

Law & Inequality: A Journal of Theory and Practice

Volume 4 | Issue 3

Article 7

1986

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Recommended Citation

James T. Hamilton, *Legisprudential Considerations in Unraveling the Safety Net: Food Stamps, Foster Care, and the Indian Child Welfare Act*, 4 *LAW & INEQ.* 667 (1986).

Available at: <http://scholarship.law.umn.edu/lawineq/vol4/iss3/7>

Law & Inequality: A Journal of Theory and Practice is published by the University of Minnesota Libraries Publishing.

Legisprudential Considerations in Unraveling the Safety Net: Food Stamps, Foster Care, and the Indian Child Welfare Act

James T. Hamilton*

Introduction

In 1982, the U.S. Agriculture Department, under the direction of Secretary John Block,¹ amended the USDA Food Stamp Regulations to include foster care maintenance payments (FCMP)² as unearned income in estimating food stamp eligibility levels.³ A class action civil rights complaint has since been filed in United States District Court⁴ on behalf of "all persons in Minnesota whose Food Stamp benefits have been in the last twelve months or will in the future be reduced, terminated or denied as a result of their receipt of foster care maintenance payments."⁵

The plaintiffs advance several arguments in their suit against the Secretary. They allege first that the Secretary, in administering the Food Stamp Program, has deprived plaintiffs of their rights to due process and equal protection of the laws afforded them under the United States Constitution. The plaintiffs also contend that the Secretary wrongfully classified foster children as members of the foster care household. Further, the suit alleges that the

* James Hamilton will receive his J.D. from the University of Minnesota in 1987.

1. Secretary Block resigned his cabinet post in mid-February of 1986. On January 29, 1986, President Reagan appointed Richard Lyng to replace him. Secretary Lyng describes himself as an "ideological twin" of Secretary Block. The new secretary was a California seed company executive prior to his recent appointment to the Agriculture Department. His history with the President dates back to his service as the head of Governor Reagan's Agriculture Commission in California. David Rapp, *Quick Confirmation Expected: Reagan Names Richard Lyng as New Agriculture Secretary*, 44 Cong. Q. Weekly Rep. 199 (1986).

2. For a discussion of foster care maintenance payments, see *infra* notes 47-48 and accompanying text.

3. 7 C.F.R. § 273.9(b)(2)(ii) (1982).

4. *Murray v. Block*, No. 4-85-611 (D. Minn. Plaintiff's and Defendant's Motions for Summary Judgment argued, submitted, and taken under advisement October 10, 1986).

5. Complaint at 3, *Murray* (No. 4-85-611).

economies of scale⁶ which the Secretary claims as justification for the ruling do not exist. Finally, plaintiffs argue that judicial review of the Secretary's decision is proper under these circumstances.⁷

Although I support the plaintiff's arguments, I propose that the Secretary's action would best be defeated on an alternate ground. This article's perspective is that the Food Stamp Act and regulations are an integral part of the social welfare "safety net"⁸ for disadvantaged children. From this perspective the Secretary's actions are shortsighted and over-reaching in his fervor to cut expenses in this program. In drafting the food stamp regulations he did not adequately take into account the broad statutory intent in the Food Stamp Act of 1977.⁹ Nor did he consider the adverse effect these rules would have upon the proper functioning of other social welfare programs.¹⁰ An examination of the Adoption Assistance and Child Welfare Act of 1980,¹¹ and the Indian Child Welfare Act,¹² with a special focus on their relationship to the Food Stamp Act, illustrates this inconsistency.

6. For a discussion of the nature of food stamp computation formulas and economies of scale arguments, see *infra* note 29.

7. Plaintiffs' Memorandum in Opposition to Defendant Block's Rule 12(b)(6) Motion to Dismiss at 18-23, *Murray* (No. 4-85-611) [hereinafter Plaintiffs' Memorandum].

8. The term "safety net" generally refers to the interlocking system of federal aid programs designed to assist those citizens unable to provide for themselves for reasons of physical or mental disability, economic dislocation, or other forces beyond their control. See *infra* note 41 and accompanying text.

9. 7 U.S.C. § 2011 (1982) (congressional declaration of policy behind enacting food stamp program).

10. A special effort is made here to place the recent food stamp regulatory action in the context of the intent of the *entire* Food Stamp Act of 1977, not merely the authorizing language. The Secretary's regulations are likewise examined in the context of other integrally related social welfare acts. My intention is to look beyond narrow legal issues and deal with the real life impact of the amended regulations on inequality in society.

11. 42 U.S.C. §§ 602, 603 note, 608, 612, 620-625, 627-628, 652, 655 note, 658, 670-672, 672 note, 673-676, 1305 note, 1308, 1318, 1320b-2-1320b-3, 1382d, 1395y, 1395cc, 1396a, 1397-1397d, 1397e-1 note (1982 & Supp. III 1985).

12. 25 U.S.C. §§ 1901-1963 (1982). An argument against the Secretary's rulemaking based on its inconsistency with the intent of the Indian Child Welfare Act was made in a memorandum of the Amicus Curiae filed September 5, 1985 in support of plaintiffs in *Murray*. See Memorandum of the Amicus Curiae, *Murray* (No. 4-85-611) [hereinafter Amicus]. Predictably, the United States Attorney responded that because the federal action regarding foster care maintenance payments is not in direct contravention of the Indian Child Welfare Act, the Secretary was under no duty to consider the effects of his actions on this Act. The United States Attorney stated that "[t]he ICWA simply is not addressed to the operation of the food stamp program." See Federal Defendant's Response to the Memorandum of the Amicus Curiae at 3, *Murray* (No. 4-85-611) [hereinafter Defendant's Response]. Such a narrow view of a secretary's responsibilities to the effective functioning of government obscures the notion of program networking. See *infra* notes 41-58 and accompanying text.

