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# Thurgood Marshall's Dissents In Defense of the Poor

John T. Hand\*

In two landmark cases of the late 1960s, the United States Supreme Court set an exceptionally positive tone for public assistance as a force capable of integrating poor people with others in our society. In *Goldberg v. Kelly*,<sup>1</sup> Mr. Justice Brennan noted that society had come to realize that “forces not within the control of the poor contribute to their poverty,” and that: “[w]elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.”<sup>2</sup> Similarly, in *Shapiro v. Thompson*,<sup>3</sup> Justice Brennan expressed a view of public assistance that contradicted negative attitudes about the poor that have their roots in the Elizabethan Poor Laws.<sup>4</sup> He wrote that it is just as acceptable for a poor mother to move from one state to another to seek a better life, including better welfare benefits for herself and her children, as it is for a person to relocate in order to obtain better educational opportunities.<sup>5</sup>

Underlying *Goldberg* and *Shapiro* are the ideas that welfare benefits are uniquely important entitlements and that people can receive assistance yet retain their dignity and responsibility to make independent decisions about how they will live. These were themes of the civil rights movement and of several feder-

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1. 397 U.S. 254 (1970) (holding that public assistance may not be terminated without a prior evidentiary hearing at which the recipient may be represented by counsel).

2. *Id.* at 265.

3. 394 U.S. 618 (1969). Durational residence requirements for public assistance constitute an invidious penalty on a person's liberty to travel from one state to another, since they preclude poor families from obtaining “the very means to subsist.” *Id.* at 627.

4. *Id.*

5. *Id.* at 632.

ally sponsored programs of the late 1960s which sought to empower the poor as well as to feed, clothe and house them. They are also themes which lie at the heart of Thurgood Marshall's dissenting opinions in welfare cases.

Over the past two decades, the trend in American welfare policy has been to make the poor live on less money by standardizing allowances and failing to increase payments in relation to the cost of subsistence needs. At the same time, governments have been imposing systems that closely monitor the poor and require recipients to obey increasingly stringent eligibility rules. Against these trends, there are few voices being heard. The poor are poor in power; they are easy targets for legislative and administrative action based upon racial and class stereotypes and prejudice.

Justice Marshall was concerned not only about unjustified reductions in public assistance but also, the ease with which legislatures — and the Supreme Court — rationalized the poverty of our nation's response to human need. In a number of cases, Justice Marshall protested the Supreme Court's refusal to come to the aid of the politically powerless segment of our society.

After the *Goldberg* and *Shapiro* decisions, it was shocking indeed to welfare advocates when the Supreme Court handed down *Dandridge v. Maryland*,<sup>6</sup> sustaining that state's policy of discriminating against large families in its public assistance program.<sup>7</sup> *Dandridge* devastated the nascent conception that welfare benefits enjoy a constitutional importance greater than the sale of used rags. Justice Marshall believed that the Court's application of the rational basis test in such circumstances ignored the importance of welfare benefits and signalled the "emasculatation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration."<sup>8</sup> Then, in *Lyng v. Castillo*,<sup>9</sup> he rebuked the majority for condoning food

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6. 397 U.S. 471 (1970). If there is "some 'reasonable basis'" for a legislative classification affecting welfare recipients, it must be upheld under the Equal Protection Clause. *Id.* at 485. Thus, the State of Maryland could implement a system of public assistance whereby allowances increased depending on the number of children in the family up to a limit of \$250 a month for five children living with a parent.

7. *Id.* at 486.

8. *Id.* at 508 (Marshall, J., dissenting).

9. 477 U.S. 635 (1986).

stamp legislation that intruded into the privacy of the dining room and told poor people with whom they must eat in order to obtain food stamps.<sup>10</sup> Here, as in *Dandridge*, Justice Marshall would have held that: "when analyzing classifications affecting the receipt of governmental benefits, a court must consider 'the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.'"<sup>11</sup>

Since family structure and survival are not of the same order as a "refusal to let a merchant hawk his wares on a particular street corner,"<sup>12</sup> Justice Marshall believed that the federal statute requiring related household members to file together for food stamps should be strictly scrutinized and, consequently, held invalid under the Fifth Amendment of the United States Constitution.

