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JUSTICE SCALIA, POVERTY
AND THE GOOD SOCIETY

Toby Golick*

Why do we care about Justice Scalia’s view of the good society, given his limited view of the role of the courts as “not inquisitors of justice but arbiters of adversary claims”?1 Maybe Justice Scalia thinks we already have a “good society,” or at least a good enough society, and that as a result, the courts have only the classic conservative role of keeping things as they are. But judges make decisions and decisions change things at least a little; the changes may be steps forward or backward, and when a Supreme Court Justice is taking the steps, it is important enough to worry about. In addition, when a judge is not entirely predictable, his view of society may be interesting enough to justify further analysis. Also, judges like Scalia who have a reputation for not only being smart, but also “intellectual,” are particularly interesting for scholars and lawyers, who hope despite all evidence to the contrary that someone “intellectual” will also be “fair-minded.” 2

Justice Scalia’s opinions in cases involving government benefits for the poor provide some clues about his view of the good society. From these opinions we learn that in the good society, the poor had better not look to the courts for help. In virtually every case involving government benefits, Justice Scalia votes to defeat the claims of public assistance recipients.3 This paper examines several of Justice

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2 I have misstated this proposition somewhat. A practicing lawyer wants a fair judge only if that is the only way to win the case.
3 See, e.g., Sullivan v. Stroop, 110 S. Ct. 2499 (1990) (sustaining regulation denying needy children the benefit of a $50 disregard for “child support” if they received Social Security benefits); Bowen v. Gilliard, 483 U.S. 587 (1987) (upholding policy requiring that income of all family members in same household be considered, even though this burdened right to live together); Lyng v. International Union, 485 U.S. 360 (1988) (sustaining statute denying food stamps to strikers); Bowen v. Yuckert, 482 U.S. 137 (1987) (upholding restrictive Social Security disability regulations); Mullins Coal v. Director, Office of Workers Compensation Programs, 484 U.S. 135 (1987) (upholding Labor Department regulations making it more difficult for miners to get black lung benefits); Cardebring v. Jenkins, 485 U.S. 415 (1988) (holding that welfare recipients are not entitled to individualized notice before their benefits were terminated as a result of the lump sum rule); Schweiker v. Chilicky, 487 U.S. 412 (1988) (social security recipient whose benefits were illegally terminated has no remedy in tort for money damages).
Scalia's opinions to try to understand why he is so resistant to the claims of the poor.

I. SCALIA'S VIEW OF CHALLENGES BY WELFARE RECIPIENTS TO PUBLIC BENEFIT REGULATIONS

We should put Justice Scalia's insensitivity to the poor in context. Even in the good old days (to poverty lawyers, at least) of the Warren court, when lawyers for the poor spent hours strategizing about how to get to the Supreme Court as quickly as possible, the Court was never willing to recognize a basic right to food and shelter comparable to the basic right to, say, erect a billboard proclaiming that one is hungry. Now, in a much more conservative era, poverty lawyers have largely abandoned generalizations about the right to life (the real "right to life" which means a right to a decent level of subsistence) and have turned to subsections of the subsections of statutes to try to squeeze out a few more dollars for the poor. Lawyers for the poor used to feel like revolutionaries articulating new social philosophies; now—searching for loopholes in restrictive statutes—we feel like the tax lawyers for the poor.

Lukhard v. Reed is an example of the efforts by lawyers for the poor to find exemptions to ameliorate the hardship of unfair public

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5 Dandridge v. Williams, 397 U.S. 471 (1970) held that a regulation providing ceilings on welfare grants, regardless of family size, does not violate equal protection or Social Security Act and signalled the limits of the Supreme Court's willingness to read the Constitution expansively to alleviate problems of poverty. And after the euphoria of our numerous victories before the Court wore off, lawyers for the poor were faced with the reality that (despite the ringing rhetoric in some of the decisions), most of the victories were based on statutory interpretations or on due process requirements for fair procedures, rather than fair amounts of benefits. See, e.g., King, 392 U.S. at 309; Goldberg v. Kelly, 397 U.S. 254 (1970). The good news is that one does not lose one's welfare benefits without a hearing. The bad news is that welfare benefits are not enough to live on.

