

Developments in Welfare Law 1973

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DEVELOPMENTS IN WELFARE LAW—1973*

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* This is the *Cornell Law Review’s* first survey of recent developments in welfare law. If it is favorably received by our readers, we hope to publish such a commentary as an annual feature of the *Review*.

The authors and the Board of Editors wish to express their appreciation to Professor Peter W. Martin of the Cornell Law School not only for the guidance received in creating this section on “Developments in Welfare Law” but also for his assistance in preparing this entire special focus survey.

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The various federally assisted "welfare" programs have been changing so rapidly that it is almost impossible to keep abreast of significant developments in the field. With that in mind, this section of the *Review* was created to provide a summary of the major changes in the welfare system which occurred in 1973.

Welfare programs lead a chameleon-like existence, changing to reflect the policies and priorities of each succeeding administration. In 1973, most of the changes in federally assisted welfare programs were administrative, as the Nixon Administration continued to retreat from the beneficence of the Great Society.¹ There was little significant legislative activity in the welfare area during the year,² but the Supreme Court continued to play a vital role in interpreting the Social Security Act³ and in defining the constitutional parameters of the various programs.⁴

These developments have affected each of the important welfare programs—Aid to Families with Dependent Children (AFDC),⁵ Supplemental Security Income (SSI),⁶ Food Stamps,⁷ Medicaid,⁸ and the Office of Economic Opportunity's (OEO) Legal Services Program.⁹ In addition, the Department of Health, Education, and Welfare (HEW) issued a series of new regulations which will have a significant impact on the administration of all public welfare programs.¹⁰

I

AFDC

With the establishment of the OEO Legal Services Program¹¹ and the recognition of the welfare recipient's right to challenge the

¹ See notes 327-558 and accompanying text *infra*.

² But see Act of Dec. 31, 1973, Pub. L. No. 93-233, 87 Stat. 947 [hereinafter cited as Pub. L. No. 93-233]; Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, 87 Stat. 221 [hereinafter cited as Pub. L. No. 93-86]; Act of July 1, 1973, Pub. L. No. 93-66, 87 Stat. 152 [hereinafter cited as Pub. L. No. 93-66].

³ 42 U.S.C. §§ 301-1396g (1970) [hereinafter cited as "the Act"].

⁴ See, e.g., *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405 (1973) (note 107 *infra*); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (note 251 *infra*); *United States Dep't of Agriculture v. Murry*, 413 U.S. 508 (1973) (note 253 *infra*); *Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973) (note 300 *infra*); *Legion v. Weinberger*, 94 S. Ct. 564, *aff'g mem.* *Legion v. Richardson*, 354 F. Supp. 456 (S.D.N.Y. 1973) (note 301 *infra*); *Carleson v. Yee-Litt*, 412 U.S. 925, *aff'g mem.* *Yee-Litt v. Richardson*, 353 F. Supp. 996 (N.D. Cal. 1973) (note 453 *infra*).

⁵ See notes 11-143 and accompanying text *infra*.

⁶ See notes 144-80 and accompanying text *infra*.

⁷ See notes 196-269 and accompanying text *infra*.

⁸ See notes 270-326 and accompanying text *infra*.

⁹ See Note, *Legal Services—Past and Present*, 59 CORNELL L. REV. 960 (1974).

¹⁰ See notes 327-558 and accompanying text *infra*.

¹¹ Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701-2981 (1970).

validity of state welfare procedures,¹² the volume of litigation in the field of welfare law has soared.¹³ In 1973, that trend continued, as evidenced by the vast number of cases involving AFDC, the largest and most expensive of the categorical assistance programs.¹⁴

A. *Controversies Involving Eligibility Criteria*

Most of last year's judicial activity in AFDC involved the revision and interpretation of various eligibility criteria and centered on three basic types of eligibility problems: (1) eligibility based on need, (2) eligibility based on nonneed factors, and (3) conditions precedent to eligibility.

1. *AFDC Eligibility Based Upon Need*

The primary factors considered in determining a family unit's eligibility for AFDC are its available income and financial resources.¹⁵ Additionally, available income and resources are determinative of the unit's level of assistance.¹⁶ Thus, in this category of eligibility criteria there are two levels of inquiry: (1) what constitutes income and resources in the determination of need (eligibility), and (2) what types of income and resources will be considered or disregarded in determining the level of assistance?¹⁷

a. *"Available Income and Resources" in the Determination of Need*

(i) *Work Expenses.* The Social Security Act states that "any expenses *reasonably attributable* to the earning of . . . income" are to be deducted from the family unit's income and resources prior to a determination of need.¹⁸ In determining the allowable deduction,

¹² See *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968). Although the state must comply with the mandates of the Social Security Act and HEW does have sanctions to encourage compliance, it appears that the recipient suit has been employed more often than administrative action. See 42 U.S.C. §§ 602, 604, 606 (1970). See also A. LA FRANCE, M. SCHROEDER, R. BENNETT & W. BOYD, *LAW OF THE POOR* 254 (1973) [hereinafter cited as *LAW OF THE POOR*].

¹³ *LAW OF THE POOR* 253-55.

¹⁴ See generally Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 *CORNELL L. REV.* 825 (1974).

¹⁵ See *id.* at 829.

¹⁶ See 45 C.F.R. §§ 233.20, 233.90 (1973).

¹⁷ Of course, the two concepts often are inseparable because income and resources for the determination of need will also be used in computing the level of assistance. However, it is important to note that there are provisions for some income disregards in determining benefit levels once a unit is found to be eligible. 42 U.S.C. §§ 602(a)(8)(A), (B) (1970); 45 C.F.R. § 233.20(a)(7)(ii) (1973).

¹⁸ 42 U.S.C. § 602(a)(7) (1970) (emphasis added).

several states have used a flat-rate work expenses deduction instead of deducting a family's actual expenses.¹⁹ They have attempted to justify this procedure by referring to the common use of a state-wide standard of need, the right of the state to determine the nature of reasonable work expenses, and the need for faster and more efficient eligibility-determination procedures. These arguments have been rejected by two courts during the past year.²⁰ In both cases, the courts indicated that the state must use the family's *actual* income and resources to determine eligibility.²¹ The use of the standard work expenses deduction allowed the states to avoid a careful evaluation of a family's actual financial requirements before making an eligibility determination and thus violated the intent of the statute.²² Arguably, the statewide standard of need represents the state's determination of the general income level at which AFDC assistance is necessary. However, the question of income and work expenses covers only the *individual* family, and therefore, the desirability of giving the state broad powers to establish an overall standard of need is immaterial.²³

Several state courts have held that a state may determine what constitutes reasonable work expenses²⁴ and that a state-wide standard deduction may be used in the interest of efficient welfare administration.²⁵ In light of the 1973 decisions discussed above, these cases are probably wrongly decided, particularly since the intent of Congress in enacting the work expenses deduction was to

Income here refers to the income of any "child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid. . . ."

Id. § 607(a)(7) (1970); see 45 C.F.R. § 233.20(a)(3)(iv)(a) (1973).

¹⁹ A "flat rate" work expenses deduction is a specific figure which is subtracted from the family's income if a member of the unit is working. For example, if the mother is employed and her work expenses (*e.g.*, travel) are \$75 per month and the state uses a flat rate deduction of \$35 per month, only \$35 will be deducted as work expenses from the unit's monthly income in determining the level of assistance.

²⁰ *Vialpando v. Shea*, 475 F.2d 731 (10th Cir. 1973); *Anderson v. Graham*, 2 CCH Pov. L. REP. ¶ 17,151 (D. Neb. 1973).

²¹ See cases cited in note 20 *supra*.

²² See cases cited in note 20 *supra*.

²³ In *Shea*, the court felt that the language of the statute requiring the state "to take into consideration" all income and resources currently available to the family unit applied equally to the work expenses section and therefore mandated that all work expenses be considered. *Vialpando v. Shea*, 475 F.2d 731, 734 (10th Cir. 1973). See 42 U.S.C. § 602(a)(7) (1970).

²⁴ See, *e.g.*, *Garcia v. Jones*, 29 Utah 2d 409, 510 P.2d 1099 (1973); *Conover v. Hall*, 104 Cal. Rptr. 77 (Ct. App. 1972).

²⁵ In *Conover*, the court reasoned that if a state could create a maximum grant, it could also use a standard deduction. 104 Cal. Rptr. at 80, 82.

provide for a work incentive by taking work expenses "fully" into account.²⁶

(ii) *Income of a Child Within the Unit.* The income of a child in the family is attributed to the family in determining need unless it is earned income of a full-time student or a "part-time student who is not a full-time employee" and who is attending a college, university, high school, or vocational school.²⁷ Although this provision appears rather straightforward, at least one state has attempted to use it to reduce the number of people eligible for AFDC.²⁸ By considering only the child's standard of need and his available income, Texas eliminated from AFDC many families in which the child's income exceeded his personal needs but not the needs of the family unit.²⁹ In *Rodriguez v. Vowell*,³⁰ the Fifth Circuit struck down this practice on the ground that the state must consider the needs of the entire family unit. Citing the intent of the program to maintain the family unit³¹ and the congressional recognition of the inseparability of the needs of the child and his caretaker adult, the court had no difficulty invalidating the regulations.³² The importance of maintaining the family unit through cash grants and services for both child and parent is a recurring theme in the AFDC program.³³

(iii) *Stepfather or Man-in-the-House Income and In-Kind Income.* Since many AFDC mothers remarry or take up residence with other men, it is not surprising that considerable litigation has arisen over the methods chosen by the states to deal with the income of a stepfather or man in the house. The law in this area was thought to have been clarified by the Supreme Court in *King v. Smith*³⁴ and *Lewis v. Martin*,³⁵ but the states continue to develop ingenious, albeit unsuccessful, methods of avoiding these decisions and the HEW regulations implementing them.³⁶ Before the income

²⁶ S. REP. No. 1589, 87th Cong., 2d Sess. (1943) (emphasis added).

²⁷ 42 U.S.C. § 602(a)(8)(A) (i) (1970).

²⁸ TEXAS FINANCIAL SERVICES HANDBOOK §§ 3310(15), (16), cited in *Rodriguez v. Vowell*, 472 F.2d 622, 623 n.1 (5th Cir. 1973).

²⁹ *Id.* For example, a family unit consisting of a child and his mother would have had a standard of need of \$134 per month, \$85 of which would have represented the child's standard of need. If the child earned \$100 per month, the unit would have been ineligible under Texas's scheme because the child's income exceeded his standard of need.

³⁰ 472 F.2d 622 (5th Cir.), cert. denied, 412 U.S. 944 (1973).

³¹ See 42 U.S.C. § 601 (1970).

³² 472 F.2d at 624-26.

³³ See note 70 *infra*.

³⁴ 392 U.S. 309 (1968).

³⁵ 397 U.S. 552 (1970).

³⁶ 45 C.F.R. § 233.90(a) (1973).

of a stepfather or man in the house may be attributed to the AFDC unit, the state must show *actual contribution* or, in the instance of a stepfather, a general obligation to support the stepchild under state law.³⁷ Some states simply choose to attribute the income of the stepfather or man in the house to the AFDC unit,³⁸ while others have attempted to deny eligibility when the mother remarries.³⁹ Still others have attempted to make "in-kind" income deductions based upon the presumption that the stepfather or man in the house assumes some of the cost of living in the family residence.⁴⁰ It is quite apparent in the man-in-the-house situation that the state's concern is more often moralistic than economic.⁴¹

The cases decided during the last year continue to follow the reasoning of *Lewis and King* in striking down such provisions.⁴² Although HEW has proposed a new regulation which would no longer require that income be available to the family unit on a regular basis before it is considered part of the family's budget, the effect of the regulation on the stepfather or man-in-the-house situation remains unclear.⁴³

(iv) *Resources*. The current HEW regulations covering a fam-

³⁷ *Id.* Essentially, the stepfather or man in the house is treated like a natural or adoptive parent for purposes of determining his duty to support the child. *Id.*; see *Lewis v. Martin*, 397 U.S. 552 (1970).

³⁸ See, e.g., 18 N.Y.C.R.R. § 352.31 (1970). This regulation was declared invalid in *Slochowsky v. Lavine*, 73 Misc. 2d 563, 342 N.Y.S.2d 525 (Sup. Ct. 1973), and *In re Uhrovick*, 2 CCH Pov. L. REP. ¶ 18,054 (N.Y. Sup. Ct. 1973). In *Boucher v. Minter*, 349 F. Supp. 240 (D. Mass. 1972), the court implied that if a mother remarries, the state cannot presume that the stepfather contributes to the children in the absence of a support obligation of general applicability. The mother's need, however, can be eliminated from the family unit's budget because the stepfather-husband does have a general obligation to support his wife. *Id.*

³⁹ See, e.g., *Donaldson v. Schmidt*, 2 CCH Pov. L. REP. ¶ 17,126 (W.D. Wis. 1973) (invalidating Wis. STAT. ANN. § 49.19(4)(d) (1957)); see *Lopez v. Vowell*, 471 F.2d 690 (5th Cir.), cert. denied, 411 U.S. 939 (1973) (invalidating TEXAS FINANCIAL SERVICES HANDBOOK §§ 3411 & 3454); cf. *Bezio v. Neville*, 305 A.2d 665 (N.H. 1973).

⁴⁰ See, e.g., *Foster v. Minnesota*, 2 CCH Pov. L. REP. ¶ 17,378 (1973); see *Waits v. Carleson*, 31 Cal. App. 3d 201, 107 Cal. Rptr. 117 (1973). See also *Hurley v. Van Lare*, 365 F. Supp. 186 (S.D.N.Y. 1973).

⁴¹ LAW OF THE POOR 302.

⁴² Income is attributed to a unit only if its receipt is reasonably predictable. *Lewis v. Martin*, 397 U.S. 552 (1970). In addition, the state cannot attempt to punish a mother for living with a man out of wedlock by terminating assistance to the entire family. *King v. Smith*, 392 U.S. 309 (1968).

⁴³ Proposed HEW Regs. §§ 233.20(a)(3)(i), (ii)(a)-(c); 233.90(a), 38 Fed. Reg. 18,254 (1973). The proposed change would strike the words "only such income as is available on a regular basis will be considered." *Id.* The present and newly proposed regulations recognize that the income of a man in the house or stepfather, who is under no general obligation to support the children, cannot be imputed to the children. This change seems to have only a marginal effect on the man-in-the-house situation.

ily unit's resources allow each state considerable discretion in establishing guidelines for determining the amount and type of property which must be included in an inventory of the recipient's resources.⁴⁴ However, in *Green v. Barnes*,⁴⁵ the Tenth Circuit held that a state may consider only an applicant's equity in a home as an available resource. The holding was based on the language of the regulation which states that "only currently available resources will be considered."⁴⁶ Thus, while the state is given some discretion in determining what property may be retained, it is still subject to restrictions in the valuation of that property.⁴⁷

In July 1973, the acting Secretary of HEW proposed a modification of the above regulation.⁴⁸ The proposed regulation would raise the maximum limit for retained resources of the family unit, limit the value of any automobile owned by the unit, and delineate methods of valuation of real property.⁴⁹ In addition, the proposed regulation would redefine available resources to include a legal interest in community property or a trust.⁵⁰ These regulations have not yet been adopted.

b. *Income and Resources and the Level of Assistance: Income from Other Public Assistance Programs.*⁵¹ A recent study by the Joint Economic Committee's Subcommittee on Fiscal Policy revealed that between 60 percent and 75 percent of households on assistance

⁴⁴ 45 C.F.R. § 233.20(a)(3)(i) (1973). These regulations require only that the states specify the kind and dollar amounts of resources which may be retained to meet the family's "current and future needs while assistance is received on a continuing basis." *Id.* However, many states have limits much lower than those allowed by the Department. LAW OF THE POOR 304.

⁴⁵ 485 F.2d 242 (10th Cir. 1973).

⁴⁶ *Id.*; 45 C.F.R. § 233.20(a)(3)(ii)(c) (1973). There have been similar decisions in New Mexico when the recipient owned a car or truck the value of which was less than the amount of the purchase price still outstanding. *Benally v. Hein*, 84 N.M. 131, 500 P.2d 416 (1972); *Trujillo v. Health & Social Servs. Dep't*, 84 N.M. 58, 499 P.2d 376 (1972).

⁴⁷ The state is not required to consider the value of the home in computing a family unit's resources. 45 C.F.R. § 233.20(a)(3)(ii)(c) (1973).

⁴⁸ Proposed HEW Reg. § 233.20(a)(3), 38 Fed. Reg. 18,254 (1973).

⁴⁹ *Id.* § 233.20(a)(3)(i)(b).

⁵⁰ *Id.* § 233.20(a)(3)(ii)(c).

⁵¹ Although the cases discussed above dealt with income in relation to the determination of eligibility, many are also in point on the issue of the level of assistance to be paid. Thus, the stepfather and man-in-the-house cases often talk of the use of "in-kind income" and of a state policy of reducing the level of assistance as a result of such income. *See* notes 34-43 and accompanying text *supra*. Of course, this result is only logical since much of the income considered in determining eligibility is also examined in determining a unit's level of assistance, and the addition of another person to the household may occur prior to or during eligibility. *See* 42 U.S.C. §§ 602(a)(7), (8) (1970).

receive assistance from more than one program.⁵² This finding is not surprising given the broad range of assistance programs that are not based on need.⁵³

An intermediate California court has held that a workmen's compensation award is subject to recoupment when a family unit becomes eligible for AFDC as a result of an injury for which the workmen's compensation payment is received.⁵⁴ Recently, another California court upheld a state regulation⁵⁵ which allowed a reduction in an AFDC unit's housing grant when (1) the AFDC family shared housing with an individual receiving assistance from another categorical program and (2) the family's housing grant exceeded its pro rata share of the actual housing costs.⁵⁶ This last holding seems doubtful in light of the stepfather cases,⁵⁷ for as in those cases, an income contribution was assumed to have been made to the family unit even though there had been no showing of actual income availability. It should be noted that in both cases the plaintiffs were natural mothers receiving Aid to the Permanently and Totally Disabled (APTD) whose children were AFDC beneficiaries.⁵⁸ They were thus obligated to support their children, and their income was therefore attributable to the family unit.

Although benefits received from another assistance program would appear to be includible as income for eligibility and level of assistance purposes, legislation pending in the 93d Congress provides that cost of living increases in Social Security payments be disregarded in computing income.⁵⁹

⁵² STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 93D CONG., 1ST SESS., HOW PUBLIC WELFARE BENEFITS ARE DISTRIBUTED IN LOW INCOME AREAS 2-3 (Comm. Print 1973).

⁵³ *Id.* at 65. While the income generated by these overlapping programs is also considered in determining eligibility for AFDC, it generally is not substantial enough to render the unit ineligible and therefore has been placed in this section. *See* Rodriguez v. Vowell, 472 F.2d 622 (5th Cir. 1973), *cert. denied*, 412 U.S. 944 (1973).

⁵⁴ Ogdon v. Workmen's Compensation Bd., 105 Cal. Rptr. 837 (Ct. App. 1973).

⁵⁵ CALIFORNIA ELIGIBILITY AND ASSISTANCE STANDARDS § 44-115.8 (1973), *cited in* Cooper v. Carleson, 31 Cal. App. 3d 546, 549 n.1, 107 Cal. Rptr. 502, 504 n.1 (1973).

⁵⁶ Cooper v. Carleson, 31 Cal. App. 3d 546, 107 Cal. Rptr. 502 (1973).

⁵⁷ *See* notes 34-43 and accompanying text *supra*.

⁵⁸ The court was careful to point out that shared expenses provided in-kind income to the AFDC unit, and as such, they were not precluded from consideration by the federal statute or regulations. Cooper v. Carleson, 31 Cal. App. 3d 546, 553, 107 Cal. Rptr. 502, 508 (1973); *see* 42 U.S.C. § 602(a)(7) (1970); 45 C.F.R. §§ 233(a)(3)(ii), (a)(4)(i) (1973). The court also relied on Jefferson v. Hackney, 406 U.S. 535 (1972), in dismissing the argument that the state was in effect lowering the standard of need. The state's action was seen as reasonable and within its discretion. The provision was directed at the level of assistance and not at the question of eligibility. 31 Cal. App. 3d at 551-53, 107 Cal. Rptr. at 506-08.

⁵⁹ H.R. 475, 93d Cong., 1st Sess. (1973).

2. *Nonneed Factors of Eligibility*

Questions involving the nonneed factors of eligibility center on the statutory definition of eligible individuals.⁶⁰ Within the past year, the focus of administrative, legislative, and judicial activity has been upon four problems: (1) the right of unborn children to AFDC, (2) what constitutes "continued absence from the home," (3) AFDC for school children, and (4) AFDC for aliens.

a. *AFDC and Unborn Children.* The Social Security Act's definition of "child" makes no reference to unborn children;⁶¹ consequently, it is not clear whether they are eligible individuals within the meaning of the Act. Since unborn children are not specifically excluded by the Act, it can be argued that the state must provide them with AFDC. Conversely, since the state's exclusion of unborn children is not specifically precluded by the Act, it can be argued that the state need not grant them AFDC. This question of statutory construction raises the most difficult current issue in determining who are "eligible individuals."

The Supreme Court in *Townsend v. Swank*⁶² held that a state may not exclude a group eligible for AFDC under the federal standards without a clear showing of congressional authorization or intent to allow the state to make such an exclusion.⁶³ However, two other Supreme Court decisions, *Wyman v. James*⁶⁴ and *Jefferson v.*

⁶⁰ 42 U.S.C. § 606 (1970).

⁶¹ *Id.* At present only 19 states have provisions for unborn children. See Parks v. Harden, 354 F. Supp. 620, 622 (N.D. Ga. 1973).

⁶² 404 U.S. 282 (1971).

⁶³ In *Townsend*, Illinois had attempted to exclude from eligibility children who had reached the age of 18 and who had enrolled in junior college. *Id.* at 284 n.2. The Court invalidated the Illinois provisions on supremacy grounds, arguing that they deprived benefits to those who were eligible according to the specific terms of the federal statute. 42 U.S.C. § 606(a)(2) (1970). The Court said:

King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion [from eligibility] 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.

404 U.S. at 286; see *Carleson v. Remillard*, 406 U.S. 598 (1972).

The *Townsend* rationale raises an interesting burden of proof problem. It would seem that the AFDC litigant must show through a reasonable interpretation of the Social Security Act and an analysis of the various congressional reports on the Act that Congress intended to extend coverage to unborn children. The state would then have to come forward and negate that showing of legislative intent by pointing out an explicit intent on the part of Congress to exclude unborn children.

⁶⁴ 400 U.S. 309 (1971). In *Wyman*, the Court approved a "home visit" condition for eligibility even though it was not authorized by statute or regulation. *Id.* at 319-20; see LAW OF THE POOR 288.

Hackney,⁶⁵ raise some doubt as to the full effect of *Townsend* and have been utilized by some lower courts to allow states to employ eligibility criteria not specifically allowed by the federal standards.⁶⁶ Essentially, the Court in *Townsend* indicated that a state cannot restrict the eligible AFDC population unless such a restriction was authorized by the Social Security Act.⁶⁷ But in *Wyman*, and more particularly in *Jefferson*, the Court seemed to say that a state can impose additional eligibility criteria so long as these criteria are not specifically prohibited by the Act, are consistent with the goals of the program, and are rationally related to the efficient administration of a state's welfare program.⁶⁸ Significantly, neither *Wyman* nor *Jefferson* purported to overrule *Townsend*.⁶⁹

The *Townsend-Jefferson* dichotomy is reflected in the unborn child decisions. Using the *Townsend* approach, some courts have held that a state AFDC program must provide coverage for unborn children.⁷⁰ These courts have consistently found that the legislative history of AFDC reveals no congressional desire to allow states to exclude unborn children and that the intent of the AFDC program demands inclusion of unborn children in the family unit. In addition, the courts have held that the HEW regulation⁷¹ which

⁶⁵ 406 U.S. 535 (1972). In *Jefferson*, the Court approved a ratable reduction which effectively denied AFDC to many family units eligible under the standard of need of the state but with incomes in excess of the level of assistance after the state's ratable reduction. *Id.* at 540; see notes 111-18 and accompanying text *infra*.

⁶⁶ See notes 111-18 and accompanying text *infra*.

⁶⁷ See *Townsend v. Swank*, 404 U.S. 282, 286 (1971).

⁶⁸ See *Jefferson v. Hackney*, 406 U.S. 535, 545 (1972); *Wyman v. James*, 400 U.S. 309, 315, 319-20 (1971).

⁶⁹ In *Jefferson*, the Court concluded that § 402(a)(23) of the Social Security Act, a cost-of-living increase provision for AFDC, did not mandate an increase in the eligible AFDC population; the section was designed to reveal the discrepancy between the level of payments made by the state and actual need and "to prod the States to apportion their payments on a more equitable basis." 406 U.S. at 542. Thus, the ratable reduction was not to be considered in determining eligibility but only in assessing the amount to be paid. "[A]nd by using a percentage-reduction system it has attempted to apportion the State's limited benefits more equitably." *Id.* at 543. *Townsend* involved an attempt by the state to interject an additional nonneed factor into the eligibility determination process. 404 U.S. 270. Thus, the two cases are not inconsistent since *Jefferson* focuses on the state's management of its welfare finances and says nothing about attempts to reduce the welfare population, the issue addressed by *Townsend*. The problem arises, however, because many courts have applied the language of *Jefferson* to situations involving an evaluation of additional nonneed criteria. See notes 70-77 & 101-18 and accompanying text *infra*; LAW OF THE POOR 290.

⁷⁰ See *Green v. Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973); *Doe v. Lukhard*, 363 F. Supp. 823 (E.D. Va. 1973); *Alcada v. Burns*, 362 F. Supp. 180 (S.D. Ia. 1973); *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973).

⁷¹ 45 C.F.R. § 233.90(c)(2)(ii) (1973).

allows a state to extend AFDC benefits to an unborn child as merely an optional program is invalid under the Social Security Act.⁷²

Yet one court has denied AFDC to unborn children on the following grounds: (1) the legislative intent of Congress is unclear;⁷³ (2) the statute reveals no specific coverage for unborn children;⁷⁴ (3) HEW's interpretation of the statute should be given substantial weight;⁷⁵ and (4) since the statute and its legislative history do not mandate eligibility for an unborn child, the state may, under the reasoning of *Jefferson*, exclude the group at its option in the interest of reducing welfare costs.⁷⁶

The courts that have adopted the reasoning of *Townsend* have searched for congressional authorization for the exclusion of unborn children, while the court relying on *Jefferson* emphasized the absence of a specific grant of eligibility. Thus, each faction has concluded that in the absence of a specific prohibition or provision the result reached was mandated by a Supreme Court decision.⁷⁷

b. *Continued Absence of the Parent.* The Social Security Act and the relevant HEW regulation state that a needy child is one "who has been deprived of parental support or care by reason of

⁷² *Doe v. Lukhard*, 363 F. Supp. 823 (E.D. Va. 1973), is the most recent of the district court cases. In his opinion in *Doe*, Judge Merhige reviewed the litigation on the subject during the past year and concluded that under *Townsend* the burden of proof is on the state to show that Congress intended to allow the states to vary eligibility requirements. *Id.* at 827; see note 63 *supra*. See also *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973). In *Wilson*, the district court discussed a recent unsuccessful attempt by the 92d Congress to bar unborn children from eligibility for AFDC benefits. The court reasoned that Congress's attempts to exclude unborn children from the program showed that they were eligible under existing law. *Id.* at 1154-55.

⁷³ *Parks v. Harden*, 354 F. Supp. 620, 625 (N.D. Ga. 1973). The cases also disagree as to the effect to be given to definitions of "child" in other federal programs and different areas of the law. *Id.* at 623-24. Compare *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973).

⁷⁴ *Parks v. Harden*, 354 F. Supp. 620, 625 (N.D. Ga. 1973).

⁷⁵ *Id.* at 623.

⁷⁶ *Id.* at 625-26. A recent California case held that an unborn child is eligible for AFDC, but the court indicated that the state may deduct from the grant to the "Family Budget Unit" the value of the unborn child's in-kind income received in the form of housing and nourishment supplied by the physical contribution of the mother during pregnancy. *California Welfare Rights Org. v. Brian*, 31 Cal. App. 3d 265, 107 Cal. Rptr. 324 (1973). The court reviewed the holding of *Jefferson* and concluded that if a state can determine how its limited resources are to be distributed among various categorical programs, as was the case in *Jefferson*, such discretion is "sufficiently broad to permit differential treatment of the born and the unborn" absent a specific prohibition by the Constitution or the Social Security Act. *Id.* at 279, 107 Cal. Rptr. at 333. The court further held that under *Dandridge v. Williams*, 397 U.S. 471 (1970), the state's practice did not violate the equal protection clause of the fourteenth amendment. 31 Cal. App. 3d at 280, 107 Cal. Rptr. at 333.

⁷⁷ This problem will again arise in connection with preconditions to eligibility. See notes 100-28 and accompanying text *infra*.

the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" a relative.⁷⁸

In 1972, the Supreme Court in *Carleson v. Remillard*⁷⁹ upheld a California district court's decision to invalidate a California regulation that denied AFDC to family units in which the parent was absent from the home as a result of military service. The Court, following the reasoning of *Townsend*, held that since there was no specific federal provision allowing the exclusion of servicemen's families, they must be considered "eligible individuals."⁸⁰ "[I]t was not stated or implied that eligibility by virtue of a parent's 'continued absence' was limited to cases of divorce or desertion."⁸¹ In June of 1973, the Acting Secretary of HEW proposed new regulations to bring the Department's guidelines into compliance with *Carleson*.⁸²

Within the past year, several federal district courts have relied on the reasoning of *Carleson* and the applicable federal regulations to hold that a state cannot premise continued absence solely upon proof of absence for a period of at least six months,⁸³ or a sentence of imprisonment.⁸⁴

c. *AFDC and School Children*. In 1956, Congress amended the Social Security Act to include all children between the ages of sixteen and eighteen in the AFDC program.⁸⁵ In Virginia, how-

⁷⁸ 42 U.S.C. § 606(a) (1970); 45 C.F.R. § 233.90(a) (1973). The regulations further define continued absence as:

Such as either to interrupt or to terminate the parent's functioning as a provider . . . and the known or indefinite duration of the absence precludes counting on the parent's performance of his function[s] . . . If these conditions exist, the parent may be absent for any reason, and he may have left only recently or some time previously.

45 C.F.R. § 233.90(c)(1)(iii) (1973).

⁷⁹ 406 U.S. 598 (1972).

⁸⁰ *Id.* at 600-05.

⁸¹ *Id.* at 602.

⁸² Proposed HEW Regs. §§ 233.90(b)(5), 233.90(c)(1)(ii), 38 Fed. Reg. 14,693 (1973).

⁸³ *Carter v. Stanton*, 350 F. Supp. 1337 (S.D. Ind. 1972), *citing* IND. ADMIN. RULES AND REGS. (52-1001)-2 (Burns 1967).

⁸⁴ *Majchszak v. Schmidt*, 358 F. Supp. 1165 (E.D. Wis. 1973). An interesting California decision, *Hypolite v. Carleson*, 32 Cal. App. 3d 979, 108 Cal. Rptr. 751 (1973), invalidated a California regulation that denied benefits to a child who did not live with his parents. The state regulation stated that the parent was not absent from the home and that therefore the child was not eligible. *Id.* at 983, 108 Cal. Rptr. at 754, *citing* CALIFORNIA ELIGIBILITY AND ASSISTANCE STANDARDS § 411-450.12. The court held that the reference point for "continued absence" was the child's home and not that of the parent. *Id.*

⁸⁵ Act of Aug. 1, 1956, Pub. L. No. 84-800, tit. III, pt. III, § 322, 70 Stat. 850 (codified at 42 U.S.C. § 606(a) (1970)). The Social Security Act of 1935 provided for aid to children only up to the age of 16. Social Security Act of 1935, ch. 531, tit. IV, § 406, 49 Stat. 629. In 1939, Congress added a provision giving the states the option of covering children in school

ever, the state made AFDC benefits available only to school children within this age group.⁸⁶ Although the Virginia procedure directly contravened the 1956 amendments, it remained in effect until a district court struck it down in 1972.⁸⁷

Congress now has extended AFDC eligibility to school children between the ages of eighteen and twenty-one attending high school, vocational school, or a college or university.⁸⁸ A recent case has held, however, that it was the intent of Congress to make this extension of eligibility optional for the states.⁸⁹ Therefore, a state may choose to exclude all children over the age of eighteen without violating the Social Security Act.⁹⁰ It would appear that the language in *Townsend* permits such a conclusion.⁹¹

d. *AFDC and Aliens*. In 1971, the Supreme Court in *Graham v. Richardson*⁹² invalidated an Arizona welfare statute which required a longer period of residence for aliens than for citizens in order to qualify for categorical assistance⁹³ and a Pennsylvania statute which denied general assistance to all aliens.⁹⁴ In June 1972,

between the ages of 16 and 17. Act of Aug. 10, 1939, ch. 666, tit. IV, § 403, 53 Stat. 1380. The 1956 amendments eliminated the school option and extended mandatory eligibility to all children under the age of 18. Act of Aug. 1, 1956, ch. 836, tit. III, §§ 321, 322, 70 Stat. 850.

⁸⁶ VA. CODE ANN. § 63.1-105(a) (1973).

⁸⁷ *Lawson v. Brown*, 349 F. Supp. 203 (W.D. Va. 1972) (invalidating VA. CODE ANN. § 63.1-105(a) (1973)). *Lawson* serves as an example of how slow a state may be in complying with federal standards; Virginia was withholding eligibility for AFDC from a group of persons to whom Congress had extended eligibility 12 years earlier. The case also illustrates the inadequacies of the federal monitoring system and the reluctance of HEW to use its influence in assuring compliance with federal law.

⁸⁸ 42 U.S.C. § 606(a) (1970).

⁸⁹ *Donaldson v. Schmidt*, 2 CCH Pov. L. REP. ¶ 17, 126 (W.D. Wis. 1973).

⁹⁰ *Id.* 42 U.S.C. § 606(a)(2)(B) (1970).

⁹¹ *Townsend v. Swank*, 404 U.S. 270, 287-91 (1971). In *Townsend*, the Court pointed out that § 406(a)(2)(B) of the Social Security Act (42 U.S.C. § 606(a)(2)(B) (1970)) was actually the latest in a series of amendments to the Act extending AFDC benefits to older children. The history of these amendments, said the Court, does show that whenever Congress extended AFDC eligibility to older children—from those under 16 to those 16-17, and finally to those 18-20—Congress left to the individual States the decision whether to participate in the program for the new age group.

Id. at 287-88.

Of course, once a state decides to expand its program to cover a new age group, it cannot, consistently with the statute, discriminate among members of the group (*e.g.*, between those attending college and those attending vocational school), providing aid to some eligible persons and not to others. *Id.* at 288. In *Townsend*, Illinois had unsuccessfully attempted to discriminate in this fashion. See note 63 *supra*.

⁹² 403 U.S. 365 (1971).

⁹³ ARIZ. REV. STAT. ANN. §§ 46-233,-252(2),-272(4) (1956). These sections relate to Aid to the Totally and Permanently Disabled, Old Age Assistance, and Aid to the Blind.

⁹⁴ PA. STAT. ANN. tit. 62, § 433(2) (1968). This restriction solely concerned

HEW proposed new regulations to implement the *Graham* decision.⁹⁵ The proposed regulations were altered in June 1973⁹⁶ and, as of this writing, have not been adopted.⁹⁷ The newly proposed regulations merely restrict AFDC eligibility to lawfully admitted aliens.⁹⁸ Recently proposed legislation would add this distinction to the Social Security Act.⁹⁹

3. *Conditions Precedent to Eligibility*

While the need and nonneed factors of eligibility define the eligible population, the conditions precedent to eligibility focus on behavior control of the individual recipient using the carrot of welfare and the stick of its denial. In 1973, there was significant legislative and judicial activity with regard to two types of conditions precedent—state supplemental work programs¹⁰⁰ and enforcement of an absent parent's support obligation.

a. *State Supplemental Work Programs.* When the Congress enacted the Work Incentive (WIN) Program in 1967,¹⁰¹ several of the states already had work requirement programs for AFDC recipients.¹⁰² Since that time twenty-two states have adopted some form of supplemental work program.¹⁰³ Early lower court cases held that such supplemental programs were preempted by the

Pennsylvania's own general assistance program which is run without federal matching funds or federal guidelines.

⁹⁵ Proposed HEW Reg. § 233.50, 37 Fed. Reg. 11,977 (1972).

⁹⁶ Proposed HEW Reg. § 233.50, 38 Fed. Reg. 16,910-11 (1973).

