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RELATIVE RESPONSIBILITY IN AFDC: PROBLEMS RAISED BY THE NOLEO APPROACH— "IF AT FIRST YOU DON'T SUCCEED"

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"Relative responsibility laws" is a generic term for legislation requiring an indigent's relatives to contribute, solely or in concert with welfare authorities, to that indigent's support. Relative responsibility provisions are found in a variety of welfare statutes, including programs for the aged poor, requiring support payments from the indigent's adult children, and Aid to Families with Dependent Children (AFDC),¹ which requires support from fathers who have deserted or abandoned their children.

This Note will begin by reviewing the popularly asserted justifications for relative responsibility provisions and the social costs involved in their enforcement. Attention will then shift to AFDC's relative responsibility provisions, Notice to Law Enforcement Officials (NOLEO), and then move to a preliminary critique of the recently enacted Child Support Program. The Note will outline the new provisions and briefly pinpoint several administrative problems the new statute presents, followed by inquiry into constitutional issues it raises.

I. JUSTIFICATIONS FOR RELATIVE RESPONSIBILITY LAWS

Three major justifications provide the basis for relative responsibility provisions in welfare legislation.² The first is essentially a moral be-

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1. Social Security Act §§ 401-10, 42 U.S.C. §§ 601-10 (1970).

2. Two additional justifications are less frequently mentioned. First, popular belief that most poor are members of minority groups, whether accurate or not, suggests that racial prejudice may play a subtle role in punitive welfare legislation. Cf. Paul, *The Return of Punitive Sterilization Proposals: Current Attacks on Illegitimacy and the AFDC Program*, 3 *LAW & SOC'Y. REV.* 77 (1968). Secondly, the giving of gratuitous support, coupled with low benefits and burdensome administrative rules and practices, may indicate conflicting feelings about the poor and dependent:

[S]ociety simultaneously loves and hates its poor, its dependent, and its disabled. The emotion of love requires that the poor and weak be protected,

lief that welfare legislation must encourage responsibility and the fulfillment of common law duties.³ Proponents of this view argue that if support were not required, persons who disregard needy relatives would be favored over those assisting their relatives at considerable personal inconvenience.⁴

Family preservation provides the second justification for relative responsibility provisions. Its proponents argue that the enactment of such provisions will strengthen and preserve family ties.⁵ The en-

nurtured, and provided for, as if they were helpless children. Failure to do so would cause collective guilt

The concurrent hatred implies fear—deep, primitive, unconscious fear—that the very existence of the poor and weak in society threatens the existence of that society. Punitive sanctions must then be applied to control those whom one fears, to make certain that they do not grow and prosper

The solution—a typically neurotic one, in my opinion—is to compromise by both giving to and oppressing the nonpersons [the have-nots].

Diamond, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions*, 54 CALIF. L. REV. 357, 361-62, 365 (1965). See also Paul, *supra*, at 105 & n.47.

3. Relative responsibility laws are not, in fact, a product of English common law, under which the only support obligation was the duty of a husband to support his wife. Mandelker, *Family Responsibility Under the American Poor Laws*, 54 MICH. L. REV. 497, 489-99 (1956). Rather, they are a product of the POOR LAW, a statute. See generally, tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257, 258-91 (1964).

4. F. BOND, OUR NEEDY AGED 353 (1954).

5. Senator Nunn expressed this viewpoint, *Hearings on S. 1842 & S. 2081 Before the Senate Comm. on Finance*, 93d Cong., 1st Sess. 59 (1973) [hereinafter cited as *Hearings on S. 1842*]: "I am interested in this legislation and I think it is a key to trying to do something about the existing welfare rolls and, also, about the breakdown of families in this Nation. I feel that it is just as important as saving money to try to do something about the breakup of families that is causing not only welfare problems, but problems throughout our entire social and criminal law stratum."

Caspar Weinberger, Secretary of the Department of Health, Education and Welfare, recently made a similar assertion: "We believe more emphasis needs to be placed on the child support enforcement programs to assure that financially able parents contribute to the support of their children. *Better enforcement of parent responsibility for support may deter fathers from deserting their families.*" *Hearings on the Economic Problems of Women before the Joint Economic Comm.*, 93d Cong., 1st Sess., pt. 2, at 412 (1973) (emphasis added) [hereinafter cited as *Economic Hearings*].

Finally, the Senate Report on the Social Services Amendments of 1974 remarked that "as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup." S. REP. NO. 93-1356, 93d Cong., 2d Sess. (1974), reported in 1975 U.S. CODE CONG. & AD. NEWS, No. 15, at 9193, 9206 (1975) [hereinafter cited as S. REP. NO. 93-1356].

forcement process itself is considered an aid to reuniting estranged families.⁶ The contrary view, however, is that the enforcement process merely increases already existing bitterness and estrangement between family members.⁷ Prosecuting fathers for failure to support their children⁸ diminishes chances for reconciliation with the mother,⁹

6. F. BOND, *supra* note 4, at 352-53.

7. The welfare system itself is popularly blamed for causing fathers to desert their families. Congresswoman Griffiths, for example, remarked:

According to Federal law, the AFDC program is intended to help maintain and strengthen family life and to help parents become self-supporting. In reality, the program encourages fathers to desert their families, leaving mothers to support and raise the children alone. . . .

In 27 States [those without the AFDC-UP program], families with two able-bodied parents are not eligible for AFDC. In order for such a family to qualify, one parent must leave home, and it is usually the father who leaves. In the other 23 States [those with AFDC-UP], families with two able-bodied parents may receive AFDC, but only if the father is unemployed and does not receive unemployment insurance. Families with an unemployed father become ineligible when the father works 100 or more hours per month, no matter how little he earns. . . . Thus, the AFDC program provides a financial incentive for low-income families to split up, leaving the mother to bear the responsibilities of parenthood alone.

Economic Hearings, *supra* note 5, at 339-40. The Unemployed Parent program (AFDC-UP), optional with the states, provides assistance to children whose fathers are in the home but unemployed, 42 U.S.C. § 607 (1970), while the basic AFDC program requires that one parent be absent from the home.

Clearly, the welfare system cannot both break families apart and bring them back together. If, in reality, fathers are leaving home in order to qualify their families for welfare, it is because those fathers are unable to support their families. Mandatory support provisions, strictly enforced, will be of little help to families in this situation. Fathers, knowing they will be pursued by legal authorities, will still have to leave in order to qualify their families for assistance, and a support order will have no effect on a man who left because he had nothing to contribute financially. To return to his family would disqualify them for assistance.

8. The stresses differ when support is sought from an adult child for his indigent parent. Adult children called upon to support their parents may "resent the financial and personal ties that the statute compels" and interpret the dependence as symbolic of "the personal inadequacy of the needy individual." Tully, *Family Responsibility Laws: An Unwise and Unconstitutional Imposition*, 5 FAMILY L.Q. 32, 39 (1971). Psychological stresses may operate within the dependent relative, leading to feelings of inadequacy and failure. In addition, support responsibility may require that the indigent parent be taken into the child's home, resulting in forced sharing of accommodations when one or both parties might prefer other arrangements. *Id.* at 43. Such difficulties lead to the suggestion that, in a society moving away from extended family relationships, "the family is no longer equipped to be the primary institution to support needy relatives." *Id.* at 44. Some evidence suggests that children called upon to support their indigent parents can do so only at the expense of their own children. Rosenbaum, *Are Family Responsibility Laws Constitutional?*, 1 FAMILY L.Q., No. 4, at 55, 67 (1967).

9. Mandelker, *supra* note 3, at 611; Redlich, *Unconstitutional Conditions on Welfare Eligibility*, 1970 Wts. L. REV. 450, 454; Silver & Efrogmson, *Suggested*

and thus reduces the likelihood of establishing (or re-establishing) a stable two-parent family.¹⁰

Saving public welfare money is the third, and most frequently asserted, justification for relative responsibility statutes.¹¹ Insufficient evidence exists, however, to determine whether support requirements do, in fact, save money. Secretary of the Department of Health, Education and Welfare (HEW) Caspar Weinberger's recent testimony before the Senate Finance Committee suggests that California and Washington, which have enacted legislation to increase the incentives for tracking down absent parents, have experienced a recovery of funds three to four times greater than collection costs.¹² The Senate Report on the Social Services Amendments of 1974 asserts that "[t]hose States which did assess administrative costs in terms of support collected indicated that in general about twenty cents in collection costs resulted in a dollar return of support payments."¹³ The Report, however, admits that accurate information is sketchy and that few

Attacks on the NOLEO Requirement, 4 CLEARINGHOUSE REV. 1, 13 (1970) [hereinafter cited as Silver & Efroymsen].

10. Comment, *AFDC Eligibility and the Mandatory Paternity Suit*, 10 J. FAMILY L. 174 (1970).

The viewpoint of the recipient was expressed by Johnnie Tillmon, Executive Director of the National Welfare Rights Organization:

The mother at that point [after the father has left in order to qualify the children for AFDC] proceeds to seek assistance. AFDC now takes the tone of a super-sexist marriage. You trade in a man for the man. You can't divorce him if he treats you bad. But he divorces you by cutting off assistance. She is then confronted with title 45, chapter II, section 220.48, which addresses itself to paternity. She is asked who is the father of her children and if she will assist in seeking support payments. If her answer is no, in some States, she will be ineligible for aid.

Her family is again faced with a decision which will eventually further divide the family and renounce all hopes of being reunited. This may appear to be a rare case in the eyes of the committee, but may I take this opportunity to inform you that it is not.

Economic Hearings, *supra* note 5, at 391. Ms. Tillmon's reference is to 45 C.F.R. § 220.48 (1974).