In *Bowen v. Gilliard*,<sup>13</sup> the government's intrusion on family living arrangements was even more direct and substantial than in *Lyng*. Since 1984, Congress has required that children whose absent fathers support them be included in the public assistance household and that support payments be paid to the state to reimburse it for assistance granted to the whole family.<sup>14</sup> This diversion of a child's support income "means that the father is rendered powerless in most cases to respond to the special financial needs of his child."<sup>15</sup> If, for example, the absent parent wishes to provide his child with a special diet or music lessons, such payments would likely be merged into his support obligation and thus paid to the state. Consequently, the impact of this statutory requirement on the parent-child relationship is

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10. *Id.* at 643-47.

11. *Id.* at 644 (Marshall, J., dissenting) (quoting *Dandridge*, 397 U.S. at 521 (Marshall, J., dissenting)). Justice Marshall previously argued that classifications based on poverty should be subject to heightened judicial scrutiny because poverty is "a suspect classification which demands exacting judicial scrutiny." *James v. Valtierra*, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting).

12. *Lyng*, 477 U.S. at 644.

13. 483 U.S. 587 (1987).

14. The Deficit Reduction Act of 1984, 98 Stat. 494, 1145, 42 U.S.C. § 602(a)(38) (1988).

15. *Bowen*, 483 U.S. at 619-20 (Brennan, J., dissenting).

direct, because a child whose mother needs AFDC<sup>16</sup> cannot escape being required to choose between living with the mother and being supported by the father. It is substantial because the consequence of that choice is damage to a relationship between parent and child. . . . As the record in these cases testifies, a typical father will feel strongly that his son should be supported by him and not by public assistance. The typical mother will feel that loss of the father's support is a price worth paying to keep the child with her. The child may well be swept up in a custody dispute over which living arrangement is in its best interest. . . . In short, the Government has sliced deeply into family life, pitting father against mother, with the child in the middle.<sup>17</sup>

In *Jefferson v. Hackney*,<sup>18</sup> the State of Texas paid less money to poor families with dependent children than it paid to aged, disabled, and blind people, despite having established an identical standard of need for each group.<sup>19</sup> When the Court sustained this discrimination, Justice Marshall disagreed, stating that Congress intended that similarly situated needy persons must be treated alike.<sup>20</sup> He also pointed out that the disfavored group — poor families with minor children — were 87% black or Mexican-American.<sup>21</sup> The record contained numerous statements by state officials indicating that poor families with children received lower funding than aged and disabled persons because the program for families was not politically popular.<sup>22</sup>

*New York State Department of Social Services v. Dublino*,<sup>23</sup> upheld New York State's imposition of additional work requirements that were not specified by Congress in the federal welfare program for families.<sup>24</sup> The danger, Justice Marshall believed, was too great that states would bow to local pressure and add restrictions not intended by Congress. "Myths abound in this area. It is widely yet erroneously believed, for example, that

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16. Aid to Families with Dependent Children, the federally sponsored public assistance program. 42 U.S.C. § 601 (1988).

17. *Bowen*, 483 U.S. at 624 (Brennan, J., dissenting).

18. 406 U.S. 535 (1972).

19. *Id.* at 574 (Marshall, J., dissenting).

20. *Id.* at 575-76.

21. *Id.* at 575.

22. *Id.*

23. 413 U.S. 405 (1973).

24. *Id.* at 408.

recipients of public assistance have little desire to become self-supporting. [citation omitted] Because the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions."<sup>25</sup> Seeking to obviate the possibility that prejudices would lead state legislators to enact repressive laws applicable to the federally sponsored welfare program for poor children and their parents, Justice Marshall wrote that the federal statutes precluded states from adding conditions of eligibility which Congress has not clearly authorized.<sup>26</sup>

Thus, over Justice Marshall's vigorous dissents, the Supreme Court has sanctioned discriminatory restrictions on eligibility for welfare benefits and governmental intrusiveness into the lives of the poor. Possibly the most far-reaching intrusion on personal privacy to find support in the Court's decisions is that of *Wyman v. James*,<sup>27</sup> which approved warrantless searches of welfare recipients' homes as a condition of eligibility for assistance.<sup>28</sup> Justice Marshall did not agree that welfare mothers should be treated like unruly children:

In deciding that the homes of AFDC recipients are not entitled to protection from warrantless searches by welfare caseworkers, the Court declines to follow prior case law and employs a rationale that, if applied to the claims of all citizens, would threaten the vitality of the Fourth Amendment. This Court has occasionally pushed beyond established constitutional contours to protect the vulnerable and to further basic human values. I find no little irony in the fact that the burden of today's departure from principled adjudication is placed upon the lowly poor.<sup>29</sup>

The Court's indifference to the inability of the poor to take advantage of liberties and privacy accorded to the rest of society

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25. *Id.* at 431-32 (Marshall, J., dissenting) (citation omitted).

