Richmond Public Interest Law Review

Volume 16 | Issue 1 Article 5

1-1-2012

Giving Voice to the Underserved: A Review of How Lower-Income Virginians Fared in the 2012 Virginia General Assembly

Christie Marra

H. Timothy Perry

GIVING VOICE TO THE UNDERSERVED: A REVIEW OF HOW LOWER-INCOME VIRGINIANS FARED IN THE 2012 VIRGINIA GENERAL ASSEMBLY

Christie Marra and H. Timothy Perry

"It's all right to say to a man that he should lift himself by his own bootstraps. It's a cruel jest to say to a bootless man that he should lift himself by his own bootstraps."[1]

DEFINING POVERTY IN AMERICA

Poverty, according to Webster's Dictionary, is "want or scarcity of means of subsistence:" insufficient caloric intake, inadequate or unsafe shelter, lack of access to medical care and lack of educational opportunity.[2] The official measure of poverty in the United States is based upon the cost of food for a household, multiplied by three (to account for other expenses).[3] A family whose pre-tax income falls below this threshold is considered poor and thus eligible for public assistance.[4] In 2010, the poverty threshold was $11,139 per year for an individual and $22,314 per year for a family of four.[5] 15.3% of Americans—nearly 50 million people—live in poverty.[6] In Virginia, the 2010 poverty rate was greater than 11%—

[1] Martin Luther King, Jr., Address at Ohio Northern University (Jan. 11, 1968), *available* at http://onu.edu/node/28509.

[2] WEBSTER'S NEW INTERNATIONAL DICTIONARY 1778 (3rd ed. 1993).

[3] *Frequently Asked Questions Related to the Poverty Guidelines and Poverty, Methodology Definitions,* U.S. DEP'T OF HEALTH & HUMAN SERVS., http://aspe.hhs.gov/poverty/faq.shtml (last updated Feb. 8, 2012) [hereinafter *Frequently Asked Questions*].

[4] *Poverty Methodology Definitions,* U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/poverty/methods/definitions.html (last visited July 11, 2012).

[5] Annalyn Censky, *Poverty Rate Rises in America*, CNN MONEY, Sept. 13, 2011, *available at* http://money.cnn.com/2011/09/13/news/economy/poverty_rate_income/index.htm.

[6] Alemayehu Bisahw, *Poverty: 2009 and 2010, American Community Survey Briefs,* U.S. CENSUS BUREAU 1 (2011), http://www.census.gov/prod/2011pubs/acsbr10-01.pdf.

861,969 Virginians, or more than one in ten,[7] lived in poverty.[8]

In a four-year span, nearly 32% percent of Americans will experience at least two months below the poverty threshold.[9] More Americans living in urban areas and the South are poor,[10] and minorities are disproportionately represented in the overall poverty population: 28.2% of Hispanics (14.1 million), 25.4% of African-Americans (9.9 million), and 16.7% of Asians (2.4 million) rank as poor, while the poverty rate among non-Hispanic whites is 11.1% (21.9 million people).[11]

The federal poverty line, as it relates to the "cost of food multiplied by three" formula,[12] is an inadequate and largely obsolete measure of actual poverty. Developed in the early 1960s as a placeholder until a more accurate measure could be fashioned, the traditional threshold fails to recognize that food purchases account for only 7.8% of the modern family's budget, that food and housing costs vary significantly by region of the country, and that many individuals living near the poverty line receive financial support from federal and state programs.[13] Nevertheless, a modified version of the "cost of food multiplied by three" standard remains the federal measure of poverty.[14]

In 2011, the Census Bureau, after sixteen years of study, released a new, more comprehensive calculus to better gauge poverty in America.[15] This "Supplemental Poverty Measure" (the "SPM") calculates the poverty threshold by estimating not only the cost of food, but also expenses related to clothing, shelter, utilities, and medical costs.[16] Further, the SPM makes adjustment for cost of living, depending upon where the family resides, and

---

[7] *See* Bishaw, *supra* note 6, at 4–5 (showing that Virginia's poverty rate increased .6% from 2009 to 2010, or 59,391 Virginias, which put Virginia within the fifty state range: 8.3% (New Hampshire) to 22.4% (Mississippi). No state had a statistically significant decline in either the number of people in poverty or the poverty rate between 2009 and 2010).

[8] *Id.* at 2.

[9] Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2010,* U.S. CENSUS BUREAU 1, 2 (Sept. 2011), http://www.census.gov/prod/2011pubs/p60-239.pdf.

[10] *See* Bishaw, *supra* note 6, at 3–4, 6.

[11] Tim Mak, *Census: 49 Million in Poverty*, POLITICO, Nov. 7, 2011, *available at* http://www.politico.com/news/stories/1111/67748.html.

[12] *Frequently Asked Questions*, *supra* note 3.

[13] *Measure by Measure: The World's Richest Country Tries to Count Its Poor*, THE ECONOMIST, Jan. 20, 2011, *available at* http://www.economist.com/node/17961878.

[14] *Frequently Asked Questions*, *supra* note 3. "Poverty thresholds for years since 1963 have been updated for price changes only using the Consumer Price Index." *Id.*

[15] *Supplemental Poverty Measure Overview*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/povmeas/methodology/supplemental/overview.html (last updated Mar. 29, 2012).

