COMMENT

AFDC ELIGIBILITY REQUIREMENTS UNRELATED TO NEED: THE IMPACT OF *KING v. SMITH* *

This Comment explores a vital aspect of the federal-state relationship in the administration of the Aid to Families With Dependent Children (AFDC) [1] program: whether a state may impose eligibility requirements other than those specifically authorized or required by the Social Security Act. A review of the genesis of the AFDC provisions and of the history of state-imposed eligibility requirements under these provisions provides the necessary background for examination of the Supreme Court's decision in *King v. Smith*,[2] which significantly changed what was thought to be the law in this field. Finally, areas of the law made doubtful by *King* are discussed. Attention is directed throughout toward interpreting the AFDC provisions of the Social Security Act;[3] constitutional questions are beyond the scope of this Comment.

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* Professor Edward V. Sparer of the University of Pennsylvania Law School suggested the topic for this Comment. His guidance has proven immeasurably helpful; of course, he bears no responsibility for errors of any nature.

[1] 42 U.S.C. §§ 601-10 (1964), *as amended*, (Supp. IV, 1969). One of the several major categories of public assistance programs established by the Social Security Act of 1935, Act of Aug. 14, 1935, ch. 531, 49 Stat. 620-48, *as amended* 42 U.S.C. §§ 301-1394 (1964), *as amended*, (Supp. IV, 1969), AFDC is part of a system of "cooperative federalism," King v. Smith, 392 U.S. 309, 316 (1968), in which the federal government provides funds in part according to the amount of each state's contribution to the program. To participate, a state must devise a plan for administering aid which meets requirements specified in the Act; but states have been permitted a great deal of flexibility in the development of their programs.

> The wide variety which appears from one State plan to another under the same title [of the Act] is further evidence that the States control the shape of their assistance programs.

F. White, Equitable Treatment Under the Public Assistance Titles, Nov. 5, 1963, at 2 [hereinafter cited as White]. The White paper was prepared by a research assistant for the Department of Health, Education, & Welfare (HEW) and does not represent official HEW policy. Comment, *Welfare's "Condition X,"* 76 YALE L.J. 1222, 1222 n.5 (1967).

Until 1962, the program was called "Aid to Dependent Children" (ADC). To avoid confusion, the term "AFDC" is used throughout this Comment, even where "ADC" would be historically proper.

Amendments to the Social Security Act frequently renumbered subsections of the Act, particularly within § 402. For example, § 402(a)(10), 42 U.S.C. § 602(a)(10) (Supp. IV, 1969) was formerly § 402(a)(9), 42 U.S.C. § 602(a)(9) (1964). All citations in this Comment are to the current code provisions.

[2] 392 U.S. 309 (1968), *noted in* 47 N.C.L. REV. 228 (1968); 47 TEXAS L. REV. 349 (1969); 22 VAND. L. REV. 219 (1968). *King* is also discussed in Comment, *Non-Need Related Provisions for the Receipt of AFDC*, 9 J. FAM. L. 101 (1969); Note, *Social Welfare—An Emerging Doctrine of Statutory Entitlement*, 44 NOTRE DAME LAW. 603 (1969).

[3] While much of the analysis presented herein may be applicable to other titles of the Social Security Act, only title IV (the AFDC provisions) is explicitly discussed in this Comment.

I. BEFORE *King v. Smith*

A. *The Background and Original Interpretation of the Social Security Act*

Moral considerations have long pervaded American social welfare programs.[4] True to their Elizabethan poor law origins, welfare programs well into this century ignored the crushing poverty of the multitude of "unworthy poor":[5] only "gilt-edged widows"[6] whose exceptional moral standards "not only differentiated them from the mass of paupers but set them apart from the totality of mothers"[7] were thought worthy of aid. With the Depression came a closer view of poverty—for many, a first hand view.[8] The "worthy-unworthy" poor distinction faltered:[9] the Social Security Act of 1935 in some ways broke significantly with the poor law tradition.[10] But although the Act did not itself dictate a test of moral character, it was interpreted by the committee reports of both houses of Congress as permitting a state to "impose such other eligibility requirements—as to means, moral character, etc.—as it sees fit."[11]

The states did not hesitate to exercise this option, and so-called "suitable home" policies shortly became the most common of the state-imposed eligibility requirements. Accepted social work opinion in 1935 recommended that assistance under the Act be given only to those children who were "living in a suitable family home meeting the standards of care and health, fixed by the laws of [the] state."[12] The suitable home provisions were viewed as necessary to "raise the standards of home care" in AFDC households.[13] Policies similar to suitable home provisions had for years regulated the lifestyle of recipients in earlier welfare programs,[14] and AFDC suitable home

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[4] *See* W. BELL, AID TO DEPENDENT CHILDREN *passim* (1965) [hereinafter cited as BELL].

[5] *See id.* 3-19.

[6] *Id.* 9. "In 1931, across the nation, the mothers in the caseload were widows in 82 percent of the families whose marital status was known." *Id.* (footnote omitted).

[7] *Id.* 13.

[8] *See id.* 20, 25 (reference to the "democratizing effect" of the Depression).

[9] *Cf. id.* 19-20.

[10] *See id.* 224 n.5. For example, it provided for cash payments for use as recipients desired. Act of Aug. 14, 1935, ch. 531, § 406(b), 49 Stat. 629, *as amended* 42 U.S.C. § 606(b) (Supp. IV, 1969); *see* H.R. REP. No. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 36 (1935).

[11] H.R. REP. No. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 36 (1935). *See also* 79 CONG. REC. 5679 (1935) (remarks of Representative Jenkins).

[12] BELL 29 (quoting AMERICAN PUBLIC WELFARE ASS'N, SUGGESTED STATE LEGISLATION FOR SOCIAL SECURITY 26 (1935)); *cf.* BELL 7.

[13] BELL 30 (quoting AMERICAN PUBLIC WELFARE ASS'N, SUGGESTED STATE LEGISLATION FOR SOCIAL SECURITY (1935)).

[14] *See* BELL 12-13, 177.

provisions were administered with similar disregard for recipient autonomy. The suitable home doctrine was at times invoked to require religious training for children,[15] but most frequently to discourage immorality and illegitimacy.[16] But the doctrine provided a vehicle for less benign motives as well. Public apathy or even hostility towards the AFDC program, combined with the almost limitless discretion afforded caseworkers by the suitable home policies,[17] permitted a lowering of welfare costs by cutting illegitimate and black children from the rolls:[18] blacks had a relatively high rate of illegitimacy,[19] and also the least "suitable" homes simply because they were among the poorest applicants.[20] Opposition to such discriminatory actions from the federal agency then administering AFDC took form with the development of "Condition X."

B. *Condition X (The Equitable Treatment Doctrine)*

The committee reports suggesting that a state might "impose such other eligibility requirements . . . as it sees fit" [21] were never interpreted literally by the Department of Health, Education, and Welfare (HEW) or its predecessor agencies. At least in intra-agency discussions, it was continuously insisted that certain eligibility requirements could not be imposed by the states.[22] Yet the rationale behind this federal policy—variously known as Condition X[23] (or more precisely, Condition 2(a)(x)),[24] the Equitable Treatment Doctrine,[25] or

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[15] *Id.* 30.

[16] *See id. passim.*

[17] *See, e.g., id.* 181.

[18] *See id. passim.* "The desire of states to restrict their programs selectively is also shown by the appearance of a series of closely related eligibility conditions which primarily affected nonwhite and illegitimate children." *Id.* 175.

[19] *Id.* 181-82.

[20] *See id.* 42-43, 182. *But cf. id.* 182, where Bell notes: "A few reports suggest that neglect is more common among white families."

[21] Note 11 *supra* & accompanying text.

[22] White 1.

[23] *Welfare's "Condition X," supra* note 1, *passim.*

[24] Each title of the Social Security Act sets forth a list of requirements which state plans must satisfy in order to qualify for federal funding. These are set out in a parallel manner in §§ 2(a), 402(a), 1002(a), and 1402(a) of the Act. In addition to the statutory requirements of subsections (a)(1), (a)(2), (a)(3), etc., found in each title, the agency thought it was imposing an additional condition—namely, condition (a)(x). Hence the policy was dubbed "condition 2(a)(x)." White 8 n.9.

Throughout this Comment, the term "Condition X" will be used to denote the federal agency's policy although the exact nature of the policy varied over the years. It should be noted that Condition X was thought to apply to all titles of the Act, not only to the AFDC provisions. In fact Congress explicitly enacted what are in substance the provisions of Condition X in three other titles of the Social Security Act. §§ 2(a)(10)(B) & (11)(D), 1602(a)(13), 1902(a)(17)(A), 42 U.S.C. §§302(a)(10)(B) & (11)(D), 1382(a)(13), 1396a(a)(17) (1964), *as amended,* (Supp. IV, 1969).

[25] White 1 (title).

the Principle of Equity and Uniformity[26]—was never clearly defined.[27] One early formulation of Condition X required that the states

> keep within basic legal principles of classification . . . . They must not classify . . . upon any basis of grouping that is not germane in some degree to the problem at hand. We must insist on good authority that they shall not exclude people because of the color of their skin or the contingency of their racial antecedents and, as we have diligently argued, their religious predilections.[28]

As this statement suggests, Condition X was originally conceived of in terms of general equal protection principles,[29] and this conception was relied upon as partial justification for the application of Condition X through the 1950's.[30] Thereafter statutory considerations were relied upon as a justification.[31] The doctrine itself remained analogous to equal protection concepts: HEW would approve a state plan containing an eligibility requirement not expressly authorized by the Social Security Act "only if the classification affecting such [additional] limitation is a rational one in the light of the purposes of public assistance programs." [32]

Despite this policy, the federal agency seldom disapproved state plans even though many states continued to use eligibility requirements conflicting with any formulation of Condition X.[33] Public antagonism toward AFDC and, perhaps, fear of congressional disapproval of aggressive federal leadership were among the deterrents to active enforcement.[34] Also important was the drastic nature of the sole remedy—termination of funds for the state's entire AFDC pro-

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[26] *Id.* 1, 8.

[27] *Id.* 1.

[28] *Id.* 4 (quoting A. D. Smith, Memorandum to Geoffrey May, Dec. 20, 1939, at 4).

[29] *See* White 6-7.

