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1974 Developments in Welfare Law Aid to Families with Dependent Children

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1974 DEVELOPMENTS IN WELFARE LAW—AID TO FAMILIES WITH DEPENDENT CHILDREN

In a year marked by a shrinking national economy and pleas from public officials for reduced welfare expenditures,[1] the federal government exhibited a mixed response to state efforts to pare from their welfare rolls recipients of Aid to Families with Dependent Children (AFDC). State devices to narrow the scope of benefits included restrictive legislation and regulations designed to limit the class of eligible recipients,[2] reduce error and fraud,[3] disregard actual needs of potential recipients in favor of statistical averages,[4] and compel recipients to assist in locating alternative sources of support.[5] These efforts were often met by judicial activity to protect AFDC recipients from the consequences of financial and administrative exigencies,[6] which in turn was countered by restrictive legislative and administrative action by the federal government.[7] This Note surveys these 1974 developments in the AFDC program.[8]

I

CONTROL OVER STATE ADMINISTRATION OF AFDC PROGRAMS

There were significant developments in 1974 in federal efforts to reduce error and fraud in payments channeled through federally subsidized welfare programs. By passage and implementation

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[1] N.Y. Times, July 3, 1974, at 35, col. 1; *id.*, June 4, 1974, at 22, col. 8; *id.*, April 5, 1974, at 74, col. 5, 8; *id.*, March 31, 1974, at 22, col. 4; *id.*, March 6, 1974, at 15, col. 4.

[2] *See* notes 56-85 and accompanying text *infra*.

[3] *See* notes 9-19 and accompanying text *infra*.

[4] *See* notes 20-55 and accompanying text *infra*.

[5] *See* notes 86-124 and accompanying text *infra*.

[6] *See, e.g.*, Van Lare v. Hurley, 43 U.S.L.W. 4592 (U.S. May 19, 1975); Shea v. Vialpando, 416 U.S. 251 (1974); Alcala v. Burns, 494 F.2d 743 (8th Cir. 1974), *rev'd*, 95 S. Ct. 1180 (1975); Shirley v. Lavine, 365 F. Supp. 818 (N.D.N.Y. 1973), *aff'd per curiam sub nom.* Lascaris v. Shirley, 95 S. Ct. 1190 (1975); Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), *prob. juris. noted sub nom.* Roe v. Norton, 415 U.S. 912 (1974) (No. 73-6033); Uhrovick v. Lavine, 43 App. Div. 2d 481, 352 N.Y.S.2d 529 (3d Dep't), *aff'd mem.*, 35 N.Y.2d 892, 324 N.E.2d 360, 364 N.Y.S.2d 890 (1974).

[7] Act of Jan. 4, 1975, Pub. L. No. 93-647, 88 Stat. 2337 (1975) (codified in scattered sections of 42 U.S.C.); 45 C.F.R. § 233.10 (1974); 39 Fed. Reg. 37,195, *amending* 45 C.F.R. § 205.40 (1974); 39 Fed. Reg. 37,195, *amending* 45 C.F.R. § 205.41 (1974); 45 C.F.R. § 205.10 (1974); *id.* § 206.10.

[8] The following survey parallels in format and serves to update *Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859 (1974).

of new regulations,[9] HEW attempted to improve quality control over administration of the AFDC program. The Department set stringent standards for allowable state errors in such areas as the provision of assistance to ineligibles and the overpayment of benefits to eligible recipients.[10] Should states exceed these tolerance levels, automatic financial penalties will be imposed.[11]

When these quality control standards were first proposed, there was strong negative reaction against the harshness of the penalties and the potential infringement on the due process rights of recipients.[12] Nevertheless, with slight modifications,[13] the administrative regulations were adopted, and there is some evidence that they are achieving their desired effect of reducing unauthorized expenditures and diminishing the number of ineligible recipients.[14]

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[9] 39 Fed. Reg. 37,195, *amending* 45 C.F.R. §§205.40-.41 (1974) (quality control and reduction in payment error); 45 C.F.R. § 205.10 (1974) (requirements for hearings); *id.* § 206.10 (application and determination of eligibility); *id.* § 233.10 (coverage and eligibility).

[10] States must reach a target of a 3% tolerance level for ineligibility, a 5% tolerance level for overpayments, and a 5% tolerance level for underpayments. Tolerance level, for purposes of the regulation, is the percentage of cases in error. If we presume a "base period error rate" calculated from the periods April 1, 1973 to September 30, 1973 and January 1, 1974 to June 30, 1974, the reduction in error must meet the following schedule:

> (i) By December 31, 1974, one-half of the difference between the base period error rates and the 3 and 5 percent tolerance levels; and
>
> (ii) By June 30, 1975, all of the difference between the base period error rates and the 3 and 5 percent tolerance levels. . . .

39 Fed. Reg. 37,196, *amending* 45 C.F.R. § 205.40 (1974).

[11] 39 Fed. Reg. 37,195, *amending* 45 C.F.R. § 205.41 (1974), provides that if a state does not meet its target error rates, a proportion of the federal financial participation due to the state will be withheld.

[12] "As originally proposed, the regulations would have excluded from Federal financial participation . . . *all* expenditures for payments for ineligible cases and overpayments for eligible cases . . . ." 38 Fed. Reg. 8743 (1973) (emphasis added).

In addition to expressing a concern about financial penalties, responses to the proposed regulations governing fraud cases questioned whether the regulations conformed to constitutional due process requirements enunciated by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970). The rule initially proposed would have dispensed with the requirement that timely notice be given before suspension or termination of probable fraud cases. Because of *Goldberg's* requirement that a recipient be granted a pretermination notice and evidentiary hearing, federally-aided programs generally provide for a 10-day notice to a recipient. HEW noted the special need to move quickly in cases of probable fraud and modified the new regulation to provide for a 5-day notice. 45 C.F.R. § 205.10(a) (4) (iv) (1974).

[13] In addition to changing the notice requirement in cases of probable fraud (*see* note 12 *supra*), HEW modified the quality control section to extend the base period for determining error rates by six months. 39 Fed. Reg. 37,195 (1974).

[14] In the first six months of 1974, the AFDC benefits of 17,500 ineligible families were terminated. A federal subsample to check on quality control found 9.7% ineligible recipients, 21.7% overpayments, and 8.1% underpayments. N.Y. Times, Oct. 19, 1974, at 34, col. 1. Although the total number of families receiving AFDC benefits was at its highest in

In addition to these administrative controls, new HEW regulations clarified the scope of permissible state discretion to establish coverage and conditions of eligibility for financial assistance.[15] Although these regulations did not go as far as some states would have liked, within the confines of constitutional limitations, standards have been broadened.[16] States are permitted to impose narrower limits on public assistance coverage than those provided in the Social Security Act only where the Act or its legislative history authorizes such limitations.[17] However, states may now impose upon applicants conditions that result in the termination or denial of benefits "if such conditions assist the States in the efficient administration of its public assistance programs, or further an independent State welfare policy, and are not inconsistent with the provisions and purposes of the Social Security Act."[18] Thus, although it appears that states may not limit the class of eligible recipients beyond the federal mandate, they may terminate or deny aid to individual recipients with greater latitude than in the past.[19]

II

AFDC Eligibility Based on Need

Eligibility for the AFDC program is based on need, a standard which is derived from the level of a household's officially calculated income and resources.[20] In the past, the Social Security Act has been interpreted to require that states determine eligibility by considering the actual level of income and resources available to a potential recipient.[21] However, to improve administrative effi-

September 1974 (3,222,000), the total number of recipients (children and parent(s) or caretaker relative(s)) was down from a peak reached in 1972. In December 1972 11,065,000 persons received AFDC benefits. By September 1974 this number was reduced to 10,796,000. 38 Soc. Sec. Bull., March 1975, at 42, Table M-31.