[16] *Id.*

also takes into account governmental support, such as food stamps and tax credits, to determine income.[17] Logically, more accurate data on poverty distribution by region, and a more precise measure of the effects of anti-poverty programs like cash benefits, food assistance, and housing aid, should benefit a lawmaker seeking to make informed decisions on how to recalibrate the existing social safety net.[18] Yet, the pushback against the SPM has been intense.[19] The failure of efforts to reform or replace the existing poverty formula underscores how contentious poverty issues can be.

THE CHALLENGE OF POVERTY ADVOCACY

There are more Americans living below the poverty threshold today than at any time since the U.S. Census Bureau began tracking poverty in 1959.[20] Despite numbering nearly fifty million,[21] the poor, for a number of reasons, are particularly ill-equipped to engage in the political process and exert influence over the development of anti-poverty policy.

In general, lower income Americans lack the financial resources to contribute to political campaigns or issue-based advocacy groups.[22] With elected officials' pressing need for campaign cash and the expense of issue advocacy, money matters.[23] Policymakers have less incentive to pay attention to people of lower socio-economic status, and the poor themselves are more likely to be cynical about the potential impact of their participation.[24] While legislative advocacy can thrive if backed by a cohesive and knowledgeable group, historically, the poor, as a group, tend to be fragmented.[25] Differences in race and culture by region are constant sources of friction.[26] The fluidity of the population living in poverty at any given time makes

[17] Kathleen Short, *The Research: Supplemental Poverty Measure 2010*, U.S. CENSUS BUREAU 1 (2011), http://www.census.gov/prod/2011pubs/p60-241.pdf.
[18] *See* W.W., *Measuring Poverty: Welfare Works*, THE ECONOMIST, Nov. 5, 2011, *available at* http://www.economist.com/blogs/democracyinamerica/2011/11/measuring-poverty.
[19] *See, e.g.,* Robert Rector & Rachel Sheffield, *Obama's New Poverty Measure 'Spreads the Wealth,'* NAT'L REV. ONLINE, Nov. 9, 2011, *available at* http://www.nationalreview.com/blogs/print/282634 ("[SPM ensures] that "poverty can't be alleviated except by extreme income leveling…").
[20] *Poverty and Health Care: Pinched*, THE ECONOMIST, Sep. 17, 2011, *available at* http://www.economist.com/node/21529076.
[21] *Id.*
[22] R. ALLEN HAYS, WHO SPEAKS FOR THE POOR: NATIONAL INTEREST GROUPS AND SOCIAL POLICY 28–29 (2001).
[23] *Id.* at 28.
[24] *Id.* at 28–29, 41.
[25] *Id.* at 28–29.
[26] *Id. at 43–44.*

cementing a long-standing advocacy group challenging.[27] Moreover, low-income individuals are among the least likely to vote, which further weakens any collective voice they might raise to elected policymakers.[28]

Poverty, generally understood as an economic condition—a lack of material goods—might be better conceptualized as political powerlessness. [29] The poor are perceived as ill-funded, ill-organized, and ill-prepared to advocate for themselves.[30] Thus, the disadvantaged face "the ultimat[e] economic, social, and civic disenfranchisement. . ."[31] At best, this disenfranchisement results in a scarcity or absence of laws designed to safeguard the rights of lower income people.[32] At worst, it leads to the passage of laws that eliminate all or part of the safety net for vulnerable, low-income populations.[33] But at times, despite the apparent disenfranchisement of the poor, their voice is heard on a few salient issues.

SNAPSHOTS OF HOW LOWER-INCOME VIRGINIANS FARED DURING THE VIRGINIA GENERAL ASSEMBLY 2012: THE GOOD, THE BAD AND THE UGLY.

The Good: Medicaid Coverage for Pregnant Legal Immigrants

With the passage of federal welfare reform legislation in 1996, legal immigrants became disqualified for public assistance until they were present in the United States for five years with "qualifying" documentation.[34] Public assistance includes Medicaid, the federal health insurance program for the poor, and CHIP (Children's Health Insurance Program).[35] In 2009,

---

[27] *Id.* at 28–29, 54.

[28] Thom File & Sarah Crissey, *Voting and Registration in the Election of November 2008: Population Characteristics*, U.S. CENSUS BUREAU (2010), http://www.census.gov/prod/2010pubs/p20-563.pdf.

[29] ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY xii (1941) ("Two kinds of power seem always in competition in our democracy: there is political power, which is the power of the voters, and there is the economic power of property, which is the power of its owners").

[30] HAYS, *supra* note 22, at 28–29.

[31] Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2135 (1994).

[32] *See id.*

[33] Anne Donnelly, *Medicaid and Medicare: Ripping Holes in the Safety Net*, THE BODY, Fall 2004, http://www.thebody.com/content/art14539.html.

[34] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2265 (1996) (codified in scattered sections of 42 U.S.C).