⁹⁷ The new proposed regulations attempt to give recognition to the reasoning of the Supreme Court in *Graham* that while the fourteenth amendment does protect aliens, the federal government has an additional constitutional interest in controlling alien affairs, and state welfare regulations denying assistance to lawfully admitted aliens violate that interest. See *id.*; *Graham v. Richardson*, 403 U.S. 365 (1971).

⁹⁸ Proposed HEW Reg. § 233.50, 37 Fed. Reg. 11,977 (1972).

⁹⁹ H.R. 2597, 93d Cong., 1st Sess. (1973).

¹⁰⁰ As a condition precedent to eligibility for the WIN program, all applicants "shall register for manpower services, training and employment." 42 U.S.C. § 602(a)(19)(A) (1970); 45 C.F.R. § 233.11(a) (1973). There are exceptions to this registration requirement, however. See 42 U.S.C. §§ 602(a)(19)(A)(i)-(vi) (1970); 45 C.F.R. §§ 233.11(a)(1)-(6) (1973). Many states have supplemental work programs which include AFDC recipients not affected by WIN.

¹⁰¹ Act. of Jan. 2, 1968, Pub. L. No. 90-248, tit. II, § 204, 81 Stat. 884-89 (codified at 42 U.S.C. § 602(a)(19)(A) (1970)). See Lurie, *supra* note 14, at 833.

¹⁰² See *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 414 (1973).

¹⁰³ *Id.* at 412. Generally, the state programs are similar to New York's. "Employable recipients," as defined by state social services laws and regulations, are required to file job certificates with the local agency prior to receipt of their welfare check. The job certificates are issued by the state employment office; they certify that the recipient has not turned down a bona fide job referral or offer without good cause. See, e.g., N.Y. SOC. SERV. LAW §§ 385.1, 385.7 (McKinney Supp. 1973). See also ILL. ANN. STAT. ch. 23, §§ 11-200 (Smith-Hurd 1968); WIS. STAT. ANN. § 49.19(6) (1957).

WIN program.¹⁰⁴ The cases generally adhered to the rationale of *Townsend v. Swank*¹⁰⁵ and held that without an express authorization for an additional state work program in the Social Security Act, the state could not restrict the otherwise eligible population under the federal statute.¹⁰⁶

In 1973, the Supreme Court put an end to this line of reasoning in *New York State Department of Social Services v. Dublino*.¹⁰⁷ The Court termed the AFDC program one of "cooperative federalism,"¹⁰⁸ under which the states had the authority to promote the efficient administration of the program.¹⁰⁹ Absent a clear expression of congressional intent to preempt the work requirement field through the WIN program, the states could seek to curb the rising costs of welfare through supplemental work programs.¹¹⁰ Analyzing the WIN program and its legislative history, the Court found no clear expression of federal preemption.

In his dissent, Mr. Justice Marshall¹¹¹ pointed out that once again the court had ignored its "fundamental rule for interpreting the Social Security Act"¹¹² as set forth in *Townsend v. Swank*.¹¹³ *Townsend* required a specific authorization in the Social Security Act for any additional state restrictions of eligibility under the Act.¹¹⁴ If *Townsend* were strictly followed, then in the absence of such an authorization a recipient eligible under the federal AFDC criteria could not be denied benefits because of state-imposed requirements.¹¹⁵ Focusing on the purpose and provisions of the

¹⁰⁴ *Bueno v. Juras*, 349 F. Supp. 91 (D. Ore. 1972); *Jeffries v. Sugarman*, 345 F. Supp. 172 (S.D.N.Y. 1972), *rev'd*, 481 F.2d 414 (2d Cir. 1973); *Woolfolk v. Brown*, 456 F.2d 652 (4th Cir.), *cert. denied*, 409 U.S. 885 (1972); see LAW OF THE POOR 366.

¹⁰⁵ 404 U.S. 282 (1971).

¹⁰⁶ See note 104 *supra*.

¹⁰⁷ 413 U.S. 405 (1973).

¹⁰⁸ *Id.* at 413.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 414. There seems to be considerable disagreement over the effectiveness of the WIN program and New York's supplemental program. See U.S. NEWS & WORLD REPORT, Dec. 24, 1973, at 66-69; N.Y. Times, Dec. 1, 1973, § 1, at 1, col. 6. See also STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 92D CONG., 2D SESS., THE EFFECTIVENESS OF MANPOWER TRAINING PROGRAMS: A REVIEW OF RESEARCH ON THE IMPACT ON THE POOR 50-56 (Comm. Print 1972). In addition to its supplemental work program, New York has been engaged in an experimental work program in some of its welfare districts which has also been the subject of litigation during the past year. *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir.), *application for stay denied*, 410 U.S. 921 (1973).

¹¹¹ Mr. Justice Brennan joined Mr. Justice Marshall in dissent. 413 U.S. at 423.

¹¹² *Id.*

¹¹³ 404 U.S. 282 (1971).

¹¹⁴ *Id.* at 286.

¹¹⁵ 413 U.S. at 423-24.

WIN program, the dissent concluded that additional state work requirements would undercut the basic policy of AFDC—maintaining the family unit while fostering economic stability.¹¹⁶

The dissent did concede that states have some “latitude” in the adjustment of benefits through the establishment of the standard of need and the level of benefits to be paid.¹¹⁷ However, these two areas are not related to “eligibility” and must be in the control of the state as long as AFDC remains a state-federal program.¹¹⁸

Dublino appears to open the door to further supplemental conditions on eligibility enacted by the states in the name of the efficient management of the welfare system.

b. *Enforcement of an Absent Parent's Support Obligation.* Since an eligible AFDC family unit is by definition one in which one of the parents is continually absent from the home,¹¹⁹ it is not surprising that the federal statute and accompanying regulations deal with the problem of obtaining support from the absent parent.¹²⁰ Many AFDC units include illegitimate children, a fact which only compounds the need to identify the absent parent.¹²¹

Frequently, the state will attempt to precondition AFDC eligibility on the disclosure of the whereabouts or the identity of the absent parent. However, these disclosure requirements have been continually rejected by the courts on the grounds that the Social Security Act “contains no explicit requirement that mothers divulge the name of or institute a support action against a child's father as a condition of [AFDC] eligibility.”¹²² Although there has been no

¹¹⁶ *Id.* at 428.

¹¹⁷ *Id.* at 432.

¹¹⁸ *Dublino* provides an interesting addendum to the earlier discussion of the *Townsend-Jefferson* dichotomized analysis of the Social Security Act. See notes 63-69 and accompanying text *supra*. In *Jefferson*, the Court rejected the argument that 42 U.S.C. § 602(a)(23) (1970) placed benefit levels within the group of criteria which could not be altered by the states. 406 U.S. at 541. In *Dublino*, it appears that the Court felt the work program was an analogous situation. However, as Mr. Justice Marshall emphasized, the question is not *how much* is to be paid, but rather, *who* is to be paid. See 413 U.S. at 424-32. Although the Court in *Wyman v. James*, 400 U.S. 309 (1971), did allow “home visits” as a state-imposed condition precedent to eligibility, thus lending support to the majority in *Dublino*, Mr. Justice Marshall correctly pointed out that *Wyman* was not decided on statutory grounds but on the issue of the constitutionality of the visit under the fourth amendment. 413 U.S. at 424-25 n.3.

¹¹⁹ 42 U.S.C. § 606(a) (1970).

¹²⁰ *Id.* § 602(a)(17)(ii) (Supp. II, 1972) (known as NOLEO provision); 45 C.F.R. § 235.70 (1973).

¹²¹ 42 U.S.C. § 602(a)(17)(i) (Supp. II, 1972); 45 C.F.R. § 235.70 (1973).

¹²² LAW OF THE POOR 342 n.20. A recent case in a federal district court in California held that implicit threats by welfare investigators, written on the stationery of the local district attorney and stating that failure to cooperate with the investigator in determining the

definitive ruling by the Supreme Court in this area, a case involving this problem is pending before the Court.¹²³

During 1973, there has been a significant amount of administrative action in response to several lower court cases. HEW has proposed several new regulations that would allow the states to condition the eligibility of the *parent* on her cooperation in naming the absent parent¹²⁴ and create a state agency with federal subsidization which would assist local welfare agencies and the local law enforcement agencies in finding the absent parent by using its own facilities and the records of the Internal Revenue Service.¹²⁵

While HEW has been active in this area during the past year, there has been some activity in Congress as well. One bill now pending before the 93d Congress would amend the Social Security Act so as to obligate the caretaker adult to disclose the identity and whereabouts of the absent parent.¹²⁶ Willful failure to disclose

whereabouts of the absent father could result in termination of assistance, violated the Social Security Act. *Doe v. Carleson*, 356 F. Supp. 753 (N.D. Cal. 1973).

¹²³ *Doe v. Burns*, 479 F.2d 646 (8th Cir.), *petition for cert. filed*, 42 U.S.L.W. 3205 (U.S. Sept. 4, 1973) (No. 406). The Court has, however, affirmed without opinion decisions striking down such eligibility rules. *See, e.g., Meyer v. Juras*, 327 F. Supp. 759 (D. Ore.), *aff'd mem.*, 404 U.S. 803 (1971). Summary affirmances have little precedential value, however. *Hurley v. Van Lare*, 365 F. Supp. 186, 197-98 (S.D.N.Y. 1973).

¹²⁴ Proposed HEW Regs. §§ 233.90(b)(4)(i), (ii), 38 Fed. Reg. 10,940 (1973). HEW's decision to allow states to precondition the parent's eligibility on cooperation with the local agency seems to be a response to the Supreme Court's remand of a New York case which had invalidated a New York statute creating a similar precondition to eligibility. *Lavine v. Shirley*, 409 U.S. 1052 (1972); *see* 6 CLEARINGHOUSE REV. 366 (1972). *See also* N.Y. SOC. SERV. LAW § 101-a (McKinney Supp. 1973); 18 N.Y.C.R.R. §§ 369.2(f)(3)(ii)(e)(3), (4) (1970). It is not clear that the Court's remand of the *Lavine* case can be interpreted as an acquiescence to the New York practice. In 1972, the state amended § 101a of the Social Services Law by adding a provision that any portions of the above noted statute that are inconsistent with a federal statute or regulation are inoperative. Ch. 687, § 4 [1972] N.Y. Laws 2996; *see* *Lewis v. Lavine*, 2 CCH Pov. L. REP. ¶ 16,547 (S.D.N.Y. 1972).

In light of the above amendment, it appears that the Court's purpose in remanding was simply to allow a more specific enunciation of the points of inconsistency. A similar result was reached in *Dublino*. *See* 413 U.S. at 422. On remand, the district court invalidated § 101a of the New York Social Services Law on the grounds that, notwithstanding the above noted HEW regulation change, the New York statute contravened a long line of cases interpreting the NOLEO provision of the Social Security Act. *Shirley v. Lavine*, 2 CCH Pov. L. REP. ¶ 18,028 (N.D.N.Y. 1973).

¹²⁵ Proposed HEW Reg. § 235.75, 38 Fed. Reg. 27,530 (1973).

¹²⁶ S. 1842, 93d Cong., 1st Sess. (1973). The proposed legislation is entitled The Federal Child Support Security Act of 1971. A similar bill was introduced in the 92d Congress. S. 2669, 92d Cong., 1st Sess. (1971). In addition to amending the Social Security Act sections on AFDC, the bill also has a number of other interesting features. It provides that any court-ordered support payments made from the federal treasury to the child will be considered *loans to the parent*, payable to the federal government with interest of 8% per annum. S. 1842, 93d Cong., 1st Sess. § 2025(a) (1973). Monies received by the federal government under this arrangement are then to be placed in a "revolving fund" to be used

would make the caretaker adult ineligible for assistance and would subject him or her to a fine or imprisonment.¹²⁷ In addition, the proposed legislation would give the federal government a lien against the property of the absent parent for any money paid out by the federal government for child support.¹²⁸

B. AFDC-UF

AFDC-UF (unemployed father) is not a mandatory program.¹²⁹ However, twenty-four states had adopted the program by mid-1973.¹³⁰ The most significant activity in AFDC-UF during 1973 centered around the definition of "unemployment."¹³¹ Previously, the definition of "unemployment" used by HEW was attacked unsuccessfully on constitutional grounds.¹³² However, the

for future loans to needy parents, thereby relieving the burden on the general taxpayer. *Id.* §§ 2020(a), (b). Of course, the federal government would have to make the initial contribution to the fund. *Id.* § 2020(c).

Finally, the bill provides that the Attorney General will have access to government records to enable him to locate the parent. *Id.* § 2030(c).

¹²⁷ The maximum penalty under the bill is a \$1,000 fine and/or one year in prison. S. 1842, 93d Cong., 1st Sess. § 2031(b) (1973). The bill's sponsor, Senator Bellmon, asserts that many welfare mothers support the bill. *See* 119 CONG. REC. 9286-92 (daily ed. May 17, 1973) (remarks of Senator Bellmon). One state has a similar statute which imposes criminal or civil penalties upon the mother of an illegitimate child who refuses to assist in the prosecution of the child's father for support. CONN. GEN. STAT. ANN. §§ 52-440(b), 52-442(a) (1960). The Connecticut statute was recently upheld on the grounds that it dealt with the mothers of illegitimate children generally and was not specifically restricted to AFDC mothers, thus avoiding a supremacy clause argument. *See Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973).

¹²⁸ S. 1842, 93d Cong., 1st Sess. § 2025(c)(1), (2) (1973); *see* note 126 *supra*. Several states have similar provisions which may even reach property held by the caretaker adult and the absent parent as joint tenants. *See, e.g.,* N.Y. SOG. SERV. LAW § 360 (McKinney Supp. 1973). One court has held that such liens can be discharged in bankruptcy. *In re Williams*, 2 CCH Pov. L. REP. ¶ 16,960 (W.D. Wash. 1973).

¹²⁹ *See Lurie, supra* note 14, at 828. AFDC-UF provides cost grants and in-kind services to family units when the dependency of the child is based on the father's unemployment. The father must register for the WIN program, and the state must attempt to provide vocational training to the father to return him to the workforce as quickly as possible. *See* 42 U.S.C. § 607(a) (1970); 45 C.F.R. §§ 233.100(a)(1)(i), (ii) (1973).

¹³⁰ *See Lurie, supra* note 14, at 829. One state, Maine, recently terminated its AFDC-UF program, and its action withstood a court challenge. The court held that the state could terminate benefits to one group, unemployed fathers, if its decision had a reasonable relation to the economic regulations of the welfare system and if the state attempted to lessen the hardship created by its action by simultaneously increasing unemployment benefits. *United Low Income, Inc. v. Fisher*, 470 F.2d 1074 (1st Cir. 1972); *see* LAW OF THE POOR 356-57.

¹³¹ 42 U.S.C. § 607(a) (1970) gives the Secretary of HEW the power to determine what constitutes "unemployment." A recent case has reaffirmed the Secretary's broad discretionary power in this area. *Francis v. Davidson*, 340 F. Supp. 351 (D. Md.), *aff'd*, 409 U.S. 904 (1972).

¹³² *See* LAW OF THE POOR 357-58.

current controversy stems from an HEW proposal that might allow strikers to receive AFDC-UF benefits. The Department has issued two proposed regulations, both of which retain the 100 hours of work per month qualification.¹³³ But one of these regulations would allow the state to impose additional restrictions (enabling the state to make strikers ineligible), while the other would make the federal definition exclusive of any additional criteria. Should the Department choose to adopt the latter, it is unclear how the states will view continued participation in the AFDC-UF program.

C. State Funding Schemes for AFDC

Although the AFDC program is primarily a cooperative venture between the states and the federal government, HEW regulations allow the states to delegate the administrative responsibilities of the program to local governments.¹³⁴ Moreover, these local governments may also be required to provide a portion of the program's necessary funding.¹³⁵ As a result, urban welfare agencies, to which this responsibility has been delegated, faced with a declining tax base, angry taxpayers, and increased welfare rolls, have attempted to reduce both the level of benefits paid and the number of recipients eligible for assistance.¹³⁶

In 1973, New York City and certain of its officials participated in an interesting and potentially significant suit challenging the funding structure of AFDC and other categorical programs. The plaintiffs in *City of New York v. Richardson*¹³⁷ alleged that the general welfare clause of article 1 of the United States Constitution required that the federal government bear the entire cost of all categorical programs¹³⁸ and, in the alternative, that the payment of

¹³³ Proposed HEW Reg. § 233.100(a)(1), 38 Fed. Reg. 49,3200 (1973). Although HEW placed a March 5, 1973, deadline on all comments from the public, the Department has not yet decided which proposal to adopt.

¹³⁴ 45 C.F.R. § 205.100(a)(1) (1973). In New York, the local agencies are organized on a county level. See N.Y. Soc. SERV. LAW § 61 (McKinney Supp. 1973).

¹³⁵ HEW regulations mandate that the state pay at least 40% of the nonfederal share. The state has two federal funding formulas from which to choose. See 42 U.S.C. §§ 603(a)(3), 1396b (1970). For a description of the two funding formulas, see I. Lurie, *Legislative, Administrative & Judicial Changes in the AFDC Program 1967-71*, in JOINT ECONOMIC COMM., 93D CONG., 1ST SESS., STUDIES IN PUBLIC WELFARE 92 (Comm. Print 1973). At least 16 states fund their programs solely from state funds. *City of New York v. Richardson*, 473 F.2d 923, 927 & n.3 (2d Cir. 1973).

¹³⁶ See notes 51-59 and accompanying text *supra*.

¹³⁷ 473 F.2d 923 (2d Cir. 1973).

¹³⁸ *Id.* at 928. The plaintiffs argued that because the Social Security Act had been enacted pursuant to the general welfare clause (U.S. CONST. art. I, § 8) the federal government was obliged to assume the full burden of the cost of the assistance programs, which were a federal concern. 473 F.2d at 928.

New York City's contribution to the programs from local property tax revenues violated the rights of city taxpayers under the equal protection clause. Although the Second Circuit dismissed the plaintiffs' welfare clause claim, it ordered that a three-judge court be empaneled to determine whether New York City taxpayers had been denied equal protection of the laws.¹³⁹ While expressly limiting its holding to a decision convening a three-judge court, the court hinted that the state would have difficulty finding a rational basis for a system which forced New York City to provide benefits for seventy-four percent of the state's welfare recipients when the city embraced only forty-five percent of the state's population.¹⁴⁰

It is important to note that the Second Circuit's decision in *Richardson* preceded the recent Supreme Court ruling in *San Antonio Independent School District v. Rodriguez*.¹⁴¹ Although *Rodriguez* involved the inequality in financial assistance for education, the Court's opinion recognizes the desirability of local administrative and financial control of local governmental services.¹⁴² In addition, the *Jefferson* holding supports a local control argument.¹⁴³ Pending a decision by the three-judge court and a potential direct appeal to the Supreme Court, state welfare schemes using local agencies and local property taxes for some of the nonfederal portion of the grant will undoubtedly continue.

D. Conclusion

During the past year the AFDC program has undergone several significant changes. Confronted with skyrocketing costs and swelling welfare rolls, state agencies have attempted to diminish the eligible population through their interpretations of the nonneed factors of AFDC eligibility—continued absence of the parent, unborn children, AFDC for school children, and AFDC for aliens—and by the creation of additional preconditions to eligibility, including “find-the-father” and work requirements. In addition,

¹³⁹ 473 F.2d at 933.

¹⁴⁰ The state did not offer an explanation of the rationale underlying the existing system, perhaps in the belief that the court would reject all of the plaintiff's claims and never reach the three-judge court issue. *Id.* at 931-32.

¹⁴¹ 411 U.S. 1 (1973).

¹⁴² See generally *id.*

¹⁴³ See *Jefferson v. Hackney*, 406 U.S. 535 (1972). The court in *Richardson* remarked that “[g]overnmental efficiency has never been thought to legitimize unconstitutional discrimination.” 473 F.2d at 932. The court relied on the district court opinion in *Rodriguez* and lower court cases to sustain its holding that a constitutional issue existed. *Id.* at 932-33 n.10. With the reversal of *Rodriguez* by the Supreme Court, the dictum in *Richardson* as to who would prevail on the constitutional issue is questionable. See *id.* at 932.

the states have attempted to reduce the level of payments through imputed income provisions, standardized deductions and broad interpretations of available resources.

All of this activity is set in a context of confusion. The AFDC program encompasses billions of dollars and millions of people. Fifty separate state agencies formulate regulations, and federal and state courts issue opinions on their validity. The breadth of the program is simply awesome.

However, one clear line of development emerged in 1973. It appears that the Supreme Court and HEW are moving toward a position in which the states will exert more influence on eligibility decisions than they have in the past. The strength of *Townsend* was severely tested during 1973, and the Supreme Court appears to have adopted a more flexible approach, from the states' standpoint, in interpreting the mandates of the Social Security Act. It is not clear, however, whether this "new federalism" will solve the problems of the poor or merely compound them.

II

SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED—SSI

Nineteen seventy-three was a year of transition from the traditional adult welfare programs to a new federal Supplemental Security Income (SSI) program which became effective January 1, 1974.¹⁴⁴ The former programs, Old Age Assistance (OAA), Aid to the Blind (AB), and Aid to the Permanently and Totally Disabled (APTD), were state-administered grant-in-aid plans.¹⁴⁵ The states retained control of the day-to-day operation of these programs and were free to establish their own benefit levels.¹⁴⁶ In comparison,

¹⁴⁴ The SSI program was included in the 1972 amendments to the Social Security Act. 42 U.S.C. §§ 1381-85 (Supp. II, 1972) [hereinafter cited as "1972 Act" or "Social Security Amendments of 1972"]. For a description of the former programs and a comparison of those programs to SSI, see 58 CORNELL L. REV. 803 (1973).

¹⁴⁵ These programs were financed through a system of cost sharing, in which the federal government paid 66% of the costs in 22 states and 60% in most of the others. Burke, *The Need for Welfare Reform*, 2 FAMILY L.Q. 353, 357 (1968).

In 1968, there were 0.1 million recipients under the AB program, 0.9 million under the APTD program, and 2.3 million under the OAA program. PRESIDENT'S COMM'N ON INCOME MAINTENANCE PROGRAMS, POVERTY AMID PLENTY: THE AMERICAN PARADOX 115 (1969).

¹⁴⁶ This freedom led to the wide disparity in benefit levels throughout the country. Although some flexibility might be necessitated by cost of living fluctuations, the variance from state to state was seen as one of the major ills of the previous system. See Musgrave,

SSI involves the establishment of minimum federal criteria for the determination of eligibility and benefit levels and is designed to avoid the wide disparity of procedures and payments which had developed throughout the country.¹⁴⁷ Additionally, states are required to supplement SSI payments in order to maintain pre-SSI benefit levels,¹⁴⁸ and the states have the option of supplementing the program to attain benefit levels even higher than federal standards require.¹⁴⁹ In either case, the states may choose between state and federal administration of the supplementation program.¹⁵⁰

The establishment of a national system is unquestionably the most significant feature of the SSI program. Old Age Assistance, for example, had been administered under fifty-four different schemes with varying need and income formulations.¹⁵¹ Providing for uniform minimum benefits and for state supplementation, SSI represents an important improvement.¹⁵²

A. *Determination of Eligibility*

In order to be eligible for SSI benefits, applicants must be at least sixty-five years of age or meet the statutory definitions of

Heller & Peterson, *Cost Effectiveness of Alternative Income Maintenance Schemes*, 23 NAT'L TAX J. 140 (1970).

¹⁴⁷ A preliminary description of SSI was provided by the House Ways and Means Committee:

Under the new Federal program, uniform eligibility requirements and uniform benefit payments would replace the multiplicity of requirements and benefit payments under the existing State-operated programs. The new program has been designed with a view toward providing:

1. An income source for the aged, blind, and disabled whose income and resources are below a specified level;
2. Incentives and opportunities for those able to work or to be rehabilitated that will enable them to escape from their dependent situations; and
3. An efficient and economical method of providing this assistance.

H.R. REP. NO. 231, 92d Cong., 1st Sess. 147 (1971) [hereinafter cited as HOUSE REPORT].

¹⁴⁸ Pub. L. No. 93-66, § 212, 87 Stat. 155; see note 178 and accompanying text *infra*.

¹⁴⁹ 42 U.S.C. § 1382e (Supp. II, 1972); see note 179 and accompanying text *infra*.

¹⁵⁰ 42 U.S.C. § 1382e (Supp. II, 1972); see notes 180-92 and accompanying text *infra*.

¹⁵¹ See HOUSE REPORT 150. Naturally, a wide disparity in benefit levels results from this multiplicity of programs. For example, in April 1968, OAA payments ranged from \$50 in Mississippi to \$182 in Nebraska. AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, THE BILL TO REVAMP THE WELFARE SYSTEM 46 (1970). The House Ways and Means Committee reported a range from \$97 to \$350 per month as of July 1970. HOUSE REPORT 150.

¹⁵² In addition to the obvious advantage of uniformity, the *quality* of administration may improve since SSI is administered by the Social Security Administration. HOUSE REPORT 157. This should obviate the uneven quality of state administration, even though many of the employees who administered the old programs will be involved with SSI. See *Hearings on the Social Security Amendments of 1971 Before the Senate Comm. on Finance*, 92d Cong., 1st Sess. 120-21 (1971) (testimony of E. Richardson, Secretary, HEW).

blindness or disability.¹⁵³ Furthermore, the proposed regulations provide that an applicant is not eligible for SSI if he is eligible for other benefits but has not applied for them.¹⁵⁴ Additional eligibility criteria include special limits on gross income from a trade or business¹⁵⁵ and a limitation on the eligibility of those who are outside the United States¹⁵⁶ and those who, throughout any month, have been in a public institution¹⁵⁷ or a "hospital, extended care facility, nursing home, or intermediate care facility" which is receiving Medicaid payments on behalf of the applicant.¹⁵⁸ Alcoholics and addicts are covered by SSI, but only if they are undergoing

Although SSI will be administered by the Social Security Administration, it will be financed out of general revenues and not from Social Security trust funds. U.S. Dep't of Health, Education & Welfare, News Release (undated) in 2 CCH Pov. L. REP. ¶ 17,488.

¹⁵³ Although 65 is the usual retirement age, it is not necessarily the most appropriate eligibility threshold. For example, the Social Security Act now provides that individuals may opt into the Old-Age, Survivors, and Disability Insurance Program (Social Security) at age 62, as long as all other eligibility criteria are met. 42 U.S.C. § 402(a)(2) (Supp. II, 1972).

The definitions of blindness and disability contained in the statute (*id.* § 1382c(a)) are somewhat technical and parallel those used in the disability insurance program under Social Security. "These definitions . . . provide reasonable, objective, and fair tests of disability and blindness which are appropriate for the proposed program." HOUSE REPORT 147.

¹⁵⁴ See Proposed HEW Reg. § 416.230, 38 Fed. Reg. 29,088 (1973). "Other benefits" include annuities, pensions, retirement benefits or disability benefits. *Id.*

¹⁵⁵ The Secretary (of HEW) may prescribe the circumstances under which, consistently with the purpose of this subchapter, the gross income from a trade or business (including farming) will be considered sufficiently large to make an individual ineligible for benefits under this subchapter. For purposes of this subsection, the term "gross income" has the same meaning as when used in chapter 1 of Title 26, Internal Revenue Code of 1954.

42 U.S.C. § 1382(d) (Supp. II, 1972).

¹⁵⁶ Notwithstanding any other provision of this subchapter, no individual shall be considered an eligible individual for purposes of this subchapter for any month during all of which such individual is outside of the United States . . . [A]fter an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Id. § 1382(f).

¹⁵⁷ *Id.* § 1382(e)(1)(A). The proposed regulations define a "public institution" as "an institution that is the responsibility of a governmental unit, or over which a governmental unit exercises administrative control." Proposed HEW Reg. § 416.231, 38 Fed. Reg. 29,088 (1973).

¹⁵⁸ 42 U.S.C. § 1382(e)(1)(B) (Supp. II, 1972). Those individuals are eligible for a maximum benefit of \$25 per month. See *id.* § 1382(e)(1)(B)(i). The apparent rationale for this provision is that "[f]or [those] people most subsistence needs are met by the institution and full benefits are not needed. Some payments to [those] people, though, would be needed to enable them to purchase small comfort items not supplied by the institution." HOUSE REPORT 150.

This "institutional inmate" exception in the case of either public or private institutions will certainly ease administrative burdens, but its supporting rationale is appropriate only with respect to those recipients who are not expected to leave such an institution. The rationale that the institution fulfills the applicant's every need ignores the fact that the

“treatment that may be appropriate for [their] condition . . . at an institution or facility approved . . . by the Secretary [of HEW]” and can demonstrate that they are “complying with the terms, conditions, and requirements of such treatment.”¹⁵⁹

Originally, SSI made no provision for continuing the coverage of “essential persons,” such as wives of eligible OAA recipients who were not eligible themselves under the old programs. However, a person “whose needs were taken into account in determining the need [of the applicant]” in December, 1973, may now be treated as an essential person, enabling the recipient to receive an additional \$70 per month.¹⁶⁰ This is an important change, for now 125,000

recipient might well have outside expenses, such as rent or taxes, which are continuing obligations. Furthermore, if the recipient has an eligible spouse, he or she will receive only one-half of the *couples* benefit of \$210 until the recipient has been institutionalized for more than six months. 42 U.S.C. § 1382c(b) (Supp. II, 1972). This amount is \$35 less than the spouse would receive as an eligible *individual*.

¹⁵⁹ 42 U.S.C. § 1382(e)(3)(A) (Supp. II, 1972). The statute is not clear as to whether aged individuals are included in this provision. It states that “[n]o person who is an *aged*, blind, or disabled individual *solely by reason of disability*” caused by alcoholism or addiction may be eligible unless he submits to treatment. *Id.* (emphasis added). Arguably this requirement should be read to cover those who are obtaining benefits solely on the basis of *disability* caused by alcoholism or addiction. The aged and the blind should be entitled to benefits simply because they are aged or blind. Apparently the House Ways and Means Committee agreed since it recommended

that those people who are *disabled*, in whole or in part, as a result of the use of drugs or alcohol should not be entitled to benefits under this program unless they undergo appropriate, available treatment in an approved facility, and the bill so provides. Your committee, while recognizing that the use of drugs or alcohol may indeed cause disabling conditions, believes that when the condition is susceptible to treatment, appropriate treatment at Government expense is an essential part of the rehabilitation process of people so disabled.

HOUSE REPORT 149 (emphasis added). As applied to the disabled, this requirement seems eminently reasonable in light of the current levels of drug addiction and alcoholism throughout the country.

¹⁶⁰ See Pub. L. No. 93-66, § 211(a)(1)(A), 87 Stat. 154, as amended, Pub. L. No. 93-233, 87 Stat. 947. This will increase to \$73 on July 1, 1974. *Id.*

The term “essential person”, when used in connection with any qualified individual, means a person who—

- (1) for the month of December 1973 was a person (described in subsection (b)(2)) whose needs were taken into account in determining the need of such individual for aid or assistance under a State plan referred to in subsection (b)(1) as such State plan was in effect for June 1973,
- (2) lives in the home of such individual
- (3) is not eligible (in his or her own right) for supplemental security income benefits under title XVI of the Social Security Act (as in effect after December 1973), and
- (4) is not the eligible spouse (as that term is used in such title XVI) of such individual or any other individual.

If for any month after December 1973 any person fails to meet the criteria specified in paragraph (2), (3), or (4) of the preceding sentence, such person shall not, for such month or any month thereafter be considered to be an essential person.

Id. As this definition illustrates, this is essentially a grandfather clause, ensuring that an essential person under a state program prior to January 1974, will be an essential person

essential persons will be eligible for \$100 million in SSI benefits.¹⁶¹

Financial eligibility requirements are reflected in SSI's uniform "needs test," which requires applicants to have personal incomes of less than \$1,560 per year and financial resources of less than \$1,500 in order to qualify for assistance.¹⁶² Because of the application of a significant income and resource disregard,¹⁶³ however, these figures are not as low as they might seem, and more applicants should be eligible under SSI than under the previous systems.¹⁶⁴ Furthermore, persons who had been receiving benefits in states which had *more* liberal income and resource limits before

under SSI. For example, the wife of an OAA recipient who would have been an essential person in December 1973 will be treated as an essential person under SSI. But the wife of an applicant who becomes eligible for SSI *after* January 1974 would not be an essential person, and the SSI recipient would not be eligible for the extra \$70 per month.

¹⁶¹ See 119 CONG. REC. S. 12,718 (daily ed. June 30, 1973).

¹⁶² 42 U.S.C. §§ 1382(a)(1)(A), (B) (Supp. II, 1972). For couples, these figures become \$2,340 and \$2,250 respectively. *Id.* See generally Proposed HEW Regs. §§ 416.1101-.1180, 38 Fed. Reg. 27,407-09 (1973), §§ 416.1201-.1266, 38 Fed. Reg. 27,409-12 (1973) (dealing with definitions of and exclusions from "income and resources").

¹⁶³ The income disregard is \$20 per month of social security or other unearned income and an additional disregard of \$65 of earned income. One-half of any earnings above \$65 per month is also disregarded. 42 U.S.C. §§ 1382a(b)(2), (b)(4)(C) (Supp. II, 1972).

The earned income disregard is essentially a work incentive program which is interesting because not only are most of the recipients unemployable, but also the social security program contains a retirement test specifically designed to discourage the elderly from working. See *id.* § 411 (1970), *as amended*, (Supp. II, 1972).

Benefits received under a state's supplementation plan are also disregarded in order to encourage the states to supplement the federal program. *Id.* § 1382e(a) (Supp. II, 1972). Obviously, if the federal benefits were reduced in amounts equal to the state's payments, the recipients would receive the same stipend and the state's supplemental plan would be frustrated.

In determining the value of an applicant's resources, his home, household goods, personal effects, and automobile are not considered if they are within the limits established by HEW. *Id.* § 1382b(a)(1)-(2); see Proposed HEW Regs. §§ 416.1212, .1216, .1218, 38 Fed. Reg. 27,410 (1973).

¹⁶⁴ One of the most striking aspects of the new program is that the number of eligible individuals in the aged, blind, and disabled categories will almost double. The projected number of recipients under the adult programs for fiscal year 1973 was 3.4 million. HOUSE REPORT 227. Under SSI, that figure should jump to 6.2 million. *Id.*; see U.S. Dep't of Health, Education & Welfare, News Release, May 30, 1973 in 2 CCH Pov. L. REP. ¶ 17,070. This will be a welcome change, particularly for the elderly, since poverty is more prevalent among the aged than among any other age group; in 1968, 25% of all aged persons were poor. See COMMITTEE FOR ECONOMIC DEVELOPMENT, IMPROVING THE PUBLIC WELFARE SYSTEM 26 (1970). This rather grim statistic improved to 22% in 1971. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHARACTERISTICS OF THE LOW INCOME POPULATION 1971, at 4 (1972).

Even in the most liberal states, SSI will reach more applicants than had been covered previously. HOUSE REPORT 227-28. California was estimated to experience the smallest increase—from 599,700 eligibles under the previous plans to 608,700 under SSI. *Id.* at 227.

the enactment of SSI are automatically deemed to meet the resource test.¹⁶⁵

Under the previous welfare plans, it was sometimes difficult to predict exactly what kinds of income or resources had to be considered in determining eligibility and benefit levels.¹⁶⁶ SSI provides for specific guidance in some of the problem areas. The value of the applicant's home and appurtenant land is excluded from the eligibility calculation,¹⁶⁷ at least to the extent that its value does not exceed an amount which HEW deems reasonable.¹⁶⁸ Additionally, SSI provides that when an applicant is living with another person, regardless of the type of accommodation, he is still eligible for SSI, but his benefits will automatically be reduced by one-third.¹⁶⁹

¹⁶⁵ 42 U.S.C. § 1382e (Supp. II, 1972). This section was added pursuant to an amendment offered by Senator Cranston. In presenting the amendment, the Senator stated: [T]his amendment is of a basically noncontroversial nature, and would simply "grandfather" in present eligibility and resources of those receiving aid to the aged, blind, and disabled. This encompasses approximately 1,500 individuals whose resources are presently within the allowable resources in their respective States, but who would be over the maximum resource "disregard" [under the new act].

118 CONG. REC. S 17,029 (daily ed. Oct. 5, 1972) (remarks of Senator Cranston).

¹⁶⁶ See generally 58 CORNELL L. REV. 803, 812-17 (1973).

¹⁶⁷ 42 U.S.C. § 1382b(a)(1) (Supp. II, 1972).

¹⁶⁸ Although this uniform approach may ease some administrative burdens, a more equitable system would not automatically deny eligibility to an applicant owning a home valued above a set amount, but would reflect the value of the home in the computation of benefits received.

