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Stephan Leibfried

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THE UNITED STATES AND WEST GERMAN WELFARE SYSTEMS: A COMPARATIVE ANALYSIS

Stephan Leibfried[†]

Welfare programs are a fundamental part of the political and social structure of the United States and West Germany. The national legislatures of both countries have used broad constitutional powers¹ to establish comprehensive statutory welfare systems.² Strong industrial economies provide revenues to support the systems,³ and persistent unemployment

[†] Professor of Welfare Law and Social Policy, University of Bremen. Ph.D. 1972, University of Bremen; Assessor 1974, West Berlin. The author wishes to thank Professors Peter W. Martin, Gunther Arzt, and Florian Tennstedt for their many valuable comments and suggestions. The author also wishes to thank James F. Bauerle, Cornell Law School class of 1979, for his assistance in the preparation of this Article.

1. The U.S. Constitution empowers Congress to "provide for the . . . General Welfare." U.S. CONST. art. I, § 8, cl. 1. Among the concurrent legislative powers that the West German Federal Constitution, the Grundgesetz [GG], grants to the German federation and its constituent states is the power to legislate regarding "public welfare" and "labour law . . . as well as social insurance, including unemployment insurance . . ." GG art. 74, §§ 7, 12, *reprinted in* 5 A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 36-37 (1974) (W. Ger.).

2. 7 U.S.C.A. §§ 2011-2027 (West 1973 & Supp. 1979) (food stamps); 42 U.S.C. §§ 601-644 (1976) (Aid to Families with Dependent Children); *id.* §§ 1381-1385 (Supplemental Security Income); *id.* §§ 1396-1396k (medicaid); *id.* §§ 5301-5317 (housing assistance). Federal Social Assistance Act (Bundessozialhilfegesetz) [BSHG], June 30, 1961, [1961] Bundesgesetzblatt [BGBI] I 815, *corrected* [1961] BGBI I 1875, *as reformulated* Feb. 13, 1976, [1976] BGBI I 289, *corrected* [1976] BGBI I 1150. For the most current overview on the BSHG and all its legal implications, including the impact of judicial decisions, see A. KNOPP & O. FICHTNER, BUNDESSOZIALHILFEGESETZ—KOMMENTAR (1979).

3. The 1977 gross national products per capita of the United States and West Germany—\$8,715 and \$8,317 respectively (in constant (1977) dollars)—were higher than all other European nations in the Organisation for Economic Cooperation and Development except Norway, Sweden, and Switzerland. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1978, at 910 [hereinafter cited as STATISTICAL ABSTRACT]. For a more general comparative approach to the relationship between gross national product and welfare expenditures, see Leibfried, *Public Assistance in the United States and the Federal Republic of Germany: Does Social Democracy Make a Difference?*, 11 COMPARATIVE POLITICS 59 (1978).

helps keep a large class of persons⁴ in need of government assistance.⁵ Both welfare systems are well established⁶ and have undergone periodic reform.⁷

This Article presents a structural comparison of the U.S. and West German welfare systems.⁸ The two systems will first be described briefly. A detailed examination will then be made of three areas in which the two systems differ fundamentally—legal programming, administration, and financing. The Article will consider how enactment of President Carter's Program for Better Jobs and Income⁹ would have strengthened or weakened these contrasts between the two systems. Because it is the most recent comprehensive U.S. reform proposal and a direct extension of past reforms, the Carter plan provides the best means to study the movement toward federalization of the U.S. welfare system.¹⁰ The analysis will conclude by

4. Of the 25.3 million persons in the West German civilian labor force, 3.6% were unemployed in 1977, whereas 7.0% of the U.S. work force of 97.4 million persons were unemployed during the same period. STATISTICAL ABSTRACT, *supra* note 3, at 915.

5. Another cause of this phenomenon in the United States is the absence of a satisfactory minimum wage level and the existence of a class of persons wholly divorced from the labor market (for a number of complex reasons which cannot be discussed here).

6. Categorical federal public assistance in the United States is over 40 years old, having been established by the Social Security Act of 1935, 42 U.S.C. §§ 301-1397f (1976). See J. AXINN & H. LEVIN, SOCIAL WELFARE 183-88 (1975); J. LIEBY, A HISTORY OF SOCIAL WELFARE AND SOCIAL WORK IN THE UNITED STATES 227-36 (1978). In 1937, the United States Supreme Court upheld the constitutionality of the Social Security Act of 1935, the cornerstone of present income transfer programs. *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

The West German Federal Social Assistance Act is 18 years old, but comprehensive federalization of social assistance dates to 1924. The first action of national significance occurred in 1871, when the central government enforced the right to free movement nationally with respect to local welfare systems.