[35] *Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET AND POLICY PRIORITIES (Aug. 13, 2012), http://www.cbpp.org/files/4-14-08tax.pdf.

as part of the Children's Health Insurance Program Reauthorization Act,[36] Congress provided states with the option of lifting this five-year ban for children and pregnant women.[37]

A coalition of advocates in Virginia began working to persuade the Commonwealth to provide Medicaid for pregnant legal immigrant women almost immediately after the federal law passed.[38] The coalition included legal experts (the Virginia Poverty Law Center);[39] the faith community (the Catholic Diocese);[40] the March of Dimes;[41] immigrants' rights advocates (the Virginia Coalition of Latino Organizations);[42] and The Commonwealth Institute for Fiscal Analysis.[43] The extended coverage was also supported by Healthcare for All Virginians,[44] a group comprised of more than sixty organizations including health care providers, health plans, and other consumer advocates.[45] Over the course of the three years following the passage of the federal law, these groups advocated for the expanded coverage on multiple fronts.[46] They presented information on the expanded coverage option to Virginia's legislative Joint Commission on Health Care,[47] a standing commission of the Virginia General Assembly that makes recommenda-

[36] Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8, 57 (codified in scattered sections of 42 U.S.C.).
[37] *Id.*
[38] *See* Letter from the National Coalition for Immigrant Women's Rights Steering Committee, to Unnamed United States Senator (Jan. 21, 2009), *available at* http://napawf.org/wp-content/uploads/2009/10/NCIWR-Child-Health-Insurance-Statement.pdf. ("Virginia had already been covering Medicaid-eligible legal immigrant children during their first five years in the U.S. with state-only funds.")
[39] Jill Hanken, *Virginia Should Improve Prenatal Care for Low-Income Legal Immigrants,* VIRGINIA POVERTY LAW CTR., http://www.vacolao.org/pregnant_legal_immigrants_mlp1.pdf (last visited Aug. 22, 2012).
[40] *VCC's 2012 Legislative Agenda*, CATHOLIC HERALD (Jan. 4, 2012), http://www.catholicherald.com/stories/Working-on-behalf-of-children-immigrants-families,17687?.
[41] *Health Insurance Coverage: A Virginia Scorecard*, HEALTHCARE FOR ALL VIRGINIANS, *available at* http://www.msv.org/DocumentVault/PDFs/Health-insurance-coverage-A-Virginia-Scorecard-PDF.aspx (last visited Oct. 11, 2012).
[42] *See* Edgar Aranda-Yanoc, *VACOLAO Legislative Update and Call for Action*, EMPOWERING ADVOCACY (Feb. 29, 2012), http://edgaranda.wordpress.com/2012/02/29/vacolao-legistlative-update-and-call-for-action.
[43] *See HB 183: Medicaid Coverage for Legal Immigrant Pregnant Women*, THE COMMONWEALTH INSTITUTE (2012) http://www.thecommonwealthinstitute.org/wp-content/uploads/2012/03/hb183_2012_issue_brief.pdf (last visited Oct. 4, 2012).
[44] *See Health & Immigration: Expanding Medicaid For Legal Immigrants*, JEWISH COMMUNITY RELATIONS COUNCIL OF GREATER WASHINGTON, https://secure2.convio.net/jcrc/sire/Advocacy?pagename=homepage&id=335&JServSessionIdr004=5351gfpd44.app207b (last visited Oct. 4, 2012).
[45] *See Member Groups*, HEALTHCARE FOR ALL VIRGINIANS, (2011), http://havcare.org.dnnmax.com/MemberGroups.aspx.
[46] *See supra* notes 42–45.
[47] *See* COMMONWEALTH OF VA. ANNUAL REPORT OF THE JOINT COMMISSION ON HEALTH CARE, REP. DOC. 14, 35 (2009), *available at* http://jchc.virginia.gov/reports.asp.

tions regarding the state's ability to best deliver high-quality, cost-efficient health care to Virginians.[48] Despite the Joint Commission's endorsement of the expanded coverage, and the advocacy groups' efforts to build support for the expanded coverage through meetings with key Executive branch members and legislatures, efforts to pass legislation and obtain supportive funding in the state budget failed in both 2010 and 2011.[49]

In 2012, bills expanding coverage were introduced in both the state Senate and House of Delegates;[50] each sought to expand coverage to include prenatal and 60-day post-partum care through Medicaid to pregnant immigrant women.[51] Existing law provides only for coverage of labor and delivery costs for these women as emergency services under Medicaid.[52] Additionally, the bills would provide for FAMIS coverage for immigrant children.[53] FAMIS is Virginia's Children's Health Insurance Program.[54] It provides low-cost health insurance for children in families who lack private health insurance but earn too much income to qualify for Medicaid.[55]

In addition to securing patrons for the bills themselves, advocates worked with key members of the Senate Finance and House Appropriations committees to ensure that budget amendments were included to support the funding for the coverage expansion.[56] This was a particularly challenging task, and required the sophisticated lobbying efforts of the advocates to procure an accurate assessment of the fiscal impact of the bill. Initially, the Department of Planning and Budget for the state produced a fiscal analysis the advocates believed significantly overstated the cost of expanded coverage provided by the legislation.[57] The advocates responded by having a friendly legislator request a key, but rarely used, procedural option. The legislator requested an independent fiscal assessment by the legislature's own auditors, and the advocates then worked closely with those auditors to

[48] *See id.*

[49] Hanken, *supra* note 39.