A denial of eligibility is especially harsh since the potential applicant does not have any opportunity to establish need. For example, suppose that HEW establishes a maximum value for an applicant's home of \$25,000. If applicant *A* has a house assessed at \$24,500, he will be "eligible" for SSI, and the value of his house will be ignored under the resource disregard. *Id.* If applicant *B* has a house assessed at \$25,500, not only will he not be entitled to the resource disregard, but he will be deemed ineligible for SSI because of the \$1,500 resource limitation. *Id.* This would be the result even if *B* had no income or other resource and *A* was earning \$3,000 per year, because *A* would be entitled to the income disregard as well. See note 163 *supra*.

In fact, the proposed regulations do establish a \$25,000 limit on the value of an applicant's home (\$35,000 in Alaska and Hawaii). See Proposed HEW Reg. § 416.1212, 38 Fed. Reg. 27,410 (1973). Until the regulations are fully implemented, however, recipients will have to be guided by imprecise generalities. See, e.g., U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, IMPORTANT INFORMATION ABOUT YOUR SUPPLEMENTAL SECURITY INCOME PAYMENTS 13 (1973) (DHEW Pub. No. (SSA) 74-11011):

Certain items of property are not counted in figuring the value of property you own. Generally, property that doesn't count includes your home, household goods, personal effects, and automobile, as long as their value does not exceed a reasonable amount.

For the regulations pertaining to the evaluation of an automobile as a resource, see Proposed HEW Reg. § 416.1218, 38 Fed. Reg. 27,410 (1973).

¹⁶⁹ 42 U.S.C. § 1382a(a)(2)(A) (Supp. II, 1972). The proposed regulations provide: Such one-third reduction in the payment standard will not apply where only

Finally, in determining the level of an applicant's income and resources for eligibility purposes, SSI provides that "income and resources shall be deemed to include any income and resources of [a] spouse, whether or not available to [the] individual."¹⁷⁰ This presumption applies not only to a legal spouse under state law but also to individuals who "are found to be holding themselves out to the community in which they reside as husband and wife."¹⁷¹ The breadth of this provision may be subject to constitutional attack.¹⁷²

support or maintenance (i.e., room or board) is furnished in kind; both support and maintenance must be furnished for such reduction to apply. Where only support or maintenance is furnished in kind, the value of such support or maintenance will be included as unearned income

Proposed HEW Reg. § 416.1125(f), 38 Fed. Reg. 27,408-09 (1973). There is a special provision dealing with how the states, in determining supplementary payment levels, may treat the situation in which the applicant is living with an AFDC family:

In the case of an individual who, for December 1973 lived as a member of a family unit other members of which received aid (in the form of money payments) under a State plan of a State approved under part A of title IV of the Social Security Act (AFDC), such State at its option may . . . reduce such individual's December 1973 income . . . to such extent as may be necessary to cause the supplemental payment . . . payable to such individual for January 1974 or any month thereafter to be reduced to a level designed to assure that the total income of such individual (and of the members of such family unit) for any month after December 1973 does not exceed the total income of such individual (and of the members of such family unit) for December 1973.

Pub. L. No. 93-233, § 10(b) 87 Stat. 947, *amending* Pub. L. No. 93-66, § 212(a)(3), 87 Stat. 155.

¹⁷⁰ 42 U.S.C. § 1382c(f)(1) (Supp. II, 1972). This income attribution applies only if the spouse lives in the same household as the applicant and may be avoided entirely if HEW deems it to be inequitable under the circumstances. *Id.*

¹⁷¹ *Id.* § 1382c(d)(2). This requirement is important since it precludes a couple from terminating their formal marital relationship solely in order to establish the eligibility of one of the partners or to obtain the increased benefits which would be available to them as individuals.

¹⁷² The validity of a presumption that a spouse's income will be imputed to the applicant is questionable, particularly since the provision applies to those who do not have a support obligation under state law. The presence of a support obligation has been deemed crucial by the Supreme Court in the AFDC area. In *King v. Smith*, 392 U.S. 309 (1968), the Court invalidated Alabama's so-called "substitute father" regulation, which denied AFDC payments to any mother who cohabited with any single or married able-bodied man. The Court held that when Congress specified "parent," it meant one who had the duty of support. *Id.* at 327. Subsequently, the Court had to determine the validity of a California regulation which presumed the needs of a family to be reduced simply by virtue of a man's presence in the home. *See Lewis v. Martin*, 397 U.S. 552 (1970), *rev'g* *Lewis v. Stark*, 312 F. Supp. 197 (N.D. Cal. 1968); notes 35-43 and accompanying text *supra*. In striking down the regulation, the Court relied on an HEW regulation which provided, in part, that "only income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment." *Id.* at 555. The current regulations provide: "[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) (1973); *see Solman v. Shapiro*, 300 F. Supp. 409 (D. Conn.), *aff'd per curiam*, 396 U.S. 5 (1969).

These cases were decided on statutory grounds, however. Consequently, if one wanted

B. State Supplementation

SSI presently provides for monthly payments of \$140 for an individual recipient or \$210 for a couple,¹⁷³ but on July 1, 1974, these levels will be raised to \$146 and \$219, respectively.¹⁷⁴ The 1972 Act provided that SSI recipients would not be eligible for food stamps,¹⁷⁵ but fortunately this provision has since been rescinded for most SSI recipients.¹⁷⁶

to attack the presumption created by the new law, he would have to formulate a constitutional argument. In the *Lewis* case, the plaintiff alleged violation of both due process and equal protection guarantees. 312 F. Supp. at 202-06. The lower court dismissed these arguments, and the propriety of that disposition was not resolved on appeal since the constitutional issue was not reached. Thus, a constitutional argument does not appear to be foreclosed.

¹⁷³ See Pub. L. No. 93-66, §§ 210(a), (b), 87 Stat. 154, as amended, Pub. L. No. 93-233, § 4(a)(1), 87 Stat. 953.

¹⁷⁴ See Pub. L. No. 93-233, § 4(a)(1), 87 Stat. 953, amending Pub. L. No. 93-66, §§ 210(a), (b), 87 Stat. 154. The 1972 Act provided for benefits of \$130 per individual and \$195 per couple. Act. of Oct. 30, 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1466. Public Law 93-66 raised these benefits to \$140 and \$210 respectively, effective July 1, 1974. Pub. L. No. 93-66, §§ 210(a), (b), 87 Stat. 154. Public Law 93-233 raised them again by changing the effective date of Public Law 93-66 to January 1, 1974, and by providing for the additional increase in July 1974. Pub. L. No. 93-233, § 4(a)(1), 87 Stat. 953. Since Public Law 93-233 was passed late in 1973, the increases it mandated were not incorporated in the January SSI payments. Consequently, SSI recipients will get their additional benefits retroactively. See 119 CONG. REC. H 11,956 (daily ed. Dec. 21, 1973).

Even with the increase, however, SSI benefits are inadequate. For example, SSI will not bring aged individuals over the poverty line of \$1,931, and aged couples will just barely clear their poverty line of \$2,424. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 164, at 18. Furthermore, the poverty line itself is not a meaningful standard. See generally S. Jacobsen, A Proposal for an Alternative Poverty Line, June 8, 1970 (unpublished thesis in Mann Library, Cornell University).

¹⁷⁵ Act of Oct. 30, 1972, Pub. L. No. 92-603, § 411(a), 86 Stat. 1492:

Effective January 1, 1974, section 3(e) of the Food Stamp Act of 1964 is amended by adding at the end thereof the following new sentence: "No person who is eligible (or upon application would be eligible) to receive supplemental security income benefits under title XVI of such Act shall be considered to be a member of a household or an elderly person for purposes of this Act."

The legislative history of this provision is not particularly clear. The Ways and Means Committee merely noted that

[the] bill would amend the Food Stamp Act of 1964 by providing that . . . adults eligible for benefits under [SSI] would be excluded from . . . the food stamp program.

Your committee also notes that the President has expressed his intention to transfer the food stamp program [from the Department of Agriculture] to the Department of Health, Education, and Welfare. Your committee believes there is considerable merit in such a step because the residual segments of this program would be administered by the same Department which administers the cash payments under this bill.

HOUSE REPORT 196.

¹⁷⁶ See Pub. L. No. 93-233, § 8(a)(1), 87 Stat. 956.

The Agricultural and Consumer Protection Act of 1973 (P.L. No. 93-86) [made] a recipient of supplemental security income benefits eligible for food stamp and food distribution programs unless such recipient receive[d], as part of his [SSI]

Some states had paid higher benefits under the former programs than the minimum established by SSI.¹⁷⁷ These states were required to supplement the federal payments so that no recipient's payments were reduced when SSI went into effect.¹⁷⁸ Moreover, each state has the option of establishing a program to supplement SSI benefits to any desired level.¹⁷⁹

benefits, an amount equal to the bonus value of food stamps (according to the Food Stamp Schedule effective July, 1973) in addition to the amount of assistance such recipient would be entitled to receive under the provisions of a state plan under Title I, X, XIV or XVI of the Social Security Act in effect for December, 1973.

2 CCH *POV. L. REP.* ¶ 17,427 (1973). This act has been modified, however, by § 8(a)(1) of Public Law 93-233 (87 Stat. 956), which provides:

Section 3(e) of the Food Stamp Act of 1964 is amended effective only for the 6-month period beginning January 1, 1974 to read as it did before amendment by Public Law 92-603 and Public Law 93-86, but with the addition of the following new sentence at the end thereof: "For the 6-month period beginning January 1, 1974 no individual, who receives supplemental security income benefits under Title XVI of the Social Security Act, State supplementary payments described in section 1616 of such Act, or payments of the type referred to in section 212(a) of Public Law 93-66, shall be considered to be a member of a household or an elderly person for purposes of this Act for any month during such period, if, for such month, such individual resides in a State which provides State supplementary payments (A) of the type described in section 1616(a) of the Social Security Act, and (B) the level of which has been found by the Secretary of Health, Education, and Welfare to have been specifically increased so as to include the bonus value of food stamps."

HEW has now determined that under Public Law 93-233 SSI recipients will be eligible to apply for food stamps in every state except California, Massachusetts, Nevada (only applies to aged and blind), New York, and Wisconsin. *See* Proposed USDA Reg. § 271.10(c), 39 Fed. Reg. 3812 (1974). However, as the six-month provision suggests, Congress has not yet defined the relationship between SSI and the food stamp program. *See* 119 CONG. REC. H 11,956-57 (daily ed. Dec. 21, 1973). For a discussion of Medicaid eligibility, see notes 279-85 and accompanying text *infra*.

¹⁷⁷ "There appears to be some 35 states in which SSI's replacement of current OAA, AB, APTD and food stamps benefits, *without state supplementation*, would mean a reduction in some recipients' incomes." Blong & Thorkelson, *State Supplementation of Benefits Under the Supplemental Security Income (SSI) Program*, 6 CLEARINGHOUSE REV. 653, 654 (March 1973) (emphasis added). These states are Alabama, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Montana, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming. *Id.* Note that this list was compiled before food stamp eligibility was reestablished and the recent increases in benefits were announced. Nevertheless, the importance of state supplementation is undiminished because even the modified benefit levels are too low. *See* note 174 *supra*.

¹⁷⁸ The Senate originally rejected an amendment to the 1972 Act which would have instituted this requirement. *See* 118 CONG. REC. S 17,037-38 (daily ed. Oct. 5, 1972). The amendment's proponents were ultimately successful, however, as Public Law 93-66 mandated that persons who were receiving OAA, AB, or APTD benefits in December 1973 were to be protected against a cut in their monthly payments with the advent of SSI. Pub. L. No. 93-66, § 212, 87 Stat. 155; *see* 9 WEEKLY COMP. OF PRES. DOCS. 896 (1973). *See generally* Proposed HEW Regs. §§ 416.2070-.2082, 38 Fed. Reg. 27,412-14 (1973) (implementing this portion of Public Law 93-66).

¹⁷⁹ 42 U.S.C. § 1382e(a) (Supp. II, 1972).

There are two kinds of state plans contemplated by the 1972 Act. The first is a state-administered supplementation plan¹⁸⁰ in which the state is free to establish and operate the supplementation program in any way it chooses.¹⁸¹ The only federal requirement is that the payments be "cash payments . . . made . . . on a regular basis . . . as assistance based on need."¹⁸²

The second alternative is a federally administered supplementation plan, which would be vastly more efficient than the state-administered plans because a single agency would administer the program.¹⁸³ Under this scheme, the state may enter into an agreement with HEW whereby the Social Security Administration will administer the state-financed supplementary program.¹⁸⁴ The state receives a distinct financial benefit from opting for the federally administered program because all administrative costs are borne by the federal government, leaving the state with only the expense of the actual benefits paid.¹⁸⁵ A state which entered into such an agreement would also benefit from the 1972 Act's "hold harmless" clause which provides that state supplementation payments "shall not exceed the non-Federal share of expenditures as aid or assistance for quarters in the calendar year 1972."¹⁸⁶ This provision is

¹⁸⁰ *Id.*

¹⁸¹ Blong & Thorkelson, *supra* note 177, at 653.

¹⁸² 42 U.S.C. § 1382e(a) (Supp. II, 1972).

¹⁸³ As the Ways and Means Committee noted:

Although . . . there may be a continuing need for State supplementation of the new Federal assistance programs, it would appear generally desirable that such supplementation be provided through the same agencies which would be established to operate the Federal programs. This would avoid unnecessary duplication of administrative costs, would permit the States to take advantage of the improved methods and procedures which the bill would require, and would tend to foster national uniformity in the operation of assistance programs.

HOUSE REPORT 199.

¹⁸⁴ 42 U.S.C. § 1382e (Supp. II, 1972). As Blong and Thorkelson explain:

If a state elects federal administration the federal government becomes responsible for the entire operation of the eligibility and payment process. The state establishes the eligibility and payment standards . . . but [the Social Security Administration] would be responsible for the acceptance and processing of applications, eligibility determinations, issuance of payment, etc. In effect, an individual would apply for both federal and state benefits by filing an application with [the Social Security Administration].

Blong & Thorkelson, *supra* note 177, at 655.

¹⁸⁵ 42 U.S.C. § 1382(d) (Supp. II, 1972).

¹⁸⁶ The statute, as amended, provides:

The amount payable to the Secretary by a State [pursuant to a state supplementation plan] for any fiscal year, other than fiscal year 1974 . . . shall not exceed the non-Federal share of expenditures . . . in the calendar year 1972 . . . , and the amount payable for fiscal year 1974 pursuant to such agreement or agreements shall not exceed one-half of the non-Federal share of such expenditures.

Id. § 1382e note, as amended, Pub. L. No. 93-233, § 87 Stat. 969.

designed to protect the states from an increased financial burden due to the application of more liberal eligibility requirements under the new federal standards.¹⁸⁷

To qualify for federal administration, a state's supplementation program must include all those eligible for SSI under the federal statute and regulations.¹⁸⁸ A state may, however, employ a higher income-resource disregard than SSI's, thereby bringing more recipients within its coverage, and still qualify for a federally administered supplementation plan.¹⁸⁹

Under either plan, the states are allowed to discourage "benefit shopping" by imposing a durational residency requirement.¹⁹⁰ Although states clearly should be allowed to limit their payments to bona fide residents, any durational requirement may well be

¹⁸⁷ See *Hearings on the Social Security Amendments of 1971 Before the Senate Comm. on Finance*, 92d Cong., 1st Sess. 117 (1971) (testimony of E. Richardson, Secretary, HEW). For example, suppose a state's share of its 1973 OAA, AB, and APTD programs were \$12 million. If it spent more than \$12 million on its SSI supplementation plan, the extra cost would be borne by the federal government. However,

[s]ince state costs under the new program are measured against the total nonfederal share of assistance costs in the adult categories, it seems unlikely that many states would approach the level at which they would qualify for federal funds unless their state supplementation level was far in excess of the federal benefit level and/or there was a great increase in the number of aged, blind or disabled individuals who qualified for aid.

Blong & Thorkelson, *supra* note 177, at 657.

¹⁸⁸ 42 U.S.C. § 1382e(b)(1) (Supp. II, 1972).

¹⁸⁹ The 1972 Act provides:

Any State (or political subdivision), in determining the eligibility of any individual for supplementary payments described in subsection (a) . . . may disregard amounts of earned and unearned income in addition to other amounts which it is required or permitted to disregard under this section in determining such eligibility, and shall include a provision specifying the amount of any such income that will be disregarded, if any.

Id. § 1382e(c)(2). Also,

in administering state payments supplementing the federal payments, the federal government will permit a state to establish two payment levels to take account of geographic variations in living costs within the state, providing the areas can be identified by county or zip code. If the state can show special justification, a third geographic variation might be allowed. Moreover, the federal government will permit a state to select up to five different payment levels to fit different living arrangements, such as a recipient living alone, living with an ineligible spouse, or living in certain kinds of care facilities, *e.g.* a nursing home.

U.S. Dep't of Health, Education & Welfare, News Release, May 30, 1973 in 2 CCH Pov. L. Rev. ¶ 17,070.

¹⁹⁰ Any State (or political subdivision) making supplementary payments described in subsection (a) . . . may at its option impose as a condition of eligibility for such payments, and include in the State's agreement with the Secretary under such subsection, a residence requirement which excludes individuals who have resided in the State (or political subdivision) for less than a minimum period prior to application for such payments.

42 U.S.C. § 1382e(c)(1) (Supp. II, 1972).

unconstitutional.¹⁹¹The proposed regulations also allow the states to impose a lien on the property of SSI recipients as a condition to eligibility and to require that a relative of the individual contribute to his support.¹⁹²

¹⁹¹ See *Shapiro v. Thompson*, 394 U.S. 618 (1969). The exact boundaries of *Shapiro* are not clear, but it has been relied upon to strike down a presumption that an applicant who was not a resident for more than one year had moved into the state for the purpose of obtaining benefits and was therefore ineligible. See *Bowens v. Wyman*, 304 F. Supp. 717 (S.D.N.Y. 1969), *aff'd*, 397 U.S. 49 (1970). In *Pease v. Hansen*, 404 U.S. 70 (1971), the Supreme Court held, per curiam, that "[w]hether a welfare program is or is not federally funded is irrelevant to the constitutional principles enunciated in [*Shapiro*]." Thus, a state may not rely upon the argument that since the program is state-funded the state may impose whatever criteria it desires. Former HEW Secretary Richardson took the view that state durational residency requirements are unconstitutional: "We think that the Supreme Court decision on this point makes unconstitutional the provision of H.R. 1 [the much amended predecessor of the 1972 Act] which seeks to permit States to apply residency requirements with respect to eligibility for the State supplement." *Hearings, supra* note 187, at 112.

Shapiro might be distinguished, however, on the ground that for SSI recipients a basic federal program is available no matter where they live. It is only the supplemental portion which is withheld by the application of the residency requirement. In *Shapiro*, the entire benefit was withheld.

Conceivably a subdivision of a state might try to impose residency requirements on applicants for a supplementary program. Such a residency requirement could impede interstate travel (if applied to a new state resident) and the right to travel intrastate (if applied to a long time state resident). See *Memorial Hosp. v. Maricopa County*, 94 S. Ct. 1076 (1974) (Supreme Court invalidated Arizona county durational residency requirement for nonemergency hospital or medical care as violative of right to travel interstate). See generally *Intrastate Residence Requirements for Welfare and the Right to Intrastate Travel*, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 591 (1973).

¹⁹² Proposed HEW Reg. § 416.2003, 38 Fed. Reg. 21,189 (1973). Lien and relative responsibility statutes are quite popular with state agencies despite the fact that lien statutes may work unnecessary hardships and relative responsibility laws may well lead to serious psychological problems for both the recipient and the responsible relative. Tully, *Family Responsibility Laws: An Unwise and Unconstitutional Imposition*, 5 FAMILY L.Q. 32, 39-43 (1971). Furthermore, relative responsibility laws tend to perpetuate poverty by thrusting a support obligation upon those just emerging from poverty themselves. *Id.* at 42-43.

Interestingly enough, the 1972 Act makes no mention of allowing states to impose these requirements. This led the Center on Social Welfare Policy and Law to criticize this section of the proposed regulations:

[T]here is nothing on the face of the federal statute which generally authorizes additional eligibility requirements in a federally administered supplementation program. On the contrary, the statute specifically recognizes the question of additional eligibility requirements for such supplementation and authorizes only one to be imposed by the states, the durational residency requirement Even more fundamentally, . . . § 1616(b) of the statute requires that federally administered supplementation be provided "to all individuals residing in such state . . . who are receiving SSI benefits . . ." Clearly the effect of Section 1616(b)(1) is to prohibit states from establishing eligibility conditions for supplementation which are different from those applicable to the federal benefits, since any variation in conditions would create a possibility that some federal recipients might not qualify for the state benefits.

Center on Social Welfare Policy & Law, Letter to Commissioner of Social Security, Aug. 30, 1973, at 3 (on file at the *Cornell Law Review*).

The limited material that is presently available indicates that all states except Texas and Arizona plan to establish or have established supplementary plans.¹⁹³ Of these, "twenty states are planning to provide only mandatory supplementation, *i.e.* supplementation only for those aged, blind and disabled individuals who [were] on the rolls in December 1973 to maintain their income at the December 1973 levels."¹⁹⁴ Not surprisingly, the majority of the states have chosen the federally administered supplementation program.¹⁹⁵

III

FOOD STAMP PROGRAM

A. *The Program Prior to 1973*

The 1964 Food Stamp Act¹⁹⁶ was one of the first major components of the Great Society. In enacting the program, Congress sought to create an alternative to direct distribution of federally held surplus and other food,¹⁹⁷ both as a better means of

¹⁹³ See Center on Social Welfare Policy & Law, *supra* note 192, at 1.

¹⁹⁴ *Id.* These states are Alabama, Arkansas, Delaware, Georgia, Indiana, Kansas, Louisiana (tentative), Maryland, Mississippi, Missouri, Montana (tentative), New Mexico (tentative), North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming. *Id.* at 2.

¹⁹⁵ Twenty-eight states have indicated they will establish a federally administered program, while only 15 are considering self-administration. See *id.* at 2-3. "Florida and Virginia appear to be leaning toward federal administration of the mandatory supplementation and state administration of the optional program." *Id.* at 2. This procedure is specifically allowed in the proposed regulations. See *Proposed HEW Reg.* § 416.2074(c), 38 Fed. Reg. 27,413 (1973). A state could not, however, manage the mandatory program itself and have the federal government manage the optional portion. The question of administration has apparently been unresolved in the remaining states.

¹⁹⁶ 7 U.S.C. §§ 2011-2025 (1970), *as amended*, 7 U.S.C. §§ 2012, 2019, 2023 (Supp. II, 1972) [hereinafter cited as Food Stamp Act].

Congress approved the Food Stamp Act as an extension of a four-year pilot program conducted by the USDA under the authority of the Act of August 24, 1935, ch. 641, § 32, 49 Stat. 750. By its final year, fiscal year 1964, the test program included 43 areas in 22 states and gave 392,000 people an added \$28.6 million of food purchasing power. In evaluating the pilot phase, USDA research agencies reported that the program had admirably accomplished its aim. Not only were many families able substantially to increase their food consumption and obtain nutritionally adequate diets, but community economics and agriculture benefited as well. Retail food sales increased about 8% in the pilot regions; 80% of that increase represented the purchase of more livestock products, fruits, vegetables, and grains—the products from which farmers get the best returns. H.R. REP. NO. 1402, 91st Cong., 2d Sess. 2, 3 (1970) [hereinafter cited as 1970 HOUSE REPORT]. For a more complete report of the impact and results of the pilot program, see S. REP. NO. 1124, 88th Cong., 2d Sess. 2-8 (1964) [hereinafter cited as SENATE REPORT].

¹⁹⁷ In parts of the country where the food stamp program is in effect, the Food Stamp Act prohibits, except in special circumstances, simultaneous distribution under the Federal

ensuring an adequate nutrition level in low income households and as a boost to the agricultural economy.¹⁹⁸ To implement this design, Congress authorized the Secretary of Agriculture "to formulate and administer a food stamp program"¹⁹⁹ which was to be made available throughout the United States. From this authority, as modified in 1971, resulted the food stamp program in effect at the start of 1973.

1. Federal-State Cooperation

Since its inception, the federal food stamp program has been administered by state agencies, or by local agencies to which the state has delegated authority, in cooperation with and under the supervision of the Food and Nutrition Service (FNS) of the United States Department of Agriculture (USDA).²⁰⁰ State participation in

Commodity Distribution Program, which provides direct donations of food "packages" containing some 20 kinds of foods designed to supply all essential nutritional requirements. 7 U.S.C. § 2013(b) (1970); 7 C.F.R. § 271.1(a) (1973). Counties in states participating in the original program were, however, free to elect either method of food assistance. There has been a consistent and comprehensive federal effort to ensure that eligible families in every political unit in the country benefit from one of these programs. In fact, by July 31, 1970, all but 22 of the nation's counties and cities were in some way involved in one of these programs. 1970 HOUSE REPORT 6-7. Recently, however, the federal government determined that the food stamp program is a more effective means of implementing food assistance. Consequently, after the end of the fiscal year 1974, any state desiring to participate in a food assistance program must do so through the distribution of food stamps. Pub. L. No. 93-86, § 3(i), 87 Stat. 247, amending 7 U.S.C. § 2019(e) (Supp. 11, 1972).

¹⁹⁸ The policy and purpose of the Food Stamp Act are set forth at 7 U.S.C. § 2011 (1970):

It is hereby declared to be the policy of Congress, in order to promote the general welfare, that the Nation's abundance of food should be utilized cooperatively by the States, the Federal Government, local governmental units, and other agencies to safeguard the health and well-being of the Nations [sic] population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.

The Food Stamp Act charges its administrators "particularly to encourage the continued use of those [foodstuffs] or surplus in abundant supply so as not to reduce the total consumption of surplus commodities which have been made available through direct distribution." *Id.* § 2019(a).

¹⁹⁹ *Id.* § 2013.

²⁰⁰ Originally, the "state agency" responsible for the administration of the program within the state was that agency responsible for the state's federally aided public assistance programs. Food Stamp Act of 1964, Pub. L. No. 88-525, § 3(h), 78 Stat. 703. Today that agency is the one specifically designated by the Secretary of Agriculture to carry out the

the program was made voluntary by the Food Stamp Act,²⁰¹ although the federal government consistently has encouraged state participation.²⁰² Once a state decides to enter the program, it becomes subject to rather close federal supervision, which is provided in two ways. First, the federal government finances a large part of the program. It is the FNS which prints the coupons, disburses them to the states, and ultimately pays for the bonus value of the monthly coupon allotments destined for eligible households through state distribution.²⁰³ Moreover, although the states must bear most of the administrative costs of the program, the FNS reimburses each state agency for 62.5 percent of costs incurred in performing the following specific duties: the education of potential recipients, the certification of households not already on federally aided public assistance grants, and the provision of hearing officials for aggrieved applicants.²⁰⁴

The more significant federal control, however, is that which the FNS exerts directly over the administration of the program in each state. The state's opportunity to participate in the food stamp program depends entirely upon its securing FNS approval of a

purposes of the Food Stamp Act. 7 U.S.C. § 2012(h) (Supp. II, 1972). Its primary duties include the certification of eligible households and the acceptance, storage, and protection of coupons after their delivery to the state. 7 C.F.R. § 271.1-9 (1973). In addition, the agency is charged with the sale and issuance of coupons, which it may control directly or through local government agencies or banks. *Id.*; see SENATE REPORT 2. Finally, the state agency must conduct an "outreach program" to inform potential participants of the program. 7 U.S.C. § 2019(a) (1970); *id.* § 2019(e) (Supp. II, 1972); 7 C.F.R. § 271.1(k) (1973); 1970 House REPORT 2.

²⁰¹ 7 U.S.C. § 2013(a) (1970); see SENATE REPORT 15.

So long as a state has chosen to participate in either federal family food assistance program, however, it has been required to provide its hungry citizens in every county with either commodity distribution or food stamps. No county may elect not to receive its share of the state's food stamp assistance. *Jay v. United States Dep't of Agriculture*, 308 F. Supp. 100, 107 (N.D. Tex. 1969).

²⁰² See note 197 *supra*. Currently 48 states and the District of Columbia participate in the food stamp program; New Hampshire and Delaware do not supply food stamps. FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRICULTURE, FOOD STAMP PROGRAM: STATISTICAL SUMMARY OF OPERATIONS, AUGUST 1973, at i (1973).

²⁰³ 7 U.S.C. § 2013(a) (1970). The Food Stamp Act authorized the Secretary of Agriculture to issue coupons redeemable at face value from funds appropriated by Congress for the program and made available through the facilities of the United States Treasury. See note 229 *infra*.

The original House version of the 1971 amendment to the Food Stamp Act provided that by fiscal year 1974 each state would finance 10% of the difference between the face value of coupons issued to a household and the amount such household paid for its coupons. H.R. 18582, 91st Cong., 2d Sess. § 9 (1970). However, this language was stricken in conference, and it was not revived on the House floor. H.R. REP. No. 1793, 91st Cong., 2d Sess. 9 (1970); see 7 U.S.C. § 2024 (1970).

²⁰⁴ 7 U.S.C. § 2024 (1970); 7 C.F.R. § 271.2 (1973).

plan of operation in which it agrees to conform to the federal regulations and to act only after confirmation by the FNS.²⁰⁵ To obtain a favorable ruling from the FNS, the state agency must agree, principally, to disregard food stamp benefits as income for Social Security, welfare, or taxation purposes; not to decrease other welfare benefits as a consequence of the receipt of food stamps; to avoid racial, political, religious, or ethnic discrimination among applicants; to impose no residence requirements for eligibility; to hold applicant information confidential; to apply uniform personnel standards in both food stamp and other federally aided assistance programs; to keep records of its actions available to the FNS; and to meet all FNS requirements in certifying eligible households and providing redress for aggrieved applicants.²⁰⁶ No food stamps will be issued without an approved plan, and failure to comply with federal standards will result in suspension of benefits until the state agency's nonconformity is corrected.²⁰⁷

2. *Eligibility and Certification*

Eligibility for food stamps is predicated on the establishment of a "household" unit, because food stamp benefits are available to "households" rather than to individuals.²⁰⁸ For the purposes of the program, "[a]ll persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child-care reasons, residing in common living quarters shall be consolidated into a group prior to determining if such a group is a household. . . ." ²⁰⁹ A "household" must at least live as an economic unit which shares cooking facilities and a common cupboard. Furthermore, until 1973, the state's inquiry extended also into the age and familial ties of the would-be household's members. For

²⁰⁵ 7 U.S.C. § 2019(e) (Supp. II, 1972); 7 C.F.R. § 271.1(i), (j) (1973). The plan must describe the manner in which and the political subdivisions wherein the program is to be established. 7 U.S.C. § 2019(e) (Supp. II, 1972). It must cover a federal fiscal year and may be extendable by the FNS for succeeding fiscal years. 7 C.F.R. § 271.1(j) (1973).

The regulations detail the necessary items in a plan of operation, including the administrative plans for accomplishing statutory duties such as outreach (*see note 200 supra*) and sampling to monitor the program's effectiveness in each state. 7 C.F.R. § 271.8 (1973).

²⁰⁶ 7 U.S.C. §§ 2019(b), (d) (1970); *id.* §§ 2019(c), (e) (Supp. II, 1972); 7 C.F.R. §§ 271.1(b)-(h) (1973). The FNS will approve no plan with eligibility standards falling short of those set by the Secretary of Agriculture. 7 U.S.C. § 2014(b) (1970).

²⁰⁷ 7 U.S.C. § 2019(f) (1970); 7 C.F.R. § 271.1(t) (1973). Of course, this action does not penalize the state, but the recipients who need the stamps and are innocent of any wrongdoing.

²⁰⁸ 7 C.F.R. § 271.3(a) (1973).

²⁰⁹ *Id.*

example, unrelated persons under sixty years of age could not be a "household" for food stamp purposes.²¹⁰

Only after an applicant or group demonstrates its identity as a valid "household" may it take its second step toward certification—proof of financial eligibility. If the household constitutes one in which all members meet the requirements for and receive other federally aided public assistance or general assistance grants, this latter task is simple. Such a household may be found eligible and be certified to participate in the program, without further inquiry into its members' income or resources,²¹¹ on the basis of information contained in an affidavit and in its assistance file.²¹²

All other households, however, must undergo a more complex eligibility determination process.²¹³ The state agency must ascertain whether an applicant satisfies the uniform national standards²¹⁴

²¹⁰ Food Stamp Act of 1964, Pub. L. No. 88-525, § 3(e), 78 Stat. 703; 7 C.F.R. § 270.2(jj) (1973). Groups or individuals who were eligible under the previous regulations included individuals related to each other by blood or marriage, a group consisting entirely of persons over 60 years of age whether or not related, individuals less than 60 years old but related to another member over 60, or a housebound elderly person, or a single individual cooking for home consumption. *Id.* For recently added eligible household categories, see notes 233-36, 251-52 & 257 and accompanying text *infra*.

Regardless of the establishment of an otherwise valid "household" entity, however, all persons even potentially eligible for SSI benefits under title XVI of the Social Security Act were to be disqualified as household members and elderly persons under the food stamp program as of January 1, 1974. 7 U.S.C. § 2012(e) (Supp. II, 1973). This provision has now been rescinded, however, and many SSI recipients are eligible for foodstamps. See notes 175-76 and accompanying text *supra*.

²¹¹ 7 C.F.R. § 271.3(b) (1973).

²¹² 7 U.S.C. § 2019(c) (Supp. II, 1972); 7 C.F.R. § 271.4(a)(1) (1973). Section 441(c) of the 1972 amendments to the Food Stamp Act deleted the specific statutory provision for the short-cut certification, but did not say that the USDA was prohibited from using this method if it wished. See 7 U.S.C. § 2019(c) (Supp. II, 1972). In fact, section 411(d) of the same amendments apparently broadens in general the power of the Secretary of Agriculture to use his discretion in setting eligibility requirements, by proclaiming that instead of certifying applicant households according to specific congressional directive, states now must follow simply whatever standards are prescribed by the Secretary pursuant to the Food Stamp Act. *Id.* § 2019(e). Consequently, the regulations dealing with the simplified certification procedure can, and still do, stand.

²¹³ All needy households, not simply those eligible for other public or general assistance, may qualify for food stamps if they meet the financial need requirements. SENATE REPORT 10-11, I5; 1970 HOUSE REPORT 4.

²¹⁴ 7 U.S.C. §§ 2014(a), (b) (1970); SENATE REPORT 15; 1970 HOUSE REPORT 3; note 237 *infra*. Ordinarily participation is limited to those households whose income and resources are recognized as substantial limiting factors on their ability to purchase a nutritionally adequate diet. Provisions were made in the original act, however, for short-term participation by households victimized by disasters which disrupted commercial channels of food distribution. Emergency eligibility standards are established without regard to a household's income or other financial resources.

prescribed by the Secretary of Agriculture.²¹⁵ In so doing, the agency must compute both the income level of the household, less deductions for any of certain specified deductible household expenses,²¹⁶ and the value of the household's resources.²¹⁷ If neither of the resultant figures exceeds the national standards,²¹⁸

²¹⁵ 7 U.S.C. §§ 2013(c), 2014(b) (1970). The Secretary of Agriculture establishes these standards in consultation with the Secretary of Health, Education, and Welfare. Standards are set for the 50 states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. The latter three regions require special eligibility standards and coupon allotment schedules reflecting average per capita income and cost of a nutritionally adequate diet in these jurisdictions; however, these standards may not exceed those used in the 50 states.

Under the original program, each participating state established its own eligibility standards, using maximum income limitations consistent with the state's standards for federally aided assistance programs. SENATE REPORT 15; 1970 HOUSE REPORT 4.

²¹⁶ The regulations define income as including, but not limited to: wages; net income from self-employment less the cost of that income's production; total income from roomers; total income from boarders, less a deduction for each boarder amounting to the value of the coupon allotment for a one-person household; total payments to the household by a member committed only to contribute part of his income; annuities, pensions, disability or unemployment compensation, and old-age, survivors, or strike benefits; payments from federally aided or other need-based assistance programs; payments other than those for medical costs made for the household by a nonmember; cash gifts and awards for support and education, scholarships, and educational grants; support and alimony payments; and all other royalty, rent, dividend, interest, or other gains. 7 C.F.R. § 271.3(c)(1) (1973).

This section also specifies that the following items are exempt from consideration as income: wages or self-employment income of students under 18; payments received under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §§ 4601-4655 (1970)); nonmonetary gains or benefits; small, irregular, and not reasonably foreseeable income gains during a given quarter; insurance-settlement, sale-of-property, and other nonrecurring lump-sum payments (such as retroactive Social Security pension payments); 10% of wages or training allowance, not to exceed \$30 per household per month; and all loans except deferred-payment educational loans. 7 C.F.R. § 271.3(c)(1) (1973).

