenever a recipient had relied on the assurances of the welfare agency that benefits would stay the same or would actually increase and had either made greater financial commitments or had expended all his resources.[181] In such a case, the city would be estopped from reducing the recipient's benefits without a prior hearing to determine the nature of the assurances given by the city.[182]

The hardship issue is the most intriguing and far-reaching of the court's three categories. In many ways it goes to the heart of the Supreme Court's concern in *Goldberg* over the "brutal need" of recipients. The court pointed out that several provisions of New York law provided recipients with emergency relief in times of excessive hardship. Consistent with the philosophy of these provi-

176. *Id.* Previously, the court had issued a preliminary injunction against the city, having found the fact-policy distinction unworkable in this context. *See* Viverito v. Smith, 421 F. Supp. 1305 (S.D.N.Y. 1976).

177. 474 F. Supp. at 1125.

178. *Id.* at 1128.

179. *Id.* at 1126.

180. For explication of the family size issue, see *id.* at 1126, 1128.

181. *Id.* at 1129.

182. *Id.*

sions, the court declared that the degree of hardship imposed on recipients by a reduction was a question of fact pertinent to grant computation, warranting a prereduction hearing.[183] As the court related, "[A]ny recipient who alleges that his or her family will become destitute as a result of a reduction in benefits and requests a hearing is entitled to receive assistance under this provision at least until the time of the fair hearing."[184]

The court's analysis of the requirements of due process further reinforced its conclusions. In fact, the court implied that recipients were entitled to greater protections under the Constitution than those facially provided by the federal regulations.[185] Using the *Goldberg* balancing test, the court stated that the grave interests at stake for recipients dwarfed the city's concerns. As the court declared, "where a reduction in benefits affects a recipient's ability to subsist with any semblance of decency, the degree of individual hardship is too great to be balanced away."[186] Thus emphasizing the need for caution, the court rejected under due process the fact-policy distinction that it had held acceptable in the regulatory scheme,[187] finding the distinction unworkable in the welfare context.[188] The court pointed out that while recipients might easily allege the error-in-family-size issue, the successful pleading of such mixed fact-law issues as estoppel and hardship would be too difficult for most recipients.[189] Consequently, the court concluded that "imposing the burden of pleading facts on the shelter allowance recipients is to deprive them unfairly of the right to a hearing."[190] Therefore, in the court's view, due process required that the state grant a hearing to any recipient who alleged not only erroneous calculation of family size but also to any recipient who alleged such mixed fact-policy questions as estoppel and hardship. The court also insisted that the state continue benefits until the issuance of a hearing decision in cases in which recipients allege hardship or estoppel.[191]

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183. *Id.* at 1130.
184. *Id.*
185. *Id.* at 1132-33.
186. *Id.* at 1132.
187. *Id.* at 1133.
188. *Id.* at 1133-34.
189. *Id.* at 1132-33.
190. *Id.* at 1133.
191. *Id.*

E. Analysis

Although both the *Budnicki* and *Viverito* courts based their holdings in part on an expansive reading of section 205.10(a)(5) of the HHS regulations, their interpretation of the requirements of constitutional due process effectively nullified the restrictive quality of that section when applied to the facts of those cases. The two decisions illustrate vividly the great potential for conflict between the regulations and the requirements of due process. Under both the constitutional and statutory approaches, the recipient must allege some legitimate complaint regarding his reduced benefits in order to obtain a prior hearing. Under the regulations, however, that complaint must pertain to "incorrect grant computation." While under the *Budnicki* and *Viverito* courts' broad interpretation of section 205.10(a)(5) nearly any genuine question could be considered an allegation of incorrect computation, this restriction still constrained the courts in determining that the regulations actually required a hearing. The courts, however, were not similarly constrained when discussing recipients' *constitutional* right to a prior hearing. Both courts articulated a broad view of due process that, like the analysis in *Yee-Litt v. Richardson,* rejected the validity of the fact-policy distinction and essentially granted a prereduction hearing to any recipient with a bona fide grievance. Although given the facts in *Budnicki* and *Viverito,* the outcome was the same under both the regulations and the constitutional analysis, the due process requirements articulated in each decision were clearly more expansive than those demanded by even the broadest interpretation of the regulations. Moreover, even in cases such as *Turner* and *Becker,* in which the courts have managed to construe plaintiffs' claims to constitute the requisite narrow factual issues, the courts have had to overcome the regulations' restrictive import to hold that factual issues can arise in the context of state-wide reductions. Thus, in situations in which courts could not mold recipients' legitimate complaints to fit the language of the regulations, the gap between the requirements of due process and even an expansive reading of section 205.10(a)(5) would become apparent. In any such conflict the due process requirements would, of course, override the regulations. A court would then face the task of choosing between ignoring or voiding the regulations, unless it could read the regulations broadly enough to eliminate totally their restrictions on pleading. If such maneuvering is necessary, however, section 205.10(a)(5)'s troublesome provision should either be rewritten to reflect the requirements of due process or simply be

eliminated. Otherwise, continued judicial innovation will be required, and recipients will continue to face recalcitrant welfare agencies that use their own literal interpretations of the regulations to deny prior hearings, regardless of what the courts do.