I. The History of the Food Stamp Act

In 1939, the United States still suffered from the effects of the 1929 stock market crash and ensuing depression. Farmers were unable to sell their products in the marketplace while thousands of families were unable to adequately feed themselves. Franklin D. Roosevelt's administration and the New Deal Congress took an unprecedented and innovative step in the attempt to alleviate the problem. Under the authority of the Agricultural Adjustment Assistance Act of 1933,¹³ the Secretary of Agriculture promulgated regulations for the first food stamp program.¹⁴

The program's scope was limited¹⁵ but proved to be tremendously popular. Due to the exigencies of the war and a falling unemployment rate, the program was discontinued in 1943. Legislation to reinstate a food stamp program was introduced in each session of Congress from 1943 until 1964, when the current Act was passed.¹⁶ Congressional approval of a food stamp act had, however, occurred earlier than 1964. In 1959, Congress authorized a program to distribute surplus commodities.¹⁷ The basic thrust of the surplus distribution program was aimed at stimulating the farm economy rather than at alleviating hunger. Neither goal, however, was ever achieved under this limited program. The Eisenhower administration failed to follow through on the program and it died an ignominious death.¹⁸

The Kennedy administration swiftly focused the nation's attention on feeding the poor and stimulating the agricultural economy. Early in his term, President Kennedy issued an executive order providing for an expanded food distribution program.¹⁹ Later, in his February, 1961 message to Congress, Kennedy stated his intent to establish a pilot program aimed at providing addi-

13. Act of May 12, 1933, ch. 25, 48 Stat. 31, amended by Act of Aug. 24, 1935, ch. 641, § 32, 49 Stat. 774-75.

14. 7 C.F.R. § 1101.001 (Supp. 1939). This program provided public assistance to eligible families with two series of stamps. The orange series were used to purchase food at retail stores; the purple series, distributed at a ratio of one for every two orange series, were redeemable for surplus food procured and distributed by the government.

15. Only 48 cities and 136 counties were participating in the program when it was discontinued in 1943.

16. See generally S. Rep. No. 1124, 88th Cong. 2d Sess. 2-4, reprinted in 1964 U.S. Code Cong. & Admin. News 3275, 3276-77 (legislative commentary on early food stamp programs); Martin Frey, *The Spiraling Food Stamp Program*, 3 Tex. Tech L. Rev. 285 (1972) (discussion of early food stamp program).

17. Agricultural Trade Development and Assistance Act, Pub. L. No. 86-341, 73 Stat. 606, 607 (1959).

18. See Frey, *supra* note 16, at 287.

19. Exec. Order No. 10,914, 3 C.F.R. 443-44 (1959-1963) (temporary order).

tional nutrition to those in need, and urged substantial improvement in a food distribution system for the poor.²⁰

Congress acted within the year to establish a pilot program in eight jurisdictions, including cities and rural counties.²¹ The pilot program rapidly expanded to include forty counties and three major cities in twenty-two states, availing benefits to 392,000 people.²² The programs proved highly successful in achieving both the agricultural stimulation and public welfare goals envisioned by supporters.²³

Shortly after establishing the pilot programs, the eighty-eighth Congress overwhelmingly approved a national policy to feed the poor. The Food Stamp Act of 1964²⁴ was signed by President Johnson on August 31, 1964. On December 3, 1964, Secretary of Agriculture Orville Freeman authorized regulations for the operation of the program, marking the beginning of the most prolific and ambitious nutrition program in United States history.²⁵

The food stamp program's growth was unprecedented both in dollars spent and in numbers of people served. The program began with a \$75 million budget in 1964. By 1975 the food stamp program was spending \$100 million per month.²⁶ From 1964 to 1970, the number of people served by the food stamp program escalated from roughly 4,000,000 to 10,000,000.²⁷

As the program grew, its emphasis shifted. It became clear that Congress intended the food stamp program to supply the nutritional needs of the poor,²⁸ and in so doing, to eradicate nutri-

20. President's Message to Congress Discussing Economic Recovery and Growth, 1961 U.S. Code Cong. & Admin. News 1028, 1033.

21. The administration acted with notable speed in establishing a pilot program. The eight areas chosen by the Department of Agriculture for the pilot program were announced about a month from the time the President addressed Congress. Named as the pilot areas on March 7, 1961 were Franklin County, Kentucky, the city of Detroit, Michigan, the Virginia-Hibbing-Nashwauk complex in northern Minnesota, Silver Bow County, Montana, San Mijuel County, New Mexico, Fayette County, Pennsylvania, and McDowell County, West Virginia. 26 Fed. Reg. 4137 (1961).

22. For a list of the participating jurisdictions and the relevant statistical analysis, see S. Rep. No. 1124, *supra* note 16.

23. *Id.* at 3280-81.

24. 7 U.S.C. §§ 2011-2029 (1964).

25. 29 Fed. Reg. 16,784-88 (1964).

26. Frey, *supra* note 16, at 285.

27. 116 Cong. Rec. 22,412 (1970).

28. It is Professor Frey's contention that the unprecedented expansion of this program was caused by a shift in emphasis from an agricultural to a welfare program. As a welfare program, there were inexorable pressures on the government to expand the program which, Professor Frey insists, led to an onerous burden on United States society. While it is true that the program has become predominantly a welfare program, it would be a mistake to discount the effect this program has

tional inequality based on income.²⁹ In 1971, to underscore its evolving attitude toward the food stamp program, Congress passed an amendment to the Act indicating that the program's goals were limited to supplemental aid. The program was seen in more comprehensive terms: "[t]o alleviate . . . hunger and malnutrition [and to] permit low income households to purchase a nutritionally adequate diet through normal channels of trade."³⁰

Congress undertook a thorough revision of the Act in 1977.³¹ Most legislators conceded that more congressional control was needed as the program grew. Congress also expanded the Act's specificity by amendment and addition.³² This process continued through a critical period in the nation's economy and several ad-

had on the United States farm economy. See Frey, *supra* note 16, at 287. Further, Professor Frey's criticism is even less valid since several measures he suggested to curb abuses of the program were adopted. See *infra* notes 35-39 and accompanying text.

