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1976 Developments in Welfare Law-Aid to Families with Dependent Children

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NOTES

1976 DEVELOPMENTS IN WELFARE LAW— AID TO FAMILIES WITH DEPENDENT CHILDREN*

Amidst continuing rhetoric about a major reform of our welfare system, the country still struggles with an unwieldy bureaucracy largely devised in 1935 by the Social Security Act.[1] This Note focuses on recent developments in one of the most controversial parts[2] of our present system—Aid to Families with Dependent Children (AFDC).[3] Under AFDC, the federal government provides funds to state-administered programs that meet federal guidelines.[4] The state agencies, in turn, pay benefits to eligible individuals.

The past year was a mixed one for AFDC recipients. Holding true to its tendency to limit welfare recipients' access to federal courts,[5] the Second Circuit in *Andrews v. Maher*[6] flatly rejected four theories on which AFDC plaintiffs have relied for federal jurisdiction. In another setback, two court decisions—one federal[7] and one state[8]—limited recipients' right to redress for wrongful public disclosure of AFDC files. But AFDC recipients gained ground as well. A federal statute[9] and a Supreme Court decision[10] now seem to require federal courts to grant attorney's fees in many cases to successful AFDC plaintiffs.

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[1] Act of Aug. 14, 1935, Pub. L. No. 74-271, ch. 531, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397f (1970 & Supp. V 1975)).

[2] *See* Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825 (1974).

[3] 42 U.S.C. §§ 601-660 (1970 & Supp. V 1975). AFDC provides benefits to "needy dependent children and the parents or relatives with whom they are living." *Id.* § 601 (1970).

[4] States have broad discretion to set standards of need and levels of benefits, but they may not impose conditions unrelated to need that exclude persons eligible under federal standards. *See* King v. Smith, 392 U.S. 309 (1968).

[5] *See, e.g.*, Freda v. Lavine, 494 F.2d 107 (2d Cir. 1974); Hagans v. Lavine, 471 F.2d 347 (2d Cir. 1973), *rev'd*, 415 U.S. 528 (1974); McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969); Rosado v. Wyman, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

[6] 525 F.2d 113 (2d Cir. 1975).

[7] Morris v. Danna, 411 F. Supp. 1300 (D. Minn. 1976), *aff'd per curiam*, 547 F.2d 436 (8th Cir. 1977).

[8] Pajewski v. Perry, 363 A.2d 429 (Del. 1976).

[9] Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976) (amending 42 U.S.C. § 1988 (1970)).

[10] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

I

JURISDICTION OVER AFDC SUITS: NARROWING THE ENTRANCE TO FEDERAL COURT

In a host of recent lawsuits, AFDC recipients have contended that rules or practices of state AFDC programs do not conform to the Social Security Act.[11] Although federal courts have recognized several bases for assuming jurisdiction over such claims in the past and Congress has recently expanded federal jurisdiction,[12] some

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[11] 42 U.S.C. §§ 301-1397f (1970 & Supp. V 1975). *See, e.g.*, Philbrook v. Glodgett, 421 U.S. 707 (1975) (claim that denial of AFDC-UF to father receiving unemployment compensation violates Social Security Act); Burns v. Alcala, 420 U.S. 575 (1975) (claim that denial of AFDC benefits to unborn children violates the Social Security Act); Roselli v. Affleck, 508 F.2d 1277 (1st Cir. 1974) (claim that flat grants violate the Social Security Act).

42 U.S.C. § 602(a)(10) (Supp. V 1975) requires states to furnish aid "with reasonable promptness to all eligible individuals." In what is known as the *King-Townsend-Remillard* trilogy (King v. Smith, 392 U.S. 309 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972)), the Supreme Court ruled that this provision bars states from imposing non-need eligibility conditions not found in the Social Security Act. However, states have broad discretion to set financial eligibility criteria and levels of benefits. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535, 541 (1972); Dandridge v. Williams, 397 U.S. 471, 478-80 (1970); Rosado v. Wyman, 397 U.S. 397, 408 (1970); Note, *1975 Developments in Welfare Law—Aid to Families with Dependent Children*, 61 CORNELL L. REV. 777, 798-99 n.163 (1976).

[12] For purposes of determining possible federal jurisdiction, AFDC claims divide into three categories. First, recipients challenge state rules or institutionalized practices as unconstitutional or inconsistent with the Social Security Act. Part I of this Note discusses four theories for getting such claims into federal courts. The second category includes claims by individuals injured by isolated instances of state violations of federal statutory standards. In Morris v. Danna, 411 F. Supp. 1300 (D. Minn. 1976), *aff'd per curiam*, 547 F.2d 436 (8th Cir. 1977), a federal court refused to hear this type of case. *See* notes 201-31 and accompanying text *infra*. Finally, AFDC recipients challenge federal regulations as inconsistent with the Social Security Act. These plaintiffs can obtain federal court review under mandamus jurisdiction (28 U.S.C. § 1361 (1970)) or federal question jurisdiction (28 U.S.C.A. § 1331 (West Supp. Dec. 1976)). Section 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Two federal courts have invoked § 1361 to review federal AFDC regulations. Jackson v. Weinberger, 407 F. Supp. 792, 795-96 (W.D.N.Y. 1976); National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861, 866-67 (D.D.C. 1974). *See* Note, *Federal Jurisdiction over Federal Welfare Claims*, 60 CORNELL L. REV. 800, 817-23 (1975) [hereinafter cited as Note, *Federal Jurisdiction*]. A 1976 amendment to § 1331 removed the $10,000 amount in controversy requirement for any action involving a federal question and brought against the United States or its officials. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721. Section 1331 now provides in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the

federal courts have nevertheless narrowed the jurisdictional avenues available to AFDC plaintiffs. Whether prompted by overcrowded dockets[13] or an unwillingness to supervise state welfare practices,[14] courts have shown increasing reluctance to decide the merits of welfare claims.[15]

Typifying this trend, the Second Circuit in *Andrews v. Maher*[16] severely restricted access to a federal forum to challenge state welfare practices. The *Andrews* plaintiffs challenged the application of a Connecticut regulation[17] that requires a recipient to appear periodically at a district office for an eligibility redetermination interview.[18] An informal state rule exempts from this requirement recipients living more than twenty-five miles from the nearest district office; instead, these recipients are visited at home by a caseworker.[19] The state does not pay travel or child care expenses

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United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

AFDC plaintiffs have already successfully used the amended section to gain access to federal courts to challenge federal regulations. Green v. Philbrook, 427 F. Supp. 834, 836 (D. Vt. 1977). Arguably, plaintiffs challenging state practices—the first kind of suit—could also gain federal review under the new § 1331 by including in their complaint a count against federal officials for failure to ensure compliance with the Social Security Act. *See* 42 U.S.C. § 604 (1970).

[13] *Cf.* Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 578-86 (1974) (crowding in federal appellate courts).

[14] *See* Reyes v. Edmunds, 416 F. Supp. 649 (D. Minn. 1976); Morris v. Danna, 411 F. Supp. 1300 (D. Minn. 1976), *aff'd per curiam*, 547 F.2d 436 (8th Cir. 1977). With only one exception (Freda v. Lavine, 494 F.2d 107 (2d Cir. 1974)), federal courts have not abstained from hearing challenges to state welfare practices, and the Supreme Court has specifically refused to require welfare plaintiffs to exhaust their administrative remedies. King v. Smith, 392 U.S. 309, 312 n.4 (1968); Damico v. California, 389 U.S. 416 (1967). *See also* Mendoza v. Lavine, 412 F. Supp. 1105 (S.D.N.Y. 1976) (jurisdiction retained to allow pretrial preparation while administrative process continued). However, Professor Redlich has shown that federal courts have discretion to refuse to hear welfare cases on either abstention or exhaustion grounds. Redlich, *The Act of Welfare Advocacy: Available Procedures and Forums*, 36 ALB. L. REV. 57, 84 n.114 (1971).

[15] *See* Andrews v. Maher, 525 F.2d 113 (2d Cir. 1975); Reyes v. Edmunds, 416 F. Supp. 649 (D. Minn. 1976); Morris v. Danna, 411 F. Supp. 1300 (D. Minn. 1976), *aff'd per curiam*, 547 F.2d 436 (8th Cir. 1977). *Cf.* Linkenhoker v. Weinberger, 529 F.2d 51 (4th Cir. 1975) (summary judgment vacated as moot); Hagans v. Wyman, 527 F.2d 1151 (2d Cir. 1975) (remand for consideration of mootness question raised by change in challenged regulation); Note, *Federal Jurisdiction*, *supra* note 12, at 800-02 (judicial and legislative "federalizing" of welfare has reduced federal jurisdiction available to welfare plaintiffs).

[16] 525 F.2d 113 (2d Cir. 1975).

[17] 1 CONN. REGS. §§ 17-2-29 to 31 (1975).

[18] 525 F.2d at 115. For a more detailed description of the facts see Andrews v. Norton, 385 F. Supp. 672, 675-77 (D. Conn. 1974).

[19] 525 F.2d at 115.

incurred by those who must appear in person. Failure to report for redetermination is grounds for termination of benefits.[20]

The plaintiffs, a class of AFDC recipients living within the twenty-five mile radius, challenged the regulation and rule on both constitutional and statutory grounds. They argued that the practice violated the equal protection clause because it arbitrarily created two classes of persons, one of which must incur extra expenses to maintain AFDC eligibility.[21] They also argued that the rules violated the Social Security Act by imposing an unauthorized condition of eligibility.[22] Affirming a lower court dismissal,[23] however, the Second Circuit rejected all four theories under which the plaintiffs alleged federal jurisdiction.

Plaintiffs first propounded their constitutional claim as the sole foundation for access to federal court.[24] Both their equal protection claim and their allegation that the state's practices violated the Social Security Act stated federal causes of action under 42 U.S.C. § 1983.[25] Only the constitutional claim, however, unquestionably fulfilled the narrower requirements of 28 U.S.C. § 1343,[26] the jurisdictional counterpart of section 1983. Once jurisdiction

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[20] 1 CONN. REGS. § 17-2-30(a) (1975).

[21] 525 F.2d at 116-17.

[22] *Id.* at 115-16. *See* note 11 *supra.*

[23] Andrews v. Norton, 385 F. Supp. 672 (D. Conn. 1974).

[24] 525 F.2d at 116-17.

[25] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[26] 28 U.S.C. § 1343(3)-(4) (1970) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
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> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Plaintiffs specifically relied upon the language of § 1343(3) granting jurisdiction over cases claiming deprivation of *any* right "secured by the Constitution." By itself, plaintiffs' claim under the Social Security Act provided only arguable grounds for jurisdiction under § 1343(3) because that section applies only to statutes "providing for equal rights of citizens." *See* notes 45-48 and accompanying text *infra.*

was established by the constitutional claim, the court could hear the statutory claim under the doctrine of pendent jurisdiction because both issues shared a "common nucleus of operative fact."[27] Although the probability of ultimate success on their constitutional claim was questionable,[28] plaintiffs contended that it was sufficiently substantial under the Supreme Court's rule in *Hagans v. Lavine*[29] to allow a federal court to hear the stronger statutory challenge.[30] Under the *Hagans* rule, a constitutional challenge is jurisdictionally sufficient to support a pendent statutory claim if the challenged regulation is not "so patently rational as to require no meaningful consideration"[31] and the question raised is not "foreclosed by prior decisions of [the Supreme] Court."[32] The *Hagans* Court, recognizing that the regulation before it might have had a rational basis,[33] nevertheless ruled that plaintiffs' challenge to that regulation presented a constitutional question sufficiently substantial to support a pendent statutory claim.[34] Since the court announced this broad substantiality test in the context of an AFDC complaint,[35] *Hagans* seemed to guarantee access to federal courts to welfare recipients who could present even tenuous constitutional claims.[36]

The Second Circuit, however, did not view *Hagans* as ensuring access to the federal courts. It affirmed the district court's determination[37] that the *Andrews* equal protection argument was in-

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[27] UMW v. Gibbs, 383 U.S. 715, 725 (1966). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 19 (3d ed. 1976).

[28] The court found it insubstantial. 525 F.2d at 116-18. *See* notes 37-44 and accompanying text *infra*.

[29] 415 U.S. 528 (1974).

[30] 525 F.2d at 116-17.

[31] 415 U.S. at 541.

[32] *Id.* at 543 (quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974)).

[33] 415 U.S. at 541-42.

[34] *Id.* at 542-43. In support of this finding, the Court stated that it was "unaware of any cases in this Court specifically dealing with this or any similar regulation and settling the matter one way or the other." *Id.* at 539 (footnote omitted).

[35] The plaintiff AFDC recipients in *Hagans* challenged a New York regulation "permitting the State to recoup prior unscheduled payments for rent from subsequent grants under the AFDC program." *Id.* at 531 (footnote omitted).

[36] *See* Note, *Hang On, Pendent Jurisdiction—Here Comes Hagans v. Lavine*, 6 CONN. L. REV. 747 (1974); Note, *The Outlook for Welfare Litigation in the Federal Courts: Hagans v. Lavine & Edelman v. Jordan*, 60 CORNELL L. REV. 897, 898-903 (1975) [hereinafter cited as Note, *The Outlook for Welfare Litigation*]; Case Comment, *Federal Jurisdiction: Supreme Court Strains to Provide a Federal Forum for Challenges to State Administration of Welfare Programs*, 59 MINN. L. REV. 761 (1975) [hereinafter cited as Comment, *Federal Jurisdiction*].

[37] Andrews v. Norton, 385 F. Supp. 672, 677 (D. Conn. 1974).

substantial, even under the *Hagans* test.[38] The circuit court cited Supreme Court decisions applying a reasonableness test to the merits of constitutional challenges to state welfare practices.[39] The court then applied the same reasonableness standard to the threshold question of the substantiality required to support jurisdiction over a pendent claim.[40] Connecticut's classification was reasonable[41] because a state may "reasonably limit its administrative offices in order to minimize costs,"[42] and "[a] state legislature is constitutionally free to decide not to provide reimbursement for travel costs in its AFDC grant, however desirable such reimbursement would be."[43] Thus, while professing to follow the *Hagans* test, the Second Circuit adopted a more stringent standard formerly applied only to the merits of a constitutional claim.[44]

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[38] 525 F.2d at 117.

[39] *Id.* (citing Jefferson v. Hackney, 406 U.S. 535 (1972) (higher percentage reduction factor applied to AFDC benefit award than to other welfare programs); Richardson v. Belcher, 404 U.S. 78 (1971) (social security benefits reduced to reflect workmen's compensation benefits); Dandridge v. Williams, 397 U.S. 471 (1970) (absolute maximum imposed on AFDC benefits to family regardless of size)).