[15] 45 C.F.R. § 233.10 (1974).

[16] These new regulations appear to comply with standards for state discretion articulated by the Supreme Court in New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973). *See* notes 76-79 and accompanying text *infra*.

[17] 45 C.F.R. § 233.10(a)(1)(ii)(A) (1974).

[18] *Id.* § 233.10(a)(1)(ii)(B).

[19] The new regulation appears to be aimed at endorsing state procedures for ensuring against welfare fraud, such as the photo identification procedure used in New York City, and the criminal and civil sanctions provided in Connecticut's requirement of information disclosure about absent parents. Conn. Gen. Stat. Ann. § 52-440(b) (Supp. 1975). *See* note 95 *infra*.

[20] 42 U.S.C. §§ 601-10 (1970), especially § 602(a)(7); 45 C.F.R. §§ 233.20, 233.90 (1974).

[21] *See, e.g.*, Lewis v. Martin, 397 U.S. 552 (1970).

ciency,[22] or in an effort to regulate the behavior of recipients,[23] many states have adopted procedures that embody presumptions of availability, without regard to whether the funds are actually available to potential recipients.[24] In 1974, various presumptions were invalidated in decisions requiring the states to comply with the general requirement of actual determination of availability.

A. *Lodgers*

In 1973 there were two federal court challenges[25] to the New York State regulations[26] that provided for a pro rata reduction in the AFDC rental stipend if there was a lodger present in an AFDC household.[27] In both instances, the regulations were declared invalid as contrary to the Social Security Act and violative of the supremacy clause.[28] By requiring a pro rata reduction in the rental stipend, the regulations conclusively presume that a lodger is contributing to a family's income, whether or not he actually makes such a contribution. The Supreme Court has found this type of presumption impermissible.[29]

The Supreme Court in *Van Lare v. Hurley*[30] held that the

[22] Vialpando v. Shea, 475 F.2d 731, 735 (10th Cir. 1973), *aff'd*, 416 U.S. 251 (1974).

[23] *See Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 865 & n.41 (1974).

[24] For an extensive listing of cases in different areas of the law in which such presumptions have been invalidated, see 43 FORDHAM L. REV. 150, 154 & n.29 (1974). See also Note, *1974 Developments in Welfare Law—The Supplemental Security Income Program*, 60 CORNELL L. REV. 825, 851-52 (1975), for an analysis of the principle of income attribution as applied to SSI recipients.

[25] Hurley v. Van Lare, 365 F. Supp. 186 (S.D.N.Y. 1973) and Taylor v. Lavine, [1972-1974 Transfer Binder] CCH Pov. L. REP. ¶ 18,046 (E.D.N.Y. 1973). The cases were consolidated and reversed on appeal, Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974), *rev'd sub nom.* Van Lare v. Hurley, 43 U.S.L.W. 4592 (U.S. May 19, 1975).

[26] 18 NYCRR 352.30(d) (Dec. 31, 1974) (recipient's shelter allowance reduced if the recipient houses a noncontributing "lodger"); 18 NYCRR 352.31(a)(3)(iv) (Oct. 31, 1974) (male living with a female recipient, but not married to her, treated as a "lodger"). A lodger is defined in the regulations as a person not legally responsible for the support of the aided recipient. 18 NYCRR 352.30(d) (Dec. 31, 1974). The pro rata reduction in shelter allowance is enforced if the lodger does not contribute at least $15 per month to the household. *Id.*

[27] In the federal court actions, the state regulations in question were found to be inconsistent with HEW regulations (45 C.F.R. § 233.90(a) (1974)). *See, e.g.*, 365 F. Supp. at 195. In a separate state court action, the state regulations were also found to violate the HEW regulations. Battle v. Lavine, 44 App. Div. 2d 307, 354 N.Y.S.2d 680 (2d Dep't 1974).

[28] The court in *Hurley* based its decision on the cases of King v. Smith, 392 U.S. 309 (1968), and Lewis v. Martin, 397 U.S. 552 (1970). *Lewis* held that AFDC was available to children deprived of support of a "parent." Parents are defined for purposes of the Social Security Act as only those persons with a legal duty of support. 42 U.S.C. § 606(a) (1970). *King* held that a state could only consider such income as was actually available for current use.

[29] 365 F. Supp. at 194-95, *citing* King v. Smith, 392 U.S. 309 (1968) and Lewis v. Martin, 397 U.S. 552 (1970).

[30] 43 U.S.L.W. 4592 (U.S. May 19, 1975).

district courts' invalidation of the regulations was correct. The regulations conflict with the Social Security Act insofar as they assume that the nonpaying lodger is contributing to the welfare household, without inquiry into whether he in fact does so.[31]

The regulations had also been attacked on constitutional grounds. A district court had found they created an irrebuttable presumption in violation of the due process clause.[32] The lower

[31] On appeal, the two district court cases (*see* note 25 *supra*) had been reversed by the Second Circuit. Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974). The court of appeals rejected the district courts' finding of a statutory conflict and said that New York's regulations were not inconsistent with the Social Security Act:

> The New York regulation merely determines the level of payment to the eligible family on the basis of the presence or absence of a lodger in the recipient household. This method of computing shelter allowance is permitted under the King v. Smith rationale if it is not designed to vindicate a moral interest unrelated to the need of the family, and if it realistically determines the level of need.

Id. at 1214-15. The court did not think that the regulations created a prohibited conclusive presumption:

> The regulations imply only that the lodger's presence evidences the recipient family's diminished need for housing space . . . .
>
> [T]he New York regulations are based on the fair inference from the presence of the lodger . . . that the AFDC-recipient family actually needs less space . . . than it is paying rent for.

Id. at 1215. Tbus, the pro rata reduction was said to reflect the recipient's actual need.

Judge Oakes, vigorously dissenting, argued that the majority's labeling of the presumption as a "fair inference" did not change its conclusive nature because the regulations precluded rebuttal. In addition, he found a "moral interest" to be underlying the regulations since the state "seeks to punish the welfare family for using its own resources in a manner of which the Commissioner disapproves" whenever the AFDC bousehold extends shelter to a lodger. *Id.* at 1221. The Supreme Court in *Van Lare* rejected the reasoning of the court of appeals and reversed, invalidating the regulations on the same basis as did the district courts.

[32] The Second Circuit had remanded the district court cases to a three-judge court for consideration of the remaining constitutional issues. In Hurley v. Van Lare, 380 F. Supp. 167 (S. & E.D.N.Y. 1974), the New York regulations were once again invalidated, this time for violating the due process clause of the Constitution. The court discussed the due process violation in the following terms:

> Before reducing the shelter allowance of a recipient family because the family houses a noncontributing lodger, the state must make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter needs. If presumptions are used they must be rebuttable.

Hurley v. Van Lare, 380 F.Supp. 167, 175 (S. & E.D.N.Y. 1974) (emphasis in original). The court summarily dismissed other constitutional questions raised by the plaintiff. It found no sex discrimination (*i.e.*, although the statute made reference to a "male" lodger at one point, it was found generally to apply to "persons"), no invasion of privacy, and no deprivation of the right to free association. Although the court recognized a valid equal protection argument, it held that the classification (welfare recipients who house noncontributing lodgers versus those who do not) was appropriately related to the valid state interest of seeking to allocate scarce resources where they were most needed. The court treated this latter claim as overlapping with the due process claim. *Id.* at 176-77.