6 The term "right to life" was originally used by poverty lawyers in the 1960s to refer to a right to have at least adequate income to sustain life decently. The term, abandoned to the antiabortion forces, now refers only to the right of a fetus to be carried to term and born, with no particular guarantee about life afterwards.


assistance regulations. The issue in this case was whether a personal injury award to a public assistance recipient should be treated as "income" or as a "resource." Not surprisingly, for many years no one—including public assistance recipients who had received personal injury awards—cared about this question. Whether a personal injury award was characterized as income or resource, the rule was that the recipient became ineligible for public assistance for as long as she had the extra money.

The issue of whether a monetary award should be treated as "income" or "resource" suddenly became important in 1981 when Congress enacted an extraordinarily harsh series of laws restricting government welfare benefits under the Aid to Families with Dependent Children (AFDC) program. One of the meanest of these provisions was the so-called lump sum rule, designed to prevent welfare recipients who receive an amount of money exceeding the state's monthly income eligibility limit from spending it right away in order to qualify again for public assistance. Under the lump sum rule, a welfare recipient who receives an amount of income exceeding the "standard of need" (the minimum subsistence level on which welfare benefits are based) is ineligible for as many months as that income would last if the recipient were to spend only an amount equal to the state's standard of need each month.

The lump sum statute was generated by the fantasy of a welfare recipient, perhaps the hated welfare queen, somehow coming into thousands of dollars—the lump sum at the end of the rainbow—and spending it all in one month of high living, instead of sticking to a budget like a "responsible" adult. Given that the "standard of need" is pitifully small even in the most generous states, the reality is that most welfare recipients lucky enough to come into some extra money cannot make it last for the period specified in the lump sum formula. So if the long lost uncle of a welfare recipient dies and leaves her a few thousand dollars in his will, then she will be worse off than she was before—with no more money than if she was getting welfare, and with a lot more trouble both in conserving the money for the required period and in dealing with the administrative headache of making sure that benefits resume promptly when the lump sum runs out. The situation of the individual who receives a personal injury award is even worse; in that case the money is seldom just a lucky windfall unaccompanied by hurt and pain and extra medical expenses.

In response to the lump sum rule, Virginia and some other states (who participate in the AFDC program and must comply with federal law in order to receive federal reimbursement for the program) re-
vised their welfare regulations to treat personal injury awards (although not proceeds from the sale or conversion of real or personal property) as income, subject to the lump sum rule. Affected welfare recipients sued, claiming that treating personal injury awards as “income” was not permitted under federal law because personal injury awards, being purely compensatory and not representing real gain or profit to the recipients, are not income. In Justice Scalia’s plurality opinion in *Lukhard v. Reed*, the court rejected the welfare recipients’ claim by a five-to-four vote.9

I am persuaded by Professor Kannar’s analysis10 that Justice Scalia is not purely result-oriented, and does not start the process of deciding a case with the view that poor people must always lose. Rather, as Professor Kannar points out, Justice Scalia’s results derive from his methodology. Unfortunately however, given this methodology, poor people always lose. Let’s watch Justice Scalia’s methodology in action in *Lukhard*, the lump sum case described above.

First, Justice Scalia ignores the consequences of his decision on the persons affected, who are barely mentioned in the opinion. (Compare Justice Powell’s dissent, which describes the hardship of impoverished plaintiffs who are forced to choose between using their personal injury awards for medical care and providing for the basic needs of their children.) Presumably, he ignores consequences because he is rigorously not result-oriented; while sometimes this approach might be beneficial (as Professor Kannar points out, not being result-oriented will often help criminal defendants), it will seldom help the poor who often need a bit of mercy as much or more than they need rigorous readings of rules.