[30] *Id.* 13.

[31] *Id.* 15. *See generally id.* 12-16.

[32] *Welfare's "Condition X," supra* note 1, at 1222 (quoting A. Willcox, Memorandum Concerning Authority of the Secretary, Under Title IV of the Social Security Act, to Disapprove Michigan House Bill 145 on the Ground of its Limitations on Eligibility, Mar. 25, 1963, at 1).

[33] For if anything at all is completely clear in this area of the law it is that the failure of HEW to cut off funds from a state program has no meaning at all.

Dandridge v. Williams, 397 U.S. 471, 516 (Marshall, J., dissenting); *see id.* at 507 (Douglas, J., dissenting); Plaintiffs' Reply Memorandum, app. A, at 2 n.1, Digesualdo v. Shea, Civil No. C-1827 (D. Colo., filed 1970) (companion case to Barksdale v. Shea, Civil No. C-1967 (D. Colo., filed 1970)): "One year after *Shapiro v. Thompson,* eight states still retain durational residency requirements under AFDC. HEW has only recently indicated that it might move to correct this."

Bell implies that such inaction was an abrogation of the federal agency's responsibility. BELL 189.

[34] BELL 38, 175; *cf. id.* 188.

gram [35]—available to the federal agency when a state persisted in its course of action despite federal protest.[36] Enforcement of this sanction would imperil all the needy children in a state, and could conceivably provoke a state to withdraw entirely from the AFDC program.[37] Finally, national political considerations may help explain the pattern of enforcement of Condition X.[38]

The doctrine was invoked in several important instances, however, and received legislative and some judicial countenance in the process. During the 1930's, the federal administrative agency refused to approve Georgia's plans to establish a racial quota in its welfare program,[39] as well as Arizona's attempted exclusion of Indians living on reservations.[40] The congressional response to this latter agency action was such that "[i]t would be difficult to find a clearer case of Congressional acquiescence in an administrative interpretation." [41] In the 1950's, the federal administrative agency announced that state AFDC plans deny-

[35] Act of Aug. 14, 1935, ch. 531, § 404, 49 Stat. 628. In 1968, the Act was amended to permit the federal agency to terminate funds for only part of the state plan, at the agency's discretion. § 404(a), 42 U.S.C. § 604(a) (Supp. IV, 1969). The considerations discussed in the text continue to be important. If the federal agency withholds funds from too small a segment of the state program, the state might simply forego that portion of its plan.

Negotiations with state agencies are common during the periodic federal review of state plans. While these negotiations have resulted in many improvements in state plans, they are normally classified as "bureaucratic secrets" between the federal agency and the state being reviewed, and therefore "much of their potential for moral and legal suasion is dissipated." BELL 190-91.

[36] *See* Rosado v. Wyman, 397 U.S. 397, 426 (1970) (Douglas, J., concurring); *id.* at 430 (quoting letter from HEW's General Counsel); BELL 189.

[37] No state has ever withdrawn from the program, however, and it may be politically unfeasible for any state ever to do so.

[38] G. STEINER, SOCIAL INSECURITY: THE POLITICS OF WELFARE 101-07 (1966) (discussing the reasons underlying HEW's disapproval in 1963 of Michigan's AFDC-UP plan); *cf.* BELL 147, 235 n.25 (noting that the Flemming Ruling—text accompanying notes 45-46 *infra*—was promulgated a few days before the change from a Republican to Democratic national administration).

[39] BELL 35 (benefits were granted according to a fixed ratio of black and white recipients).

[40] *See* Petition of the State of Ga. for Reconsideration of Its Proposed Implementation of Section 208(b) of Pub. L. 90-248, at 5 (HEW, Apr. 2, 1968) (M. Switzer, Administrator, Social & Rehabilitation Service) [hereinafter cited as 1968 Ga. Conformity Hearing], in 1 E. Sparer, Materials on Public Assistance Law, ch. 3, at 66, 70 (Summer 1969) (unpublished materials for use at the University of Pennsylvania Law School); White 8.

[41] White 11. In 1939, the President transmitted to Congress a report of the Social Security Board specifically mentioning the Indian question. Witnesses before the appropriate committee of each house suggested that the federal government assume the entire cost of supporting Indians, and the witness before the Senate committee stated that the Social Security Act had "been construed to mean that Indians are entitled to the same benefits as any other individual." Nevertheless, both committees recommended that Congress enact the 1939 Social Security amendments without any change in the treatment of Indians. A floor amendment prohibiting the federal agency from disapproving any state plan "because such plan does not apply to or include Indians" passed the Senate, but was deleted by the conference committee. Thus no change in the status of Indians was made by the 1939 amendments. In 1950, Congress enacted legislation making available for two specific Indian tribes additional grants to the states proportionate to the states' Social Security Act contributions. But faced again with the question, Congress did not otherwise disturb the administrative interpretation. *Id.* 8-11; *see* 1968 Ga. Conformity Hearing 5.

ing aid to illegitimate children would be disapproved.[42] The agency also refused to approve another attempt by Arizona to exclude Indians from one of the public assistance titles,[43] and received limited judicial sanction for Condition X in the ensuing litigation.[44]

Condition X reached a high water mark in 1961 when Secretary of HEW Arthur Flemming responded to a particularly dramatic situation in Louisiana[45] with the far-reaching and controversial prohibition of suitable home provisions:

> Effective July 1, 1961, a state plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.[46]

To afford state legislatures an opportunity to change their state provisions,[47] and to provide time to examine the advisability of new legislation,[48] Congress extended the effective date of the Flemming Ruling for one year.[49] Congress simultaneously enacted temporary legislation to permit AFDC assistance to children placed in foster homes "as a result of a judicial determination" that continued residency in their present homes would be "contrary to the welfare of such child[ren]."[50] This provision was made permanent in 1962, and was extended to include children placed in child-care institutions.[51] The 1962 AFDC

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[42] 1968 Ga. Conformity Hearing 6; BELL 67-75.

[43] 1968 Ga. Conformity Hearing 5; White 12-13.

[44] The District Court for the District of Columbia supported the federal action in an unreported decision, but in Arizona v. Hobby, 221 F.2d 498 (D.C. Cir. 1954), the court of appeals dismissed for lack of jurisdiction without reaching the merits. This instance of enforcement of Condition X was based, however, entirely on fourteenth amendment equal protection considerations. Further discussion of the case can be found in 1968 Ga. Conformity Hearing 5-6; White 12-13; *Welfare's "Condition X," supra* note 1, at 1227-28.

[45] *See generally* BELL 137-47 (Louisiana reduced the size of its AFDC program from 102,962 recipients in June 1960, to 72,250 in August. Press coverage was such that "housewives in England, school children in the Far West" sent money and clothing).

[46] State Letter No. 452, Bureau of Public Assistance, Social Security Administration, HEW (1961).

[47] *See* S. REP. No. 165, 87th Cong., 1st Sess. (1961), in 1961 U.S. CODE CONG. & AD. NEWS 1716, 1721.

[48] *See* CONF. REP. No. 307, 87th Cong., 1st Sess. (1961), in 1961 U.S. CODE CONG. & AD. NEWS 1723, 1725.

[49] Act of May 8, 1961, Pub. L. No. 87-31, § 4(b), 75 Stat. 77, *as amended* 42 U.S.C. § 604(b) (Supp. IV, 1969).

[50] Act of May 8, 1961, Pub. L. No. 87-31, § 2, 75 Stat. 76, *as amended* 42 U.S.C. § 608 (1964), *as amended,* (Supp. IV, 1969). This Act was primarily an accommodation for Michigan's policies. *See* BELL 150, 235-36 n.28.

[51] Act of July 25, 1962, Pub. L. No. 87-543, §§ 101(b)(2)(D), 104(a)(3)(F), (G), 131(b), 135(a)-(e), 155(a), 76 Stat. 180, 185, 193, 196, 197, 207, *as amended* 42 U.S.C. § 608 (1964), *as amended,* (Supp. IV, 1969).

amendments also modified the Flemming Ruling by permitting states to disqualify from AFDC children living in unsuitable homes if they are otherwise given "adequate care and assistance." [52] As applied to children without other means of support, however, Congress left the Flemming Ruling unchanged.

Condition X was used twice more before the Supreme Court's decision in *King*. In 1963, HEW refused to approve Michigan's AFDC-UP plan [53] because it denied aid to children of unemployed parents not covered by the state's unemployment compensation statute—which only applied to employers of four or more employees.[54] And in 1968, several weeks before the oral argument in *King*, HEW refused to approve Georgia's attempt to institute a waiting list for AFDC.[55] HEW rested its decision on Condition X and on the statutory requirement that aid be given "with reasonable promptness to all eligible individuals." [56]

II. *King v. Smith*

In light of the previous restraint typifying the use of Condition X, the Supreme Court's decision in *King* was surprising. Despite HEW's difficulty over the years in settling upon a rationale for the legality of the doctrine,[57] and despite the appellees' arguments in favor of a Condition X approach,[58] the Court based its decision on a rationale imposing even greater restrictions on a state's ability to deny aid to dependent children.

At issue was Alabama's "substitute father" regulation denying AFDC benefits to a family whenever the mother "cohabited" in her home or elsewhere with any single or married male.[59] "Cohabitation" was a euphemism for " 'frequent' or 'continuing' sexual relations." [60] Aid was terminated regardless of whether the "substitute father" was

[52] Act of July 25, 1962, Pub. L. No. 87-543, § 107(b), 76 Stat. 189, *as amended* 42 U.S.C. § 604(b) (Supp. IV, 1969).

[53] § 407, 42 U.S.C. § 607 (1964). This is the "unemployed parent" provision of title IV. Children with two parents, one of whom is unemployed, can receive AFDC benefits if the state at its option decides to participate in this part of the program.

[54] G. STEINER, *supra* note 38, at 101-07; *see* 1968 Ga. Conformity Hearing 7-8; White, *supra* note 1, at 26-28.

[55] 1968 Ga. Conformity Hearing.

[56] § 402(a)(10), 42 U.S.C. § 602(a)(10) (Supp. IV, 1969). For a discussion of this section, see text accompanying notes 83-86 & 124-29 *infra*.

[57] *See* White, *supra* note 1, at 4-28, 42; *Welfare's "Condition X," supra* note 1, at 1222-28; text accompanying notes 22-32 *supra*.