Judge Hays, who had written the Second Circuit's opinion in Taylor v. Lavine, dissented from the three-judge court decision. He asserted that the Second Circuit's reasoning in *Taylor* controlled this case and that the pro rata reduction was a valid presumption because a lodger, by necessity, must have some means of contributing to an AFDC household, even if

court found the regulations were based upon two presumptions, neither of which was universally or necessarily true.[33] The Supreme Court did not reach the constitutional question in *Van Lare.*[34] But in light of this decision, the states are again cautioned that needy children may not be deprived of welfare assistance to further some other state policy.[35]

B. *Stepfathers*

Attempts by the states to make the determination of need for an AFDC family turn upon a presumed contribution to the household by a stepfather[36] are analogous to the attribution of income or resources assumed from the presence of a lodger.[37] The cases that considered this issue in 1974 resolved the controversy by relying on principles set forth in *Lewis v. Martin,*[38] a Supreme Court case that had presumably settled this area of the law. *Lewis* held that the validity of the presumption of a contribution to an AFDC household depended upon the existence of a state law of general applicability compelling stepfathers to support their dependent children.[39] Therefore, in the absence of a stepfather's legal duty to support his children, a state could not reasonably presume that his

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his only potential resources were his own eligibility for public assistance. *Id.* at 178. This reasoning, however, ignores the requirement of the Social Security Act and of HEW regulations that only *actually* available income and resources be taken into account. 45 C.F.R. § 233.90(a) (1974).

[33] The rejected presumptions were that a recipient family able to house a noncontributing lodger (*1*) needs less space for its own use, and/or (*2*) requires less money to pay its own pro rata share of the rent. Judge Weinstein discussed at length possible factual circumstances, such as the low vacancy rate for low-rental housing, which might present an alternative interpretation of why a lodger was present and of why an AFDC family might not need less space. *Id.* at 173-74.

[34] Van Lare v. Hurley, 43 U.S.L.W. 4592 (U.S. May 19, 1975). Justice Rehnquist, dissenting, did reach the constitutional issues presented. *Id.* at 4595. He found the regulations were not constitutionally defective for the reasons cited by Judge Hays dissenting in Hurley v. Van Lare, 380 F. Supp. 167, 177 (S. & E.D.N.Y. 1974). *See* note 32 *supra.*

[35] "But States may not seek to accomplish policies aimed at lodgers by depriving needy children of benefits." 43 U.S.L.W. at 4595. Consistent interpretation in several earlier cases had led to the invalidation of regulations containing similar irrebuttable presumptions. See, *e.g.*, Roselli v. Affleck, 373 F. Supp. 36 (D.R.I. 1974), where a "flat grant" system of providing shelter allowances was rejected as violating the Social Security Act.

[36] *See generally Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 864-65 (1974).

[37] *See* notes 25-35 and accompanying text *supra.*

[38] 397 U.S. 552 (1970).

[39] *Lewis* upheld the HEW regulation, 45 C.F.R. § 203.1 (1969), now codified in essentially the same form in 45 C.F.R. § 233.90(a) (1974), requiring a state law of general applicability. The threshold issue to be resolved in these cases is the definition of "general applicability." Even in the face of a state-required stepfather support obligation, the courts must determine whether it meets this standard.

income was available and could not terminate or decrease AFDC benefits without evidence of a stepfather's actual contribution to the household.[40]

Litigation in 1974 focused upon whether relevant state laws imposed generally applicable stepfather support obligations and thus whether a presumption of stepfather support contributions was reasonable. Under this analysis, Minnesota, New Hampshire, and New York regulations requiring that a stepfather's income be considered available to an AFDC family were held contrary to HEW regulations implementing the Social Security Act because of the absence of a generally applicable duty of support.[41]

C. *Standardized Formulas: Work Expenses and Presumed Payments*

States have attempted to impose presumptions of available resources and level of need in two other areas: deductible work expenses and average family need levels. In 1974 several courts rejected these efforts as impermissibly ignoring the actual financial situation of an AFDC family.

In determining eligibility for AFDC based on the level of need, the Social Security Act requires that states "take into consideration" expenses reasonably attributable to the earning of income.[42] A principal purpose of the AFDC program is to help parents and relatives "attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection."[43] To help achieve this purpose, expenses attributable to the earning of income are disre-

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[40] 397 U.S. at 559-60. *See also* 45 C.F.R. § 233.90(a) (1974).

[41] The New York regulations, 18 NYCRR 352.31(a)(2) (Dec. 31, 1974), were found not to reflect a generally applicable duty of support by a stepfather in New York, and thus the irrebuttable presumption that he was in fact contributing was unreasonable. Uhrovick v. Lavine, 43 App. Div. 2d 481, 352 N.Y.S.2d 529 (3d Dep't), *aff'd mem.*, 35 N.Y.2d 892, 324 N.E.2d 360, 364 N.Y.S.2d 890 (1974). A case that challenged the same New York regulations in federal court resulted in a district court injunction against their enforcement on the grounds of contravention of the federal regulations (45 C.F.R. § 233.90(a) (1974)). Freda v. Lavine, 494 F.2d 107 (2d Cir. 1974). The Second Circuit vacated this decision on the grounds of federal abstention, citing the then unresolved *Uhrovick* case as indicating that New York courts were in the process of clarifying a confused statutory scheme. *Id.* at 109.

In Meagher v. Hennepin County Welfare Bd., 221 N.W.2d 140 (Minn. 1974), the Minnesota Supreme Court declared null and void the state policy of automatically reducing a family's AFDC benefits by making the mother ineligible upon her remarriage without considering her needs and those of her children. *See* MINNESOTA DEPARTMENT OF PUBLIC WELFARE, INCOME—MAINTENANCE MANUAL, IV-2224.04, *quoted*, 221 N.W.2d at 141-42. For litigation in New Hampshire, see Messier v. Zeiller, 373 F. Supp. 1198 (D.N.H. 1974).

[42] 42 U.S.C. § 602(a)(7) (Supp. III, 1973).

[43] 42 U.S.C. § 601 (1970).

garded when determining need.[44] The disregard of these expenses serves to encourage employment, while recognizing that any income produced does not eliminate entirely the need for public assistance.[45]

Some states have simplified the calculation of work expenses by establishing a standard amount to be disregarded for an employed AFDC applicant.[46] In *Shea v. Vialpando*,[47] however, the Supreme Court held that such formulas may be invalid if they create a standard work expense disregard that effectively serves as a conclusive presumption of the amount to be deducted.[48] Under the guidelines articulated in *Shea*, a standard allowance is permissible only if it also provides for individual consideration of expenses in excess of the standard.[49] The Court held that the language of the Social Security Act ("take into consideration")[50] is not satisfied by the use of a statistical average; actual expenses must be taken into account.[51]

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[44] "[O]nly such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered . . . ." 45 C.F.R. § 233.20(a)(3)(ii)(c) (1974).

[45] The legislative history of 42 U.S.C. § 602(a)(7) (Supp. III, 1973) supports this interpretation.

> Under existing law if these work expenses are not considered in determining need, they have the effect of providing a disincentive to working since that portion of the family budget spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter.

S. REP. No. 1589, 87th Cong., 2d Sess. I8 (1962). This legislative history is cited as persuasive in Shea v. Vialpando, 416 U.S. 251 (1974).