11. Mandelker, *supra* note 3, at 501, *citing* *People v. Hill*, 163 Ill. 186, 46 N.E. 796 (1896), and *Ketcham v. Ketcham*, 176 Misc. 993, 29 N.Y.S.2d 773 (Dom. Rel. Ct. 1941).

12. *Hearings on S. 1842*, *supra* note 5, at 80.

13. S. REP. NO. 93-1356, *supra* note 5, at 9209. The Report, however, neither lists "those States" nor indicates what administrative cost factors were included. The table in the Report provides only amounts collected; it does not list amounts expended, thus preventing the reader from making an independent judgment. *Id.*; *see* note 14 *infra*.

states have made a concerted effort to enforce support obligations.¹⁴ Most writers take the position that, once administrative costs are deducted, the statutes do not result in a net savings of welfare funds.¹⁵ Without more detailed information, the real impact of the statutes on gross welfare savings cannot be evaluated.¹⁶

In any event, the argument that stringent support provisions do in fact save welfare money is undercut by data suggesting that court ordered support payments are set too low and collected too

14. The Senate Report quotes a four-state study of child support programs conducted by the General Accounting Office (GAO) and reported in March, 1972. The GAO found that HEW

has not monitored the States' child support enforcement activities and had not required the States to report on the status or progress of the activities. Consequently, HEW regional offices did not have information on the number of absent parents or amount of child support collections involved or the progress and problems being experienced by the States in collecting child support. . . . Regional officials informed us that they did not, at the time of our field work, have any plans to evaluate the support enforcement programs or impose reporting requirements on the States.

S. REP. NO. 93-1356, *supra* note 5, at 9208. Furthermore, HEW admitted in Senate Finance Committee hearings held eighteen months after the GAO report that it still did not have information on "the extent to which the paternity of illegitimate AFDC children has been established, the extent to which court orders for the support of AFDC children have been obtained, the amount of support collections for AFDC children, or the amount of Federal matching funds devoted to the States' administrative expenses in connection with child support." *Id.* at 9209.

It is submitted by this writer that necessary information is unavailable to assess accurately the effectiveness of stringent enforcement of support obligations in reducing welfare budgets. This is a cause of great concern in light of repeated Congressional efforts to increase enforcement efforts. See Social Services Amendments of 1974, 42 U.S.C.A. §§ 651-60 (Pamphlet No. 1, 1975).

15. Comment, *Pennsylvania's Family Responsibility Statute—Corruption of Blood and Denial of Equal Protection*, 77 DICK. L. REV. 331, 350 (1973) and sources cited therein. The commentator's conclusion is reasonable in light of fathers' desertion of their families to make them eligible for AFDC support. See note 7 *supra*.

16. Accurate information is a prerequisite to a viable assessment of the economic impact of relative responsibility statutes. The Community Service Society of New York challenged findings of the Moreland Commission that New York collected 7.25 million dollars from responsible relatives at a cost of 1.25 million dollars: "The recovery of \$7.25 million includes all lump-sum recoveries from recipients, estates of deceased recipients and relatives achieved through court and other legal procedures, but excludes relatives' monthly contributions which are buried in case records. The cost figures ignore expenditures to establish the existence of responsible relatives and their ability to contribute." Rosenbaum, *supra* note 8, at 60, quoting COMMUNITY SERVICE SOC'Y OF NEW YORK, FAMILIAL RESPONSIBILITY AND PUBLIC WELFARE 8 (1964).

infrequently to be of any help to recipient families.¹⁷ Taken together, low payment levels and recurrent non-compliance mean that welfare departments will often have to make up for unpaid support obligations. It is submitted that no net savings of welfare funds will result after these replacement payments (plus administrative costs of securing support orders and recalculating welfare budgets) are subtracted from gross savings.¹⁸ In addition, families needing welfare assistance may be hurt more by unpaid court-ordered support payments than if no support entitlement had initially been established.¹⁹ Thus despite substantial legislative and administrative efforts,²⁰ it is

17. While little data exists regarding compliance with support orders based on a welfare population, evidence is available regarding compliance with support orders issued in conjunction with divorce. Support orders are fully complied with during the first year following divorce in only 38% of the cases; no compliance at all was found in 42% of the cases. Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 189-91 (1971). The full compliance figure steadily drops to 13% ten years after the order, and there is no compliance at that point in 79% of the cases. Despite this poor showing, legal action (in the form of contempt proceedings, rather than prosecutions for non-support) was taken in only 19% of the cases the first year and one percent the tenth year. *Id.* at 190.

The authors, noting that payment levels are based on ability to pay, indicate that poor enforcement may be attributable to pro-male bias on the part of legislators, judges and prosecutors. *Id.* at 191. Although one might expect support orders in welfare cases to be more stringently enforced than in divorce cases due to the interest of welfare departments, the analogy to the welfare context is still clear. Additionally, the marginal economic position of many deserting fathers suggests that ability-to-pay arguments overlook the difficulties these men face in meeting their court-ordered obligations. These individuals are particularly susceptible to economic fluctuations and the reduced need for unskilled labor. They may also be less likely to resort to the courts for an adjustment in their support obligations. Welfare recipients agree with the commentators that support orders are inadequately enforced. *Economic Hearings*, *supra* note 5, at 404 (remarks of Johnnie Tillmon).

18. In addition to actual costs, social costs are incurred by families who must wait for their replacement checks.

19. In determining the need of the welfare recipient the state may not presume that support obligations have been met; only income and resources actually available can be counted in determining the grant level. *Lewis v. Martin*, 397 U.S. 552 (1970). The welfare department, therefore, must compute the monthly grant on the basis of the support actually paid. Even if grants are recomputed every month, sporadic or partial payments cause fluctuation in the recipient's income. Note, *Maintaining Welfare Families' Income in Kentucky: A Study of the Relationship Between AFDC Grants and Support Payments from Absent Parents*, 57 KY. L.J. 228, 245-46 n.80 (1969). When recomputations are made, delay and inconveniences to the recipient will be burdens added to the uncertainties of a fluctuating income.

20. The Social Services Amendments of 1974, 42 U.S.C.A. §§ 651-60 (Pamphlet No. 1, 1975), are the most recent attempt to increase compliance with outstanding support orders.

doubtful that even stringent collection procedures will ultimately benefit either the needy family or the welfare department. Nevertheless, proponents of relative responsibility laws continue to assert the importance of such procedures.²¹ This is cause of great concern in light of recent Congressional action to increase efforts to enforce collection of support obligations.

II. RELATIVE RESPONSIBILITY IN AFDC: NOLEO

The legislative history of the Social Services Amendments of 1974²² (1974 Amendments) stresses the soaring costs of AFDC and asserts that increased enforcement of support obligations will help curtail these costs. To effectuate this goal, the 1974 Amendments significantly altered eligibility requirements under the AFDC provisions by requiring that recipient families cooperate with state enforcement procedures. In addition, the 1974 Amendments have erected a new set of administrative mechanisms designed to bolster collection of support obligations.

A. *The Old and the New Statutory Schemes*

The relative responsibility provision in AFDC, known as NOLEO, was added to the Social Security Act in 1950.²³ NOLEO required that each state AFDC plan "provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent."²⁴ Congress became dissatisfied with certain procedural

21. *Hearings on S. 1842, supra* note 5, at 58-59 (remarks of Senator Nunn):

Mr. Chairman, I am convinced that if this bill is enacted the additional costs of obtaining child support will be more than offset by welfare savings. Some of these savings will be measurable as a result of the increased support payments offsetting AFDC grants. But more important will be the invisible but very real savings which result if fewer families going [*sic*] on welfare in the first place. And this bill can make that happen by making it clear that the day has passed in this nation when men or women can abandon their families to welfare without facing any substantial fear of being held responsible for the support of their children.

22. S. REP. NO. 93-1356, *supra* note 5, at 9205-08.

23. Social Security Act Amendments of 1950 ch. 809, § 321(b), 64 Stat. 549, *as amended*, 42 U.S.C. § 602(a)(11) (1970).

24. 42 U.S.C. § 602(a)(11) (1970). The section has recently been amended to read: "provide for prompt notice (including the transmittal of all relevant information) to the State child support collection agency (established pursuant to part D of this title) of the furnishing of aid to families with dependent children with respect to a child who has been deserted or abandoned by a parent (including a child born out of wedlock without regard to whether the paternity

aspects of NOLEO in 1967 when AFDC was generally under heavy criticism. The then-existing statute did not provide for a formal relationship between the welfare departments and local law enforcement agencies. The informal relationships that developed were insufficient to reach every deserting parent. In response to these procedural shortcomings, Congress provided for the reimbursement of law enforcement agencies by welfare departments, with partial federal funding.²⁵ In addition, each local welfare department was required to have a separate unit, with a full-time staff, responsible for locating and recovering support from absent parents.²⁶ When even these efforts proved insufficient, Congress responded with the 1974 Amendments, substantially altering the statutory scheme.

The 1974 Amendments overruled decisions²⁷ holding that a state

of such child has been established)" Social Services Amendments of 1974, 42 U.S.C.A. § 602(a)(11) (Pamphlet No. 1, 1975).

25. Social Security Act § 402 (a)(18), 42 U.S.C. 602(a)(18) (1970).

26. The former section 602(a), now repealed, read:

A State plan for aid and services to needy families with children must . . .

(17) provide —

(A) for the development and implementation of a program under which the State agency will undertake —

(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and

(B) for the establishment of a single organizational unit in the State agency or local agency administering the State plan in each political subdivision which will be responsible for the administration of the program referred to in clause (A)

Id. § 402(a)(17), 42 U.S.C. § 602(a)(17) (1970).