[50] H. B. 183, 2012 Va. Gen. Assemb. Reg. Sess. (Va 2012) (as introduced Jan. 11, 2012); S. B. 568, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan. 17 2012); S.B. 568, Department of Planning and Budget: 2012 Fiscal Impact Statement, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?121+oth+SB568FER122+PDF.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Covering Children and Pregnant Women with Affordable Health Insurance,* FAMIS, http://www.famis.org (last visited Sept. 4, 2012).

[55] *Frequently Asked Questions*, FAMIS, http://www.famis.org/faq.cfm?language=English (last visited Sept. 4, 2012).

[56] *See generally* H.B. 183, 2012 Joint Legislative Audit and Review Commission, Fiscal Impact Review, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?121+oth+HB183J110+PDF (last visited Sept. 4, 2012).

[57] *See id.*

insure they had accurate data on which to base the assessment.[58] The result was a much more realistic cost estimate.[59]

The expanded Medicaid coverage proposed by the Senate and House bills ultimately passed,[60] as did the budget amendments paying for the additional coverage they provide to pregnant women and their children.[61] The new laws became effective July 1, 2012.[62]

Although the option to cover pregnant legal immigrant women in the U.S. less than five years did not attain instant passage,[63] and despite the fact that the group it benefitted (low income immigrants) is often seen as having little if any political power, the intelligent, diligent efforts of a diverse group of advocates prevailed upon the members of the Virginia General Assembly to adopt the option. Their success rests largely on their practical approach, one that emphasized cost-benefits rather than individual rights.[64]

The Bad: The Veto of a Bill Facilitating School Enrollment of Youth in Kinship Care

Kinship care is "the full-time care, nurturing, and protection of children by relatives."[65] According to a May 2012 report of The Annie E. Casey Foundation ("The Casey Report"), approximately 2.7 million children in the United State live in kinship care because their parents can no longer care for them.[66] The report estimates that 69,000 children in Virginia are residing in kinship care, many of whom live informally with their relatives without a formal custody order or foster care placement.[67] While there is no aggregate data for Virginia kinship families readily available, the Casey Report states that 63% of all children living in kinship care in the U.S. live

[58] *See* S.B. 568, 2012 Fiscal Impact Statement, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?121+oth+SB568FER122+PDF.
[59] *See id.*
[60] H.B. 183, Va. Gen. Assemb. Reg. Sess. (Va. 2012) ¶ 25, § 32.1-325 (as approved April 9, 2012).
[61] *Id.*
[62] *See* VA. CODE ANN. § 32.1-325 (2012); VA. CODE ANN. § 32.1-351 (2012).
[63] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2262 (codified in 8 U.S.C 1612).
[64] *See Provide Health Care Coverage for Low Income Legal Immigrants,* VA. INTERFAITH CTR., http://org2.democracyinaction.org/o/7352/p/dia/action/public/?action_KEY=9329 (last visited Sept. 4, 2012) (An independent legislative fiscal analysis noted that it was "likely that in the long run, the costs . . .may largely be offset by the associated savings resulting from improved neonatal outcomes.").
[65] VA. CODE ANN. § 63.2-100 (2012).
[66] *See* Annie E. Casey Found., *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families* 1 (2012), http://www.aecf.org/KnowledgeCenter/~/media/Pubs/Initiatives/KIDS%20COUNT/S/SteppingUpforKids2012PolicyReport/SteppingUpforKidsPolicyReport2012.pdf.
[67] *See id* at 3.

in households with income at or below 200% of the federal poverty line;[68] 38% live in households existing below the poverty line.[69] Anecdotal data indicates that Virginia's kinship families have very similar incomes.[70]

Kinship families face a number of challenges. First, there is an emotional burden imposed on both the children and the relative caregivers by whatever crisis created the kinship situation.[71] Such crisis may involve parental substance abuse, incarceration, homelessness or death of one or both parents.[72] Children experiencing the loss of one or both parents through traumatic circumstances may have few resources to enhance their underdeveloped coping skills,[73] as they are less likely to be covered by health insurance[74] and more likely to have physical and mental disabilities.[75] Relatives may not know to apply for Medicaid or the Children's Health Insurance Program coverage for the children in their care, though many may be eligible. Similarly, most children living in kinship care are eligible for Temporary Assistance to Needy Families (cash assistance), although the Casey Report notes that fewer than 12% of kinship families receive any assistance from TANF.[76]

Despite these challenges, multiple reports have indicated that children who must live apart from their parents fare far better in kinship care than they do in formal foster care with strangers.[77] Largely in response to these reports, child welfare agencies in Virginia and elsewhere have adopted policies and practices that support "diverting" children who have been abused or neglected away from formal foster care and into an informal kinship care arrangement.[78] These practices generally include asking parents to identify relatives who can properly care for their children when social workers determine that children are at imminent risk of coming into foster care.[79] Often, social workers must facilitate emergency transfers of physical