[46] In Colorado, a standardized figure of $30 per month for work expense allowances was reached by taking a statistical average of work expenses incurred by every recipient in the AFDC program during a one year period. 416 U.S. at 255 n.2. *See also Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 862 (1974).

[47] 416 U.S. 251 (1974).

[48] The Court held that Congress, in enacting 42 U.S.C. § 602(a)(7) (Supp. III, 1973), had directed that no limitation except reasonableness be placed upon the recognition of expenses attributable to the earning of income. It was therefore contrary to the Social Security Act to impose a fixed work expense allowance that did not permit deductions for expenses in excess of the standard. 416 U.S. at 260.

[49] 416 U.S. at 265.

[50] 42 U.S.C. § 602(a)(7) (Supp. III, 1973).

[51] [I]t seems inescapable that whatever treatment is accorded income must also be extended to expenses attributable to the earning of income. And, it has consistently been the practice to compute the income of an AFDC applicant on an *individual basis*.

Shea v. Vialpando, 416 U.S. 251, 260 (1974) (emphasis added). Colorado's use of a standardized employment expense disregard was declared invalid as being in conflict with the Social Security Act. Although the Court decided this case on the grounds of statutory conflict, the decision was rooted in the due process argnment against conclusive presumptions. *See* notes 31-35 and accompanying text *supra*. In two other cases related to deduction of work expenses, regulations were invalidated because of their conflict with the Social Security Act. In Rivet v. Minter, 2 CCH Pov. L. REP. ¶ 20,038 (D. Mass. Aug. 1, 1974), a

Courts in 1974 rejected several other state procedures that were based on presumptions of available income and which ignored actual availability.[52] In a key decision, the Fifth Circuit declared invalid a Georgia welfare department policy which averaged the income available to children who were the intended beneficiaries of court-ordered child support.[53] Because these child support payments were often sporadic and unpredictable, the policy was found to be in conflict with federal regulations[54] that require determination of AFDC eligibility to be based on actually available child support payments rather than potential payments. This decision, and others, clearly suggest that the courts will continue to implement the Social Security Act by consistently requiring that states take into account a recipient's actual need when determining his eligibility.[55]

III

NONNEED FACTORS OF ELIGIBILITY—AID TO THE UNBORN

The question of whether unborn children are eligible for AFDC benefits was extensively litigated in 1974.[56] Of the six circuits

section of the *Massachusetts Public Assistance Manual* was held invalid for denying AFDC recipients enrolled in a program under an amendment to the Manpower Development & Training Act of 1962, Act of Nov. 7, 1966, Pub. L. 89-792, § 4(c), 80 Stat. 1435 (repealed 1973), a full disregard for a training incentive and expense allowance. In Dunbar v. Weinberger, 2 CCH Pov. L. REP. ¶ 20,039 (D. Mass. Aug. 7, 1974), Massachusetts regulations denying a full disregard of income earned as a work incentive for participating in a Work Incentive Program (WIN) were also invalidated. The court stated that a recipient could not be refused AFDC benefits simply because of participation in a federal work incentive program. *See also* Conover v. Hall, 11 Cal. 3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974) ($50 standard deduction for work expenses held invalid).

[52] Two cases rejected the use of "flat grants" where particular needs, varying materially from the average, were disregarded. Clark v. New Hampshire Dep't of Health & Welfare, [1972-1974 Transfer Binder] CCH Pov. L. REP. ¶ 18,667 (N.H. Feb. 20, 1974); Roselli v. Affleck, 373 F. Supp. 36 (D.R.I. 1974). *See* note 35 *supra*.

[53] Barron v. Bellairs, 496 F.2d 1187 (5th Cir. 1974).

[54] 45 C.F.R. § 233.20(a)(3)(ii)(c) (1974).

[55] *See* note 52 *supra*.

[56] This question was answered in the affirmative in five of the six circuits where it was raised. *See* note 57 *infra*. In agreement with the majority of the circuits were Morris v. Houston, 2 CCH Pov. L. REP. ¶ 19,945 (W.D. Mich. Oct. 18, 1974); Reilley v. Wohlgemuth, 2 CCH Pov. L. REP. ¶ 19,681 (E.D. Pa. July 8, 1974); Wheling v. Westby, 2 CCH Pov. L. REP. ¶ 19,252 (D.S.D. Jan. 14, 1974); Whitfield v. Minter, 368 F. Supp. 798 (D. Mass. 1973); Boines v. Lavine, 44 App. Div. 2d 765, 354 N.Y.S.2d 252 (4th Dep't), *cert. denied*, 419 U.S. 1040 (1974); Chillous v. Lavine, [1972-1974 Transfer Binder] CCH Pov. L. REP. ¶ 18,556 (Sup. Ct. N.Y. Feb. 6, 1974); Murphy v. Lavine, [1972-1974 Transfer Binder] CCH Pov. L. REP. ¶ 18,555 (Sup. Ct. N.Y. Jan. 30, 1974).

In accord with the minority circuit holding that an unborn child was *not* a child for

which addressed this question, five held that AFDC benefits should be extended to the unborn.[57] Such a finding requires that the unborn must be included when benefit levels and eligibility for an AFDC household are determined. These decisions raised questions of constitutional interpretation as well as of possible conflict between state regulations and the Social Security Act. The Supreme Court considered these issues in *Burns v. Alcala*.[58]

A. *Statutory Argument*

The *Burns* decision, in construing the Social Security Act[59] and HEW regulations,[60] rejected the contention that the unborn child was mandatorily eligible for AFDC benefits under federal law. In reversing the Eighth Circuit's decision granting aid, the Supreme Court examined the major arguments which had been made in the various circuits for inclusion of the unborn.

Before the *Burns* case, HEW regulations interpreting the Act allowed a state an option to provide AFDC benefits to unborn children if they would be eligible for such benefits once they were born.[61] In accord with the longstanding rule of judicial interpretation, that the opinion of the agency charged with administering a statute should be given considerable weight,[62] courts had generally

purposes of AFDC and thus not eligible for aid were Mixon v. Keller, 372 F. Supp. 51 (M.D. Fla. 1974) and Poole v. Endsley, 371 F. Supp. 1379 (N.D. Fla. 1974).

[57] Alcala v. Burns, 494 F.2d 743 (8th Cir. 1974), *rev'd*, 95 S. Ct. 1180 (1975), extended aid to unborn children as did Carver v. Hooker, 501 F.2d 1244 (1st Cir. 1974), Wilson v. Weaver, 499 F.2d 155 (7th Cir. 1974), and Doe v. Lukhard, 493 F.2d 54 (4th Cir. 1974), which have been subsequently vacated and remanded by the Supreme Court for further consideration in light of *Burns*. 95 S. Ct. 1440-41 (1975). The fifth case in this majority is Parks v. Harden, 504 F.2d 861 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3442 (U.S. Jan. 17, 1975) (No. 74-877). Only the Second Circuit held to the contrary. Wisdom v. Norton, 507 F.2d 750 (2d Cir. 1974).

[58] 95 S. Ct. 1180 (1975).

[59] The Social Security Act defines dependent child as

> a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and . . . a student regularly attending a school . . . .