7. See, e.g., Food Stamp Act Amendments of 1977, 7 U.S.C.A. §§ 2011-2027 (West Supp. 1979); Social Security Amendments of 1972, 42 U.S.C. §§ 1381-1385 (1976) (establishing SSI program); R. PLOTNICK & F. SKIDMORE, PROGRESS AGAINST POVERTY (1975) (overview of effectiveness of reforms undertaken from 1964 to 1974); E. OESTREICHER, BUNDESSOZIALHILFEGESETZ—KOMMENTAR, annots. 28-29e, 59 (1978) (complete listing of amendments to the BSHG and short descriptions of their nature. See also H. Niedrig & H.-C. Hoppensack, *Sozialhilfe vor der Demontage?—Sozialstaat in der Bewährung*, [1977] THEORIE UND PRAXIS DER SOZIALEN ARBEIT 363 (summary of past reform trends and an introduction to present reform tendencies).

8. Similar patterns of socioeconomic development make a comparison of the United States and West Germany more useful than a comparison of the United States and other continental countries. See J. KOCKA, ANGESTELLTE ZWISCHEN FASCHISMUS UND DEMOKRATIE 39-45 (1977).

9. H.R. 9030, 95th Cong., 1st Sess., 123 CONG. REC. H9283 (daily ed. Sept. 12, 1977) [hereinafter cited as H.R. 9030].

10. See generally President's Message to Congress Transmitting Program for Better Jobs and Income, 13 WEEKLY COMP. OF PRES. DOC. 1205 (Aug. 6, 1977); *Administration's Welfare Reform Proposal: Joint Hearings on H.R. 9030 Before the Welfare Reform Subcomm. of the House Comm. on Agriculture, House Comm. on Education and Labor, and House Comm. on*

assessing the implications of the different system structures for welfare reform in the United States.

Two restrictions will further focus the analysis. It will concentrate on welfare programs in the domestic political context, without considering the socioeconomic implications of the issues under discussion. The analysis will also be confined to cash assistance and food stamp programs and will not encompass health care, housing assistance, and social insurance programs.

I

THE UNITED STATES AND WEST GERMAN WELFARE SYSTEMS

Before receiving public support, twenty-one million American families, or one out of every four, had economic resources below the U.S. Government's poverty threshold in fiscal 1976.¹¹ In an attempt to assist these families, the Government paid them \$44.7 billion in welfare benefits during 1976.¹² Three federal programs, along with state general assistance plans, form the core of this welfare system.

Aid to Families with Dependent Children (AFDC)¹³ is the U.S. Government's major cash assistance program. It reaches indigent families with children who have at least one absent or incapacitated parent. In twenty-four states, families in which the father is unemployed are also eligible for AFDC.¹⁴ Enacted in 1935,¹⁵ AFDC is administered by the states under rules prescribed by the Department of Health, Education, and Welfare (HEW).¹⁶ More than eleven million persons received assistance totaling \$9.6 billion under the program in 1976.¹⁷

Ways and Means, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Joint Hearings*]; HOUSE WELFARE REFORM SUBCOMM. OF THE COMM. ON AGRICULTURE, COMM. ON EDUCATION AND LABOR, AND COMM. ON WAYS AND MEANS, EXPLANATORY MATERIAL TO ACCOMPANY H.R. 10950, THE BETTER JOBS AND INCOME ACT, 95th Cong., 2d Sess. (1978) (summary and sectional explanation); J. STOREY, R. HARRIS, F. LEVY, A. FECHTER & R. MICHEL, THE BETTER JOBS AND INCOME PLAN (1978).

11. CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE UNITED STATES, WELFARE REFORM xxi (1977) [hereinafter cited as *WELFARE REFORM*]. The poverty income standard for a nonfarm family of four in 1976 was \$5,670. J. STOREY, R. HARRIS, F. LEVY, A. FECHTER & R. MICHEL, *supra* note 10, at 9.

12. WELFARE REFORM, *supra* note 11, at xxi.

13. 42 U.S.C. §§ 601-644 (1976).

14. *Id.* § 607(a).

15. Social Security Act of 1935, 42 U.S.C. §§ 301-1397f (1976). For a review of the evolution of AFDC, see Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825 (1974).

16. 45 C.F.R. §§ 204-206, 213, 220, 224, 231-237 (1978).