[40] 525 F.2d at 117-18. The Supreme Court in *Hagans* rejected the reasonableness test in the jurisdictional context. The *Hagans* Second Circuit panel had applied the reasonableness standard of Dandridge v. Williams, 397 U.S. 471 (1970), to the challenged regulation and found the challenge insubstantial, because the regulation had a rational basis. Hagans v. Wyman, 471 F.2d 347, 349-50 (2d Cir. 1973). Conceding that the regulation might be rational when judged on the merits (415 U.S. at 542), the Supreme Court nevertheless reversed the Second Circuit, because the regulation's reasonableness was "not immediately obvious from the decided cases or so 'very plain' under the Equal Protection Clause." *Id.* (footnote omitted). Thus, although *Hagans* and cases cited therein (*e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Bell v. Hood, 327 U.S. 678 (1946)) use language of reasonableness in defining the substantiality test for jurisdiction, post-*Hagans* plaintiffs seeking only access to a federal court should face a far easier hurdle than those urging that a regulation is unreasonable on the merits.

[41] Although arguably reasonable, the classification was not beyond reproach; it did not provide for those within the 25 mile radius who found travel difficult or impossible (*e.g.*, the handicapped).

[42] 525 F.2d at 117 (footnote omitted).

[43] *Id.*

[44] The Second Circuit ignored not only the Supreme Court's specific refusal in *Hagans* to apply a reasonableness test to the jurisdictional issue (*see* note 40 *supra*), but also the policies both explicit and implicit in *Hagans*. Arguably, *Hagans* represents a Supreme Court decision that despite crowded dockets, federal courts should hear all good faith claims charging inconsistency with the Social Security Act. The Court first hinted at this policy in 1970 when it wrote:

> [The Social Security Act] question is so essentially one "of federal policy that the argument for exercise of pendent jurisdiction is particularly strong."
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> . . . .
>
> It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that

As a second jurisdictional basis, the plaintiffs argued that 28 U.S.C. § 1343(3)[45] encompassed their federal statutory claim independent from any constitutional issues. This subsection provides federal jurisdiction over suits alleging state violations of rights "secured by the Constitution of the United States or by *any Act of Congress providing for equal rights of citizens.*"[46] The Second Circuit had previously ruled, however, that the Social Security Act does not provide "for equal rights of citizens."[47] Therefore, the plaintiffs urged the court to disregard the "equal rights" language of subsection 1343(3) and find that the statute conferred jurisdiction over any section 1983 action.[48]

Substantial authority supported the *Andrews* plaintiffs' expansive reading of subsection 1343(3). In *Blue v. Craig*,[49] the Fourth Circuit found that subsection 1343(3) encompasses all 1983 ac-

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Congress has attached to their use.

Rosado v. Wyman, 397 U.S. 397, 404, 422-23 (1970) (footnote omitted). The *Hagans* decision also invokes the unique expertise of the federal courts in construing federal statutes, particularly in applying preemption principles in supremacy clause cases. 415 U.S. at 548-50. *See* Comment, *Federal Jurisdiction*, *supra* note 36, at 772-73. The *Andrews* court recognized that a federal forum would be appropriate for plaintiffs' claims but nevertheless denied jurisdiction. 525 F.2d at 119-20.

Commentators have argued that the federal interest in Social Security Act programs, the inadequacy of administrative remedies, and the expertise of federal courts in interpreting the Social Security Act provide sufficient justification for federal courts to stretch the limits of their jurisdiction to include all beneficiary complaints. *See* Cover, *Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights when no Violations of Constitutional Rights are Alleged* (pt. 1), CLEARINGHOUSE REV., Feb.-March, 1969, at 5; Herzer, *Federal Jurisdiction over Statutorily-Based Welfare Claims*, 6 HARV. C.R.-C.L. L. REV. 1, 9-12 (1970); Note, *Federal Jurisdiction over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1404, 1405 (1972) [hereinafter cited as Note, *Welfare Challenges*]; Note, *Federal Jurisdiction*, *supra* note 12, at 802. In other welfare cases, circuit courts, including the Second Circuit, have noted the limitations *Hagans* imposed on the substantiality test for jurisdiction. *See* Holley v. Lavine, 529 F.2d 1294, 1295-96 (2d Cir. 1976), *cert. denied*, 426 U.S. 954 (1976); Maggett v. Norton, 519 F.2d 599, 602 (2d Cir. 1975); Glover v. McMurray, 507 F.2d 1325, 1326 n.2 (2d Cir. 1974); Murrow v. Clifford, 502 F.2d 1066, 1068 (3d Cir. 1974); Doe v. Rampton, 497 F.2d 1032, 1036 (10th Cir. 1974). *But see* Randall v. Goldmark, 495 F.2d 356, 359 n.5 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974).

[45] 28 U.S.C. § 1343(3) (1970). The text of the statute is set out in note 26 *supra*.

[46] 28 U.S.C. § 1343(3) (1970) (emphasis added).

[47] Aguayo v. Richardson, 473 F.2d 1090, 1101 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Almenares v. Wyman, 453 F.2d 1075, 1082 n.9 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); McCall v. Shapiro, 416 F.2d 246, 250 (2d Cir. 1969); Rosado v. Wyman, 414 F.2d 170, 178 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397 (1970). *Accord*, Young v. Harder, 361 F. Supp. 64, 74 (D. Kan. 1973); Acosta v. Swank, 325 F. Supp. 1157, 1161 (N.D. Ill. 1971).

[48] 525 F.2d at 118.

[49] 505 F.2d 830 (4th Cir. 1974). In *Blue*, medicaid recipients charged that the state's failure to pay their expenses for travel to and from places providing medical services violated the Social Security Act.

tions.[50] After reviewing the history of sections 1983 and 1343(3),[51] the *Blue* court construed the statute's reference to equal rights "not so much as a term limiting the scope of the statute but rather as a term intended to spread the jurisdictional umbrella of the federal courts over any actions authorized under statutes enacted to give effect to the Fourteenth Amendment, including specifically § 1983."[52] Despite *Blue*, and scholarly opinion from which the decision drew support,[53] the Second Circuit held that subsection 1343(3) does not create federal jurisdiction over actions—including section 1983 actions—based solely on violations of the Social Security Act.[54] The court relied on the weight of its own prior decisions[55] and the Supreme Court's refusal to decide the issue in reaching this result.[56]

The third jurisdictional allegation raised in *Andrews* was also drawn from *Blue*. Once again citing subsection 1343(3), the *Andrews* plaintiffs argued "that a claim that state welfare regulations violate the Social Security Act is in fact a claim, under section 1343(3), of deprivation of rights 'secured by the Constitution,' because such a claim cannot succeed without ultimate resort to the Supremacy

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[50] *Id.* at 839.

[51] *Id.* at 836-39. The court pointed out that Congress originally enacted §§ 1983 and 1343(3) together in the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871).

[52] 505 F.2d at 838. *Accord*, Vazquez v. Ferre, 404 F. Supp. 815, 824 (D.N.J. 1975). *Contra*, Randall v. Goldmark, 495 F.2d 356, 359 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974).

[53] *See* Cover, *supra* note 44; Herzer, *supra* note 44; Note, *Welfare Challenges*, *supra* note 44.

[54] 525 F.2d at 118.

[55] *See* cases cited at note 47 *supra*. The Fourth Circuit in *Blue* squarely faced the Second Circuit's objections to finding subsection 1343(3) coextensive with section 1983. First, the *Blue* court recognized the concern, expressed in McCall v. Shapiro, 416 F.2d 246, 250 (2d Cir. 1969), that welfare cases would overwhelm federal courts adopting the coextensive rule. The Fourth Circuit answered that Rosado v. Wyman, 397 U.S. 397, 422 (1970), encouraged federal courts to hear welfare cases, so long as provisions for federal administrative supervision of the states were insufficient. 505 F.2d at 840. Second, the Fourth Circuit pointed out that in Lynch v. Household Finance Corp., 405 U.S. 538, 542 (1972), the Supreme Court rejected the distinction between personal rights and property rights used by the Second Circuit in Almenares v. Wyman, 453 F.2d 1075, 1081-82 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972), and McCall v. Shapiro, 416 F.2d 246, 250 (2d Cir. 1969). 505 F.2d at 840-41. Finally, *Blue* stated that both policy reasons and the legislative history of subsection 1343(3) militated against the restrictive reading of "equal rights" espoused by the Second Circuit in McCall v. Shapiro, 416 F.2d 246, 250 (2d Cir. 1969); rather, federal jurisdiction should extend to all § 1983 claims. *McCall*, said the Fourth Circuit, illogically infers a Congressional intent to create a federal right and simultaneously deny access to the only forum capable of enforcing that right. 505 F.2d at 841-42.

[56] 525 F.2d at 118. The Supreme Court declined to resolve the issue of the scope of § 1343(3) in Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974).

Clause."[57] In *Blue*, the Fourth Circuit asserted that the Supreme Court's treatment of jurisdiction in welfare cases "point[s] inescapably to the conclusion . . . that a claim that a state statute or regulation is inconsistent with federal law poses a constitutional issue under the Supremacy Clause, jurisdictionally cognizable under § 1343(3)."[58] The Second Circuit, however, rejected the plaintiffs' argument, stating that "it transforms statutory claims into constitutional claims by verbal legerdemain."[59] Citing only one case as authority,[60] the court ruled that the plaintiffs were actually seeking to vindicate rights conferred by statute and not by the supremacy clause; the clause itself "does not secure rights to individuals,"[61] but "states a fundamental structural principle of federalism."[62] Although this reading settles the question in the Second Circuit, the Supreme Court may yet find merit in the notion that federal supremacy, once asserted, inures to the benefit of individuals and is a right secured by the Constitution.[63]

Finally, plaintiffs urged the Second Circuit to hear their claim under subsection 1343(4),[64] which creates federal jurisdiction over claims for "relief under any Act of Congress providing for the

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[57] 525 F.2d at 118.

[58] 505 F.2d at 844. *Accord*, Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973). *See* Note, *The Outlook for Welfare Litigation*, *supra* note 36, at 902-03.

[59] 525 F.2d at 118-19. *Accord*, Prigmore v. Renfro, 356 F. Supp. 427, 430 (N.D. Ala. 1972), *aff'd mem.*, 410 U.S. 919 (1973); Gage v. Commonwealth Edison Co., 356 F. Supp. 80, 86 (N.D. Ill. 1972) (by implication).

[60] Swift & Co. v. Wickham, 382 U.S. 111 (1965). In *Swift*, the Court held that a supremacy clause challenge to a state law did not present a constitutional question requiring a three-judge district court. However, in *Hagans* the Supreme Court noted:

> But *Swift* itself recognized that a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution—"to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution."

Hagans v. Lavine, 415 U.S. 528, 533-34 n.5 (1974) (quoting Swift & Co. v. Wickham, 382 U.S. 111, 125 (1965)). *See also* Blue v. Craig, 505 F.2d 830, 843-44 (4th Cir. 1974); Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481, 486 n.1 (D. Conn. 1972).

[61] 525 F.2d at 119.

[62] *Id.*

[63] *See* Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974). The *Hagans* Court, recognizing that the supremacy clause issue remains undecided, cited Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481 (D. Conn. 1972) as representing one line of argument on the question. 415 U.S. at 533 n.5. The court in *White* asserted: "If the state policy is in conflict with the federal statute, . . . this would deny plaintiffs a right secured by the Constitution—namely, the right to secure the benefit of the Supremacy Clause." 55 F.R.D. at 486 (footnote omitted).

[64] The text of 28 U.S.C. § 1343(4) (1970) is set out in note 26 *supra*.

protection of civil rights."[65] As with the "equal rights" problem encountered under subsection 1343(3),[66] the plaintiffs faced the obstacle of prior Second Circuit cases holding that the Social Security Act does not provide "for the protection of civil rights."[67] They approached this hurdle with an ingenious argument. Their claim, it was alleged, had two distinguishable levels.[68] The primary level consisted of a suit under section 1983, a statute that is part and parcel of a civil rights act.[69] It therefore brought plaintiffs' claim within subsection 1343(4). Only on a secondary level, not pertinent to jurisdiction, did plaintiffs' claim arise under the Social Security Act. The provisions of the Social Security Act would determine whether or not the state had deprived plaintiffs of a right secured by federal laws, but it was section 1983—a civil rights act—that gave rise to plaintiffs' right to redress for violation of those laws.[70]

This subtle argument has carried plaintiffs over the "civil rights" hurdle of subsection 1343(4) in a number of courts.[71] The *Andrews* court was willing to grant that subsection 1343(4), originally enacted only as the jurisdictional counterpart of the Civil Rights Act of 1957,[72] had been expanded by the Supreme Court to encompass other civil rights acts.[73] Nevertheless, the Second Circuit declined to take what it termed "the possibly large jurisdictional step plaintiffs urge[d]."[74] The court believed that "plaintiffs' theory takes a claim which in any normal understanding is based

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[65] 28 U.S.C. § 1343(4) (1970).

[66] *See* notes 45-56 and accompanying text *supra*.

[67] Almenares v. Wyman, 453 F.2d 1075, 1082 n.9 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); McCall v. Shapiro, 416 F.2d 246, 249 (2d Cir. 1969).

[68] 525 F.2d at 119.

[69] *Id.*

[70] *Id.*

[71] Blue v. Craig, 505 F.2d 830, 842 (4th Cir. 1974); Gomez v. Florida State Employment Serv., 417 F.2d 569, 580 n.39 (5th Cir. 1969); Mathes v. Nugent, 411 F. Supp. 968, 970 (N.D. Ill. 1976); Bass v. Rockefeller, 331 F. Supp. 945, 949 n.5 (S.D.N.Y.), *appeal dismissed per curiam*, 464 F.2d 1300 (2d Cir. 1971); Worrell v. Sterrett, [1968-1971 Transfer Binder] Pov. L. Rep. (CCH) ¶ 10,575 (N.D. Ind. 1969). *Contra*, Randall v. Goldmark, 495 F.2d 356, 359-60 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974).

[72] Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified in scattered sections of 5, 28 & 42 U.S.C.). *See* Randall v. Goldmark, 495 F.2d 356, 360 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974); H.R. Rep. No. 291, 85th Cong., 1st Sess. 5, 11 (1957); Cover, *supra* note 44, at 25; Herzer, *supra* note 44, at 18; Note, *Welfare Challenges*, *supra* note 44, at 1427-28.

[73] 525 F.2d at 120. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 554 (1969) (suit under Voting Rights Act of 1965); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412 n.1 (1968) (suit under Civil Rights Act of 1866).

[74] 525 F.2d at 120.

on the Social Security Act, and says that it is really based on something else, because something else must be invoked before relief is available."[75] Further, according to the panel, section 1983 provided a procedure for the protection of civil rights but did not actually provide for any civil right.[76] Finally, the court chose to rely on the original congressional purpose of subsection 1343(4) rather than the Supreme Court's expansive reading of the provision.[77]

The *Andrews* decision severely limits a welfare plaintiff's access to federal courts in the Second Circuit. It sets a higher jurisdictional standard of substantiality for constitutional claims than the Supreme Court announced in *Hagans*. Moreover, *Andrews* rejects three alternative theories of jurisdiction that welfare plaintiffs have successfully urged in other federal courts. As *Blue* demonstrates, there is now a significant split among the circuits concerning the construction of 28 U.S.C. § 1343. The future course of the undecided circuits on these issues is unclear. If, however, courts consider the policy arguments of *Blue* and the scholarly opinion on which the decision largely rested[78]—arguments and authority that went virtually unnoticed in *Andrews*[79]—the balance may shift in favor of welfare recipients.