[58] Brief for Appellee at 20-21, King v. Smith, 392 U.S. 309 (1968); Brief for NAACP Legal Defense & Education Fund, Inc., Nat'l Office for the Rights of the Indigent, & the Center on Social Welfare Policy & Law as Amicus Curiae at 14-15, King v. Smith, 392 U.S. 309 (1968).

[59] 392 U.S. at 314.

[60] *Id.*

the father of any of the AFDC mother's children, was under any legal duty to support them, or was actually donating money for their support.[61] Declining to decide whether Alabama had denied Mrs. Smith's children equal protection of the law by discriminating against them on the basis of their mother's "immorality," the Court found Alabama's regulation invalid as inconsistent with the Social Security Act.[62]

Alabama asserted two state interests in justification for its refusal to allot AFDC assistance to households with substitute fathers, even though the children were needy:

> [F]irst, it discourages illicit sexual relationships and illegitimate births; second, it puts families in which there is an informal "marital" relationship on a par with those in which there is an ordinary marital relationship, because families of the latter sort are not eligible for AFDC assistance.[63]

The Court disposed of these two arguments with what were in effect separate lines of reasoning.

A. *Discouraging Illegitimacy and Immorality*

Notwithstanding Alabama's legitimate interest in discouraging illegitimacy and immorality, the Court found that the chosen means of deterrence were precluded by the congressional approval given the Flemming Ruling.[64] The Court bolstered its conclusion by pointing to sections 402(a)(14), (15), and (17),[65] enacted in 1968, which require states to deal with the problems of illegitimacy and unsuitability of home conditions by instituting rehabilitative services,[66] voluntary family planning programs,[67] and programs to establish the paternity of and secure support for illegitimate children.[68] This pattern of legislation, the Court held, demonstrated that

> Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather

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[61] *Id.*

[62] Justice Douglas, concurring, reached the same result as the majority, but relied on the fourteenth amendment's guarantee of equal protection of the law. He felt it necessary to reach the constitutional question primarily because, in his opinion, there was "a long-standing administrative construction that approves state AFDC plans containing a man-in-the-house provision," and also because of the possibility that Alabama would withdraw from the AFDC program yet retain its objectionable provision. *Id.* at 334-38. *See also* note 72 *infra.*

[63] 392 U.S. at 318.

[64] Notes 49-52 *supra* & accompanying text.

[65] 42 U.S.C. §§ 602(a)(14), (15), (17) (Supp. IV, 1969).

[66] *Id.* § 602(a)(14).

[67] *Id.* § 602(a)(15).

[68] *Id.* § 602(a)(17).

> than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC.[69]

The Court may have exaggerated in suggesting that the congressional response to the Flemming Ruling was "statutory approval," [70] and might also have more clearly noted that the Flemming Ruling by its terms explicitly prohibits only eligibility requirements based on the suitability of a child's home. The Ruling should nevertheless be interpreted as prohibiting suitable home provisions as they were historically administered: primarily to deter illegitimacy and immorality.[71] Thus, although Alabama's substitute father regulation ostensibly was not a suitable home provision, it was actually just one variation thereof, and was prohibited by the Flemming Ruling.[72]

The Court's holding on this issue, then, directly prohibits only state eligibility requirements instituted to deter immorality and illegitimacy on the part of adults in the household of the dependent child. Eligibility requirements of this type are numerous;[73] had the Court gone no further, the permissible range of state-imposed eligibility requirements would have been severely circumscribed. But the Court's holding was even more restrictive.

B. *Equating Marital and Informal Relationships*

Alabama also argued that because children of formal marital unions were denied AFDC benefits because they had fathers, Alabama's regulation was a valid method of eliminating inequity by putting children of informal "marital" unions (actually, informal sexual liaisons)

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[69] 392 U.S. at 325. In instituting the Work Incentive Program (WIN) amendments, § 402(a)(19), 42 U.S.C. § 602(a)(19) (Supp. IV, 1969), Congress faced a similar problem with respect to parents who refused to work without "good cause." *See* S. REP. No. 744, 90th Cong., 1st Sess. (1967), in 1967 U.S. CODE CONG. & AD. NEWS 2834, 2860:

> Protective and vendor payments would be provided [by the Senate bill] to protect dependent children from the faults of others. Under the House bill, such payments would be optional with the States, but under the [Senate] committee proposal the children must be given this protection.

The conference committee accepted the Senate version, thus providing mandatory protection for children of parents who refuse to work. *See* § 402(a)(19)(F)(i), 42 U.S.C. § 602(a)(19)(F)(i) (Supp. IV, 1969).

[70] 392 U.S. at 324.

[71] Text accompanying note 16 *supra.*

[72] "[Substitute parent] policies tended to precede and outlive the *almost indistinguishable* 'suitable home' policies." BELL, *supra* note 4, at 76 (emphasis added).

Whatever the logical implications of the Flemming Ruling per se, it must be remembered that HEW did not disapprove all state plans containing substitute father regulations. *See* King v. Smith, 392 U.S. 309, 335, 337-38 (1968) (Douglas, J., concurring). Bell's criticism of HEW is enlightening:

> Had the federal agency issued prompt guidelines establishing limits to state discretion in defining "substitute parents" or had guidelines been developed that would prevent the use of any eligibility condition which fell most heavily on specific groups of needy children, there would be more reason to be sanguine about ADC.

BELL, *supra* note 4, at 190; *see id.* 150-51.

[73] *See, e.g.,* text accompanying notes 195-96, 198-99 *infra.*

in the same category.[74] More specifically, the state asserted that it had a right to define the term "parent" in section 406(a) of the Act, and that its regulation, in effect, defined parent to include a "substitute father." Section 406(a) states:

> The term "dependent child" means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a *parent* . . . .[75]

But the Court held that Congress intended the term "parent" in section 406(a) "to include only those persons with a legal duty of support." [76] According to the Court, the legislative history of the Social Security Act evinced a congressional purpose "to provide programs for the economic security and protection of *all* children." [77] Children deprived of the care of a parent would be covered by AFDC.[78] Other children, it was thought, could be aided indirectly; their plight presented " 'no other problem than that of providing work for the breadwinner of the family,' " [79] and could be assuaged by " 'the work relief program and . . . the revival of private industry.' " [80] The Court also found support for its construction of "parent" in the use of the same term in other AFDC provisions to designate one who has a legal duty to support a child.[81]

Because Alabama imposed no support duty on substitute fathers,[82] Mrs. Smith's paramour was not a "parent" within the meaning of section 406(a) and her children were thus dependent. The Court considered that finding sufficient to require Alabama under section

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[74] 392 U.S. at 327; note 63 *supra* & accompanying text.

> [The Alabama regulation] merely purports to define for the purposes of receipt of public assistance ways to identify a substitute parent. . . . In marginal income groups . . . there would no doubt be a bitter resistance to the matter of being ineligible merely because persons in the home were married when other persons similarly situated would be able to receive public assistance solely because they were unmarried. Undoubtedly the public senses this inequity also.

Reply Brief for Appellants at 2-3, King v. Smith, 392 U.S. 309 (1968).

[75] 42 U.S.C. § 606(a) (Supp. IV, 1969) (emphasis added). "Dependent child" and "dependent children" are used throughout this Comment in accordance with the definition set forth in this section of the Act.

[76] 392 U.S. at 327.

[77] *Id.* at 330 (emphasis in original).

[78] The 1968 AFDC-UP enactments provide that children who have been deprived of parental support or care because of their father's unemployment can be given aid if the state elects to participate in this part of the program. § 407, 42 U.S.C. § 607 (Supp. IV, 1969).

[79] 392 U.S. at 328 (quoting S. REP. No. 628, 74th Cong., 1st Sess. 17 (1935)).

[80] *Id.*

[81] *See id.* at 330-33, in which the Court discusses the use of the term "parent" in §§ 402(a)(11), (17), (21), (22), 42 U.S.C. §§ 602(a)(11), (17), (21), (22) (Supp. IV, 1969) (note that what is presently § 602(a)(11) was § 602(a)(10) at the time of the *King* decision).

[82] *See generally* Lewis v. Martin, 397 U.S. 552 (1970).

402(a)(10) [83]—directing that aid be furnished to "all eligible individuals"—to provide AFDC assistance to the family. From the Court's reading of section 402(a)(10) derives *King*'s major restriction on the states. For it appears that the Court's view was that Congress intended all dependent children to be given aid, at least absent some indication that Congress approved of a particular state eligibility requirement denying aid to some dependent children.

1. Evaluation

The Court in *King* properly determined the scope of section 406(a)—the definition of dependent child—but it should have more fully and clearly discussed whether section 402(a)(10) required that assistance be given to Mrs. Smith's dependent children. Why could not Alabama choose to aid only some dependent children even though federal matching funds were available for all such children? The Court apparently thought either that section 402(a)(10) federalized the AFDC eligibility requirements, or that the requirements had always been purely federal.[84]

In light of the emphasis on Alabama's violation of section 402(a)(10),[85] the Court appears to interpret the section as federalizing the AFDC eligibility requirements rather than duplicating an original requirement that the states aid all dependent children. Both approaches, however, merit examination. What follows is a consideration of the proper construction of the Social Security Act absent section 402(a)(10), and then of the effect of this section. Although the issue is close, this Comment concludes that a proper reading of *King* and the Act requires that aid be given to all needy dependent children unless Congress has authorized the states to impose a specific eligibility requirement. This conclusion is contrary to what appears to be HEW's present view: that the states are free to exclude dependent children pursuant to any eligibility condition they choose to impose, subject only to the express prohibition of the Act and the Condition X doctrine.[86]

a. *The Statute*

Section 402(a)(10) aside, the Social Security Act, both as originally enacted and as presently amended, is ambiguous as to whether states can impose additional eligibility requirements. Section

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[83] 42 U.S.C. § 602(a)(10) (Supp. IV, 1969).

[84] *See generally* text accompanying notes 124-29 *infra*.

[85] *See, e.g.*, 392 U.S. at 333:

> In denying AFDC assistance to appellees on the basis of this invalid regulation, Alabama has breached its federally imposed obligation to furnish "aid to families with dependent children . . . with reasonable promptness to all eligible individuals . . . ."