Permissible deductions listed include mandatory deductions from earnings such as taxes, Social Security, and union dues; medical expenses exceeding \$10 per month; child or other care costs necessary to enable a household member to be employed; unusual and not reasonably anticipated expenses; court-ordered outgoing support and alimony payments; educational expenses for tuition and mandatory school fees, including those covered by educational assistance grants of all types; and shelter costs in excess of 30% of the household's income. *Id.*

²¹⁷ The regulations outline exclusions and inclusions in, as well as a standard for determining, the value of household resources. *See* 7 C.F.R. § 271.3(c)(4) (1973). Inclusions are liquid negotiable resources and nonliquid property assets. *Id.* Excluded from resources are the household's home, car, household and personal effects, and the cash value of life insurance policies; any "income-producing property producing income consistent with its fair market value"; additional vehicles necessary for work, tools of a household member's trade, and farm machinery necessary for the household's self-support; the total resources of roomers, boarders, and household members committed to contribute only a part of their incomes to the household; and "Indian lands held jointly with the tribe" or saleable only with approval from the United States Bureau of Indian Affairs. *Id.*

Resource value represents fair market value, less encumbrances. There are no "deductions" from resources similar to those provided for income valuation.

²¹⁸ The maximum allowable resources—including both liquid and nonliquid

and formerly if the applicant met both a tax dependency²¹⁹ and a work registration requirement,²²⁰ the applicant household may be

assets—of all members of each household shall not exceed \$1,500 for each household, except, for households of two or more persons with a member or members age 60 or over whose resources are not excluded under subdivision (iii)(c) of this subparagraph, the resources shall not exceed \$3,000.

Id. § 271.3(c)(4)(i). Subdivision (iii)(c) of this regulation excludes the total resources of a roomer or boarder committed to contribute only part of his income to the applicant household, as payment for services including food and lodging. According to another provision in the regulations,

[u]niform national income standards of eligibility for participation of nonassistance households in the program for the 50 States and the District of Columbia shall be the higher of: (i) The income poverty guidelines issued by the Secretary of Agriculture based on the statistics on poverty levels reported by the Census Bureau's Current Population Reports; or (ii) the level at which the total coupon allotment equals 30 percent of income. These income standards for each nonassistance household size will be prescribed in General Notices published in the FEDERAL REGISTER.

Id. § 271.3(c)(3).

For example, FSP No. 1974-1.1, amend. 18, fixed the national income standards for nonassistance households in the District of Columbia and all states except Alaska and Hawaii as the higher of:

- (1) The maximum allowable monthly income standards for each household size which were in effect in such States or the District of Columbia prior to July 29, 1971, or
- (2) The following maximum allowable monthly income standards.

Household size:	Maximum allowable monthly income standards—48 States and District of Columbia
One	\$183
Two	260
Three	373
Four	473
Five	560
Six	646
Seven	726
Eight	806
Each additional member	+67

38 Fed. Reg. 30,118 (1973).

²¹⁹ Under the statutory mandate (7 U.S.C. § 2014(b) (1970)), the Secretary of Agriculture reiterated in FNS regulations a "tax dependency requirement." For a discussion of the demise of that requirement, see notes 253-54 and accompanying text *infra*.

The regulations declared the ineligibility of any household which included a member age 18 or over who was claimed as a dependent for federal income tax purposes by a member of a household not certified as eligible for food assistance, during the tax period for which such dependency was claimed, and for one year thereafter. 7 C.F.R. § 271.3(d) (1973). For example, a mother with whom a child 18 or over resided in an otherwise eligible household unit had to be disqualified for two years from receiving food stamps if her estranged husband, living elsewhere, had claimed the child as a dependent because he, the husband, made support payments, even though those payments were inadequate to eliminate the need for food assistance.

²²⁰ The statute sets forth a "work registration requirement." 7 U.S.C. § 2014(c) (1970). Unlike the tax dependency clause, this mandate has weathered the changes of 1973. Consequently, under the regulations each applicant household must see that its able-bodied members between the ages of 18 and 65 who are not already working 30 hours a week, are

certified "eligible" and scheduled to receive food stamps, subject to periodic recertification.²²¹ This determination process must be completed within thirty days of receipt of an application.²²²

3. *Coupon Allotments, Purchase Requirements, and Redemption of Coupons*

Every certified household is entitled to receive a specific monthly coupon allotment, for which it pays only a percentage of the monetary face value.²²³ The difference between the face value of the allotment and its cost to the recipient constitutes the "benefit" conferred by the program.

The size of the allotment awarded each household depends not on income, but solely upon the number of individuals in the household.²²⁴ Income does bear, however, on the cost of the food stamp allotment to the recipient. A household must pay a higher percentage of the face value of its allotment as its income increases. Thus, while two families of four will receive the same monthly allotment of stamps, each will pay a different sum to obtain them,

not mothers charged with the care of dependent minors or of incapacitated adults, or are not at least half-time students, register with the appropriate state or federal employment agency, and comply with certain other requirements with respect to accepting reasonable offers of employment. See 7 C.F.R. § 271.3(e) (1973). Failure to so register and become available for employment renders the household ineligible for food stamps.

This requirement reflects substantial debate over the 1971 amendment. The House Committee on Agriculture concluded that it was both necessary and desirable to deny assistance to "freeloaders" while at the same time preserving "the idea that honest labor to earn one's livelihood is a fundamental part of our national heritage . . ." 1970 House REPORT 11.

²²¹ 7 C.F.R. §§ 271.4(2), (4) (1973). Certification generally is made on the basis of the application, an interview, and the verification of income and any other factors in question. When a household's income changes substantially in source or amount, a reverification and recertification must follow. In addition, the agency must review participant households at regular intervals to determine any other changes in status likely to affect eligibility, size of coupon allotment, or purchase requirement. Certification periods vary with the type of household, *i.e.*, welfare, nonassistance, or farm. See *id.* § 271.4(4). See note 246 *infra*.

²²² 7 C.F.R. § 271.4(3) (1973).

²²³ 7 U.S.C. § 2013(a) (1970).

²²⁴ Parker, King & Maloney, *Polyunsaturated Placebos for the Poor: Food Stamps, the Food Industry and Government Regulation*, 17 How. L.J. 489, 505 (1972). For an example of allotments for each household size, see FSP No. 1973-1, 38 Fed. Reg. 8287 (1973), and note 226 *infra*.

Prior to 1973, the value of any allotment was "in such amount as the Secretary determines to be the cost of a nutritionally adequate diet," and was adjusted once a year to reflect changes in the prices of food as they were published by the Department of Labor's Bureau of Labor Statistics. 7 U.S.C. § 2016(a) (1970). For the current situation, see notes 242-43 *infra*.

depending upon the size of their respective incomes. The needier participant will receive a greater "bonus" from the program.²²⁵

As they are prescribed, the FNS publishes schedules of allotments and purchase requirements in the *Federal Register*.²²⁶ In addition to these specific per household prescriptions, the Food Stamp Act itself establishes a ceiling cost beyond which households may not be charged. Under the Act, each purchase requirement "shall represent a reasonable investment on the part of the household, but in no event more than 30 per centum of the household's income . . .," and no charge may be made against a family of four with income less than thirty dollars per month.²²⁷

²²⁵ Parker, King & Maloney, *supra* note 224, at 505. The authors provide an illuminating example of how the food stamp program works to deliver its actual benefits. *Id.* at 506-12.

²²⁶ 7 C.F.R. § 271.5 (1973). The most recently published schedules appear at 38 Fed. Reg. 30,119, 31,874-76, 32,588, 32,826 (1973). A schedule is structured in this manner:

MONTHLY COUPON ALLOTMENTS AND PURCHASE REQUIREMENTS—
48 STATES AND DISTRICT OF COLUMBIA

Number of Persons in Household	1	2	3	4	5	6	7	8
Monthly Coupon Allotment	\$42	\$78	\$112	\$142	\$168	\$194	\$218	\$242
Monthly Net Income	Monthly Purchase Requirement							
0- \$19.99	0	0	0	0	0	0	0	0
\$20- \$29.99	1	1	0	0	0	0	0	0
\$30- \$39.99	4	4	4	4	5	5	5	5
\$40- \$49.99	6	7	7	7	8	8	8	8
\$50- \$59.99	8	10	10	10	11	11	12	12
\$60- \$69.99	10	12	13	13	14	14	15	16
\$70- \$79.99	12	15	16	16	17	17	18	19
\$80- \$89.99	14	18	19	19	20	21	21	22
\$90- \$99.99	16	21	21	22	23	24	25	26
\$100-\$109.99	18	23	24	25	26	27	28	29
\$110-\$119.99	21	26	27	28	29	31	32	33
\$120-\$129.99	24	29	30	31	33	34	35	36
\$130-\$139.99	27	32	33	34	36	37	38	39
\$140-\$149.99	30	35	36	37	39	40	41	42

The chart continues on through a net monthly income of \$780 to \$809.99 for a family of eight. As the monthly income increases, families with fewer members are disqualified for stamps, so that by the time \$809.99 is reached, only eight-person households are still eligible. Households of more than eight persons are subject to a different formula for finding the value of the allotment and purchase requirement. *See id.* at 30,119.

²²⁷ 7 U.S.C. § 2016(b) (1970); 7 C.F.R. § 271.6(d)(3) (1973). Eligible households may elect to receive less than their authorized allotments and to pay for the reduced allotments

After a household receives its allotment,²²⁸ it is free to use the stamps to purchase certain eligible foodstuffs, including all domestic staples, produce, meat, and some prepared meals.²²⁹ Such purchases may be made only at retail stores which have been approved for participation in the program by the FNS.²³⁰ Either

charges bearing the same ratio to the charges they would have paid for their entire allotments as the face values of the reduced allotments bear to the face values of the entire allotments. *Id.*

Until 1973, all participant households could elect to have charges, if any, for their coupon allotments deducted from any other welfare or federally aided assistance grants they were entitled to receive, and to have their allotments distributed to them together with such grants. Act of Jan. 11, 1971, Pub. L. No. 91-671, § 6(b), 84 Stat. 2048; *see* note 244 *infra*.

The House bill for the 1971 amendment proposed a minimum purchase requirement of at least \$0.50 per person per month, not to exceed \$3.00 per month for a family of six or more. This minimum charge met strong objection, however, and consequently failed to pass. The final bill contained a compromise authorizing the Secretary to provide free stamps to the neediest households. The no-charge proviso of the statute (7 U.S.C. § 2016(b) (1970)), couched in terms of four-member households, was meant to extend to smaller and larger households with similar needs. 1970 HOUSE REPORT 14-15, 31; H.R. REP. No. 1793, *supra* note 203, at 8.

²²⁸ The state agency may issue coupons through the United States mail (7 C.F.R. § 271.6(d)(1) (1973)), or may arrange to have them sold at local government agencies or its own outlets. 7 U.S.C. § 2019(b) (1970); 7 C.F.R. § 271.6(d) (1973).

²²⁹ 7 U.S.C. §§ 2012(b), 2019(h) (1970); 7 C.F.R. § 270.2(s) (1973); note 239 *infra*. Under the program in effect through 1972 and early 1973, eligible food excluded alcoholic beverages, tobacco, foods identified on the packages as imported, and any imported meat. But meals purchased by elderly persons from authorized nonprofit meal delivery services did constitute "eligible food" so long as the elderly persons so using their coupons were feeble, housebound, disabled, or physically handicapped. 7 U.S.C. § 2019(h) (1970).

The express intent of the Senate Committee on Agriculture and Forestry in its original definition of food and designation of the coupon allotment size allowed each household was to restrict recipients to the purchase of low-cost, nonluxury food items designed to provide high nutritional value. SENATE REPORT 9-10; *see* 7 U.S.C. § 2019(a) (1970).

Failure to comply with regulations governing the use or redemption of coupons means temporary or perhaps even permanent disqualification from the program for the offending household. 7 C.F.R. § 271.9(e) (1973).

²³⁰ 7 U.S.C. § 2015(b) (1970); *Kentucky Fried Chicken of Cleveland, Inc. v. United States*, 449 F.2d 255 (5th Cir. 1971). All establishments falling within the Act's definition of "retail food store" (7 U.S.C. § 2012(f) (1970)), however, are not ipso facto admitted to the program. Despite its concession that *Kentucky Fried Chicken of Cleveland, Inc.*, satisfied the basic definitional requirements for participation, the Fifth Circuit in 1971 sustained its exclusion from the food stamp program. Because Congress had aimed particularly at providing low income households with "an opportunity more nearly to obtain a low-cost nutritionally adequate diet" (7 U.S.C. § 2016(a) (1970)), the court determined that it was perfectly reasonable for the Secretary of Agriculture to exercise the prerogative vested in him by granting approval only to grocery establishments stocking a large number of low-cost foods. 449 F.2d at 257.

Coupons may not be used to pay for food previously bought on credit. 7 C.F.R. § 271.9(c) (1973). A recipient who transfers his coupon allotment to someone else for cash instead of redeeming his coupons in the authorized manner is guilty of a misdemeanor or a felony, depending upon the total value of the stamps he sells. 7 U.S.C. § 2023(b) (1970).

the certified head of the household or his authorized representatives may redeem the coupons.²³¹

B. *Program Developments*

With the year 1973 came several changes in the food stamp program of substantial significance to would-be stamp recipients. Generally, these changes broadened the scope of food stamp coverage, particularly in the area of eligibility for benefits.

1. *Legislative and Administrative Changes*

a. *Eligibility.* Section 3 of the Agriculture and Consumer Protection Act of 1973²³² extends and amends the provisions of the Food Stamp Act. Probably its most important feature is its extension of eligibility to a number of previously excluded groups of individuals. Now encompassed within the definition of eligible "households" are drug addicts and alcoholics who regularly participate in drug addiction or alcoholic treatment and rehabilitation programs.²³³ Moreover, most aged, blind, and disabled individuals eligible to receive Supplementary Security Income benefits, who were to be excluded from eligibility as food stamp "households" as of January 1, 1974,²³⁴ have been reinstated as potential participants

²³¹ 7 C.F.R. § 271.9(a) (1973). Once the retailer obtains the stamps, he may redeem them for face value through authorized wholesalers who act in cooperation with the federal government, or by depositing them, like money, in his regular bank account. The bank will then redeem the coupons through the United States Treasury and Federal Reserve System. 7 U.S.C. § 2018 (1970); SENATE REPORT 16.

²³² Pub. L. No. 93-86, § 3, 87 Stat. 246.

²³³ *Id.* §§ 3(a), (c), (d), (e), (f), amending 7 U.S.C. §§ 2012, 2014, 2019 (1970); see notes 208-10, 215 & 229 and accompanying text *supra*.

"Household" is now defined to encompass any narcotics addict or alcoholic living under the supervision of a private nonprofit organization or institution for the purpose of regular participation in a treatment and rehabilitation program. To qualify, the "nonprofit organization or institution" and its program must be certified by the state agency or agencies designated by each state's governor, pursuant to federal law, as administrator of the state's own drug and alcohol addiction treatment programs. Pub. L. No. 93-86, §§ 3(a), (c), 87 Stat. 246, amending 7 U.S.C. § 2012 (1970). Like other households these newly defined units will be subject to uniform national standards of eligibility prescribed by the Secretary of Agriculture. *Id.* § 3(d), 87 Stat. 246, amending 7 U.S.C. § 2014 (1970). Members of such units, however, are not subject to the work requirement of the statute (see 7 U.S.C. § 2014(c) (1970)) because they are excluded from the definition of "able-bodied adult" used therein. Pub. L. No. 93-86, § 3(e), 87 Stat. 247. Finally, drug addicted or alcoholic members of eligible households may use their coupons to purchase meals prepared or served to them during the course of their treatment or rehabilitation program under the same conditions governing purchase of meals by the elderly. *Id.* § 3(f), 87 Stat. 247, amending 7 U.S.C. § 2019 (1970).

²³⁴ 7 U.S.C. § 2012 (Supp. II, 1972); note 210 *supra*.

in the program.²³⁵ Finally, residents of certain federally subsidized housing for the elderly become eligible to form a food stamp "household" because the new law specifically removes them from the excluded category of residents of institutions and boarding houses.²³⁶

The Agriculture and Consumer Protection Act alters food stamp eligibility in two other important ways. First, the Act increases the Secretary of Agriculture's ability to establish temporary emergency eligibility standards.²³⁷ Second, the prescribed uniform national standards of income and resource eligibility now take into account part of the value of housing furnished by an employer to members of an applicant household.²³⁸

²³⁵ The Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, § 3, 87 Stat. 246, provided that certain SSI recipients could be eligible for food stamps. The eligibility criteria spelled out in the Act were altered by Public Law 93-233 (87 Stat. 947), but at least some SSI recipients will still be eligible for food stamps. See notes 175-76 and accompanying text *supra*.

Under the Agriculture and Consumer Protection Act, households including SSI recipients would become "nonassistance" households for the purposes of food assistance. This means they would not be entitled to the presumption of financial eligibility that is enjoyed by participants in other federally-aided public assistance programs. Pub. L. No. 93-86, § 3(b), 87 Stat. 246; see notes 211-12 and accompanying text *supra*. However, the effective date of this provision was postponed until at least July 1, 1974 (Pub. L. No. 93-233, § 8(a)(2), 87 Stat. 956), and it is not clear whether it will ever become effective.

²³⁶ Pub. L. No. 93-86, § 3(p), 87 Stat. 249, amending 7 U.S.C. § 2012(e) (1970). Residents in housing built under either § 202 of the Housing Act of 1959 (12 U.S.C. § 1701q (1970)), or § 236 of the National Housing Act (12 U.S.C. § 1715z-1 (1970)) are not ineligible because of residence in a boarding house or institution. See 7 U.S.C. § 2012(e) (Supp. II, 1972).

²³⁷ Pub. L. No. 93-86, § 3(h), 87 Stat. 247, amending 7 U.S.C. § 2014(b) (1970). The Secretary now may establish temporary emergency eligibility standards without regard to income and other financial resources not only for households victimized by disasters which have disrupted commercial channels of food distribution (see note 214 *supra*), but also for households which are victims of mechanical disasters which disrupt the distribution of coupons. Such emergency standards may be set for the former group when the Secretary determines that the victim households require temporary food assistance and that commercial channels of food distribution are again available to meet these households' temporary food needs. Pub. L. No. 93-86, § 3(h), 87 Stat. 247; 7 U.S.C. § 2014(b) (1970). For the latter group, temporary eligibility standards apply only for the duration of the mechanical disaster. H.R. REP. NO. 427, 93d Cong., 1st Sess. 29 (1973) (conference report).

The House Committee on Agriculture intended in its endorsement of this provision to emphasize the need for certification prior to the actual issuance of food stamps. Its purpose was to "unalterably condemn"

the practice it understands has developed in some areas of issuing food stamps to large groups of applicants who make application at the same time and because of limited staff facilities, food stamps are issued immediately without regard to determining the eligibility of the individual applicants.

H.R. REP. NO. 337, 93d Cong., 1st Sess. 46 (1973).

²³⁸ Pub. L. No. 93-86, § 3(g), 87 Stat. 247. Payments in kind are relevant to financial eligibility standards only if such payments are in lieu of or supplemental to the household's income and only when the payment takes the form of housing provided the employee by the

b. *Definition of Eligible Food.* A second area of major change in the food stamp program is reflected in the Agriculture and Consumer Protection Act's expansion of the definition of eligible food. For the first time, a food stamp recipient may use his coupons to obtain imported foods, garden seeds, plants intended to produce food for the personal consumption of the eligible household, and, for some certified households in Alaska, hunting and fishing equipment.²³⁹ In addition, the ability of elderly persons to purchase prepared meals with their coupons has been greatly augmented. No longer is the use of food stamps for that purpose restricted to meals delivered to housebound, feeble, disabled, or physically handicapped aged individuals in their homes.²⁴⁰

c. *Allotment and Administration.* Finally, the Agriculture and Consumer Protection Act affects the food stamp program in two other areas: coupon allotments and the general implementation and administration of the program in the states.²⁴¹ The face value

employer. The value taken into account is that of the actual value of the housing, "but in no event shall such value be considered to be in excess of the sum of \$25.00 per month." *Id.*, amending 7 U.S.C. § 2014(b) (1970).

²³⁹ Pub. L. No. 93-86, §§ 3(1), (n), 87 Stat. 248-49, amending 7 U.S.C. § 2012(b) (1970); compare 7 C.F.R. § 270.2(s) (1973). The USDA revised its definition of eligible food to include seeds, plants, and imported foods immediately upon the passage of the amendments, without the usual 30 days' notice, because the Agriculture and Consumer Protection Act mandated the change, because this particular change involved action only by USDA, and because it felt that speedy removal of the restriction on imported foods would "allow food stamp participants the flexibility they need to get the most economical and nutritious foods available with their limited food purchasing power." 38 Fed. Reg. 22,465 (1973).

Alaskan household members, in accordance with any rules and regulations the Secretary deems necessary to prescribe, can purchase with their coupons hunting and fishing equipment to be used for obtaining food for the household, if the Secretary determines that the location of the household makes it extremely difficult for its members to reach retail food stores and that the household greatly depends upon hunting and fishing for its subsistence. Firearms, ammunition, and other explosives are not permissible food stamp purchases. Pub. L. No. 93-86, § 3(n), 87 Stat. 248-49.

²⁴⁰ Pub. L. No. 93-86, § 3(k), 87 Stat. 248, amending 7 U.S.C. § 2019(h) (1970); note 229 *supra*. Coupons may now be used by members of eligible households who are at least 60 years of age or elderly persons and their spouses to pay for meals prepared by senior citizens' centers, apartment buildings occupied primarily by elderly persons, public or nonprofit private schools which prepare meals especially for elderly persons, public or nonprofit eating establishments which prepare meals especially for elderly persons during special hours, and any other public or nonprofit private establishments approved for such purpose by the Secretary of Agriculture. Pub. L. No. 93-86, § 3(k), 87 Stat. 248. They may also be used to purchase meals prepared especially for elderly persons during special or regular hours and offered for sale at concessional prices pursuant to any contract for such purpose between an appropriate state or local agency and a private establishment. *Id.*

²⁴¹ Pub. L. No. 93-86, §§ 3(i), (j), (m), 87 Stat. 247-48, amending 7 U.S.C. §§ 2019(e), 2016(a), 2025 (1970).

The Agriculture and Consumer Protection Act extends the food stamp program through June 30, 1977, and provides for the continued availability of any sums appropriated under the Food Stamp Act until those funds are expended. *Id.* § 3(j), 87 Stat. 247.

of the coupon allotment which a state agency will be authorized to issue henceforth will be adjusted semi-annually rather than annually, in order to allow the FNS the opportunity to keep pace with changes in the cost of a nutritionally adequate diet.²⁴² Allotments now must be distributed at least twice each month,²⁴³ and each state must institute procedures under which any recipient households may arrange to have the charges for their coupon allotments deducted from any payments or grants they may receive under the AFDC program.²⁴⁴ Congress has changed the law to assure that all

²⁴² *Id.* at § 3(m), 87 Stat. 248, amending 7 U.S.C. § 2016(a) (1970); H.R. REP. NO. 427, *supra* note 237, at 30, 40; note 224 *supra*.

Beginning with the 1974 allotments, food stamp benefits will be updated twice as often as previously. The initial adjustments will incorporate price changes through August 31, 1973, as reported by the Department of Labor's Bureau of Labor Statistics. All adjustments will occur in \$2.00 increments, or "by the nearest dollar increment that is a multiple of two."

In October 1973, the USDA announced the first allotment adjustments made pursuant to the new law. On January 1, 1974, the monthly food stamp allotment for a family of four rose nearly 22%, from \$116 to \$142. Giving this increase even more meaning to nonassistance households, USDA simultaneously raised the maximum cash income allowable for financial eligibility. For example, the maximum for a household of four has been raised from \$387 per month to \$473—also approximately a 22% increase. Only about 5% of the 12.3 million food stamp recipients will not benefit from a similar increase. Recipients near the upper limit on the income eligibility scale for one- and two-person households will find their increased allotments offset by increased purchase requirements. N.Y. Times, Oct. 31, 1973, at 9, col. 1.

The increased allotments and benefits will of course have an impact on the cost of the food stamp program. It was estimated at the time the increase was published that government costs would rise in the current fiscal year by \$400 million, to \$2.9 billion. *Id.* This budget increase may create some fiscal problems, because to date Congress has appropriated only \$2.5 billion to cover the augmented expense of administering the amended program with its substantially expanded eligibility. 1973 CONG. Q. WEEKLY REP. vol. XXXI, no. 41, at 2747, col. I. In recognition of congressional determination to maintain or increase levels of participation in food assistance programs, however, President Nixon in his 1975 budget requests has asked for an increase in food stamp appropriations to \$3.9 billion in the next fiscal year. 1974 CONG. Q. WEEKLY REP. vol. XXXII no. 6, at 272, col. 2.

²⁴³ Pub. L. No. 93-86, § 3(i), 87 Stat. 247-48, amending 7 U.S.C. § 2019(e) (1970). Formerly the frequency of issuance was determined by the regulations (7 C.F.R. § 271.6(d)(4) (1973)), which required that eligible households be offered the frequency of coupon issuance best geared to the frequency of their receipt of income. A proviso to that regulation assured that all project areas would provide at least for a monthly and a semi-monthly schedule of issuance.

²⁴⁴ Pub. L. No. 93-86, § 3(j), 87 Stat. 247-48, amending 7 U.S.C. § 2019(e) (1970). Until March 28, 1973, the Secretary's regulations, pursuant to legislative authority (*see* 7 U.S.C. § 2019(e) (1970)), ordered state agencies to permit any participating household to elect to have the cost of its full monthly coupon allotment deducted from the amount of its federally aided public assistance grant or payment. 7 C.F.R. § 271.6(d)(2) (1973); note 227 *supra*. In response to the revocation of that legislative authority (*see* 7 U.S.C. § 2019(e) (Supp. II, 1972)), the Secretary amended the regulations simply to give the state agency the *option* of providing for a means of voluntary household deduction of the food stamp purchase requirement from any federally aided public assistance grants or payments the household may be entitled to receive. 38 Fed. Reg. 8049-50 (1973). The newest provision restores the mandate of the earlier law insofar as it may have applied to grants received under AFDC,

states implement the food stamp program in every one of their political subdivisions if it is feasible to do so.²⁴⁵

Only a few administrative changes occurred in the food stamp program during 1973. In July, the FNS announced a new averaged yearly income method for computing income received by household members on other than an hourly or piecework basis, although nonetheless received under a contract renewable on a yearly or longer basis, as in the case of public school employees.²⁴⁶ In August, it amended its financial eligibility standards for nonassistance households²⁴⁷ to exclude any earnings resulting from volunteer services performed by elderly applicants.²⁴⁸ And in May,

which provides grants to the states to aid families with dependent children and to foster other child-welfare projects.

²⁴⁵ Pub. L. No. 93-86, § 3(i), 87 Stat. 247-48, amending 7 U.S.C. § 2019(e) (1970); 7 C.F.R. § 271.1(i) (1973), as amended, 38 Fed. Reg. 22,465-66 (1973). Originally, the state only had to specify in which of its political subdivisions it desired to provide coupons; but the new food stamp law has required that each state agency prior to January 1, 1974, submit for FNS approval a plan delineating the way in which it intended to conduct the food stamp program in all of its political subdivisions. The only means by which a state could avoid this duty to submit a plan for any of its subdivisions was to demonstrate effectively the impossibility or impracticability of implementing the program in the designated subdivision. The FNS is to approve or disapprove each state plan in sufficient time to allow for its institution by no later than June 30, 1974. See note 197 *supra*.

²⁴⁶ 38 Fed. Reg. 17,845 (1973). Before this amendment, the regulations permitted (1) the averaging of household income over the appropriate certification period, (2) the even averaging or uneven prorating of farm or self-employment income over a certification period not to exceed one year, and (3) the averaging of income from scholarships, educational grants, fellowships, and veterans' educational benefits over the period which such income was intended to cover in determining household eligibility. 7 C.F.R. §§ 271.3(c)(2)(i), (ii), (iii) (1973). To these methods of handling income, the Secretary added the following provision:

To determine the eligibility of households with members who receive compensation on other than an hourly or piecework basis under a contract which is renewable on a yearly or longer basis (such as, but not limited to, school employees), such members shall be deemed to be receiving compensation continuously for an entire year even though predetermined nonwork (vacation) periods are involved or actual compensation payments are scheduled for payment during work periods only. For such persons, compensation received under such contracts shall be averaged over a 12-month period.

38 Fed. Reg. 17,845 (1973), amending 7 C.F.R. § 271.3(c)(2) (1973). This new means for handling income does not apply in situations in which the other party to the contract refuses or is unable to pay under the contract, or in which the flow of earnings anticipated in the contract otherwise is interrupted. *Id.*

²⁴⁷ See notes 211-12 and accompanying text *supra*.

²⁴⁸ 38 Fed. Reg. 21,917 (1973). Because the Older Americans Comprehensive Services Amendments of 1973, Pub. L. No. 93-29, 87 Stat. 55 (amending the Older Americans Act of 1965), prohibit considering as income for any purpose whatsoever any compensation authorized to be paid to elderly volunteers participating in the National Older Americans Volunteer Program, the food stamp program's definition of income had to be altered to conform with that law. The result is a new regulation which views money earned this way as nonincome with respect to food assistance eligibility. 38 Fed. Reg. 21,917 (1973), amending 7 C.F.R. § 271.3(c)(1)(ii) (1973).

the FNS updated its procedures for verifying the amount of income a household receives from any of the Social Security programs.²⁴⁹

2. *Judicial Activity*

During 1973, some of the most telling blows against the program's eligibility standards were dealt not by the legislature, but by the courts.²⁵⁰ Significantly, these decisions uniformly favored the would-be beneficiaries of the program.

In June 1973, the Supreme Court declared unconstitutional two of the most comprehensively exclusive requirements for food stamp eligibility. In *United States Department of Agriculture v. Moreno*,²⁵¹ the Court struck down as violative of due process the rule that all members of an eligible household must be related to one another, or else be over sixty and living elsewhere than in an institution or a boarding house.²⁵² For similar reasons, in *United States Department of Agriculture v. Murry*²⁵³ the Court invalidated the requirement that no member of a certified household who is over eighteen may have been claimed as a tax dependent by a member of an ineligible household for the year prior to the one for which food assistance is sought.²⁵⁴ This requirement had apparently been enacted for the purpose of keeping food stamps out of the hands of the children of relatively affluent families, who might attempt to obtain stamps through a "household" established while away at school or college.²⁵⁵ Both provisions and their attendant regulations, according to the Court, created legislative classifications unsustainable under the fifth amendment. The relatedness rule fell

²⁴⁹ 38 Fed. Reg. 11,338 (1973). Each state agency, if it so chooses, may verify a household's report of Social Security benefits received via the automated data processing system used jointly by the Social Security Administration and the Social and Rehabilitation Service of the United States Department of Health, Education, and Welfare. *Id.*, amending 7 C.F.R. § 271.4(a)(2)(iii) (1973).

²⁵⁰ The courts were particularly critical of those standards established in the original act which were buttressed in 1971 by a Congress hesitant to dole out benefits to the fraudulent or undeserving. See 1970 HOUSE REPORT 11; note 220 *supra*; notes 252 & 254 *infra*.

²⁵¹ 413 U.S. 528 (1973).

²⁵² See note 210 and accompanying text *supra*. This requirement was introduced in the 1971 amendments for the stated purpose of preventing "hippies" and "hippie communes" from qualifying to participate in the food stamp program. See H.R. REP. No. 1793, *supra* note 203, at 8; 116 CONG. REC. 44,439 (1970) (remarks of Senator Holland).

²⁵³ 413 U.S. 508 (1973).

²⁵⁴ For an example of how this exclusion works, see note 219 and accompanying text *supra*. The 1971 amendments had contained this requirement also.

²⁵⁵ 116 CONG. REC. 41,979, 41,981, 41,993, 42,021 (1970); 7 SUFFOLK L. REV. 746 (1973).

under the "traditional" equal protection analysis²⁵⁶ because it was not rationally related to a legitimate governmental interest; the tax dependency provision succumbed because it created a false "conclusive presumption" that the household containing the claimed dependent is not in need.²⁵⁷

²⁵⁶ In *Moreno*, the Court translated its due process rationale for invalidation into an equal protection argument used throughout the opinion simply by declaring at the outset that the challenged provision violated the "equal protection component of the Due Process Clause of the Fifth Amendment." 413 U.S. at 532-33.

²⁵⁷ Because the statutory classification of households into two groups challenged in *Moreno* was irrelevant to the stated purposes of the Food Stamp Act (*see* 7 U.S.C. § 2011 (1970)), the Court sought some other legitimate government interest upon which to sustain the regulation. 413 U.S. at 535. But neither the avowed purpose for the rule (*see* note 252 *supra*) nor the "purpose for the purpose"—the minimization of fraud in the administration of the program—could salvage it. The former could scarcely justify the discrimination between related and unrelated households under the doctrine of equal protection, since "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." 413 U.S. at 534 (emphasis in original). Nor could the latter reason serve to sustain the classification, for the Food Stamp Act itself amply guards against fraud and claims for aid by the "voluntarily poor" by imposing the work-registration requirement (*see* 7 U.S.C. § 2014(c) (1970); note 220 *supra*) and strict penalties for fraudulent use or procurement of food coupons (7 U.S.C. §§ 2023(b), (c) (1970)). As a result, the Court found the espoused "purpose behind the purpose" to be doubtful at best. 413 U.S. at 536-37. Moreover, the particular requirement established would not rationally operate to prevent fraud, because unrelated persons frequently could alter their living arrangements to avoid having to be treated as a single household, by ceasing to live as an economic unit, or to share cooking facilities, or to purchase food in common. Consequently, the Court could only conclude that the

1971 amendment excludes from participation in the food stamp program, *not* those persons who are "likely to abuse the program" but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.

Id. at 538 (emphasis in original). Thus, the Court found that the 1971 amendment was "wholly without any rational basis." *Id.*

Although *Murry* involved a similar problem, the Court for some reason adopted a slightly different approach for its solution. Rather than concentrating on the equal protection argument, it used a straight due process analysis based on the use of the conclusive presumption coupled with the lack of opportunity for a household to demonstrate its need despite the tax claim of one of its members by a nonindigent household. Declared the court:

We have difficulty in concluding that it is rational to assume that a child is not indigent this year because the parent declared the child as a dependent in his tax return for the prior year. But even on that assumption our problem is not at an end. Under the Act the issue is not the indigency of the child but the indigency of a different household with which the child happens to be living. Members of that different household are denied Food Stamps if one of its present members was used as a tax deduction in the past year by his parents even though the remaining members have no relation to the parent who used the tax deduction, even though they are completely destitute and even though they are one, or 10 or 20 in number. We conclude that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact. It therefore lacks critical ingredients of due process

United States Dep't of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

For a brief discussion of these two cases see *The Supreme Court, 1972 Term*, 87 HARV. L.

The third and final judicial attack on preexisting eligibility standards occurred in a federal district court. Early in 1973, the United States District Court for the Northern District of California permanently enjoined the Secretary of Agriculture from refusing food stamps to any person simply because not all persons with whom the applicant shared living quarters and expenses were eligible for food relief under the program.²⁵⁸ In addition, that court held invalid, as contrary to the relevant provisions of the Food Stamp Act, all instructions and regulations which characterized all persons sharing living quarters and expenses as automatically comprising a single household.²⁵⁹

Eligibility standards, however, were not the only victims of the trend toward enhancing rights of recipients. Two other aspects of the food stamp program were reviewed in the courts. A federal district court in Kentucky invalidated two FNS instructions which severely limited federal liability for food stamps lost, stolen, or

REV. 125-33, 128-29 n.22 (1973). The authors note that "*Moreno* appears to be the first case in which the Court has applied its new stricter rationality test to a classification limiting welfare disbursements." *Id.* at 129. This conclusion is based upon the observation that although the Court in *Moreno* professed to use the "traditional" rational basis test, it assayed the relationship between the exclusion of unrelated households and the stated purposes for that exclusion in greater depth than has traditionally been characteristic of equal protection analysis, giving far less than the usual deference to legislative judgment on ends and means. *Id.* at 129-31.

²⁵⁸ *Knowles v. Butz*, 358 F. Supp. 228, 232-34 (N.D. Cal. 1973).