42 U.S.C. § 606(a) (1970).

[60] HEW regulations provide for federal subsidy of payment to an unborn child. Federal financial participation is available in:

> . . . .
>
> (ii) Payments with respect to an unborn child when the fact of preguancy has been determined by medical diagnosis;

45 C.F.R. § 233.90(c)(2)(ii) (1974).

[61] *Id.*

[62] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

placed the unborn in the category of "dependent children" when states chose to include them.[63]

However, lower courts rejected the optional nature of the inclusion.[64] They "seriously question[ed] the right of HEW, as opposed to the unquestioned right of Congress, to decide what benefits are optional."[65] These courts held that states had no option to deny such benefits if the unborn were considered eligible for benefits under federal AFDC standards.[66] However, because the Supreme Court decided in *Burns* that federal standards do not *require* provision of aid to the unborn, the states may again have the

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[63] *See, e.g.*, Wilson v. Weaver, 499 F.2d 155 (7th Cir. 1974). "Since 1941 HEW and its predecessors have consistently interpreted the Act so as to provide benefits to unborn children who in all other aspects save birth qualify . . . ." *Id.* at 157. The Supreme Court rejected this argument in Burns v. Alcala, 95 S. Ct. 1180, 1186 (1975). The Court referred to a brief submitted on behalf of HEW in the *Burns* case which disavowed this interpretation of its past allowance of aid to the unborn. HEW took the position that its consistent past history of aid to unborn children was not based upon their inclusion in the federal eligibility standards as dependent children. Rather, this aid was permitted by the agency's general rule-making power, 42 U.S.C. § 1302 (1970), and was intended, along with other provisions of that subsection, to provide temporary aid at the option of states to individuals in the process of gaining or losing aid under the AFDC program. 95 S. Ct. at 1186.

Justice Marshall, dissenting in *Burns*, vigorously contested HEW's explanation of their past practices. Calling the new HEW position an "inventive solution," and a "late-blooming tactical switch," Marshall asserted that HEW changed its interpretation only after lawsuits had been initiated to compel payments to the unborn in states which had not granted such benefits in their AFDC plans. "I would view somewhat skeptically the agency's assertion that it has never deemed unborn children to be within the eligibility provisions of § 406(a)." 95 S. Ct. at 1189. Thus, Justice Marshall would find support for inclusion of the unborn in the past and consistent interpretation of the agency charged with administering the statute.

[64] Wisdom v. Norton, 507 F.2d 750, 752 (2d Cir. 1974); Carver v. Hooker, 501 F.2d 1244, 1248 (1st Cir. 1974); Alcala v. Burns, 494 F.2d 743, 746 (8th Cir. 1974); Doe v. Lukhard, 493 F.2d 54, 60 (4th Cir. 1974). The Supreme Court in *Burns* refused to deal with the propriety of the optional nature of this inclusion since no challenge to this position was briefed or argued before the Court. 95 S. Ct. at 1187.

[65] Alcala v. Burns, 494 F.2d 743, 746 (8th Cir. 1974).

[66] As elaborated in several Supreme Court decisions, the test for determining eligibility for AFDC benefits is:

> [I]n the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

Townsend v. Swank, 404 U.S. 282, 286 (1971). Certain lower courts had interpreted this language as creating a presumption of inclusion where the Act was ambiguous. In *Burns*, however, the Court explicitly indicated such a view was contrary to ordinary principles of statutory interpretation. The Court held that *Townsend*

> establish[ed] only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional. The method of analysis used to define the federal standard of eligibility is no different from that used in solving any other prohlem of statutory construction.

95 S. Ct. at 1184.

option to make such benefits available under their power to grant temporary assistance.[67]

The circuits that required the mandatory granting of aid found support in the legislative history of the Social Security Act for HEW's decision to include the unborn. They noted that Congress had tacitly approved the HEW regulation allowing aid,[68] and pointed to the failure of congressional efforts in 1972 to specifically exclude the unborn from AFDC.[69] *Burns* rejected this argument, and found that both House and Senate proposals would have excluded unborn children from aid and that the failure of such a "minor provision" to be enacted was attributable only to an inability of the two houses to agree on major issues of AFDC reform.[70]

Lower courts had pointed to the purpose of AFDC as well as the legislative history of the Act when they endorsed the extension of benefits to unborn children. The courts cited the protection of needy children as the paramount goal of the AFDC program.[71] "Payments to the unborn are an appropriate, if not essential, means to that end, especially in light of the undisputed evidence . . . that pre-natal nutrition and medical care are important determinants of 'later susceptibility to disease, neurological problems and long-term learning capacity.' "[72]

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[67] *Id.* at 1187.

[68] *See, e.g.*, Wilson v. Weaver, 499 F.2d 155, 157 (7th Cir. 1974); Carver v. Hooker, 501 F.2d 1244, 1247 (1st Cir. 1974). However, some jurists did not find this interpretation of congressional silence persuasive:

> That Congress in several decades has not dealt specifically in the present context with the status of the unborn child is as consistent with the belief that the fetus was not eligible as otherwise . . . .
>
> . . . .
>
> While both houses passed bills to [exclude the unborn], because of other differences on proposed revisions of Title IV neither version became law. There was significantly, however, no disagreement on the aspect of the legislation here involved.

Wilson v. Weaver, 499 F.2d 155, 160-61 (7th Cir. 1974) (Pell, J., dissenting in part).

[69] Wilson v. Weaver, 499 F.2d 155, 157 (7th Cir. 1974).

[70] 95 S. Ct. at 1187.

> Under the circumstances, failure to enact the relatively minor provision relating to unborn children cannot be regarded as approval of HEW's practice of allowing optional benefits. To the extent this legislative history sheds any light on congressional intent, it tends to rebut the claim that Congress by silence has acquiesced in the former HEW view that unborn children are eligible for AFDC payments.

Id.

[71] King v. Smith, 392 U.S. 309, 325 (1968); Wilson v. Weaver, 499 F.2d 155, 158 (7th Cir. 1974).

[72] Carver v. Hooker, 501 F.2d 1244, 1247 (1st Cir. 1974). *See also* Wilson v. Weaver, 499 F.2d 155, 158 n.3 (7th Cir. 1974) (medical opinion as to the importance of prenatal care for the future health of the unborn child).

Burns, however, recognized a different purpose of the AFDC program.[73] The Supreme Court accepted the interpretation of the one circuit which did not support the extension of coverage to the unborn. The Second Circuit had held that the purpose of Title IV (AFDC) was to allow mothers of fatherless children to stay home and care for their dependents and that providing AFDC benefits to the unborn did nothing to further this purpose.[74] In fact, at the time of the passage of the Social Security Act, a separate title provided for prenatal and maternal care.[75]

The *Burns* decision also incorporated an additional argument against inclusion of the unborn based on a revised interpretation of appropriate standards for measuring state discretion, which was implicitly suggested by the Supreme Court's decision in *New York Department of Social Services v. Dublino*.[76] Although the case did not involve the rights of the unborn, *Dublino* is relevant because the Court distinguished a state's right to exclude from AFDC eligibility persons who were expressly included in the Social Security Act (a policy which is clearly prohibited by recent Supreme Court decisions) from a state's right to exclude those not expressly included.[77] The Court concluded that where there is no express inclusion a state may exercise its discretion not to provide benefits.[78] *Burns*

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[73] 95 S. Ct. at 1184-85.

[74] Wisdom v. Norton, 507 F.2d 750, 755 (2d Cir. 1974).