17. WELFARE REFORM, *supra* note 11, at 23 (1977).

The food stamp program¹⁸ provides assistance in kind in an attempt to assure poor persons an adequate diet.¹⁹ Participants receive an allotment of food stamps,²⁰ which they use as cash substitutes in purchasing groceries. To be eligible, an applicant must pass a means test²¹ and a work requirement.²² Created by the Food Stamp Act of 1964,²³ the program is administered by state welfare agencies²⁴ pursuant to federal regulations.²⁵ Benefits distributed to eighteen million recipients in fiscal 1976 totaled \$5.3 billion,²⁶ all of which came from federal sources.

The Supplemental Security Income program (SSI)²⁷ was established by Congress in 1972 to replace the previous AFDC-like grant-in-aid programs for the aged, blind, and disabled.²⁸ SSI was designed to provide national minimum income support to those who qualify²⁹ and to reduce eligibility requirements other than lack of income.³⁰ The Federal Govern-

18. 7 U.S.C.A. §§ 2011-2027 (West 1973 & Supp. 1979).

19. See generally A. LA FRANCE, M. SCHROEDER, R. BENNETT & W. BOYD, *LAW OF THE POOR* 259-60 (1973).

20. 7 U.S.C.A. § 2013 (West 1973 & Supp. 1979). Prior to January 1, 1979, most food stamp recipients purchased food stamps at less than face value. The amount of the discount or "bonus value" depended on the recipient's need. This purchase requirement was abolished by the Food Stamp Act of 1977, 7 U.S.C.A. §§ 2011-2027 (West Supp. 1979), and implementing regulations issued by the Department of Agriculture, 43 Fed. Reg. 47,846 (1978) (to be codified in 7 C.F.R.). The Act and regulations are the "most major overhaul in the program's history" and are designed "to tighten administration of the program and [to] redirect benefits to needier persons." 2 P.OV. L. REP. (CCH) ¶ 26,972.

21. The means test consists of two parts, an assets test, 43 Fed. Reg. 47,900 (1978) (to be codified in 7 C.F.R. § 273.8), and an income test, *id.* at 47,903 (to be codified in 7 C.F.R. § 273.9(a)), both of which the applicant must satisfy in order to qualify for benefits. See M. MACDONALD, *FOOD, STAMPS, AND INCOME MAINTENANCE* 23 (1977).

22. Certain employable persons in families receiving food stamps must register for work at a state or local employment office and accept reasonable offers of employment. 43 Fed. Reg. 47,898 (1978) (to be codified in 7 C.F.R. § 273.7); M. MACDONALD, *supra* note 21, at 37.

23. 7 U.S.C.A. §§ 2011-2025 (West 1973 & Supp. 1979).

24. *Id.* § 2020. *E.g.*, CAL. WELF. & INST. CODE §§ 18900-18919 (West Supp. 1979).

25. 43 Fed. Reg. 47,881 (1978) (to be codified in 7 C.F.R. §§ 271-282).

26. WELFARE REFORM, *supra* note 11, at 23. In fiscal 1977, \$5.5 billion in benefits was paid to 17 million recipients.

27. 42 U.S.C. §§ 1381-1385 (1976).

28. STAFF OF SENATE COMM. ON FINANCE, 95TH CONG., 1ST SESS., *REPORT ON THE SUPPLEMENTAL SECURITY INCOME PROGRAM* 3 (Comm. Print 1977) [hereinafter cited as SSI REPORT]. SSI was designed "to take the income maintenance functions previously handled by the State welfare agencies and transform them into something which could be handled by the Social Security Administration largely in the way in which it had always handled social security benefits." *Id.* at 24. The House Ways and Means Committee estimated that states would save \$1.5 billion during the first year of the program compared to their expenditures under prior law. H.R. REP. NO. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4989, 4993.

29. H.R. REP. NO. 231, *supra* note 28, at 4992.

30. *Id.* As with AFDC, see note 21 *supra*, eligibility is determined by a two part means test with an income element and an asset element. 42 U.S.C. § 1382(a) (1976).

ment administers SSI³¹ and paid \$6 billion in benefits to 4.4 million recipients in 1976.³²

General assistance describes those remaining welfare programs in which the Federal Government takes no part.³³ Funded and administered by state and local governments,³⁴ general assistance plans provide benefits in cash or in kind to poor persons not covered by AFDC or SSI.³⁵ Because the Federal Government exercises no control over general assistance programs, states may make benefits available on either an emergency or a long-term basis and the amount of benefits paid varies greatly from state to state.³⁶ In fiscal 1976, nearly one million persons received general assistance benefits totaling \$1.2 billion.³⁷

Public assistance in West Germany consists of a nationwide income maintenance program established under the Federal Social Assistance Act.³⁸ The Act provides two forms of assistance: "basic aid"³⁹ and "special aid."⁴⁰ Basic aid has two components. "Continuous support" covers ordinary, recurring expenditures, such as food, energy, and rent; "special support" covers extraordinary, nonrecurring expenditures, such as furniture, appliances, and major clothing expenses. The West German Government provides special aid either wholly or partly in lieu of basic aid in certain circumstances. Principal types of special aid are homemaker care, attendant care, rehabilitation services for the handicapped, and medical care.⁴¹

31. *Id.* § 1383b. Regulations governing SSI appear at 20 C.F.R. § 416 (1978).