[86] *See* text accompanying notes 113-23 *infra*.

401 states that the purpose of the Act is to encourage "the care of dependent children." [87] Throughout the statute, reference is made to "dependent children" who are receiving or claiming aid.[88] Thus a natural inference is that aid is to be given to dependent children as defined by the Act itself. Congressional intent to permit states to restrict aid at their will might be expected to have been expressly delineated in the statute.[89]

But the Act nowhere explicitly requires states to give aid to all dependent children. Moreover, section 401 states that the purpose of the AFDC provisions is not simply to aid dependent children, but to do so "by enabling each state to furnish financial assistance and rehabilitation and other services, *as far as practicable under the conditions in such state . . . .*" [90] Beyond this, section 401 does not militate against the *King* conclusion. States establish benefit levels—that is, the amount of money given to each family—and thereby fix the size of their AFDC budgets.[91] A construction of the Social Security Act requiring states to give aid to a federally defined class of recipients (the size of which they cannot control) would therefore not require that assistance be furnished beyond what is "practicable" for a state, because the state could lower its benefit level to conform to its desired AFDC budget.

b. *Legislative History*

The legislative history from which *King* concluded that Congress intended "to provide programs for the economic security and protection of *all* children" suggests that Congress in 1935 expected AFDC to protect all dependent children, not just those the states wished to protect.[92] But committees of both the Senate and the House, reporting on the original Act, provided compelling contrary evidence in asserting that a state could "impose such other eligibility requirements—as to means, moral character, etc.—as it sees fit." [93] Yet perhaps this language is less sweeping than a first reading might suggest. The two examples, means and moral character, may indicate that the breadth of the statement should be limited to similar eligibility requirements. Eligibility requirements based on "means" are explicitly authorized by the federal statute: the Act requires that children receiving AFDC benefits be "needy," [94] and it is unquestioned that states determine who

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[87] 42 U.S.C. § 601 (Supp. IV, 1969).

[88] §§ 402(a)(8), (13), (19)(F)(ii), 21, 42 U.S.C. §§ 602(a)(8), (15), (19)(F)(ii), (21) (Supp. IV, 1969).

[89] *See* text accompanying note 136 *infra.*

[90] 42 U.S.C. § 601 (Supp. IV, 1969) (emphasis added).

[91] *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 408 (1970); King v. Smith, 392 U.S. 309, 318-19, 334 (1968).

[92] *See* 392 U.S. at 328-30 & sources cited therein; text accompanying notes 77-80 *supra.*

[93] Note 11 *supra* & accompanying text.

[94] § 406(a), 42 U.S.C. § 606(a) (Supp. IV, 1969).

is needy.[95] The moral character of the parent is no longer a valid basis for an eligibility requirement because of the Flemming Ruling;[96] but the Ruling aside, Congress in 1935 may well have permitted eligibility requirements based on moral character, even if all other state eligibility requirements were prohibited, because historically welfare programs made extensive use of such requirements.[97]

In interpreting the 1935 committee reports, the changed nature of the AFDC program should also be considered. The original AFDC statute contained significantly fewer provisions regulating state plans than presently exist.[98] Thus, while AFDC remains basically a state program, over the years it has become less state-oriented and more federalized—a trend reflected by President Nixon's proposed Family Assistance Plan.[99]

Some legislative history does indicate that in at least certain areas Congress specifically intended to permit the states a degree of discretion in determining eligibility. In setting the age limits on children to whom the states could offer aid and be federally reimbursed on a matching basis, Congress made clear that its expanding coverage was not mandatory on the states, although the scope of the option provided is unclear.[100] In 1939, section 406(a)(2) was amended to expand the definition of dependent child from children sixteen years old and under to include sixteen- to eighteen-year-old students regularly attending school. The committee reports of both houses expressly indicated that the states were permitted a choice whether or not to aid these children.[101] The 1956 amendments struck the school requirement and simply raised age levels from sixteen to eighteen. The committee reports, although less explicit than the 1939 reports, stated that a decision by the states to aid children within the expanded age limits would *"permit* Federal sharing," [102] the choice of the term "permit" perhaps

[95] *See* note 91 *supra.*

[96] *See* text accompanying notes 64-73 *supra.*

[97] *See* BELL, *supra* note 4, at 177, 186-87; *cf. id.* 13.

[98] Section 402(a) of the original statute contained provisions essentially identical to the present §§ 402(a)(1)-(3), (6), but with provisions less detailed than the current §§ 402(a)(4), (5). The present § 402(a) contains 23 subsections, some quite detailed. *Compare* Act of Aug. 14, 1935, ch. 531, § 402(a), 49 Stat. 627, *with* 42 U.S.C. § 602(a) (Supp. IV, 1969).

[99] H.R. 16311, 91st Cong., 2d Sess. (1970). *See also* Shapiro v. Thompson, 394 U.S. 618, 677 (1969) (Harlan, J., dissenting) (citing "current discussions regarding the 'federalizing' of . . . aspects of welfare relief"); BELL, *supra* note 4, at 151 ("[t]he solution of federalizing state programs . . . deserves a thoughtful reappraisal").

[100] Once states have exercised the option to aid some students, they may have to "go all the way." For example, they may not be able to deny aid to 18-year-old students while aiding 17-year-old students, and may not be able to condition aid on attendance at a certain type of school. It is also important to distinguish the situation in which a child under 16 is denied AFDC because of poor school attendance. Such a requirement has no congressional approval, and is therefore impermissible under the interpretation of *King* and the Act urged in this Comment. HEW, it should be noted, has approved plans which contain the latter as well as the former limitations.

[101] H.R. REP. No. 728, 76th Cong., 1st Sess. 28-29 (1939); S. REP. No. 734, 76th Cong., 1st Sess. 29 (1939).

[102] S. REP. No. 2133, 84th Cong., 2d Sess. 30 (1956) (emphasis added).

indicating an intent to provide the states with an option. Finally, in 1964 and 1965, when amendments increased the age limits to twenty-one for children in certain types of schools, the committee reports stated that these changes "would be optional with the States." [103]

Similarly, legislative history makes clear that Congress in 1935 intended that states could exclude children living with certain relatives. One supporter of the 1935 bill stated:

> A State will not have to aid every child which it finds to be in need. Obviously, for many States, that would be too large a burden. It may limit aid to children living with their widowed mother, or it can include children without parents living with near relatives. The provisions are not for general relief of poor children but are designed to hold broken families together.[104]

Assuming that students under the age of twenty-one and children living with the relatives specified in the Act are always dependent children, clearly all dependent children as defined by Congress need not be given aid. Congress expanded the definition of dependent child, yet said that states need not aid all those included within the definition. The interpretation of *King* urged herein—that a state must aid a dependent child unless legislative history indicates that the state-imposed eligibility requirement resulting in the denial of aid was approved by Congress—is consistent with this history. Although *King* never stated that congressionally sanctioned state-imposed eligibility requirements were valid, had the issue arisen, the Court would certainly have given controlling weight to congressional intent.

The same result—that all dependent children must be aided unless Congress gives the states an option to exclude a specific category of dependent children—may be reached by examining the statutory definition of dependent child in section 406(a). The section states in part that:

> The term "dependent child" means a needy child (1) . . . who is living with his . . . [specified relatives] *or* niece . . . and (2) who is (A) under the age of eighteen, *or* (B) under the age of twenty-one and . . . a student . . . .[105]

It is conceivable that the use of "or" in the quoted provision indicates that states have some discretion in defining dependent children, and that states may exclude from the definition students eighteen to twenty-one and children living with certain relatives. Ambiguity in

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[103] S. REP. No. 1517, 88th Cong., 2d Sess. 2 (1964). *See also* 110 CONG. REC. 23701 (1964) (remarks of Representative Mills).

[104] 79 CONG. REC. 9269 (1935) (remarks of Senator Harrison).

[105] 42 U.S.C. § 606(a) (Supp. IV, 1969) (emphasis added).

the statute permits recourse to the legislative history: and the legislative history just examined supports the proposition that a state enjoys some latitude in defining dependent child, although it may not deny aid to any children falling within its definition.

The two analyses are, then: (1) that Congress defined the class of dependent children in section 406(a) but permitted states to deny aid to students above the age of eighteen or to children living with specified relatives; and (2) that Congress in section 406(a) permitted the states some discretion in defining dependent children insofar—and only insofar—as they could use the disjunctive "or" to exclude from the definition children over eighteen and children living with specified relatives. Either analysis yields the same result: states may deny aid to these two classes of children *and only* to these children. For the sake of convenience, this Comment hereafter will refer only to the first analysis.

c. *Administrative Interpretation*

The construction put on a statute by the relevant administrative agency is of great weight in construing the statute,[106] particularly if the administrative interpretation is of long standing, as was the case with Condition X. The repeated legislative acquiescence in the agency's disapproval, pursuant to Condition X, of Arizona's plan to exclude Indians[107] lends extra stature to the doctrine.[108] Moreover, Condition X has, in effect, been incorporated into HEW's recently proposed rules,[109] and thus is likely to finally become a formal, publicly promulgated regulation.

Condition X presumes that some state-imposed eligibility requirements more restrictive than those authorized by the Act itself or by inference from legislative history are valid so long as they are "rational . . . in the light of the purposes" of the Act. This presumption poses difficulties. *King* was certainly correct in concluding that the "protection of [dependent] children is the paramount goal of AFDC,"[110] but the Act has other purposes as well. For example, Congress desired that states have wide discretion in the operation of their programs,[111] and also to deter parental desertion.[112] The problem with the Condition X presumption arises partly because the Social Security Act offers no discernible criteria to distinguish permissible from prohibited state-imposed requirements, and partly because examinations of rationality

[106] *E.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965).

[107] Text accompanying notes 40-43 *supra.*

[108] This congressional acquiescence in the application of Condition X is as consistent with the interpretation of *King* suggested in this Comment as it is with Condition X.

[109] Proposed HEW Reg., 35 Fed. Reg. 8786 (1970) (proposed 45 C.F.R. §§ 233.10 (a)(1)(ii), (iv)).

[110] 392 U.S. at 325.

[111] *See* text accompanying note 91 *supra.*

[112] *See* note 178 *infra* & accompanying text.