²⁵⁹ The defendants claimed that because all persons who share living quarters and expenses for them compose an "economic unit," they necessarily also must be treated as a "household for purposes of the program." As the court observed, however, FNS Instruction 732-1, § 111(D)(1)(d) (1972), clearly a proper regulation for the Secretary to promulgate, defines "economic unit" inconsistently with this view. An economic unit not only provides common living expenses for all its members from their pooled resources, it also meets the basic needs of all members "without regard to their [individual] ability or willingness to contribute." 358 F. Supp. at 231. The court concluded that

[u]nder this definition, however, not all who share living quarters and share the expenses for such quarters are an "economic unit," which is what defendants contend; rather, the sharing of living quarters and the expenses for them would be but one factual datum to be considered. Those who do not share income and other resources with their cotenants and who do not share any expenses except the expense of housing probably could not constitute an "economic unit" together with their cotenants under this definition. Certainly, the definition does not support any *per se* rule that they would.

Id. at 231-32.

To reinforce its opinion, the court then noted that even if a group of individuals does constitute an "economic unit," that group cannot automatically be considered a "household." Under the Food Stamp Act, an "economic unit" is only a "household" if it shares cooking facilities and customarily purchases food in common. *Id.* at 232. Thus, FNS Instruction 732-1, § 111(D)(2)(b) (1972) and the regulation (7 C.F.R. § 271.3(a) (1973)), which were challenged in *Knowles* because they rendered ineligible an entire household if one tenant in the commonly funded living quarters was ineligible, had to be held invalid.

withheld because of a state administrative error in such a way as effectively to eliminate all federally financed retroactive relief.²⁶⁰ In its opinion, the court said that the FNS can neither categorize retroactive food assistance as administrative costs to be borne by the states,²⁶¹ nor deny outright federal retroactive stamp relief,²⁶² without violating the policies and the purposes of the Food Stamp Act.²⁶³ Consequently, it ordered the federal government to fund adjustments in the price of future coupons to be issued to persons proving that previous benefits were wrongfully withheld.²⁶⁴

²⁶⁰ Stewart v. Butz, 356 F. Supp. 1345 (W.D. Ky. 1973).

²⁶¹ *Id.* at 1350-51, 1353-54; FNS Instruction 734-2, § VI(C) (1969). This food stamp directive terminated after one month federal liability for stamps lost, stolen, or, as in this case, withheld through state administrative mistake. The federal agency declared itself immune from payment for replacement stamps unless they were issued in the same month as the loss and in response to a timely request for reissuance. Apparently, the federal agency attempted to categorize the reissuance and replacement benefits as "administrative costs" to be borne by the states. See note 204 and accompanying text *supra*.

²⁶² Stewart v. Butz, 356 F. Supp. 1345, 1351-52, 1354 (W.D. Ky. 1973); FNS Instruction 732-14(D) (1972). Food stamp recipients who had prevailed at "fair hearings" to determine if their benefits were wrongfully withheld were totally cut off from federal relief.

²⁶³ Since the Food Stamp Act is designed to provide *federal* funds to assist needy families in attaining an adequate nutrition level (see 7 U.S.C. § 2011 (1970); notes 198 & 203 and accompanying text *supra*) regulations depriving a family of federal support for that purpose directly conflict with congressional intent. Administrative regulations thus inconsistent with their enabling legislation are void. Stewart v. Butz, 356 F. Supp. 1345, 1351 (W.D. Ky. 1973). The Kentucky court saw the inconsistency in an "unreasonable regulation" which "effectively deprives a poor person of a federal statutory right simply because of a state administrative error":

We simply do not see the justice of allowing a poor food stamp recipient to be the loser caught in the midst of an administrative tangle between the federal and state governments. We think the federal government should face up to its responsibilities under the Food Stamp Act. The injustice of the situation becomes patent where, as here, the food stamp recipient makes a "timely request for reissuance" during the month of non-issuance (i.e., May, 1972) the state fails to reissue the stamps during the month, and the food stamp recipient subsequently prevails at a fair hearing in which it is determined that she indeed has a "right" to receive the stamps withheld from her, but that no (federal) remedy is available. We can see the need for some limit of federal liability for food stamps, but we do not believe that one month is reasonable.

Id.

In support of its decision the court invoked the eleventh amendment, which strips the federal court of the power to order a state to expend funds from its own treasury. *Id.* at 1352. Since Goldberg v. Kelly, 397 U.S. 254 (1970), has "elevated welfare benefits, including food stamps, to a position of *legal right* and statutory entitlement," and every such right has an attendant remedy (Stewart v. Butz, 356 F. Supp. 1345, 1349 (W.D. Ky. 1973)), the court had to formulate relief other than federal disbursement of state monies.

²⁶⁴ Stewart v. Butz, 356 F. Supp. 1345, 1354 (W.D. Ky. 1973). The court settled on forward adjustment of the purchase requirements for the wrongfully deprived household as the proper remedy because, unlike other types of "retroactive relief," it is not susceptible to fraud. The issuance of extra food stamps may often be conducive to hoarding and the formation of a black market in food coupons; but the reduction of the price of the stamps for as long as necessary by as much as necessary simply compensates the wronged household for the expenditures it had to make during the time it did not receive stamps.

Later in the year, two circuit court decisions unequivocally sustained the Kentucky court's rationale.²⁶⁵ When stamps have been withheld wrongfully as a result of state administrative error, it now is clear that federal policy demands that households be "given an opportunity to make up the cash discount of which they were deprived."²⁶⁶

Finally, in mid-summer 1973, the United States Court of Appeals for the District of Columbia Circuit in *Rodway v. United States Department of Agriculture*²⁶⁷ firmly cemented to the ongoing food stamp system the right of recipients to seek judicial review of the Secretary of Agriculture's determination of what constitutes a "nutritionally adequate diet."²⁶⁸ That right of review, however, is confined to an inquiry as to whether the Secretary had a rational basis for his selection of criteria for establishing a schedule of coupon allotments.²⁶⁹

²⁶⁵ *Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973), cert. denied, 42 U.S.L.W. 3352 (U.S. Dec. 11, 1973); *Bermudez v. Butz*, 2 CCH Pov. L. REP. ¶ 17,825 (D.C. Cir. 1973), cert. denied, 42 U.S.L.W. 3352 (U.S. Dec. 11, 1973).

²⁶⁶ *Carter v. Butz*, 479 F.2d 1084, 1088 (3d Cir. 1973). Although the court recognized the power of the federal government to impose liability on the states as an incentive to police strictly the administration of the program and as a means of reinforcing the federal purpose of reserving stamps for purely nutritional uses, it pointed out that neither the Act nor the regulations provided specifically for such an "incentive-penalty" against the states. Therefore, the court bore the responsibility of finding the appropriate remedy for the deprived recipients. That remedy had to be levied against the federal government instead of the states, since Congress and not the states had appropriated funds to pay for food stamp benefits. Even though Congress could have required as a condition of state participation in the program that each state waive its sovereign immunity and assume direct liability, it had not done so and thus had to shoulder the burden of funding the relief alone.

From the fact that the FNS specifically had provided that even if the federal government would not give retroactive relief the states could still do so, the court implied that the FNS recognized the need for some adjustment. Forward adjustment struck the court as most consistent with federal nutritional purposes because it would reimburse householders for the money that they would have had to spend for food in lieu of stamps and would assure the current use of food stamps for nutritional purposes. *Id.* at 1088-89.

²⁶⁷ 482 F.2d 722 (D.C. Cir. 1973).

²⁶⁸ *Id.* at 726-27. The plaintiffs were members of low income households who maintained that the Economy Food Plan upon which the Secretary of Agriculture based his assessment of the cost of a nutritionally adequate diet (*see* notes 198, 214 & 229 *supra*), and hence his schedule of coupon allotments, did not in fact provide a nutritionally adequate diet. They also contested the Secretary's failure to adjust allotments to reflect regional differences in food costs. The court doubted the likelihood of finding that the Secretary had set arbitrary and unreasonable standards since Congress when it approved the 1971 amendments had been quite aware of his intent to base his standards on the Economy Food Plan. H.R. REP. No. 1793, *supra* note 203, at 9. Nonetheless, the court asserted the necessity of proper judicial review of the issue at the district court level. *Rodway v. United States Dep't of Agriculture*, 482 F.2d 722, 729 (D.C. Cir. 1973).

²⁶⁹ 482 F.2d at 727, 729. The court directed the district court to determine whether there was (1) no abuse of discretion by the Secretary, and (2) a rational basis for the Secretary's determination with respect to (a) the use of the Economy Food Plan in determin-

IV

MEDICAID PROGRAM

A. *The Program Prior to 1973*1. *Structure and Administration*

In 1965, Congress amended title XIX of the Social Security Act²⁷⁰ in order to inaugurate a unique program of federal medical assistance grants to the states popularly known as "Medicaid." The purpose of this amendment was to replace the medical aid benefit programs formerly available to the poor only through the states²⁷¹ with a combined federal-state program covering "all medical care expenses for those persons, regardless of age, whose income and assets are low enough to meet the eligibility requirements."²⁷²

Cooperatively financed with federal, state, and sometimes local revenues, this program is jointly administered by the federal Medical Services Administration of HEW, and a single statewide agency, usually the state department of welfare and health.²⁷³ Although each state retains some discretion in the formulation of its own program, title XIX in effect mandates that every state, if it is to receive any form of federal medical assistance funding, enact some form of Medicaid plan²⁷⁴ which complies with certain minimum

ing the level of coupon food allotments, and (b) in failing to provide differences in coupon allotments to reflect regional differences in food costs. *Id.* at 729.

²⁷⁰ Social Security Amendments of 1965, Pub. L. No. 89-97, tit. XIX, 79 Stat. 343 (codified at 42 U.S.C. §§ 1396-1396i (1970), *as amended*, (Supp. II, 1972)). The 1965 amendments were heralded as the "greatest advance in social legislation ever presented to the Congress." S. REP. NO. 404, 89th Cong., 1st Sess. 277 (1965) (supplemental views of Senators Ribicoff & Hartke).

²⁷¹ S. REP. NO. 404, *supra* note 270, at 2-3; Bernard & Feingold, *The Impact of Medicaid*, 1970 Wis. L. REV. 726, 726-27.

²⁷² Bernard & Feingold, *supra* note 271, at 726.

²⁷³ 42 U.S.C. §§ 139a(a)(2), (5) (1970); 45 C.F.R. § 205.100 (1973); Bernard & Feingold, *supra* note 271, at 726, 741-42.

Originally the state could acquire up to 60% of its nonfederal Medicaid funds from local governments. Since July 1, 1969, the entire nonfederal share must come from the state, unless it has devised a means of safeguarding against an inadequate medical assistance level in those of its political subdivisions unable to contribute adequately toward a medical program.

As for administration, each state creates or delegates authority to one administrative body. If this agency is not the one which normally handles public assistance, determination of eligibility, at least insofar as it relates to the aged, must remain a responsibility of the latter department. Frequently, the state contracts with a private organization, usually Blue Cross and Blue Shield, to operate its Medicaid plan, under state agency supervision, on the local level.

²⁷⁴ 42 U.S.C. § 1396(b) (1970); S. REP. NO. 404, *supra* note 270, at 204; Bernard & Feingold, *supra* note 271, at 731.

federal eligibility, coverage, and administrative standards.²⁷⁵ To assure compliance, the Act requires that a participating state submit a proposal for approval by the federal agency before its program may take effect.²⁷⁶ Such a plan must provide for the availability of Medicaid in all political subdivisions of the state, prompt action on applications, a fair hearing of all grievances, an administrative body and procedures for handling assistance cases, restrictions on disclosure of information about recipients or applicants, maintenance of health and other standards for private and public institutions in which Medicaid recipients may receive care or services, coverage of residents temporarily absent from the state, reviewable records of all personnel and transactions relevant to the administration of the program, procedures for licensing participating nursing home administrators, procedures for the use of and payment for services available under the plan, and specific coverage of mandatory and elective classes through mandatory or elective services.²⁷⁷ As with most federally aided assistance programs, should the plan be altered to such an extent that it no longer complies with the Social Security Act, or should it fail in its administration to comply with federal standards, federal assistance will be terminated.²⁷⁸

Under title XIX, the states were given the option of replacing their existing public assistance medical care programs with the Medicaid system. This "option" was in effect a mandate, however, since title XIX curtailed federal payments for non-Medicaid medical assistance after December 31, 1969, making Medicaid the only source of such assistance for recipients. Bernard & Feingold, *supra* note 271, at 743. To date, only Arizona has failed to develop a Medicaid program. CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED, ¶ 755.61, at 389. Interim arrangements have been made to accommodate SSI recipients until that state does implement Medicaid coverage.

²⁷⁵ See notes 279-81 & 292-99 and accompanying text *infra*.

²⁷⁶ 42 U.S.C. § 1396 (1970).

²⁷⁷ *Id.* §§ 1396a(a)(1), (3), (4), (5), (7), (8), (9), (10), (13), (16), (27), (29), (30).

Section 1396a contains a series of additional provisions covering state financial participation, state agency reporting of its Medicaid operations, the eligibility of nursing homes for federal financial participation, cooperation with state health and vocational rehabilitation services, ascertainment of the legal liability of third parties for care and services arising out of injury, disease, or disability, review procedures for providers of services and suitability of services made available, special provisions for the blind, insured, and inmates of mental or permanent care facilities, and other general requirements such as time periods of eligibility and reasonable financial eligibility standards. When the Secretary of Health, Education, and Welfare promulgates regulations in furtherance of these statutory provisions, detailed state plan requirements and conditions for approval, too numerous to catalogue here, appear in the *Federal Register* or *Code of Federal Regulations*. See 45 C.F.R. § 246 (1973).

²⁷⁸ 42 U.S.C. § 1396c (1970). Unfortunately, this type of penalty simply cuts off further federal money for Medicaid until correction of state noncompliance, affecting most severely those least able to remedy the situation—the recipients.

2. Coverage and Eligibility

The designation of specific classes of eligible individuals rests largely within the discretion of the state, except that each state must include certain basic groups. Most significantly, the state must provide medical assistance for all persons already qualifying for benefits under the broad eligibility requirements of the federal programs for cash-payment assistance to the aged, the blind, the totally or permanently disabled, and families with dependent children.²⁷⁹ Persons qualifying for Medicaid in this way are termed "categorically needy."

In addition to these mandatory groups, a state program *may* include several other categories of individuals²⁸⁰ for which the

²⁷⁹ *Id.* § 1396a(a)(10) (1970); 45 C.F.R. §§ 248.10(a)(1), (b)(1)(i) (1973); note 309 and accompanying text *infra*. This class also includes all persons determined to be "essential" to the categorical recipients under the state categorical plan. For purposes of the Medicaid program, a person is "essential" to another individual if that person is "the spouse of and living with the individual, has his needs taken into account in the determination of how much assistance to give the individual under a state financial assistance program, and has been determined under the other program to be essential to the well-being of the individual" 42 U.S.C. § 1396d(a) (1970). Furthermore, the state plan must cover individuals who could be categorical recipients if the state plan were as broad as permitted under federal law. *See* note 280 *infra*.

The state must also provide Medicaid to all persons who have been eligible for one of the categorical assistance programs except for a state-imposed eligibility requirement that is validly imposed for categorical assistance purposes but is prohibited under title XIX. 45 C.F.R. § 248.10(b)(1)(iii) (1973). For example, a state is allowed by statute to establish a durational residency requirement for its supplemental SSI program. *See* notes 190-91 and accompanying text *supra*. However, a state may not use a durational residency requirement as a precondition to Medicaid eligibility. 42 U.S.C. § 1396a(b)(3) (1970). Any plan containing age requirements more stringent than those for a state's other financial assistance programs will be rejected. 45 C.F.R. § 248.30(a)(3) (1973). Not only must title XIX plans cover all United States citizens, but programs including the medically needy (*see* note 282 and accompanying text *infra*) must include all otherwise eligible individuals, regardless of citizenship status, although a state may choose to condition eligibility on citizenship if all of its approved financial assistance programs contain such a condition. 45 C.F.R. § 248.50(b) (1973). All persons voluntarily living in the state with the intention of making their homes there must be included so long as their presence in the state is interrupted only temporarily. During temporary absences from the state, residents continue to be eligible for medical assistance as if they were present within the state, if the need for medical care arises from emergency, accident, or illness, or if delay of medical care until return to the state would impair the health of the individual, or if an attempt to return to the state for care would endanger the individual's health. In conjunction with this provision, title XIX requires each state to facilitate the meeting of medical needs within the state for residents from other states. 45 C.F.R. § 248.40 (1973).

Finally, all individuals under age 21 who would qualify under the state's approved AFDC plan except for age or school attendance requirements must also be included. 42 U.S.C. § 1396a(b)(2) (1970); 45 C.F.R. §§ 248.10(b)(1)(ii), 248.30(a)(2) (1973).

²⁸⁰ Among these may be persons who would be eligible for assistance under any other state categorical assistance plan but have not applied for it, or cannot receive it because they reside in a medical facility. 45 C.F.R. §§ 248.10(b)(2)(i), (ii) (1973); note 310 and accompany-

states may set basic eligibility standards, subject to federal guidelines.²⁸¹ The most important of these optional categories is that consisting of the "medically needy." The "medically needy" are those persons whose income and resources equal or exceed the state's standards for categorical assistance but who nevertheless are unable to meet costs both for medical insurance premiums and necessary medical and remedial services.²⁸²

While the financial eligibility requirements for the categorically ing text *infra*. The state may also include in its program those "who would be eligible for a categorical public assistance program if the state's program were as broad as federal legislation permits." Bernard & Feingold, *supra* note 271, at 734. This group includes, for example, persons who would be eligible for AFDC if the state program covered families with children deprived of parental support to the full extent permitted under federal legislation. 45 C.F.R. § 248.10(b)(2)(iii) (1973). A state program might embrace all financially eligible individuals under 21 who do not qualify as dependent children for AFDC purposes and all caretaker relatives of these medically indigent youths. *Id.* § 248.10(b)(2)(iv), (v); note 310 and accompanying text *infra*. Groups of children comprising "reasonable classifications," such as all those in foster homes, may also be designated a needy category by the state. Individuals barred from financial assistance only because work-related child-care costs are not paid out of earnings may participate in a state's program (45 C.F.R. § 248.10(b)(2)(vi) (1973)) as well as any other group of individuals the state chooses. Bernard & Feingold, *supra* note 271, at 734. For these groups federal cost-sharing would not be available as far as medical costs are concerned. See notes 287-88 and accompanying text *infra*.

Although its goal never materialized, the federal government, through title XIX, before the 1972 amendments, did try to compel each state to provide at its own expense for the age group between 21 and 65, despite that group's general ineligibility for federal participation. Bernard & Feingold, *supra* note 271, at 741; see S. REP. NO. 222, 91st Cong., 1st Sess. (1969).

²⁸¹ 45 C.F.R. § 248.10(c) (1973); see note 280 *supra*.

Groups that a state elects to include must be based on reasonable, unambiguous, and nonarbitrary classifications. The groups included may not be subject to more numerous or stringent conditions of eligibility, except for need, than groups receiving other assistance under approved state plans, and may not be subject to age, residence, or citizenship requirements prohibited by title XIX. In addition, as some commentators have observed:

Determination of eligibility should be "consistent with simplicity of administration and the best interests of the recipients." The individual's privacy should be protected with regard to the kinds of information sought about him and the way in which it is sought. Typical relative responsibility requirements of public assistance programs are relaxed under the Medicaid program so that the only relatives with prior responsibility for payment of medical care costs are an individual's spouse and the parents of a child who is under 21, blind, or disabled. Liens may not be imposed against the property of any recipient while he is alive; recovery may be had only from the estates of recipients who were 65 or over when they received medical assistance, and then only after the death of the spouse and if there is no surviving child aged under 21, or who is blind or disabled. The state agency is required to publicize the program so that potential applicants are aware of it and keep persons eligible for the program informed about the changes in the program.

Bernard & Feingold, *supra* note 271, at 737 (footnotes omitted); see 42 U.S.C. §§ 1396a(a)(19), (17)(D), (19) (1970); 45 C.F.R. § 248.10(c)(5) (1973). Compare note 192 and accompanying text *supra*.

²⁸² 45 C.F.R. § 248.10(a)(2) (1973). Frequently, medically needy groups correspond to the specified categorically needy groups; when a state plan covers a medically needy class related to either of the specific categories, it must cover those related to both of them. *Id.* § 248.10(b)(3); Bernard & Feingold, *supra* note 271, at 733; note 309 *infra*.

needy are those of the pertinent financial assistance plan,²⁸³ the state promulgates its own conditions for any medically needy individuals that its Medicaid plan encompasses. These standards must be reasonable and consistent with the liberalizing objectives of title XIX. Like the conditions of eligibility for the categorically needy, they may consider only the applicant's "in hand" funds and may not take account of any other individual's income unless that individual is the spouse of the applicant or recipient, or the parent of a child under twenty-one or who is blind or totally or permanently disabled.²⁸⁴ Moreover, the standards must provide for adjustments for family size and actual medical care expenses accumulated.²⁸⁵

3. *Services and Payment*

Federal funds finance between fifty percent and eighty-three percent of the recipient's actual medical expenses with the state paying the remaining share.²⁸⁶ As a general rule, however, the

²⁸³ 45 C.F.R. § 248.21(a)(1)(i) (1973).

²⁸⁴ 42 U.S.C. § 1396a(a)(17) (1970); 45 C.F.R. §§ 248.21(a)(2), (3) (1973).

Income eligibility levels must be comparable as among individuals and family sizes and must be set at any time on or after January 1, 1966, at the lesser of (1) the levels of the most liberal money payment standard used by the state as a measure of financial eligibility in any state categorical money payment program, or (2) the level for which federal financial participation is available under the requirements set forth in the statute and the regulations. See 42 U.S.C. § 1396b(f)(B) (1970); 45 C.F.R. § 248.21(a)(3)(i)(b) (1973); notes 288-89 *infra*. A lower income level will be used for individuals not living in their own home but receiving care in nursing homes, institutions for tuberculosis or mental diseases, or other medical facilities, commensurate with those individuals' reasonable needs for clothing and personal items. Alternatively, if such an individual's home is being maintained for a spouse or other dependents, the appropriate income level for such spouse, plus the individual's income level for maintenance in a long-term care facility, is applicable. 45 C.F.R. § 248.21(a)(3)(i)(c) (1973).

The cut-off level for resources held must be separate from income eligibility levels and must, as a minimum, be at the most liberal level used in any state money payment program on or after January 1, 1966, and the amount of liquid assets which may be held must increase with an increase in the number of family members. *Id.* § 248.21(a)(3)(i)(d).

²⁸⁵ 42 U.S.C. §§ 1396a(a)(17), 1396b(f)(1)(B)(ii), (2) (1970); 45 C.F.R. §§ 248.21(b)(2)(ii)(b), (c) (1973). A state's income levels may also reflect variations in shelter costs between rural and urban areas, but only for those groups not receiving aid under AFDC or OAA, APTD or AB (now SSI).

²⁸⁶ 42 U.S.C. §§ 1396a(a)(2), 1396d(b) (1970); *id.* §§ 1396b(a)(1), (g) (Supp. II, 1972); note 273 *supra*.

The state share in Medicaid costs equals the percentage of the total cost which bears the same ratio to 45% as the square of the state's per capita income bears to the square of the per capita income of the United States (including Alaska and Hawaii). 42 U.S.C. § 1396d(b) (1970).

After June 30, 1973, federal contributions for inpatient hospital, nursing facility, or intermediate care facility services beyond 60 days in any fiscal year, or mental hospital care

federal government will share in a state's expenditures for medical care only "for needy or medically needy persons under 21 or over 65, but will not participate in the cost of medical services for persons between those ages unless they are blind, disabled, or parents of children eligible for AFDC,"²⁸⁷ even though the state plan may include other classes of eligible individuals. Thus, a state plan must specify which of its eligible groups lie within the scope of federal financial participation and for which the state must bear the full cost.²⁸⁸ On the other hand, federal cost sharing in *administrative* expenses was available for all phases of a state program until 1973.²⁸⁹

Medicaid coverage for individuals qualifying for or receiving AFDC, AB, APTD, or OAA (now SSI) cash payments must be identical in amount, duration, and scope, regardless of the category to which the individual belongs.²⁹⁰ Likewise, assistance to all medi-

for more than 90 days, decreased by 33.3% of the costs thereof, unless the state could demonstrate an effective program for control over utilization of such services by its Medicaid recipients. *Id.* § 1396b(g) (Supp. II, 1972).

²⁸⁷ Bernard & Feingold, *supra* note 271, at 734; see notes 311 & 313 and accompanying text *infra* (listing recent additions to categories of Medicaid recipients eligible for federal financial participation).

The federal government will participate in payments for medical care and services provided under a state plan for all financially eligible persons under 21, 65 or over, blind, 18 or over and disabled, caretaker relatives of children under 21 who are not eligible for AFDC because of the failure of the child to attend school regularly, and spouses of OAA, AB, APTD, or AABD (now SSI) recipients who are determined to be essential to the well-being of the recipient. 42 U.S.C. §§ 1396d(a)(i)-(vi) (1970); 45 C.F.R. §§ 248.10(d)(2), 248.11, 248.30(b) (1973).

Title XIX also restricts federal payments to states to only such amounts as are determined not to exceed reasonable charges for the services obtained. This restriction eliminates the federal obligation to share in the costs of hospital inpatient services which exceed either the institution's customary charges or "fair compensation" for the services. 42 U.S.C. § 1396(b)(i)(1)(3) (Supp. II, 1972).

²⁸⁸ 45 C.F.R. §§ 248.10(b)(5), (c)(2) (1973). A state may establish income eligibility levels for medically needy individuals above the federal limits for financial participation, but must assure the federal agency that it will limit claims for federal monies accordingly. *Id.* § 248.21(b)(3).

²⁸⁹ 42 U.S.C. § 1396h(a)(2) (1970); *id.* §§ 1396b(a)(3)-(6) (Supp. II, 1972); 45 C.F.R. § 248.10(d)(1) (1973). Each state with an approved plan used to receive from the federal government (1) 75% of its expenditures for compensation to or training of professional medical personnel and their supporting staff, (2) 90% of expenditures for design, development, or installation of mechanized claims processing or information retrieval systems to update and improve administration and 75% of the cost of operating such systems, (3) 90% of the cost for cost-determination systems in state-owned hospitals, (4) 100% of expenditures for compensation or training of inspection personnel for reviewing long-term care provider institutions, (5) 90% of the costs of family planning services and supplies, and (6) 50% of any other necessary administrative costs. Payments were made quarterly. For the current position on federal contribution for administrative costs, see note 311 *infra*.

²⁹⁰ 42 U.S.C. § 1396a(a)(10)(A) (1970). Such assistance may not be less in amount,

cally needy groups must be equal,²⁹¹ although services offered to the categorically needy need not be the same as those made available to the medically needy.²⁹² Some institutional and non-

duration, or scope than that made available for groups eligible for Medicaid but not receiving categorical assistance.

²⁹¹ *Id.* § 1396a(a)(10)(B)(ii). For an interesting discussion of this requirement and that above (see note 290 *supra*), see Bernard & Feingold, *supra* note 271, at 736.

²⁹² A state has the option of offering the medically needy either the same five items of medical and remedial care that it provides for categorically needy recipients or any seven of the comparable services enumerated in title XIX. 42 U.S.C. § 1396d(a) (1970); *id.* §§ 1396a(a)(13), 1396d(a) (Supp. II, 1972); 45 C.F.R. § 249.10 (1973). Medicaid programs may cover any of the following designated services:

- (1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);
- (2) outpatient hospital services;
- (3) other laboratory and X-ray services;
- (4) (A) skilled nursing facility services . . . for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished . . .
- (5) physicians' services furnished by a physician . . . whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere;
- (6) medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law;
- (7) home health care services;
- (8) private duty nursing services;
- (9) clinic services;
- (10) dental services;
- (11) physical therapy and related services;
- (12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select;
- (13) other diagnostic, screening, preventive, and rehabilitative services;
- (14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;
- (15) intermediate care facility services (other than such services in an institution for tuberculosis or mental diseases) . . .
- (16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under 21

Id. §§ 1396d(a)(1)-(3), (6)-(13) (1970); *id.* §§ 1396d(a)(4)-(5), (14)-(16) (Supp. II, 1972). In addition, a state may supply medical assistance for any other medical or remedial care recognized under state law and specified by the Secretary of Health, Education, and Welfare. *Id.* § 1396d(a)(17) (Supp. II, 1972).

A state must, however, provide at least items one through five for all Medicaid recipients also receiving AFDC or OAA, AB or APTD (now SSI) benefits. At its option the state may provide these same items, or any seven other items in the list, to other recipients. If a state chooses the optional seven services and elects to cover hospital and skilled nursing facility services, it must also provide physicians' services to an individual while he is in the hospital or skilled nursing facility. 45 C.F.R. § 249.10(a)(1), (2) (1973).

Bernard and Feingold observe that

[t]he most frequently offered services, in addition to the basic five, are, in descend-

institutional care and services must be afforded all recipients, however, including the reasonable cost of inpatient hospital services provided under the plan.²⁹³

Payment for available services will amount to "reasonable charges consistent with efficiency, economy, and quality of care."²⁹⁴ In some cases, states make payments directly to the recipient, and in others, to the provider of the service or treatment.²⁹⁵ In any event, any individual eligible for Medicaid may freely choose to obtain medical care from any qualified provider of such treatment who will arrange for its availability on a prepayment basis. This right of choice, of course, remains subject to the state's right to establish the fees which may be paid to providers of various types of care or service and to promulgate reasonable qualification standards for providers to Medicaid beneficiaries.²⁹⁶ The state must make payments for medical care and services furnished to eligible individuals in or after the third month *prior* to the month of application, so long as the individual was, or would have been, eligible at the time services were obtained.²⁹⁷ No categorically

ing order, prosthetic devices, home health care, dental care, prescribed drugs, eyeglasses and ambulance service (as of July 1968). These choices reflect, at least in part, fiscal pressures prompting choice of low cost options rather than higher priority but more expensive options. It is very likely, for example, that prescribed drugs are more important to a coherent medical care program than are prosthetic devices, but drugs are also much more expensive.

Bernard & Feingold, *supra* note 271, at 745 n.73.

²⁹³ 42 U.S.C. § 1396a(a)(13)(A) (Supp. II, 1972).

Federal medical assistance programs must be designed to dispense aid "sufficient in amount, duration, and scope to reasonably achieve their purpose." 45 C.F.R. § 249.10(a)(5) (1973). They must provide extensive diagnostic services, some home health services, and necessary transportation of recipients to and from providers. *Id.* §§ 249.10(a)(3), (4), (5).

²⁹⁴ 42 U.S.C. § 1396a(a)(30) (Supp. II, 1972). Lengthy regulations govern these charges. 45 C.F.R. § 250.30 (1973).

²⁹⁵ 42 U.S.C. § 1396a(a)(32) (Supp. II, 1972); 45 C.F.R. § 249.32 (1973).

²⁹⁶ 42 U.S.C. § 1396a(a)(23) (Supp. II, 1972); 45 C.F.R. § 249.11 (1973). This provision means that no state may restrict the obtaining of Medicaid-covered services to public hospitals or any other specific facilities.

²⁹⁷ 42 U.S.C. § 1396a(a)(34) (Supp. II, 1972); 45 C.F.R. § 249.81 (1973); note 314 *infra*.

Until 1974, the federal regulations made available payments through federal financial participation for the month in which they were paid, regardless of the eligibility status of the individual in the month of payment, if:

(a) He was found eligible for medical assistance for the month during which the medical care and services were rendered, and was alive at the time the application was made;

(b) He received such medical care and services in or after the third month before the month in which he made application; and

(c) Not more than 24 months have elapsed since the month of the latest services for which the particular payment is being made with respect to the individual, except that:

(1) This time limitation does not apply with respect to retroactive adjust-

needy recipient may be required to share in the cost of, or pay a deduction, enrollment fee, premium, or other charge for medical or remedial care furnished under the plan. However, a state may impose administratively feasible cost sharing upon the medically needy, if the cost sharing is reasonably related to the individual recipient's income and resources.²⁹⁸ Receipt of Medicaid may not interfere with or reduce a categorically needy recipient's AFDC or SSI benefits.²⁹⁹

B. Program Developments

Like most other federally funded assistance programs, Medicaid underwent substantial changes in its eligibility requirements and administrative procedures in 1973.

1. Federal Court Action

The federal courts considerably clarified the rights of Medicaid recipients and the availability of program benefits. Action in the Supreme Court both assured the broad availability of benefits to one group of applicants and upheld the termination of Medicaid funds to another group of would-be recipients. On the one hand, the Court affirmed on equal protection grounds the right of women Medicaid beneficiaries to receive medical assistance for purely elective as well as for medically indicated abortions.³⁰⁰

ment payments where services are reimbursed on the same basis as under title XVIII;

(2) Where a claim for payment for services has been filed timely for title XVIII purposes with the Social Security Administration, an intermediary or a carrier, Federal financial participation is available in payments for such services made by the title XIX agency after the 24-month period provided they are made within 6 months after the month in which the title XIX agency or the vendor receives notice regarding the claim.

45 C.F.R. § 249.81 (1973).

²⁹⁸ 42 U.S.C. § 1396a(a)(14) (Supp. II, 1972); 45 C.F.R. § 249.40 (1973).

²⁹⁹ 42 U.S.C. § 1396a(c) (1970). The purpose of this provision, according to the Senate Report on the legislation, is

to make certain that States do not divert funds from the provision of basic maintenance to the provision of medical care. If the Secretary should find that his approval of a title XIX plan would result in a reduction of aid or assistance for persons receiving basic maintenance under the public assistance titles of the Social Security Act (except as specified above) he may not approve such a plan under title XIX. The committee recognizes the need and urgency for States to maintain, if not improve, the level of basic maintenance provided for needy people under the public assistance programs. The provision is intended to prevent any unwarranted diversion of funds from basic maintenance to medical care.

S. REP. NO. 404, *supra* note 270, at 82-83.

³⁰⁰ Commissioner of Social Servs. v. Klein, 412 U.S. 925 (1973). In *Klein*, the Court vacated and remanded without opinion, for consideration in light of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), aspects of the decision in *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972). *Ryan v. Klein*, 412 U.S. 924

At the same time, it also endorsed as constitutional the regulations excluding from Medicaid coverage patients in state mental institutions who are under sixty-five years of age, despite equal protection and due process challenges.³⁰¹

A number of lower federal courts also addressed various Medicaid issues in 1973. The United States District Court for the Southern District of Florida struck down as unconstitutional a Florida provision that precluded the dispensing of Medicaid benefits to aliens who had not been residents of the United States for at least twenty years.³⁰² However, the court declined to order retroactive benefits for any individuals who had been excluded by the provision. On the basis of the supremacy clause, another Florida district court invalidated and enjoined the enforcement of certain Florida regulations which allowed the state to terminate or

(1973), *aff'g in part*, *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972). The Court's several rulings on the three-judge district court's decision that denial of Medicaid assistance for elective, not medically indicated abortions would deprive indigent women of equal protection of the laws, have been interpreted as securing the right to medical assistance for eligibles seeking *any* kind of legal abortion within the 24-week period established by *Doe v. Bolton*, *supra*, and *Roe v. Wade*, *supra*. 2 CCH Pov. L. REP. ¶¶ 17,065, 17,066 (1973). A federal district court reiterated this interpretation of constitutional requirements later last summer. *Doe v. Rose*, 2 CCH Pov. L. REP. ¶ 17,859 (D. Utah 1973).

³⁰¹ *Legion v. Weinberger*, 94 S. Ct. 564, *aff'g mem.* *Legion v. Richardson*, 354 F. Supp. 456 (S.D.N.Y. 1973).

In *Legion v. Richardson*, 354 F. Supp. 456 (S.D.N.Y. 1973), the plaintiffs brought a class action allegedly on behalf of a million mentally ill American inpatients of public mental institutions, seeking either a declaration that the Medicare and Medicaid programs were unconstitutional per se or, in the alternative, a declaration that the exclusion from the benefits of the plaintiff class was constitutionally invalid. 354 F. Supp. at 457. The plaintiffs' challenges to the Medicaid program were based upon the theory that it discriminated against "the poorer and sicker of America's hospitalized mentally ill" by making only state mental institutions ineligible for Medicaid benefits under the statutory definition of available medical assistance. 42 U.S.C. § 1396d(a)(15)(B) (1970). This exclusion operates to prohibit federal payment for medical services rendered to patients under 65 who receive their treatment for mental disease not in a general hospital, or private psychiatric hospital, or community mental-health center affiliated with a general hospital, but in an "institution" solely providing treatment for mental diseases. 45 C.F.R. §§ 249.10(b)(1), (4)(i), (14) (1973); note 287 and accompanying text *supra*. The court held, however, that this procedure was constitutional because it merely reflected "the belief by Congress that care of the mentally ill in state hospitals was the responsibility of the states." 354 F. Supp. at 459.