32. WELFARE REFORM, *supra* note 11, at 23.

33. J. STOREY, WELFARE IN THE 70's, at 23 (1974).

34. *E.g.*, CAL. WELF. & INST. CODE §§ 18450-18524 (West 1972); N.Y. SOC. SERV. LAW §§ 157-166 (McKinney 1976).

35. Although general assistance plans are designed to aid those not provided for by AFDC or SSI, the New York Court of Appeals has ruled that New York may not condition receipt of general assistance benefits on nonreceipt of SSI benefits. *Lee v. Smith*, 43 N.Y.2d 453, 462-63, 373 N.E.2d 247, 251-52, 402 N.Y.S.2d 351, 356-57 (1977).

36. "The comprehensiveness of GA programs runs the gamut, from locally run programs offering only free groceries and shelter on an emergency basis, to statewide programs offering long-term cash supplements to any needy person not covered under AFDC or SSI." J. STOREY, *supra* note 33, at 23.

37. WELFARE REFORM, *supra* note 11, at 23.

38. BSHG, *supra* note 2. For a description and analysis of the West German system, see Leibfried, *Public Assistance in the Federal Republic of Germany: "Take Up" of Benefits and the Structure of Welfare Bureaucracy*, in J. JOWELL & M. PARTINGTON, SOCIAL POLICY AND WELFARE LAW 169-94 (1979).

39. BSHG §§ 11-25 (*Hilfe zum Lebensunterhalt*).

40. *Id.* §§ 27-75 (*Hilfen in besonderen Lebenslagen*).

41. When taken together, these services accounted for 90% of the special aid benefits paid in 1975. Homemaker and attendant care services for the handicapped received DM 2.9 billion (54.8%), rehabilitation for the handicapped DM 1.3 billion (24.5%), and medical care DM 0.6 billion (11.5%). Total special aid benefits in 1975 were DM 5.3 billion with 1.147 million recipients in the special aid category. In contrast, basic aid expenditures amounted to DM 3 billion in 1975 with 1.190 million recipients sharing in these benefits. Due to an overlap of

Recipients are entitled to both basic and special aid as a matter of right. In 1975, for the first time since the adoption of the Federal Social Assistance Act, more than two million persons received aid under this program.⁴²

The welfare systems of the United States and West Germany thus consist largely of government-administered cash transfers and serve many of the same purposes. Yet the differences between the two systems outweigh the similarities. It is to these differences that the focus now shifts in order to highlight the distinctive features of each system and assess reform patterns in the United States by comparing legal programming, administration, and financing in the two national welfare systems.

II COMPARATIVE ANALYSIS

A. LEGAL PROGRAMMING

Legal programming is the process of establishing the content of a welfare program—eligibility requirements, form and amount of benefits, administrative procedures, quality control methods, and so forth. Enactment of welfare programs by statute and revision of them by amendment is the most basic form of programming. Yet the national legislature may delegate legal programming responsibility to state or local governments or to administrative agencies. Courts too may exercise an important influence over both the process and the result of legal programming. The U.S. and West German welfare systems exhibit marked differences in the allocation of legal programming responsibility and in the influence that courts exert over the legal programming process. These differences help produce dissimilar benefit structures in the two national welfare systems.

1. Organization of Legal Programming Responsibility

Legal programming occurs at different levels of government in the United States and West Germany, with state and local governments conducting much more programming in the United States. When Congress established most American welfare programs, it vested state and local governments with principal legal programming responsibility.⁴³ Recent judi-

basic and special aid, the total number of recipients—2.049 million—is smaller than the sum of the two components of West Germany's welfare scheme. See STATISTISCHES BUNDESAMT, SOZIALHILFEAUFWAND 1975, in [1976] WIRTSCHAFT UND STATISTIK 581; STATISTISCHES BUNDESAMT, SOZIALHILFEEMPFÄNGER 1975, in [1977] WIRTSCHAFT UND STATISTIK 325.

42. In 1963, there were 1.491 million welfare recipients or 26 recipients per 1,000 inhabitants. In 1975, there were 2.049 million recipients or 33 per 1,000 inhabitants. See SOZIALHILFEEMPFÄNGER 1975, *supra* note 41, at 324.