II

Recovery of Attorney's Fees in AFDC Litigation

In 1976, two developments in federal law virtually guaranteed that AFDC recipients who successfully challenge state AFDC rules and practices in federal court will receive attorney's fees awards.[80]

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[75] *Id.* at 119.

[76] *Id.* The Fifth Circuit dismissed this problem, saying: "[Section] 1983, although operating as a conduit through which other statutory rights are protected, is itself an 'Act of Congress providing for the protection of civil rights.'" Gomez v. Florida State Employment Serv., 417 F.2d 569, 580 n.39 (5th Cir. 1969). *See generally* Cover, *supra* note 44, at 7, 24; Herzer, *supra* note 44, at 17-18; Note, *Welfare Challenges*, *supra* note 44, at 1427.

[77] The court wrote:

> But there is a difference between extending section 1343(4) to laws such as these, [the Civil Rights Act of 1866 and the Voting Rights Act of 1965] which protect specific rights and engender comparatively little litigation, and applying it to section 1983, which protects all rights "secured by the Constitution and laws."

525 F.2d at 120.

[78] *See* sources cited in note 53 *supra*.

[79] The *Andrews* court acknowledged that *Blue* gave plaintiffs' § 1343(3) argument a "surface plausibility" (525 F.2d at 119), but did not go on to consider that case before rejecting plaintiffs' jurisdictional theory.

[80] The substantive and jurisdictional bases for bringing AFDC litigation in federal court are set out in notes 24-32 and accompanying text *supra*.

In June, the Supreme Court resolved the issue of the constitutionality of such an award. *Fitzpatrick v. Bitzer*[81] held that congressional power to enforce the fourteenth amendment overrides eleventh amendment restrictions on suits against states.[82] The Court thus ensured the constitutionality of federal legislation authorizing an award of legal fees to litigants who enforce their fourteenth amendment rights against states and state officials.[83]

Shortly after the *Fitzpatrick* decision, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976 (CRAFAA).[84] Filling a gaping hole in the federal common law of fee awards,[85] the Act grants federal courts discretion to award legal fees to the prevailing party in suits based on various provisions of specific civil rights acts.[86] Among the specified provisions is 42 U.S.C. § 1983,[87] the statute granting a federal right to relief in most AFDC suits.[88]

Significant in their own right, these developments in the law also raise a number of issues concerning the continuing role of legal services organizations in welfare litigation. May legal services organizations continue to accept AFDC cases brought under section 1983? May the courts award legal fees to such organizations? May the organization accept fee awards? The 1976 Act itself, prior case law, and public policy considerations demonstrate that legal services organizations should continue to represent AFDC litigants and should reap the rewards of the 1976 Act.

A. *The Civil Rights Attorney's Fees Awards Act of 1976*

CRAFAA[89] is a boon to AFDC litigants. Prior to the enactment

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[81] 427 U.S. 445 (1976).

[82] *Id.* at 456.

[83] *See id.*

[84] *Fitzpatrick* was decided June 28, 1976. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976) (amending 42 U.S.C. § 1988 (1970)), was enacted October 19, 1976. The text of the Act is reproduced in note 89 *infra*.

[85] *See* notes 96-100 and accompanying text *infra*.

[86] The Act applies to suits under 42 U.S.C. §§ 1981-1983, 1985, 1986 (1970) and 20 U.S.C. § 1681 (1970). Most AFDC litigants allege violations of 42 U.S.C. § 1983 (1970). *See* notes 21-32 and accompanying text *supra*.

[87] 42 U.S.C. § 1983 (1970). The text of this section is set out in note 25 *supra*.

[88] *See* notes 25-32 and accompanying text *supra*.

[89] The substantive provision of the Act reads as follows:

> In any action or proceeding to enfore a provision of sections 1981 to 1983, 1985, and 1986 of this title, chapter 38 of Title 20, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or subchapter V of chapter 21 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C.A. § 1988 (West Supp. Dec. 1976).

of this legislation, successful AFDC plaintiffs generally could not recover legal fees.[90] Under the traditional American Rule,[91] courts may not award attorney's fees to successful parties absent specific statutory authorization[92] or circumstances that permit the use of one of three equitable exceptions to the rule. Because of the harsh effect of the general rule, courts have made frequent use of the bad faith,[93] common fund or benefit,[94] and private attorney general[95] doctrines to encourage citizens to enforce their rights.

In 1975, however, the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*[96] rejected the private attor-

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[90] *See* notes 93-95 *infra*.

[91] "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). The Supreme Court first recognized this rule in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). For further discussions of the American rule and its application, see McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761, 765-70, 779-82 (1972); Comment, *Liability for Attorney's Fees in the Federal Courts—The Private Attorney General Exception*, 16 B.C. INDUS. & COM. L. REV. 201, 201-07 (1975) [hereinafter cited as Comment, *Private Attorney General*]; Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976) [hereinafter cited as Note, *Exceptions*]; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 637-44 (1974); Comment, *Attorneys' Fees: Only Congress Can Award Compensation to Private Attorneys General*, 1975 WASH. U.L.Q. 1071, 1072 [hereinafter cited as Comment, *Congress Can Award*]; 80 DICK. L. REV. 852, 854-55 (1976).

[92] *E.g.*, 42 U.S.C. § 2000a-3(b) (1970) (attorney's fees allowed to prevailing party in suit for discrimination or segregation in places of public accommodation).

[93] Under this exception, a court uses its equity powers to punish a losing party who has acted frivolously, vexatiously, or wantonly, or who has abused the legal processes. *See, e.g.*, Vaughan v. Atkinson, 369 U.S. 527 (1962); Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976), *vacated*, 97 S. Ct. 479 (1977) (AFDC plaintiffs); Class v. Norton, 505 F.2d 123 (2d Cir. 1974) (AFDC plaintiffs). *See also* Note, *Exceptions*, *supra* note 91, at 726-29.

[94] This exception applies when a successful litigant has created a fund or wins a ruling that benefits an ascertainable class of people. The court invokes its equity powers to distribute the cost of litigation by paying legal fees out of tbe fund or by assessing fees against a party capable of distributing the cost to the beneficiaries of the litigation. *See, e.g.*, Hall v. Cole, 412 U.S. 1, 5-9 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-94 (1970). *See also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 282-88 (1975) (dissenting opinion, Marshall, J.); Note, *Exceptions*, *supra* note 91, at 729-33.

[95] Following Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), lower courts began awarding fees to parties who promoted a public interest—private attorneys general. Although *Newman* involved an award authorized by statute, courts expanded the holding to apply to any litigation concerning an important public interest, particularly suits raising environmental and civil rights issues. *See, e.g.*, Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). AFDC recipients benefited from this exception in Rodriguez v. Trainor, 67 F.R.D. 437, 439 (N.D. Ill. 1975). *Cf.* Brandenburger v. Thompson, 494 F.2d 885, 888-89 (9th Cir. 1974) (state welfare payments). *See also* Comment, *Private Attorney General*, *supra* note 91, at 211-30; Note, *Exceptions*, *supra* note 91, at 733-37.

[96] 421 U.S. 240 (1975).

ney general doctrine and severely limited the applicability of the common fund or benefit theory. Prior to *Alyeska*, these two doctrines had been the most useful tools for justifying awards to public interest litigants.[97] The bad faith exception survived *Alyeska*, but instances of actual bad faith on the part of defendants in public interest litigation are rare.[98] In sum, *Alyeska* severely limited judicial discretion to provide financial incentives for the vindication of civil rights.[99] The Court deferred to Congress to designate issues of sufficient public importance to justify attorney's fees awards.[100]

Congress quickly accepted the Court's invitation "to pick and choose among its statutes and to allow attorneys' fees under some, but not others."[101] Passed in reaction to *Alyeska*,[102] CRAFAA provides incentives for private citizens to enforce their civil rights where money damages may not be available.[103] In suits under various statutes,[104] including the one invoked by most AFDC liti-

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[97] *See* notes 94-95 *supra*. *See also* Townsend v. Edelman, 518 F.2d 116, 123 (7th Cir. 1975) (demonstrating futility of AFDC plaintiffs trying to come within common fund or benefit exception as narrowed by *Alyeska*).

[98] *But see, e.g.*, Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976) (bad faith found in two-year delay in implementing program required by statute), *vacated*, 97 S. Ct. 479 (1977); Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975) (bad faitb found in refusing to allow abortions in city hospital after Roe v. Wade, 410 U.S. 113 (1973)), *cert. granted*, 96 S. Ct. 3220 (1976). *See also* Note, *Attorneys' Fees—"Bad Faith" Exception—Attorneys' Fees Allowed Under Bad Faith Exception After Alyeska Decision Narrowed "Private Attorney General" Doctrine*, 8 CONN. L. REV. 551 (1976); Note, *Exceptions*, *supra* note 91, at 726-29, 736-37; Comment, *Congress Can Award*, *supra* note 91, at 1081-82.

[99] In reaction to the *Alyeska* decision, some authorities urged expansion of the remaining equitable exceptions to encourage public interest suits. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 285 (1975) (dissenting opinion, Marshall, J.) (common fund or benefit exception). *Compare* Bond v. Stanton, 528 F.2d 688, 689-90 (7th Cir. 1976) (bad faith exception invoked), *vacated*, 97 S. Ct. 479 (1977), *with* Townsend v. Edelman, 518 F.2d 116, 123-24 (7th Cir. 1975) (no bad faith found).

[100] 421 U.S. at 263-64.

[101] *Id.* at 263.

[102] Both the Senate and House reports and the debates on the Act show that Congress intended to fill the gaps left by the *Alyeska* decision. *See* H.R. REP. No. 1558, 94th Cong., 2d Sess. 2-3 (1976) [hereinafter cited as HOUSE REPORT]; S. REP. No. 1011, 94th Cong., 2d Sess. 1, 1, 4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909, 5911-12 [hereinafter cited as SENATE REPORT]; 122 CONG. REC. S16,431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway); 122 CONG. REC. H12,159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

[103] HOUSE REPORT, *supra* note 102, at 1; SENATE REPORT, *supra* note 102, at 2-5, [1976] U.S. CODE CONG. & AD. NEWS 5909-13. Congress provided this incentive in other civil rights legislation, considering it necessary to promote the protection of all citizens. For a list of provisions analogous to CRAFAA, see HOUSE REPORT, *supra* note 102, at 13 (Appendix A).

[104] *See* note 86 *supra*.

gants,[105] "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[106]

Although the brief text of the Act[107] provides little guidance concerning the specifics of its application, judicial construction of nearly identical statutes and the legislative history of CRAFAA itself suggest the scope of its operation. The legislative history indicates that a court may award legal fees even if it ultimately decides a case on the basis of a claim ancillary to one enumerated in the Act.[108] Moreover, in appropriate circumstances, courts may award attorney's fees while the action is pending even if the party receiving the award does not ultimately prevail.[109] To encourage out-of-court settlements, the legislative history provides that a party may prevail "through a consent judgment or without formally obtaining relief" and still receive a fee award.[110] The Act applies to all cases

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[105] 42 U.S.C. §1983 (1970). *See* 122 CONG. REC. S17,053 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk); 122 CONG. REC. H12,159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

[106] 42 U.S.C.A. § 1988 (West Supp. Dec. 1976).

[107] *See* note 89 *supra*.

[108] *See* HOUSE REPORT, *supra* note 102, at 4 n.7. Where a claim subject to a fee award statute involves a constitutional question, a court may obscure the fee award issue by deciding the case on the basis of a nonconstitutional ancillary claim that is not encompassed by the fee award statute. According to the House Report, a court may still award fees in this situation.

> In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, *see Hagans v. Lavine*, [415 U.S. 528 (1974)] . . . , attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'

Id. A fortiori, CRAFAA allows attorney's fee awards where the plaintiff's victory rests on a pendent claim covered by CRAFAA, but not independently cognizable in federal court. This situation may arise frequently since welfare plaintiffs, to obtain federal jurisdiction, often append § 1983 claims based on state violations of the Social Security Act to § 1983 claims alleging constitutional infringements. *See* notes 21-32 and accompanying text *supra*. *But see* note 163 *infra*.

[109] SENATE REPORT, *supra* note 102, at 5, [1976] U.S. CODE CONG. & AD. NEWS 5912-13; HOUSE REPORT, *supra* note 102, at 8. The reports cited Bradley v. School Bd., 416 U.S. 696, 722-23 & n.28 (1974) (interim award under 20 U.S.C. § 1617 (Supp. II 1970)) and Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389-97 (1970) (award under common fund or benefit exception before creation of fund).

[110] SENATE REPORT, *supra* note 102, at 5, [1976] U.S. CODE CONG. & AD. NEWS 5912; HOUSE REPORT, *supra* note 102, at 7-8. *See* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1383 (4th Cir.) (injunction against discrimination denied where employer voluntarily eliminated practices, but plaintiff awarded attorney's fees), *cert. denied*, 409 U.S. 982 (1972); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429-30 (8th Cir. 1970) (plaintiff who secured no relief but acted as "catalyst" for employer's elimination of discrimination awarded fee); Corcoran v. Columbia Broadcasting Sys., 121 F.2d 575, 576 (9th Cir.

pending on October 19, 1976, the date of enactment.[111]

According to the terms of the Act, a court may award attorney's fees "in its discretion."[112] This discretion is limited. The Senate Report, quoting *Newman v. Piggie Park Enterprises, Inc.*,[113] states that "[a] party seeking to enforce the rights protected by the statutes covered by [the 1976 Act], if successful, 'should *ordinarily* recover an attorney's fee unless special circumstances would render such an award unjust.' "[114] Moreover, in *Northcross v. Board of Education*,[115] the Supreme Court interpreted a statute similar to the 1976 Act as requiring courts to justify any denial of fees to a prevailing plaintiff.[116] Thus, the 1976 Act leaves courts little latitude in deciding whether or not to award legal fees when the plaintiff prevails.

Although fee awards may be a matter of course for prevailing plaintiffs, prevailing defendants' requests for fees will face closer scrutiny.[117] The tension between two purposes of the Act requires this asymmetrical result. Congress wished to mitigate the "chilling effect"[118] of prospective plaintiffs' fears of being forced to pay

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1941) (defendant awarded attorney's fees where plaintiff voluntarily dismissed claim without prejudice); Parker v. Mathews, 411 F. Supp. 1059, 1061-65 (D.D.C. 1976) (plaintiff awarded attorney's fees after settlement); Aspira of New York, Inc. v. Board of Educ., 65 F.R.D. 541, 542-43 (S.D.N.Y. 1975) (plaintiff awarded attorney's fees after consent decree); Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 341 (D. Ore. 1969) (plaintiff denied damages and injunction because discrimination unintentional, but awarded attorney's fees).