27. *Doe v. Flowers*, 364 F. Supp. 953 (N.D.W. Va. 1973), *aff'd mem.*, 94 S. Ct. 1921 (1974); *Story v. Roberts*, 352 F. Supp. 473 (M.D. Fla. 1972); *Doe v. Ellis*, 350 F. Supp. 375 (D.S.C. 1972); *Doe v. Gillman*, 347 F. Supp. 483 (N.D. Iowa 1972), *aff'd*, 479 F.2d 646 (8th Cir. 1973); *Doe v. Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Saiz v. Hernandez*, 340 F. Supp. 165 (D.N.M. 1972); *Saddler v. Winstead*, 332 F. Supp. 130 (N.D. Miss. 1971); *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill.), *aff'd mem. sub nom. Weaver v. Doe*, 404 U.S. 987 (1971); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal.), *aff'd mem. sub nom. Carleson v. Taylor*, 404 U.S. 980 (1971); *Meyers v. Juras*, 327 F. Supp. 759 (D. Ore.), *aff'd mem.*, 404 U.S. 803 (1971); *Doe v. Harder*, 310 F. Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902 (1970); *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970). *Contra*, *Lascaris v. New York State Dep't of Social Servs.*, 67 Misc. 2d 17, 323 N.Y.S.2d 567 (Sup. Ct. 1971).

Each of these decisions turned on a finding of conflict between state eligibility and § 602(a)(10) of the federal statute, as it stood prior to 1974. That section required that "aid to families with dependent children shall be furnished with

could not make a welfare recipient's eligibility depend upon compliance with NOLEO.²⁸ It is now clear that Congress intends to make compliance a condition of eligibility,²⁹ not for the child but for the "applicant,"³⁰ who in most instances is the dependent child's mother seeking benefits as a caretaker relative.³¹ The 1974 Amend-

reasonable promptness to all eligible individuals . . ." Social Security Act § 402(a)(10), 42 U.S.C. § 602(a)(10) (1970).

The courts relied heavily on NOLEO's legislative history in holding that compliance as a requirement of eligibility conflicted with the pre-existing § 602(a)(10). Remarks of Representative Wilbur Mills were widely quoted: "Are you satisfied with the fact that illegitimacy in this country is rising and rising and rising? I am not. We have tried to encourage the States to develop programs to do something about it. *We are not going to take a child off the rolls in any State* nor fail to participate with Federal funds in the care of the child, *regardless of what the parent does.*" 113 CONG. REG. 23053 (1967) (emphasis added), quoted in *Doe v. Shapiro*, 302 F. Supp. 761, 767 (D. Conn. 1969). In addition, the courts looked to HEW regulations stating expressly that NOLEO, as it stood in 1967, did not impose an additional eligibility requirement. HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION pt. IV, § 8120, quoted in *Doe v. Shapiro*, *supra*, at 766.

28. *E.g.*, 1 CONN. HANDBOOK OF SOCIAL SERVICES ch. III, § P.3460.1(2)(b), *invalidated in Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969).

The state statutes and regulations varied in their applicability. Some required disclosure of the putative father's name, *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969); others required the filing of a paternity action, *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal.), *aff'd mem. sub nom. Carleson v. Taylor*, 404 U.S. 980 (1971); *Meyers v. Juras*, 327 F. Supp. 759 (D. Ore.), *aff'd mem.*, 404 U.S. 803 (1971). The Wisconsin statute attacked in *Doe v. Schmidt*, 330 F. Supp. 159 (E.D. Wis. 1971), applied to married women. It required commencement of divorce, separation or other legal action against the husband as a condition of eligibility.

29. *Lascaris v. Shirley*, 43 U.S.L.W. 4422 (U.S. Mar. 18, 1975); S. REP. No. 93-1356, *supra* note 5, at 9212-13.

30. A State plan for aid and services to needy families with children must . . . (26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

(A) to assign the State any rights to support from any other person such applicant may have . . .

(B) to cooperate with the State

(i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and

(ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, . . . if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) [42 U.S.C. § 606(b)(2)] . . .

Social Services Amendments of 1974, 42 U.S.C.A. § 602(a)(26) (Pamphlet No. 1, 1975).

31. Social Security Act § 406(b)(2), 42 U.S.C. § 606(b)(2) (1970).

ments also require the assignment of support rights to the state.³² The support obligation becomes a debt payable to the state, which distributes the proceeds to the family, retaining a specified portion to offset welfare benefits paid to the family.³³

In order to locate absent parents, the 1974 Amendments established a Parent Locator Service, to be run by a separate organizational unit within HEW.³⁴ The Service is empowered to obtain "the most recent address and place of employment of any absent parent" that is contained either in HEW files or in the records of "any other department, agency, or instrumentality, or [sic] the United States or of any State."³⁵ This provision is, apparently, aimed at tapping the extensive information available in Internal Revenue Service (IRS) files.

After the absent parent's whereabouts are established, the state agency administering the "plan for child support"³⁶ must establish his paternity, if necessary, and seek an order for support.³⁷ The amount of the support obligation can be set either by a court order³⁸ or, in the absence thereof, "in accordance with a formula approved by the Secretary."³⁹ It appears, therefore, that an administrative procedure will be made available for determining the level of support payments.

Collection of support obligations can be carried out in the traditional ways—by court-ordered contempt for non-payment or garnishment of wages⁴⁰ or by use of the Uniform Reciprocal Enforcement of Support Act.⁴¹ In addition, the 1974 Amendments established two new methods. First, if no other state has undertaken enforcement

32. Social Services Amendments of 1974, 42 U.S.C.A. § 602(a)(26)(A) (Pamphlet No. 1, 1975), set out at note 30 *supra*. See also *id.* § 656(a).

33. *Id.* § 657(a).

34. *Id.* § 653. The organizational separation is intended to increase the likelihood that this administrative function will be carried out.

35. *Id.* § 653(b).

36. *Id.* § 654. Both the state and federal child support units must be organizationally separate from the other welfare units. *Id.* §§ 652(a), 654(3). Unlike the prior provision, 42 U.S.C. § 602(17)(B) (1970), the state unit need not be within the welfare agency. It could, for example, be placed in the office of the state attorney general. S. REP. NO. 93-1356, *supra* note 5, at 9213.

37. Social Services Amendments of 1974, 42 U.S.C.A. § 654(4) (Pamphlet No. 1, 1975).

38. *Id.* § 656(a)(1)(A).

39. *Id.* § 656(a)(1)(B). See note 63 and accompanying text *infra*.

40. See, e.g., N.Y. DOM. REL. LAW §§ 244, 245 (McKinney 1964).

41. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1968 version).

of a support order and no other reasonable enforcement procedures are available, the state may apply to the child support unit in HEW for permission to bring a federal court suit.⁴² Jurisdiction, without regard to amount in controversy, is provided by the 1974 Amendments.⁴³ Secondly, if "diligent and reasonable efforts to collect such amounts" have failed, the state may request the Secretary of HEW to certify the arrearages to the Secretary of the Treasury for collection.⁴⁴ The latter will then collect it "as if such amount were a tax imposed by subtitle C"⁴⁵—the income tax withholding section of the Internal Revenue Code.⁴⁶

Finally, the 1974 Amendments introduced strict requirements for the auditing of state child support collection programs.⁴⁷ A state failing to operate a satisfactory support program will lose five percent of its federal welfare matching funds.⁴⁸

The new approach has merit, since the family's benefits will neither be reduced in anticipation of support payments nor fluctuate due to irregular payments coupled with constant recomputation of benefits. In addition, the 1974 Amendments are more likely than the old provisions to lead to enforcement of child support obligations.⁴⁹ While this result is subject to the argument that family estrangement and bitterness will be exacerbated,⁵⁰ the family will receive 40% of the first 50 dollars collected without an offsetting reduction in welfare benefits.⁵¹

42. Social Services Amendments of 1974, 42 U.S.C.A. § 652(a)(8) (Pamphlet No. 1, 1975).

43. *Id.* § 660.

44. *Id.* § 652(b).

45. INT. REV. CODE OF 1954 § 6305(a).

46. *Id.* §§ 3101-3505. Under these provisions, the obligation must be paid before its existence or amount is litigated. Since the 1974 Amendments remove federal court jurisdiction "to restrain or review the assessment and collection" of support payments collected through IRS procedures, *id.* § 6305(b), the obligated parent is left to state judicial or administrative remedies.

47. Social Services Amendments of 1974, 42 U.S.C.A. § 652(a)(4) (Pamphlet No. 1, 1975).

48. *Id.* § 603(h).

49. *See* note 17 *supra*.

50. *See* text at notes 7-10 *supra*.

51. Social Services Amendments of 1974, 42 U.S.C.A. § 657(a)(1) (Pamphlet No. 1, 1975). This financial incentive was included in order to obtain the mother's cooperation in identifying the recipient-child's father. S. REP. NO. 93-1356, *supra* note 5, at 9215. Since, however, assignment of support rights and cooperation in establishing paternity and collecting the support obligation are requirements for AFDC eligibility, the need for such an incentive is questionable.