43. For example, under the original legislative authorization for the food stamp program,

cial decisions,⁴⁴ federal administrative regulations, and congressional enactments⁴⁵ have enlarged the role of the Federal Government. But state and local governments continue to promulgate many of the rules and regulations implementing federal welfare statutes. The AFDC program illustrates this pattern: each state is free to decide whether to have an AFDC program, to choose among several coverage options,⁴⁶ and to establish the need test and benefit level⁴⁷ for AFDC recipients within its jurisdiction.

By contrast, most legal programming in the West German welfare system occurs on the national level.⁴⁸ The Federal Government determines the standards of eligibility, the time and manner of benefit payments, and

[t]he program . . . was basically state-oriented. The Act placed the responsibility for establishing the food stamp program in state agencies authorized to administer assistance programs. The federal government established the purchase requirements for the full stamp allotment and bore the cost of the bonus stamps, but individual states specified eligibility standards.

CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE UNITED STATES, THE FOOD STAMP PROGRAM 3-4 (1977). Similarly, "ADC—now AFDC . . . was conceived as a State program, with the Federal government simply helping by paying one-third of the bill During the first decades of the program, the Federal government, including the Congress, was content to leave the program in State hands." CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 95TH CONG., 1ST SESS., REPORT ON ADMINISTRATION OF THE AFDC PROGRAM 12 (Comm. Print 1977) [hereinafter cited as AFDC ADMINISTRATION].

44. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968). *But see Quern v. Mandlay*, 98 S. Ct. 2068 (1978) (states may choose to operate emergency assistance programs that have more restrictive eligibility requirements than the federal program).

45. *E.g.*, Food Stamp Act Amendments of 1977, 7 U.S.C.A. §§ 2011-2027 (West Supp. 1979); Social Security Act Amendments of 1972, 42 U.S.C. §§ 1381-1385 (1976) (establishing SSI program).

46. *E.g.*, *Burns v. Alcala*, 420 U.S. 575 (1975) (states may offer welfare benefits to pregnant women for unborn children but are not required to do so); 42 U.S.C. § 607 (1976) (AFDC coverage for dependent children with unemployed fathers).

47. "A State Plan for . . . AFDC . . . must . . . [s]pecify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment." 45 C.F.R. § 233.20(a)(2) (1978). *See also* 18 N.Y.C.R.R. § 387 (1962) (certification standards and procedures for federal food stamp program); *id.* § 388 (AFDC work incentive program regulations).

48. *Compare* the BSHG with a series of decrees (Verordnungen) based on it: Verordnung zur Durchführung des § 22 BSHG (Regelsatzverordnung), July 20, 1962, [1962] BGBI I 515, *as amended* May 10, 1971, [1971] BGBI I 451; Verordnung zur Durchführung des § 24(2)(1) BSHG, June 28, 1974, [1974] BGBI I 1365; Verordnung nach § 47 BSHG (Eingliederungshilfe-Verordnung), May 27, 1964, [1964] BGBI I 339, *as reformulated* Feb. 1, 1975, [1975] BGBI I 433; Verordnung zur Durchführung des § 72 des BSHG, June 9, 1976, [1976] BGBI I 1469; Verordnung zur Durchführung des § 76 des BSHG, Nov. 28, 1962, [1962] BGBI I 692, *as amended* Nov. 23, 1976, [1976] BGBI I 3234; Verordnung zur Durchführung des § 81(1) no. 3 des BSHG, May 12, 1975, [1975] BGBI I 1109; Verordnung zur Durchführung des § 88(2) no. 8 des BSHG, Nov. 9, 1970, [1970] BGBI I 1529, *as amended* June 14, 1974, [1974] BGBI I 1292. The single most important decree is the Regelsatzverordnung. *See generally* K. PETERSEN, DIE REGELSATZE NACH DEM BSHG (1972); note 50 *infra*. Also important are the decree on assets and income tests (Verordnung zur Durchführung des § 76 BSHG) and the decree giving shape to rehabilitation of the handicapped (Eingliederungshilfe-Verordnung).

some rules governing benefit levels.⁴⁹ In addition, the *Deutscher Verein für öffentliche und private Fürsorge*, a private organization composed of public and private institutions active in the welfare field, has exercised an important influence on benefit levels by securing the consent of both federal and state authorities to a uniform yet flexible "needs basket" of welfare benefits.⁵⁰ State and local governments are responsible for supplementary benefits that they provide, such as the aid to the blind dispensed by the *Länder*⁵¹ and the Christmas assistance provided by the cities.⁵² But the dominant role of legal programming still belongs to the Federal Government, complemented by the *Deutscher Verein*.