29. "Participation in the food stamp program shall be limited to those households whose income and other financial resources . . . are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet." 7 U.S.C. § 2014(a) (1982 & Supp. 1985). The states are to determine eligibility guidelines based on 125% of the "poverty line" as determined by the Office of Management and Budget. 42 U.S.C. § 9902(2) (1982 & Supp. 1985). The responsible state agency is to calculate benefits based on a sliding scale of benefits to income. The basis for calculating the benefits in a given eligible household is a state-calculated "Thrifty Food Plan." This is defined as the "diet required to feed a family of four persons consisting of a man and woman twenty through fifty-four, a child six through eight and a child nine through eleven." *Id.* The cost of this diet is determined by the Secretary of Agriculture and is adjusted for family size by applying regional and household economies of scale. 7 U.S.C. § 2012(o) (1982 & Supp. 1985). The Agriculture Department uses an economy of scale argument to justify its inclusion of FCMP as unearned income. While this may be justified for the average food stamp family, such is not the case for foster care families. First, "foster families are not obligated to provide financial support for their foster children," and likewise, "the foster child is not expected to financially support the host family." Plaintiffs' Memorandum, *supra* note 7, at 15. Second, any adjustment in benefits to account for economy of scale should be done at the level of AFDC assistance not in food stamp grants. See *infra* notes 52-56 and accompanying text.

30. Food Stamp Act of Jan. 11, 1971, Pub. L. No. 91-671, § 1, 84 Stat. 2048 (current version at 7 U.S.C. § 2011-2029 (1982 & Supp. III 1985)).

31. Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 913 (current version at 7 U.S.C. § 2011-2029 (1982 & Supp. III 1985)).

32. It is useful to gauge the scope of the 1977 changes in the Food Stamp Act by a cursory examination of the increased length of the Act. A section of special importance to this article is an example of this prolixity—the section determining income guidelines for eligibility standard: 7 U.S.C. § 2014 (1977). In 1964, this section occupied 12 lines of text. See Pub. L. No. 88-525, § 5, 78 Stat. 704 (1964). In 1977, the same section occupied nearly three full pages. See Pub. L. No. 95-113, §§ 5-6, 91 Stat. 958, 962-64 (1977). As a result of extensive amendment, the eligibility guidelines section became much more specific. This specificity shows an increasing desire on the part of Congress to guide the food stamp program's administration. The 1964 Act merely stated a specific intention to benefit low-income families and relegated to the states the onerous task of determining the appropriate level of assistance. The 1977 amendments, however, meticulously defined what kind of income

ministration changes.³³ Significantly, throughout this period, Congress never waived from its basic intent to eradicate nutritional inadequacy based on income inequality and to do so fairly.³⁴

Despite its laudable purpose and performance, the food stamp program has come under repeated attack. Many perceive it to be rife with recipient fraud.³⁵ Unfortunately, there has been abuse. Particularly relevant to this article was a loophole in the statutory definition of "household": parents and children who live together could qualify as separate households by claiming separate food preparation and purchase functions.³⁶

was included or excluded in determining "low income." As a whole, the Act grew from its original seven pages to over 24 pages of amendments in 1977.

33. The food stamp program has been subject to major amendment by virtually every Congress since 1979. See Pub. L. No. 96-58, 93 Stat. 389 (1979); Pub. L. No. 96-249, 94 Stat. 357 (1980); Pub. L. No. 97-35, 95 Stat. 358 (1981); Pub. L. No. 97-253, 96 Stat. 772 (1982). The current version of the Food Stamp Act is at 7 U.S.C. §§ 2011-2029 (1982 & Supp. III 1985).

34. There was substantial pressure on the federal government from the 1980 election onward to drastically trim domestic spending. The food stamp program, as the second largest entitlement program, came under intense scrutiny. In 1981, the proposed food stamp budget was cut by \$2.6 billion. The program's strength became clear under pressure. Senator Bob Dole of Kansas, a farm state senator and the newly elected majority leader of the Senate, flexed the program's agricultural support muscles and forced the White House to reduce the cut to \$1.8 billion. Meanwhile over 100 groups, from unions to civil rights organizations, from churches to grocery stores, were brought together to fight the cuts. More than 100 poor people were brought before Congress to lobby their representatives to vote against the budget slashing. Steven V. Roberts, *Debate Opens on Cuts in Food Stamps*, N.Y. Times, Mar. 17, 1981, at B13, col. 1 [hereinafter Roberts, *Debate Opens*]. For further information on the budget process in 1981 and its effect on the food stamp program, see also Steven V. Roberts, *Supporters and Critics of Food Stamps Prepare to Battle on Scope of Program*, N.Y. Times, Feb. 14, 1981, at B9, col. 1; Steven V. Roberts, *'Antihunger' Lobbyists Start Their Rounds*, N.Y. Times, Mar. 10, 1981, at B5, col. 3. In the face of this pressure on Congress and the White House, the program has demonstrated a relative immunity from the budget-cutting fever which gripped Capitol Hill after the election of President Reagan. The following are the food stamp allocations since 1979: Act of 1979, Pub. L. No. 96-58, 93 Stat. 389 — \$6,778,900,000; Act of 1980, Pub. L. No. 96-243, 94 Stat. 345—\$9,191,000,000; Act of 1981, Pub. L. No. 97-18, 95 Stat. 102—\$11,480,000,000; Act of 1982, Pub. L. No. 97-253, 96 Stat. 785—\$12,874,000,000. The 1982 amendment also authorized expenditures "not in excess of \$13,145,000,000 for the fiscal year ending Sept. 30, 1984; and not in excess of \$13,933,000,000 for the fiscal year ending September 30, 1985." *Id.*