"in the light of the purposes" of the Act were not restricted to considerations of state eligibility requirements explicitly sanctioned by Congress. *King* indeed circumscribed the states' power more than did Condition X as loosely applied by the administrative agencies. But to the extent *King* indicates that the protection of dependent children is the statutory goal overshadowing all others, the formulation (if not the administration) of Condition X is effectively the same as the *King* rationale.

Additional administrative interpretation is reflected in the amicus brief[113] recently filed by HEW in the pending case of *Barksdale v. Shea*.[114] At issue is Colorado's regulation limiting AFDC to a class of recipients smaller than that for which federal matching funds would be available.

Plaintiffs argued that the definition of dependent child in the federal statute prevented Colorado from requiring as a condition for aid school attendance of children sixteen to eighteen years old. The amicus brief takes the position that only section 402 contains requirements for state plans. Section 406(a), HEW asserts, defines the class of children for which federal matching funds are available, but does not require the states to aid all such children.[115] The brief reaffirms Condition X,[116] claiming that the doctrine is "based upon a principle of Constitutional law, the overall purpose and intent of the public assistance titles, the legislative history of the Act and individual plan requirements."[117] In support of its interpretation of section 406(a) the brief focused on the legislative history indicating that all dependent children need not be given aid, and particularly the history indicating that the states have the option to expand their AFDC programs to include students.[118] Moreover, HEW claimed that it and its predecessor agencies have

> consistently maintained that the purpose of section 406 of the Social Security Act is to delineate the maximum scope of Federal financial participation available to State AFDC programs and generally is not to set requirements with which those programs must comply.[119]

But the amicus brief's discussion of *King* is not entirely consistent with this view. HEW is clearly aware of and concerned with *King*'s "language which appears to suggest a result inconsistent with that

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[113] Brief for Robert H. Finch, Secretary of Health, Education, and Welfare, as Amicus Curiae, Barksdale v. Shea, Civil No. C-1967 (D. Colo., filed 1970) [hereinafter cited as Brief for Amicus Curiae].

[114] Civil No. C-1967 (D. Colo., filed 1970).

[115] Brief for Amicus Curiae 4-5.

[116] *Id.* 9-11.

[117] *Id.* 10.

[118] *Id.* 11-19; *see* text accompanying notes 93-104 *supra*.

[119] Brief for Amicus Curiae 3.

urged by this brief." [120] Nevertheless, the brief attempts to distinguish *King* by interpreting Alabama's bizarre definition of parent as an uncommon instance of a state definition creating an eligibility requirement clearly in conflict with the dominant purpose of the Act. HEW does admit to the possibility of other invalid state requirements, however, by stating that "most" state refusals to aid federally defined dependent children will not frustrate congressional intent.[121]

HEW's amicus brief is entitled to some weight as an administrative interpretation of the AFDC provisions,[122] although perhaps not the same weight as a publicly promulgated regulation or policy of long standing. But this caveat is partly nullified, since HEW's recently proposed regulations, although by no means clear on this point, appear to incorporate the interpretation presented in the amicus brief:

> Although the public assistance titles define the coverage in which the Federal Government will participate financially, a state may provide coverage on a broader or more limited basis . . . .
>
> . . . .
>
> The following is a summary statement regarding the groups for whom Federal financial participation is available. [A paraphrase of section 406(a) follows.] [123]

The arguments presented in the amicus brief are unpersuasive, however, for the reasons presented in this Comment. Moreover, in one sense the amicus brief and proposed regulations come too late. HEW's position might best have been presented to the *King* Court; to the extent that the administrative interpretation conflicts with *King* it is entitled to little weight.

d. *Section 402(a)(10)*

Section 402(a)(10) requires that a state plan:

> provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . . . [124]

If the term "eligible individuals" denotes a federal definition including essentially all those on whose behalf a state could receive federal AFDC

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[120] *Id.* 21.

[121] *Id.* 23.

[122] *Cf.* Rosado v. Wyman, 397 U.S. 397, 407 (1970); Dandridge v. Williams, 397 U.S. 471, 515 (1970) (Marshall, J., dissenting).

[123] Proposed HEW Reg., 35 Fed. Reg. 8786 (1970) (proposed 45 C.F.R. §§ 233.10 (a)(1)(i), (b)(2)).

[124] 42 U.S.C. § 602(a)(10) (Supp. IV, 1969).

matching funds, then this section would require the state to give aid to all dependent children as defined in section 406(a). The legislative history of section 402(a)(10) is sparse, however, and generally not helpful:

> The requirement to furnish assistance "with reasonable promptness" will still permit the States sufficient time to make adequate investigations but will not permit them to establish waiting lists for individuals eligible for assistance.[125]

As the Supreme Court has stated, "[a]n extensive alteration in the basic underlying structure of an established program is not to be inferred from ambiguous language which is not clarified by legislative history."[126] It is not clear, however, that a federal definition of "eligible," as used in section 402(a)(10), would have effected an extensive alteration of the AFDC program—particularly since the status of state-imposed eligibility requirements absent this section is doubtful.[127] Because this section was designed to restrict the states' latitude in administering their programs, to interpret "eligible" as a term to be given a purely federal definition would not be unreasonable.

HEW's amicus brief argues the contrary. After a discussion of the legislative history of this section, the amicus brief concludes:

> The prior history of Title IV indicates clearly that the Congress was concerned with persons, *determined to be eligible under standards set by the state*, who nonetheless were not receiving assistance.[128]

Moreover, according to the brief, the federal agency "has never viewed that plan requirement as conferring additional authority to prescribe eligibility criteria on a Federal basis."[129] While this administrative interpretation was presented too late to influence the *King* holding, in view of the meager legislative history of section 402(a)(10) and the administrative interpretation of this provision, section 402(a)(10) probably should not be interpreted as an absolute requirement that aid be furnished for all dependent children as federally defined in section 406(a). A reasonable interpretation of these provisions in light of *King* is that a state is prohibited from withholding funds from dependent children unless explicit legislative history indicates that Congress intended to provide states with an option.

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[125] CONF. REP. No. 2771, 81st Cong., 2d Sess. (1950), in 1950 U.S. CODE CONG. SERV. 3482, 3507. *See also* text accompanying note 134 *infra*.

[126] Rosado v. Wyman, 397 U.S. 397, 414 n.17 (1970).

[127] *See* text accompanying notes 87-91 *supra*.

[128] Brief for Amicus Curiae 20 (emphasis in original).

[129] *Id.*

2. Summary

Relying either on section 402(a)(10) or on the Act as a whole, the *King* Court found that, once a child falls within the federal definition of dependent child, a state is obliged to give aid to the child—unless legislative history demonstrates congressional approval of a state-imposed eligibility requirement denying aid to a category of dependent children. The qualification is appended because the Court was not faced with such an eligibility requirement; had it been it would certainly have deferred to congressional intent. Analysis of the statute, the legislative history, and the administrative interpretation points out that the strengths and weaknesses of the Court's position are closely balanced.[130] The remainder of this Comment will examine *King*'s impact on state-imposed eligibility requirements.

III. After *King v. Smith*

A. *Subsequent Cases*

Language in *Dandridge v. Williams*,[131] recently decided by the Supreme Court, is relevant to an analysis of the *King* holding. In *Williams*, welfare benefits which reached a maximum per family regardless of family size were found to meet the requirements of the Social Security Act and the equal protection clause of the fourteenth amendment. Because all "eligible individuals" were receiving some aid no matter how large their family, the Court found the state's maximum grant regulation consistent with section 402(a)(10), although individual members in large families received less per capita than those in smaller families.[132] The Social Security Act permits states to set benefit levels, and the Act is not violated, the Court held, so long as "some aid is provided to all eligible families and all eligible children . . . ." [133]

Although neither this language nor the *Williams* result in itself restricts *King* in any way, one footnote to the Court's opinion could be interpreted as inconsistent with *King*. This ambiguous footnote states:

> The State argues that in the total context of the federal statute, reference to "eligible individuals" means eligible

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[130] Policy considerations support the Court's position. The Advisory Council appointed by the Secretary of HEW in 1964, acting under a congressional directive contained in the 1962 Social Security amendments, recommended legislation in which "[n]eed would be the sole measure of entitlement." U.S. Advisory Council on Public Welfare, Having the Power, We Have the Duty xiii (1966). The Advisory Council also recommended that while "planning goes forward to achieve . . . basic reforms . . . in their state plans for public assistance, states should be required to include all types of persons eligible under federal law." *Id.* 113 (capitalization omitted). Bell's recommendations are substantially the same. *See* Bell, *supra* note 4, at 195.

[131] 397 U.S. 471 (1970).

[132] *Id.* at 481.

[133] *Id.*

> applicants for AFDC grants, rather than all the family members whom the applicants may represent, and that the statutory provision was designed only to prevent the use of waiting lists. There is considerable support in the legislative history for this view. See H.R. Rep. No. 1300, 81st Cong., 1st Sess., 48, 148 (1949); 95 Cong. Rec. 13934 (1949) (remarks of Rep. Forand). And it is certainly true that the statute contemplates that actual payments will be made to responsible adults. See, *e.g.*, 42 U.S.C. § 605. For the reasons given above, however, we do not find it necessary to consider this argument.[134]

The Court in this footnote refers to two state arguments: first, that "eligible individuals" in section 402(a)(10) refers to adult applicants for AFDC rather than to individual members of families receiving aid; second, that section 402(a)(10) prohibits only waiting lists. Whether the Court thought that there was "considerable support" for both these propositions, or only for the former, is unclear. But the legislative history and the statutory provision cited by the Court refer only to the first state argument, and the Court probably referred approvingly only to this proposition.

Although the *Williams* majority neither reaffirmed nor undercut the interpretation of *King* discussed in this Comment, the three dissenting Justices stated that in their opinion state-imposed eligibility requirements denying aid to dependent children are prohibited by the Social Security Act. Justice Douglas thought that:

> The history of the Social Security Act thus indicates that Congress intended the financial benefits, as well as the other benefits, of the AFDC program to reach *each* individual recipient *eligible under the federal criteria.* It was to this purpose that Congress had reference when it commanded in § 402(a)(10) of the Act that aid to families with dependent children shall be furnished to "all eligible individuals."[135]

Justice Marshall, joined by Justice Brennan, reasoned as follows:

> The phrase "aid to families with dependent children," from which the AFDC program derives its name, appears in § 402(a)(10) of the Act, 42 U.S.C. § 602(a)(10) (1964 ed., Supp. IV), and is defined in 42 U.S.C. § 606(b) (1964 ed., Supp. IV) as, *inter alia*, "money payments *with respect to* . . . dependent children." (Emphasis added.) Moreover, the term "dependent child" is also extensively defined in the Act. See 42 U.S.C. § 606(a) (1964 ed., Supp. IV).