Although it acknowledged sympathy for the inadequate care often afforded the institutionalized mentally ill, the three-judge district court would not declare either challenged program unconstitutional on its face or as applied to the individual plaintiffs. The court disposed of the plaintiffs' equal protection argument by finding a rational distinction between medically indigent persons in need of short-term as opposed to long-term care. *Id.* The court also rejected any due process claim and consequently dismissed the complaint on the merits. *Id.* at 459-60.

³⁰² *Machado v. Department of Health & Rehab. Servs.*, 2 CCH Pov. L. REP. ¶ 17,577 (S.D. Fla. 1973).

reduce Medicaid assistance for prescribed medicine without prior notice and hearing for the recipient. The state's policy of eliminating these procedural safeguards was found to be inconsistent with the "fair hearings" requirements of the Social Security Act and its implementing regulations.³⁰³

Other states were affected by federal court action as well. Pennsylvania was directed to excise from its welfare regulations a provision which openly violated the Social Security Act, by providing for the determination of financial eligibility for Medicaid on the basis of gross rather than net available income.³⁰⁴ In a related development, Michigan's welfare agency was ordered by the District Court for the Western District of Michigan to implement procedures for the medical screening, diagnosis, and treatment of eligible individuals under the age of twenty-one. That state had failed to take any action during the eleven months after HEW had clearly mandated the establishment of such procedures.³⁰⁵ Finally, in a decision less favorable to Medicaid recipients, the Fifth Circuit disclaimed the eligibility for Medicaid of an individual who had lost his original eligibility because his gross income from Social Security disability benefits exceeded the state's categorical assistance standard, but who asserted alternative eligibility under a "spenddown" provision covering medically needy persons.³⁰⁶

2. *Administrative Changes*

Even more pervasive changes in the Medicaid program emerged through the rules and regulations promulgated by the

³⁰³ *Silvey v. Roberts*, 363 F. Supp. 1006 (M.D. Fla. 1973). The complainants in this case, without prior notice and hearing, had been deprived of Medicaid payments which were to supplement the \$20 state drug allowance by covering medicine expenses in excess of the allotted state aid. The court determined that not only were the Florida procedures directly in conflict with the Social Security Act (42 U.S.C. §§ 1382(a)(4), 1302(2), (3), 602(a)(4), 1202(a)(4) (1970)) and the regulations (45 C.F.R. § 205.10 (1973)), but they also raised grave constitutional questions. 363 F. Supp. at 1012. See notes 389-485 and accompanying text *infra*.

³⁰⁴ *Baran v. Wohlgenuth*, 2 CCH Pov. L. REP. ¶ 17,626 (E.D. Pa. 1973).

³⁰⁵ *Dominguez v. Milliken*, 2 CCH Pov. L. REP. ¶ 16,863 (W.D. Mich. 1973). The violated HEW directive appears in 45 C.F.R. § 249.10(a)(3)(iv) (1973).

³⁰⁶ *Freeman v. Parham*, 475 F.2d 185 (5th Cir. 1973). The so-called "spenddown provision" of the Social Security Act (42 U.S.C. § 1396a(a)(17) (1970)) allows for flexibility in income eligibility standards by providing that medical or remedial care expenses, such as insurance premiums and other actual health care costs, will be taken into account in ascertaining an applicant's income. But, as the court indicated in *Freeman*, that provision only applies when a state has elected to aid the medically needy, because only those individuals not qualifying under another assistance program are subject to the specified medical assistance eligibility standards. 475 F.2d at 187. Since a state need never choose to cover the medically needy under the statute (42 U.S.C. § 1396(a)(10)(B) (1970)) and because his state had not chosen to include them, this individual was without relief.

Social and Rehabilitation Service of HEW over the course of 1973. The most comprehensive of these changes appeared at the end of the year, in the form of a revision in Medicaid eligibility requirements.³⁰⁷ Still acting to implement the Social Security Amendments of 1972,³⁰⁸ HEW amended the definition of "categorically needy" to include certain additional groups of individuals³⁰⁹ and revised state plan requirements for optional categorically needy groups.³¹⁰ Moreover, HEW altered certain general condi-

³⁰⁷ 38 Fed. Reg. 33,380-83 (1973).

³⁰⁸ 1972 Act, Pub. L. No. 92-603, 86 Stat. 1465 (codified in scattered sections of 7, 42 U.S.C. (Supp. II, 1972)).

³⁰⁹ 38 Fed. Reg. 33,380-81 (1973), amending 45 C.F.R. §§ 248.10(a)(1), (b)(3), (4) (1973); see notes 279-80 and accompanying text *supra*. After August 1972 and until July 1, 1975, any individual who was receiving or was eligible to receive assistance under a state categorical assistance program during the month of August 1972 and who was entitled to monthly insurance benefits under title II of the Social Security Act for the same month may be treated as "categorically needy" if he would have been eligible for federal financial assistance "for the current month" except for the increase in his monthly insurance benefits under title II resulting from the enactment of Public Law 92-336. 42 U.S.C. § 415 (Supp. II, 1972). To come within this special class of "categorically needy" recipients, the applicant actually must have received financial assistance during the designated month, or have been potentially eligible except for his failure to apply or his residence in a medical or intermediate care facility. Even if he had been thus potentially eligible under the federal guidelines, however, the applicant could not qualify unless his state Medicaid program in August 1972 had covered as categorically needy those persons who had not applied or were barred from eligibility solely because of their institutional residence. See 45 C.F.R. §§ 248.10(b)(2)(i), (ii) (1973). Besides these requirements, the applicant must satisfy the agency that he is eligible for financial assistance for the current month. Proof of financial eligibility may be shown in one of two ways. The applicant may simply demonstrate that he meets *all* conditions for financial assistance, whether or not he has applied. Alternatively, he may establish that he would be eligible for financial assistance if he left the medical or intermediate care facility in which he resides, because his state's title XIX plan extends coverage to individuals who would qualify as categorically needy except for the single reason that they presently are inpatients at a medical institution. See 45 C.F.R. § 248.10(b)(2)(ii) (1973), as amended, 38 Fed. Reg. 33,381 (1973). The former group of "currently eligible" persons is eligible to the same extent as any other individuals receiving categorical assistance; the latter are to be considered as categorically needy and eligible to the same degree as other categorically needy individuals in medical or intermediate care facilities. *Id.*

Moreover, effective January 1, 1974, state plans must also provide

that any family that was receiving assistance under the State's plan under title IV-A in at least 3 of the 6 months immediately preceding the month in which such family became ineligible for such assistance because of increased income from employment; will continue to be eligible for medical assistance to the same extent and under the same conditions as it is furnished to the categorically needy under the current title XIX plan, for a period of 4 calendar months beginning with the month in which such family became ineligible for assistance under title IV-A because of increased earnings, as long as a member of the family is employed.

Id.

³¹⁰ *Id.* at 33,380-81; notes 279-80 and accompanying text *supra*. Besides adding rules which assure that the states adjust their programs to cover the new "treated-as-categorically-needy" groups, the recent rules broaden the definitions of permissible "categorically needy" individuals which may, but need not, be covered by a state plan. 38 Fed. Reg. 33,380-81 (1973). To the persons who would be eligible for financial assistance under

tions for federal financial participation in the program,³¹¹ slightly revised age limitations on federal financial participation to cover the new groups of eligible individuals,³¹² expanded the scope of the limited federal funding for medical care to inmates of public institutions to encompass patients in intermediate care facilities and youthful recipients of inpatient psychiatric hospital services,³¹³ and modified the time limitations imposed on federal financial contributions to medical assistance payments.³¹⁴

In addition, the Social and Rehabilitation Service made several other changes in the Medicaid regulations affecting recipients' ability to obtain coverage for the services of skilled nursing homes. First, federal subsidies for services received in skilled nursing facilities were extended to cover certain institutions located in Indian reservations.³¹⁵ Christian Science sanatoria now are ex-

another state plan except for their continuing stay in a medical or intermediate care facility but who may nevertheless be covered by a Medicaid plan, the revisions annex any inpatient children who would be eligible under a state's AFDC plan if outside the facility. *Id.* at 33,381. In addition, HEW sweeps into the optional category embracing persons under 21 who are financially eligible but not qualified as dependent children under the appropriate AFDC plan, not only children publicly or privately placed in foster homes or private institutions, but also, effective July 1, 1973, individuals below the age of 21 who are in intermediate care facilities, including institutions for the mentally retarded and psychiatric hospitals. *Id.*

³¹¹ *Id.* at 33,381-82. The December 1973 regulations provide that the federal government, as of October 30, 1972, will participate only in the administrative costs of providing medical care and services to persons in whose medical-care costs the federal government also shares. *Id.* at 33,381. Compare note 289 and accompanying text *supra*. Furthermore, they extend the scope of federal cost-sharing for medical care and services provided under a state plan for young eligibles to include persons 22 or younger who receive inpatient psychiatric hospital care, and to residents in intermediate care facilities as well as to patients in medical institutions. 38 Fed. Reg. 33,381-82 (1973); note 287 and accompanying text *supra*.

Of course, these regulations also provide financial eligibility standards and certify the availability of federal financial participation for the newly-covered auxiliary classes of categorically needy individuals and families. *Id.* at 33,382; note 309 *supra*.

³¹² 38 Fed. Reg. 33,382 (1973), amending 45 C.F.R. § 248.30(b)(1) (1973).

³¹³ 38 Fed. Reg. 33,383 (1973), amending 45 C.F.R. §§ 248.60(a)(1), (2), (3)(iv) (1973); see note 311 *supra*.

³¹⁴ 38 Fed. Reg. 33,383 (1973), amending 45 C.F.R. §§ 249.81(a), (c)(1), (c)(2) (1973); see note 297 and accompanying text *supra*. It is no longer necessary for the recipient of federally shared vendor payments for medical care to have been alive at the time application for benefits was made, so long as the individual for whose care the payments are sought was found eligible for medical assistance for the month during which services were rendered. As a result, survivors now rightly may defray the expenses of a deceased relative's last illness by means of federal medical assistance. 38 Fed. Reg. 33,383 (1973). Moreover, the new rules exempt *all* retroactive adjustment payments from the 24-month time limit for federal participation, not just those coinciding with title XVIII reimbursement conditions. *Id.* But federal contributions to claims filed timely for title XVIII purposes with the appropriate source, but after March 1968, will apply only when actual payment is made within three months after the publication of the new regulations.

³¹⁵ 45 C.F.R. § 249.10(b)(4)(i) (1973); see note 277 and accompanying text *supra*. The institutions must be certified as qualified skilled nursing facilities by the Secretary of HEW.

explicitly excluded from the definition of "nursing home" employed by HEW in licensing state nursing facilities for Medicaid purposes;³¹⁶ the availability of provisional licenses for nursing home administrators has been curtailed greatly; and grants to states for training and instructing the previously existing class of provisional licensees have been eliminated.³¹⁷ Finally, HEW established preliminary program-wide conditions for federal payment for nursing home care, based on the provider-facility's ability to meet the fire safety standards of the *Life Safety Code* of the National Fire Protection Association.³¹⁸

3. Congressional Innovations

With the exception of administrative revisions of the overall citizenship requirements for eligibility,³¹⁹ the remainder of the changes in the Medicaid program in 1973 were made through legislative action. Congress twice last year enacted amendments to

The eligible institutions do not include those treating patients older than 21 years with tuberculosis or mental diseases.

³¹⁶ 45 C.F.R. § 252.10(b)(1) (1973). The definition of "nursing home" also excludes a distinct part of a hospital which is designated as a skilled nursing facility, but is not licensed or formally approved by the state as a nursing home.

Christian Science sanatoria are not excluded from participation under a Medicaid plan. Since 1972, however, they need not meet the same eligibility requirements as "skilled nursing facilities." CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 755.13, at 382, ¶ 755.57, at 388.

³¹⁷ 45 C.F.R. §§ 252.10(c)(2)(iii), (d) (1973). Provisional licenses are available only to persons who have served as administrators for three entire years previous to their application, for the purpose of enabling them to fill unexpectedly vacated positions, and then only for a period of up to six months.

1973 cases involving the participation of nursing homes in the Medicaid program are *Maxwell v. Wyman*, 478 F.2d 1326 (2d Cir. 1973) (continued aid to nursing home); *Florida v. Richardson*, 355 F. Supp. 1027 (N.D. Fla. 1973) (certification rules for participating facilities); *Ross v. Lucey*, 2 CCH Pov. L. REP. ¶ 16,785 (E.D. Wis. 1973) (summary removal of patients for noncompliance with standards).

³¹⁸ 38 Fed. Reg. 21,413 (1973), amending 45 C.F.R. §§ 249.33(a)(1)(vii), (c)(2) (1973). The standards must assure compliance with the *Life Safety Code* of the National Fire Protection Association (21st ed. 1967) or an equivalent state code.

³¹⁹ 38 Fed. Reg. 30,259, 31,174 (1973), amending 45 C.F.R. § 248.50 (1973); note 280 *supra*.

Beginning January 2, 1974, a state Medicaid plan must cover all otherwise eligible individuals who are United States residents, so long as those persons are United States citizens or aliens lawfully admitted for permanent residence or otherwise permanently living in the United States under color of law. CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 725, at 371. This mandate applies to aliens lawfully present in the United States under § 203(a)(7) and § 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. §§ 1153(a)(7), 1182(d)(5) (1970) (relating to refugees from Communist, Communist-dominated, or middle-eastern countries, or from natural calamities, and to persons admitted to United States for reasons of public interest). CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 725, at 371.

the Social Security Act which affect medical assistance to needy individuals.³²⁰

The earlier of the two amendments, enacted in July 1973, accomplishes the most numerous changes. First, the law guarantees continued eligibility and coverage to all "essential persons" qualifying for Medicaid assistance as of December 1973.³²¹ Second, it prevents the expected loss of Medicaid benefits by institutionalized recipients whose special circumstances would not have entitled them to Medicaid once the SSI program became operative.³²² Moreover, the amendment assures that blind and disabled individuals who were Medicaid beneficiaries under the old adult welfare programs will continue to be eligible under SSI, regardless of those persons' conformity or nonconformity with new federal blindness and disability standards.³²³ Finally, it extends the 1972 amendments' prohibition against disqualifying formerly eligible categorically needy persons solely because they received an increase in Social Security payments pursuant to the 1972 congressional directive raising benefits under that program.³²⁴

Dissatisfied with its attempts last summer to update the Medicaid program, Congress at year's end made one last effort to

³²⁰ Pub. L. No. 93-66, §§ 230-34, 87 Stat. 159-60; Pub. L. No. 93-233, § 13, 87 Stat. 960.

³²¹ Pub. L. No. 93-66, § 230, 87 Stat. 159; CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 715, at 364; note 279 *supra*. "Essential spouses" of aged, blind, or disabled (now SSI) cash assistance recipients who were eligible for Medicaid in December 1973 will be eligible in each subsequent month in which they meet the eligibility standards effective regarding "essential spouses" in December 1973, provided that the individuals with whom they live remain eligible under the same criteria, and they continue in an "essential relationship" with those individuals.

³²² Pub. L. No. 93-66, § 231, 87 Stat. 159-60, *as amended*, Pub. L. No. 93-233, § 13(b)(1)(A), 87 Stat. 964; CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 715, at 364. Those Medicaid recipients who in December 1973 received or would have been eligible under a state plan for cash assistance, except for their status as inpatients in medical institutions, can still receive Medicaid. Continued eligibility, however, is restricted to the period of successive months beginning January 1974 in which need continues for institutional care for the same condition for which hospitalization occurred in December 1973. The continued eligibility is conditioned upon the recipient's maintenance of eligibility under the state's December 1973 plan.

³²³ Pub. L. No. 93-66, § 232, 87 Stat. 160, *as amended*, Pub. L. No. 93-233, § 13(b)(2), 87 Stat. 964; CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 715, at 364.

³²⁴ Pub. L. No. 93-66, § 233, 87 Stat. 160; CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 715, at 365. Only states which limit their programs to categorically needy groups are subject to this provision.

The final Medicaid provision of the July legislation eliminates a subsection added to title XIX by the 1972 amendments which delineated the formula for determining the amount of federal funds payable to any state for expenditures for skilled nursing and intermediate care facilities after December 1972. Pub. L. No. 93-66, § 234, 87 Stat. 160, *amending*, 42 U.S.C. § 1396b(j) (Supp. 11, 1972).

modify the program. Although the later law serves also to clarify the provisions of the earlier enactment,³²⁵ its primary purpose is otherwise as far as Medicaid is concerned. At the last possible moment before SSI took effect, Congress adapted the Medicaid law to conform to and complement its new program by announcing the eligibility conditions for Medicaid which would pertain to the newly-created category of SSI recipients, rendering the bulk of that class eligible for medical assistance.³²⁶

V

PROCEDURAL ASPECTS

In 1973, the Department of Health, Education and Welfare issued a series of regulations for applications, hearings, and recoupment of overpayments which will significantly affect the operation of federal-state welfare programs. HEW initially purported to apply these procedural regulations³²⁷ to all federal grant-in-aid programs.³²⁸ However, on January 1, 1974, all the adult welfare

³²⁵ Pub. L. No. 93-233, §§ 13(b)(1), (2), 87 Stat. 964.

³²⁶ *Id.* § 13(c); CCH 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 715, at 364-65. Under this provision, the states may deem all individuals who are eligible for SSI relief likewise eligible for Medicaid. Furthermore, the states *must* perpetuate Medicaid coverage of those persons whose SSI benefits the law requires the states to supplement in order to maintain the December 1973 income levels enjoyed by those individuals under OAA, AB, APTD, or AABD. *See* note 178 and accompanying text *supra*. They also may classify institutionalized individuals eligible for Medicaid, even though the individuals may have income levels exceeding cash assistance requirements and may reside in states having no medically needy Medicaid coverage, as long as the individuals' total incomes remain at 300% of the SSI benefit level or less. 119 CONG. REC. H 11,957 (daily ed. Dec. 21, 1973) (remarks of Congressman Ullman).

Much earlier in 1973, the House of Representatives introduced another bill containing "technical and conforming changes" to the Social Security Act Amendments of 1972 (H.R. 3153, 93d Cong., 1st Sess. (1973)); at the time of passage of Public Law 93-233, this bill had still not been enacted. Provisions in it were urgently needed as the effective date for SSI approached and accordingly were incorporated into H.R. 11333. Still pending are provisions relating to federal matching grants under Medicaid for care to Indians and health maintenance organizations under Medicaid. For the legislative history of H.R. 3153, see H. REP. NO. 81, 93d Cong., 1st Sess. (1973), and S. REP. NO. 553, 93d Cong., 1st Sess. (1973).

Before the enactment of the last-minute amendments, HEW, in response to the congressional silence on continued Medicaid coverage for the aged, blind, and disabled, proposed new regulations to implement the intent of Congress and the President, as expressed in Public Law 93-66 and the Social Security Amendments of 1972. 38 Fed. Reg. 32,216-22 (1973). These regulations would have reorganized substantially part 248 of Chapter 45 of the *Code of Federal Regulations*, and were projected to become operative on January 1, 1974. Revised regulations no doubt will follow the enactment of the new law.

³²⁷ The regulations as first proposed appeared at 38 Fed. Reg. 9819 (1973) and appeared in final form at 38 Fed. Reg. 22,006 (1973).

³²⁸ *See* 42 U.S.C. §§ 301-306 (1970) (OAA); *id.* §§ 601-610, 620-26, 630-44 (AFDC); *id.*

categories were integrated into the new SSI program.³²⁹ SSI is federally administered and is presently operating under new, independently proposed regulations.³³⁰ Thus, the major programs covered by the new regulations are AFDC and Medicaid.

Nevertheless, these developments will affect the great majority of welfare recipients. AFDC is by far the largest need-tested *cash assistance* program, both in terms of number of recipients and benefits distributed.³³¹ Medicaid is presently the largest need-tested program of all. It distributes more dollar equivalent benefits and reaches more needy persons than even AFDC.³³² Ninety-nine percent of all the recipients in the grant-in-aid programs were covered by Medicaid in 1972.³³³

Since both AFDC and Medicaid will continue to be administered by the states in accordance with federal requirements, the issue of whether a federal court can order the state to pay retroactive benefits to applicants and recipients under AFDC and Medicaid is of extreme importance. This critical problem spawned a substantial amount of litigation in 1973, but still awaits definitive solution by the Supreme Court.

A. *Application Procedures*

1. *The New System*

Application procedures³³⁴ in federal assistance programs were extensively modified by the 1973 regulations.³³⁵ These changes will

§§ 1201-1206 (AB); *id.* §§ 1351-1355 (APTD); *id.* §§ 1381-1385 (AABD); and *id.* §§ 1396a-1396i (Medicaid).

³²⁹ 42 U.S.C. §§ 1381-1385 (Supp. II, 1972).

³³⁰ Regulations for the administration of SSI will appear in title 20 of the *Code of Federal Regulations* at § 416. Proposed regulations for SSI will function as operating guidelines until they become finalized. For a discussion of 1973 developments in SSI, see notes 144-95 and accompanying text *supra*.

There is one complication in the administration of Medicaid for SSI recipients. *See* 42 U.S.C. § 1383c (Supp. II, 1972). This problem is dealt with in subpart U of the proposed SSI regulations. *See* Proposed HEW Regs. §§ 416.2001-.2119, 38 Fed. Reg. 21,193 (1973). The state has the option of retaining state Medicaid administration for these recipients or allowing for federal administration in accordance with the state plan. *See id.* § 416.2101(a).

³³¹ In 1972, AFDC benefits reached 11.1 million recipients while the adult programs (OAA, AB, APTD) together reached only 3.4 million recipients. Likewise, \$6.7 billion were distributed by AFDC, and the adult program benefits totaled \$4.1 billion. STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 92D CONG., 2D SESS., PUBLIC INCOME TRANSFER PROGRAMS: THE INCIDENCE OF MULTIPLE BENEFITS AND THE ISSUES RAISED BY THEIR RECEIPT 5, 24 (Comm. Print 1972).

³³² In 1972, Medicaid distributed \$7 billion worth of benefits to 20.6 million recipients. *Id.* at 5, 24.

³³³ *Id.*

³³⁴ 45 C.F.R. § 206.10 (1973).

³³⁵ 38 Fed. Reg. 22,005 (1973).

have an immediate effect upon both the recipient and the local administrator with regard to three specific practices: (1) the form and method of application, (2) verification of eligibility requirements, and (3) extended time limits for administrative action.

However, a more far-reaching impact can be expected from two conceptual changes in the new regulations. First, in characterizing welfare benefits, the regulations now refer to "assistance" instead of "entitlement."³³⁶ Although HEW cannot change the Supreme Court's definition of such benefits,³³⁷ this modification essentially notifies local agencies and potential recipients of a basic change in HEW's concept of an applicant's "right" to welfare. Furthermore, the regulations delete all references to recipients' rights of privacy and personal dignity.³³⁸ Agencies are no longer expressly forbidden from harassing recipients, nor from violating common decencies. All that is left is a vague prescription to respect constitutional and statutory rights. HEW apparently has thus abdicated responsibility for a more precise definition of what these rights are, leaving the decision to the state and local agencies and, ultimately, to the courts.

a. *Form and Method of Application.* According to the new regulations, the states must require a written application,³³⁹ signed under penalty of perjury,³⁴⁰ to be effective only when fully completed by the applicant. This requirement is considerably more stringent than the old regulation which allowed any action indicat-

³³⁶ 45 C.F.R. § 206.10(a)(6) (1973).

³³⁷ In *Goldberg v. Kelly*, 397 U.S. 254 (1970), such benefits were held to be a matter of statutory entitlement. However, in *Wyman v. James*, 400 U.S. 309 (1971), the Court analogized welfare benefits to charity.

³³⁸ Prior regulations provided:

[Standards and methods for determination of eligibility will be consistent with the objectives of the programs, will respect the rights of individuals under the United States Constitution, the Social Security Act, title VI of the Civil Rights Act of 1964, and all other relevant provisions of Federal and State Laws,] and will not result in practices that violate the individual's privacy or personal dignity, or harass him or violate his constitutional rights. Under this requirement, the agency especially guards against violations of legal rights and common decencies in such areas as entering a home by force, or without permission, or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours; and searching in the home, for example, in rooms, closets, drawers, or papers, to seek clues to possible deception.

³³⁹ 36 Fed. Reg. 3865 (former 45 C.F.R. § 206.10(a)(10) (1972)). The present regulations include only the bracketed material. 45 C.F.R. § 206.10(a)(10) (1973).

The identical changes have been made in the New York State regulations. Investigators are no longer cautioned against violating individual rights of privacy or personal dignities or harassing applicants. See 18 N.Y.C.R.R. § 351.1 (1973).

³³⁹ 45 C.F.R. §§ 206.10(a)(1)(ii), (b)(2) (1973).

³⁴⁰ *Id.* § 206.10(a)(1)(ii).

ing a desire to receive assistance to be treated as an application.³⁴¹ The class of persons who may file on behalf of applicants has also been restricted,³⁴² and the specific mandate for state simplification of forms has been entirely deleted.³⁴³ Also, the agency is no longer required to help the applicant provide the necessary information nor to give special assistance to applicants with mental or physical disabilities.³⁴⁴ In short, the application procedure has become more complex, restrictive, and burdensome, with all responsibility for the proper preparation of the application shifted to the individual applicant.

b. *Verification of Eligibility Requirements.* In any need-tested assistance program, the agency must have a method for comparing applicant income and resources with a need standard, in order to ascertain if the applicant is eligible for assistance and, if so, to determine the level of benefits he is to receive.³⁴⁵ HEW has reaffirmed the traditional investigative method of evaluating eligibility by abandoning the simplified or declaration method³⁴⁶ and the primary source rule.³⁴⁷ The impetus for this change came from Congress's specific prohibition of the use of the simplified method for the new SSI program.³⁴⁸

Regulations prescribing use of the simplified method were

³⁴¹ Compare *id.* § 206.10(b)(2), with 36 Fed. Reg. 3865 (1971) (former 45 C.F.R. § 206.10(b)(2) (1972)). The simple term "action" has been modified to require an indication in writing that an applicant desires assistance. Application can no longer be initiated by a telephone call or by mail as was previously specifically allowed. See 36 Fed. Reg. 26,600 (1971) (former 45 C.F.R. § 206.10(a)(1) (1972)).

³⁴² The written application may be accepted from the applicant's "designated representative." 45 C.F.R. § 206.10(a)(1)(ii) (1973). Previously such application could be accepted from a "designated representative" or someone acting responsibly for the applicant. 36 Fed. Reg. 26,600 (1971) (former 45 C.F.R. § 206.10(a)(1)(ii) (1972)). The new regulations provide no specific clue as to what practical effect this change in terminology will have.

³⁴³ See 34 Fed. Reg. 1145 (1969) (former 45 C.F.R. § 205.20(c)(1) (1972)).

³⁴⁴ 36 Fed. Reg. 3865 (1971) (former 45 C.F.R. § 206.10(a)(12)(ii) (1972)).

³⁴⁵ See R. LEVY, T. LEWIS & P. MARTIN, *SOCIAL WELFARE AND THE INDIVIDUAL* 106-16 (1971). See generally Handler & Hollingsworth, *How Obnoxious Is the "Obnoxious Means Test"? The Views of AFDC Recipients*, 1970 WIS. L. REV. 114; Comment, *Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania*, 115 U. PA. L. REV. 1307 (1967).

³⁴⁶ 34 Fed. Reg. 1145 (1969) (former 45 C.F.R. § 205.20 (1972)).

³⁴⁷ See 36 Fed. Reg. 3865 (1971) (former 45 C.F.R. § 206.10(a)(12) (1972)).

³⁴⁸ The Social Security Amendments of 1972 provide:

[E]ligibility for benefits under this subchapter will not be determined solely on the basis of declarations by the applicant concerning eligibility factors or other relevant facts, and . . . relevant information will be verified from independent or collateral sources and additional information obtained as necessary in order to assure that such benefits are only provided to eligible individuals

42 U.S.C. § 1383(e)(1)(B) (Supp. II, 1972).

promulgated in 1969.³⁴⁹ Use of the simplified method meant that the agency obtained needed information by relying primarily upon the applicant's own statements.³⁵⁰ Independent agency verification of these statements was allowed *only* when the information supplied was incomplete, unclear, or inconsistent.³⁵¹ The method was not used to make complex determinations which required expert opinion.³⁵²

When the simplified method was not applicable, agencies' investigations were restricted by the primary source rule. Under this rule, the applicant was still the primary source of eligibility information,³⁵³ and verification was limited to what was reasonably necessary to ensure the legality of expenditures.³⁵⁴ Agencies were forbidden from making collateral contacts with third parties without the applicant's consent.³⁵⁵ However, if the applicant was unwilling to consent to the requested verification and the information otherwise available to the agency was insufficient to make a proper determination, the agency was free to deny or terminate assistance.³⁵⁶

The new regulations have eliminated all existing federal guidelines for procedures used by local agencies to verify eligibility.³⁵⁷ What remains is only an imprecise requirement that the state remain informed about local adherence to state standards for such verification.³⁵⁸

c. *Time Limits.* The time available to the states for a decision upon an application has been increased from thirty to forty-five days for most applicants;³⁵⁹ however, the disability programs retain their sixty-day requirement.³⁶⁰ This time limit runs from submis-

³⁴⁹ See 34 Fed. Reg. 1145 (1969).

³⁵⁰ *Id.* (former 45 C.F.R. § 205.20(c) (1972)).

³⁵¹ *Id.* (former 45 C.F.R. § 205.20(a)(3) (1972)).

³⁵² *Id.*

³⁵³ 36 Fed. Reg. 3865 (1971) (former 45 C.F.R. § 206.10(a)(12)(i) (1972)).

³⁵⁴ *Id.* (former 45 C.F.R. § 206.10(a)(12)(iii) (1972)).

³⁵⁵ *Id.* (former 45 C.F.R. § 206.10(a)(12)(iii)(a) (1972)).

³⁵⁶ *Id.* (former 45 C.F.R. § 206.10(a)(12)(iii)(c) (1972)).

The New York State regulations have retained much of the primary source and collateral contact rules. The only major difference in the New York regulations is that the applicant's consent is no longer required before the agency makes collateral contacts. However, the agency shall continue to explain what information is sought from each collateral source and why it is being sought. 18 N.Y.C.R.R. §§ 351.5, .6 (1973).

³⁵⁷ 36 Fed. Reg. 3865 (1971) (former 45 C.F.R. § 206.10(a)(12) (1972)).

³⁵⁸ 45 C.F.R. § 206.10(a)(12) (1973).

³⁵⁹ *Id.* § 206.10(a)(3)(i) (1973).

³⁶⁰ *Id.* § 206.10(a)(3)(ii).

sion of the completed written application.³⁶¹ Agencies are directed not to use these minimum standards of promptness as a waiting period before the granting of aid,³⁶² and in fact, eligible applicants are not financially burdened by this fifteen-day extension because the regulations require that benefits begin at least as of thirty days after the receipt of the application.³⁶³

2. *Too Much Flexibility?*

HEW's watchword in instituting these changes in application regulations was flexibility.³⁶⁴ But flexibility is only a means of achieving three stated ends—assistance to the eligible, denial of assistance to the ineligible, and less costly, more efficient administration.³⁶⁵ In effect, however, the flexibility now written into the regulations is an invitation to the states to reorder these priorities, so that the denial of assistance for the ineligible becomes the state's primary concern. Indeed, the practical thrust of welfare reform at the state level has been in this direction.³⁶⁶ This increased flexibility also raises the spectre of states resuming the abusive practices of the past.³⁶⁷ At the very least, it is likely that the

³⁶¹ *Id.* § 206.10(a)(6)(i)(A)(2).

³⁶² *Id.* § 206.10(a)(3)(ii). Although the states are allowed time for determinations of eligibility, they are not to delay all actions on applications to the permissible limit in order to save on expenditures. Once the applicant is found eligible, the agency is then obligated to commence payment of benefits.

³⁶³ *Id.* § 206.10(a)(6)(i)(2); see notes 383-88 and accompanying text *infra*.

³⁶⁴ See 38 Fed. Reg. 9819 (1973).

³⁶⁵ When the new regulations were first proposed HEW stated:

These changes are intended to promote efficient administration of the public assistance programs by granting States greater flexibility in designing methods and procedures for assuring that assistance is provided to individuals who qualify for it under applicable Federal and State standards, and is denied to those who do not so qualify. The greater latitude which these proposed regulations will give States in controlling the eligibility determination and payment process is intended to assist in elimination of error and reduction of unnecessary program costs.

38 Fed. Reg. 9819 (1973).

³⁶⁶ As first priority, it was determined to assist local welfare districts in removing reportedly ineligible recipients from the rolls. The second priority was assigned to investigations and studies to ascertain the extent, causes and possible remedies for abuses and administrative failures in the welfare system.

OFFICE OF THE WELFARE INSPECTOR GENERAL OF NEW YORK STATE, FIRST ANNUAL REPORT OF THE OFFICE OF THE WELFARE INSPECTOR GENERAL 1 (1972).

It has been reported that local welfare authorities suggest curtailing due process guaranties in fair hearings in order to save costs. See Handler, *Federal-State Interests in Welfare Administration*, in SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMM., 92d CONG., 2d SESS., ISSUES IN WELFARE ADMINISTRATION: INTERGOVERNMENTAL RELATIONSHIPS 34 (1973).

³⁶⁷ See Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967). See also STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 92d CONG., 2d SESS., ISSUES IN WELFARE ADMINISTRATION: WELFARE—AN ADMINISTRATIVE NIGHTMARE

legality of state actions will be challenged in the courts, a situation which is hardly conducive to efficient administration. Moreover, when the courts correct abusive or illegal state practices, the added costs to the public may become enormous.³⁶⁸

Juxtaposed against the problem of too much flexibility in some areas is HEW's rigid requirement of a written application form. HEW's stated objectives for this requirement were met by the former regulations, and there is certainly no purpose served by delaying the processing of applications until the full written form is submitted.³⁶⁹ These regulations effectively will make benefits less accessible to all, including the truly needy.³⁷⁰

The crux of these procedural changes is the method for determining eligibility. Here the means test,³⁷¹ collateral contacts,³⁷² and recipient rights interact most sensitively. To insure accuracy in eligibility determinations, extensive verification is necessary.³⁷³ Although the dangers of verification to the individual

32 (1972). See generally Sitkin, *Welfare Law: Narrowing the Gap Between Congressional Policy and Local Practice* in SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMM., 92d CONG., 2d SESS., ISSUES IN WELFARE ADMINISTRATION: INTERGOVERNMENTAL RELATIONSHIPS 36 (1973).

³⁶⁸ For example, when a California court found that fair hearings had been illegally denied to terminated recipients because the state agency had made no effort to comply with federal guidelines, retroactive payments were ordered for those wrongfully terminated. The California legislative subcommittee on welfare reform estimated the cost of this fiasco to California taxpayers to be between \$10 and \$25 million. Sitkin, *supra* note 367, at 48-51.

However, HEW has indicated that agencies must still respect constitutional rights as defined by the courts. 38 Fed. Reg. 22,007 (1973). New methods, developed within constitutional guidelines, are purportedly aimed at avoiding inaccuracy, thus leaving more funds available for the truly needy.

³⁶⁹ According to HEW, a signed application is necessary (1) to provide a dated legal document indicating the applicant's intent, (2) to put the applicant on notice of his rights and liabilities, (3) for evidentiary functions in court, and (4) to provide the agency with sufficient information to make accurate decisions. 38 Fed. Reg. 22,006 (1973). None of these arguments explains why such a form is required before the agency is obligated to take even initial action.

This is an area in which the states should experiment in order to discover more efficient procedures. Presumably, if a state agency can now decide where the threshold between constitutional violations and acceptable harassment lies, it could certainly decide when and why a written application is desirable.

³⁷⁰ See Comment, *supra* note 345, at 1308.

³⁷¹ The means test has been described as performing the gatekeeper's function with regard to welfare eligibility. The test defines the recipient's net need as the difference between an established need standard, and available recipient income and resources. Such a test requires individual evaluation for each applicant, including detailed inquiries into all personal circumstances affecting each variable in the need equation. See Handler & Hollingsworth, *supra* note 345, at 122-23; Comment, *supra* note 345, at 1308.

³⁷² Collateral contacts are simply agency contacts with anyone other than the recipient in the process of eligibility verification.