This different organization of legal programming responsibility significantly affects the content of the American and West German welfare systems. The delegation of primary legal programming authority to state and local governments in the United States prevents the establishment of a national minimum benefit level. Because each state in the AFDC program is free to prescribe its own need test and benefit levels,⁵³ a one-parent family of four in Hawaii receives nearly three times the AFDC and food stamp benefits as a similar family in Mississippi.⁵⁴ By contrast, the dominant legal

49. See BSHG §§ 1, 11-16, 18, 76-78 (eligibility conditions for basic aid); BSHG §§ 3, 22-24 (some principles concerning benefit levels in basic aid); BSHG § 5 (time of payment); BSHG §§ 8 (1), 21 (manner of payment). See also note 48 *supra*.

50. On the basis of the needs basket, the Federal Government promulgated the *Verordnung zur Durchführung des § 22 BSHG*, note 49 *supra*. This *Verordnung* accords state authorities wide regulatory powers, which, if used, could lead to widely divergent benefit levels. But the state authorities' practice of consenting to the application of the needs basket of the *Deutscher Verein* prevents the development of any wide disparity in benefit levels. Differences are small and due only to regional price differences of the needs basket. Its price is redetermined regularly to keep pace with regional price developments and inflation. The difference in 1977 between the highest *Regelsatz*—DM 292 in Hessen—and the lowest—DM 280 in Saarland—was only DM 12. The average was DM 287 for a single person. See *Regelsätze nach § 22 des Bundessozialhilfegesetzes im Bundesgebiet und in Berlin (West)*, 57 NACHRICHTENDIENST DES DEUTSCHEN VEREINS FÜR ÖFFENTLICHE UND PRIVATE FÜRSORGE 55 (1977). If the *Deutscher Verein* did not exist, straightforward federalization would obtain. See K. PETERSEN, *supra* note 48, at 54.

The continuous readjustment of benefit levels (indexing) is not done according to a mechanical rule. Rather it is performed in consultation with "persons with experience in the field of welfare" (*sozial erfahrene Persönlichkeiten*). BSHG § 114(1). This procedure permits some bargaining and often extends to the local government level the private government structure found at the national level in the establishment of the standard needs basket. The same consultation takes place when general internal administrative rules (*allgemeine Verwaltungsvorschriften*) are promulgated, *id.*, and when internal administrative appeals are heard, *id.* § 114(2).

51. See O. MERGLER, G. ZINK, E. DAHLINGER & H. ZEITLER, *BUNDESZOZIALHILFEGESETZ—KOMMENTAR* § 67, annot. 36 (1975) (listing the state laws governing aid to the blind).

52. It is unclear whether Christmas assistance is an integral part of the basic federal welfare scheme. *Id.* § 12, annot. 36.

53. See note 47 *supra* and accompanying text.

54. The Mississippi family would be eligible to receive \$2,712 per year in AFDC and food

programming role of the West German Federal Government and the *Deutscher Verein*⁵⁵ makes it possible for that system to come much closer to achieving a national minimum benefit level.⁵⁶ Supplementary assistance programs of state and local governments as well as different regional price levels produce some deviation from a national standard, but these variations are minor. In the United States, decentralized programming combined with the categorical character of U.S. programs⁵⁷ leaves states largely in control of the effect of welfare programs on family structure⁵⁸ and work,⁵⁹ because the states alone determine the level of support for recipients outside the federally-administered categories of assistance.

The Carter reform proposal would have greatly expanded the U.S. Government's legal programming responsibility by consolidating programming functions in the Federal Government, establishing a scale of national minimum benefits,⁶⁰ and prescribing uniform benefit reduction levels for earned income.⁶¹ These changes would have extended to the entire welfare system the process of federalization that has occurred on a limited basis through judicial and administrative changes in AFDC⁶² and through congressional enactment of SSI. By federalizing the entire system, the Carter plan would have ended the existing patchwork of need tests and benefit standards and would have eliminated significant aspects of state control over the effect of welfare programs on family structure and work. These changes would have reduced the disparity in legal programming patterns between the United States and West Germany.

stamps whereas the Hawaii family could receive \$7,044. S. DANZIGER, R. HAVEMAN & E. SMOLENSKY, *THE PROGRAM FOR BETTER JOBS AND INCOME* (1977). Compare MISS. CODE ANN. § 43-17-5 (Supp. 1978) (providing benefits of \$60 per month for the first child, \$36 per month for the second, and \$24 per month for each additional child) with N.Y. SOC. SERV. LAW § 131-a (McKinney 1976 & Supp. 1978) and 18 N.Y.C.R.R. § 352.2 (1962) (providing benefits of \$94 per month for the first person in the household, \$56 for the second, \$50 for the third, \$58 for the fourth, \$60 for the fifth, and \$50 for each additional person).