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[134] *Id.* at 481 n.12.

[135] *Id.* at 502 (emphasis added).

> Nowhere in the Act is there any sanction or authority for the State to alter those definitions—that is, to select arbitrarily from among the class of needy dependent children those whom it will aid. Yet the clear effect of the maximum grant regulation is to do just that, for the regulation creates in effect a class of otherwise eligible dependent children with respect to whom no assistance is granted.
>
> It was to disapprove just such an arbitrary device to limit AFDC payments that Congress amended § 402(a)(10) in 1950 to provide that aid "shall be furnished with reasonable promptness *to all eligible individuals.*" (Emphasis added.) Surely as my Brother DOUGLAS demonstrates, this statutory language means at least that the State must take into account the needs of, and provide aid with respect to, *all* needy dependent children. Indeed, that was our assessment of the congressional design embodied in the AFDC program in *King v. Smith* . . . .[136]

Thus Justices Marshall and Brennan thought that the scheme of the Social Security Act indicated the Act had always prohibited state-imposed eligibility requirements; section 402(a)(10), in their view, was intended to reaffirm this prohibition. Justice Douglas appears to have reached the same conclusion.

Several lower court cases have clearly indicated that *King* should be interpreted as prohibiting state-imposed eligibility requirements. *Evans v. Department of Social Services,*[137] *Cooper v. Laupheimer,*[138] and *Doe v. Shapiro* [139] are discussed below.[140] *Damico v. California* [141] involved a California statute and the regulation interpreting it. These provisions denied AFDC benefits to a family during the first three months of a parent's absence from the home unless legal action had been taken to terminate the marriage or the parent had been incarcerated or deported. Avoiding the constitutional arguments pressed upon it, the court held that the statute and regulation in practical effect established "a rigid three-month waiting period for children deserted by one parent, unless the remaining parent takes legal action to terminate the marriage." [142] Relying on the *King* conclusion that

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[136] *Id.* at 510-11 (emphasis in original).

[137] — Mich. App. —, 178 N.W.2d 173 (1970).

[138] Civil No. 69-2421 (E.D. Pa., Apr. 16, 1970).

[139] 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed for failure to docket within prescribed time,* 396 U.S. 488 (1970) (Black & Douglas, JJ., dissenting).

[140] Text accompanying notes 162-68, 187-90 *infra.*

[141] 2 CCH Pov. L. REP. ¶ 10,478, at 11,370 (N.D. Cal., Sept. 12, 1969). A Minnesota statute and regulation essentially identical to that in *Damico* were declared invalid by a federal district court in Doe v. Hursh, No. 4-69-Civil 403 (D. Minn., June 30, 1970). The court, citing *King,* held that § 402(a)(10), 42 U.S.C. § 602(a)(10), "together with [§ 406(a),] 42 U.S.C. § 606(a), details the obligation of the participating state." *Id.* at 5.

[142] 2 CCH Pov. L. REP. at 11,373.

"protection of [dependent] children is the paramount goal of AFDC," [143] the court found the California statute and regulation inconsistent with the purpose of the federal statute and thus prohibited under *King*.

The court refused to accept two asserted state justifications for the provisions, reasoning that *King* prohibited placing "administrative convenience ahead of the welfare of needy children." [144] First, the state's interest in preventing fraud and collusion between parents was considered a justification similar to that rejected in *King*.[145] Second, discouraging parents from separating by requiring a three-month waiting period for AFDC was viewed as a "legitimate interest . . . clearly promoted by means impermissible under the Federal Act, because it postulates deprivation of the children as the club to keep the parents together." [146] In any event, that this interest was actually furthered by the California provision was unclear, because available statistics indicated that the provision encouraged divorce. Thus the California law conflicted with an expressed purpose of the Social Security Act: to "help maintain and strengthen family life." [147] The court also found that there were two crucial inquiries in dealing with such justifications for a state's eligibility requirements: "Are the children *eligible* and needy? Is the absence of the parent 'continued'?" [148]

Although much of the *Damico* opinion was based simply on a judgment that the California law was inconsistent with the primary federal purpose,[149] the logical extension of the court's analysis would be that all dependent children must be given aid. In defining the "crucial inquiries," the court could not have used the word "eligible" to mean eligible under the *state* criteria, because a state's definition of eligibility is necessarily compatible with its justification therefor. Rather, the court must have asked: "Are the children eligible under the *federal* criteria?"

The recent case of *McClellan v. Shapiro* [150] upheld a Connecticut statute excluding from Connecticut's AFDC program children above the age of nineteen who are attending college or vocational school. Focusing on the legislative history previously discussed,[151] the court held that Congress left to the states the decision whether to aid children because they are students. Thus, in giving effect to the congressional intent evidenced by this legislative history, *McClellan* is

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143 Text accompanying note 69 *supra*.

144 2 CCH Pov. L. Rep. at 11,373.

145 *Id.*

146 *Id.* at 11,374.

147 § 401, 42 U.S.C. § 601 (Supp. IV, 1969).

148 2 CCH Pov. L. Rep. at 11,374 (emphasis added).

149 *See id.* at 11,372 (emphasizing the conflict with "the primary purposes of the AFDC program.").

150 Civil No. 13,267 (D. Conn., Apr. 29, 1970).

151 Text accompanying note 103 *supra*.

consistent with the interpretation of *King* suggested in this Comment. Moreover, language in *McClellan* supports this interpretation. The court adopted the analysis discussed above—that section 406(a) is ambiguous and that states have some discretion in defining dependent child:[152]

> At issue here is the proper interpretation of [section 406(a), 42 U.S.C.] § 606(a) . . . .
>
> Obviously, if part (2)(B) of [this] section is not regarded as an optional alternative to (2)(A) instead of an enlargement of it . . . [Connecticut's statute] conflicts with 606(a).[153]

B. *Distinguishing Eligibility Requirements Based on Need*

Although *King* forbids all state-imposed eligibility requirements unrelated to need unless congressional intent indicates otherwise, states retain the power to establish standards of need and levels of benefits. Standards of need determine the putative economic requirements of a family; levels of benefits represent that percentage of each family's need that the state is willing to provide.

Section 406(a) defines as dependent a needy child meeting the other specified requirements.[154] Because a state may determine who is needy, but is prohibited by *King* from establishing other eligibility requirements, eligibility requirements based on need must be carefully distinguished from eligibility requirements based on other considerations. The pertinent inquiry is whether the state regulation is based on a determination of the amount of money the applicant or recipient and his family have available and the amount they require to maintain a certain standard of living.

A state regulation serving generally to terminate aid rather than to diminish the size of the grant indicates that the regulation may be nonneed related. A need-related regulation results in termination of AFDC when an individual is no longer needy. Usually, however, AFDC recipients become only less needy rather than not needy at all. Therefore a true need-related regulation normally results only in diminution of aid.

The line to be drawn between regulations related and unrelated to need is fine. A regulation forever barring from the AFDC program a family which has fraudulently obtained aid is clearly an eligibility requirement unrelated to need: however needy, the family cannot receive aid. But a regulation diminishing or terminating aid following an investigation showing that the fraudulently received funds have so improved the family finances as to make the family presently less

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152 Text accompanying notes 104-06 *supra.*

153 Civil No. 13,267, at 8.

154 42 U.S.C. § 606(a) (Supp. IV, 1969).

needy or not needy is clearly need-related and permissible. Yet a procedure terminating benefits until the amount fraudulently obtained is recouped is unrelated to need if the family's present financial status is disregarded. The state has either followed this procedure to deter fraud or to recoup funds, conclusively presuming that need has diminished despite the possibility that the family has spent all the fraudulently obtained funds and is as impoverished as ever. The scheme may guarantee restitution and perhaps punishment, but if it disregards the actual needs of the family it is nonneed related and impermissible.

C. *The Range of Issues*

At this point a discussion of specific examples would be helpful. State regulations subject to attack under the *King* holding are numerous, however, and thus this Comment will attempt a thorough discussion of only two general categories of state eligibility requirements. These categories have been chosen because they represent common types of state eligibility requirements and because litigation in these areas has resulted in judicial recognition of the *King* rationale presented above.

1. Fraud

The incidence of welfare fraud in various states and localities has been much debated by politicians; evidence on the extent of the problem tends to be conflicting and difficult to interpret.[155] Any discussion of the policy reasons underlying enforcement against fraud must be grounded in a realization that what is referred to as "welfare fraud" involves greatly disparate degrees of moral turpitude. Failure to report additional income, such as unemployment compensation, is a common type of fraud.[156] A sham transfer of property prior to application for assistance is another.[157] Until recently,[158] the New York welfare department's long-standing policy was that welfare recipients were not permitted to have any savings; recipients who attempted to save money from their welfare grant were considered to have committed fraud.[159]

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[155] *See* BELL, *supra* note 4, at 61-63 (suggesting that fraud is a relatively small problem which is magnified by political ambitions). "There are some who contend that everyone receiving assistance commits fraud to some extent. . . . Others say the incidence of fraud is very low." Aikman & Berger, *Prosecution of Welfare Fraud in Cook County: The Anatomy of a Legal System*, 45 U. DET. J. URBAN L. 287, 316 (1967) (footnotes omitted) [hereinafter cited as *Fraud in Cook County*].

[156] *See Fraud in Cook County* 299.

[157] 2 Sparer, *supra* note 40, ch. 7, at 68 (citing Conn. State Welfare Manual § 126.1).

[158] The policy has been changed. New York City Dep't of Social Services, Informational No. 68-19 (Mar. 14, 1968), *noted in* 13 WELFARE L. BULL., June 1968, at 13.

[159] *Cf.* Hunt v. Bonilla, (N.Y. County Ct., Apr. 5, 1968), *noted in* 13 WELFARE L. BULL., June 1968, at 12 (benefits reduced by amount of unreported savings).