B. Preliminary Problems Presented by the 1974 Statute

This new statutory scheme, however, raises several problems. The first is the lack of a hearing before the amount of a support obligation is established.⁵² Section 656 (a) (1) provides that in the absence of a court order, the amount is determined under a state formula approved by the Secretary of HEW,⁵³ in effect permitting the assessment and collection of support payments without a hearing at which an obligated parent can first dispute the existence or amount of his obligation.⁵⁴

A strong argument can be made that this scheme violates due process. In *Sniadach v. Family Finance Corp.*⁵⁵ the Supreme Court held that garnishment procedures freezing wages without a prior hearing violated due process. There, a schedule of amounts was statutorily set for withholding wages to be paid to the garnisher; the AFDC provision is equivalent except that the amounts to be imposed absent a court order are set by regulation. The taking of wages for a support obligation imposes the same burdens on the individual that produced the requirement of a hearing in *Sniadach*. Support levels have traditionally been set without resort to fixed formulas.⁵⁶ Courts have considered the important factors to include the financial circumstances, future expenses, other support responsibilities, age, health and accustomed style of living of the parties.⁵⁷ These six factors cannot be adequately dealt with in a formula, and they are strong reasons for requiring, in order to satisfy due process, a prior hearing, whether judicial or administrative, to determine the amount of support orders under section 656 (a) (1).⁵⁸

52. The lack of a statutory provision for a hearing is not filled by the Administrative Procedure Act (APA), which establishes elements of due process that must be provided in administrative hearings. 5 U.S.C. § 556 (1970). The APA only applies to determinations by agencies of the federal government. *Id.* § 551(1). Thus a constitutional due process problem is presented.

53. Social Services Amendments of 1974, 42 U.S.C.A. § 656(a)(1) (Pamphlet No. 1, 1975).

54. This result would be especially onerous if the IRS collection procedure were employed, under which the non-supporting parent must pay first and sue for a refund later. *See* note 46 *supra*.

55. 395 U.S. 337 (1969).

56. At least one court has held that the use of a formula to determine the amount of child support payments is clearly erroneous. *Barlow v. Barlow*, 282 S.W.2d 429 (Tex. Civ. App. 1955).

57. Annot., 1 A.L.R.3d 324 (1965).

58. Social Services Amendments of 1974, 42 U.S.C.A. § 656(a)(1) (Pamphlet No. 1, 1975).

An asserted state interest in protecting its welfare funds does not override the constitutional requirement of a prior hearing. Such an interest was argued in *Shapiro v. Thompson*,⁵⁹ but the Court held it insufficient to override the constitutional right to travel.⁶⁰ By analogy, neither should it be compelling in the face of a constitutional right to a hearing. In addition, protection of the fisc was rejected in *Goldberg v. Kelly*⁶¹ because of the burden that would attach to an eligible recipient if funds were lost even for a short time. In the support context, an order imposed under regulations would create similar burdens for a parent who is "overcharged" on the amount of his obligation. The new provision prohibiting discharge of the support obligation in bankruptcy increases the burden.⁶² Such a burden, therefore, would be too great to be overridden by a state desire to save money.

A similar due process problem is raised by the use of the IRS as a collection mechanism. Under tax collection procedures, the disputed taxes must be paid first, before the obligation or its amount is judicially tested. The 1974 Amendments impose these procedures in the child support context. This is, in effect, the collection of a judgment without a chance to appear, which is constitutionally mandated when other judgments are collected. Thus the IRS procedures arguably violate due process when applied to the collection of child support obligations.

A second problem with the 1974 Amendments is the conflict of interest created by an administrative determination of the level of the support obligation, even if a hearing is provided.⁶³ Since the new scheme provides a five percent penalty for failure to operate an effective

59. 394 U.S. 618 (1969).

60. *Dandridge v. Williams*, 397 U.S. 471 (1970) is not inapposite. The Court there found asserted state interests, among them the most efficient allocation of state resources, sufficient to meet the "rational basis" equal protection test. See note 124 *infra*. Unlike the instant situation, the state's interests in *Dandridge* did not have to meet the higher equal protection test (*i.e.* compelling interest), applied when a state seeks to infringe upon a constitutional right.

61. 397 U.S. 254 (1970).

62. Social Services Amendments of 1974, 42 U.S.C.A. § 656(b) (Pamphlet No. 1, 1975).

63. The 1974 Amendments require that the states undertake to establish paternity and secure support from absent parents, *id.* § 654(4), and that the federal unit establish standards to make the state programs effective, *id.* § 652(a)(1). The 1974 Amendments do not, however, specify whether these determinations are to be made in an administrative or judicial forum.

program to recover funds from non-supporting parents,⁶⁴ and still permits the child support unit to be a part of the state welfare department,⁶⁵ it is in the interest of the agency to obtain as high a rate of support recovery as possible.⁶⁶ This "interest" would render objectivity impossible. Such a situation, akin to being tried before a judge interested in the outcome of the case,⁶⁷ is inherently unfair. Thus it can be argued that the determination of paternity and support should be judicial, rather than administrative, functions.⁶⁸

Additional support for the argument that the setting of support obligations should be a judicial function, performed in a prior hearing, is found in a careful reading of the 1974 Amendments. Both of the enforcement procedures—certification of child support obligations to the Secretary of the Treasury and the bringing of a federal court suit—speak in terms of a "court order."⁶⁹ No specific enforcement procedure is provided for administratively determined support obligations. It would be necessary, therefore, for the agency to seek

64. *Id.* § 603(h).

65. See note 36 *supra*.

66. This would be true even if the support unit were a separate organizational entity. Loss of federal funds could still be attributed to, and blamed on, that unit. It, therefore, would seek to maximize the support payments collected. Furthermore, the impetus to achieve higher recoveries is itself increased because of the previously unavailable partial reduction in federal funding. A serious problem in welfare administration has been the unavailability of any federal penalty for state improprieties except total loss of federal matching funds. HEW has never imposed that penalty because of the severe impact it would have on recipients in a penalized state. Note, *AFDC Eligibility Conditions Unrelated to Need: The Impact of Dublino*, 49 *IND. L.J.* 334, 336 (1973-74) and sources cited therein. The states, therefore, have been virtually free flagrantly to disregard HEW viewpoints that conflicted with their own. The new provision, however, changes this situation; the five percent penalty is not so severe that HEW would avoid imposing it and the stringent auditing requirements increase the likelihood that HEW will learn of violations.

67. *Tumey v. Ohio*, 273 U.S. 510 (1927).

68. Prejudice in having the determinations made by an agency, rather than by a court, may be cured if there is a later *de novo* judicial review of the agency decision. *Cf. Fung Ho v. White* 259 U.S. 276 (1922). The system, however, should be set up to avoid the creation of prejudice initially.

69. The former states that "[n]o amount may be certified for collection under this subsection except the amount of the delinquency under a *court order* for support . . ." Social Services Amendments of 1974, 42 U.S.C.A. § 652(b) (Pamphlet No. 1, 1975) (emphasis added). The latter requires that the federal child support unit "receive applications from States for permission to utilize the courts of the United States to enforce *court orders* for support . . ." *Id.* § 652(a)(8) (emphasis added).

a court judgment before the special statutory collection procedures could be utilized. This would be wastefully duplicative, rendering the administrative procedure efficient only when support order compliance is readily forthcoming. Previous experience suggests that such instances are infrequent.⁷⁰

A third problem with the new AFDC-NOLEO provisions is the extent to which they insert the federal government into domestic relations—an area traditionally left to the states.⁷¹ Such an intrusion is, most likely, justifiable as a necessary and proper⁷² measure to protect federal welfare funds. The Parent Locator Service and collection mechanisms are, however, also available to non-welfare families.⁷³ When so applied, no “necessary and proper” justification exists for permitting the federal government to intrude into the manner in which the states deal with their non-welfare-related domestic relations problems. There is some authority holding that federal intrusion into domestic relations violates the tenth amendment, which reserves to the states power not specifically delegated.⁷⁴ That position would

70. See note 17 *supra*.

71. C. WRIGHT, *THE LAW OF FEDERAL COURTS* 84-85 (2d ed. 1970).

President Ford, in signing the Social Services Amendments of 1974, expressed reservations that “certain provisions of this legislation go too far by injecting the Federal Government into domestic relations. Specifically, provisions for use of the Federal courts, the tax collection procedures of the Internal Revenue Service and excessive audit requirements are an undesirable and an unnecessary intrusion of the Federal Government into domestic relations.” *Weekly Compilation of Presidential Documents*, Vol. 11, No. 2, Jan. 13, 1975, at 20, *quoted in* *Lascaris v. Shirley*, 43 U.S.L.W. 4422 (U.S. Mar. 18, 1975). This interference will be greatest if paternity and support decisions are made at the administrative level, thus rendering ineffective state statutes giving to family courts exclusive jurisdiction to make those determinations. *See, e.g.*, 29A N.Y. JUDICIARY LAW §§ 411, 511 (McKinney 1963), *as amended*, § 511 (McKinney Supp. 1974).

72. U.S. CONST. art. I, § 8.

73. The Parent Locator Service can be utilized by any “authorized person,” which is defined to include courts, parents, guardians, and agents of the child, as well as child support agencies. *Social Services Amendments of 1974*, 42 U.S.G.A. § 653(c) (Pamphlet No. 1, 1975). When the Service is used by parents, guardians, or agents of a child, a fee is charged. *Id.* § 653(e)(2). In addition, the paternity determination and collection procedures available under the state plan may be utilized by non-recipients on application and, if the individual state so requires, payment of a fee. *Id.* § 654(6). The fact that the services used by non-recipients may involve some cost, for which reimbursement may seem proper, does not affect analysis of the constitutional power under which Congress has acted. Congress cannot set up a profit-making corporation without foundation in the enumerated powers.