55. See notes 48 & 50 *supra* and accompanying text.

56. *Id.* Different social situations of recipients and different administrative practices mitigate somewhat this tendency toward a national minimum benefit level. See S. Leibfried, *Introduction*, in F.F. PIVEN & R. CLOWARD, *REGULIERUNG DER ARMUT* 27-28, 36, 46, 49-64 (1977).

57. See notes 104-05 *infra* and accompanying text.

58. See S. DANZIGER, R. HAVEMAN & E. SMOLENSKY, *supra* note 54, at 4.

59. See *id.*

60. H.R. 9030, *supra* note 9, §§ 2104-2106. "A four person family with no income and no member expected to work would receive a benefit . . . of \$4,200 a year." CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE UNITED STATES, *THE ADMINISTRATION'S WELFARE REFORM PROPOSAL 6* (1978) [hereinafter cited as ADMINISTRATION PROPOSAL].

61. H.R. 9030, *supra* note 9, § 2106. Benefits would have been reduced by \$.50 for each dollar of earned income, *id.* § 2106(a)(3), and by \$.80 for each dollar of nonemployment income, *id.* § 2106(a)(2).

62. See note 44 *supra* and accompanying text.

2. Role of the Courts

Although legal programming of the welfare system is subject to judicial review in both the United States and West Germany, American and West German courts have taken markedly different roles in shaping the direction of legal programming. Contrasting organization of legal programming responsibilities has produced different jurisdictional patterns. Welfare clients in the United States have had greater legal resources available for litigating test cases. Perhaps as a result, American courts, especially the Supreme Court, have exercised a stronger influence over the direction of welfare policy than their West German counterparts, the *Bundesverfassungsgericht* and the *Bundesverwaltungsgericht*.

Court jurisdiction over welfare law cases mirrors the different allocation of legal programming responsibility in the United States and West Germany. Jurisdiction is divided between state and federal courts in the United States. State courts hear cases arising under state general assistance programs⁶³ as well as some cases in which state administration of federal welfare laws is at issue.⁶⁴ Federal courts exercise jurisdiction over cases arising under SSI and certain federal aspects of the AFDC and food stamp programs.⁶⁵ In addition, welfare recipients may institute a federal class action to challenge a state policy or rule in federal court. In West Germany, a more homogeneous and functionally specialized system of administrative courts hears all public law cases⁶⁶ that do not fall within a more specialized public law jurisdiction. Although the social welfare courts are the specialized courts that would most logically be responsible for welfare cases, their jurisdiction is limited to social insurance and similar matters,⁶⁷ and does

63. *E.g.*, *Sabot v. Lavine*, 42 N.Y.2d 1068, 369 N.E.2d 1173, 399 N.Y.S.2d 640 (1977); *Baumes v. Lavine*, 38 N.Y.2d 296, 342 N.E.2d 543, 379 N.Y.S.2d 760 (1975).

64. *E.g.*, *Waits v. Swoap*, 11 Cal. 3d 887, 524 P.2d 117, 115 Cal. Rptr. 21 (1974); *Payne v. Sugarman*, 39 A.D.2d 720, 331 N.Y.S.2d 813, *aff'd*, 31 N.Y.2d 845, 292 N.E.2d 304, 340 N.Y.S.2d 162 (1972). State courts hear many suits that might otherwise be brought in federal court because of restrictions recently imposed by the United States Supreme Court on the ability of plaintiffs to recover benefits retroactively. The Court held that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief and may not include a retroactive award which requires the payment of funds from the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (citations omitted).

65. But federal courts do not take jurisdiction over all claims under U.S. welfare laws. Recipients must establish that their case presents a "substantial constitutional claim." *Hagens v. Lavine*, 415 U.S. 528, 536-39 (1974). In order to take cognizance of claims arising out of the administration of the food stamp program, federal courts have exercised their original jurisdiction over actions arising under federal statutes regulating interstate commerce. *See, e.g.*, *Tyson v. Norton*, 390 F. Supp. 545 (D. Conn. 1975), *aff'd in part and vac. in part on other grounds sub nom. Tyson v. Maher*, 523 F.2d 972 (2d Cir. 1975).

66. *See generally* J. MERRYMAN & D. CLARK, *COMPARATIVE LAW* 279-81 (1978).