Evidence of past fraud is grounds in many states for termination or reduction of benefits.[160] The circumstances under which such a policy is unrelated to need—and therefore prohibited by *King*—have been discussed.[161] A state's desire to deter moral turpitude in general, and welfare fraud in particular, is similar to the interest asserted by Alabama in *King*. This was the holding in *Evans v. Houston*,[162] in which a Michigan county court, relying partly on *King*, prohibited the total denial of AFDC benefits to a family because the mother had been convicted of fraud.

In *Evans v. Department of Social Services*,[163] the Michigan Court of Appeals affirmed *Evans v. Houston* in an opinion based on a construction of the Michigan act implementing AFDC in that state. The court's construction of the Michigan act followed the construction of the Federal Act implicit in *King*. The court interpreted Michigan's act as authorizing the revocation of assistance "[o]nly where a recipient is no longer 'dependent' within the meaning of [the Michigan definition of dependent child, which parallels the federal definition] or is no longer in financial need." [164] Because fraud is relevant to neither criterion, the state could not cut off funds on that basis. Thus this decision explicitly supports the view that states may normally not impose additional non-need-related eligibility requirements.

A three-judge federal court in *Cooper v. Laupheimer* [165] reached the same conclusion. *Cooper* was a class action attacking a Pennsylvania regulation requiring that restitution be made for duplicate assistance payments by reduction in the amount of future welfare checks, whether procured through fraud or mistake, regardless of the family's financial status. Relying on *King*, the court held that the duty imposed by section 402(a)(10) "is breached if an otherwise eligible child is deprived of AFDC funds because of parental misconduct." [166] Holding that "Congress established only two prerequisites for eligibility: need and dependency," [167] the court concluded that states have a duty to provide "current payments for current needs." [168]

Under the *Evans* and *Cooper* rationale, the state admittedly has a difficult problem of deterrence. The state can still criminally prosecute the offender; but because welfare fraud often carries severe sentences,[169] prosecution may be an overly harsh deterrent.[170] Because

[160] *Cf.* 2 Sparer, *supra* note 40, ch. 7, at 58-60.

[161] Text following note 154 *supra*.

[162] 2 CCH Pov. L. Rep. ¶ 9615 (Mich. Cir. Ct., Jan. 30, 1969).

[163] — Mich. App. —, 178 N.W. 2d 173 (1970).

[164] *Id.* at —, 178 N.W. 2d at 179.

[165] Civil No. 69-2421 (E.D. Pa., Apr. 16, 1970).

[166] *Id.* 13.

[167] *Id.* 15.

[168] *Id.* 16.

[169] *See, e.g.*, Ala. Code tit. 49, § 17(21) (1958) (maximum penalty of $500 fine, and/or 1 year at hard labor).

[170] *But cf. Fraud in Cook County* 316 ("[M]uch empirical research is needed, . . . deterrence remains an uncertain rationale.").

children may suffer if their parent is sent to jail or fined, criminal prosecution is normally inadvisable,[171] as is any remedy. But if the state is insistent, a less harsh remedy would be a requirement of restitution, or at least an option of restitution or jail. Although this approach may be as onerous for the AFDC family as outright aid termination,[172] it has several advantages. If the offender is given an option to repay or be imprisoned, at least it is he[173] who is deciding what would be better for his family. And even if no option is presented, at least the determination of guilt is made by a court with the protection of a complete adversary procedure, rather than by a state administrator in an informal proceeding.[174] Also, if benefits could be reduced because of fraud, it would be possible both to terminate AFDC and to institute criminal prosecution. Possibly the best solution when a state feels that some action must be taken would be to institute a civil proceeding.[175]

HEW regulations originally did not allow reduction in benefits because of prior fraud, but rather permitted only a need test to determine benefit payments:

> Assistance payments must be based on need in the light of currently available income or resources. Current payments cannot be reduced because of prior overpayment, if the recipient no longer has the income available which occasioned the overpayment. Examples: Unreported income several months ago which is no longer available, as well as agency overpayments.[176]

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[171] *See id.* 297-99 (discussion of factors influencing the decision whether to prosecute in one jurisdiction).

[172] *See id.* 316-18 (emphasizing the stigma and employment handicap accompanying a criminal record, and suggesting methods for mitigating this aspect of the problem).

[173] Actually the parent receiving aid is normally the mother; this Comment uses the word "he" only for the sake of generality.

[174] *But cf. Fraud in Cook County* 309-11, 313-14 (criticizing the lack of attorneys in these cases).

[175] It may be that for many welfare recipients it is not the threat of criminal conviction that is effective, but the threat of court action of any kind; courts mean lost time, maybe lost earnings, and confrontation with a lawyer and judge. It may be that the threat of any court action, including a civil action, would be as effective as is the threat of criminal prosecution.

Civil actions are presently used by the Department of Public Aid, but only when the welfare recipient has an identified and readily available fund, such as a bank account, or when he owns property which can be attached. It would seem that the Department of Public Aid could expand its use of the civil courts to cases where immediate recovery is not available by bringing actions of debt of contract or by obtaining a confession of judgment. The record of recovery could hardly be less successful that the current record, and the threat of court action would be retained. Although a larger collection staff might be required and greater diligence on the part of the staff would certainly be required, the net gain, measured in both financial and human gain, might more than justify the change.

Id. 317-18 (footnotes omitted).

[176] U.S. Dep't of Health, Education, & Welfare, Handbook of Public Assistance Administration, pt. IV, § 3120 (Transmittal 120, effective July 1, 1967), in 2 Sparer, *supra* note 40, ch. 7, at 71.

Thus the original regulations permitting only a need test were consistent with *King*, as interpreted by *Cooper* and *Evans*. But this regulation was recently amended to provide that

> current payments of assistance will not be reduced because of prior overpayments unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment; except that where there is evidence which clearly establishes that a recipient willfully withheld information about his income or resources, such income or resources may be considered in the determination of need to reduce the amount of the assistance payment in current or future periods . . . .[177]

The HEW regulation as it now stands, if it results in aid termination, conflicts with *King* because it permits a state policy unrelated to need in the case of a "willful" withholding of information.

2. NOLEO-Related Rules

A 1950 AFDC amendment provided that, beginning in 1952, a state plan must

> provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent . . . .[178]

This amendment, commonly known as Notice to Law Enforcement Officials, or NOLEO, was enacted at a time when the AFDC program was under attack on many fronts.[179] NOLEO was specifically occasioned by the denial of a county prosecutor's request to examine a list of AFDC recipients to investigate whether court support orders were being obeyed.[180] Proposals to make desertion or abandonment a federal crime were defeated because of the cost of federal prosecution and the propriety of involving the federal government in a domestic relations problem; NOLEO was a compromise measure.[181] The legislative history makes it clear that NOLEO was not intended to be a federal eligibility requirement. In urging the passage of the original bill containing the NOLEO provision, the bill's sponsor said in part:

> In introducing this bill, I do not intend that aid shall be withheld from any needy child, but rather this bill is aimed

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[177] Transmittal 120, 45 C.F.R. § 233.20(3)(ii)(d) (1970).

[178] § 402(a)(11), 42 U.S.C. § 602(a)(11) (Supp. IV, 1969).

[179] M. McKEANY, THE ABSENT FATHER AND PUBLIC POLICY IN THE PROGRAM OF AID TO DEPENDENT CHILDREN 41-42 (1960) [hereinafter cited as McKEANY]. *See also* BELL, *supra* note 4, at 80.

[180] McKEANY 42 (citing Cohen, *Factors Influencing the Content of Federal Public Welfare Legislation*, in THE SOCIAL WELFARE FORUM 210 (1954)).

[181] McKEANY 42-46.

> at parents, who, without justification, shift the financial responsibility for their children to the Federal, State, and local governments.[182]

HEW regulations are to the same effect:

> The public assistance job is seen as that of providing eligible children with the assistance they need; and it is not the intent of the legislation to deprive needy children of assistance in order to punish their parents for neglect of their duties. Although accepting assistance involves notice to the law enforcement officials if a parent has deserted or abandoned his child, the amendment does not impose an additional eligibility requirement.[183]

Although NOLEO was thus not a federal eligibility requirement, many states felt free (as shall be seen) to establish eligibility requirements based on the NOLEO provisions. The above HEW regulation suggests that state eligibility requirements based on the NOLEO provisions are inadvisable and inconsistent with the purposes of the Federal Act, but it does not explicitly prohibit a state from instituting eligibility requirements of this type. Although Condition X would appear to apply to this situation, it has not been invoked by HEW. Under the *King* analysis suggested by this Comment, however, NOLEO-related eligibility requirements are invalid unless in some manner they can be considered determinations of need.[184]

a. Requirement That Applicant Consent to or File Complant Against Deserter

Many states require as a condition of eligibility that an AFDC applicant file a criminal or civil complaint against a deserting parent, or expressly consent to the filing of a complaint by the state welfare department.[185] A requirement such as this is clearly non-need-related and impermissible under *King*. There would be no objection, however, to stating on the application form that a deserting parent will be sued or prosecuted by the welfare department if the applicant accepts

[182] *Hearings on H.R. 2983 Before the House Comm. on Ways and Means*, 81st Cong., 1st Sess., pt. 2, at 1978 (1949) (statement of Representative Steed).

[183] U.S. Dept. of Health, Education, & Welfare, Handbook of Public Assistance Administration, pt. IV, § 8120, in 2 Sparer, *supra* note 40, ch. 7, at 44-45.

[184] For example, a father not supporting his illegitimate child could conceivably be considered a "resource" of the child and aid accordingly terminated. Even were a complaint filed against the father, however, there is no guarantee that a judgment could be obtained against him for any significant amount. "Studies in this area generally conclude that the absent fathers of needy children tend, like their families, to be poor, and even vigorous law enforcement does not create income." BELL, *supra* note 4, at 214 n.7. HEW regulations require that only "net income as is actually available for current use on a regular basis" be considered in determining need. 45 C.F.R. § 203.1(b) (1970).

[185] *See* 13 WELFARE L. BULL., June 1968, at 14, discussing Young v. Massachusetts Dep't of Pub. Welfare, No. 147 (Mass. Super. Ct., filed Feb. 16, 1968; settled June 12, 1968) & *In re* M., No. 69378 (Ariz. Dep't of Pub. Welfare, Apr. 1, 1968).

aid. In fact, if the policy of the welfare department is to pursue such a course of action, the applicant should be notified so that he can decide whether he wishes to apply for aid. This policy might discourage AFDC applications, but an eligibility requirement is not thereby instituted.