[111] HOUSE REPORT, *supra* note 102, at 4 n.6 (citing Bradley v. School Bd., 416 U.S. 696 (1974)). *See also* Larson, *The Civil Rights Attorneys Fees Award Act of 1976*, 10 CLEARINGHOUSE REV. 778, 780-81 (1977); Note, *Federal Appellate Procedure—Statutory Authorization for Awarding of Attorneys' Fees Applied Retroactively to Services Rendered Prior to Its Enactment, Despite an Absence of Language or Legislative History Indicating It Was to Be Applied to Pending Cases*, 24 DRAKE L. REV. 435 (1975).

[112] 42 U.S.C.A. § 1988 (West Supp. Dec. 1976).

[113] 390 U.S. 400 (1968) (per curiam).

[114] SENATE REPORT, *supra* note 102, at 4, [1976] U.S. CODE & CONG. AD. NEWS 5912 (quoting 390 U.S. at 402) (emphasis added). *See* HOUSE REPORT, *supra* note 102, at 6.

[115] 412 U.S. 427 (1973) (per curiam).

[116] *Id.* at 427-28. *See also* Note, *Exceptions*, *supra* note 91, at 720-21. The House Report cites both *Newman* and *Northcross* with regard to determining the proper standard for awarding fees in civil rights actions. *See* HOUSE REPORT, *supra* note 102, at 6. These cases are particularly pertinent, because they involve statutes having the same language and purpose as the 1976 Act. SENATE REPORT, *supra* note 102, at 2-5, [1976] U.S. CODE CONG. & AD. NEWS 5909-13; HOUSE REPORT, *supra* note 102, at 1, 5-6.

[117] As the *Newman* Court pointed out, this stricter standard is appropriate in light of the Act's purpose to encourage private persons to protect their rights. Successful plaintiffs should expect fee awards. 390 U.S. at 402 & n.4. Successful defendants, however, should have no such expectation because the Act is designed to discourage only the most frivolous plaintiffs. For a discussion of how courts have applied this standard, see Note, *Exceptions*, *supra* note 91, at 720-22. *See also* Larson, *supra* note 111, at 778-80.

[118] HOUSE REPORT, *supra* note 102, at 7.

defendants' legal fees.[119] At the same time, Congress did not want to encourage vexatious or frivolous suits.[120] To resolve these conflicting goals, the committee reports instruct courts to deny the prevailing defendant's request for attorney's fees unless the plaintiff's conduct was vexatious, harassing, or in bad faith.[121] This amounts to little more than a restatement of the bad faith exception to the American Rule.[122]

The 1976 Act allows courts to award "a reasonable attorney's fee,"[123] but provides no guidance on how to measure the amount of an award. The legislative history stresses that courts should award "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys."[124] Both the House and Senate reports endorse the standard applied in *Johnson v.*

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[119] *Id.*; SENATE REPORT, *supra* note 102, at 5, [1976] U.S. CODE CONG. & AD. NEWS 5912.

[120] HOUSE REPORT, *supra* note 102, at 7; SENATE REPORT, *supra* note 102, at 5, [1976] U.S. CODE CONG. & AD. NEWS 5912. Congress faced the same dilemma in enacting the attorney's fees provision of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(k) (1970). *See* Comment, *Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants*, 1976 WIS. L. REV. 207, 218-20 [hereinafter cited as Comment, *Title VII Standards*].

[121] HOUSE REPORT, *supra* note 102, at 7; SENATE REPORT, *supra* note 102, at 5, [1976] U.S. CODE CONG. & AD. NEWS 5912. The reports cited several decisions applying the bad faith standard for awarding fees to prevailing defendants under a nearly identical statute, 42 U.S.C. § 2000e-5(k) (1970). Carrion v. Yeshiva Univ., 535 F.2d 722, 726-29 (2d Cir. 1976) (fee awarded where suit "motivated by malice and vindictiveness"); Wright v. Stone Container Corp., 524 F.2d 1058, 1063-64 (8th Cir. 1975) (award denied where plaintiff showed sufficient good faith even though claim dismissed for failure to show prima facie case); United States Steel Corp. v. United States, 519 F.2d 359, 362-65 (3d Cir. 1975) (defendant denied fee where government's demand for information not "unfounded, meritless, frivolous or vexatiously brought"). Student commentators considering Title VII fee awards have concluded that this standard properly avoids discouraging good faith plaintiffs. *See* Comment, *Title VII Standards*, *supra* note 120, at 221-22 (better to tolerate some meritless cases than to discourage one case with merit); 80 DICK. L. REV. 852, 860 (1976) (defendant should not receive benefits afforded plaintiffs because defendant not "cloaked in the same veil of public interest").

Some commentators argue that a defendant prevailing against the government should enjoy the same standard as the prevailing plaintiff. The policy of encouraging private enforcement does not apply in such cases, and courts should discourage the government from bringing frivolous suits. *See* United States v. Gray, 319 F. Supp. 871, 872 (D.R.I. 1970); Note, *Exceptions*, *supra* note 91, at 721 & n.53; Comment, *Title VII Standards*, *supra* note 120, at 227-30. *But see* United States Steel Corp. v. United States, 519 F.2d 359, 362-65 (3d Cir. 1975).

[122] *See* notes 91-98 and accompanying text *supra*.

[123] 42 U.S.C.A. § 1988 (West Supp. Dec. 1976).

[124] SENATE REPORT, *supra* note 102, at 6, [1976] U.S. CODE CONG. & AD. NEWS 5913. *See also* HOUSE REPORT, *supra* note 102, at 9.

Georgia Highway Express, Inc.[125] The Fifth Circuit panel in *Johnson* listed twelve factors to be considered in determining the amount of an award: time and labor required; novelty and difficulty of the questions; skill required to perform the legal service properly; preclusion of other employment due to acceptance of the case; customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; amount involved and result obtained; experience, reputation, and ability of the lawyers; "undesirability" of the case; nature and length of the professional relationship with the client; and awards in similar cases.[126] Trial courts enjoy great discretion in applying these standards,[127] but they must hold an evidentiary hearing on the measure of fees[128] and explain how they arrived at an amount.[129]

In sum, CRAFAA, viewed in the context of its legislative his-

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[125] 488 F.2d 714 (5th Cir. 1974). *See* HOUSE REPORT, *supra* note 102, at 8; SENATE REPORT, *supra* note 102, at 6, [1976] U.S. CODE CONG. & AD. NEWS 5913.

[126] 488 F.2d at 717-19. The *Johnson* court acknowledged the similarity between its standards and those suggested by the American Bar Association to guide attorneys in setting fees. *Id.* at 719. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-106 (1974). The use of these standards by courts to set fee awards has received mixed comment. *Compare* Comment, *Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines*, 16 B.C. INDUS. & COM. L. REV. 630, 632-33 (1975), *with* 8 SUFFOLK U.L. REV. 1354, 1359-61 (1974). At least two circuits, however, have adopted the *Johnson* factors. *See* Evans v. Sheraton Park Hotel, 503 F.2d 177, 188 (D.C. Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885, 890 n.7 (9th Cir. 1974).

In Lindy Bros. Builders, Inc. v. American Radiator & Std. Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), a case involving a fee award following settlement of an antitrust action, the Third Circuit provided some guidance as to how the various factors should be weighed and interrelated when measuring fees. The court should first determine the number of hours the attorneys worked and what lawyers engaged in which activities. *Id.* at 167. The court must then value the time spent by applying the lawyers' normal billing rates, which may vary with the class or status of the attorney and the type of activity. *Id.* at 167-68. The court then applies these rates to the hours worked to find "the only reasonably objective basis for valuing an attorney's services." *Id.* at 167. Two additional factors then enter the computation: the "contingent nature of success" and "the quality of an attorney's work." *Id.* at 168. The court may increase the award if it finds the action had little chance of success or the lawyer did high quality work. *Id.* at 168-69. Although neither committee report cites *Lindy* specifically, both reports comment favorably on the standards used in antitrust cases. *See* HOUSE REPORT, *supra* note 102, at 8-9; SENATE REPORT, *supra* note 102, at 6, [1976] U.S. CODE CONG. & AD. NEWS 5913.

[127] *E.g.*, Kiser v. Huge, 517 F.2d 1237, 1253 (D.C. Cir. 1974); Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95, 97 (5th Cir. 1972); Green v. Transitron Elec. Corp., 326 F.2d 492, 496 (1st Cir. 1964).

[128] Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970) (per curiam).

[129] This requirement facilitates appellate review for abuse of discretion. *See, e.g.*, Kiser v. Huge, 517 F.2d 1237, 1255-56 (D.C. Cir. 1974); Evans v. Sheraton Park Hotel, 503 F.2d 177, 186-89 (D.C. Cir. 1974); Lindy Bros. Builders, Inc. v. American Radiator & Std. Sanitary Corp., 487 F.2d 161, 169 (3d Cir. 1973).

tory and the judicial treatment of its sister acts, is tailor-made for the AFDC litigant in federal court. Section 1983 actions raising constitutional questions as well as pendent claims that a state has violated the Social Security Act[130] presumptively entitle a successful plaintiff to a fee award,[131] even if the pendent nonconstitutional claim provides the sole basis for relief.[132] Interim awards and awards in settled actions are available.[133] Courts have announced standards for fee awards in other contexts which future courts can use to compute awards under the 1976 Act.[134] The private bar should take note of this expansion in the power of federal courts to award attorney's fees.

B. *Constitutionality of Fee Awards Exacted from States*

Because most AFDC litigants sue states or state officials,[135] state treasuries will pay the legal fees awarded to such plaintiffs under CRAFAA. A 1974 Supreme Court case, however, cast doubt upon the constitutionality of such an award. In *Edelman v. Jordan*[136] the Court held that the eleventh amendment severely restricts a federal court's power to award damages against a state.[137] Although the standard pronounced in *Edelman* was unclear,[138] it arguably barred fee awards against states under the 1976 Act.[139] More recently, however, the Supreme Court avoided this result.

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[130] *See* notes 24-32 and accompanying text *supra*.

[131] *See* notes 112-16 and accompanying text *supra*.

[132] *See* note 108 and accompanying text *supra*.

[133] *See* notes 109-10 and accompanying text *supra*.

[134] *See* notes 125-29 and accompanying text *supra*.

[135] *See* notes 11-15 and accompanying text *supra*.

[136] 415 U.S. 651 (1974).

[137] *Id.* at 663. Although the eleventh amendment does not literally prohibit citizens from suing their own states in federal court, it has consistently been construed to that effect. *Id.* at 662-63. In fact, the Supreme Court has interpreted the amendment as constitutionalizing sovereign immunity. *See* Comment, *Federal Powers and the Eleventh Amendment: Attorneys' Fees in Private Suits Against the State*, 63 CALIF. L. REV. 1167, 1172-82 (1975) [hereinafter cited as Comment, *Eleventh Amendment*]; Comment, *Suits Against State Officials: Attorneys' Fees and the Eleventh Amendment*, 53 TEX. L. REV. 85, 87 (1974) [hereinafter cited as Comment, *Suits Against State Officials*].

[138] One commentator concluded that *Edelman* allows any award that leaves a state a choice—to pay damages or to follow some other course of action—no matter how unreasonable that choice may be. *See* Comment, *Eleventh Amendment, supra* note 137, at 1182-94.

[139] Before *Edelman*, courts relied on the Supreme Court's summary affirmance in *Amos v. Sims*, 409 U.S. 942 (1972), *aff'g mem.* 340 F. Supp. 691 (M.D. Ala.) (per curiam) (three-judge court) *and* 336 F. Supp. 924 (M.D. Ala.) (per curiam) (three-judge court), when awarding attorney's fees against states. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974); Gates v. Collier, 489 F.2d 298, 302-03 (5th Cir. 1973). Subsequently, courts split on whether *Edelman* prohibited fee awards against states. Two circuits allowed awards. *See* Souza v. Travisono, 512 F.2d 1137, 1139 (1st Cir.) ("fees are incidental

In *Edelman*, the district court had ordered Illinois to pay retroactive welfare benefits that had been wrongfully withheld during a three-year period.[140] The Supreme Court found this award indistinguishable from a damage award against the state, an award prohibited by the eleventh amendment.[141] The Court narrowly distinguished *Ex parte Young*,[142] the seminal case allowing federal courts to entertain suits for prospective relief against state officials. According to the *Edelman* court, the payments ordered in cases decided under the *Young* doctrine had only "an ancillary effect on the state treasury"[143] and were "the necessary result of compliance with decrees which by their terms were prospective in nature."[144]

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to the main litigation, which, being for injunctive and declaratory relief, was permissible under the eleventh amendment"), *vacated on other grounds*, 423 U.S. 809 (1975); Class v. Norton, 505 F.2d 123, 127 (2d Cir. 1974) (fee has only an "ancillary effect" on state treasury and is a "necessary result of attempts to gain compliance"). Three circuits denied them. Jordan v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974) (award "measured in terms of a monetary loss resulting from a past breach of a legal duty"), *cert. denied*, 421 U.S. 991 (1975); Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017, 1026 (5th Cir. 1974) (award paid from general revenues of state barred), *cert. denied*, 420 U.S. 926 (1975); Skehan v. Board of Trustees, 501 F.2d 31, 42-43 n.7 (3d Cir. 1974) (*Edelman* "clos[es] the door on any money award from a state treasury in any category"), *vacated on other grounds*, 421 U.S. 983 (1975). *See* Comment, *Eleventh Amendment*, *supra* note 137, at 1197-98, 1201-02; Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1895-98 (1975); Comment, *Suits Against State Officials*, *supra* note 137, at 93-102.

[140] Jordan v. Swank, [1972-1974 Transfer Binder] POV. L. REP. (CCH) ¶ 15,135 (N.D. Ill. 1972), *aff'd sub nom.* Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973). The plaintiffs represented the class of Illinois applicants for Aid to the Aged, Blind and Disabled (AABD), a federally funded, state-administered, categorical assistance program created under the Social Security Act (*see* 42 U.S.C. §§ 1381-1385 (1970)). Replaced by Supplemental Security Income (42 U.S.C. §§ 1381-1385 (Supp. V 1975)) in 1974, AABD's structure resembled AFDC's; federal statutes and regulations controlled state administration of the program. The *Jordan* plaintiffs contended that Illinois did not comply with 45 C.F.R. § 206.10(a)(3) (1972), which required states to determine the eligibility of aged and blind persons within 30 days of application and the eligibility of disabled persons within 60 days of application. This regulation was superseded in 1973 to extend the time period for aged and blind persons to 45 days. *See* 45 C.F.R. § 206.10(a)(3) (1976).

[141] 415 U.S. at 668.

[142] 209 U.S. 123 (1908). In *Young*, the Court held that the eleventh amendment did not bar a federal court from hearing a suit against a state official acting under an allegedly unconstitutional state law. Young, the attorney general of Minnesota, had attempted to enforce railroad rates that violated the fourteenth amendment. Upholding a federal court's injunction against further enforcement by Young, the Supreme Court created the fiction that a suit against a state official was not a suit against the state. Without the *Young* fiction, federal courts would have no means to compel state compliance with the Federal Constitution. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 48, at 208-10 (3d ed. 1976); Comment, *Eleventh Amendment*, *supra* note 137, at 1181-82.