[68] *Id.* at 4.
[69] *Id.*
[70] *Id.*
[71] Aron Shlonsky et al., *Kinship Support Services in California: An Evaluation of California's Kinship Support Services Program (KSSP)*, CTR. FOR SOC. SERVICES, 10–14 (Jan. 2004), http://cssr.berkeley.edu/childwelfare/pdfs/kssp_March03_v21.pdf.
[72] Donna M. Butts, *Kinship Care: Supporting Those Who Raise Our Children,* 5 (2005), http://www.aecf.org/upload/PublicationFiles/Kincare.pdf.
[73] *Id.* at 7–9.
[74] *Id.* at 10.
[75] Annie E. Casey Found., *supra* note 66, at 5–6.
[76] *Id.* at 6–7.
[77] *See, e.g.*, Tiffany Conway & Rutlege Q. Hutson, *Is Kinship Care Good for Children?*, CTR. FOR LAW AND SOC. POLICY, 1–3 (Mar. 2, 2007), http://www.clasp.org/admin/site/publications/files/0347.pdf.
[78] *SEE* VA. COMM'N ON YOUTH, DEFINITION OF KINSHIP CAREGIVERS: STUDY PLAN 1–2 (2012), *avaible at* http://coy.state.va.us/vcoy/PDFfiles/051412_Kinship%20Care%20Definition%20Study%20Plan.pdf.
[79] VA. CODE ANN. § 63.2-900.1 (2012); VA. CODE ANN. § 16.1-281 (2012).

custody to relatives with only days' or hours' notice to everyone involved;[80] there is no formal foster care placement made and no case filed with the juvenile or family court. According to Virginia Department of Social Services estimates, between 1,400 to 1,800 children in Virginia have been diverted away from foster care and into kinship care over the past few years.[81]

Unfortunately, some of these placements are disrupted and children are forced into foster care placements because of problems that arise when relatives without legal custody orders attempt to enroll the children for whom they are caring in their local public schools.[82] Under Virginia law, all children are entitled to a free public education in the school district where they reside if: they live with a birth or adoptive parent;[83] they are living with a person designated to care for them by a Special Power of Attorney while their custodial parent is on active military duty;[84] their parents are dead and they are living with a person acting in loco parentis;[85] their parents are unable to care for them and they are living, not solely for school purposes, with a person residing in the school district who is their court-appointed guardian or legal custodian or acting in loco parentis pursuant to an adoptive placement;[86] they are living in the school district as an emancipated minor;[87] or they are homeless youth under the McKinney Vento Act.[88] Because children residing in kinship care do not fit neatly into any one of these categories, many school divisions in Virginia refuse to enroll children living with relative caregivers unless those caregivers have orders granting them legal custody.[89] Some of these school divisions offer admittance to these children in exchange for steep tuition payments, reportedly as high as $4,000 per year,[90] which few kinship caregivers can afford. Relatives are therefore faced with an impossible choice: allow the social workers to take their grandchildren, nieces and nephews into foster care with strangers, or sue their sons, daughters, sisters and brothers for custody. As the Casey

[80] *See generally Emergency Foster Care*, ADOPTION.COM, http://forums.adoption.com/becoming-foster-parents/371156-emergency-foster-care.html (last visited Oct. 19, 2012).
[81] *2012 Legislative Agenda*, VOICES FOR VA. CHILDREN (2012), http://www.vakids.org/pubs/Action/draft%202012%20legislative%20agenda.pdf.
[82] VA. COMM'N ON YOUTH, BARRIERS TO KINSHIP CARE IN VIRGINIA 5 (2010), *available at* http://services.dlas.virginia.gov/User_db/frmView.aspx?ViewId=877.
[83] VA. CODE ANN. § 22.1-3 (2012).
[84] VA. CODE ANN. § 22.1-3 (2012); VA. CODE ANN. § 22.1-360 (2012).
[85] VA. CODE ANN. § 22.1-3 (2012).
[86] *Id.*
[87] *Id.*
[88] Va. Code Ann. § 22.1-3 (2012).
[89] Jasmine Jefferson & Kristen Sweaney, *Kinship Care and School Enrollment in Virginia*, DIVISION OF LEGISLATIVE AUTOMATED SYSTEMS 4, http://services.dlas.virginia.gov/User_db/frmView.aspx?Viewid=1115.
[90] *See id.*

Report notes, many kinship caregivers find it intimidating to go to court, particularly against their child or sibling, and most cannot afford legal representation.[91]

In an attempt to help relatives caring for children in informal arrangements (i.e. without a court order giving them legal custody) and to prevent unnecessary placements of youth into Virginia's foster care system, S.B. 217 was filed in the 2012 session of the Virginia General Assembly.[92] S.B. 217's goal was simple: to clearly state that relatives providing full-time care for children were entitled to send those children to the public school where they lived, for free.[93] To appease concerns of some local school divisions that parents would abuse the new law by using it solely to place their children in "better" schools, the patron of S.B. 217[94] included provisions in the bill allowing schools to require parents and relatives to sign affidavits swearing that the kinship care arrangement was legitimate and not made solely for school enrollment purposes,[95] and further allowing schools to demand that parents transfer educational decision making powers to relative caregivers via powers of attorney.[96]