[75] Social Security Act, Title V, 42 U.S.C. §§ 701-16 (1970), *as amended*, 42 U.S.C. §§ 701-16 (Supp. III, 1973) (Maternal and Child Health and Crippled Children's Services). Judge Coffin, however, rejected the argument that the existence of Title V precluded the inclusion of the unborn under Title IV:

> But Titles IV and V are qualitatively different weapons against poverty and deprivation, the latter providing medical services while the former disburses cash for improvement of the home environment. Moreover, because the medical services provided under Title V extend to born as well as unborn children, it seems incongruous that Congress would not make similar provision under Title IV. Thus, the congressional concern evidenced by Title V with respect to pre-natal care does not militate against an intention to assist the unborn through AFDC payments as well.

Carver v. Hooker, 501 F.2d 1244, 1246 (1st Cir. 1974). *See also* Wilson v. Weaver, 499 F.2d 155, 159 (7th Cir. 1974) (Pell, J., dissenting in part). The Supreme Court in *Burns* did not find the existence of Title V persuasive evidence that aid should be granted to the unborn. Rather, the Court endorsed the view of Judge Weinfeld in Wisdom v. Norton, 507 F.2d 750 (2d Cir. 1974), that "Title V is as evidence . . . of a congressional intent *not* to include unborn children under AFDC but to provide for maternity care in a different section of the statute." *Id.* at 755 n.27 (emphasis in original). *See* Burns v. Alcala, 95 S. Ct. 1180, 1186 n.10 (1975).

[76] 413 U.S. 405 (1973). *See* notes 15-19 and accompanying text *supra*.

[77] *See* note 66 *supra*.

[78] 413 U.S. at 417. A *Dublino* rationale has been used to condemn inclusion of the unborn. Wilson v. Weaver, 499 F.2d 155, 158-60 (7th Cir. 1974) (Pell, J., dissenting in part). Judge Pell would rely on the plain meaning of the word "child" to show no congressional intent to provide benefits to the unborn. He reasons that a father has no duty to support an

endorsed this reasoning and added that to deny a state the right to exclude those not specifically covered in the statute would be to create a presumption of coverage where the statute was ambiguous, contrary to general notions of statutory interpretation.[79] Although *Burns* was decided contrary to the apparent trend of the circuit courts, it did conclusively resolve the statutory issue and established that the unborn were not mandatorily eligible for benefits under federal law.

B. *Constitutional Argument*

Although the Supreme Court settled the statutory issue presented by the provision of aid to the unborn, it remanded *Burns* to the district court for consideration of the remaining constitutional questions.[80] Lower courts have dealt summarily with the equal protection questions raised by the denial of aid to unborn children.[81] The threshold equal protection issue is whether a fetus is a person for purposes of the fourteenth amendment. The Supreme Court's abortion decisions may be interpreted as proscribing the recognition of a fetus, at least in the first trimester of pregnancy, as a "human being" for purposes of constitutional protection,[82] but there has not been a definitive statement of law on this point.

A question also remains whether a distinction may rationally be drawn between unborn children and all other children when a state decides whether or not to provide benefits to the unborn.[83]

unborn child; nor can a child be deprived of parental support, as required by the statute, until there are parents, and "[n]either mother nor father is 'a parent' before a child is born."

[79] 95 S. Ct. at 1184-85. It is possible to distinguish the provision of benefits to the unborn from the Work Rules requirement upheld in *Dublino*. In *Dublino*, New York was allowed to exclude from benefits those who would not accept employment if they were able to work. 413 U.S. at 418-22. The Court found no congressional intent to expressly include applicants who fell within the Work Rules provisions. *Id.* at 418-19. It may be argued, however, that the long history of granting aid to the unborn, in accord with HEW regulations, is tantamount to an express inclusion of the unborn within the statutory scheme. *See also* note 66 *supra*.

[80] Burns v. Alcala, 95 S. Ct. 1180, 1187 (1975).

[81] "I am unaware of any court decision which has given serious consideration to a resolution of the present issue on an equal protection basis and I therefore find no necessity for addressing that contention." Wilson v. Weaver, 499 F.2d 155, 161 (7th Cir. 1974) (Pell, J., dissenting in part).

[82] Roe v. Wade, 410 U.S. 113, 158-64 (1973). "*Roe* suggests that the status of a foetus as a person for purposes of the equal protection clause may be sufficiently different from a child who is born so that the 'rational basis' test . . . may permit differential treatment." Doe v. Lukhard, 493 F.2d 54, 57 n.3 (4th Cir. 1974).

[83] Even if a fetus is not a "human being" for constitutional purposes following the abortion case, "that decision neither proscribes the recognition of a fetus as 'living' nor forbids the government to benefit the fetus." Carver v. Hooker, 501 F.2d 1244, 1246 n.2 (1st Cir. 1974).

Should a state decide not to provide such benefits, the courts must determine whether it is discriminatory to separate the unborn class from a class consisting of all children.[84] The classification must be rationally related to advancing the purposes of the Social Security Act and the AFDC program if it is not to constitute an invidious discrimination in violation of the equal protection clause of the fourteenth amendment.[85]

These constitutional issues await resolution on the remand of *Burns*. In light of the Court's reluctance to extend constitutional protection to the unborn, evidenced by the abortion decisions, it is unlikely that the Court will favor an extension of equal protection rights to them.

IV

Conditions Precedent to Eligibility—Enforcement of an Absent Parent's Support Obligation

Both legislative and judicial activity in 1974 involved the right of a state to condition AFDC eligibility upon whether a recipient assisted the state in locating an absent parent who had a legal duty to support dependent and needy children. Recent amendments to the Social Security Act have significantly increased a state's power to compel the disclosure of information relating to the location of additional sources of support for potential AFDC recipients.[86] This

[84] None of the circuits that granted aid to the unborn reached the equal protection issue. However the Second Circuit, which denied such benefits, found that the classification of unborn children and their mothers was a rational means of advancing one of the purposes of the Social Security Act, which the court interpreted as keeping relatives in the home to supervise the upbringing of children. Wisdom v. Norton, 507 F.2d 750, 757-59 (2d Cir. 1974).

[85] The standards for meeting equal protection requirements are articulated in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). If a classification does not operate to the disadvantage of some suspect class or infringe a fundamental right protected by the Constitution, it does not require strict judicial scrutiny. It must still be examined, however, to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the equal protection clause of the fourteenth amendment. *Id.* at 17.

[86] The Social Services Amendments of 1974 (Act of Jan. 4, 1975, Pub. L. No. 93-647, 88 Stat. 2337) (codified in scattered sections of 42 U.S.C.) provide that states must require, as a condition of eligibility, that applicants cooperate in the location of a person with a legal duty to support a dependent child and assign to the state any rights to such support. The amendments also impose severe financial penalties if a state fails to provide an effective plan to obtain such support. The state may lose up to five percent of its federal subsidy for child support programs for failure to implement an effective program for establishing paternity and obtaining support payments for children who seek AFDC aid. 42 U.S.C.A. §§ 602(a)(26)-(27), 603(h) (Pamph. Feb. 1975).

change in the federal statute eclipses the importance of earlier successful claims by litigants that states could not condition eligibility beyond need and dependency criteria where Congress had not done so. In previous years, states had attempted to condition the eligibility of an AFDC household upon the initiation of support proceedings or other disclosures concerning a missing parent. These attempts were struck down because they created an additional condition of eligibility, beyond need and dependency, contrary to the intent of the Social Security Act.[87]

Because of this conflict over the validity of disclosure requirements, Congress took action to clarify the situation. The Social Services Amendments of 1974[88] added specific language amending the AFDC Title to provide that the requirement of cooperation in disclosure was a federally mandated condition of eligibility for aid,[89] and that state plans for AFDC programs must include provisions to assist in obtaining any possible support from legally obligated absent parents.[90] Federal money was made available to assist in the search for additional sources of support from absent parents.[91] The amendments also provided for the creation of a "Parent Locator Service" to assist a state, court, or resident in finding absent parents.[92] The passage of this legislation moots a question which had been in the midst of litigation during 1974.