[143] 415 U.S. at 668.

[144] *Id.*

Recognizing that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between night and day,"[145] the Court overturned the retroactive award. It found the award was not "a necessary consequence of compliance in the future with a substantive federal-question determination"[146] but rather was "measured in terms of a monetary loss resulting from a past breach of a legal duty."[147] The circuits split on whether *Edelman* barred attorney's fees awards against states,[148] thus setting the stage for a Supreme Court test.

Fitzpatrick v. Bitzer[149] gave the Court the opportunity to resolve the conflict. In *Fitzpatrick* retired Connecticut employees asserted that the state's retirement plan discriminated against them on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.[150] The district court agreed with the plaintiffs and granted injunctive relief.[151] The court refused, however, to award retroactive benefits or attorney's fees, despite statutory authorization for both forms of relief.[152] On appeal, the Second Circuit agreed that the eleventh amendment, as construed in *Edelman*, barred retroactive benefits,[153] but held that the amendment was no bar to an

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[145] *Id.* at 667.

[146] *Id.* at 668.

[147] *Id.*

[148] *See* note 139 *supra*.

[149] 427 U.S. 445 (1976).

[150] 427 U.S. at 448. The plaintiffs specifically relied on 42 U.S.C. § 2000e-2(a) (1970).

[151] Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974). Plaintiffs represented present and former male employees of the state of Connecticut. The district court found that Connecticut's retirement plan discriminated against them on the basis of sex because it required men to work until age 55 before retirement but allowed women to retire at age 50. In addition, the retirement benefit rates favored women who had worked less than 25 years over men who had worked an equivalent length of time.

[152] 390 F. Supp. at 288-90. The plaintiffs sought back pay under 42 U.S.C. § 2000e-5(g) (1970). The district court held that *Edelman* barred this relief because it would be paid from the state's general fund. 390 F. Supp. at 289.

42 U.S.C. § 2000e-5(k) (1970) provides:

> (k) Attorney's fee; liability of Commission and United States for costs.
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The court characterized attorney's fees awards as "tantamount to an award of money damages" (390 F. Supp. at 289), and therefore held that the eleventh amendment barred such awards. *Id.*

[153] Fitzpatrick v. Bitzer, 519 F.2d 559, 565-71 (2d Cir. 1975). The Second Circuit found that the suit was "in essence against the state and as such [was] subject to the Eleventh Amendment." *Id.* at 565. The court also rejected plaintiffs' argument that Con-

award of attorney's fees if it had "a permissible 'ancillary effect' on the state treasury."[154]

The Supreme Court held *Edelman* inapposite because it did not involve statutory authorization for a monetary award against a state.[155] In contrast, the awards in *Fitzpatrick* were specifically authorized by statute.[156] Moreover, this statute had its constitutional roots in the enforcement clause of the fourteenth amendment.[157] Thus, the Court was forced to decide whether the fourteenth amendment limited the eleventh.[158]

Justice Rehnquist, speaking for the Court, found that the fourteenth amendment worked a "shift in the federal-state balance"[159] because it imposed on states "duties with respect to their treatment of private individuals"[160] and "sanctioned intrusions by Congress . . . into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."[161] As to the specific relationship of the eleventh and fourteenth amendments, the Court stated that

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necticut had waived its eleventh amendment immunity. *Id.* at 566-68. Finally, the court reconciled the eleventh and fourteenth amendments by holding that the eleventh amendment protected states against damage claims by individuals if alternative remedies for fourteenth amendment violations were available. The court determined that individuals could sue states under Title VII for injunctive relief (*see* 42 U.S.C. § 2000e-5(g) (1970)), and that the federal government, on behalf of individuals, could sue states for back benefits (*see* 42 U.S.C. § 2000e-5(e) (1970)). 519 F.2d at 570. The court found that *Edelman* "reaffirm[ed] the necessity of maintaining this balance between enforcement of individual constitutional rights and protection of the state's fiscal administration under the Eleventh." *Id.*

[154] 519 F.2d at 571-72 (quoting Edelman v. Jordan, 415 U.S. at 668).

[155] Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976).

[156] *See* 42 U.S.C. §§ 2000e-5(g), -5(k) (1970); note 152 *supra*.

[157] 427 U.S. at 453 n.9. The Court indicated that the parties did not dispute the point and cited legislative history indicating that Congress intended to invoke its enforcement power under § 5 of the fourteenth amendment.

[158] The Court had never considered the issue, and commentators differed on its probable resolution. *Compare* Note, *supra* note 139, at 1898 n.132 ("it may be that in ratifying the fourteenth amendment the states waived a portion of their immunity under the eleventh amendment"), *with* Comment, *Eleventh Amendment*, *supra* note 137, at 1206 ("while the fourteenth amendment's enforcement clause is an important potential source of congressional fee-shifting power, it may be subject to eleventh amendment constraints").

[159] 427 U.S. at 455 (citing Ex parte Virginia, 100 U.S. 339 (1880)). In *Virginia*, a state judge challenged his imprisonment for violation of a federal law prohibiting racial discrimination in the selection of jurors. The Supreme Court held that the thirteenth and fourteenth amendments gave Congress authority to enact the statute even though it applied to both federal and state judiciaries. The court said § 5 of the fourteenth amendment "expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." *Id.* at 347-48.

[160] 427 U.S. at 453.

[161] *Id.* at 455.

> the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment . . . . Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan* . . . .[162]

As a result, Congress could constitutionally enforce the fourteenth amendment by authorizing retroactive benefits and attorney's fees against a state.[163]

Because Congress enacted CRAFAA under its fourteenth amendment power,[164] federal courts may award attorney's fees to AFDC recipients who sue states or state officials under section 1983.[165] One district court[166] has already accepted this reading of *Fitzpatrick*. Others will surely follow.

C. *The Propriety of Fee Awards to Legal Services Organizations*

AFDC recipients usually come to court represented by government-funded or charitable legal services organizations.[167] As a result, courts will soon have to decide whether or not to award attorney's fees under CRAFAA to parties who have no obligation to pay their lawyers. The history[168] and policy[169] of the 1976 Act and cases decided under similar statutes[170] suggest an affirmative answer to this question. Assuming that legal services clients can

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[162] *Id.* at 456.

[163] Courts have yet to decide, however, whether the power to enforce the fourteenth amendment against states extends to ancillary claims. Congress intended the 1976 Act to authorize fee awards even where a court does not actually enforce the fourteenth amendment, but rests its decision on a pendent claim or an independently cognizable section 1983 claim based on statutory violations. *See* note 108 and accompanying text *supra*. The scope of the fourteenth amendment, however, may not be sufficient to allow congressional intent to overcome the eleventh amendment in this situation. Even if the fourteenth amendment power is not this broad, plaintiffs who prevail against states could argue that attorney's fees awards are not like damages and thus not prohibited by the eleventh amendment. *See* cases cited in note 139 *supra*. This would put them outside the scope of *Edelman*.

[164] SENATE REPORT, *supra* note 102, at 5, [1976] U.S. CODE CONG. & AD. NEWS 5913; 122 CONG. REC. H12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

[165] *See* notes 25-27 and accompanying text *supra*.

[166] Wade v. Mississippi Coop. Extension Serv., 424 F. Supp. 1242 (N.D. Miss. 1976).

[167] *E.g.*, Holley v. Lavine, 529 F.2d 1294 (2d Cir.), *cert. denied*, 426 U.S. 954 (1976); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

[168] *See* note 174 and accompanying text *infra*.

[169] *See* notes 175-85 and accompanying text *infra*.

[170] *See* notes 178-81 and accompanying text *infra*.

cash in on the 1976 Act, both statutory proscriptions and general policy may bar government-funded offices from representing parties who can pay attorneys from awards received under the Act. The Legal Services Corporation (LSC)[171] has nonetheless indicated that the possibility of a fee award should not prevent continued representation of AFDC plaintiffs by local LSC offices, as long as the private bar is unwilling to represent AFDC recipients.[172]

Although the 1976 Act itself provides no guidance as to whether courts should award fees to parties benefiting from free legal representation,[173] the Act's legislative history indicates that courts should not withhold fees merely because litigants take advantage of such services.[174] Moreover, a major policy underlying the statute supports awarding fees for legal work by these organizations. Congress intended the 1976 Act to encourage private enforcement of civil rights.[175] Fee awards to parties represented by organizations that expect no remuneration will promote this purpose. Awards to legal services offices would encourage the filing of more AFDC suits, prosecuted more quickly and pursued with the full concentration of office resources.[176] In addition, cases brought

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[171] Congress created the Legal Services Corporation in 1974 to administer the program of federally funded legal services for the poor. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, § 2, 88 Stat. 378 (1974) (codified at 42 U.S.C. §§ 2996-2996*l* (Supp. V 1975)).

[172] *See* notes 189-90 and accompanying text *infra*.

[173] The text of the Act is reproduced in note 89 *supra*.

[174] The House Report stated in a footnote: "Similarly, a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization." HOUSE REPORT, *supra* note 102, at 8 n.16. The footnote also cited with approval three decisions awarding fees to parties represented by charitable and government-funded organizations: Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974) (award to legal services organization partially funded by federal grants); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) (award to Lawyers Committee for Civil Rights Under Law); Torres v. Sachs, 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2d Cir. 1976) (award to Puerto Rican Legal Defense and Education Fund, Inc.). In addition, during floor discussion on the bill, Senator Helms argued the bill was unnecessary to insure the protection of indigents' rights, because the indigent can obtain free legal assistance. 122 CONG. REC. S16,433 (daily ed. Sept. 22, 1976) (remarks of Sen. Helms). Nevertheless, the bill passed without distinguishing between parties who paid their lawyers and parties who did not.

[175] *See* notes 102-06 and accompanying text *supra*.

[176] Commentators agree that the Legal Services Corporation needs additional funds to accomplish its stated objectives. *See, e.g.*, Cramton, *The Corporation Speaks: Chairman Cramton, President Ehrlich Greet NLADA*, 33 NLADA BRIEFCASE 42, 44-45 (1976); Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339, 1340-41 (1975); Drinan, *Reflections on the Struggle*, 33 NLADA BRIEFCASE 51, 55-56 (1976). The LSC has been forced to set undesirably low financial eligibility standards for clients (*see* 41 Fed. Reg. 51604 (1976) (regulation to be codified at 45 C.F.R. § 1611)). Since the LSC and local offices may accept funds from

by legal aid offices may draw the attention of private attorneys. The private bar may become more interested in AFDC litigation as legal services attorneys expand the body of substantive AFDC precedent and as accompanying fee awards become more commonplace.[177]

A number of courts have recognized that awarding fees to plaintiffs represented by government-funded and charitable legal services offices encourages the private enforcement of legal rights.[178] Even courts denying fees to legal aid offices have recognized that granting the award would have promoted this policy as much as an award to a private attorney's client.[179] Since the 1976 Act is intended to promote private enforcement,[180] these cases indicate that courts should award fees under the Act without regard to the prevailing party's obligation to pay his attorney.[181]

On the other side of the coin, Congress hoped the 1976 Act would deter frivolous litigation.[182] To accomplish this purpose,

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sources other than the government (42 U.S.C. §§ 2996e(a)(2), 2996i(c) (Supp. V 1975); 45 C.F.R. § 1609.5 (1976)), the possibility of a fee award could encourage a local office to pursue AFDC recipients' § 1983 actions. Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 411, 413-17 (1973).

[177] *See* McLaughlin, *supra* note 91, at 765; Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301, 331-32 (1973); Note, *supra* note 176, at 414.

[178] *See, e.g.*, Torres v. Sachs, 538 F.2d 10, 11-14 (2d Cir. 1976); Tillman v. Wheaton-Haven Rec. Ass'n, 517 F.2d 1141, 1146-48 (4th Cir. 1975); Hairston v. R & R Aptmts., 510 F.2d 1090, 1091-93 (7th Cir. 1975); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286 (6th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 536-37 (5th Cir. 1970).

[179] In Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974), the court awarded fees under the private attorney general exception to a private attorney who represented prisoners but denied fees to the co-counsel legal services office, because the award to the private attorney would adequately encourage private enforcement. If there had been no private attorney involved, the court indicated that it would have awarded a fee to the legal services office. *Id.* at 221. One federal judge denied a legal aid society's request for fees under the had faith exception, although he agreed the defendant showed bad faith. Woolfolk v. Brown, 358 F. Supp. 524, 535-37 (E.D. Va. 1973). In a different case two days later, he awarded the legal aid society fees under a statute, because the congressional purpose of encouraging private enforcement of the statute was more important than the problems raised by a fee award to a government-funded office. Jones v. Seldon's Furniture Warehouse, Inc., 357 F. Supp. 886 (E.D. Va. 1973).

[180] *See* notes 102-06 and accompanying text *supra*.

[181] Courts have also held that the measurement of the fee should not vary simply because the recipient is a government-funded or charitable organization. *E.g.*, Torres v. Sachs, 538 F.2d 10, 11-14 (2d Cir. 1976); Tillman v. Wheaton-Haven Rec. Ass'n, 517 F.2d 1141, 1148 (4th Cir. 1975); Fairley v. Patterson, 493 F.2d 598, 606-07 (5th Cir. 1974). *See* Note, *supra* note 176, at 412 n.8. *But see* Souza v. Travisono, 512 F.2d 1137, 1140-41 (1st Cir.), *vacated on other grounds*, 423 U.S. 809 (1975).

[182] *See* notes 117-22 and accompanying text *supra*.

courts may assess fees against plaintiffs who act in bad faith.[183] Similarly, the LSC is statutorily liable for defendants' attorney's fees if a local office represents a plaintiff who has sued solely for "harassment" or has "maliciously abused legal process."[184] Thus, by awarding fees to successful defendants under appropriate circumstances, courts can further the deterrence policy of the 1976 Act.[185]

Even if courts decide to award fees to prevailing legal services organizations, LSC regulations arguably prohibit local offices from continuing to accept cases subject to the 1976 Act. To "insure that [it does] not compete with private attorneys,"[186] a local office may not accept a "fee-generating case."[187] Nevertheless, the purpose of the 1976 Act of encouraging private enforcement can be effected only if plaintiffs can find lawyers to assist them. Despite the possibility of fee awards, private attorneys may remain uninterested in AFDC cases. The area is complex, and private practitioners may find themselves unable to correctly assess their prospects in particular cases.[188] If private attorneys therefore refuse to take AFDC cases, the local LSC-funded office will continue to represent AFDC recipients[189] in section 1983 actions under exceptions to the "fee-generating case" prohibition.[190] If the private bar becomes inter-

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[183] *See id.*

[184] 42 U.S.C. § 2996e(f) (Supp. V 1975). *See* CONF. REP. No. 93-247, 93d Cong., 2d Sess. (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3897, 3904.

[185] *See* Note, *supra* note 176, at 417-20 (pointing out also that the award or threat of one promotes settlement).