35. During the 1981 budget hearings, the level of insensitivity and shortsightedness reached heights not seen since the 1890's. Chief among the food stamp witch-hunters was Senate Agriculture Committee Chair Jesse Helms of North Carolina. The Senator gave new fire to old conservative complaints. He degraded the program as being exploited by able-bodied workers and warned that the greatest harm of the food stamp program would befall the recipients themselves. In addition, the Senator warned the hungry that accepting the benefits would destroy their initiative. Apparently the senator forgot that malnutrition destroys more than mere initiative. See Roberts, *Debate Opens*, *supra* note 34, at B13, col. 1.

36. Food Stamp Act of 1977, 7 U.S.C. § 2012(i).

In 1981, the newly elected United States Senate quickly recognized the loophole in the Act's definition of "household."³⁷ As a response, Congress amended the Food Stamp Act to treat parents and children living in the same household as a single household regardless of how food is purchased or prepared.³⁸ The next year Congress further amended the Act to consider siblings residing together as a single household.³⁹

Using this congressional initiative as a justification, and under the authority given the Secretary of Agriculture to "issue such regulations consistent with this Chapter as the Secretary deems necessary or appropriate,"⁴⁰ Secretary of Agriculture John Block issued the regulations which form the focus of this article. Contrary to this claim of authority, however, and viewed in light of this and other similar congressional acts, these regulations are not consistent with congressional intent. Such regulations are neither necessary to the proper functioning of the food stamp program, nor appropriate in the face of the critical condition of neglected children.

II. Gnawing at the Safety Net: Secretary Block, Reaganomics, and the Frustration of Legislative Intent

President Reagan and his critics have consistently differed on the nature and purpose of the so-called "safety net" of social welfare programs. Even the most extreme conservatives agree that some system of assistance for the indigent, especially for the children of poverty, is a legitimate function of government.⁴¹ Such a

37. S. Rep. No. 139, 97th Cong., 1st Sess. 52 (1981), *reprinted in* 1981 U.S. Code Cong. & Admin. News 442. The report noted:

Because small households are provided more food stamps per person and because the same standard deduction is applied to income regardless of household size, a residential unit that splits into several smaller households can, under present law, receive larger total benefits than would be the case if the individuals applied as a single, larger household.

The legislative prescription would be to "require that parents and children who are living together would always be defined as a single household unit, regardless of whether they purchase food and prepare meals together." *Id.*

38. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 101, 95 Stat. 358 (codified as amended at 7 U.S.C. § 2012(i)).

39. Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 192, 96 Stat. 789 (codified as amended at 7 U.S.C. § 2012(i)). Congress rejected the Senate's move to include all related persons living together in the same household and limited the final revision to include only siblings, thus saving the Department of Agriculture the task of delving into extended genealogies. S. Rep. No. 504, 97th Cong., 2d Sess. 24 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 9260, 9262.

40. 7 U.S.C. § 2013(c) (1982).

41. Ostensibly, even the President is committed to retaining a safety net under the poor and disadvantaged. President Reagan has recognized the legitimate gov-

system may require considerable reworking of the social welfare system. In the most paranoid of moods, we are sometimes given to think that this reworking entails a system akin to Dickens's England, replete with orphanages, workhouses, and debtor prisons for the poor. Happily, Congress seems unwilling to acquiesce to the extreme solutions of the more doctrinaire conservatives among the administration's policymakers. Drastic transformations in the system of safety net programs are unlikely; its ends continue to be carried out through the systems and methods currently in place.

The safety net analogy of this system of assisting the poor is appropriate. By its nature the safety net must be a mutually dependent interweaving of programs. These programs necessarily spread throughout various departments, commissions, and agencies of government. An action in one department may have a significant impact in another department. Regulations promulgated to provide, create, and uphold the safety net should be carefully examined for possible adverse consequences to other programs.⁴² Secretary Block's regulations regarding earned income and FCMP are a prime example of the calamitous effects resulting from the disregard of this principle.

When Congress closed the "household loophole" in the food stamp program,⁴³ the Secretary of Agriculture seized the opportunity to cut back on the eligibility of some recipients by further redefining *income* in the program's regulations. Ironically, the recipients affected by the Secretary's action were among those who best fit the class of people Congress intended to assist in the redevelopment of the food stamp program. The resulting regulation stated: "Unearned income shall include . . . foster care payments

ernment function of providing basic human services to those unable to fend for themselves. See "A Program for Economic Recovery," H.R.J. Res., 97th Cong., 1st Sess., 127 Cong. Rec. 17,481 (1984).

42. Secretary Block presumably relies on Justice Stevens' dictum in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-15 (1976), to disregard the effect his regulations might have on other programs and departments of the government. In *Wong*, the Civil Service Commission was chastised by the Court for promulgating rules supposedly motivated by a concern for foreign affairs. The Court stated that "[t]he only concern of the Civil Service Commission is the promotion of an efficient federal service." *Id.* at 114.

It would be specious for the Secretary of Agriculture to argue as a justification for his regulations that the Department of Agriculture's only purpose concerning the food stamp program is its efficient operation. The Food Stamp Act was passed as an integral part of the "Great Society" program. The food stamp program has a special concern in providing proper nutrition for children suffering from poverty and neglect. This concern is intrinsically connected to ancillary social welfare programs and their goals.