A broad coalition of advocates supported the bill, including the Virginia Chapter of the AARP; FACES of Virginia's Families (Virginia's kinship, adoptive and foster parent association); the Virginia Education Association; Voices for Virginia's Children and the Virginia Poverty Law Center.[97] The bill passed with broad bi-partisan support, 76-17 in the House of Delegates and 38-1 in the Senate.[98]

Despite the wide range of support, when the bill reached the Governor's desk, he amended it to allow schools to require relatives to have court orders of custody in order to enroll the children in their care.[99] In recognition that this requirement was the very thing the bill had been designed to eliminate, the Senate rejected the Governor's amendment by a vote of 12

[91] Annie E. Casey Found., *supra* note 66, at 8.
[92] S.B. 217, Va. Gen. Assemb. Reg. Sess. (Va. 2012), § 22.1-3 (as introduced Mar. 15, 2012).
[93] Dept. of Budget and Planning, 2012 Fiscal Impact Statement SB 217, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?121+oth+SB6F122+PDF (emphasis added).
[94] *Id.*
[95] S.B. 217, Va. Gen. Assemb. Reg. Sess.(Va. 2012), ¶ 22-27, § 22.1-3 (as introduced Mar. 15, 2012).
[96] S.B. 217, Va. Gen. Assembly, ¶ 25-31, § 22.1-3 (as introduced Mar. 15, 2012 by George L. Barker).
[97] Tara Casey, *Bipartisan Support, Near Unanimous Passage, Helps Children in Crisis - Three Good Reasons Why Governor McDonnell's Veto is Bad for Virginia's Children*, RICHMOND TIMES DISPATCH, May 22, 2012, *available at* http://punditspodium.tumblr.com/post/23562539808/bipartisan-support-near-unanimous-passage-helps.
[98] S.B. 217, Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as adopted by the House Mar. 10, 2012); S.B. 217, Va. Gen. Assemb. Reg. Sess. (Va. 2012) (Senate Conference Report Mar. 10, 2012).
[99] S.B. 217, Va. Gen. Assemb. Reg. Sess. (Va. 2012) (Governor's Recommendation Apr. 09, 2012).

(in favor) to 27 (opposed).[100] The Governor vetoed the bill in response.[101] In his explanation of his action, the Governor stated,

> Virginia law only allows custody and parenting authority to be legally transferred via a court order, except in very limited circumstances. School divisions must have assurance that the adult enrolling the child has legal authority to make educational decisions for the child. . . Given the often fluid and tragic circumstances that typically generate kinship custody arrangements, a court order provides children and families with the stability, certainty and oversight to ensure that kinship arrangements are necessary or appropriate in light of changing circumstances while protecting Virginia's school divisions from being entangled in custody disputes.[102]

Although the Governor's action disregards that signing the bill into law would have clearly made it lawful for a parent to transfer certain authority over a child without a court order, it was a legitimate use of his veto power and a good example of how one branch of Virginia government can dissolve the actions of another. It also demonstrates that strong support does not make legislative action indestructible; only a two-thirds rejection of the Governor's amendment in both chambers would have made the bill veto-proof.[103] Whether the lower-income status of most of the bill's likely beneficiaries had any impact on its ultimate outcome would be purely speculative, and in fact the broad support for the bill among advocates and legislators alike indicates that their status played little if any role in the Governor's decision to veto the bill. Nonetheless, the fate of S.B. 217 in the 2012 session dealt a blow to lower-income families across the Commonwealth who are trying to care for relatives without the expense and trauma of going to court.

The Ugly: Efforts to Drug-Test Applicants for Temporary Assistance to Needy Families

Temporary Assistance to Needy Families ("TANF") is the federal-state cash assistance program for very poor parents.[104] Despite the fact that benefit amounts in Virginia are quite low ($292 per month for a family of

[100] S.B. 217, Va. Gen. Assemb. Reg. Sess. (Va. 2012) (Senate rejected Governor's Recommendation Apr. 18, 2012).
[101] S.B. 217, Va. Gen. Assemb. Reg. Sess. (Va. 2012) (Governor's Veto Explanation May 18, 2012), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?121+amd+SB217AG.
[102] *Id.*
[103] VA. CONST. art V, § 6
[104] *Temporary Assistance for Needy Families (TANF)*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/recovery/programs/tanf/index.html (last visited Oct. 19, 2012).

three, for example),[105] there are numerous and complicated qualifications that must be met to obtain these benefits.[106] During the 2012 Virginia General Assembly session, no fewer than eight bills were filed that sought to add yet another requirement to qualify for TANF: each recipient would be screened for drug use and many would be required to take and "pass" a drug test in order to be deemed eligible for benefits.[107] Each of the bills provided that an applicant would be required to undergo a drug test only if a screening tool indicated "probable cause" that the applicant abused illegal substances.[108] All of the bills would have authorized the local department of social services director to make the determination of whether probable cause existed, and order the applicant to undergo a drug test if it did.[109] Presumably, this nod to the probable cause requirement was an effort to distinguish the Virginia bills from the Florida law halted by a U.S. District Court injunction last October.[110] This article argues below that the inclusion of such a flimsy probable cause determination is insufficient to make the Virginia bills constitutional.