Second (or he would probably say “first”), Justice Scalia looks at the “plain language” of the statutory provision at issue, which here states that the lump sum rule applies to “income.” At this point, the welfare recipients lose the case, just as they will lose every case where it is claimed that a regulation is inconsistent with a statute. Language is almost always elastic enough (the “treachery and versatility of our language”)11 to accommodate multiple meanings including the meaning claimed by the administrative agency. So of course even though the term “income” usually does not include a personal injury award, surely the word is broad enough to mean any money that comes in, and so Justice Scalia finds.

Third, Justice Scalia rejects the welfare recipients’ argument

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9 Id.
based on the administrative and legislative history of the AFDC program. There is a lot to say about the history and purpose of the AFDC program, which is to protect needy families, and particularly needy children. However, Justice Scalia ignores the question (the answer to which decided the case for Justice Powell, who wrote the dissent)\(^\text{12}\) of whether a provision working such substantial hardship on needy families suffering personal injury could be consistent with a congressional scheme to benefit needy families. Instead, Justice Scalia concentrates his analysis on the microhistory of the administrative letters and directives issued by the federal agency.

Because Justice Scalia has frequently written skeptically about how legislative and administrative history is made and why it is unreliable, it is curious that he chooses to give credence to "history" as counterfeit as that presented here. The "history" consists of recent administrative rulings written by the conservative bureaucrats who took over the agency after the election of Ronald Reagan. These administrative rulings, every one of which was written after the enactment of the lump sum rule, announce that there is "long-standing precedent" for the states being able to treat personal injury awards as income, but not a single older document demonstrates the validity of the recent documents' version of history. Nor does the record show that any state has ever availed itself of this "long-standing precedent."

Justice Scalia, suggesting that it is inappropriate "to speculate upon what Congress would have said if it had spoken," rejects the welfare recipients' arguments based on congressional intent: "the legality of Virginia's policy must be measured against the AFDC statute Congress passed, not against the hypothetical statute it is most 'reasonable to believe' Congress would have passed had it considered the question of personal injury awards."\(^\text{13}\) Justice Scalia's approach to congressional intent knocks out the last pillar of the welfare recipients' argument in this case and is an ominous portent to public assistance advocates in other cases. Public benefit programs are enacted with generally benevolent purposes (or, at least, generally benevolent purposes are announced), and lawyers for the poor rely on these intentions in their arguments that particular restrictive regulations violate this intent. If so little weight is accorded to the intent and context of the statute, the welfare recipients challenging a restrictive regulation have little on which to base their arguments.

Justice Scalia next makes fun of the welfare recipients' argument

\(^{12}\) See Lukhard, 481 U.S. at 392 (Powell, J., dissenting). Justice Powell's dissenting opinion was joined by Justices Brennan, Marshall and O'Connor.

\(^{13}\) Id. at 376 n.3.
that the personal injury award should be treated as a resource because the award compensates for damage to the "resource" of a healthy body. Justice Scalia responds that "since healthy bodies are worth far more than the statute's $1,000 family resource limit... acceptance of respondents' major premise would render every family ineligible for AFDC benefits." If this is a joke, it is chilling. However it seems not to be a joke because there is no further effort to respond to the welfare recipients' argument on this point. But of course, acceptance of the premise does not make all welfare recipients with healthy bodies ineligible until they sell enough body parts to deplete their resource for the simple reason that certain resources of public assistance recipients have never been counted in determining eligibility. The remark about healthy bodies, however, suggests that it is not just the restrictions in Justice Scalia's methodology with which welfare recipients must contend, but a degree of callousness as well.

_Sullivan v. Everhart_ is another example of the prevailing genre of technical, statutory challenges to public benefits regulations—in this case, challenges to the Social Security Administration rules and regulations that govern overpayments and underpayments. Again, Justice Scalia's methodology results in poor people losing the case.

The issue in the case, as described by Justice Scalia's majority opinion, sounds dry and uninteresting:

If the Secretary of Health and Human Services determines that a beneficiary has received "more or less than the correct amount of payment," the Social Security Act requires him to effect "proper adjustment or recovery," subject to certain restrictions in the case of overpayments. This case requires us to decide whether the Secretary's so-called "netting" regulations, under which he calculates the difference between past underpayments and past overpayments, are merely a permissible method of determining whether "more or less than the correct amount of payment" was made, or are instead, as to netted-out overpayments, an "adjustment or recovery" that must comply with procedures for recovery of overpayments imposed by the Act.