[186] 45 C.F.R. § 1609.1 (1976).

[187] 45 C.F.R. § 1609.3 (1976). The text of this section is set out in note 190 *infra*. 45 C.F.R. § 1609.2 (1976) provides:

> "Fee-generating case" means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party.

[188] *See* 41 Fed. Reg. 51,604-05 (1976) (Comment accompanying eligibility regulations).

[189] AFDC recipients will usually meet the financial eligibility criteria. *See* 42 U.S.C. § 2996a(3) (Supp. V 1975); 41 Fed. Reg. 51,604 (1976) (to be codified at 45 C.F.R. § 1611).

[190] 45 C.F.R. § 1609 (1976) provides in pertinent part:

> § 1609.3 Prohibition.
>
> No recipient shall use funds received from the Corporation to provide legal assistance in a fee-generating case unless other adequate representation is unavailable. All recipients shall establish procedures for the referral of fee-generating cases.
>
> § 1609.4 Authorized representation in a fee-generating case.
>
> Other adequate representation is deemed to be unavailable when (a) The recipient has determined that free referral is not possible because:
>
> (1) The case has been rejected by the local lawyer referral service, or by two private attorneys; or

ested in AFDC-1983 cases, however, LSC-funded offices will have to turn AFDC recipients away.[191] Thus, the LSC-funded legal services organizations may find themselves representing clients with only the most marginal claims. But whoever ultimately dominates in representing AFDC litigants, the purposes of the Civil Rights Attorney's Fees Awards Act of 1976 will be fostered to the benefit of AFDC recipients.

III

REMEDIES FOR UNLAWFUL DISCLOSURE OF CONFIDENTIAL AFDC FILES

In the late 1960s, critics of welfare programs expressed concern about the growing invasion of recipients' privacy. Criticism focused both on the wealth of information accumulated and on the methods employed to acquire that information.[192] More recently, however, Congress and the courts have shown less concern for recipient privacy, authorizing intrusions that would have provoked vehement dissent a few years ago.[193] The present scheme of federal welfare statutes does retain some protection of privacy in 42

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(2) Neither the referral service nor any lawyer will consider the case without payment of a consultation fee; or

(3) The case is of the type that private attorneys in the area ordinarily do not accept, or do not accept without prepayment of a fee; or

(4) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate, and consistent with professional responsibility, referral will be attempted at a later time; or

(b) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other non-pecuniary relief; or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims; or

(c) A court appoints a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

[191] Exceptions allowing LSC-funded offices to handle the fee-generating cases would no longer apply. *See* 45 C.F.R. §§ 1609.3-.4 (1976), set out in note 190 *supra*.

[192] *E.g.*, Doe v. Swank, 332 F. Supp. 61 (N.D. Ill.) (eligibility requirement that unwed mother identify child's father violates Social Security Act), *aff'd mem. sub nom.* Weaver v. Doe, 404 U.S. 987 (1971); Parrish v. Civil Serv. Comm'n., 66 Cal. 2d 260, 425 P.2d 223 (1967) (welfare eligibility may not be conditioned on consent to midnight raids conducted without a search warrant). *See* Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963); Wickham, *Restricting Home Visits: Toward Making the Life of the Public Assistance Recipient Less Public*, 118 U. PA. L. REV. 1188 (1970).

[193] *See* Lascaris v. Shirley, 420 U.S. 730 (1975) (per curiam) (since congressional action required AFDC recipients to cooperate in paternity and support proceedings, Court did not consider district court ruling that requirement violated Social Security Act); Act of Jan.

U.S.C. § 602(a)(9),[194] which requires states to maintain the confidentiality of recipients' files. Two 1976 decisions, however, indicate that even this protection may be deteriorating.

In *Morris v. Danna*[195] and *Pajewski v. Perry*,[196] state welfare officials released embarrassing information from welfare files to local news media. The welfare recipients sued the state officials for damages. These suits presented a novel issue in welfare law, for the remedies available to welfare recipients are generally limited to prospective injunctive relief compelling states to comply with the

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4, 1975, Pub. L. No. 93-647, § 101, 88 Stat. 2351, *as amended*, Act of Aug. 9, 1975, Pub. L. No. 94-88, tit. 2, 89 Stat. 433 (to be codified in scattered sections of 42 U.S.C.) (established Parent Locator Service to use federal files to help states and private persons locate absent parents). *See also* Piven & Cloward, *Eroding Welfare Rights*, CIV. LIB. REV., Winter/Spring 1974, at 41 (arguing that ligitation has more impact in times of unrest and that present calm has resulted in less favorable decisions in welfare cases). *Compare* Wickham, *supra* note 192 (arguing that conditioning AFDC eligibility on consent to home visits violates fourth amendment and right to privacy), *with* Wyman v. James, 400 U.S. 309 (1971) (upholding home visits as condition to AFDC eligibility).

[194] 42 U.S.C. § 602(a)(9) (Supp. V 1975) provides:

> A State plan for aid and services to needy families with children must . . . (9) provide safeguards which restrict the use of [sic] disclosure of information concerning applicants or recipients to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part B, C, or D of this subchapter or under subchapter 1, X, XIV, XVI, XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, and (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need; and the safeguards so provided shall prohibit disclosure, to any committee or a legislative body, of any information which identifies by name or address any such applicant or recipient . . . .

The protection of this section is not as complete as may first appear. In the Revenue Act of 1951, Congress included a little-known and still-uncodified amendment—the Jenner Amendment. Revenue Act of 1951, Pub. L. No. 183, c. 521, tit. VI, § 618, 65 Stat. 452. This amendment allows states to provide public access to records of individual AFDC disbursements as long as the records are not used for commercial or political purposes. Despite subsequent amendments to § 602(a)(9) (Act of Jan. 4, 1975, Pub. L. No. 93-647, § 101(c)(2), 88 Stat. 2351; Act of Aug. 9, 1975, Pub. L. No. 94-88, tit. 2, § 207, 89 Stat. 433) accompanied by legislative history that indicates ignorance of the Jenner Amendment (*see* S. REP. NO. 93-1356, 93d Cong., 2d Sess. 20, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8152), HEW disclosure regulations continue to allow states to provide this limited public access. 45 C.F.R. § 205.50(e) (1976). Even if the Jenner Amendment has retained its vitality, however, § 602(a)(9) would still protect AFDC recipients from embarrassing disclosures since the amendment allows the public to know only the amount of individual disbursements—not personal information. In addition, newspaper or magazine publication is at least arguably a commercial purpose.

[195] 411 F. Supp. 1300 (D. Minn. 1976), *aff'd per curiam*, 547 F.2d 436 (8th Cir. 1977).

[196] 363 A.2d 429 (Del. 1976).

Social Security Act.[197] More specifically, section 602(a)(9) has never been the basis of compensatory relief; rather, recipients or welfare departments usually invoke the section, or state rules enacted to comply with it, to prevent prospective disclosure of AFDC files in unrelated proceedings.[198] In *Morris*, a federal court held that it had no jurisdiction to hear a defamed recipient's damage suit because the state's own confidentiality regulations transformed the claim into an issue of state law.[199] Four months later, the Delaware Supreme Court held in *Pajewski* that sovereign immunity bars recovery on such a claim in state court unless the state legislature, or its administrative delegate, has specifically waived immunity for defamation.[200] Thus, a welfare recipient defamed by the very disclosures required for eligibility under a federal statute faces the Catch-22 of federalism. In federal court, state remedies are exclusive; in state court, federal protections are unrecognized. This section will propose several theories under which both state and federal courts might avoid these present obstacles to relief.

A. *Morris v. Danna: A Federal Court Ducks the Issue*

In *Morris*, newspaper stories about the successes of a local welfare fraud unit mentioned Morris, the plaintiff AFDC recipient, by name and reported sensitive information from the medical history in his welfare file.[201] Morris sought declaratory, injunctive, and monetary relief, alleging that local welfare officials had violated federal[202] and state[203] statutes and regulations protecting the con-

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[197] *See* note 12 and accompanying text *supra*.

[198] *See, e.g.*, Mace v. Jung, 386 P.2d 579 (Alaska 1963) (error to admit evidence obtained from examination of plaintiff's welfare file in tort action); *In re* Cager, 251 Md. 473, 248 A.2d 384 (1967) (recipients challenge use of records in neglect proceedings); Paine v. Chick, 50 App. Div. 2d 686, 375 N.Y.S.2d 198 (3d Dep't 1975) (trial court properly ordered limited production of plaintiff's welfare records in tort action); McMullan v. Wohlgemuth, 453 Pa. 147, 308 A.2d 888 (1973) (state opposing newspaper's suit for access to welfare files), *appeal dismissed*, 415 U.S. 970 (1974); State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1946) (juvenile court may order welfare records produced at confidential proceedings).

[199] 411 F. Supp. at 1305-09.

[200] 363 A.2d at 430-36.

[201] 411 F. Supp. at 1301.

[202] 42 U.S.C. § 602(a)(9) (Supp. V 1975). The text of the statute is set out in note 194 *supra*. The applicable federal regulation, 45 C.F.R. § 205.50 (1976), requires that state welfare plans forbid disclosures of the type allegedly committed in *Morris*.

[203] Minnesota welfare statutes do not specifically protect the confidentiality of records hut give the state commissioner power to promulgate regulations to qualify the state for federal grants. MINN. STAT. ANN. § 256.011(1) (West Supp. 1976). MINN. RULE DPW 45 prohibits disclosure of the contents of recipients' files except for program administration purposes or for the administration of services that the recipient has requested from another agency. 10 MINN. STATE REGS. 116 (1976). The plaintiff also relied on two sections of

fidentiality of his AFDC records.[204] In a decision subsequently adopted by the Eighth Circuit,[205] the district court ruled that it had neither federal question jurisdiction under 28 U.S.C. § 1331[206] nor equal rights jurisdiction under 28 U.S.C. § 1343.[207]

The court assumed arguendo that the plaintiff met the $10,000 amount-in-controversy requirement for federal question jurisdiction.[208] Rather, the plaintiff's problem lay in stating a claim "aris[ing] under the Constitution, laws, or treaties of the United States."[209] The district court had little difficulty deciding that the disclosures involved did not encroach upon a privacy right of constitutional significance.[210] Only very subtle reasoning, however, al-

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the Minnesota Administrative Procedure Act, which provide:

> "Confidential data on individuals" means data which is: (a) made not public by statute or federal law applicable to the data and is inaccessible to the individual subject of that data; or (b) collected by a civil or criminal investigative agency as part of an active investigation undertaken for the purpose of the commencement of a legal action, provided that the burden of proof as to whether such investigation is active or in anticipation of a legal action is upon the agency.

MINN. STAT. ANN. § 15.162(2a) (West 1977).

> Private or confidential data on individuals shall not be used, collected, stored or disseminated for any purposes other than those stated to an individual at the time of collection in accordance with section 15.165 or, in the case of data collected prior to August 1, 1975, for any purpose other than those originally authorized by law, unless (1) the responsible authority files a statement with the commissioner describing the purposes and necessity of the purpose with regard to the health, safety or welfare of the public and the purpose is approved by the commissioner, or (2) the purpose is subsequently authorized by the state or federal legislature, or (3) the purpose is one to which the individual subject or subjects of the data have given their informed consent.

MINN. STAT. ANN. § 15.1641(c) (West 1977).

[204] 411 F. Supp. at 1301-02.

[205] The Eighth Circuit affirmed on the basis of the district court's opinion. Morris v. Danna, 547 F.2d 436 (8th Cir. 1977), *aff'g per curiam* 411 F. Supp. 1300 (D. Minn. 1976). The discussion in the text therefore focuses on the lower court's reasoning.

[206] 28 U.S.C. § 1331(a) (1970) (amended 1976). The current version of this section is set out in note 12 *supra*.

[207] 28 U.S.C. § 1343 (1970). The text of the applicable subsections is set out in note 26 *supra*.

[208] 411 F. Supp. at 1303. Plaintiff alleged damage to his reputation in the amount of $75,000. *Id.*

[209] 28 U.S.C. § 1331(a) (1970) (amended 1976). The current version of this section is set out in note 12 *supra*.

[210] 411 F. Supp. at 1303-05. The court determined that the privacy right protected by Griswold v. Connecticut, 381 U.S. 479 (1965), did not extend to all aspects of common-law privacy. *Griswold* concerned the right to be free from "intrusion upon the plaintiff's solitude or seclusion . . . ." 411 F. Supp. at 1303 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 807 (4th ed. 1971)). Morris' complaint, however, closely resembled an entirely different tort described by Prosser as "publicity, of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation." *Id.* at 809. The district court stated that prior decisions of the Eighth Circuit had determined that even actual defamation by state officials did not impugn a

lowed the court to find that plaintiff's claim did not "arise under" the Social Security Act. The court acknowledged that the Act required the state to "provide safeguards which restrict the use [or] disclosure of information concerning applicants or recipients."[211] The State of Minnesota, however, had fully met this requirement by promulgating regulations governing confidentiality.[212] Under the rationale of *Miller's Executors v. Swann*,[213] an 1893 Supreme Court decision, plaintiff's claim raised only the issue of compliance with state law—despite the origin of that law in federal statutory requirements.

Plaintiff's pleadings made this judicial legerdemain possible. As the court read the complaint, plaintiff "allege[d] in effect that the plan adopted by the State of Minnesota has complied with § 602(a)(9)."[214] Had plaintiff alleged that unenforced state regula-

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constitutionally protected privacy right. 411 F. Supp. at 1304 (citing Ellingburg v. Lucas, 518 F.2d 1196 (8th Cir. 1975) (per curiam)). Therefore, plaintiff's allegation of quasi-defamation by the state could not possibly amount to a constitutional tort.

The court declined to follow a contrary notion expressed by Justice Douglas in Doe v. McMillan, 412 U.S. 306 (1973). In his concurring opinion, Justice Douglas indicated that congressional publication of derogatory information about school children violated their constitutional rights. *Id.* at 325. Commentators who have considered the problem of welfare recipients' privacy have urged expansion of the constitutional tort concept. One writer has argued that courts should bar intrusions into the privacy of the family relationship. Such protection would promote "the three vital social interests traditionally associated with an autonomous child-based unit: social stability, individual liberty and child welfare." Poulin, *Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits*, 70 Nw. U.L. REV. 910, 914 (1976). Others have defined privacy more broadly. More than simple freedom from intrusion, privacy includes the freedom to control the information that others have about us. Fried, *Privacy*, 77 YALE L.J. 475 (1968); Wickham, *supra* note 192. Although these arguments were originally offered to support restrictions on the information welfare administrators can initially obtain about recipients, they are equally applicable to restrictions on the subsequent disclosure of information.

[211] 411 F. Supp. at 1305 (quoting 42 U.S.C. § 602(a)(9) (Supp. V 1975)).

[212] *See* note 203 *supra*.