43. See *supra* notes 36-39 and accompanying text.

for children or adults."⁴⁴ The primary effect of this regulation is to place a substantial impediment in the path of low-income families wishing to raise a foster child. An examination of this action reveals its patent irrationality.

This examination begins by investigating the effects of the Department's regulation on the families it reaches. *Murray v. Block* presented the hardship of the regulation by citing the following facts:

In February, 1985 . . . the Murray household received \$298 in Food Stamps. If the foster child and any foster care reimbursements were both excluded from the calculations, the Murray family would have received \$78 more. In April, 1985, Ms. Murray received \$58 in Food Stamps. If the foster child and her accompanying payments had been excluded from the calculations the Murray family would have received \$159 more in Food Stamps. In other months, the foster care payment's inclusion in budgeting result[ed] in ineligibility for any Food Stamp benefits. To this low-income family, the loss of \$159 or even \$78 per month in Food Stamps is very significant.⁴⁵

This diminution in benefits is, at best, a disincentive for low-income families to become foster care families. At worst, this regulation can be viewed as a penalty exacted on low-income families for undertaking foster care responsibilities. The invidiousness of this policy, as well as its contravention of congressional intent, is best understood in light of the Aid to Families with Dependent Children (AFDC) foster care program.⁴⁶

Under the provisions of the Adoption Assistance Act, states are to calculate FCMP reimbursement rates "to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation."⁴⁷ This scheme makes no allowance for remunerating the foster care provider or for using FCMP to maintain the provider's biological family. The foster care regulations prohibit a foster care provider from using *any* of the FCMP for any purpose other than to exclusively benefit the foster child.⁴⁸ In short, the FCMP may be of no assistance in meeting the foster family's living expenses. The Secretary is ignoring this fact and inexplicably designates the payments as unearned *income*.

This inconsistency has escaped the Secretary of Agriculture,

44. 7 C.F.R. § 273.9(b)(2)(ii) (1986).

45. Plaintiffs' Memorandum, *supra* note 7, at 3.

46. *See* 42 U.S.C. §§ 670-676 (1982).

47. 42 U.S.C. § 675(4) (1982).

48. *Id.*

which is particularly odd in light of Congress's Food Stamp Act definition of income. This definition specifically excludes reimbursements that, like FCMP, do not represent a gain to the household.⁴⁹ Surely the Secretary knows of this statutory provision since he has promulgated regulations mirroring this language.⁵⁰

At this point, it is important to recall the reason for Congress's action in closing the "household loophole." It is from this same reason that the Secretary has gleaned authority to take the actions so adversely affecting low income foster care families. Congress intended to keep families who reside together from registering as separate households for benefit calculation purposes. The AFDC foster care program's FCMP, however, includes full reimbursement for the foster child's nutritional needs. Under this rationale, the regulations are functionally superfluous. The foster child could not qualify as a separate household or member of a separate cohabitating household under any circumstances.

Congress did speak directly to the interrelationship of the food stamp program and the AFDC foster care program in the 1981 legislative session. It did so by passing AFDC legislation, not by amending the food stamp program.⁵¹ Congress gave states the option to include food stamp allocations in income to determine AFDC⁵² cash payments.

49. "[R]eimbursements' which do not exceed expenses actually incurred and which do not represent a gain of benefit to the household" are excluded from income for food stamp purposes. 7 U.S.C. § 2014(d)(5) (1984). In answering the assertion raised in *Murray v. Block*, the Department makes a conclusory argument. It contends that the foster child is a member of the household and FCMP "do represent a gain or benefit to the household." Memorandum in Support of Defendant Block's Motion to Dismiss, at 8, *Murray v. Block*, No. 4-85-611 (D. Minn. filed Apr. 25, 1985) (emphasis in original). This conclusory language belies a literalist approach which, if strictly applied, renders this exclusion nugatory. It is difficult to imagine *any* reimbursement that would not constitute a gain or benefit in a strict sense. After all, if the expense is not reimbursed, it must be to the economic detriment of the household. It is far more reasonable to consider a FCMP as a reimbursement intended to be excluded by Congress. The foster family's income for food stamp purposes is exactly the same with or without the foster child in residence since, by statute and regulation, the FCMP themselves *cannot be used for the gain or benefit* of any one in the household other than that child.

50. "Income exclusions [include] . . . reimbursements for past or future expenses, to the extent they . . . do not represent a gain or benefit to a household." 7 C.F.R. § 273.9(c)(5) (1985). In these regulations the Secretary has defined such exclusions as "payments . . . specifically for an identified expense, other than normal living expenses" and includes by specific example, "(iii) medical or dependent care reimbursements." As shall be seen, FCMP fully fit this criteria.

51. The AFDC foster care legislation provides that "[t]he term 'aid to families with dependent children' shall . . . include also foster care." 42 U.S.C. § 602(a)(7)(C)(i). While certain reimbursement rates may differ for foster children, the general provisions of AFDC title IV also apply to the foster care program.

52. 42 U.S.C. § 602(a)(7)(C)(i) (1982 & Supp. III 1985) provides that states may

Legislative history shows that the change in the definition of income was Congress's answer to the problem of pyramiding benefits.⁵³ The Senate Finance Committee intended that the "[a]mendment [to § 602] would specifically *permit* States to take into account the value of any food stamps [as income for AFDC purposes]. . . . The committee believes that *this* provision would . . . mitigate the effects of pyramiding benefits."⁵⁴

For purposes of examining the Secretary's regulations, this history is crucial. First, Congress intended to give states the option of calculating both food stamps and AFDC together. The Secretary's rules give no such option to the state. This generally runs counter to the "New Federalism," and to Congress's explicit intention to leave the option to the states.