³⁷³ 38 Fed. Reg. 22,007 (1973).

are manifold,³⁷⁴ these dangers have been subordinated to official concerns over the size of the welfare rolls.³⁷⁵ It is clear that elaborate verification procedures can keep the absolute size of the welfare rolls down,³⁷⁶ but these procedures do not necessarily ensure accuracy or reduce overall costs to the agency. Indeed, President Nixon has suggested that welfare reform is best served by simplifying the entire eligibility process.³⁷⁷

Collateral contacts may create noneconomic adverse consequences for the welfare agency, including inaccurate information provided by third-party contacts, distrust among recipient neighbors, and a stigmatizing effect upon recipients and applicants.³⁷⁸ Removal of all restrictions on investigations is also an invitation for increased administrative costs,³⁷⁹ particularly since there has been no showing that elaborate verification procedures will result in overall savings to the states.³⁸⁰ Government studies did not indicate

³⁷⁴ See Wickham, *Restricting Home Visits: Toward Making the Life of the Public Assistance Recipient Less Public*, 118 U. PA. L. REV. 1188, 1192-95 (1970).

³⁷⁵ See notes 366-68 and accompanying text *supra*.

³⁷⁶ The Government Accounting Office found that rejection rates were higher when eligibility workers made comprehensive investigations, than under simplified procedures. *Hearings on Problems in Administration of Public Welfare Programs, Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.*, 92d Cong., 2d Sess. 16 (1972) [hereinafter cited as *1972 Hearings*].

³⁷⁷ I propose that these payments be made upon certification of income, with demeaning and costly investigations replaced by simplified reviews and spot checks

. . . .
If a person spent a great deal of time and effort to get on the welfare rolls, wouldn't he think twice about risking his eligibility by taking a job that might not last long?

. . . .
The new system will lessen welfare red tape and provide administrative cost savings. To cut out the costly investigations so bitterly resented as "welfare snooping," the Federal payment will be based upon a certification of income, with spot checks sufficient to prevent abuses.

. . . These simplifications will save money and eliminate indignities.

President Nixon's Welfare Reform Message of Aug. 11, 1969. 115 CONG. REC. 23,143 (1969).

³⁷⁸ See Comment, *supra* note 345, at 1328-29. HEW has stated that new methods of eligibility determination are needed to protect the truly needy and to restore faith in the welfare system. 38 Fed. Reg. 22,007 (1973). HEW is apparently referring to the taxpayers' faith that no funds are being wrongfully spent and not the recipient's faith in the welfare system with which he or she must deal.

³⁷⁹ See Comment, *supra* note 345, at 1330.

³⁸⁰ Again all other values have been subordinated to the top priority concern of clearing the welfare rolls of ineligible. However, there is a trade-off between funds saved by not providing assistance to ineligible and funds expended on verification. For some categories, AB or APTD, detailed initial investigations will not have to be repeated and there is arguably a long-run savings. The question is much less clear with AFDC, in which personal status changes constantly affect eligibility. Here continuing verification is conceivably as expensive as payment of improper benefits. At least HEW has not shown the contrary to be true.

that case loads increased under the use of the simplified method.³⁸¹ On the contrary, deficiencies in the simplified method were traced either to the failure of the local agency to implement the system properly, or to the improper application of highly complex eligibility criteria.³⁸²

The Social Security Act requires that assistance be furnished with reasonable promptness.³⁸³ On its face, the new increase in the time allotted for decisions on applications does not violate this legislative mandate. HEW maintains that such an extension is necessary for verification of eligibility in only some cases; most decisions will be made within a shorter time.³⁸⁴ But the old thirty-day requirement had a built-in "unusual circumstances" provision, allowing the states some leeway in exceptional cases.³⁸⁵ Furthermore, HEW recently defended the thirty-day limit as the product of considerable agency experience.³⁸⁶ The extension is really another element in the elaborate verification scheme created by the new regulations.³⁸⁷ However, because the agency must begin paying benefits from no later than the thirtieth day after application, any financial incentives for delay have been removed.³⁸⁸ Thus, the impact of this extension on eligible applicants will be minimal.

There is the possibility that underlying implicit value judgments are at work here. Administrators might feel that, on balance, it is better to spend n dollars in creating jobs for welfare investigators, caseworkers, and office personnel, than to spend the same n dollars on government handouts.

³⁸¹ 1972 *Hearings* 16 (statement of E. Staats, United States Comptroller Gen'l).

³⁸² Comparison of the two methods, as applied to AFDC, showed little difference between the extent of verification done by the agency under the investigative and the simplified method. See 1972 *Hearings* 6. See also STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 92D CONG., 2D SESS., *supra* note 367, at 6.

HEW has abandoned the simplified method in the face of continued recommendation for its retention and recognition of its potential for good. See 1972 *Hearings* 508; Handler, *supra* note 366, at 18-20; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON WELFARE PROPOSALS 25 (1970).

³⁸³ See, e.g., 42 U.S.C. § 602(a)(10) (1970).

³⁸⁴ 38 Fed. Reg. 22,006 (1973).

³⁸⁵ 36 Fed. Reg. 3864 (1971) (former 45 C.F.R. § 206.10(a)(3) (1972)).

³⁸⁶ "The [30-day requirement] adopted draws on the experience of more than 17 years in administering the statute, as well as the experience and comments of various states and recipients." Memorandum for the United States as Amicus Curiae at 7, *Swank v. Rodriguez*, 403 U.S. 901 (1971). The history of the 30-day requirement is traced from 1951, through the *Public Assistance Handbook*, and into the *Code of Federal Regulations*. *Id.* at 5-6.

³⁸⁷ An overall simplified application procedure obviously requires less time for the initial agency decision. In its proposals for welfare reform, the Association of the Bar of the City of New York suggested, along with full implementation of the simplified method, prompt decisions within ten working days. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *supra* note 382, at 26-27.

³⁸⁸ 38 Fed. Reg. 22,006 (1973). See also note 363 and accompanying text *supra*.

B. Hearings

1. New Regulations

The 1973 regulations have revised the entire framework within which the welfare "fair hearing" functions. The only phase of the process left unchanged is the specific conduct of the hearing mandated by *Goldberg v. Kelly*.³⁸⁹ Thus, minimum due process guaranties are retained—timely and adequate notice, a personal appearance by the recipient allowing him oral presentation of the case and optional representation by counsel, the opportunity to present evidence and to cross-examine adverse witnesses, and a requirement that the hearing decision be based only on rules and evidence adduced at the hearing.³⁹⁰ Beyond this required minimum, however, HEW has declined to attend to recipients' additional procedural guaranties.

The tone of these changes is reflected in the deletion of "fair" from the phrase "fair hearings."³⁹¹ This deletion is not merely a

³⁸⁹ 397 U.S. 254 (1970). *Goldberg* involved an action brought by New York recipients of AFDC and home relief, alleging that termination, or proposed termination, of benefits without prior notice, and without a pretermination hearing, was a denial of due process. Recognizing the "brutal need" of the recipients (*id.* at 261), and taking cognizance of the "new property" concept (*id.* at 262 n.8), the Supreme Court held that welfare recipients are entitled to a pretermination evidentiary hearing.

Although *Goldberg's* holding was restricted to termination of benefits, courts have subsequently extended its procedural protections to all phases of government-individual interaction in the welfare process. See *Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972) (reduction in benefits); *Hunt v. Edmunds*, 328 F. Supp. 468 (D. Minn. 1971) (reduction in benefits); *Diaz v. Wyman*, 41 App. Div. 2d 722, 341 N.Y.S.2d 370 (1st Dep't 1973) (recoupment proceeding); *Morales v. Lavine*, 41 App. Div. 2d 627, 340 N.Y.S.2d 931 (1st Dep't 1973) (recoupment proceeding). See also *Barnett v. Lindsay*, 319 F. Supp. 610 (D. Utah 1970) (all phases of welfare process) (*dictum*). Likewise, *Goldberg* has been extended to cover all cash and in-kind assistance programs. New York State regulations prescribe fair hearing protections for recipients of cash assistance benefits, food stamps, and social services. 18 N.Y.C.R.R. §§ 358.4(a)-(c) (1973).

In issuing new fair hearing regulations on May 29, 1970, HEW specifically stated that it was implementing the Supreme Court's holding in *Goldberg*. 35 Fed. Reg. 8448 (1970). Except for minor procedural changes (36 Fed. Reg. 3034 (1971)), these regulations remained substantially unchanged until the 1973 revisions.

The new regulations specifically state that hearings must meet the due process standards of *Goldberg*. See 45 C.F.R. § 205.10(a)(1)(ii) (1973).

³⁹⁰ These minimum requirements of due process were detailed by the Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970). They are specifically incorporated into the new regulations. See 45 C.F.R. §§ 205.10(a)(13), (14) (1973). The detailed conduct of a fair hearing in New York is prescribed at 18 N.Y.C.R.R. § 358.16 (1973).

For a discussion of the effect of the *Goldberg* holding on the mechanics of a fair hearing, see Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725, 728-33 (1972).

³⁹¹ See 45 C.F.R. § 205.10(a) (1973). The Social Security Act specifically requires that

matter of form, but reflects several minor substantive changes made in the hearing procedure. Previously, the agency was required to provide recipients with information on how to obtain legal help for the hearings,³⁹² but this requirement has been deleted. Previously, the hearing was to be held at a time and place convenient to the recipient;³⁹³ now the time and place need only be reasonable.³⁹⁴ Whereas the agency was previously required to help the recipient in requesting a hearing,³⁹⁵ now such help is only discretionary.³⁹⁶ Although a clear expression of intent by the recipient was formerly sufficient for the request of a hearing, now the agency may demand that such a request be in writing.³⁹⁷ In addition to this erosion of procedural guaranties, there are five other changes: (1) the introduction of local evidentiary hearings, (2) reduction of the timely notice requirements, (3) exceptions to timely notice, (4) recovery of aid paid pending the hearing, and (5) clarification of the fact-policy distinction.³⁹⁸

a. *Local Evidentiary Hearings.* Prior regulations required hearings before a single state agency.³⁹⁹ The hearing officer was required to be impartial and could not have been involved in the adverse agency decision.⁴⁰⁰ The states are now provided the option of either retaining the old procedures on the state level or instituting local evidentiary hearings with a right to appeal to a state agency.⁴⁰¹ Local evidentiary hearings need not be provided throughout the state.⁴⁰² If the recipient loses at the local eviden-

each state provide a system of "fair hearings" as part of its state plan for the grant-in-aid programs. See, e.g., 42 U.S.C. § 602(a)(4) (Supp. II, 1972).

³⁹² 36 Fed. Reg. 3034 (1971) (former 45 C.F.R. § 205.10(a)(6) (1972)).

³⁹³ *Id.* at 3035 (former 45 C.F.R. § 205.10(a)(7) (1972)).

³⁹⁴ 45 C.F.R. § 205.10(a)(8) (1973).

³⁹⁵ 36 Fed. Reg. 3034 (1971) (former 45 C.F.R. § 205.10(a)(3)(ii) (1972)).

³⁹⁶ 45 C.F.R. § 205.10(a)(5)(ii) (1973).

³⁹⁷ Compare 36 Fed. Reg. 3034 (1971) (former 45 C.F.R. § 205.10(a)(3)(i) (1972)), with 45 C.F.R. § 205.10(a)(5)(i) (1973) (new regulation). This trend toward requiring more formalized recipient action before the agency is required to respond also appears in the application regulations. 45 C.F.R. § 206.10(a)(1)(ii) (1973). See note 339 and accompanying text *supra*.

³⁹⁸ For an analysis of changes in the fact-policy distinction, see notes 447-85 and accompanying text *infra*. This section includes a discussion of adverse determinations caused by changes in law that affect classes of recipients and the recently defined due process standards applicable in such circumstances.

³⁹⁹ 36 Fed. Reg. 3034 (1971) (former 45 C.F.R. §§ 205.10(a)(1), (3) (1972)).

⁴⁰⁰ *Id.* at 3035 (former 45 C.F.R. § 205.10(a)(8) (1972)).

⁴⁰¹ 45 C.F.R. § 205.10(a)(1) (1973).

⁴⁰² *Id.* Arguably, providing for local evidentiary hearings in only some subdivisions of the state, is in violation of the Social Security Act's requirement for a uniform state plan for AFDC and for Medicaid. See 42 U.S.C. §§ 1396a(a)(1), (3) (1970); *id.* §§ 602(a)(1), (4) (Supp. II, 1972).

tiary hearing, he has fifteen days within which to request a de novo hearing before the state agency.⁴⁰³ If he appeals but does not specifically request a de novo hearing, the state agency will determine only if the local decision was supported by substantial evidence.⁴⁰⁴ The requirements for an impartial, disinterested hearing officer remain,⁴⁰⁵ and both the local and state hearings are to be conducted according to *Goldberg's* standards.⁴⁰⁶

b. *Timely Notice Requirements.* *Goldberg* did not fix the exact requirements of timely notice,⁴⁰⁷ but regulations promulgated in response to *Goldberg* provided that notice of an adverse agency action be mailed to the recipient fifteen days before such action was taken.⁴⁰⁸ The timely notice requirement serves two functions. First, it informs the recipient of the imminent adverse action. Additionally, it establishes the time period within which the recipient is obligated to request a hearing, if such a recipient desires continued benefits until the hearing decision is rendered.⁴⁰⁹ HEW has now reduced this required period to only ten days,⁴¹⁰ although the state may, at its option, extend this period for another ten days.⁴¹¹

Ironically, while shortening the time period within which a hearing may be requested, HEW has expanded the period within which the agency is required to reach a decision on the hearing. Final action is now to be taken within ninety days of the date of the hearing request.⁴¹²

c. *Exceptions to Timely Notice.* There are now ten specified

⁴⁰³ 45 C.F.R. § 205.10(a)(6)(iii) (1973).

⁴⁰⁴ *Id.* Note, however, that the agency is no longer required to help the recipient in requesting a hearing. See note 395 *supra*. Notice of the local evidentiary hearing decision must include proper notice of opportunity to appeal. Such notice must now adequately distinguish between the two forms of review. When the notice fails to make a proper distinction in plain language that the recipient can understand, litigation can be expected.

⁴⁰⁵ 45 C.F.R. § 205.10(a)(9) (1973).

⁴⁰⁶ See notes 389-90 and accompanying text *supra*.

⁴⁰⁷ "We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient *per se*, although there may be cases where fairness would require that a longer time be given." *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

⁴⁰⁸ See 36 Fed. Reg. 3034 (1971) (former 45 C.F.R. § 205.10(a)(5)(i)(a) (1972)). When these regulations were initially promulgated in 1970, HEW explained that they were in direct response to the holding of *Goldberg*. See 35 Fed. Reg. 8448 (1970).

⁴⁰⁹ 45 C.F.R. § 205.10(a)(6)(i) (1973).

⁴¹⁰ *Id.* § 205.10(a)(4)(i)(A).

⁴¹¹ *Id.* § 205.10(a)(7).

⁴¹² *Id.* § 205.10(a)(16). The regulations do not specify, however, whether a local evidentiary hearing decision is final action, and if so, how long the state agency has for decision on the subsequent state agency hearing.

Prior regulations required final administrative action within 60 days of the hearing request. 36 Fed. Reg. 3035 (former 45 C.F.R. § 205.10(a)(11) (1972)).

circumstances which excuse the agency from having to provide timely notice before the termination of benefits. These include death of a recipient, voluntary termination, commitment to an institution or a nursing home, recipient's whereabouts unknown, recipient receiving benefits in a new jurisdiction, judicial removal of an AFDC child from the home, prescribed change in medical care, and end of a special allowance.⁴¹³ The agency is still required, however, to provide adequate notice no later than the date of action.⁴¹⁴ The tenth circumstance allowing the agency to dispense with timely notice is the most controversial—suspected recipient fraud. The regulation as first proposed provided that timely notice need not be given when the agency had found that there was a likelihood of fraud and had notified law enforcement officials.⁴¹⁵ The repropoed regulation would impose more stringent requirements on the agency. There must be clear evidence of criminal fraud, substantiated through collateral sources when possible. Furthermore, the agency must not have obtained the evidence in sufficient time to provide timely notice, and a hearing must be made immediately available to the recipient.⁴¹⁶

d. *Aid Paid Pending the Hearing.* A recipient now is given up to ninety days after an adverse agency action to appeal that action by requesting a hearing.⁴¹⁷ However, if the recipient requests a hearing within the prescribed period, benefits continue until the date of the hearing decision. HEW has now determined that such continued benefits are subject to recovery if the agency action is sustained at the hearing.⁴¹⁸ Presumably, such recovery will be effected under the new recoupment regulations.⁴¹⁹

⁴¹³ 45 C.F.R. §§ 205.10(a)(4)(ii)(A)-(I) (1973). At the date of publication only these nine circumstances had been finalized in the regulation. The tenth circumstance, suspected recipient fraud (*see* notes 415-16 and accompanying text *infra*), had only been proposed by HEW. The finalized regulation was not yet promulgated.

⁴¹⁴ *Id.* § 205.10(a)(4)(ii).

⁴¹⁵ *See* Proposed HEW Reg. § 205.10(a)(5)(ii)(E), 38 Fed. Reg. 9820 (1973).

⁴¹⁶ *See* Proposed HEW Reg. § 205.10(a)(4)(ii)(j), 38 Fed. Reg. 22,042 (1973).

⁴¹⁷ 45 C.F.R. § 205.10(a)(5)(iii) (1973). The regulations specify 90 days as the maximum period available to the recipient for requesting a hearing. Under prior regulations, which specified only a reasonable time for the recipient to make such a request (36 Fed. Reg. 3034 (1971) (former 45 C.F.R. § 205.10(a)(3)(iii) (1972)), New York established a 60-day reasonable time period. 18 N.Y.C.R.R. § 358.5(a) (1973).

⁴¹⁸ 45 C.F.R. § 205.10(a)(6)(i) (1973).

⁴¹⁹ *Id.* § 233.20(a)(12); *see* notes 486-522 and accompanying text *infra*. The new recoupment regulations allow recovery of overpayments from currently available resources or assistance benefits, or both. Most cases of recoupment of aid paid pending the hearing will therefore have an impact only when the proposed agency action is a reduction and the recipient is still receiving benefits.

2. Criticism

These new regulations pay lip service to *Goldberg*, by retaining the basic hearing requirements, while stretching the due process context of the hearings to the breaking point. States are given unbridled flexibility in many areas, and once again, litigation challenging state procedures will unquestionably ensue.⁴²⁰

HEW has taken the cue for local evidentiary hearings from the Social Security Amendments of 1972 and extended the procedure to AFDC and Medicaid.⁴²¹ But local hearings have been criticized on two grounds.⁴²² The two-tiered system of hearings will increase administrative costs, and impartiality at the local hearing will be difficult to attain. Whenever the local hearing officer has been involved in any way with the recipient's case, litigation can be expected. Increasing local staff to avoid this problem will further increase administrative costs. Because the regulations also do not clarify the way in which the local evidentiary hearing and the state agency hearing will interact, substantial confusion might arise.⁴²³ Local agencies favor local evidentiary hearings because they facilitate the prompt discovery of errors and thereby reduce incorrect benefit payments.⁴²⁴ But this saving may well be offset by the use of less efficient administrative procedures.⁴²⁵

⁴²⁰ HEW purports to provide for more efficient welfare administration by allowing the states greater flexibility in designing procedures that distribute benefits only to those eligible. See 38 Fed. Reg. 9819 (1973). This efficiency, however, does not relate to potentially increased administrative costs. For a discussion of increased administrative expenses resulting from imprecise limits on agency behavior, see notes 367-68 and accompanying text *supra*.

⁴²¹ 1972 Act, § 407, 86 Stat. 1489. The Social Security Amendments of 1972 allowed the states to institute local evidentiary hearings for adult categories until SSI became effective on January 1, 1974. This provision is seemingly contradictory to much of the general purpose of SSI, however, which was intended to provide streamlined, less costly federal administration.

⁴²² See Comments on Proposed Regulations Re: Methods of Determining Eligibility, Fair Hearings and Recoupment of Overpayments, Before the Department of Health, Education and Welfare 30-39 (1973) (on file at the *Cornell Law Review*). These comments were presented as testimony before HEW by the NLSP Center on Social Welfare Policy and Law, on behalf of the National Welfare Rights Organization.

⁴²³ For example, what is the final agency action required within 90 days of the hearing request? If only the local evidentiary hearing decision is required within this time period, then another 105 days could pass before the recipient receives a decision from the state agency.

Another problem involves the location of the state agency hearing. If the local evidentiary hearing is made available in the recipient's county, will state agency hearings granted only in the state capital be reasonably located, or is it necessary for all hearings to be conducted in the recipient's county of residence? Arguably, different standards for *de novo* hearings and substantial evidence review hearings could be implemented.

⁴²⁴ See 38 Fed. Reg. 22,005 (1973).

⁴²⁵ "Efficient benefits" is used here in referring to the percentage of benefits paid only

A further disincentive to efficient administration is the longer period allowed for rendering hearing decisions. If aid is paid during this time, and the hearing decision sustains the local agency action, extra incorrect benefits will have been paid. The real risk, however, involves the class of cases in which no timely notice is required and the recipient is denied benefits for three months until the agency action is reversed.⁴²⁶ HEW's justification for such an extension is the increased hearing case load.⁴²⁷ However, it does not follow that the decisionmaker's case load is reduced by giving him more time to respond.⁴²⁸

The reduction of the timely notice period is inconsistent with the expansion of time limits for agency action.⁴²⁹ The time in which recipients must decide whether or not to request a hearing has been reduced from fifteen to ten days. But because the regulation requires only the mailing and not the receipt of notice within ten days prior to agency action, the *effective* notice period may be reduced by as much as one-half.⁴³⁰

HEW purports to defend the change by arguing that it reduces overpayments to ineligible.⁴³¹ But even if a recipient is ineligible, he is entitled to a due process hearing to assert his continued eligibility. If the new regulation hinders the recipient from requesting such a hearing, it is unconstitutional; if not, it merely cuts benefits paid by five days while another regulation

to eligible recipients. This implicit HEW value judgment, concerning how welfare dollars are best spent, on benefits or on administrative costs, has cropped up in the new application regulations. See note 380 and accompanying text *supra*.

⁴²⁶ Of course, the recipient would then be entitled to receive corrective retroactive payments for this period. 45 C.F.R. § 205.10(a)(18) (1973). However, if the recipient does win at the hearing, he is by definition needy; yet he is deprived of benefits for up to three months, or longer, with state agency hearings. Note also that the states are forbidden from paying aid pending the state hearing after the recipient loses the local evidentiary hearing. *Id.* § 205.10(a)(6)(iii).

⁴²⁷ See 38 Fed. Reg. 22,006 (1973).

⁴²⁸ If there are n hearings every 60 days, then there would be $3/2 (n)$ hearings every 90 days. In either case, the hearing officer must decide the same number of hearings per day. His burden is determined not by the time in which he must act, but rather by the volume of hearings requested. It is only in the unusual circumstances in which the administrator requires more than 60 days to decide a particular hearing that the extension is needed. HEW should have limited the extension to these circumstances.

⁴²⁹ See, e.g., 45 C.F.R. § 206.10(a)(3) (1973). The time limit for agency action after initial application has been increased by 50%. See also *id.* § 205.10(a)(16). The time within which the agency must render a hearing decision has also been increased by 50%.

⁴³⁰ Since the period begins to run at the time of mailing, as it did with the prior 15 day requirement, the recipient necessarily has less than 10 days for response. Therefore the absolute five-day reduction is more than one-third of the time previously available to the recipient.

⁴³¹ See 38 Fed. Reg. 22,007 (1973).

allows the hearing decision to be delayed by thirty days.⁴³² However, if the recipient is found eligible, no expenditures are saved, and the recipient is unnecessarily inconvenienced. HEW could better achieve the same result by ensuring quick hearings and decisions.

By reducing the timely notice period, HEW has increased the probability that recipients will litigate the issue of whether timely and adequate notice has been afforded in each circumstance. If the mail delays the notice until the date of agency action, due process is obviously violated. If the agency further requires written hearing requests,⁴³³ it becomes practically impossible for the recipient to act in time to request the hearing. However, states may and should avoid these problems by allowing the recipient an additional ten days within which to request a hearing and to receive aid pending the decision.⁴³⁴

At first glance, the circumstances in which the agency may dispense with timely notice appear eminently reasonable.⁴³⁵ All but fraud involve clear-cut termination situations in which necessary information can be readily verified; however, despite the availability of verified information, factual questions, which the hearing is designed to resolve, arise in many of these cases.⁴³⁶ In any event, there is little justification for not providing timely notice. The funds saved by not satisfying the timely notice period are insubstantial, and even if the savings were significant, protection of the public fisc has not been accepted as an agency interest of sufficient substantiality to warrant dispensing with due process.⁴³⁷

These criticisms are even more compelling in the case of suspected recipient fraud. Suspected fraud is the one situation in

⁴³² See note 412 and accompanying text *supra*.

⁴³³ See 45 C.F.R. § 205.10(a)(5)(i) (1973).

⁴³⁴ See *id.* § 205.10(a)(7).

⁴³⁵ For a discussion concerning timely and adequate notice in cases of class reduction due to changes in law, see notes 465-81 and accompanying text *infra*.

⁴³⁶ These [due process] rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

Goldberg v. Kelly, 397 U.S. 254, 268 (1970) (footnotes omitted). See also notes 448-50 and accompanying text *infra*.

⁴³⁷ Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance. . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process.

397 U.S. at 261, quoting Kelly v. Wyman, 294 F. Supp. 893, 901 (S.D.N.Y. 1968) (footnotes omitted).

which a hearing is clearly needed and in which the agency should be prevented from taking unilateral action. The repropounded regulation, seemingly an attempt to restrict unfettered agency discretion, has only increased the likelihood of unilateral agency decisions. Collateral contacts by the agency are required, but studies have shown that such information is often unreliable.⁴³⁸ The requirement for an immediate hearing implies a quick decision, but efficient administration would reduce unnecessary expenses without threatening recipients' due process rights.

HEW defends these regulations on the ground that they govern only decisions on questions of law, not of fact.⁴³⁹ However, the situations covered by the regulations involve changes in recipients' circumstances, not changes in state or federal law that affect recipients. The trend in 1973 case law has been to extend *Goldberg* to all recipients *individually* affected,⁴⁴⁰ but to restrict its application when changes in law affect *classes* of recipients.⁴⁴¹ These regulations conflict with this philosophy.

Probably the most questionable change in the regulations is the provision for recoupment of aid paid pending the hearing. In one sense this is merely another disincentive for prompt agency action, both in scheduling the hearing and in rendering the decision. Procedures ensuring speedy hearings would reduce undesired administrative expenses, but HEW's scheme forces recipients to shoulder the burden of poor administration.⁴⁴²

The more serious problem posed by the new regulation concerns the chilling effect that it might have on the recipient's exercise of his right to request a hearing. HEW is concerned with deterring requests for hearings when the recipient knows that the agency action is not erroneous.⁴⁴³ But the regulation will obviously affect recipients in doubt as to the propriety of the agency's action who would otherwise request a hearing.

The new regulations abound with potential for severe agency abuse. For example, recipients may be denied aid paid pending the

⁴³⁸ See Comment, *supra* note 345, at 1328-29.

⁴³⁹ See 38 Fed. Reg. 22,006 (1973).

⁴⁴⁰ See *Yee-Litt v. Richardson*, 353 F. Supp. 996 (N.D. Cal.), *aff'd mem. sub nom. Carleson v. Yee-Litt*, 412 U.S. 924 (1973).

⁴⁴¹ See generally notes 465-81 and accompanying text *infra*.

⁴⁴² One could argue that recipients do not suffer in these circumstances, that the aid paid pending the hearing was aid for which they were ineligible in any event and was therefore rightfully recouped. The burden, however, results from the double reduction of benefits in such a circumstance: (1) benefits would be reduced following the sustained agency action; and (2) benefits would be further reduced to effect recoupment. See note 419 *supra*.

⁴⁴³ See 38 Fed. Reg. 22,006 (1973).

hearing because the agency alleges a specific exception to the timely notice requirement.⁴⁴⁴ Other recipients may find their benefits terminated at the local evidentiary hearing when the hearing officer decides that no questions of fact are involved. Wrongfully terminated recipients may be forced to wait up to 195 days for reinstated benefits.⁴⁴⁵ A delay of such magnitude provides a tool for severe harassment.⁴⁴⁶

3. Clarification of the Fact-Policy Distinction

In 1973, cases and regulatory changes have considerably clarified the fact-policy distinction⁴⁴⁷ which had been applied to determine the class of recipients and applicants to whom the full procedural protections of *Goldberg* applied. The plaintiffs in *Goldberg* had complained that their benefits had been terminated on the basis of inaccurate and misleading factual information, and that they had not been afforded a hearing at which time they could challenge these errors in their records.⁴⁴⁸ In accepting the plaintiffs' contention that due process did indeed require a pretermination hearing for individual recipients in the plaintiffs' situation, the *Goldberg* Court left unresolved the questions of what due process required before a state could terminate the benefits of either an individual recipient or a broad class of recipients on the basis of an interpretation of policy or a rule of law.⁴⁴⁹ Lower courts subsequently held that *Goldberg* was implicitly limited to situations involv-

⁴⁴⁴ See 45 C.F.R. § 205.10(a)(4)(ii)(A)-(I) (1973).

⁴⁴⁵ Ninety days are apparently allowed for the local evidentiary hearing decision. 45 C.F.R. § 205.10(a)(16) (1973). The recipient has 15 days for requesting review at a state agency hearing. *Id.* § 205.10(a)(6)(iii). Presumably there is then another 90 days for decision on the state agency hearing. *Id.* § 205.10(a)(16).

⁴⁴⁶ This concern is not merely idle speculation. "[I]t has been suggested by local authorities that due process in welfare hearings should be curtailed to save welfare costs." Handler, *supra* note 366, at 34.

Also, some welfare officials apparently feel that *Goldberg* has unnecessarily raised administrative expenses by requiring hearings. In view of this added expense, perhaps more stringent measures, which make such hearings more burdensome for the recipient, are somehow justified. See STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 92D CONG., 2d Sess., *supra* note 367, at 15-16; 1972 Hearings 672.

⁴⁴⁷ 36 Fed. Reg. 3034 (1971) (former 45 C.F.R. § 205.10(a)(5)(iii)(a)(1) (1972)).

⁴⁴⁸ *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). "The question for decision [was] whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process . . ." 397 U.S. at 255.

⁴⁴⁹ 397 U.S. at 268 n.15. The Court never expressly limited its holding to the federal context.

ing factual determinations and did not apply to situations in which issues of law or policy were in dispute.⁴⁵⁰

Federal regulations reflected the limitation on *Goldberg* which the fact-policy distinction represented. Benefits were to be continued until the fair hearing decision was reached unless the agency determined that the recipient's challenge to termination raised only questions of policy and none of fact.⁴⁵¹ However, the terms "fact," "law," and "policy" were never defined. Nor were distinctions drawn between policy questions affecting individual recipients or broad classes of recipients, and across-the-board changes affecting all recipients. Court decisions failed to provide uniform law in this area.⁴⁵²

The Supreme Court, in *Carleson v. Yee-Litt*,⁴⁵³ recently applied *Goldberg's* due process requirements⁴⁵⁴ to all recipients adversely affected by agency determinations relating to the individual recipient's case. In affirming without opinion the decision of a three-judge panel, the Court enjoined use of the fact-policy distinction as unconstitutional under *Goldberg*.⁴⁵⁵ Consequently, the agency can no longer decide, ex parte, that only questions of policy or law are involved in a decision to terminate, thus ending benefits before the fair hearing.

The plaintiffs in *Yee-Litt* were terminated recipients who had been denied continued benefits prior to their fair hearings. In terminating the plaintiffs' benefits, the state agency had decided that no fact questions were left for decision at the hearings.⁴⁵⁶ A temporary restraining order was then issued by the court enjoining

⁴⁵⁰ See *Russo v. Kirby*, 453 F.2d 548 (2d Cir. 1971); *Provost v. Betit*, 326 F. Supp. 920 (D. Vt. 1971); *Merriweather v. Burson*, 325 F. Supp. 709 (N.D. Ga. 1970).

⁴⁵¹ 36 Fed. Reg. 3034 (1971) (former 45 C.F.R. § 205.10(a)(5)(iii)(a)(1) (1972)).

⁴⁵² The Second Circuit failed to reach the question of whether or not strikers were entitled to assistance benefits, dismissing for lack of jurisdiction. The court went on, however, in explicit dictum, to point out that the purpose of *Goldberg* was to provide eligible recipients with an opportunity to prove facts. When only questions of law are present, there is no need for a prior hearing. *Russo v. Kirby*, 453 F.2d 548 (2d Cir. 1971).

The Seventh Circuit has held, though, that only the precise procedural requirements of *Goldberg* are limited to a factual resolution. *Mothers' & Children's Rights Org. v. Sterrett*, 467 F.2d 797 (7th Cir. 1972). With pure questions of law, there is no need to present or to cross-examine witnesses, but an opportunity to be heard is still mandated. *Id.* With questions of fact, alone or mixed with questions of law, *Goldberg* specifically applies. *Id.*

⁴⁵³ 412 U.S. 925, *aff'g mem.* *Yee-Litt v. Richardson*, 353 F. Supp. 996 (N.D. Cal. 1973).

⁴⁵⁴ See notes 389-90 and accompanying text *supra*.

⁴⁵⁵ *Yee-Litt v. Richardson*, 353 F. Supp. 996 (N.D. Cal.), *aff'd mem. sub nom.* *Carleson v. Yee-Litt*, 412 U.S. 924 (1973).

⁴⁵⁶ *Id.* at 999-1000.

such terminations, although it was subsequently modified to allow the agency to implement new information-gathering regulations.⁴⁵⁷ When the new regulations failed to protect the recipients' due process rights, further use of the fact-policy distinction was enjoined.

Yee-Litt was based on a strict interpretation of *Goldberg*, and did not represent a decision to extend *Goldberg* to a new class of recipient-applicants.⁴⁵⁸ *Goldberg* had focused on the specific problem of denying benefits to potentially eligible recipients.⁴⁵⁹ The three-judge panel in *Yee-Litt* found the fact-policy distinction to be inherently unworkable⁴⁶⁰ because it inevitably denies due process protection to a certain number of otherwise eligible individual recipients. Two areas of particular concern were noted. The first was termination or denial by mistake.⁴⁶¹ Balancing the respective burdens, and focusing on the brutal need factor, the court found that in such cases the agency must bear the cost of minimizing improper adverse determinations. The second, and more far-reaching, area was that of agency misuse of regulations.⁴⁶² The stakes here are too great for the recipient involved to allow the agency room for judgmental errors in deciding that no questions of fact are present.⁴⁶³

HEW still has not abandoned the fact-policy distinction altogether. If at the local evidentiary hearing a decision is made that only questions of policy or law are involved in a dispute, benefits may be terminated at that time, instead of when the full hearing decision is rendered. Until this preliminary decision, benefits must be continued.⁴⁶⁴

Goldberg has not been extended to adverse determinations

⁴⁵⁷ The California state agency argued that the fact-policy distinction was valid when the administrator had sufficient information on which to base his decisions. Consequently new state regulations, providing for greater information gathering prior to termination, were enacted. The court permitted the agency to attempt to solve its own problem with its own regulations pursuant to *Richardson v. Wright*, 405 U.S. 208 (1972). See 353 F. Supp. at 998-99.

⁴⁵⁸ 353 F. Supp. at 1000.

⁴⁵⁹ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

⁴⁶⁰ "The Court further concludes that the fault does not lie with the State, but rather with the unclear and unmanageable fact-policy distinction which the regulations have created." 353 F. Supp. at 1001.

⁴⁶¹ *Id.* at 999.

⁴⁶² *Id.* at 1000, 1001; see *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

⁴⁶³ 353 F. Supp. at 1000.

⁴⁶⁴ 45 C.F.R. § 205.10(a)(6)(i)(a) (1973). The danger here is that early termination may be used by the agency as a harassment technique, removing recipients from the welfare rolls and forcing them to bear the burden of obtaining reinstated benefits.

affecting broad classes of recipients involved in an assistance program; however, new regulations provide that timely and adequate notice shall be afforded all recipients so affected.⁴⁶⁵ But there is no requirement for a pretermination or prereduction hearing in such cases.⁴⁶⁶ Group hearings remain available when the sole question involved is one of state or federal law or policy, but only at the discretion of the state agency.⁴⁶⁷

These new regulations essentially embody the rationale of recent court decisions in this area. In 1973, two circuits dealt with the problem of timely and adequate notice and prereduction hearings for large classes of recipients. In *Rochester v. Baganz*,⁴⁶⁸ the Third Circuit reviewed an across-the-board percentage reduction for all recipients in the state of Delaware. The reduction resulted from limited state funding for AFDC.⁴⁶⁹ Seven-day notice was sent to most recipients with no opportunity for continued benefits pending a hearing. The district court had held that in such a case the requirements of *Goldberg* did not apply and that notice and a hearing were not mandated.⁴⁷⁰

The circuit court reversed in part, basing its decision on federal regulations. The court held that while the states were free to reduce benefits they were nevertheless required to comply with the applicable regulations,⁴⁷¹ and timely notice had not been

⁴⁶⁵ *Id.* § 205.10(a)(4)(iii).