And the hypothetical examples Justice Scalia uses to illustrate the problem make it sound both uninteresting and unimportant. In reality, the problem of Social Security underpayments and overpayments is, if not exactly fascinating, of tremendous importance to affected individuals, almost all of whom are poor—a fact you would not learn from reading Justice Scalia's opinion.

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14 _Id._ at 381.
16 _Id._ at 962.
Overpayments and underpayments occur frequently in the error-prone and complex world of Social Security benefit computations, and often amount to thousands of dollars—huge sums for all recipients of Supplemental Security Income (for whom poverty is a condition of eligibility) and for many, if not most, Social Security recipients who are by definition elderly or disabled (or their dependents or survivors). In recognition of the fact that overpayments are often not the fault of the recipient, and that repayment can cause great hardship if the money has been spent, Congress has mandated that the Social Security Administration must waive collection of overpayments from any recipient who is without fault and if “adjustment or recovery would defeat the purposes” of the Act or “would be against equity and good conscience.”

In general, therefore, waiver is appropriate if the overpayment was not the recipient’s fault (note that this is quite a strict standard—it is not enough that the recipient did nothing to cause the overpayment; the recipient must also be unaware that the payments are in the wrong amount) and, in addition, if recovery of the overpayment would cause financial hardship.

With few exceptions, as a practical matter, the only individuals who ever meet the test for waivers are poor. In 1979, the Supreme Court (recognizing the importance of the waiver provisions) read into the statute a requirement for a prior oral hearing before a requested waiver was denied. In 1989, the Court considered a challenge to the validity of regulations promulgated by the Secretary to defeat the statutory waiver provisions when a recipient had received both underpayments and overpayments. Instead of (as in the past) considering the overpayments separately to determine if waiver applied, the overpayment and underpayment are calculated together (“netted”) and the recipient has no opportunity to seek waiver of any part of the overpayment netted against the underpayment.

Justice Scalia, writing for a divided five-to-four Court, found no problem with this regulatory scheme. His approach is profoundly discouraging to advocates for the poor.

First, he neutralizes the issue by ignoring the human dimensions of the problems faced by plaintiffs who live in a real world of poverty, illness and overdue bills. He illustrates the problem raised by the case in terms of a “hypothetical” couple, coolly called Mr. A and Mrs. B,

each of whom has underpayments and overpayments amounting to under $50. In contrast, Justice Stevens in his dissenting opinion, chooses the real life example of the plaintiff Emil Zwiezen and his wife, who lost thousands of dollars in benefits because of the netting rule and as a result "could not pay his water bills, had fallen behind in his house payments, and feared that his doctor and druggist would stop providing him medical care."^21

Justice Scalia’s next step is to look at the "plain" language of the statute, and of course (as will almost always be possible) there is a way to read the words to permit the result reached. As Justice Felix Frankfurter has pointed out, "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."^22

Reaching this result requires ignoring the intent of Congress, as reflected in the mandatory language of the waiver statute. Because waiver is guaranteed for "any" adjustment or recovery Justice Scalia writes that the agency is not engaged in adjustment or recovery when it nets an underpayment against an overpayment, but is simply calculating whether more or less than the correct amount of payment has been made. Only after that calculation is made, in Justice Scalia’s view, does the Secretary decide whether any remaining overpayment should be waived.

The next step is to determine if the result accords with the statute, but here, as in Lukhard v. Reed, the test is a negative one—not is it the result most consistent with the statutory scheme, but is it an "absurd" result? Justice Scalia’s answer is that it is not absurd, because it is not as much of a hardship not to receive a payment due (when an underpayment is reduced by a past overpayment) as it is to have to pay over cash, so the waiver provisions need only apply to the latter. But if the only test a regulation need meet is that it does not produce an "absurd" result, any challenge to a regulation does not stand much chance.