Second, Congress intentionally chose to deal with the pyramiding problem by allowing a decrease in the AFDC cash benefits rather than in food stamp benefits. In this way, Congress expressed a preference for food to be a constant percentage of a family's total budget. Congress would have been evincing a very different social welfare preference had it chosen to allow the decrease in benefits to affect the food stamp allocation in favor of cash derived from AFDC payments. Congress is essentially saying that nutrition, the very basis of the food stamp program, is Congress's highest priority.

Third, statutorily permitting the inclusion of food stamps as income for AFDC purposes, combined with the Agriculture Department's regulatory requirement of AFDC income inclusion, is extraordinarily draconian. A low-income family would suffer a double penalty for taking in a foster child. This penalty is contrary to congressional intent and against the best interests of dependent children.

The Food Stamp Act previously required that "[p]articipating States or political subdivisions thereof shall not decrease welfare grants or other similar aid extended to any person or persons as a consequence of such person's or persons' participation in benefits made under the provisions of [the Food Stamp Act] or the regula-

include income in "an amount not to exceed the value of the family's monthly allotment of food stamp coupons, to the extent such value duplicates the amount for food included in the maximum amount that would be payable under the state plan to a family of the same composition with no other income." *Id.*

53. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (emphasis added). "Pyramiding" means receiving multiple benefits for a single purpose. It is precisely this pyramiding that the Secretary has claimed as the basis for the FCMP unearned income inclusion.

54. *Id.*

tions issued pursuant to [it]."⁵⁵ Congress omitted this precise language when it restructured the Act in 1977.⁵⁶ The omission, viewed in light of the provisions in 42 U.S.C. § 602(a)(7)(c)(i) (1982), does not speak to a legislative grant of power to lower food stamp benefits for AFDC foster care families. To the contrary, the omission should be read as speaking only to allowing provisions desired by the states, such as those allowing the set-off of AFDC cash assistance payments by food stamp benefit values. Nowhere in the Act does Congress lend credence to the Secretary's program by indicating it favored cash benefits over food stamp allocations. The Secretary has contravened a clear legislative scheme by lowering the food stamp allocation of these families.

The Secretary has placed low-income foster parents in an untenable position. On the one hand, a family may be forced to use the FCMP as household income. This is specifically disallowed by the statute and by state regulations governing the foster care program.⁵⁷ On the other hand, a family may absorb the lost purchasing power by lowering its food budget. The level of the "thrifty food plan" is minimal by definition.⁵⁸ Such a family would therefore be forced into a substandard diet: a result clearly at odds with the legislative intent and purposes of the Food Stamp Act.

For a family caught in the above dilemma, these regulations provide strong disincentives to taking on foster care responsibilities. This reflects a subtle and unenunciated, yet clear, bias by the Reagan Administration against low-income foster care providers. It appears the Reagan administration is intimating that economically disadvantaged families are somehow less fit to raise children.

Furthermore, it should be recalled that FCMP provide all of the economic needs of the child in AFDC foster care. Any government bias against low-income foster care providers is not due to a low-income family's inability to provide the child with an adequate standard of living. Congress determines the standard of living through the provision of FCMP. It is more likely that government bias is rooted in determining a person's worth one-dimensionally: you are what you earn. This class-based distinction is unsupported and irrelevant when the real question is an individual's ability to love and raise a child. The losers in such a tautology are the neglected children.

55. 7 U.S.C. § 2019(d) (1974).

56. See Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 913.

57. See, e.g., Minn. R. 9545.0350 (1984).

58. The United States Supreme Court has determined that the level must be defined as providing only a minimal standard of living. See *Dandridge v. Williams*, 397 U.S. 471 (1970); *King v. Smith*, 392 U.S. 309 (1968).

A. *The Foster Care Program: Purposes and Provisions*

A question which must be answered at this point is whether the Department of Agriculture's bias against low-income foster care families is rational. It can be argued that children in out-of-home placement ought to be in a setting where they will receive the greatest economic and social benefits possible. In a world where more is better, this makes sense. The level of FCMP, while adequate, by no means constitutes affluence. If a child suffers neglect, it can be argued that the solution to the child's problem is inextricably tied to providing an environment without the economic pressures poverty brings on the family. Under such an economic-centered scheme, placing a child in a welfare home courts disaster.

A preference for foster care providers who are not economically burdened is not necessarily in the child's best interests when one examines who the foster care children are and what the foster care program intends to accomplish. A child may be placed in foster care either voluntarily or by a court order, when continuing the child's current home conditions would "be contrary to the welfare of [the] child."⁵⁹ The determination of whether to remove the child from the home is based on whether the child is categorized as a "dependent child." A dependent child is defined in part as "a needy child who has been deprived of parental support or care by reason of the death, continued absence from the home, . . . or physical or mental incapacity [of the parents]."⁶⁰ The statute emphasizes the emotional and psychological well-being of the child. Income is *not* stated as a criterion to consider in making a foster care placement.

Non-economic considerations also provide criteria for the certification of foster care providers. The basis for child placement and provider certification determinations vary to some degree from state to state. All states, however, are charged with developing plans, based on broad statutory guidelines, to implement the foster care program to meet the needs of neglected children.⁶¹ All state placement plans must assure that the child "receives proper care and that services are provided which are designed to improve the conditions in the home from which [the child] was removed."⁶²

59. 42 U.S.C. § 672(a)(1) (1982).

60. 42 U.S.C. § 606(a) (1982).

61. The foster care program generally referred to is statutorily defined in part IV of the Social Security Act, Foster Care and Adoption Assistance, 42 U.S.C. §§ 670-676 (1983 & Supp. III 1985). The state plan provisions are contained in 42 U.S.C. § 671.