If the welfare department merely requested that the applicant sign a statement indicating that he understood this policy, no eligibility requirement would be established unless the applicant were required to sign the statement, although an applicant might be misled into thinking that his signature was required. But if the applicant were required to sign the statement, an eligibility requirement unrelated to need would be established. Where the welfare department is empowered under state law to sue without the applicant's consent,[186] the applicant might nevertheless refuse to give his unneeded "consent" out of fear of retribution from the deserter, out of stubborness, or as a sign of dissatisfaction with the welfare system. Denial of aid to applicants in such a situation may be phrased in terms of "lack of cooperation"; but in fact such a determination is simply a moral eligibility requirement similar to the requirement condemned in *King*. The state's interest in requiring consent or a signature indicating understanding of the department policy is illusory. An applicant refusing to sign could easily be questioned to determine his understanding that the deserter would still be sued. And where the welfare department is required to obtain the applicant's consent in order to sue under state law, the state's interest could easily be protected by changing the law. Thus such requirements are an unjustified and largely unnecessary restriction on eligibility, falling clearly within the proscription of the *King* rationale.

b. Requirement That Mother of Illegitimate Child Name the Father

At first glance, a welfare department's requirement that the mother of an illegitimate child name the father so that the department can institute support action appears quite reasonable. But the reasonableness fades upon closer examination.

In *Doe v. Shapiro* [187] such a "name the father" regulation was involved, and the court employed an analysis similar to that presented

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[186] *E.g.*, CAL. WELF. & INST'NS CODE § 11476 (West 1966).

[187] 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed for failure to docket within prescribed time*, 396 U.S. 488 (1970) (Black & Douglas, JJ., dissenting). Surprisingly, *Doe* was reviewed by a columnist in the public press, most likely—as the title of the column evidences—because of the "human interest" nature of the case. Cuneo, *Federal court upholds Hester Prynne . . . at last*, Phila. Evening Bulletin, Feb. 7, 1970, at 9, col. 4. Considering the hostility that normally greets AFDC, it was also surprising that this columnist cited the case approvingly. Subsequent to the dismissal of the *Doe* appeal, Connecticut changed the rule at issue so as to terminate aid to the mother who refused to name the father and grant aid to the child. On the theory that the child's aid was inextricable from aid to the mother, a federal district court found the Connecticut officials in contempt of the *Doe* order and threatened sanctions unless they restored the aid denied under the invalid rule. Doe v. Harder, 310 F. Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902 (1970).

in this Comment. Mrs. Doe refused to name the father of her illegitimate son, Scott, and the Connecticut welfare department thereupon removed the child from the AFDC program, while continuing to aid Mrs. Doe and her three legitimate children. A federal three-judge court held that section 402(a)(10) requires states to aid all dependent children. The court also held that NOLEO and the 1967 amendments do not constitute a federal eligibility requirement, and that therefore Scott Doe had been improperly denied aid.

The state certainly has a legitimate interest in requiring support from the father of an illegitimate child, yet obviously its interest is frustrated if it cannot obtain the name of the father. Cutting off AFDC benefits may well be the only viable method of forcing the mother to name the father. Furthermore, Congress has expressed grave concern over the problem of deserting fathers: thus both Congress and the state are interested in forcing the mother to name the father.

But there are good reasons for not forcing a mother to name the father of her illegitimate child. Appealing *Doe* to the Supreme Court, Connecticut argued that:

> The Connecticut regulation . . . has the further social goal of protecting the mother from her own shortsighted stupidity caused by her desire to protect her current paramour rather than protecting the future of her children.[188]

Conceivably a mother would refuse to name the father of her child simply to protect a man for whom she feels affection. But because actual contributions by the father are considered in determining need and she thus does not gain financially from refusing to name the father, it is just as likely that the mother will refuse to name the nonsupporting father for other reasons, such as her feeling that a low pressure approach may lead to marriage, or at least some financial support. This, in fact, was the reason behind Mrs. Doe's refusal to name Scott's father.[189]

The Connecticut welfare department's response to Mrs. Doe is an excellent example of what one authority has called the "best interest theory" in welfare administration.[190] According to this theory, welfare departments virtually always rationalize their actions in terms of what they consider to be the best interests of the recipient, disregarding the recipient's own evaluation of his position. Thus, although Mrs. Doe determined from her own experience that it was in her children's best interest not to pressure Scott's father, the welfare department insisted that she was incorrect.

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188 Jurisdictional Statement at 5-6, Shapiro v. Doe, 396 U.S. 488 (1970).

189 Interview with Professor Edward V. Sparer, University of Pennsylvania Law School, in Philadelphia, April 20, 1970.

190 Sparer, *The Place of Law in Social Work Education: A Commentary on Dean Schottland's Article*, 17 BUFFALO L. REV. 733, 735 (1968).

Of course, a state may decide that money in hand is better than gambling on a future marriage, notwithstanding the desirability of the latter result. This policy decision, having no bearing on the legality of the state's action in terminating aid, is one the state is free to make; but whether or not Connecticut properly decided this policy question, it is prohibited by the *King* rationale from denying aid to Scott Doe. AFDC is not intended to provide the state a sword to deter parental misbehavior; thus the importance of the state's interest cannot be considered controlling when it denies aid to needy dependent children.

The possible variations on NOLEO themes are boundless. Some local welfare agencies have required as a condition to aid that the applicant actually locate the father rather than simply name him.[191] Attempts have been made to condition aid on the mother's willingness to undergo a lie detector test to substantiate the identity of the father of her illegitimate child.[192]

3. Other State Eligibility Requirements Unrelated to Need

As the specific discussion of the NOLEO and fraud situations has suggested, non-need-related state eligibility requirements subject to challenge under the *King* rationale are numerous. Although an extensive categorization is not attempted, a few examples provide an idea of the continuous variety.[193]

A number of challenges are being addressed to state provisions granting aid to children over the age of eighteen only if they attend specified types of schools.[194] In at least one state, misguided theories of social "therapy" have resulted in a requirement that the mother of an illegitimate child make a "personal effort" to contact the father and have him come to the offices of the welfare department with her.[195] This policy has been pursued even when the father has remarried after parting with the applicant under unpleasant circumstances.[196] Inadvertent overpayment by the welfare department may occasion a restitution requirement, even though the family has completely spent the overpayments.[197] Any conclusive presumption that money is available to a dependent child, when the money is in fact unavailable, is also open to a *King* challenge.

Other practices, although not normally considered as such, are eligibility requirements in effect. The controversial practice of "mid-

[191] Mississippi State Advisory Comm'n, Welfare in Mississippi: A Report to the United States Commission on Civil Rights 18 (February 1969), in 2 Sparer, *supra* note 40, ch. 7, at 47.

[192] *See* County of Contra Costa v. Social Welfare Bd., 229 Cal. App. 2d 762, 40 Cal. Rptr. 605 (1964).

[193] *Welfare's "Condition X," supra* note 1, at 1228-33, discusses some other important examples.

[194] *See, e.g.,* Alexander v. Swank, 2 CCH Pov. L. Rep. ¶ 9614 (N.D. Ill. 1969).

[195] *See* Sparer, *supra* note 190, at 736-37.

[196] *Id.* 736.

[197] *See* Stallworth v. California, No. 48393 (N.D. Cal., filed Dec. 13, 1967). HEW regulations prohibit this. Transmittal 120, 45 C.F.R. § 233.20(3)(ii)(d) (1970).

night raids" [198] to determine whether a welfare recipient is living with a man began to fall out of favor even before the Court's decision in *King*; where this practice exists in order to determine fraud, or where more conventional fraud investigations are used, consent to a search by the caseworker is often administered as an eligibility requirement.[199] Consent to a "home visit" by a caseworker is a frequent eligibility requirement.[200] Unnecessarily burdensome application procedures [201] can perhaps be considered eligibility requirements. Ultimately the range of state regulations subject to attack under *King* is limited principally by counsel's ability to perceive the true nature of provisions in fact constituting eligibility requirements unrelated to need.

SUMMARY

The Supreme Court's decision in *King* subjects many state welfare regulations to challenge on the grounds that they do not conform to the AFDC provisions of the Social Security Act. States have long considered themselves free to deny welfare benefits as they saw fit. The federal agency charged with the administration of the AFDC program only prohibited state eligibility requirements not "reasonably related" to the purposes of the federal statute; moreover, this policy, known as Condition X, was enforced only sporadically.

King not only prohibits states from withholding AFDC to deter illegitimacy or control sexual conduct, but also precludes all eligibility requirements unrelated to need, except those explicitly sanctioned by the statute or its legislative history.

This interpretation is finding increasing judicial acceptance; if this trend continues, and if Congress or the state legislatures can be convinced to raise the unconscionably low level of welfare benefits, America may eventually achieve the rather modest goal of providing adequate economic protection for at least those children of its poor within the scope of the federal AFDC provisions.

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198 *See generally* Parrish v. Civil Service Comm'n, 66 Cal. 2d 200, 425 P.2d 223, 57 Cal. Rptr. 623 (1967); Bell, *The 'Rights' of the Poor: Welfare Witch-hunts in the District of Columbia*, 13 J. Soc. WORK 60 (1968). Note that U.S. Dep't of Health, Education, & Welfare, Handbook of Public Assistance Administration § 2300 (a) (Transmittal 139), prohibits policies "that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights. . . . [especially such violations as] making home visits outside working hours . . . ."

199 *See* Bible v. Smith, 3 CLEARINGHOUSE REV. 26 (Wash. Sup. Ct. 1969); Patricia A. Smith, Nos. C71-3502.0 & C174-570.0, at 23-24 (D.C. Dep't of Pub. Welfare, Oct. 16, 1968), in 2 Sparer, *supra* note 40, ch. 8, at 18.

200 James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969) (declaring a home visit a search within the meaning of the fourth amendment), *prob. juris. noted sub nom.* Wyman v. James, 397 U.S. 904 (1970).

201 *See generally* Comment, *Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania*, 115 U. PA. L. REV. 1307, 1316, 1319 (1967).