74. *Cleveland v. United States*, 146 F.2d 730 (10th Cir. 1945), *aff'd on other grounds*, 329 U.S. 14 (1946); *McCarty v. Hollis*, 120 F.2d 540 (10th Cir. 1941).

be tempered by finding a constitutional basis for the federal intervention, as the necessary and proper clause provides. In its absence, however, and despite the broad interpretation given the necessary and proper clause,⁷⁵ the child support provisions may be unconstitutional, being beyond the power of Congress when applied to non-welfare parents.⁷⁶

A puzzling provision of the 1974 Amendments grants federal court jurisdiction over actions properly certified through the Secretary of HEW.⁷⁷ A finding must be made that a federal court suit "is the only reasonable method of enforcing" a support order before the suit can be brought.⁷⁸ It may be speculated, therefore, that federal suit is expected to compensate for shortcomings in the state enforcement procedures. Nevertheless, the advantage to be gained by making the federal courts available to the states⁷⁹ for enforcement purposes is unclear.

When more than one state is involved in issuing and enforcing support orders, full faith and credit questions are raised.⁸⁰ A support order

75. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

76. Those groups who supported passage of the 1974 Amendments, such as the National Organization of Women, focused on the impact of the legislation on non-welfare families. See Cowley, Whitman & Bale, *Paying Their Dues*, NEWSWEEK, Feb. 24, 1975, at 55-56. For such families, the Parent Locator Service and support collection mechanisms may be most beneficial. The federal mechanism will not be utilized except on election of the parent having custody and, it may be hypothesized, only against parents able, but unwilling, to meet their obligations. When utilized against welfare fathers, on the other hand, the mechanisms are of a different character. The mother is not permitted to choose, on the basis of her assessment of what is best for her children and her relationship with their father, whether or not to pursue him through the child support provisions of the 1974 Amendments. Furthermore, welfare fathers are unlikely to include men who flaunt obligations they could otherwise afford. Rather, these men are likely to have marginal incomes themselves, which are perhaps depleted by later-acquired family obligations.

77. Social Services Amendments of 1974, 42 U.S.C.A. § 660 (Pamphlet No. 1, 1975).

78. *Id.* § 662(a)(8)(B).

79. The statute as written would permit the state to sue without regard to amount in controversy, but the obligated parent wishing to contest some question of the obligation's existence or amount would be subject to, and probably barred by, the amount in controversy requirement. This result may not be unwelcome, from the point of view of sparing the federal court docket. If, on the other hand, federal courts are expected to provide more uniform enforcement, opening the remedy only to the states may be self-defeating at worst and an unfair tipping of the scales at best.

80. U.S. CONST. art. IV, § 1.

must be given full faith and credit only if it is not prospectively modifiable.⁸¹ Amounts that have accrued are, ordinarily, not subject to modification and, thus, entitled to full faith and credit. The forum has the option to adopt and enforce the support orders as its own, but no constitutional compulsion exists to do so.⁸² As to a modifiable order, the forum "has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State in which it was rendered."⁸³ Provision for federal court jurisdiction is puzzling because the federal courts are under the same full faith and credit requirements as state courts. They are no more obligated to recognize and enforce a state judgment for future support payments than is a sister state. Thus it is difficult to conceive of the advantage to be gained by resort to federal enforcement rather than state enforcement. The state's desire to mandate an on-going flow of payments, in order to avoid a continuing return to court as amounts become due, is no better served by federal than by state jurisdiction. Perhaps the statute's drafters hypothesized or hoped that federal courts would be more likely to choose to extend full faith and credit, in the absence of requirement, than the state courts. Such guesswork, however, is a sorry basis on which to legislate.

Finally, the 1974 Amendments are problematic with respect to statutory rights⁸⁴ to privacy.⁸⁵ The 1974 Amendments make available

81. *Barber v. Barber*, 323 U.S. 77 (1944); *Sistare v. Sistare*, 218 U.S. 1 (1910).

82. For a more complete discussion of full faith and credit requirements as to support orders see R. LEFLAR, *AMERICAN CONFLICTS LAW* 552 (rev. ed. 1968); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 187-88 (1971).

83. *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947).

Since full faith and credit complications are raised when judicial enforcement of modifiable support orders is sought, use of the courts is not a preferred enforcement mechanism. An enforcement mechanism not having these problems is provided in the Uniform Reciprocal Enforcement of Support Act § 2, which requires enforcement of orders sued on outside the issuing state, despite modifiability. The 1974 Amendments require that this avenue be exhausted before federal courts are involved. The Uniform Act, therefore, may be the first and better procedure.

84. The constitutional right to privacy has not been extended to provide protection for "privacy in its 'primary or strong sense'—the ability to keep secret personal information about oneself." Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 770 (1973). Thus statutory protection is needed. For a discussion of the constitutional privacy problems, other than record-keeping, raised by NOLEO see text at notes 143-54 *infra*.

85. [F]amilies function better in private than they do if exposed to public scrutiny. To the extent that the dysfunctional family is a problem in the

information concerning "the most recent address and place of employment of any absent parent" that is contained either in HEW files or in the records of "any other department, agency, or instrumentality, or [sic] the United States or of any State."⁸⁸ This provision, as previously noted, seems to be aimed at tapping the extensive information available in IRS files.

The issue here involves neither constitutional rights to privacy nor violations of statutorily-mandated confidentiality. First, the confidentiality provision in the Internal Revenue Code⁸⁷ confers a statutory privilege only;⁸⁸ Congress has the power to permit certain types of disclosures without infringing on constitutional rights.⁸⁹ Secondly, the 1974 Amendments specifically provide that address and employment information can be made available "notwithstanding any other provision of law."⁹⁰ The issue is, therefore, one of policy to be ad-

United States, and to the extent that encouragement is to be given to the functional family, it might be to the state's advantage to promote privacy. The economic costs of dysfunction are high, while the costs of privacy are comparatively low.

Brodie, *Privacy: The Family and the State*, 1972 U. ILL. L.F. 743, 759.

86. Social Services Amendments of 1974, 42 U.S.C.A. § 653(b) (Pamphlet No. 1, 1975).

87. INT. REV. CODE OF 1954, § 7213(a)(1), provides that "[i]t shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return"

88. *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F.R.D. 190, 191-92 (D. Conn. 1940).

89. *Cf. United States v. Dickey*, 268 U.S. 378 (1925).

90. Social Services Amendments of 1974, 42 U.S.C.A. § 653(b) (Pamphlet No. 1, 1975).

This negates otherwise-existent conflicts with other statutes requiring confidentiality. Thus disclosure for AFDC purposes would not conflict with the Internal Revenue Code's confidentiality provision. *Cf. United States v. Dickey*, 268 U.S. 378 (1925), *United States v. Tucker*, 316 F. Supp. 822 (D. Conn. 1970). Nor would a conflict be found with the AFDC confidentiality provision, which was rewritten by the 1974 Amendments. The original provision, 42 U.S.C. § 602(a)(9) (1970), required that the states "provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to families with dependent children. . . ." The new section reads: "provide safeguards which permit the use or disclosure of information concerning applicants or recipients only to (A) public officials who require such information in connection with their official duties, or (B) other persons for purposes directly connected with the administration of aid to families with dependent children." *Id.*, as amended, 42 U.S.C.A. § 602(a)(9) (Pamphlet No. 1, 1975).

dressed to Congress.⁹¹ The question to be answered is whether such use of tax records, the confidentiality of which has been jealously guarded, is a desirable policy. In signing into law the 1974 Amendments, President Ford stated that "the establishment of a parent locator service in the Department of Health, Education and Welfare with access to all Federal records raises serious privacy and administrative issues. I believe that these defects should be corrected in the next Congress and I will propose legislation to do so."⁹² Secretary of HEW Weinberger also expressed reservations about opening IRS files, noting the potential abuse of automated personal data systems.⁹³ The use and abuse of IRS files is an issue of increasing concern. In fact, the Privacy Act of 1974⁹⁴ established a Privacy Protection Study Commission,⁹⁵ which is mandated to investigate "whether the Internal Revenue Service should be prohibited from transferring individually identifiable data to other agencies and to agencies of State governments"⁹⁶

An argument can be made that IRS files should not be used in carrying out the policies of the Social Services Amendments of 1974. The provision requiring disclosure of information from agency files states that "[n]o information shall be disclosed to any person if the disclosure of such information would contravene the *national policy* or security interests of the United States or the *confidentiality of census data*."⁹⁷ The IRS files contain as much or more personal information as do census files. This, plus the strong policy to protect IRS information, argues that IRS files should also be held beyond the reach of support order enforcement authorities as a matter of "national policy." This interpretation is buttressed by legislative

91. Something is said in the briefs, and was said at the bar, as to the wisdom, on the one hand, of secrecy, and, on the other hand, of publicity, in respect to tax returns. But that is a matter addressed to the discretion of the lawmaking department, with which the courts are not concerned, so long as no constitutional right or privilege of the taxpayer is invaded

United States v. Dickey, 268 U.S. 378, 386 (1925).

92. Weekly Compilation of Presidential Documents, *supra* note 71.

93. *Hearings on S. 1842*, *supra* note 5, at 81-82.

94. Privacy Act of 1974 § 5, Pub. L. No. 93-579, 88 Stat. 1896, reproduced in 1974 U.S. CODE CONG. & AD. NEWS 6881, 6893-97.

95. 5 U.S.C.A. § 552a (Pamphlet No. 1, 1975).

96. Privacy Act of 1974 § 5(c)(2)(B)(ii), Pub. L. No. 93-579, 88 Stat. 1896, reproduced in 1974 U.S. CODE CONG. & AD. NEWS 6881, 6894.