[213] 150 U.S. 132 (1893). The case involved a land dispute between Alabama and a private party, arising out of a railroad bankruptcy. The state had obtained land under a federal statute and conveyed it by statute to the railroad, retaining a mortgage that included conditions required by the federal act. The railroad in turn conveyed the land to the private party in tbe case. The Alabama Supreme Court found the railroad had not complied with the mortgage terms imposed by the federal act and awarded title to the state. The United States Supreme Court declined to review the decision:

> The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. . . . The inquiry along Federal lines is only incidental to a determination of the *local question of what the State has required and prescribed.*

Id. at 136-37 (emphasis added).

[214] 411 F. Supp. at 1305. Since the court could read the complaint to admit compliance with federal standards, the Social Security Act was not "an essential element of plaintiff's cause of action." 1 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.60[8.-3], at 630 (2d

tions did not "*provide safeguards*,"[215] as required by the federal Act, his claim would arguably have "arisen under" a federal statute.[216] This view gains support from the many cases finding federal question jurisdiction over noncompliance suits involving unwritten regulations or state practices that violate Social Security Act provisions.[217] Nevertheless, the *Morris* court indicated that a federal question arises only "when conflicts between state and federal laws exist."[218]

Having found the plaintiff's claim to lie outside of section 1331, the court then considered whether it had jurisdiction under 28 U.S.C. § 1343.[219] Subsection 1343(3), however, could not constitute a basis for federal jurisdiction since neither the Social Security Act generally[220] nor section 602(a)(9) standing alone[221] is a statute "providing for equal rights of citizens."[222] The court also rejected

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ed. 1976) (footnote omitted). Nor did plaintiff's claim meet the test proposed by Professor Mishkin and approved by Wright, Miller and Cooper: "a substantial claim founded 'directly' upon federal law." C. WRIGHT, A. MILLER and E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562, at 414 (1975). *See also* Gully v. First Nat'l Bank, 299 U.S. 109, 115-16 (1936) (where right to be enforced is created by state, it is unimportant that state authority stems from federal consent).

[215] 42 U.S.C. § 602(a)(9) (Supp. V 1975) (emphasis added).

[216] The importance of the manner in which plaintiff framed his complaint appears from the following excerpts from the court's opinion:

> To paraphrase the Court in [Miller's Executors v. Swann], the question is not what rights and duties passed to the State under the Federal act—since the plaintiff alleges that the State has already complied with such duties—but what duties the defendants had under the laws of the State. "The inquiry along federal lines is only incidental to a determination of the local question of *what the state has required and prescribed*."
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> . . . .
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> As one commentator has stated in analyzing the welfare statutes, "Federal court jurisdiction can be invoked only when conflicts between state and federal laws exist." . . . The allegations of the complaint demonstrate that there is no such conflict here, and the case does not "arise under" a law of the United States.

411 F. Supp. at 1306-07 (citations omitted) (emphasis in original).

[217] *E.g.*, Burns v. Alcala, 420 U.S. 583 (1975) (practice of denying AFDC benefits to pregnant women); Lund v. Affleck, 388 F. Supp. 137 (1975) (practice of denying benefits to minor unwed mothers).

[218] 411 F. Supp. at 1307 (quoting Herzer, *supra* note 44, at 11).

[219] 28 U.S.C. § 1343 (1970). The text of the applicable subsections is set out in note 26 *supra*.

[220] 411 F. Supp. at 1308 (citing Almenares v. Wyman, 453 F.2d 1075, 1082 n.9 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Aguayo v. Richardson, 352 F. Supp. 462, 469 (S.D.N.Y. 1972), *modified on other grounds*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974)).

[221] 411 F. Supp. at 1308 (citing McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951) (wiretap provisions of Federal Communications Act of 1934 do not protect equal rights)).

[222] 411 F. Supp. at 1308 (quoting 28 U.S.C. § 1343(3) (1970)). *See* notes 45-56 and accompanying text *supra*.

the plaintiff's claim for relief under subsection 1343(4), because he was not seeking relief "under" a federal statute.[223]

The narrow reading of federal question jurisdiction in *Morris* is not unique.[224] Nevertheless, federal interest in proper administration of AFDC programs arguably outweighs the desire to keep state-law squabbles out of federal court.[225] Indeed, the expansion of pendent federal jurisdiction over AFDC claims in *Hagans v. Lavine*[226] draws the narrow views of *Morris* into serious question.[227] If the underlying rationale of *Morris* is a desire to avoid the indelicacy of awarding substantial damages to an AFDC recipient implicated in welfare fraud, a federal court need only look to the eleventh amendment and *Edelman v. Jordan*[228] to find full protection for the state's coffers. Only the individual state official guilty of defamation[229] could be called upon to pay money damages —hardly a deep pocket. Yet *Morris* denied even prospective injunctive relief,[230] thus leaving to the state the enforcement of the protections that Congress required in section 602(a)(9). A recent Delaware decision[231] aptly illustrates the dangers inherent in relegating federal confidentiality rules to the vagaries of state courts.

B. *Pajewski v. Perry: A State Court Ducks the Issue*

In *Pajewski v. Perry*,[232] the Delaware Supreme Court limited a recipient's right to enforce the confidentiality of his AFDC records and to obtain a remedy for their illegal disclosure. The plaintiffs complained that a magazine article publicized family history drawn from their welfare file without concealing their identity. Welfare

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[223] 411 F. Supp. at 1308. *See* notes 64-77, 208-18, and accompanying text *supra*.

[224] *See* Gully v. First Nat'l Bank, 299 U.S. 109, 118 (1936) (narrowly construing "arising under" in a different context). Decided four months after *Morris*, Reyes v. Edmunds, 416 F. Supp. 649 (D. Minn. 1976), followed the same reading of § 1331.

[225] *See* note 44 *supra*.

[226] 415 U.S. 528 (1974).

[227] *See* notes 29-36 and accompanying text *supra*.

[228] 415 U.S. 651 (1974). *See* notes 136-47 and accompanying text *supra*. Absent a federal statute rooted in the enforcement clause of the fourteenth amendment, the eleventh amendment bars a federal court from awarding damages to an individual in a suit against a state. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[229] *See* Note, *Suing State Welfare Officials for Damages in Federal Court: The Eleventh Amendment and Qualified Immunity*, 4 FLA. ST. U.L. REV. 105, 123-25 (1976) (arguing retroactive benefits may be available from state welfare officials acting in bad faith or unreasonably). Of course, a federal court might not even assume jurisdiction over a pendent claim against an individual. *See* UMW v. Gibbs, 383 U.S. 715 (1966).

[230] 411 F. Supp. at 1307.

[231] Pajewski v. Perry, 363 A.2d 429 (Del. 1976).

[232] *Id.*

department personnel also disclosed the information at a seminar.[233] The recipients sued the state for damages both in tort and in contract.

The tort claim, charging state welfare officials with libel and invasion of privacy, faced the barrier of sovereign immunity. Although the doctrine has lost some vitality as government activity has expanded[234]—a trend the Delaware court noted with approval[235]—sovereign immunity is not dead.[236] The court pointed out that 1969 Delaware legislation[237] "create[d] what appears to be a comprehensive insurance program with implementing administrative provisions."[238] The statute waived the immunity defense against any insured risk.[239] After much struggle with the language of the insurance act, however, the court was unable to decide whether the state had waived its immunity to the *Pajewski* claim because the state had yet to purchase any insurance.[240] It remanded for a determination of whether or not the committee responsible for buying insurance had decided to insure against this particular risk.[241]

Although the *Pajewski* tort claim survived to spend another round in the trial court, the difficulty encountered by the Delaware Supreme Court in deciding the sovereign immunity issue exemplifies the obstacles facing many plaintiffs alleging libel and invasion of privacy against a state. In only a few jurisdictions has sovereign immunity been totally abolished by judicial fiat.[242] In others, like Delaware, legislative waiver is on a piecemeal basis, generally including only the more common physical risks incurred

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[233] *Id.* at 430.

[234] *See, e.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (tort immunity "discarded"); Willis v. Department of Conservation and Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970) (tort immunity limited to governmental functions); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 54, 305 A.2d 877 (1973) (tort immunity "abolished"). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 984-87 (4th ed. 1971).

[235] 363 A.2d at 434 & n.3.

[236] *See, e.g.*, Bale v. Ryder, 286 A.2d 344 (Me. 1972) (deferring to the legislature to abrogate immunity); O'Dell v. School Dist., 521 S.W.2d 403 (Mo.) (only legislature can abrogate tort immunity completely), *cert. denied*, 423 U.S. 865 (1975).

[237] DEL. CODE tit. 18, §§ 6501-6543 (1974).

[238] 363 A.2d at 435.

[239] *Id.* at 432. *See* DEL. CODE tit. 18, § 6511 (1974).

[240] 363 A.2d at 432-33.

[241] *Id.* at 436-37.

[242] For a recent state-by-state discussion of the status of sovereign immunity, see Harley & Wasinger, *Governmental Immunity: Despotic Mantle or Creature of Necessity*, 16 WASHBURN L.J. 12, 33-53 app. (1976).

in the operation of government services.[243] Thus, AFDC recipients face a difficult, if not impassable, road in asserting privacy claims against loose-lipped caseworkers.

In their contract count, plaintiffs alleged that the disclosure breached the federal-state contract to provide AFDC benefits in Delaware. They asserted a right of action under this contract as intended third-party beneficiaries.[244] The state of Delaware, argued the plaintiffs, promised the federal government that it would comply with the subsection 602(a)(9) limitations on disclosure when it accepted federal AFDC funds.[245] Although recognizing that "Delaware may have a contractual duty to the Federal Government to preserve confidentiality,"[246] the court denied the plaintiffs' request for damages resulting from breach.[247]

The court began its cursory treatment of this question by distinguishing an earlier case[248] in which it had recognized a cause of action by a federal prisoner against the state for breach of a state-federal contract governing his incarceration. The court reasoned that the federal government owed the federal prisoner a "statutory duty of 'safekeeping' and 'protection,' "[249] a duty that Delaware had contracted to perform, but that in *Pajewski* "[n]either the record nor the briefs show[ed] any duty owed by the United States to plaintiffs which the State ha[d] undertaken to perform."[250] In addition, the plaintiffs failed to qualfiy as intended beneficiaries under section 145 of the *Restatement of Contracts*[251] because "nothing in the alleged contract nor in the surrounding circumstances

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[243] *See id.*

[244] 363 A.2d at 430. In the language of the *Restatement*, third-party beneficiaries are either "intended" or "incidental." Only the former may sue the promisor for breach. RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Draft No. 3, 1967).

[245] 363 A.2d at 430-31.

[246] *Id.* at 431. Because the federal government does not compel states to participate in AFDC, there is a strong argument that the obligation to maintain the confidentiality of records is contractual and not statutory. Only after a state decides to participate in the AFDC program and accept federal funds does it assume the obligation to comply with the Social Security Act. See 42 U.S.C. §§ 601 & 604 (1970 & Supp. V 1975). AFDC may be an "offer a state cannot refuse," but it is, nevertheless, an offer. *See* Rosado v. Wyman, 397 U.S. 397, 408 (1970).

[247] 363 A.2d at 432.

[248] Blair v. Anderson, 325 A.2d 94 (Del. 1974).

[249] 363 A.2d at 431.

[250] *Id.*

[251] RESTATEMENT OF CONTRACTS § 145 (1932) provides:

> A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for

. . . manifest[ed] an intention to give plaintiffs a right to sue the State on the grounds . . . alleged."[252]

Pajewski v. Perry reflects a misunderstanding of the Social Security Act, Supreme Court decisions interpreting it, and modern developments in third-party beneficiary law. In *Weinberger v. New York Stock Exchange*,[253] the Southern District of New York applied section 145 to a contract between the United States and a quasi-governmental body—the New York Stock Exchange.[254] In deciding whether the plaintiff was an intended beneficiary of the contract, the court looked to two sources: the statute requiring the contract and judicial interpretations of the statute.[255] The AFDC portion of the Social Security Act is intended to "encourag[e] the care of dependent children in their own homes or in the homes of relatives . . . [and] to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ."[256] Subsection 602(a)(9) in particular requires states to "provide safeguards which restrict the use of [sic] disclosure of information con-

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the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,

(a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences, or

(b) the promisor's contract is with a municipality to render services the nonperformance of which would subject the municipality to a duty to pay damages to those injured thereby.

[252] 363 A.2d at 431.

[253] 335 F. Supp. 139 (S.D.N.Y. 1971). To come within the longer statute of limitations for contract claims, Weinberger asserted that he was the intended third-party beneficiary of the contract between the Securities and Exchange Commission and the New York Stock Exchange. As required by statute, the Exchange agreed to enforce the securities laws against its members. Weinberger had invested in a member firm that had allegedly violated securities laws before going bankrupt. *Id.* at 140.

[254] *Weinberger* is analogous to AFDC defamation claims in at least three ways. First, the Exchange's promise to enforce the securities laws was a statutory consequence of its decision to register as a national exchange, much as a state's obligation to comply with the Social Security Act arises by statute from acceptance of AFDC funds. Second, the *Weinberger* contract protected investors from violations of the securities laws just as a state's agreement to comply with the Social Security Act protects recipients against violations of subsection 602(a)(9). The Exchange enforces the securities laws against its members, and the state enforces subsection 602(a)(9) against welfare employees. Finally, as an enforcer of the securities laws whose rules have been given the force of law, the Exchange resembles a governmental body like a state.

[255] 335 F. Supp. at 143-44.

[256] 42 U.S.C. § 601 (1970).

cerning applicants or recipients . . . ."[257] This language evinces a purpose to protect recipients. Moreover, the legislative history of the initial enactment and subsequent amendments of subsection 602(a)(9) support this reading.[258]

Judicial construction of the statute also illuminates the government-promisee's intention to benefit third parties. At least three state courts[259] have found that subsection 602(a)(9) or state rules passed to comply with it are intended to protect AFDC recipients as a group. In addition, the Supreme Court has ruled on several occasions that individual AFDC recipients can challenge any state rule or practice that denies them benefits if the rule or practice is inconsistent with the Social Security Act.[260] The logical inference from these holdings is that the Supreme Court believes that the requirements of the Social Security Act were intended to benefit recipients and to give them a personal right of action for deprivation of those benefits. Thus the words and history of subsection 602(a)(9) and judicial interpretations of its meaning make a recipient, in the language of the *Weinberger* court, "more than an incidental beneficiary of the contract mandated by an Act of Congress. [They give] him an independent claim for relief."[261]

No less important than the foregoing statutory analysis is the new formulation of third-party beneficiary law embodied in the *Restatement (Second) of Contracts*.[262] The revised section 145 suggests

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[257] 42 U.S.C. § 602(a)(9) (Supp. V 1975).

[258] Both the Senate and House committee reports accompanying the original enactment stated that its "obvious purpose [was] to insure efficient administration and to protect recipients from humiliation and exploitation." S. REP. No. 734, 76th Cong., 1st Sess. 31 (1939); H.R. REP. No. 728, 76th Cong., 1st Sess. 29 (1939). Although Congress amended the section in 1974 to grant access to the files to persons searching for absent parents, the Senate committee report reiterated that the original purpose was "to prevent harassment of welfare recipients." S. REP. No. 93-1356, 93d Cong., 2d Sess. 49, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8152.