The Florida law was admittedly broader than the Virginia bills, as it required all applicants for TANF benefits to undergo a drug test.[111] After noting that "(i)t is well established that a drug test is considered a search under the Fourth Amendment,"[112] the U.S. District Court conducted an analysis of whether the Florida law met the "Special Needs" exception to the Fourth Amendment.[113] Under this exception, the government need not show that it has individualized suspicion of wrongdoing as long as it can demonstrate "exceptional circumstances in which special needs, beyond the

---

[105] TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) GUIDANCE MANUAL 14, *available at* http://www.dss.virginia.gov/files/division/bp/tanf/manual/300.pdf.

[106] *See* VA. CODE ANN. §§ 63.2-602–63.2-608 (2012); VA. CODE ANN. § 63.2-614 (2012).

[107] *See generally* S.B. 6, Va. Gen. Assemb. Reg. Sess. (Va. 2012) ¶ 1, § 1 (as engrossed Feb. 14, 2012); S.B. 318, Va. Gen. Assemb. Reg. Sess. (Va. 2012) ¶ 1, § 1 (as introduced Jan. 10, 2012); H.B. 73, Va. Gen. Assemb. Reg. Sess. (Va. 2012) ¶ 1, § 1 (as substituted Jan. 24, 2012); H.B. 221, Va. Gen. Assemb. Reg. Sess. (Va. 2012) ¶ 1, § 1 (as introduced Jan. 10, 2012); H.B. 249, Va. Gen. Assemb. Reg. Sess. (Va. 2012) ¶ 1, § 1 (as introduced Jan. 10, 2012); H.B. 598, Va. Gen. Assembl. Reg. Sess. (Va. 2012) ¶ 1, § 1 (as introduced Jan. 10, 2012); H.B. 955, Va. Gen. Assemb. Reg. Sess. (Va. 2012) ¶ 1, § 1 (as introduced Jan. 11, 2012).

[108] S.B. 6, ¶ 1, § 63.2-608.1; S.B. 318, ¶ 1, § 63.2-608.1; H.B. 73, ¶ 1, § 63.2-608.1; H.B. 221, ¶ 1, § 63.2-608.1; H.B. 249, ¶ 1, § 63.2-608.1; H.B. 598, ¶ 1, § 63.2-608.1; H.B. 955, ¶ 1, § 63.2-608.1.

[109] S.B. 6, ¶ 1, § 63.2-608.1; S.B. 318, ¶ 1, § 63.2-608.1; H.B. 73, ¶ 1, § 63.2-608.1; H.B. 221, ¶ 1, § 63.2-608.1; H.B. 249, ¶ 1, § 63.2-608.1; H.B. 598, ¶ 1, § 63.2-608.1; H.B. 955, ¶ 1, § 63.2-608.1.

[110] Lebron v. Wilkins, 820 F.Supp. 2d 1273, 1275 (M.D. Fla. 2011).

[111] *Id.* at 1275–76 (emphasis added).

[112] *Id.* at 1281–82 (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, (2002); Chandler v. Miller, 520 U.S. 305, 313 (1997); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989); Skinner v. Ry. Labor Execs.' Ass'n., 489 U.S. 602, 617 (1989); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, (1995)).

[113] *Lebron*, 820 F.Supp. 2d at 1284 – 92.

normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[114]

The U.S. District Court held that the state of Florida did not demonstrate the special needs required to come under the exception.[115] While the court agreed with the state that its stated goals (to ensure TANF funds were not diverted to drug use;[116] to protect children be ensuring funds are not used to visit an "evil" upon their homes;[117] to ensure that funds aren't used contrary to the goal of getting recipients employed;[118] and to ensure government does not fund the "drug epidemic[119]"), it found that a previous study commissioned by the State of Florida disputed that these were in fact valid goals of the legislation.[120]

The prior study, conducted between 1999 and 2001, screened more than 8,000 applicants for welfare benefits using a written test designed to differentiate between substance abusers and non-abusers.[121] 1,447 applicants were determined to be potential drug abusers and were required to undergo the urine screen; only 315 of them (5.1% of the total population that was screened) tested positive.[122]

Both these statistics, stated in the U.S. District Court's October 2011 opinion, and data regarding the results of drug testing under the Florida program for the four months before it was enjoined were available to members of the Virginia General Assembly as they debated the TANF drug testing bills during the 2012 session.[123] Of the 4,086 TANF applicants tested for drugs under Florida's law from July through October, only 108 people – 2.6% of all tested – failed the drug test.[124] This is far less than the percentage of all adults living in the U.S. using illegal drugs.[125] According to the