97. Social Services Amendments of 1974, 42 U.S.C.A. § 653(b) (Pamphlet No. 1, 1975) (emphasis added).

history suggesting that any records containing information as sensitive as census files would be protected by a "national policy" against disclosure.⁹⁸

Concern with the privacy of personal records in general, and of IRS records in particular, coupled with support provisions requiring the invasion of such records, reflects schizophrenic policies. This can reasonably be viewed as a repressive attitude toward non-supporting fathers of, primarily, welfare families. Welfare families are singled out, since non-welfare families can choose whether or not to pursue their non-supporting member through IRS sources.

III. CONSTITUTIONAL ISSUES RAISED BY NOLEO

The previous section considered administrative and related policy issues raised by the 1974 Amendments. It is submitted that the NOLEO provisions suffer from problems much more basic than these statutory mechanics.

The statute as it now stands reflects the view that federal efforts to find absent parents and enter support orders against them are "useless" without the cooperation of recipients and that such cooperation will not be voluntary.⁹⁹ While this may be true when the name of the putative father is not known, in other instances the welfare department and, hence, the Parent Locator Service, may have sufficient information to proceed without the recipient's cooperation. The new Amendments, nevertheless, mandate the recipient's participation in locating the absent parent. The constitutional implications of NOLEO, therefore, become important.

A. *Self-Incrimination*

A woman who reveals information about a non-marital liaison may face the possibility of losing her children in a neglect proceeding.¹⁰⁰ In this respect NOLEO may operate as a "suitable home"

98. "Information of a national security nature or information in such highly confidential files as those of the Bureau of the Census would not be divulged." S. REP. No. 93-1356, *supra* note 5, at 9212; *cf.* remarks of President Ford, *supra* note 71.

99. This view was suggested in *Saiz v. Goodwin*, 325 F. Supp. 23, 25 (D.N.M.), *rev'd and remanded*, 450 F.2d 788 (10th Cir. 1971).

100. While neglect proceedings can be either civil or criminal, the fifth amendment by its terms is not applicable to a civil proceeding. U.S. CONST. amend. V. It does, however, apply "alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

provision.¹⁰¹ The suitable home provision in AFDC requires that welfare agencies transmit information concerning child abuse and neglect to law enforcement officials.¹⁰² The requirement, however, conflicts with the AFDC confidentiality provision, which permits disclosure of information concerning applicants and recipients "only to (A) public officials who require such information in connection with their official duties, or (B) other persons for purposes directly connected with the administration of aid to families with dependent children. . . ."¹⁰³ Before NOLEO was passed, no information that a client provided to a welfare agency could be released for any reason. NOLEO became an express exception to the confidentiality requirement, permitting information concerning the father's whereabouts to be communicated to law enforcement officials. If, through the use of such information, the putative father is located and paternity proceedings initiated, immunity granted to the mother would protect her from criminal prosecution for fornication or adultery,¹⁰⁴ but the information could be used in a civil neglect proceeding. "While the federal confidentiality provision places restrictions on the disclosure of information, the unsuitable home section demands full disclosure

101. For a discussion of the Louisiana suitable home provision and the Fleming Ruling, which prohibited using a "suitable home" as an eligibility requirement, see *King v. Smith*, 392 U.S. 309, 321-27 (1968).

102. Social Security Act § 402(a)(16), 42 U.S.C. § 602(a)(16) (1970) provides:

[W]here the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State, providing such data with respect to the situation it may have

103. Social Services Amendments of 1974, 42 U.S.C.A. § 602(a)(9) (Pamphlet No. 1, 1975).

104. *But see* *State v. Plummer*, 5 Conn. Cir. 35, 241 A.2d 198 (1967), in which a welfare mother was prosecuted for lewd and lascivious carriage on the basis of information originally given to the police by welfare authorities. The court held the arrest to be the result of police observation and found no error in the authorities' refusal to permit the recipient to investigate the source of the information. *Id.* at 41, 241 A.2d at 202. In the sole case in which self-incrimination was held a defense to prosecution for lewd and lascivious cohabitation, the court found that statements made in connection with NOLEO provisions, then a requirement for eligibility, were coerced and involuntary. *Commonwealth v. Lawrence*, 1 POVERTY L. RPT'R. § 1310.10 (Mass. Dist. Ct. 1967). For more complete discussions see Comment, *AFDC Eligibility and the Mandatory Paternity Suit*, *supra* note 10, at 181; Silver & Efroymsen, *supra* note 9, at 76.

of the same information. Immunity based on such a contradiction provides no protection against self-incrimination at all."¹⁰⁵

In *Doe v. Shapiro*,¹⁰⁶ the plaintiff-mother claimed that state regulations conditioning her AFDC eligibility upon disclosure of her child's putative father violated her constitutional right against self-incrimination. While the majority was skeptical about the state immunity statute's effectiveness,¹⁰⁷ it did not rule on the constitutional issue. Instead, the court accepted defendant's argument that the statute must be interpreted to safeguard individuals in plaintiff's position¹⁰⁸ and thus did not consider the conflict between the state disclosure statute and the AFDC confidentiality provision.

*In re Cager*¹⁰⁹ is frequently cited as proof that self-incrimination fears are not fanciful:

Perhaps the most notorious incident of the use of information required by notice provisions occurred recently in Maryland. In that state, an applicant for AFDC is required to fill out a form stating certain information about the father(s) of her children and giving her name. She must, as a condition of eligibility for AFDC, then take the form, which is a request for action against the father, to the State's Attorney. Amid great publicity of his campaign against illegitimacy and welfare abuse, the State's Attorney arrested several mothers who had applied for AFDC and had filed the required form in his office. These women were originally charged with criminal neglect; later the State's Attorney instituted civil neglect proceedings in the Juvenile Court. The results of either criminal or civil suits where neglect is found would be removal of the children from the home, although only in a criminal action would the mother be fined or imprisoned.¹¹⁰

105. Comment, *AFDC Eligibility and the Mandatory Paternity Suit*, *supra* note 10, at 181.

106. 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970).

107. Although CONN. GEN. STAT. REV. § 52-435b (1975) gave full immunity for statements made in the paternity proceeding itself, the court questioned whether its immunity extended to involuntary statements made out of court prior to the paternity proceedings. 302 F. Supp. at 763. If the immunity given "in connection with such proceedings," CONN. GEN. STAT. REV. § 52-435b (1975), excluded involuntary pre-hearing statements, then the mother could be subject to criminal prosecution for fornication or lascivious carriage. *Id.* § 53-21 (1975). The statute would, therefore, violate the rule laid down in *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), whereby an individual may not be compelled to give inculpatory information unless it cannot be used in a criminal prosecution against him. *Id.* at 78-79.

108. 302 F. Supp. at 763.

109. 251 Md. 473, 248 A.2d 384 (1968).

110. *Silver & Efroymsen*, *supra* note 9, at 55.

The *Cager* trial court's finding of neglect, based solely on the fact that each mother had had more than one illegitimate child, was reversed on appeal on the ground of violation of confidentiality.¹¹¹ The court held, however, that illegitimacy should continue to be one factor considered in a neglect proceeding, although it alone would no longer be sufficient for a finding of neglect.¹¹² Thus the possibility remains that, in a child neglect proceeding brought under the suitable home provision, the use of NOLEO information could be considered a purpose "directly connected with the administration"¹¹³ of AFDC and, therefore, unprotected by the confidentiality provision.¹¹⁴

Now that cooperation in establishing paternity and obtaining and enforcing support orders is an express condition of AFDC eligibility,¹¹⁵ the risk is increased that disclosures might be used in child neglect proceedings under the suitable home provision. Because suitable home statutes were poorly enforced in the past,¹¹⁶ it was unlikely that information gained through NOLEO, evidencing illegitimacy or promiscuity, would be used to take children away from their mothers. A study of the Florida suitable home statute found that, in spite of diligent efforts to enforce the law, only one percent of the mothers gave up their children in response to the loss of assistance, and in only one-half percent of the cases were children removed from their homes by the court.¹¹⁷ Hopefully the new statutory scheme will not increase the danger of suitable home enforcement, carried out through information required to be disclosed under the eligibility provisions.

B. Equal Protection

Even after NOLEO eligibility provisions were held invalid¹¹⁸ and before the 1974 Amendments overruled those decisions, efforts by

111. 251 Md. at 481-83, 248 A.2d at 389-90.

112. *Id.* at 479-80, 248 A.2d at 388.

113. Social Security Act § 402(a)(16), 42 U.S.C. § 602(a)(16) (1970).

114. Silver & Efrogmson, *supra* note 9, at 56. This interpretation would eliminate the conflict between §§ 602(a)(9) and (16) of the Act (*see* text at notes 102-05 *supra*), but the resolution would hardly favor the recipient.

115. Social Services Amendments of 1974, 42 U.S.C.A. § 602(a)(26) (Pamphlet No. 1, 1975).

116. Chilton, *Social Control Through Welfare Legislation: The Impact of a State "Suitable Home Law,"* 5 LAW & SOC'Y REV. 205 (1970).

117. *Id.* at 221.

118. *See* cases cited note 27 *supra*.

some states to coerce paternity information from welfare recipients were not abandoned. For example, after Connecticut's regulations making compliance with NOLEO a condition of eligibility were invalidated,¹¹⁹ the State passed another statute aimed at securing the same information.¹²⁰ While avoiding the statutory conflict that led to invalidation of the prior regulations,¹²¹ the new Connecticut statute raises serious equal protection problems.