It may be helpful to distinguish the two fact situations involved in these adverse determinations. The *Yee-Litt* type termination was based on the application of a rule of policy or law to the individual recipient. For example, a stepfather might have been found living in the recipient's home and benefits would then have been terminated according to agency policy. A recipient could challenge this agency policy, but because no questions of fact were involved, the man's presence being admitted, the *fact-policy distinction* allowed the agency to deny aid pending the hearing. *Yee-Litt* has now forbidden such action. *Carleson v. Yee-Litt*, 412 U.S. 925, *aff'g mem.* *Yee-Litt v. Richardson*, 353 F. Supp. 996 (N.D. Cal. 1973).

Compare the *Yee-Litt* termination with a reduction of benefits to all recipients in a program, as would occur if the state ran low on welfare appropriations. Here all recipients are affected by a change in law; there is no decision to reduce benefits to selected recipients. See notes 468-74 and accompanying text *infra*. Admittedly, the line between these two examples is not always so easily drawn.

⁴⁶⁶ *Id.* § 205.10(a)(5)(v). Hearings are available to contest the correctness of the reduction computation. *Id.* § 205.10(a)(5). However, the regulations do not provide for continued aid pending the hearing in such a case.

⁴⁶⁷ 45 C.F.R. § 205.10(a)(5)(iv) (1973).

⁴⁶⁸ 479 F.2d 603 (3d Cir. 1973).

⁴⁶⁹ *Id.* at 604. The cause of the reduction is explained with greater detail in the district court opinion. See *Rochester v. Ingram*, 337 F. Supp. 350, 352-53 (D. Del. 1972).

⁴⁷⁰ *Rochester v. Ingram*, 337 F. Supp. 350 (D. Del. 1972); see *Riggins v. Graham*, 2 CCH Pov. L. REP. ¶ 17,801 (Ariz. 1973).

⁴⁷¹ 479 F.2d at 605.

provided.⁴⁷² The court found that the notice requirements were within HEW's rulemaking authority and consistent with the aim of orderly administration of the welfare system.⁴⁷³ However, no pre-reduction hearing was required. The regulation allowing for post-reduction hearings to correct possible computation errors was upheld.⁴⁷⁴

The First Circuit, in *Velazco v. Minter*,⁴⁷⁵ was confronted with a general reduction of OAA benefits resulting from a congressional increase in OASDI benefits.⁴⁷⁶ The state agency had provided timely but somewhat inexact notice⁴⁷⁷ to recipients and had denied prereduction hearings. The court upheld the agency action on both constitutional and statutory grounds.⁴⁷⁸ Balancing agency and recipient interests under the due process clause, the court found that because overall benefits would increase there was no risk of grievous loss to the recipients.⁴⁷⁹ Since this determination resulted from a change in law affecting a broad class of recipients, a prereduction hearing was not necessary.⁴⁸⁰ In view of the complex nature of the recomputation, the notice was held to be adequate under the circumstances, but the court did indicate that such notice would fail in the ordinary case.⁴⁸¹

The apparent direction of these changes is both efficient and fair. The unmanageable fact-policy distinction has been effectively eliminated. Now in assessing the applicability of the *Goldberg* requirements the threshold question is whether individual recipients or a class of recipients is adversely affected by an agency decision.

⁴⁷² *Id.* at 606. The regulations defined "timely" as requiring notice mailed at least 15 days before agency action was taken. 36 Fed. Reg. 3034 (1971) (former 45 C.F.R. § 205.10(a)(5)(i)(a) (1972)).

⁴⁷³ 479 F.2d at 606.

⁴⁷⁴ *Id.* at 607.

⁴⁷⁵ 481 F.2d 573 (1st Cir. 1973).

⁴⁷⁶ OASDI benefits were increased 20% by Congress in 1972. 42 U.S.C. § 415 (Supp. II, 1972). Consequently, all OAA recipients receiving OASDI had increased income which in turn affected the level of their OAA benefits. This interaction is well detailed by the court. *See* 481 F.2d at 575.

⁴⁷⁷ "While specifying the kinds of changes to be expected and indicating that the recipient would be receiving, from both his OASDI and OAA checks, more money than before, the notice gave no formulae, computations or amounts." 481 F.2d at 575.

⁴⁷⁸ The district court had upheld the agency action on the theory that social security and old age welfare programs were *in pari materia*. Thus, there had been no reduction in benefits at all; rather the recipient was receiving increased benefits. *Velazco v. Minter*, 352 F. Supp. 1109 (D. Mass. 1973). The circuit court noted that its affirmance was based on a different approach.

⁴⁷⁹ 481 F.2d at 577.

⁴⁸⁰ *Id.* at 578.

⁴⁸¹ *Id.* at 581.

Agencies can no longer terminate benefits to individual recipients without a hearing by resorting to the pretext of "policy" questions.⁴⁸² At the same time, efficient administration is promoted by not requiring individual hearings for class reductions.⁴⁸³

Problems do remain, however. The contours of a policy question are yet to be defined. This failure to delineate the boundaries of a "question of policy" could lead to abuses of the hearing process at the local level.⁴⁸⁴ Local hearing officers could merely convene a hearing, promptly decide that no fact questions are present, and immediately adjourn the proceeding, thereby depriving the recipient of a meaningful opportunity to be heard. Second, the problem of an incorrect reduction due to agency error in the computation of across-the-board budget cuts still remains. An individual whose benefits are so reduced is permitted a hearing, but not prior to benefit changes.⁴⁸⁵ This procedure is particularly harsh in cases like *Rochester* in which an individual could face two reductions—the overall reduction and the improper computation.

C. *Recoupment*

1. *New Regulations*

New regulations have greatly expanded the state agency's ability to recoup prior overpayments from assistance recipients.⁴⁸⁶ Under prior regulations, recoupment was possible in only two circumstances: (1) when the recipient had income or resources currently available, or (2) when evidence clearly showed that a recipient had willfully withheld information from the administering agency.⁴⁸⁷ Only in the latter instance was the agency able to

⁴⁸² See, e.g., *Yee-Litt v. Richardson*, 353 F. Supp. 996, 1000 (N.D. Cal. 1973).

Such practices also expose the state agency to the risk of extraordinary expenses for compensating recipients wrongfully terminated. See *Sitkin*, *supra* note 367, at 48-50.

⁴⁸³ The district court in *Rochester* pointed out the possible danger that, were the state unable to reduce the standard of need promptly, limited funds appropriated for AFDC would run out before the end of the fiscal year. Recipients would then face the possibility of no benefits. Both parties had an interest in the uninterrupted receipt of assistance and therefore in prompt adjustment of the benefit level. *Rochester v. Ingram*, 337 F. Supp. 350, 357 (D. Del. 1972).

From the state's point of view, continuing benefits prior to fair hearings would be a great expenditure of funds to essentially ineligible recipients. Such a procedure would also encourage unnecessary hearings and greatly increase administrative costs. See STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 92D CONG., 2D SESS., *supra* note 367, at 16.

⁴⁸⁴ See notes 445-46 and accompanying text *supra*.

⁴⁸⁵ 45 C.F.R. § 205.10(a)(5) (1973).

⁴⁸⁶ *Id.* § 233.20(a)(12).

⁴⁸⁷ 34 Fed. Reg. 1395 (1971) (former 45 C.F.R. §§ 233.20(a)(3)(ii)(c), (d) (1972)).

effect recoupment by reducing assistance benefits. Under new regulations, the state may recoup from currently available income or resources, assistance benefits, or both.⁴⁸⁸ When assistance is reduced, there are only vague prescriptions that "reasonable limits" be set on the proportion of the benefits suspended⁴⁸⁹ and that the state avoid causing undue hardship.⁴⁹⁰ The only specific limitation placed on a state plan for recoupment, in the absence of willful withholding of information, is that the state is limited to recouping those overpayments made in the twelve months immediately preceding the discovery of the overpayment.⁴⁹¹

2. Criticism

The Social Security Amendments of 1972 authorized recoupment procedures for the SSI program.⁴⁹² The statutory language was very much like that of the OASDI recoupment of overpayment provision.⁴⁹³ However, the regulations promulgated by HEW for the SSI program bear no relation to the corresponding OASDI program.⁴⁹⁴ The "without fault" phrase, common to both statutory schemes,⁴⁹⁵ and treated extensively by the OASDI regulations,⁴⁹⁶ is absent from HEW's new regulations. Thus, even the most innocent and unknowing recipients of overpayments are subject to future reduction in their benefit checks. This is made more troubling by the inevitable presence of hardship in any reduction of welfare benefits. In the statutes and the regulations, both OASDI and SSI

⁴⁸⁸ 45 C.F.R. § 233.20(a)(12)(i)(c) (1973).

⁴⁸⁹ *Id.* § 233.20(a)(12)(i)(d).

⁴⁹⁰ *Id.* It is not clear how reductions in benefits in any need-oriented welfare program could avoid undue hardship. See note 497 and accompanying text *infra*.

⁴⁹¹ 45 C.F.R. § 233.20(a)(12)(i)(b) (1973).

The proposed regulations for recoupment contained no limits whatsoever on the agency's ability to recoup overpayments. See 38 Fed. Reg. 9822 (1973). Also there was no mention how, or even if, underpayments were to be dealt with. In apparent response to criticism of these regulations, the new regulations included the 12-month rule and ordered correction of underpayments, also limited to the 12 previous months. See Fed. Reg. 22,007 (1973).

⁴⁹² 42 U.S.C. § 1383(b) (Supp. II, 1972).

⁴⁹³ Compare *id.* (SSI), with *id.* §§ 404(a), (b) (1970) (OASDI). OASDI requires that there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Id. § 404(b) (1970). The corresponding language of the Social Security Amendments of 1972 includes the same terms, but is not mandatory. Rather, the Secretary is to promulgate regulations designed to meet these same objectives. *Id.* § 1383(b) (Supp. II, 1972).

⁴⁹⁴ See 20 C.F.R. §§ 404.506-15 (1973).

⁴⁹⁵ 42 U.S.C. § 404(b) (1970); *id.* § 1383(b) (Supp. II, 1972).

⁴⁹⁶ 20 C.F.R. §§ 404.507, 404.510-11 (1973).

factor the recipient's hardship into the decision of whether or not to recoup.⁴⁹⁷ Since OASDI is not a need-determined program, the effect of recoupment may vary considerably from case to case. Because welfare benefits are directly related to recipient need, however, except in cases of gross fraud, any reduction in the amount of assistance checks will automatically result in a hardship.

The application of the new regulations to AFDC recipients may violate the principle enunciated in *King v. Smith*,⁴⁹⁸ that "protection of . . . [dependent] children is the paramount goal of AFDC."⁴⁹⁹ Federal courts have applied this rationale to strike down recoupment schemes that reduced benefits to the children as a means of controlling or punishing other members of a family.⁵⁰⁰ If HEW seeks to justify the new, broadened recoupment procedures as a deterrent to fraudulent practices, it must distinguish *King* and explain why criminal fraud prosecution and civil actions for recoupment are insufficient to achieve the same deterrent ends. If the purpose of recoupment is only to control welfare expenditures, however, then HEW must meet a "heavy burden of justification."⁵⁰¹ It is questionable whether a measure that creates hardship for innocent recipients will meet this burden, particularly when the source of the problem is agency error.⁵⁰²

⁴⁹⁷ 42 U.S.C. § 404(b) (1970) and 20 C.F.R. §§ 404.506-15 (1973) (OASDI); 42 U.S.C. § 1383(b) (Supp. II, 1972) and 45 C.F.R. § 233.20(a)(12)(i)(D) (1973) (SSI).

⁴⁹⁸ 392 U.S. 309 (1968). *King* involved an Alabama substitute father rule that denied AFDC aid to the mother and children when the mother cohabited with any able-bodied single or married man. *Id.* at 311. The Supreme Court struck down the regulation as inconsistent with the AFDC statutory scheme. The Court held that when alternative methods were available to the agency, benefits should not be denied to AFDC children as a means of controlling the behavior of a parent. The Court noted that Congress had determined that immorality and illegitimacy should be dealt with through the use of rehabilitative measures (*id.* at 325), although it did not specify what these measures were.

⁴⁹⁹ *Id.* at 325.

⁵⁰⁰ See *Bradford v. Juras*, 331 F. Supp. 167 (D. Ore. 1971); *Cooper v. Laupbeimer*, 316 F. Supp. 264 (E.D. Pa. 1970). *King* is distinguishable from the situation presented here. In this situation, the state is not seeking to regulate recipient behavior; the recoupment regulation is clearly related to HEW's objective.

⁵⁰¹ *Taylor v. Martin*, 330 F. Supp. 85, 88 (N.D. Cal.), *aff'd mem. sub nom. Carleson v. Taylor*, 404 U.S. 980 (1971). The *Taylor* court struck down as invalid under *King* a California AFDC regulation that required the remaining parent to sign a criminal nonsupport complaint against the absent parent.

Note that AFDC has been denied to recipients in furtherance of valid agency aims. Work rules have been held to be a valid state condition for eligibility and not violative of the Social Security Act. *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405 (1973). Home visits have also been held to be a valid eligibility requirement. *Wyman v. James*, 400 U.S. 309 (1971).

⁵⁰² It can be seriously questioned whether providing for any recoupment is justified. Innocent members of the family are likely to suffer if overpayments are

In 1973, two New York courts followed the *King* reasoning in disallowing recoupment of duplicate checks.⁵⁰³ One court instructed the state agency to pay particular attention at the rehearing to the fact that the assistance sought to be reduced was paid primarily for the benefit of the children of the recipient parent.⁵⁰⁴ In the other case, the court invalidated state suspension of benefits pending any agency investigation into the parents' misconduct.⁵⁰⁵ Citing *King*, the court stated that the parents' misconduct was not a sufficient reason for terminating benefits to AFDC children.⁵⁰⁶

Arguably, the new recoupment scheme is also defective with respect to all assistance programs because it violates the statutory mandate to furnish assistance to needy persons. The language of the Social Security Act is prescriptive.⁵⁰⁷ Each of the assistance programs establishes simple eligibility requirements based on need and nonneed factors. Denying or reducing assistance to an eligible recipient contravenes the general intent of the Social Security Act.⁵⁰⁸

Like the new application regulations,⁵⁰⁹ the new recoupment regulations are noticeably lacking in standards to guide the states. The percentage of the assistance check that may be withheld for recoupment is not specified, nor is the length of time during which the state should reduce benefits.⁵¹⁰ The terms "willfully withheld"⁵¹¹ and "undue hardship"⁵¹² are not explained; one must

recovered from a guilty member Recoupment reduces the family benefits as a whole, causing the family as a whole—guilty and innocent members together—to subsist on a lesser amount of public assistance.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *supra* note 382, at 27.

⁵⁰³ *Diaz v. Wyman*, 41 App. Div. 2d 722, 341 N.Y.S.2d 370 (1st Dep't 1973); *Morales v. Lavine*, 41 App. Div. 2d 627, 340 N.Y.S.2d 931 (1st Dep't 1973).

⁵⁰⁴ *Diaz v. Wyman*, 41 App. Div. 2d 722, 341 N.Y.S.2d 370, 371 (1st Dep't 1973).

⁵⁰⁵ *Norton v. Lavine*, 74 Misc. 2d 590, 344 N.Y.S.2d 81 (Sup. Ct. 1973).

⁵⁰⁶ *Id.* 74 Misc. 2d at 599-600, 344 N.Y.S.2d at 90.

⁵⁰⁷ "Aid . . . shall be furnished . . . to all eligible individuals." 42 U.S.C. § 602(a)(10) (1970) (AFDC). "Every aged, blind, or disabled individual who is determined . . . to be eligible on the basis of his income and resources shall . . . be paid benefits by the Secretary of [HEW]." *Id.* § 1381a (Supp. 11, 1972) (SSI).

⁵⁰⁸ This argument is developed in much greater detail in the National Welfare Rights Organization's testimony before HEW concerning the proposed 1973 regulations. See Comments on Proposed Regulations, *supra* note 422, at 99-103.

The argument has been used by a New York court to strike down recoupment of AFDC benefits. Noting that need and dependency were the only eligibility requirements for AFDC, the court forbade recoupment without consideration of the child's need. *Norton v. Lavine*, 74 Misc. 2d 590, 344 N.Y.S.2d 81 (Sup. Ct. 1973).

⁵⁰⁹ See notes 334-88 and accompanying text *supra*.

⁵¹⁰ See 45 C.F.R. § 233.20(a)(12) (1973).

⁵¹¹ See note 491 and accompanying text *supra*.

⁵¹² See note 490 and accompanying text *supra*.

guess as to how each state will interpret them.⁵¹³ Although HEW could defend this procedure as allowing for experimentation at the state level it appears to be another invitation to litigation.⁵¹⁴

A general criticism of HEW's new scheme is that it sanctions gross inequity in the recoupment procedure. Studies have shown that erroneous payments are widespread in all welfare programs.⁵¹⁵ Nevertheless, HEW has lumped virtually all possible overpayment situations together,⁵¹⁶ not differentiating recipients according to degrees of fault, or knowledge of their ineligibility for benefits.

Commentators and litigants have suggested that recoupment generally violates various constitutional provisions;⁵¹⁷ but the courts have been unresponsive to these challenges.⁵¹⁸ The Second Circuit, in a recent decision, rejected the argument that the group of recipients whose benefits were reduced comprised a suspect classification.⁵¹⁹ Although the new recoupment scheme is broader, it does not appear to contain constitutional infirmities.

A recoupment system similar to that of the OASDI program would be more equitable than the one adopted by HEW.⁵²⁰ In view

⁵¹³ *Id.* Contrast these regulations to the OASDI regulations regarding overpayment. All of the key statutory terms, "without fault," "defeat the purpose of Title II," "against equity and good conscience," are extensively defined in the regulations. Examples also are furnished. 20 C.F.R. §§ 404.507-11 (1973).

⁵¹⁴ Reduction of discretionary state decisions will arguably provide for better welfare administration. See Sitkin, *supra* note 367, at 54.

⁵¹⁵ See STAFF OF SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 92D CONG., 2D SESS., *supra* note 367, at 38-40.

⁵¹⁶ The only instance of differing treatment according to recipient culpability is the inapplicability of the 12-month limit for recoupable overpayments in cases of willful withholding of information. 45 C.F.R. § 233.20(a)(12)(i)(b) (1973).

⁵¹⁷ See Comment, *Recoupment of Welfare Overpayment: The Legal Effect of State Recoupment of Overpayment Provisions on Welfare Recipients Who No Longer Have the Temporary Job or Income That Caused the Overpayment*, 7 HOUSTON L. REV. 635 (1970). The author suggests that recoupment violates due process, equal protection, and the eighth amendment sanction against cruel and unusual punishment.

In *King v. Smith*, 392 U.S. 309 (1968), the plaintiffs raised an equal protection argument that was avoided by the Court when the case was decided on statutory grounds. However, in a concurrence, Mr. Justice Douglas saw the man-in-the-house rule as discriminating against illegitimate children and hence violative of the equal protection clause. *Id.* at 336.

⁵¹⁸ A recent circuit court decision rejected the contention that the class of recipients from whom the agency seeks to recoup benefits is a suspect classification. Finding no constitutional claim, the court dismissed the case for want of jurisdiction. *Hagans v. Wyman*, 471 F.2d 347 (2d Cir. 1973). A district court decision upholding a regulation requiring an AFDC mother to name the father of her illegitimate child also found no constitutional question involved. Since a three-judge panel was denied, there was no pendent jurisdiction, and the statutory question was not reached. *Saiz v. Goodwin*, 325 F. Supp. 23 (D.N.M. 1971).

⁵¹⁹ *Hagans v. Wyman*, 471 F.2d 347 (2d Cir. 1973).

⁵²⁰ See 20 C.F.R. §§ 404.506-15 (1973).

of the inevitable hardships resulting from reduced welfare benefits, "without fault" should be more leniently defined,⁵²¹ and there should be some differentiation according to recipient culpability. A Committee of the Association of the Bar of the City of New York has suggested allowing recoupment only in cases of actual fraud with present need still considered.⁵²² At the very least, HEW should have provided more specific guidelines for the states, rather than leaving to the courts the task of precisely defining regulatory terms.

D. Federally Awarded Retroactive Payments

Although the new regulations have been criticized here for creating the potential for much litigation, it is important to note that the federal courts have become an increasingly important forum for the assertion of welfare rights. During 1973, the only major question before the courts concerning federal review of state welfare programs was whether a federal court could order a state to make retroactive payments of benefits wrongfully denied a recipient. Four circuits have expressed differing opinions on the question of whether the eleventh amendment is a bar to such an order.⁵²³ Obviously, until the Supreme Court speaks there is no chance for any uniform law in this area.⁵²⁴

The retroactivity issue was addressed initially by the Second Circuit in *Rothstein v. Wyman*.⁵²⁵ The court found that an award of retroactive benefits by a federal court was both an improvident

⁵²¹ See *id.* § 404.507.

⁵²² ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *supra* note 382, at 28.

⁵²³ Retroactive benefits were denied in *Anderson v. Graham*, Nos. 73-1441, 73-1466 (8th Cir., Dec. 20, 1973); *Like v. Carter*, 486 F.2d 552 (8th Cir. 1973); *Dawkins v. Craig*, 483 F.2d 1191 (4th Cir. 1973); and *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1973).

Retroactive benefits were granted in *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973), and *McDonald v. Department of Pub. Welfare*, 430 F.2d 1268 (5th Cir. 1970). The eleventh amendment was not raised as a defense in *McDonald*, however, and the court decided the issue simply on the equities involved.

The following district courts have also dealt with the question of retroactives. *Campagnuolo v. White*, 2 CCH Pov. L. REP. ¶ 17,219 (D. Conn. 1973); *Green v. Stanton*, 2 CCH Pov. L. REP. ¶ 17,756 (N.D. Ind. 1973); *Story v. Roberts*, 352 F. Supp. 473 (M.D. Fla. 1972); *Carter v. Stanton*, 350 F. Supp. 1337 (S.D. Ind. 1972).

⁵²⁴ After this Comment was prepared for publication, the Supreme Court reversed the Seventh Circuit and held that the eleventh amendment did bar a federal court from ordering a state to pay retroactive welfare benefits. *Edelman v. Jordan*, 42 U.S.L.W. 4419 (March 25, 1974).

⁵²⁵ 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973) New York had enacted a statute dividing the state into four districts with different need standards in each district. N.Y. Soc. SERV. LAW § 131-a (McKinney 1969). A seven-county area surrounding New York City had a lower need standard than that for the five counties comprising New York City.

exercise of its equity jurisdiction and a violation of the eleventh amendment. In balancing the equities, the court looked to the competing interests of the state and the recipient, and to the overall congressional intent in this area.⁵²⁶ On the one hand was recipient need, against which were weighed the desirability of smooth administration and the limited financial resources of the state. The court felt that the scales were tipped, however, by the congressional policy of "cooperative federalism"⁵²⁷ as exemplified by the federal-state relationship created by the Social Security Act. Furthermore, the court reasoned that recipient need was not determinative because so much time had elapsed between the agency violation and the award of benefits that the payments had become compensatory and not merely remedial.⁵²⁸

The court also found that retroactive payments were jurisdictionally barred by the eleventh amendment. *Ex parte Young*⁵²⁹ had held that the eleventh amendment did not prevent a federal court from ordering a state official to terminate practices found to be in conflict with federal law. However, the *Rothstein* court found that the eleventh amendment did bar an action against a state official when the order required the payment of public funds.⁵³⁰ Although a state could waive its eleventh amendment immunity from suit, the court said such a waiver must be "clear and unequivocal."⁵³¹ Since there was no explicit conditioning of federal welfare funds on a state's liability in federal court, and waiver is usually only implied when the state has entered into activities ordinarily in the private sector,⁵³² the court found that the clear and unequivocal test had not been met.

Four months later the Seventh Circuit reached a contrary

The plaintiffs in the seven outlying counties sued to enjoin enforcement of the statute. The statute was struck down, and this action was not contested on appeal. The only issue before the Second Circuit was the district court's award of retroactive benefits for the period when § 131-a was in force. 467 F.2d at 229-33.

⁵²⁶ 467 F.2d at 232-35.

⁵²⁷ *Id.* at 232, 235.

⁵²⁸ Sixteen months had elapsed between the violation and the district court's award of retroactive payments. The court reasoned that these benefits had no correspondence to present need. *Id.* at 235. However, the assumption that merely because the plaintiffs lived through this reduction they were not in need of benefits, is questionable. If every dollar is needed by the recipient, by definition, any reduction will remain unremedied over time. The mere fact that recipients lived through a reduction in no way indicates that the benefits are not needed.

⁵²⁹ 209 U.S. 123 (1908).

⁵³⁰ *Rothstein v. Wyman*, 467 F.2d 226, 236 (2d Cir. 1972).

⁵³¹ *Id.* at 238.

⁵³² *Id.* The court cited *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), in making this distinction. For a discussion of *Parden*, see note 544 *infra*.

result in *Jordan v. Weaver*.⁵³³ The court based its holding on four affirmances by the Supreme Court in cases in which retroactive benefits were granted.⁵³⁴ The court in *Jordan* rejected the *Rothstein* interpretation of *Young* as applicable only to prospective injunctions, by pointing out that an order to bring state procedures into accordance with federal law would drain state funds to a greater extent than would an award of back benefits.⁵³⁵ The Seventh Circuit emphasized that the injunction in *Young* constituted completely adequate relief and that nothing in *Young* expressly limited its application to injunctive relief.⁵³⁶ The *Jordan* court asserted that policy considerations required the payment of retroactive benefits to compel state conformity at the earliest possible date.⁵³⁷ Also, the court characterized retroactive benefits as restitutionary relief and not as damages, notwithstanding the contrary assertion in *Rothstein*.⁵³⁸

Finally, in *Jordan* it was found that Illinois had waived its sovereign immunity by participating in a federal grant-in-aid program. The court implied a condition upon such participation, namely, consent to suit in federal courts. The welfare program was

⁵³³ 472 F.2d 985 (7th Cir. 1973). The plaintiffs in *Jordan* were eligible AABD applicants whose applications were not acted upon within the 30 or 60-day periods prescribed by the federal regulations. The defendant state agency began paying benefits from the date of approval and not for prior months when the plaintiffs would have been collecting benefits but for the agency's delays. The court enjoined further variance from the federal regulations in addition to awarding retroactive payments.

⁵³⁴ *Sterrett v. Mothers' & Children's Rights Org.*, 409 U.S. 809 (1972); *State Dep't of Health & Rehab. Servs. v. Zarate*, 407 U.S. 918 (1972); *Wyman v. Bowens*, 397 U.S. 49 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Sterrett* and *Zarate* were summary affirmances of three-judge decisions. In *Shapiro*, the Court affirmed the district court without commenting on the issue of retroactive benefits, and in *Wyman*, the Court affirmed the district court per curiam, citing only *Shapiro*. None of these cases, however, dealt specifically with the eleventh amendment defense. But, the Seventh Circuit noted the precedential value of summary affirmances in awarding retroactive benefits on the authority of these cases. *Jordan v. Weaver*, 472 F.2d 985, 989 (7th Cir. 1973).

⁵³⁵ Mandatory injunctions granted on the authority of *Ex parte Young* have certainly had an impact on the state treasury by requiring the expenditure of public funds. . . . Here the district court's permanent injunction . . . requires the expenditure of more monies than the state was spending under the practices found unlawful. In fact [it] requires the expenditure of more monies than the seriously disputed part of the judgment requiring the payment of wrongfully withheld benefits! Whether a liability is declared which must be met from the state's public funds is not the touchstone of the Eleventh Amendment's applicability.

Id. at 991.

⁵³⁶ *Id.*

⁵³⁷ Without retroactive payments being ordered, "the force of federal law could be seriously blunted. The state welfare officials could withhold benefits in violation of federal law until suit is brought and a court acts, and retain the illegal savings acquired theretofore."

Id. at 992.

⁵³⁸ *Id.* at 993.

essentially one of congressional regulation, and the *Jordan* court found that Congress had implicitly intended a violation of its laws or regulations to be properly redressed.⁵³⁹

Two later circuit court decisions⁵⁴⁰ have relied on the Supreme Court's recent decision in *Employees v. Department of Public Health & Welfare*⁵⁴¹ in reaching results consistent with *Rothstein*. *Employees* involved a suit for minimum wages for state hospital employees under the Fair Labor Standards Act.⁵⁴² The Court found that although the plaintiffs were entitled to greater wages,⁵⁴³ the eleventh amendment deprived the Court of jurisdiction to force the state to make such an award. Moreover, the Court refused to imply a waiver of sovereign immunity, arguing that a finding of implied waiver is justified only if the state is engaged in private or proprietary as opposed to governmental activity.⁵⁴⁴ In so doing, reliance was placed upon the congressional pursuit of "harmonious federalism."⁵⁴⁵ The Court noted that either the plaintiffs could sue in state courts, or the Secretary of Labor could sue to enforce their rights.⁵⁴⁶ Thus, the Supreme Court found that these plaintiffs were without a federal remedy to redress the denial of their rights, seemingly paving the way for a reversal of *Jordan's* liberalization of the implied waiver concept.

⁵³⁹ *Id.* at 995.

⁵⁴⁰ *Anderson v. Graham*, Nos. 73-1441, 73-1466 (8th Cir., Dec. 20, 1973); *Dawkins v. Craig*, 483 F.2d 1191 (4th Cir. 1973)..

⁵⁴¹ 411 U.S. 279 (1973). *Rothstein* was decided in the fall of 1972, and *Jordan* followed in January 1973. *Employees* was then decided in April 1973 and was followed by *Dawkins* and *Anderson*.

⁵⁴² 29 U.S.C. § 216(b) (1970). Employers violating federal minimum wage standards are liable to their employees in the amount of the unpaid wages plus an equal amount for liquidated damages.

⁵⁴³ The Court had previously held, in *Maryland v. Wirtz*, 392 U.S. 183 (1968), that state hospital employees were covered by the FLSA. However, the question of sovereign immunity was reserved for decision at a future date.

⁵⁴⁴ 411 U.S. at 284. The Court thus limited the applicability of the implied waiver doctrine of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). *Parden* involved a suit by a railroad employee for damages under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1964). The defendant, Alabama, owner and operator of the railroad, asserted the defense of sovereign immunity. The Court held, however, that by entering an area of congressional regulation under the commerce clause, Alabama had acted as if it were a private person or corporation and therefore had waived its sovereign immunity. *Id.* at 196-97.

The governmental-proprietary distinction has surfaced from time to time throughout the history of eleventh amendment litigation. See McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C.L. Rev. 485, 486-92, 514 (1973).

⁵⁴⁵ 411 U.S. at 286.

⁵⁴⁶ The question of whether or not the plaintiffs could sue in Missouri courts was not reached by the majority, although the Court admitted such suits arguably were permitted. *Id.* at 287. In his concurrence, however, Mr. Justice Marshall insisted that Missouri's liability in its own courts is constitutionally mandated. *Id.* at 298; see 59 CORNELL L. REV. 709 (1974).

It is apparent that none of these eleventh amendment cases has dealt satisfactorily with all of the issues involved. *Rothstein's* balancing of the equities will inevitably favor the state agency because of its emphasis on cooperative federalism.⁵⁴⁷ A better test would place greater stress on recipient need as opposed to administrative convenience. The purpose of AFDC is to provide assistance to the needy, not to further a scheme of cooperative federalism.⁵⁴⁸ Additionally, *Rothstein's* dismissal of the need problem is unsound.⁵⁴⁹ If recipients are living at the subsistence level, then any deprivation remains absolute until remedied. Equally unsound is the distinction drawn in *Rothstein* between an injunction and an award of money damages.⁵⁵⁰

Jordan reaches a more equitable result than *Rothstein*, but it is unlikely to survive appeal. It is doubtful that the summary affirmances of retroactive awards will have much value as authority, since there was no mention of the eleventh amendment defense in these cases. Also, *Jordan's* waiver analysis seems at least to have been undermined by the *Employees* holding. If the Supreme Court decides *Jordan* without reaching the constitutional question, it hopefully will consider the underlying enforcement considerations in balancing the equities. There is a need for quick state response to federal statutory and regulatory changes. Present procedures for conformity hearings have been wholly inadequate.⁵⁵¹ Both the federal government and individual recipients have an interest in the lawful administration of the state welfare system.

More generally, the Supreme Court's treatment of the eleventh amendment has been criticized as historically unsound.⁵⁵² It has been suggested that the eleventh amendment was only intended to bar diversity suits against a state in the federal courts.⁵⁵³ Furthermore, a limitation of *Young* to prospective injunctive relief is fallacious. *Young* did not express this limitation, nor is there any practical difference between the effect on the state of prospective injunctive relief and that of an award of retroactive

⁵⁴⁷ See 26 VAND. L. REV. 633 (1973).

⁵⁴⁸ Indeed, the AFDC program is hardly an appropriate instrument for encouraging cooperation between the federal government and the states. The mechanisms involved in the administration of a grant-in-aid program are an inevitable source of federal-state tension.

⁵⁴⁹ See note 528 *supra*.

⁵⁵⁰ See note 535 *supra*. When the enforcement of an injunction costs more than the award of retroactive payments, any distinction between the two remedies based on the payment of public funds is clearly meaningless. See 7 GA. L. REV. 366, 377 (1973).

⁵⁵¹ See generally Sitkin, *supra* note 367.

⁵⁵² See McCormack, *supra* note 544, at 500-13; Fontaine, *The Constitutional Law of Remedies in Welfare Litigation*, 23 MAINE L. REV. 41, 44-60 (1971).

⁵⁵³ See McCormack, *supra* note 544, at 500-07.

benefits.⁵⁵⁴ These two decisional lines produce the anomalous result of a right existing without a remedy to vindicate it. This was illustrated in *Employees* when the Court recognized an enforceable federal right, but held that the eleventh amendment deprived the plaintiffs of redress in federal court.⁵⁵⁵ This holding will encourage forum shopping. If state courts will not hesitate to award retroactive benefits,⁵⁵⁶ it is overly formalistic to suppose that the federal courts are not forcing the states to pay retroactively when they decide that benefits were unlawfully withheld. Finally, the Court soon will be forced to address the conflict between the fourteenth and eleventh amendments. The eleventh amendment should not be read to relieve the states of the responsibility of enforcing rights guaranteed by the fourteenth.⁵⁵⁷

Once the Supreme Court removes jurisdictional barriers to the award of retroactive benefits, it can recognize that the overriding concern in each case should be recipient need.⁵⁵⁸ For subsistence recipients, a deprivation does not disappear when full benefits are reinstated. Retroactive benefits are mandated in any need-oriented program.

CONCLUSION

The sheer number of significant developments in 1973 illustrates the volatile nature of the nation's entire welfare system, and the ongoing process of amending and reinterpreting the Social Security Act will undoubtedly continue while the country searches for realistic alternatives. Throughout this evolutionary process, it is important to try to keep up with these changes not only to assist in the efficient operation of the various programs but also properly to evaluate comprehensive reform proposals.

Carol B. Clemons
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⁵⁵⁴ See 7 GA. L. REV. 366, 373-77 (1973).

⁵⁵⁵ Commentators have suggested that a proper analysis of sovereign immunity under the eleventh amendment must distinguish between rights granted to the people by congressional acts and inherent rights of the people guaranteed protection by the Constitution. See McCormack, *supra* note 544, at 507. See generally Fontaine, *supra* note 552. It is illogical to suppose that the states are immune from federal enforcement of federal rights.

⁵⁵⁶ See, e.g., *Campbell v. Department of Pub. Aid*, 9 Ill. App. 3d 962, 294 N.E.2d 698 (1973).

⁵⁵⁷ See Fontaine, *supra* note 552, at 55-60. This is a further reason for limiting the application of the eleventh amendment to cases in which the federal court's jurisdiction is based on diversity. Such a limitation has been recently suggested by various commentators. *Id.* at 60-61; McCormack, *supra* note 544, at 515; 26 VAND. L. REV. 633, 642 (1973).

⁵⁵⁸ See Levy, *The Aftermath of Victory: The Availability of Retroactive Welfare Benefits Illegally Denied*, 3 CLEARINGHOUSE REV. 253 (1970).