---

[114] *Id.* at 19, (citing *New Jersey v. T.L.O.,* 469 U.S. 325, 315 (1985)) (Blackmun, J., concurring).
[115] *Id.* at 1286.
[116] *Lebron*, 820 F.Supp. 2d at 1286.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* at 1277 (citing Robert E. Crew, Jr. & Belinda Creel Davis, *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits: The Outcome of a Demonstration Project in Florida*, 17 J. HEALTH & SOC. POL. 39, 42 (2003)).
[122] *Lebron*, 820 F.Supp. 2d at 1277 (quoting Crew & Davis, *supra* note 121, at 45 (2003)).
[123] Dept. of Budget and Planning, 2012 Fiscal Impact Statement SB 6, at 4 (Jan. 30, 2012) *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?121+oth+SB6F122+PDF (referencing CENTER FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY ET AL., Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, at 11, 13 (SAMHSA 2011), *available at* http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf).
[124] Lizette Alvarez, *No Savings Are Found From Welfare Drug Tests*, N.Y. TIMES, Apr. 17, 2012, http://www.nytimes.com/2012/04/18/us/no-savings/found-in-florida-welfare-drug-tests.html.
[125] CENTER FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY ET AL., RESULTS FROM THE 2010

results of the 2010 National Survey on Drug Use and Health conducted by the U.S. Department of Health and Human Services, 6.6% of all adults in the U.S. over the age of twenty-six use illegal drugs, and 21.5% of those between the ages of eighteen and twenty-five use illegal substances.[126]

Despite the overwhelming evidence that the bills were solutions looking for problems that did not exist, the TANF drug testing bills moved forward in the 2012 Virginia General Assembly. Assertions by the bills' opponents that the bills were unconstitutional did as little to stop their progress as did the statistical evidence that the problem they were allegedly addressing did not exist. However, there is merit to the arguments that the bills were unconstitutional. The Virginia TANF drug testing bills required the local director of the child welfare agency to "screen each participant to determine whether probable cause exists to believe such participant is engaged in the use of illegal substances."[127] If the screening indicated the applicant used illegal substances, the applicant could be required to undergo a drug test.[128] Thus, the bills authorized drug testing of any applicant who "failed" the screening tool, without any requirement that the local director seek a warrant and without any alternative path for judicial review.[129] Such testing seems a far cry from what the U.S. Supreme Court contemplated as valid searches in *Terry v. Ohio*.[130]

In *Terry*, the Court emphasized that law enforcement must obtain advance judicial approval of searches through obtaining a warrant whenever practicable.[131] Warrantless searches were thus limited to those instances where the opportunity to conduct the search would be lost if time were taken to seek and obtain a warrant.[132] This is clearly not the case where a local child welfare director determines, through review of a written screening tool, that an applicant for TANF might be using illegal drugs. The director knows that the applicant will return to the welfare office if he or she wants to receive benefits. In fact, the director has the authority to schedule the applicant's next appointment in such a way as to provide ample time for the director to seek a search warrant before requiring the drug test.[133] By elimi-

NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 14 (2011), *available at* http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf.

[126] *Id.*

[127] S.B. 6, ¶ 1, § 63.2-608.1.

[128] S.B. 6, ¶ 1, § 63.2-608.1.

[129] S.B. 6, ¶ 1, § 63.2-608.1.

[130] Terry v. Ohio, 392 U.S. 1 (1968).

[131] *Id.* at 21.

[132] *See* U.S. v. Johnson, 802 F.2d 1459, 1461–62 (D.C. Cir. 1986); U.S. v. Adams, 365 F.Supp. 896, 898 (1973).

[133] S.B. 6, 2012 Gen. Assemb., Reg. Sess. (Va. 2011) (passed to 2013) (The Code of Virginia is Amended by adding a section numbered 63.2-608.1).

nating any warrant requirement, Virginia's TANF drug testing bills place the local child welfare directors outside the scope of judicial review and thus eliminate a key component of constitutional searches. As noted in Terry, "the scheme of the Fourth Amendment becomes meaningful only when it is assured that, at some point, the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge."[134]

Ultimately, the Virginia General Assembly's disregard of both the data showing low drug use among TANF recipients and the likely unconstitutionality of the TANF drug testing bills was immaterial. Because of the steep cost to administer the drug tests,[135] the bills were continued to the 2013 legislative session.[136] For now, at least, Virginia is not following Florida's lead in drug-testing TANF applicants, but the issue has by no means disappeared, and those advocating for lower-income Virginians will have to arm themselves and their legislative allies on the issue for the potential of another round of debate in 2013.

CONCLUSION

The 2012 Virginia General Assembly session was not atypical in its treatment of poverty-related issues, although the high was admittedly better than in most years and the low admittedly worse. The expansion of Medicaid to cover pregnant legal immigrants present in the U.S. less than five years was a great achievement for lower-income women and their advocates, and its success demonstrates the importance of building strong and diverse coalitions, understanding and using every legislative tool available and, perhaps most importantly, continuing the advocacy for as long as necessary. A similar approach may well ultimately achieve both the passage of a law to help relative caregivers enroll children in public schools and the elimination of bills that seek to require drug-testing of low income parents seeking the cash assistance they need to care for their children.

[134] *Terry*, 392 U.S. at 21.

[135] $654,023 in Fiscal Year 2013 and $372,863 each year thereafter, according to the Department of Planning and Budget. S.B. 6, Department of Planning and Budget: 2012 Fiscal Impact Statement, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?121+oth+SB6FES1122+PDF.

[136] S.B. 6, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (passed by until 2013 session).