Early attempts by the states to compel disclosure of informa-

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Even prior to the 1974 amendments, the Social Security Act included several provisions relating to the location of absent parents and state efforts to obtain financial support from them. 42 U.S.C. § 602(a)(11) (Supp. III, 1973) requires states to notify local law enforcement officials of the desertion or abandonment of a child, if such desertion or abandonment would make that child a "dependent" for AFDC eligibility purposes. This is the so-called NOLEO (Notice of Law Enforcement Officials) provision. The states are also required to design a program

> 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 [also] . . . in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support . . . .

42 U.S.C. § 602(a)(17) (Supp. III, 1973) (emphasis added). Section 602(a)(18) requires states to provide for cooperative arrangements among the courts, law enforcement officials, and state agencies administering AFDC to implement § 602(a)(17).

[87] *See, e.g.*, 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).

[88] Act of Jan. 4, 1975, Pub. L. No. 93-647, 88 Stat. 2337 (codified in scattered sections of 42 U.S.C.).

[89] 42 U.S.C.A. §§ 602(a)(26)-(27) (Pamph. Feb. 1975).

[90] *Id.*

[91] 42 U.S.C.A. § 651 (Pamph. Feb. 1975).

[92] 42 U.S.C.A. § 653(a) (Pamph. Feb. 1975).

tion and other types of cooperation by AFDC recipients resulted in court decisions which held that a child's eligibility for AFDC benefits could not be conditioned upon parental conduct.[93] In response, the states modified their former approach of precluding an entire household from AFDC coverage for its failure to cooperate. The current policy simply provides for the reduction or elimination of the proportionate share of benefits that would have been allocated to the uncooperative parent or caretaker.[94] Civil and criminal sanctions are also imposed upon recalcitrants.[95]

Under this modified approach, the states maintained that the disclosure requirements were no longer impermissible conditions of eligibility, but rather were a "method of obtaining information so that actual need and therefore eligibility could be determined."[96] They further argued that the notice provisions in the Social Security Act[97] were intended to facilitate and encourage the obtaining of support from legally obligated absent parents,[98] and that Congress must have intended to give the states authority to enforce these provisions. This argument, based on legislative intent, was reinforced by the broad discretion traditionally allowed the states in implementing AFDC programs as long as no specific provisions of the Constitution or the Social Security Act were violated.[99] In the exercise of this discretion, the states contended that the modified disclosure requirements were necessary to facilitate the development of alternative programs of support for needy children and to minimize reasonably the unnecessary expenditure of public moneys.[100]

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[93] *See, e.g.*, Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal.), *aff'd mem. sub nom.* Carleson v. Taylor, 404 U.S. 980 (1971).

[94] *See, e.g.*, 18 NYCRR 369.2(f)(3)(ii)(e)(4) (1975).

[95] *See, e.g.*, CONN. GEN. STAT. ANN. § 52-440(b) (Supp. 1975) which makes failure to disclose information about the biological father of illegitimate children and failure to prosecute a paternity action subject to fine and/or imprisonment for contempt.

[96] This is the State of Utah's characterization of the relevant section of the *Utah State Department of Social Services Policy Manual* as quoted in Doe v. Rampton, 497 F.2d 1032, 1035 (10th Cir. 1974).

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

[98] Shirley v. Lavine, 365 F. Supp. 818, 821 (N.D.N.Y. 1973), *aff'd per curiam sub nom.* Lascaris v. Shirley, 95 S. Ct. 1190 (1975).

[99] But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Dandridge v. Williams, 397 U.S. 471, 487 (1970).

[100] Doe v. Norton, 365 F. Supp. 65, 73 n.10 (D. Conn. 1973), *prob. juris. noted sub nom.* Roe v. Norton, 415 U.S. 912 (1974) (No. 73-6033). Connecticut indicated that its statute was

The arguments against the imposition of disclosure requirements, even with modified sanctions, raised questions of statutory interpretation as well as the claim of violations of constitutional guarantees. On statutory grounds, it was asserted that, before the 1974 amendments to the Social Security Act, state laws and regulations requiring recipient cooperation in paternity or support actions were in violation of the Social Security Act and therefore void under the supremacy clause.[101] Potential recipients could be excluded in a manner allowed by the Social Security Act only if there were evidence of congressional intent which justified the exclusion,[102] such as legislative history. Because federal disclosure of information requirements had consistently been construed by the judiciary as not imposing an additional condition of eligibility,[103] and because Congress did not take any corrective action to alter this policy before 1974,[104] the requisite legislative intent was arguably missing. Until recently, HEW, the administrative agency charged with approving state plans, gave the federal disclosure requirements a similar interpretation. However in 1973, under pressure from New York State, HEW altered its interpretation.[105] Accordingly, new regulations permitted states to disallow maintenance payments for a parent or caretaker relative who failed to provide assistance in seeking support from a person with a legal support obligation.[106] Nevertheless, in a three-judge district court

intended to protect the state's coffers. The statute requires the state welfare administrator to establish the primary obligation of a father to support his child and to consider this support as one of the resources which the state can consider when determining AFDC eligibility. *Id.* at 80.

[101] *See* note 66 *supra.*

[102] Although Congress may condition eligibility for assistance upon new and additional requirements, as it did in the case of work requirements, 42 U.S.C. § 602(a)(19)(f) (Supp. III, 1973), the NOLEO provisions were not intended to serve such a purpose. "Congress ha[d] made no such provision in regard to NOLEO." Shirley v. Lavine, 365 F. Supp. 818, 824 (N.D.N.Y. 1973).

[103] No one has questioned, nor do we here, that Congress has the power to condition eligibility for assistance upon new and additional requirements.
What the cases construing the NOLEO provisions make clear, however, is that in enacting them Congress did not utilize this power.

Id. at 822.

[104] *Id.* at 824.

[105] Judge Port recognized the instrumental part that the office of Commissioner of Social Services Lavine played in the modification of HEW's interpretation:

> The portion of the amendment permitting denial of assistance to parents or caretakers refusing to cooperate in obtaining support from absent parents . . . was prompted, we are advised by defendant Lavine's counsel, by requests sent by Lavine and others to HEW. The amendment is a departure from the agency's past position.

Id. at 823 (footnotes omitted).

[106] 45 C.F.R. § 233.90(b)(4)(ii) (1974).

decision, *Shirley v. Lavine*,[107] New York's Social Services Law, which provided the same sanction as was permitted under the new federal regulation,[108] was held to violate the Social Security Act. In his decision Judge Port reasoned that since it was not settled policy, or consistent with past interpretations, "the agency's new interpretation in [45 C.F.R. § 233.90] is in error and not a guidepost to be followed judicially."[109] A number of other cases in 1974 struck down similar laws and regulations which had cut off uncooperative parents and caretakers from benefit payments.[110]

The Social Services Amendments of 1974 definitively resolved this question of statutory interpretation. States may now clearly compel the disclosure of information as a condition of AFDC eligibility for a parent or caretaker. Although the Supreme Court has recently affirmed *Shirley*,[111] the passage of the new legislation provides the states with a new tool to restrict the distribution of AFDC benefits to a large group of individuals unless they are willing to reveal intimate information to state officials.