II. IS THERE ANYTHING TO BE HAPPY ABOUT?

It is sometimes suggested that Justice Scalia’s narrow view of the role of the Court may, in the end, be a good thing given the Court’s current composition. Regrettably, however, there are some signs that when private property interests are threatened, deference to the legis-

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21 Sullivan, 110 S. Ct. at 970 (Stevens, J., dissenting, joined by Justices Brennan, Marshall and Kennedy).

lature becomes less important, and Justice Scalia may be willing to see the Court take an activist role.

In *Pennell v. San Jose*, Justice Scalia dissented from a decision upholding a California rent control regulation, which included a provision permitting a hearing officer to consider the tenant's financial hardship in determining if the regulated rent was excessive. The landlords had argued that this provision constituted an unconstitutional taking of private property without compensation. The majority said that the issue was premature because there was no record that the hardship provision had ever been applied.

Justice Scalia, who in other contexts has been quick to urge the Court not to reach out to decide cases unnecessarily, here argues vehemently that the lack of any showing that the hardship regulation has been applied is "no reason thus to shield alleged constitutional injustice from judicial scrutiny." Is this the same justice who in *Webster v. Doe* dismissed the notion that all constitutional violations must be remediable in Court? And what about the fact that the provision at issue was enacted as part of the normal legislative process, so respected by Justice Scalia in other contexts? In his dissent, Justice Scalia reasons that the rent control ordinance redistributes wealth in a way hidden from public scrutiny, rather than by the "normal democratic processes." This case is not a good sign about where we will find Justice Scalia if the government ever moves toward greater efforts to redistribute wealth.

### III. Is There Any Hope?

There is always hope, but hope is not always reasonable. It is a sad but safe prediction that public assistance recipients challenging unfair public assistance programs will seldom persuade Justice Scalia, given his narrow view of the role of the courts.

During his confirmation hearing, Justice Scalia spoke engagingly of the beauty of the American system of checks and balances:

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24 See, e.g., *Honig v. Doe*, 484 U.S. 305, 332 (1988) (Scalia, J., dissenting) (arguing that a school suspension case should be dismissed as moot because the individual plaintiff had not demonstrated that it was "probable" that the problem would recur).
25 *Pennell*, 485 U.S. at 19 (Scalia, J., dissenting in part).
27 *Pennell*, 485 U.S. at 22 (Scalia, J., dissenting in part).
28 I wonder if Justice Scalia particularly disapproves of rent controls. In his contribution to a Federalist Society symposium on federalism, then-Professor Scalia urged conservatives to consider federal legislation to mandate market freedom, and asked (rhetorically?) why no one has considered a federal law banning rent control. Scalia, *The Two Faces of Federalism*, 6 *Harv. J.L. & Pub. Pol'y* 19 (1982).
If you had to put your finger on what has made our Constitution so enduring, I think it is the original document before the amendments were added.

Because the amendments [the Bill of Rights], by themselves, do not do anything. The Russian constitution probably has better, or at least as good guarantees of personal freedom as our document does. What makes it work, what assures that those words are not just hollow promises, is the structure of government that the original Constitution established, the checks and balances among the three branches, in particular, so that no one of them is able to "run roughshod" over the liberties of the people as those liberties are described in the Bill of Rights.²⁹

Justice Scalia has an extremely optimistic (although perhaps insincere) view of the legislature's capacity to correct injustice, restricting the Court's role to "making it inescapably clear to Congress what changes need to be made."³⁰

The problems of access to the democratic process do not much trouble Justice Scalia. In Community Nutrition Institute v. Block,³¹ then-Judge Scalia dissented from a decision granting standing to individuals challenging United States Department of Agriculture milk regulations that raised prices. Justice Scalia observed, "[g]overnmental mischief whose effects are widely distributed is more readily remedied through the political process, and does not call into play the distinctive function of the courts as guardians against oppression of the few by the many."³² The difficulty of mobilizing a large political constituency when the issue is raising milk prices only a few cents for each consumer is not addressed in the opinion.