26. However, Congress itself has enacted welfare statutes restricting eligibility based on stereotypes and political prejudices. *Lyng v. International Union, UAW*, 485 U.S. 360, 385 (1988) (Marshall, J., dissenting). Justice Marshall, citing Congress' attempt to disqualify "hippies" from receiving food stamps in *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), viewed the disqualification of strikers from eligibility for food stamps as nothing but the same "bare congressional desire to harm a politically unpopular group." *Id.*

27. 400 U.S. 309 (1971).

28. *Id.* at 326.

29. *Id.* at 347 (Marshall, J., dissenting).

was again condemned by Justice Marshall in *Beal v. Doe*.<sup>30</sup> In that case, the Court ruled that the federal Medical Assistance program<sup>31</sup> does not require participating states to include non-therapeutic abortions in their medicaid programs.<sup>32</sup> Justice Marshall wrote:

I am appalled at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children. . . . If there is any state interest in potential life before the point of viability, it certainly does not outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women.<sup>33</sup>

One of the more cynical of the Supreme Court's failures to accord constitutional protection to the poor is its decision in *Clark v. Community for Creative Non-Violence*.<sup>34</sup> Homeless people sought to demonstrate their plight graphically by a round-the-clock protest, including sleeping, in Lafayette Park across the street from the White House.<sup>35</sup> The primary purpose of including sleeping in the park was " 'to re-enact the central reality of homelessness.' "<sup>36</sup> "By using sleep as an integral part of their mode of protest, [the homeless] 'can express with their bodies the poignancy of their plight.' "<sup>37</sup>

Yet, the Court upheld the United States Park Service's ban on sleeping in Lafayette Park as if the protestors were merely trying to save on a hotel bill. The majority gave short shrift to the demonstrators' First Amendment rights by applying minimal scrutiny to the Park Service's regulations since they fell under the rubric of time, place and manner regulation rather than content regulations.<sup>38</sup> Justice Marshall realized that a content-neutral regulation is fully capable of unnecessarily dimin-

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30. 432 U.S. 438 (1977).

31. 42 U.S.C. §§ 1396-1396s (1988).

32. *Beal*, 452 U.S. at 447.

33. *Id.* at 456-57, 461 (Marshall, J., dissenting).

34. 468 U.S. 288 (1984).

35. *Id.* at 289.

36. *Id.* at 303-04 (Marshall, J., dissenting) (quoting Brief for Respondents).

37. *Id.* at 306 (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 601 (D.C. Cir. 1983)).

38. *Id.* at 298.

ishing First Amendment freedom of expression:

A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse. [citation omitted] This sort of latent inequality is very much in evidence in this case for respondents lack the financial means necessary to buy access to more conventional modes of persuasion.

A disquieting feature about the disposition of this case is that it lends credence to the charge that judicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas.<sup>39</sup>

Justice Marshall's dissents deplore not only the Supreme Court's standard for constitutional adjudication in the area of welfare legislation but also its frequent reliance upon unjustified premises about how the poor live and act. *United States v. Kras*<sup>40</sup> raised an important issue concerning the due process rights of the poor to have access to the judicial system, i.e., the validity of requiring an indigent person to pay a fee for filing a petition in bankruptcy. Justice Marshall castigated the majority which believed that \$1.28 a week is pin money that no one would miss: "[b]ut no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."<sup>41</sup>

Today, the poor face a future that is bleak both as to their material needs and their constitutional rights. Like the Reverend Martin Luther King, Jr., Justice Thurgood Marshall had "the audacity to believe that peoples everywhere can have three meals a day for their bodies, education and culture for their minds, and dignity, equality, and freedom for their spirits."<sup>42</sup>

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39. *Id.* at 313-14 n.14.

40. 409 U.S. 434 (1973).

41. *Id.* at 460 (Marshall, J., dissenting).

42. MARTIN LUTHER KING, JR., *THE WORDS OF MARTIN LUTHER KING, JR.* 25 (Coretta Scott King ed. 1983).



Sadly, Justice Marshall and most of the other great leaders of the civil rights movement are now gone. Though the times may not seem auspicious for a revival of the spirit of those days, we are very much in need of the passion of that movement.