The statute subjects unwed mothers who refuse to name the putative father to civil contempt, punishable by a fine of 200 dollars, imprisonment for a year, or both.¹²² The statute applies to all unwed mothers, regardless of their welfare status; mothers receiving welfare are required to make the disclosure to the welfare commissioner while mothers not on welfare must give this information to the child's guardian or guardian ad litem. In *Doe v. Norton*¹²³ plaintiffs argued that the statute was based on the suspect category of illegitimacy and should, therefore, be subject to strict scrutiny equal protection standards.¹²⁴ The court rejected this argument, concluding that the statute

119. *Doe v. Harder*, 310 F. Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902 (1970); *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970).

120 CONN. GEN. STAT. REV. § 52-440b (1971).

121. Connecticut's first regulation designed to obtain paternity information provided for the termination of welfare benefits to illegitimate children when the mother refused to disclose the father's name. Application of this regulation was enjoined in *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970), on the ground that it conflicted with the federal statute by imposing an additional eligibility requirement. Connecticut then amended its regulation to terminate welfare payments only to the non-cooperating mother, leaving the children on the rolls. The per curiam opinion in *Doe v. Harder*, 310 F. Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902 (1970), found the amended regulation subject to "the same vice as the original" and in violation of the *Shapiro* injunction.

122. The unwed mother who names the putative father is immune from prosecution for crimes, such as fornication or adultery, that her testimony reveals. CONN. GEN. STAT. REV. §§ 52-435b, c (1975).

123. 365 F. Supp. 65 (D. Conn. 1973), *prob. juris. noted sub nom. Roe v. Norton*, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974). Oral argument was recently heard and is reported at 43 U.S.L.W. 3469-71 (U.S. Mar. 4, 1975).

124. 365 F. Supp. at 78-79. "Strict scrutiny" and "rational basis" are the two equal protection standards. The former is applicable whenever a statutory classification is based upon suspect categories such as race, *Loving v. Virginia*, 388 U.S. 1 (1967), and illegitimacy, *Levy v. Louisiana*, 391 U.S. 68 (1968), or when the classification impinges on fundamental interests such as the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the right to vote, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Under strict scrutiny "any classification which serves to penalize the exercise of that [constitutional] right, unless shown to be

was beneficial, not burdensome, to illegitimate children.¹²⁵ In so doing, the court ignored the emotional and psychological stresses inherent in support proceedings that may further alienate the father.¹²⁶

Having determined that the less stringent rational basis equal protection test was applicable, the *Norton* court identified the governmental interest as the enforcement of the parental duty to support one's children. The court rejected plaintiffs' assertion that the statute impermissibly discriminates between unwed mothers receiving welfare benefits and unwed mothers not on welfare, reasoning that unwed mothers not on welfare were similarly treated, since they were obligated to disclose the father's name to the child's guardian or guardian ad litem.¹²⁷ The court further held that the statute is rea-

necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The rational basis test, applicable in all other instances, requires that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The equal protection test applied is crucial to the outcome of the case. "Some situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal [to the challenged legislation] in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). For a definitive discussion of equal protection doctrine see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

125. 365 F. Supp. at 79. The court quoted from *Wyman v. James*, 400 U.S. 309, 318 (1971): "The focus is on the *child* and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights." 365 F. Supp. at 79 n.24.

126. See text at notes 5-10 *supra*.

127. 365 F. Supp. at 81.

It is submitted that the statutory requirement that the non-recipient mothers disclose the father's identity was included to avoid equal protection problems, since children not on welfare are unlikely to have guardians or guardians ad litem to whom the mothers are accountable. Connecticut law does not contemplate that all illegitimate children are likely to have guardians. The state statute governing guardianship provides in the pertinent part: "The *mother* of each illegitimate child under eighteen years of age shall be the *sole guardian* of the person of such child. . . . If [the probate] court finds . . . that either or both [parents] are unfit persons to have charge of such child or have abandoned or neglected to make suitable provision for the support or education of such child . . . , it may remove as guardian such parent or parents . . . and appoint a guardian" CONN. GEN. STAT. REV. § 45-43 (1975) (emphasis added). Thus no guardian exists to

sonably related to the public's interest in preserving welfare funds even if it applied only to unwed mothers receiving welfare assistance.¹²⁸ Yet such a classification, while reasonably related to saving money, does not assure parental support for *all* illegitimate children, regardless of their welfare status—the interest the court had earlier identified. Additionally, the desire to protect state funds as the justification for the statute might render it unconstitutionally overinclusive,¹²⁹ since it requires that non-recipient mothers also report the name of the child's father.

The 1974 Amendments, however, do not evoke the same equal protection problems embodied in the Connecticut statute. Both statutes purport to apply to non-recipients as well as recipients. Unlike the Connecticut statute, however, the penalty provided by the federal statute—loss of welfare benefits—is applicable only to AFDC recipients. In addition, only welfare recipients are forced to cooperate with the Parent Locator Service; non-recipients can do so if they choose. Since Congressional action in social and economic matters may be incremental without denying equal protection,¹³⁰ and since the differential impact of the federal statute is rationally related to a state desire to save welfare funds,¹³¹ this special impact on the welfare population may not constitute an equal protection violation. It does, however, suggest that the child support efforts will not fulfill their intended purpose to provide parental support for all children.¹³²

whom the mother can report the name of the putative father unless the mother has been found unfit and a guardian appointed by the probate court. This rarely occurs. See generally Chilton, *supra* note 116. Similarly, Connecticut law does not contemplate the existence of a guardian ad litem unless a suit has arisen in which the child has an interest. CONN. GEN. STAT. REV. § 45-54 (1975). Undoubtedly the statute was not drafted with any serious thought to the possibility of suit by a guardian or guardian ad litem.

128. "In the case of these plaintiffs, it is the state, not a private party, which furnishes to the plaintiffs and their children welfare assistance in accordance with their needs. Because the state provides those benefits, it is rational that it should take steps to enforce the prior obligation of their fathers to provide that support." 365 F. Supp. at 82.

129. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 351-52 (1949).

130. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

131. *Cf. Dandridge v. Williams*, 397 U.S. 471 (1970).

132. Social Services Amendments of 1974, 42 U.S.C.A. § 651 (Pamphlet No. 1, 1975). It may be credibly argued, however, that Congress never had a serious intention to "benefit" any children other than AFDC recipients. The legislative

It also suggests that Congress was not really concerned with child support in general but only with controlling the rising cost of AFDC.¹³³

*Department of Mental Hygiene v. Kirchner*¹³⁴ represents a different approach to the equal protection problem. *Kirchner* held that treatment of persons in state mental institutions is a proper state function, benefiting society as a whole. Therefore, burdening the relatives of institutionalized persons with the costs of that treatment constituted an arbitrary charge on one class of society in violation of equal protection. One authority explains *Kirchner* as an expansion of the *parens patriae* concept.¹³⁵ The state's obligation to provide for needy citizens has gradually developed into a relationship so direct that, when support is concerned, the citizen's relationship to his family is secondary.¹³⁶ The legislature is precluded from imposing the financial burden on the recipient's relatives because those relatives do not experience any special benefit.¹³⁷ Rather, society as a whole benefits from alleviation of the poverty and dependence produced by the complex intermeshing of economic, social and psychological causes.¹³⁸

history, while asserting an interest in all children, identifies the benefits of the statute only in terms of its effect on AFDC:

The Committee believes that all children have the right to receive support from their fathers. The Committee bill . . . is designed to help children attain this right including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S REP. NO. 93-1356, *supra* note 5, at 9206.

133. The legislative history explicitly states that the primary purpose of the bill is to obtain parental support for AFDC recipients, S. REP. NO. 93-1356, *supra* note 5, at 9218, although non-welfare families can use the Parent Locator Service upon payment of a fee. Social Services Amendments of 1974, 42 U.S.C.A. § 654(6)(B) (Pamphlet No. 1, 1975).

134. 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964).

135. tenBroek, *supra* note 3, pt. 3, 614, at 640 (1965).

136. Tully, *supra* note 8, at 44.

137. tenBroek, *supra* note 3, pt. 3, 614, at 641. Professor tenBroek notes that justifying relative responsibility provisions as attempts to save welfare dollars does not avoid the *Kirchner* reasoning. That justification "can accurately be understood . . . only as a qualification upon a larger and more affirmative purpose of which it is a part, the purpose of maintaining the poor and caring for them in their poverty. . . . Responsibility of relatives provisions are, therefore, a publicly created and enforced method of raising money to achieve a public purpose—caring for the poor." *Id.*

138. *Id.* at 641-42.

Since the purpose of the Social Security Act is "to promote the general welfare,"¹³⁹ and since *Kirchner* could apply equally to public aid other than the institutional treatment of the mentally ill,¹⁴⁰ it can be argued that NOLEO provisions constitute an attempt to charge a specific class with the costs of public programs when the members of the class do not receive a special benefit. *Kirchner*, however, has not been so broadly construed. Subsequent California cases have held *Kirchner* applicable only when persons from whom support is sought are not liable for that support under any statute other than the welfare statute.¹⁴¹ Since fathers are liable for support both under NOLEO provisions and under domestic relations statutes,¹⁴² they would retain their support responsibilities despite *Kirchner* and its progeny.

C. Privacy

1. General Principles and Precedents

The privacy argument, applied to NOLEO, is that compelled disclosure of a putative father's name invades the mother's right to maintain intimate relationships without state intrusion.¹³⁴ The scope of the right to privacy is uncertain,¹⁴⁴ however, and decisions of the Supreme Court do not provide clear constitutional precedent for the recipient mother's argument.¹⁴⁵ Nevertheless, two categories of privacy cases are relevant to NOLEO—those dealing with raising children and those dealing with contraception and abortion.

139. Social Security Act of 1935, Preamble, 49 Stat. 620.

140. tenBroek, *supra* note 3, pt. 3, 614, at 639.