But even when the "distinctive function of the courts as guardians against oppression of the few by the many" is called into play Justice Scalia still doesn't see a role for the courts. In Employment Division, Department of Human Resources v. Smith,³³ Justice Scalia's majority opinion held that Oregon could deny unemployment benefits to individuals fired for using a drug prohibited by state law during religious ritual.³⁴ His opinion states: "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process" and there-

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³¹ 698 F.2d 1239 (D.C. Cir. 1983) (Scalia, J., dissenting in part).
³² Id. at 1256.
³⁴ Id. at 1606.
fore, it is up to the Oregon state legislature to make exception to their drug laws for sacramental peyote use. Justice Scalia’s opinion goes on to recognize that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of all religious beliefs.

But as Justice O’Connor aptly points out in her sharp concurrence, “the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups.”

Other aspects of Justice Scalia’s jurisprudence are also not encouraging for the poor hoping that the good society will include them. Justice Scalia hates balancing tests. But the poor often fare very well on balancing tests because their needs are so urgent. His opinion in Employment Division, Department of Human Resources v. Smith illustrates his willingness to jettison years of “painstakingly” developed standards to avoid requiring the Court to apply a traditional balancing approach. Justice Scalia describes as “horrible” the contemplation of federal judges being “constantly in the business” of weighing claims for religious exemption from generally applicable laws. Justice O’Connor describes the process more simply, stating that it is “our role as judges to decide each case on its individual merits.”

Another aspect of Justice Scalia’s jurisprudence that is troubling for the poor is his love of clean, bright lines and rules that are strictly

35 Id.
36 Id.
37 See, e.g., Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (individual’s overpowering need not to be deprived of basic assistance outweighs justified desire to protect public funds).
38 Employment Division, 110 S. Ct. at 1595.
39 Id. at 1615 (Blackmun, J., dissenting).
40 Id. at 1606 n.5. For other examples of Justice Scalia’s hostility to balancing tests, see Rutan v. Republican Party, 110 S. Ct. 2729, 2746-57 (1990) (Scalia, J., dissenting) (arguing that the Court should overrule cases permitting balancing test for determining whether party membership may be required for government job) and Bendix Autolite v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment) (urging abandonment of balancing approach in negative commerce clause cases).
41 110 S. Ct. at 1611 (O’Connor, J., concurring).
enforced, regardless of the circumstances. His dissent in *Houston v. Lack* 43 is a disturbing example of this approach. In that case, the issue was whether a prisoner’s *pro se* notice of appeal was timely filed. Because the prisoner lacked funds, prison authorities had refused his requests to certify the notice for mailing on the day in question and to send it air mail. The notice was received late, and the question was whether the otherwise meritorious appeal should be dismissed.

The majority held that the notice was timely because the prisoner had timely delivered it to prison officials. 44 (Perhaps trying for Justice Scalia’s vote, the majority opinion urged that their approach was bright line because it would recognize the moment of receipt by prison authorities as the moment of filing.) 45 In contrast, Justice Scalia’s dissent argues that the rule adopted by the majority should be rejected even though it “makes sense,” for Congress, not the courts, should enact such a rule. Justice Scalia specifically rejects the bright line argument, noting that once equitable considerations are applied, other circumstances will be urged as excusing compliance with the rules. “Thus is wasteful litigation in our appellate courts multiplied.” 46 Justice Scalia may be correct in arguing that too many bright lines defeat the purpose of a rule. However, it hardly seems “wasteful” for the courts to decide issues as important as whether individuals should be denied access to appellate remedies based on technical defaults that are not their fault.

IV. Is THERE A GLIMMER OF HOPE?

During his confirmation hearings, Justice Scalia said, “courts should be, obviously, as concerned about massive societal problems, such as the problem of discrimination in this country as either of the other two branches of government.” 47 Is there any chance that his concern will be translated into action?