[259] *In re* Cager, 251 Md. 473, 482-83, 248 A.2d 384, 389-90 (1968); Paine v. Chick, 50 App. Div. 2d 686, 687, 375 N.Y.S.2d 198, 200 (3d Dep't 1975); McMullan v. Wohlgemuth, 453 Pa. 147, 164-65, 308 A.2d 888, 897 (1973), *appeal dismissed*, 415 U.S. 970 (1974). *Cf.* Morris v. Danna, 411 F. Supp. 1300, 1307 (D. Minn. 1976) (dicta recognizing that "Congress did wish to assure that welfare files were in fact kept confidential" and referring to "the right of confidentiality"), *aff'd per curiam*, 547 F.2d 436 (8th Cir. 1977).

[260] Carleson v. Remillard, 406 U.S. 598, 600-01 (1972); Townsend v. Swank, 404 U.S. 282, 285-86 (1971); King v. Smith, 392 U.S. 309, 333 (1968). *See* note 11 *supra*.

[261] Weinberger v. New York Stock Exchange, 335 F. Supp. 139, 144 (S.D.N.Y. 1971).

[262] RESTATEMENT (SECOND) OF CONTRACTS § 145 (Tent. Draft No. 3, 1967) provides:

> (1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.

two theories supporting the position that individual AFDC recipients are intended beneficiaries of confidentiality rules. First, applying subsection 145(2)(a), the state would be liable if "the terms of the promise provide for such liability."[263] This promise need not be explicit; "[i]f there is no explicit promise, . . . the question whether a particular claimant is an intended beneficiary is one of interpretation, depending on all the circumstances of the contract."[264] Each year states voluntarily accept federal funds with notice of the terms, legislative history, and judicial construction of the Social Security Act. As previously demonstrated,[265] these "circumstances of the contract" reveal an intention to benefit the group of people whom the states deem financially eligible for AFDC benefits.[266] More importantly, individual members of this group can point to a history of suits in which they were allowed to enforce the contractual obligation between the state and federal governments.[267] At least impliedly, "the terms of the promise provide for [state] liability."[268]

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(2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless

(a) the terms of the promise provide for such liability; or

(b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

[263] *Id.* § 145(2)(a).

[264] *Id.* § 145, Comment c (Tent. Draft No. 3, 1967).

[265] *See* notes 256-61 and accompanying text *supra*.

[266] In the public housing area, tenants and persons displaced by urban redevelopment have standing to enforce federal standards against local housing agencies that receive federal funds. Thompson v. Washington, 497 F.2d 626, 632 (D.C. Cir. 1973); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 932-37 (2d Cir. 1968); Western Addition Community Org. v. Weaver, 294 F. Supp. 433, 443-45 (N.D. Cal. 1968). *But see* Boston Pub. Housing Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493, 495-96 (D. Mass. 1974). The federal government disburses redevelopment funds under contracts that require compliance with certain standards. Generally, courts find a congressional intention to protect the plaintiffs and hold that tenants have rights as third-party beneficiaries. Admittedly, these cases involve an explicit contract, unlike the AFDC arrangement. The *Pajewski* court, however, thought the State had a contractual obligation to the federal government, despite the lack of a separate writing. The public housing contract analogue is therefore apposite. For decisions where courts found intended beneficiaries of government contracts in other contexts, see Hebah v. United States, 428 F.2d 1334 (Ct. Cl. 1970) (individual Indian intended beneficiary of treaty between tribe and federal government); Bartashevich v. City of Portland, 308 A.2d 551 (Me. 1973) (injured citizen intended beneficiary of employment contract between city and policeman).

[267] *See* cases cited in note 260 *supra*.

[268] RESTATEMENT (SECOND) OF CONTRACTS § 145(2)(a) (Tent. Draft No. 3, 1967).

AFDC recipients can also qualify as intended beneficiaries of the state-federal AFDC contract under the second test stated in the tentative draft of the *Restatement*. If the federal government "is subject to liability to the [AFDC recipient] for the damages and a direct action against the [state] is consistent with the terms of the contract and with the policy of the law authorizing the contract,"[269] the recipient has a right of action as an intended beneficiary. Thus, the first question under subsection 145(2)(b) is whether the federal government may be liable for damages to an AFDC recipient. By enacting section 602(a)(9), the federal government arguably assumed a duty to enforce the confidentiality requirements against the states. Negligence in that enforcement could subject the federal government to liability under the Federal Tort Claims Act[270] if it results in disclosures damaging to an AFDC recipient. Courts have held the federal government liable to members of the public under this statute in a number of different contexts in which the government has assumed some obligation.[271] These courts have reasoned that "if the Government undertakes to perform certain acts or functions thus engendering reliance thereon, it must perform them with due care."[272] Further, "that obligation of due care extends to the public and the individuals who compose it."[273] This analysis is easily applied in the AFDC context. Since the federal government has undertaken to protect AFDC recipients from disclosure of their records,[274] and recipients rely on this protection when divulging personal information, the federal government may be liable to the recipients if it negligently performs its duty.

The second question raised by subsection 145(2)(b)—whether policy supports a direct action against the state promisor—is answered by the Supreme Court's rulings that AFDC recipients themselves can compel states to comply with the Social Security Act.[275]

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[269] *Id.* § 145(2)(b).

[270] 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1970).

[271] *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61 (1955) (government liable for negligent operation of lighthouse); Fair v. United States, 234 F.2d 288 (5th Cir. 1956) (government liable for negligent release of patient from psychiatric care); Union Trust Co. v. United States, 113 F. Supp. 80 (D.D.C. 1953) (government liable for negligent control of air traffic), *aff'd sub nom.* Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955).

[272] Fair v. United States, 234 F.2d 288, 294 (5th Cir. 1956).

[273] *Id.*

[274] The legislative history of subsection 602(a)(9) demonstrates that Congress intended it to protect recipients. *See* note 258 *supra*.

[275] *See* cases cited in note 260 *supra*.

If AFDC recipients can bring direct actions seeking injunctive relief when states breach the AFDC contract, they should likewise be able to recover directly for injuries resulting from past breach.

One analytical hurdle remains, however, in the path of an AFDC recipient who relies upon section 145(2)(a) or 145(2)(b) of the *Restatement* to recover as a third-party beneficiary. Both sections are exceptions to the general rule that a contractor providing a service intended to benefit the general public does not incur liability to individual members of the public when he fails to perform.[276] Members of the general public are presumptively *incidental* beneficiaries of *intended* public benefits. Thus, the exceptions stated in section 145 assume *sub silentio* a distinction between benefits addressed to the general public and benefits intended for specific individuals. Applying these two exceptions to AFDC recipients requires an understanding of the tort and contract law that has created this distinction between public and individual beneficiaries.

In tort actions, courts have not required governmental bodies to exercise due care in the performance of duties owed only to the general public.[277] In *Riss v. City of New York*,[278] for example, the New York Court of Appeals held that a city has no duty to provide adequate police protection even in response to an individual's request. Thus, if the federal government's obligation to enforce the confidentiality requirements of the Social Security Act extends only to the public generally, the government arguably would not be liable for a specific AFDC recipient's injuries resulting from negligent enforcement. As a result, an AFDC recipient would not be an intended beneficiary under subsection 145(2)(b).[279] Similarly, in contract actions, courts have refused to find that particular individuals are intended beneficiaries of government contracts that benefit the public generally.[280] Thus in *H.R. Moch Co. v. Rensselaer Water Co.*,[281] the New York Court of Appeals denied recovery to a

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[276] *See* RESTATEMENT (SECOND) OF CONTRACTS § 145(2) (Tent. Draft No. 3, 1967).

[277] Prosser states: "Certain functions and activities, which can be performed adequately only by the government, are more or less generally agreed to be 'governmental' in character, and so immune from tort liability." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 979 (4th ed. 1971).

[278] 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

[279] *See* notes 269-75 and accompanying text *supra*.

[280] Corbin stated: "In a number of cases it was said that the contract was not made for the benefit of individual citizens but for the benefit of the municipality as a whole, and that it was not intended that a citizen should have any right." 4 A. CORBIN, CORBIN ON CONTRACTS § 806, at 207 (1951).

[281] 247 N.Y. 160, 159 N.E. 896 (1928).

plaintiff who had suffered fire damage resulting from the defendant water company's breach of its contract with the city to provide adequate water pressure at fire hydrants. Under such an analysis, an AFDC recipient would not be an intended beneficiary if the state-federal AFDC contract were for the benefit of the public at large.

AFDC recipients, however, are not the general public. They constitute a class that is clearly defined by federal and state eligibility criteria. Although the public may benefit from the existence of the AFDC program, it is the recipients who benefit from the conditions the Social Security Act imposes on state acceptance of federal funds. Subsection 602(a)(9), by its terms and legislative history, is clearly intended to benefit an identifiable group—recipients about whom information is on file—as opposed to the public at large.

The class of third-party beneficiaries of subsection 602(a)(9) may at first appear so large as to be indistinguishable from the public generally. In *Weinberger v. New York Stock Exchange*,[282] however, the court recognized as an intended beneficiary a member of a group potentially as large as the beneficiaries of subsection 602(a)(9). The court found the plaintiff investor in a member firm of the New York Stock Exchange to be an intended beneficiary of the Exchange's promise to the Securities and Exchange Commission.[283] Courts have also recognized prisoners[284] and public housing tenants[285] as intended beneficiaries of contracts. Moreover, the rule that specific members of the public are incidental beneficiaries of the government's obligation to provide police or fire protection has come under increasing attack.[286]

Most importantly, the policies underlying cases like *Riss v. City*

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[282] 335 F. Supp. 139 (S.D.N.Y. 1971).

[283] *See* notes 253-55 and accompanying text *supra*.

[284] Blair v. Anderson, 325 A.2d 94 (Del. 1974).

[285] *See* note 266 *supra*.

[286] *See, e.g.*, Harris v. Board of Water & Sewer Comm'rs, 294 Ala. 606, 609-11, 320 So. 2d 624, 627-28 (1975) (individual member of public intended beneficiary of contract to provide adequate water pressure at fire hydrant). *See also* Riss v. City of New York, 22 N.Y.2d 579, 592, 240 N.E.2d 860, 867, 293 N.Y.S.2d 897, 907 (1968) (dissenting opinion, Keating, J.):

> Some indication of the movement of the law against the existing rule can be extracted from the fact that, whereas a few decades ago, the rule that there is no duty to provide adequate police and fire protection was attacked only intermittently, in recent years more and more insistently we have been asked to reject the rule. An assault can be found now in almost every recent volume of the New York Reports . . . .

of New York[287] do not apply to the federal government's duty to enforce subsection 602(a)(9). In *Riss*, the New York Court of Appeals refused to find that the city had a duty to provide police protection, even when specifically requested, because it did not want to impose judicial review upon administrative allocation of the police department's scarce resources.[288] Congress, however, has already indicated its desire to expend federal resources protecting AFDC recipients[289] by directing the Secretary of Health, Education and Welfare to "approve any plan which fulfills the conditions specified in [42 U.S.C. § 602(a)]."[290] If courts were to find that the federal government owed a duty to individual AFDC recipients to enforce the Social Security Act against the states, it would still not be necessary for them to review the allocation of resources. Congress has already commanded the allocation of resources for individual protection. Thus, a court would simply determine whether or not agents of the federal government enforced the Social Security Act with reasonable care.

Similarly, the policies against finding liability to individual beneficiaries as part of the "terms of the promise" do not apply in the AFDC situation. Regarding cases like *H.R. Moch Co. v. Rensselaer Water Co.*,[291] Corbin has written:

> Perhaps the prevailing reason in the water cases has been one of supposed public policy. The courts seem to fear that water companies would be charged with stupendous losses out of proportion to their compensation, that the attempt is being made to hold them as insurers, and that the public service of supplying water would be paralyzed by holding the companies under such a liability.[292]

On one hand, states receive no compensation for administering AFDC, other than the reduction in their own welfare expenditures that federal AFDC funding makes possible. On the other, the liabilities incurred by a water company insuring fire protection are much greater than those assumed by a state insuring the confidentiality of welfare records. Furthermore, the plaintiffs in the water

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[287] 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968). *See* text accompanying notes 277-78 *supra*.

[288] 22 N.Y.2d at 581-83, 240 N.E.2d at 860-61, 293 N.Y.S.2d at 897-99.

[289] *See* notes 256-58 and accompanying text *supra*.

[290] 42 U.S.C. § 602(b) (1970). *See also* 42 U.S.C. § 604 (1970) (stopping payments upon deviation from required provisions of plan).

[291] 247 N.Y. 160, 159 N.E. 896 (1928). *See* text accompanying notes 280-81 *supra*.

[292] 4 A. CORBIN, CORBIN ON CONTRACTS § 806, at 209 (1951).

company cases can protect themselves by purchasing fire insurance, but the AFDC recipient has no way to insulate himself from the harm of public disclosure of the contents of his welfare file. Finally, state welfare programs would not be paralyzed by the possibility of liability for breaching the confidentiality condition. States have generally shown an interest in complying with the condition by passing statutes that impose criminal sanctions for wrongful disclosure[293] and by objecting to court orders to produce records.[294] To these states, the possibility of liability would make little difference. To the extent that states do not have this interest, however, courts should encourage concern for confidentiality by allowing recipients to enforce the federal standards with suits for damages. Supposed fiscal paralysis, a matter of conjecture to begin with, is no defense to liability for intentional wrongs committed by state officers.[295]

In sum, both implied consensuality[296] and the federal government's assumption of a duty to AFDC recipients[297] support the argument that welfare recipients are intended beneficiaries of confidentiality rules. If the federal courts continue to refuse jurisdiction and the state courts are hampered by sovereign immunity in disclosure suits, contract theory could and should provide a remedy for an obvious wrong.

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[293] *See, e.g.*, DEL. CODE tit. 31, § 1101(c) ($500 fine and/or 6 months imprisonment); PA. STAT. ANN. tit. 62, § 483 (Purdon) ($100 fine and/or 6 months imprisonment).

[294] Paine v. Chick, 50 App. Div. 2d 686, 375 N.Y.S.2d 198 (3d Dep't 1975) (welfare department unsuccessfully contested court order to produce welfare records at defendant's request in personal injury action brought by welfare recipient); State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1946) (welfare department unsuccessfully contested order from juvenile court to produce records). *Cf.* McMullan v. Wohlgemuth, 453 Pa. 147, 308 A.2d 888 (1973), *appeal dismissed*, 415 U.S. 970 (1974) (welfare department successfully withheld records from newspaper).

[295] The *Weinberger* court was not concerned that the New York Stock Exchange might be paralyzed by liability to third-party beneficiaries, and the stock exchange's liability seldom if ever arises out of intentional violation of the terms of its contract with the SEC.

[296] *See* notes 263-68 and accompanying text *supra*.

[297] *See* notes 269-75 and accompanying text *supra*.