Even with the issue of compulsory disclosure settled on a statutory level, substantial constitutional issues have been raised involving the right of privacy, the guarantee of equal protection, and the privilege against self-incrimination. *Doe v. Norton*,[112] a 1973 district court case, touched on many of these issues in upholding a Connecticut statute which compelled unwed mothers to disclose the names of the fathers of their children and to prosecute paternity actions against them under penalty of possible incarceration:

> "[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy." . . . Thus, the question presented is whether an unwed mother's desire to keep secret the name of her child's father is so "fundamental" or "implicit in the concept of ordered liberty" as to require constitutional protection.[113]

Measured against this standard, the *Norton* court found that the

[107] 365 F. Supp. 818 (N.D.N.Y. 1973), *aff'd per curiam sub nom.* Lascaris v. Shirley, 95 S. Ct. 1190 (1975).

[108] N.Y. Soc. Serv. Law § 101-a (McKinney Supp. 1974).

[109] 365 F. Supp. at 824.

[110] Doe v. Rampton, 497 F.2d 1032 (10th Cir. 1974); Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973), *cert. denied sub nom.* Burns v. Doe, 43 U.S.L.W. 3549 (U.S. April 14, 1975) (decided before *Shirley* but using the same rationale with respect to the statutory issues); Messer v. Flowers, 2 CCH Pov. L. Rep. ¶ 19,715 (S.D. W. Va. Sept. 10, 1974); Doe v. Flowers, 364 F. Supp. 953 (N.D. W. Va. 1973), *aff'd mem.*, 416 U.S. 922 (1974).

[111] Lascaris v. Shirley, 95 S. Ct. 1190 (1975).

[112] 365 F. Supp. 65 (D. Conn. 1973), *prob. juris. noted sub nom.* Roe v. Norton, 415 U.S. 912 (1974) (No. 73-6033).

[113] 365 F. Supp. at 74, *quoting* Roe v. Wade, 410 U.S. 113, 152 (1973).

statute did not infringe any fundamental rights relating to privacy because the relationship between an unwed mother and her paramour was not deserving of the same protection granted to a husband and a wife.[114] The invasion caused by the requirement in *Norton* that a name merely be disclosed was not so great as to violate any zone of privacy, since there was no intrusion into the home and no effort to regulate the mother's conduct.[115]

Self-incrimination might arise from the compelled disclosure of extramarital activities which are illegal in the state administering the welfare program. Many states have laws against adultery, fornication, and other illicit sexual behavior.[116] If a welfare recipient who has an illegitimate child is compelled to disclose information about that child's father, she may subject herself to prosecution. This issue has not been resolved, although the self-incrimination claim was raised in one case.[117]

The equal protection argument, initially raised in *Norton*, was based on the claim that the Connecticut statute created two classes of children—illegitimate and legitimate. This argument was dismissed because the classifications were found to be rationally related to a legitimate state purpose and created no invidious discrimination.[118]

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[114] Special recognition has been extended to the marital relationship. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (law against giving information on contraception held to violate the right to marital privacy).

[115] 365 F. Supp. at 77.

[116] Most jurisdictions have statutes prohibiting adultery and fornication. Adultery is generally defined as sexual intercourse between persons, one of whom is married to a third person. Fornication generally involves illicit intercourse between unmarried persons. *See, e.g.*, N.Y. PENAL LAW § 255.17 (McKinney Supp. 1973); N.C. GEN. STAT. § 14-184 (1969).

[117] The court in Doe v. Rampton, 497 F.2d 1032, 1033 (10th Cir. 1974), noted that a mother might be compelled to reveal extramarital acts which constituted violations of Utah law, but it did not reach the constitutional question.

[118] 365 F. Supp. at 78-84.

> Even if, as the plaintiffs argue, the statute ought logically to be construed to create a separate classification affecting only unwed mothers of illegitimate children who receive some form of public assistance, that particular classification is directly linked to the public interest the statute is designed to secure.

Id. at 82.

The court noted that the Supreme Court has consistently held that legislative discrimination to the disadvantage of illegitimate children must meet a showing that the state interest in the classification was substantial; *i.e.*, a strict scrutiny of the classification. *Id.* at 79 n.26. However, the court here found this statute operated to the benefit of illegitimates and therefore it must merely be rationally related to some legitimate state purpose to avoid violation of equal protection standards. *Id.* at 78-80. *See also* note 85 *supra*.

An argnment might be made that the statute is not, in fact, rationally related to the purpose it was intended to serve. Establishing paternity and locating a missing parent do not guarantee that such a parent will be able to provide support for his offspring. Therefore,

In 1974 the Supreme Court noted probable jurisdiction in *Norton*,[119] but it is possible that the Court will decide this case on statutory rather than constitutional grounds.[120] The district court decision held that the Connecticut statute in question[121] was not inconsistent with the intention of the Social Security Act.[122] Judge Blumenfeld opined that the establishment of paternity determination was one of the substantial purposes behind the Social Security Act.[123] While recognizing that it was also the purpose of the AFDC program to protect and support needy children, the court held that incarceration of an uncooperative mother did not necessarily prevent the achievement of this goal. The decision emphasized that incarceration was only a discretionary remedy; moreover, Judge Blumenfeld relied heavily upon the following reasoning:

> While the operation of this new statute may have the undesirable effect of diminishing the amount of time that a recalcitrant mother will be able to spend with her child, it does not deny to either the mother or the child the benefits of food, clothing or shelter in accordance with their needs.[124]

The Supreme Court, however, may find that such a disregard for the recognized purpose of keeping a family intact and providing parental care for needy children is frustrated when the parent is in jail. A decision should be forthcoming this term.

Despite a clarified statutory scheme for compelled parental disclosure of information and compelled cooperation, important constitutional questions remain. Those who seek to apply laws like Connecticut's will be left without guidelines to prevent intrusions on constitutionally protected interests if the Supreme Court does not speak to these issues.

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the state cannot justify the withdrawal of a mother's benefits or her incarceration by linking the disclosure of information with the automatic appearance of a support payment from the missing parent. To do so would be tantamount to a presumption that locating a parent is equivalent to obtaining money from him. *See* notes 20-55 and accompanying text *supra* for a discussion of conclusive presumptions.

[119] 415 U.S. 912 (1974) (No. 73-6033).

[120] "[O]ur decision follows the Supreme Court's repeated direction that in such a case we should adjudicate the statutory claim rather. than indulge in a constitutional ruling." Shirley v. Lavine, 365 F. Supp. 818, 821 (N.D.N.Y. 1973). However, the presence of a constitutional claim is crucial to obtaining a federal forum. *See* Note, *The Outlook for Welfare Litigation in the Federal Courts: Hagans v. Lavine & Edelman v. Jordan*, 60 CORNELL L. REV. 897, 898-902 (1975).

[121] CONN. GEN. STAT. REV. § 52-440(b) (1973).

[122] 365 F. Supp. at 84.

[123] *Id.* at 71.

[124] *Id.* at 72.

Conclusion

The year 1974 presented welfare recipients with a mixed response on the state and federal level to pressures for reduced AFDC expenditures. The trend toward efficiency and limitation of benefits clashed with the desire to assist the genuinely needy to the best of the government's ability. The tightening of procedures designed to reduce fraud and error and the extension of the ability to compel recipients to assist in the location of alternative sources of support served to limit the breadth of the AFDC program. But recipients were protected from administrative restrictiveness by the requirement that only actually available income be utilized in AFDC need determination. On balance, both Congress and the courts resisted the extension of benefits to new classes, while still requiring close attention to the needs of individual recipients.

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