I have been interested to note that in Justice Scalia’s decisions on social welfare issues, he frequently mentions (albeit in passing) policy issues, as if to say, that while they do not really matter to his result, the result is not as harsh as it seems. In his dissent in *Pennell v. San Jose*, the California rent control case, Justice Scalia observes that the “hardship” exceptions for rent increases are available to individuals

44 Id. at 270.
45 Id. at 275.
46 Id. at 281.
47 Hearings, supra note 29, at 59.
making up to $32,400 a year. Of course, it is irrelevant to the due process-taking analysis that the municipality is extremely generous, or even overly generous, in defining hardship. Does mentioning that some of the rent control tenants are relatively well off reflect some sensitivity to the problems of the poor? If so, it is a very limited sensitivity, and one that does not bear close analysis. It is not just the unworthy tenant making $32,400 who loses a benefit if the rent control ordinance is invalid; obviously the worthy tenant making $3,000 is also hurt, and even more so.

Similarly, in Sullivan v. Everhart, the Social Security netting case, Justice Scalia mentions that having an underpayment reduced by a past overpayment will not hurt a Social Security recipient as much as a reduction in current benefits. And he justifies his crabbed interpretation of Social Security waiver and netting rules by noting that the "expenses" of the Social Security recipients proposal "in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." Advocates for the poor should be forgiven a certain skepticism about whether the money saved by denying due process to some poor persons will be redistributed among the poor. But does Justice Scalia's remark show some rudimentary sensitivity to the needs of recipients, or some guilt about the result? Or is this just a kind of interrorem clause of the opinion, warning recipients that if they keep asking for more, they may end up with less?

Maybe there is a basis for hope after all. This past term, Justice Scalia joined the majority in Sullivan v. Zebley, invalidating Social Security regulations denying Supplemental Security Income disability benefits to disabled children whose impairment is not mentioned on the "list" of impairments contained in the regulations. Given his jurisprudence, he should have come out the opposite way. As in Everhart, the statute could be read to justify the Secretary's regulation (and several other courts had so read it). There is the principle of deference to the agency's interpretation. There is a regulatory scheme with the clearest and cleanest of bright lines—if the child's impairment is on the list, the child gets benefits; if not, benefits are denied. There is the certainty that if the Secretary's regulatory scheme is rejected in favor of a more individualized approach to children's disabil-

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48 485 U.S. 1, 23 (1988).
50 Id. at 967 (quoting Mathews v. Eldridge, 424 U.S. 319, 348 (1976)).
52 Hinckley ex rel. Martin v. Secretary of Health and Human Servs., 742 F.2d 19 (1st Cir. 1984); Powell ex rel. Powell v. Schwecker, 688 F.2d 1357 (11th Cir. 1982).
ity, the courts will be busy—as with the adult disability program—reviewing the Secretary’s determinations. But despite all that, there is Justice Scalia with the majority invalidating the regulation.

We can only guess at Justice Scalia’s reasoning. Unfortunately for those trying to understand Justice Scalia, but fortunately for the children, the opinion was written by Justice Blackmun. Possibly Justice Scalia was not unmoved by the reality of thousands of indigent severely disabled children (and their families, struggling to care for them at home) deprived of benefits. Indeed only the most hard-hearted Justice (Justice White) or the most heartless (Justice Rehnquist) was unaffected and dissented.

There may be a lesson here for advocates. Perhaps in our pessimism and wish to be taken seriously as calm, analytical lawyers rather than wild-eyed (or teary-eyed, for some) lunatics with law degrees, we have not been working hard enough to demonstrate to the courts the extreme misery of our clients’ lives. Still, Zebley is more likely an aberration than a straw in the wind.

CONCLUSION

It is not enough in a “good society” for the poor to be free to burn the flag to protest their hunger, homelessness and oppression. In a good society of our wealth, no one should be without adequate food, clothing, or shelter. And the courts should be open to their claims, as to the claims of others who are oppressed by the majority. Lawyers and courts have a role in attaining the good society and, even if it is a long way off, perhaps we can make some things better for the poor as we struggle toward this goal. If we succeed, I fear it will be despite and not because of Mr. Justice Scalia.

53 And the poor had better stick to flag burning in Scalia’s good society. Sleeping in a public park, as a means of protesting the plight of the homeless, may be forbidden. See Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1983) (Wilkey, J., dissenting, with whom Scalia, J., concurs).