62. 42 U.S.C. § 608(f) (1982).

Each state is responsible for licensing foster care homes based on this statutory direction.⁶³ Income levels of the foster care households are *not* included as standards to determine whether a foster care license is granted.

Under the legislative scheme for foster care placement, economic factors should not distinguish one neglected child from another. Likewise, the primary factor to consider in a foster home is not its income level but, rather, the decent and caring environment it can offer the child.

In *Miller v. Youakim*⁶⁴ the Supreme Court addressed the question of whether states are permitted to distinguish among equally neglected children based on the nature of the foster home. At issue in *Miller* was an Illinois regulation which allowed those children residing with relatives to receive for the child only the AFDC level of assistance. Children residing with unrelated foster parents could qualify for greater payments of the AFDC foster care program. Justice Marshall stated that such action clearly conflicted with Congress's "over-riding purpose of providing the best available care for all dependent children removed from their homes."⁶⁵

In crucial aspects, the regulations in *Miller* closely parallel Department of Agriculture regulations. As was noted earlier, the Department of Agriculture's regulations substantially reduce the total FCMP grant. Both the Department of Agriculture's regulations and those at issue in *Miller* undermine congressional intent to fully provide for the economic needs of neglected children. Most importantly, such regulations may discourage those who may be the best possible providers from taking in foster children. In this regard, Justice Marshall stated:

Indeed, if the States' interpretation of the statute were correct, relatives . . . might subordinate their interests in supervising the well-being of youngsters they love to ensure that these children receive the greater cash benefits and services available only to foster children placed in unrelated homes. Similarly, the availability of significantly more financial assistance under AFDC-FC might motivate child-placement authorities to refrain from placing foster children with relatives, *even when those homes are best suited to the needs of the child.*⁶⁶

Viewing the AFDC-foster care legislation as Congress intended, the overriding interest in this program is not merely the

63. *Id.*

64. 440 U.S. 125 (1979).

65. *Id.* at 145.

66. *Id.* at 142 n.21 (emphasis added).

material well-being of the child, but also the loving and caring environment in which the child lives. The Act focuses on the *neglect* of the child. When such neglect is present the child may clearly be removed from the home regardless of the neglectful parent's income.⁶⁷ Justice Marshall has spoken definitively on the congressional intent of this Act. He has directly addressed the crux of the argument against using food stamps to draw class-based distinctions between foster families. Speaking for the Court, he said: "The overriding purpose of [the AFDC-foster care program] was to assure that the most appropriate substitute care be given to those dependent children so mistreated that a court has ordered them removed from their homes."⁶⁸

As an indication of its concern, Congress offered a system of state subsidies to effect the policy of removing children from "home environments that are clearly contrary to [their] best interests."⁶⁹ Neither the House or Senate reports on the original Act nor the final bill ever mention income as a consideration when determining an environment's effect on neglected children.⁷⁰

In addition to circumventing congressional intent by prejudicing the system against low-income families as foster care providers, a second problem is created by including FCMP in household income calculations for food stamp purposes. States are unable to meet the current demand for adequate foster care homes. This is especially true for children with special physical or emotional needs. For example, in Minnesota, the Department of Human Services has established a sliding reimbursement scale to attract, or at the very least, to not dissuade foster care families from dealing with the needs of special children.⁷¹ The Department of Agriculture rules work directly contrary to this purpose. As the FCMP of a special child increase to compensate for the increased expense of caring for that child, the food stamp allocation to the family is decreased under Secretary Block's earned income regulations. If the child has several disabilities, the FCMP will most likely be raised

67. 42 U.S.C. § 606(a) (1982) (emphasis added).

68. *Miller*, 440 U.S. at 145.

69. S. Rep. No. 165, 87th Cong., 1st Sess. 6-7 (1961).

70. See also S. Rep. No. 1589, 87th Cong., 2d Sess. 12-13 (1962). Public Welfare Amendments of 1962, *Hearing before the Senate Comm. on Finance*, 87th Cong., 2d Sess. 65 (1962).

71. Minnesota Rules establish the basic reimbursement rates for foster children in Minnesota. An additional care rate is determined based on a system of points which are added for a "difficulty of care" criterion defined as either emotional, physical, or auxiliary. A maximum of 175 points can be assigned to any child. Minn. R. 9500.0350 (1984). This point level, for example, would increase the FCMP for a child 9 to 11 years old from \$172 per month, with a per diem of \$4.50, to \$598 per month at a per diem of \$19.40.

to the point where food stamp benefits will be terminated. This negates the purpose of federal subsidies to the states to provide for and effectively recruit alternative homes for neglected children.

It seems clear that Congress realized that foster children presented special challenges and needs. During debate on this bill, Senator Eugene McCarthy stated: "The conditions which make it necessary to remove such [neglected] children from unsuitable homes often result in needs for special psychiatric and medical care of the children. . . . These are the most underprivileged children and often have special problems."⁷² Congress committed itself to applying special resources to the situation. Its recognition of the problems facing foster care providers led to a 1967 amendment to the Act. This amendment increased the federal matching payment to the states for AFDC foster care to beyond that paid for basic AFDC care.⁷³ In light of this specific history and affirmative legislative action, Secretary Block's regulations effectively ignore the congressional intent behind the foster care program.

B. Profile of Foster Care Children: Class-Based Intrusions on Racial/Cultural Heritage

Retaining a child's socioeconomic and cultural heritage has been a major concern in foster care administration. The Supreme Court, in discussing this concern, noted that "the poor resort to foster care more often than other citizens," and that "minority families are also more likely to turn to foster care."⁷⁴ The Court pointed out that middle and upper income families needing temporary services for their children have the resources to purchase private care.⁷⁵ The poor do not.