141. *E.g.*, County of Alameda v. Espinoza, 243 Cal. App. 2d 534, 52 Cal. Rptr. 480 (Dist. Ct. App. 1966); County of Alameda v. Kaiser, 238 Cal. App. 2d 815, 48 Cal. Rptr. 343 (Dist. Ct. App. 1965).

142. *E.g.*, 29A N.Y. FAMILY COURT ACT § 413 (McKinney 1963).

143. NOLEO challenges, prior to the 1974 Amendments, were decided on statutory grounds, leaving the constitutional privacy issues unresolved, *E.g.*, Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970).

144. Discussions of privacy often deal with tort concepts rather than purely constitutional questions. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 802-18 (4th ed. 1971); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

145. Privacy cases often involve other constitutional elements, such as search and seizure, obscenity, and freedom of association. Because of the presence of these other elements, the cases are only nominally "privacy" cases and therefore do not support a privacy argument against NOLEO.

A right to privacy defense, both in obscenity, United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49

Supreme Court decisions have recognized the right of parents to direct their children's upbringing.¹⁴⁶ Based upon these decisions the argument might be made that a mother has the right to direct the upbringing of her children, including the right to decide whether their support will come from their father or from the state. Such decisions, however, dealt with situations in which the state's proper concern was being met by independent parental action.¹⁴⁷ NOLEO is

(1973), and search and seizure cases, *e.g.*, *Stanley v. Georgia*, 394 U.S. 557 (1969), acknowledges the sanctity of the home as the substantive right protected. ". . . *Stanley* depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home. Three concurring Justices indicated that the case could have been disposed of on Fourth Amendment grounds without reference to the nature of the materials. *Stanley v. Georgia*, *supra*, at 569 (STEWART, J., joined by BRENNAN and WHITE, J.J., concurring)." *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 126 (1973). Since NOLEO does not involve a physical invasion of the home, such cases are of no precedential value in a right to privacy argument against NOLEO requirements.

The right to freedom of association has been recognized and was protected in two major cases involving the NAACP, a factor rendering the applicability of those cases to NOLEO dubious. *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958). Both cases recognized and protected forms of association that "pertain to the social, legal and economic benefit of the members." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), *citing NAACP v. Button*, 371 U.S. 415, 430-31 (1963). It is evident that personal relationships were not the kind of association contemplated by the NAACP cases. Having its basis in the first amendment, the right of association is closely related to explicitly protected rights of speech and assembly, and contemplates a group. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

The Supreme Court's recent decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), undercuts application of right of association-privacy arguments to NOLEO. *Boraas* upheld a zoning ordinance that limited occupancy of single-family residences to no more than two unrelated persons. The Court rejected association and privacy arguments because a "family" could "entertain whomever it likes," 416 U.S. at 9, and held it within the police power to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U.S. at 9. NOLEO provisions inhibit freedom of association even less than the zoning provision in *Boraas*. Welfare mothers can live with "whomever they like," but the state's interest in promoting "family values" will justify intrusion into that life-style to the extent necessary for securing paternity information.

146. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (statute requiring children of certain ages to attend only public schools "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (statute prohibiting the teaching of languages other than English interfered with "the power of parents to control the education of their own").

147. In *Pierce* the children were receiving a comparable education in private schools. In *Meyer* school children were taught English in addition to German, so the state's interest in a literate electorate was served.

easily distinguished. A mother's reliance on welfare drains the state's fiscal resources. In addition, permitting a mother to choose welfare frustrates the state's interest in enforcing parental support duties. Since the Supreme Court does not recognize unlimited parental authority, parents' childrearing preferences, and hence their privacy, must yield to a sufficiently strong state interest.¹⁴⁸ It appears unlikely that courts will thwart legislative attempts to enforce the parental duty to support one's children, as reflected in NOLEO, merely to protect a mother from the embarrassment of revealing the name of her children's father.

The second category of constitutional privacy cases includes the contraception¹⁴⁹ and abortion¹⁵⁰ decisions. The contraception cases protect the privacy of the intimate relationship between a man and a woman, regardless of marital status.¹⁵¹ In NOLEO an intimate relationship is not involved since the situation arises only when the relationship has been broken. It can be argued, however, that NOLEO hampers or destroys opportunities to re-establish the relationship between parents of the child.¹⁵² Yet this argument overlooks a legitimate state interest in securing parental support, which the courts would likely view as outweighing speculative chances for reconciliation.¹⁵³

148. *Prince v. Massachusetts*, 321 U.S. 158 (1944), involved a guardian who permitted her ward to sell religious literature on the streets based upon a bona fide belief that such activity was a prerequisite to spiritual salvation. Despite the fundamental nature of the free exercise of religion, the Court held that the state could prohibit the child's employment.

149. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

150. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

151. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). See also *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

152. See text at notes 7-10 *supra*.

153. While recognizing that the right of privacy has "some extension" into the areas of marriage, procreation, contraception, family relationships and child rearing, *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), balanced the burdens faced by a woman to whom abortion is unavailable against asserted state interests in regulating access to abortion. The holding, requiring unfettered access to

The application of established privacy analysis would thus be of no avail to a welfare recipient challenging NOLEO.¹⁵⁴

2. Judicial Treatment of Privacy Arguments

Courts have not generally been required to decide constitutional privacy arguments because attacks on state NOLEO-type provisions have been decided on statutory grounds.¹⁵⁵ A privacy challenge presented in *Doc v. Norton*,¹⁵⁶ however, was analyzed in terms of power to compel testimony.¹⁵⁷ That power is limited only by the protection against self-incrimination, and since both the mother and putative father are

abortions during the first trimester of pregnancy, turned less on the woman's interests than on a lack of compelling state interests during those first months:

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus The situation therefore is inherently different from marital intimacy, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. . . . It is reasonable and appropriate for a State to decide that at some point in time another interest, that of the health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Id. at 159.

154. One writer has argued that application of existing contraception-abortion principles to NOLEO-type situations is improper:

[U]se of the constitutional right of privacy to protect the individual when the question is secrecy and control over information rather than a right of autonomous decision serves only to confuse the issue and to make the "right of privacy" more amorphous than it already is. Whatever the merits of using the term "privacy" to denominate what is essentially a limited right of autonomy, the courts would be well advised to treat various kinds of "private" interests differently and to use *Griswold* and *Roe* only when autonomy is involved. Until and unless the Supreme Court demonstrates an inclination to extend constitutional protection to the qualitatively different forms of "privacy" involved in disclosure cases, the two issues should be kept clearly separated by lower courts.

Note, *On Privacy: Constitutional Protection for Personal Liberty*, *supra* note 84, at 771-72. The writer advocates a limited return to substantive due process concepts, to the extent of requiring "that disclosures must in fact serve a valid governmental purpose and that all of the information requested must be relevant to the accomplishment of that purpose." *Id.* at 772 n.660. For a case of the type to which the writer refers see *Shulman v. New York City Health & Hosps. Corp.*, 70 Misc. 2d 1093, 335 N.Y.S.2d 343 (Sup. Ct. 1972), *vacated & remanded*, 41 App. Div. 2d 714, 341 N.Y.S.2d 242, *judgment reinstated*, 75 Misc. 2d 150, 346 N.Y.S.2d 920 (Sup. Ct. 1973).

155. See cases cited note 27 *supra*. But see *Saiz v. Goodwin*, 450 F.2d 788 (10th Cir. 1971); *Doe v. Schmidt*, 330 F. Supp. 159, 163 (E.D. Wis. 1971), in which constitutional privacy arguments were viewed as meritorious.

156. 365 F. Supp. 65 (D. Conn. 1973), *prob. juris. noted sub nom. Roe v. Norton*, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974). See text at notes 118-29 *supra*.

157. 365 F. Supp. at 75-78.

granted immunity from prosecution based upon their disclosures,¹⁵⁸ the court found that the statute did not unduly invade the privacy of the individuals involved. The court sanctioned disclosure despite the possibility of "those situations in which the testimony sought to be elicited may prove embarrassing, or otherwise impinges upon the sensitivities of the witness whose testimony is sought."¹⁵⁹ It is apparent however, that a legitimate judicial treatment of the right to privacy cannot be framed in self-incrimination terms; the former does in fact deal with embarrassments and sensitivities, while the latter does not.

Although the courts will be the ultimate balancers of the personal and state interests, it is submitted that NOLEO provisions will prevail in the absence of a substantive examination of the state's alleged interests. If, however, courts question the reasonableness of the state's arguments, they will likely discover that disclosure provisions do not make fathers more responsible, benefit deserted children, or save state welfare money.¹⁶⁰ Substantive examinations of asserted state interests are occurring in equal protection cases.¹⁶¹ It should be essential in all cases that governments be required to assert legitimate, provable interests before constitutional guarantees of any nature are subordinated.

CONCLUSION

NOLEO is a manifestation of the general dissatisfaction with the welfare system—its increasing rolls and increasing costs. As disenchantment grows, attempts to reverse or slow the trend proliferate. As each step in turn proves unsuccessful, the legislatures vainly seek to close the gaps in welfare abuse and make their theories work. But NOLEO has been part of federal law for a quarter of a century and fathers are still abandoning their children. That is a great tragedy in itself. Equally tragic is our inability or unwillingness to examine the theories underlying our laws. Instead we blindly pursue a course already begun in the vain belief that it is the details that foil us rather than our basic premises.

158. *Id.* at 76 nn.15-16.

159. *Id.* at 75.

160. *See* text at notes 5-19 *supra*.

161. Gunther, *supra* note 124, at 17-24.

COMMENTS