Additionally, the extremes to which the *Viverito* court had to go to recognize "excessive hardship" as a valid ground for granting a prior hearing demonstrates one of the major shortcomings of both section 205.10(a)(5) and the cases that insist on the validity of the fact-policy distinction. Although the courts can stretch the HHS regulations to "require" a prior hearing because of the potential for individual hardship in automatic grant adjustments, the regulations themselves discourage such a broad reading. Couched in restrictive language that encourages use of the questionable fact-policy distinction, the regulations actually provide an incentive to state welfare agencies to resist the recognition of "hardship" as grounds for a prior hearing. Ironically, a general overview of the focus of the regulations would seem to imply that states should consider hardship one of the most legitimate reasons for a prereduction hearing. The regulations themselves state that they are intended to implement the Supreme Court's decision in *Goldberg v. Kelly*. One of the court's greatest concerns in *Goldberg* was that recipients in a condition of "brutal need" not be improperly deprived of their means of survival. Even "anti-hearing" courts such as *Merriweather* and *Provost* recognized this concern for the potential hardships facing reducees, although they accorded it less weight than the "pro-hearing" courts. Moreover, as the *Rochester* court recoguized, the major purpose of the regulations' timely notice requirement is to give recipients sufficient time to "adjust" their living standards to accommodate the impending reduction of their benefits. The *Rochester* court, however, had no answer for those families whose economic situations make them unable to "adjust." With only a timely notice requirement and nothing more, the regulations defeat what ought to be their major purpose. By recognizing "excessive hardship" as a legitimate basis for a prior hearing, the *Viverito* court judicially filled this great gap in the regulations.[192]

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192. Under the *Viverito* rationale, if a recipient alleges that the proposed reduction would create excessive hardship for him or his family, a state must provide a prior hearing to examine this complaint and must continue benefits until a hearing decision is tendered. Carrying the analysis to its next step, the logical conclusion would seem to be that if the hearing panel concluded that the reduction would cause excessive hardship and that the recipient would be unable to make the expected "adjustments," the panel would postpone

IV. Conclusion

Although the Supreme Court has yet to rule on the reduction issue, the more recent, well-reasoned cases indicate that due process necessitates that a state provide recipients with the opportunity for a hearing before it implements a wholesale or across-the-board reduction of benefits. Although some courts have held that hearings are not required before a state may effectuate such reductions, they have based their conclusion on a fact-policy distinction that numerous other courts have questioned and discredited. By focusing on the nature of the state's reduction effort rather than on the claims or condition of the individual recipient, the "anti-hearing" courts have failed to recognize that even in across-the-board reductions there will be individual questions that must be examined before a recipient's benefits can be reduced. Even if one accepts the use of the fact-policy distinction, there will be questions of "fact" demanding resolution at a hearing.

The federal regulations, although intended to facilitate recipients' right to a prior hearing in many cases, have often worked to deprive them of that right when states have implemented statewide benefit reductions. By insisting that a recipient plead "incorrect grant computation" before requiring a hearing in automatic adjustments, the regulations have placed both excessive restrictions on the hearing right and an unfair and unconstitutional burden on recipients to plead "facts," a term not adequately defined by the courts or the agencies. By so restricting the hearing right and embracing the fact-policy distinction, the regulations have provided an incentive to state welfare agencies to deny all prior hearing requests when they seek to implement wholesale reductions. Indeed, the regulations have encouraged an abuse of discretion on the part of agencies, even though *Goldberg v. Kelly* dictates great caution. This abuse has forced recipients to engage in protracted litigation to secure their rights. Some recipients have been fortunate enough to come before broad-minded courts that understand their dilemma and order prior hearings. Other recipients have not been so fortunate.

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the reduction for that recipient until such time as the recipient could make the adjustment. The panel could review the recipient's status periodically to determine when due process would permit the implementation of the reduction. Such a process would be neither unduly cumbersome nor unreasonably costly to the state. Indeed, *Goldberg* demonstrates that a state must comply with due process despite the attendant costs. Moreover, the cost of continuing benefits to a recipient when only a reduction is proposed are much less than those involved when a complete termination of benefits is at issue.

Several enlightened courts have recognized that due process does require a prereduction hearing even in across-the-board reductions. These courts have recognized that the brutal need of most recipients necessitates extra care on the part of the state to insure that it does not unfairly and improperly deprive recipients of their very means of existence. Many of these courts have found the fact-policy distinction unworkable in the welfare context and have rejected it as a means for deciding whether a recipient is entitled to a prior hearing. Other courts have accepted the distinction in theory, but have found that state agencies have abused it in denying hearings. Under both approaches the courts have concluded that due process dictates that the focus of the inquiry be upon the type of argument made by the individual recipient and upon his individual situation. The courts have rejected an inquiry that focuses on the nature of the state's reduction effort itself.

The conclusions of these "pro-hearing" courts on the due process issue have demonstrated dramatically the problems created by section 205.10(a)(5) of the HHS regulations. When this constitutional due process analysis has revealed a potential conflict with the restrictive language of that section, the courts have been hesitant to invalidate the regulations. Instead, the courts have had to resort to various judicial innovations and broad interpretations of the scope of section 205.10(a)(5) in order to make it comport with the requirements of procedural due process. The result is a lack of agreement among the courts concerning the exact extent to which the section requires a prior hearing in across-the-board reductions. While such broad perspectives as those of the *Budnicki* and *Viverito* courts are definitely more desirable, it is likely that state agencies will seek to follow the holdings of the "anti-hearing" courts as long as section 205.10(a)(5) is couched in its restrictive terminology. Consequently, the solution is either to rewrite the regulations to incorporate the broad view of the *Viverito* court into some definition of "incorrect grant computation," or simply to eliminate the provision entirely and ensure recipients affected by across-the-board reductions the same due process rights as those facing individualized cut-backs. In either event, due process dictates the elimination of the current incentive that the regulations provide to states to deny all hearing requests when a state-wide reduction is implemented.

STEPHEN ALAN OWENS