A leading authority on child welfare services has indicated that a disproportionate number of children in foster care come from one parent, non-white families on public assistance.⁷⁶ These children are no strangers to the social services network. A majority of children coming into the system were receiving income maintenance and other supportive services under AFDC before their out-of-home placement.⁷⁷

72. 108 Cong. Rec. 12,692-93 (1962).

73. Social Security Amendments of 1967, Pub. L. No. 90-248, § 205(b), 81 Stat. 892 (codified as amended at 42 U.S.C. § 402(a) (1967)).

74. *Smith v. Organization of Foster Families*, 431 U.S. 816, 833 (1976).

75. *Id.* at 834 (citing Martin Rein, Thomas Nutt & Heather Weiss, *Foster Family Care: Myth and Reality*, in *Children and Decent People* 24, 25-29 (Alvin Schorr ed. 1974)).

76. Alfred Kadushin, *Child Welfare Services* 325 (1980).

77. *Id.* at 327.

Minnesota's experience is similar to this nationwide trend, particularly in relation to the ethnic and racial composition of foster care children. The rate of out-of-home placements, including foster care placements for Indian children in Minnesota, is nearly ten times that of the majority white population. For Black children the rate exceeds five times that of the white population.⁷⁸

This disparity is of special concern to Minnesota officials. Their concern is evidenced by the Department of Human Services' rule directing that local social service agencies "shall provide for the preservation of the child's religious, racial, cultural, and ethnic heritage through: A. placement if possible . . . in a foster home of similar background."⁷⁹ As the statistics show, those who tend to end up in foster care situations are both poor and minority children. Consequently, the greatest demand for foster homes is in the minority community. It follows that if the placement policy is to be implemented, the minority communities will have to be heavily included in the foster family system. Secretary Block's regulations concerning food stamps and FCMP are not assisting the situation. In Minneapolis, for example, it is estimated that two-fifths of the families in the Indian community who could provide foster care services are living well below the federally established poverty level and are eligible for food stamps.⁸⁰ The earned income regulations are a direct disincentive to all of these families to open their homes to a foster child.

Congress voiced its agreement with the United States Supreme Court that foster care is generally a "class-based intrusion into the family life of the poor."⁸¹ Congress acted specifically upon this analysis of the foster care system and generally on out-of-home placements of neglected children by passing the Indian Child Welfare Act (ICWA).⁸² The ICWA attempts to ensure that an Indian child is placed in a home reflecting "the unique values of Indian culture."⁸³ It requires that "[i]n any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to placement [within the Indian cultural context]."⁸⁴

78. This information is gleaned from a Department of Health and Human Services report of a national one-day count of children in foster care placement. The results are published in Child Welfare Research Note Number 7, May 1984, at 6.

79. Minn. R. 9560.0630 (1984).

80. City of Minneapolis Planning Department, Minneapolis American Indians: A Population Report 8 (1984).

81. *Smith v. Organization of Foster Families*, 431 U.S. 816, 833 (1976).

82. Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1982).

83. 25 U.S.C. § 1902.

84. 25 U.S.C. § 1915.

Congress's belief in the urgency of Indian child placement is underscored by the House report on the bill authorizing the Indian Child Welfare Act. The House stated in unambiguous terms that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."⁸⁵

In light of this strong language, the Secretary's action in promulgating the regulations including FCMP as unearned income only reinforces the perception that it was enacted both in disregard to congressional intent and in an arbitrary and capricious manner. In fact, Congress has stated that a preference *shall* be given to placements in the Indian cultural community absent a good cause to the contrary.⁸⁶ The Secretary's action surely impedes such a placement.

The Secretary has argued that he need not be concerned with the rationality or effect of rulemaking on programs such as the ICWA or, for that matter, the AFDC foster care program.⁸⁷ He has no authority over programs outside his department's purview. He contends that another department's programmatic regulations cannot affect the Agriculture Department.⁸⁸

The Secretary's contention is disingenuous. In light of the prominent role of the Food Stamp Act's history as an integral part of the welfare system, and considering the administration's frantic attack on that welfare system, the Secretary's actions appear altogether mean-spirited. The crowning achievement of a Reaganite, it seems, is not only to dismantle your own program, but to destroy a broad number of aid programs as well.⁸⁹

The Secretary may contend that the ICWA's terms do not limit the Secretary's authority over the food stamp program and so "imposes no duty on the Secretary of Agriculture."⁹⁰ It seems that it is against the demands of rationality, consistency, and equity for the Secretary to blithely ignore congressional authority on so narrow a ground. It has long been an accepted canon of statutory in-

85. H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530, 7531.

86. 25 U.S.C. § 1901.

87. Defendant's Response, *supra* note 12, at 3, 4.

88. Plaintiffs' Memorandum, *supra* note 7, at 7.

89. Such a perspective is not surprising from a Secretary of Agriculture who sees his department's greatest role as aiding in United States military hegemony. This is illustrated by the Secretary's remarks soon after his confirmation by the Senate when he said that "[f]ood was America's greatest diplomatic weapon." Seth King, *Block Sees Food as U.S. Weapon in Foreign Policy*, N.Y. Times, Dec. 24, 1980, at 1A, col. 5.

90. See Defendant's Response, *supra* note 12, at 3.

terpretation to construe a law so as not to render another statute ineffective. Secretary Block has boldly destroyed the effectiveness of a statute through regulation.

The crucial fact facing the Secretary and the administration is that a scattershot, piecemeal dismantling of the social welfare safety net, without regard to its legislative environment, can have disastrous effects on both real persons and on United States society as a whole. The question remains whether the Secretary of Agriculture exhibited manifest incompetence in promulgating regulations clearly in conflict with congressional purposes and intent or incredible arrogance in disregarding the legislative branch's strong message.