67. Social Welfare Courts Law (Sozialgerichtsgesetz) [SGG], Sept. 3, 1953, [1953] BGB I 1239, *as reformulated* Sept. 23, 1975, [1975] BGB I 2535. The jurisdiction of these courts is

not extend to the welfare law area. Accordingly, the administrative courts hear all cases arising under the Federal Social Assistance Act. The Carter reform proposal would have reduced this contrast in jurisdictional patterns by making federal courts the sole arbiters of controversies arising out of the federal welfare system.⁶⁸

In addition to this variation in jurisdictional patterns, the U.S. welfare system manifests a much higher level of court influence over welfare law and policy.⁶⁹ During the last twenty years, American courts, especially the Supreme Court, have taken a strong part in shaping U.S. welfare law.⁷⁰ Both federal and state courts have expanded the substantive and procedural rights of welfare recipients.⁷¹ By contrast, the German judiciary, especially the *Bundesverfassungsgericht* and the *Bundesverwaltungsgericht*, has responded in a much more restrained manner when ruling on welfare law issues.

Federalization of the American welfare system under the Carter proposal might have restricted judicial influence over the development of welfare law. The contrast in judicial control over state-oriented AFDC and federalized SSI illustrates this point. To receive federal funding, state AFDC plans must satisfy numerous specific standards established by Congress and HEW.⁷² Courts have used these detailed standards to impose new substantive and procedural requirements on the states by finding the state plans in violation of the federal standards.⁷³ But when Congress cre-

prescribed in SGG § 51. It centers on social insurance and veterans benefits. Social welfare is not mentioned and is specifically excluded with reference to veterans, *id.* § 51(2).

68. No provision in the bill would have created exclusive jurisdiction in the federal courts. But since many welfare cases heard by state courts involve state welfare plans that implement federal welfare programs, the federalization of the welfare system under the Carter proposal would have greatly reduced the amount of welfare litigation conducted in state courts.

69. Compare Leibfried, *supra* note 38 (reviewing pertinent decisions of the *Bundesverfassungsgericht*) with F. DOOLITTLE & S. DURBIN, JUDICIAL CONSTRAINTS ON AFDC POLICYMAKING (1977). See also 1 RECHTSPRECHUNG DES BUNDESVERWALTUNGSGERICHTS IN SOZIALHILFESACHEN (1973) (compendium of decisions by the *Bundesverwaltungsgericht* on BSHG cases from 1964 to 1972); 2 RECHTSPRECHUNG DES BUNDESVERWALTUNGSGERICHTS IN SOZIALHILFESACHEN (1977) (compendium of decisions from 1972 to 1976).

70. See Martin, *Sozialrecht in den Vereinigten Staaten: Eine Einführung in den Status eines neuen Arbeitsfeldes*, 24 ZEITSCHRIFT FÜR SOZIALREFORM 561 (1978) (listing notable United States Supreme Court decisions in welfare law).

71. See cases cited in note 44 *supra*.

72. The statute authorizing states to submit AFDC plans for approval by the Secretary of HEW establishes 23 separate requirements that a state must satisfy in order for the Secretary to approve a plan. 42 U.S.C. § 602(a) (1976).

73. *E.g.*, *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972), *dismissed on other grounds on remand*, 353 F. Supp. 405 (E.D. Mo. 1973) (AFDC application must be acted upon within 30 days of applicant's filing in order to comply with requirement that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals," 42 U.S.C. § 602(a)(10) (1976)).

ated SSI, it prescribed more general standards to govern the program and vested more discretionary authority in the Social Security Administration.⁷⁴ Courts ruling on challenges to the SSI program have thus lacked detailed standards against which to test the program and have been compelled to rely on broad constitutional doctrines of equal protection and due process.⁷⁵ In addition, the SSI program includes a very elaborate internal administrative appeals procedure,⁷⁶ which makes court action and test cases less likely than under the AFDC program. Both the more general standards governing the program and its more elaborate administrative appeals structure may have limited the courts' ability to impose new requirements on the Federal Government to benefit recipients. Adoption of a comprehensive reform plan like the Carter proposal could have the same effect on a system-wide basis, reducing the number of welfare cases heard by the courts. In this respect, too, welfare reform could strengthen the likeness of the American system to the German model.

The greater influence that U.S. courts exercise over welfare law and policy is partly attributable to a further difference between the two systems—the greater availability in the United States of special and concentrated resources for legal action. Indigents have been able to use the services of staff attorneys from the Legal Services Program of the U.S. Office of Economic Opportunity and its successor, the Legal Services Corporation, to litigate test cases, challenging inequities in the welfare system that affect large classes of recipients.⁷⁷ No comparable legal services program exists in West Germany. Instead, private practitioners handle legal matters

74. See, e.g., 42 U.S.C. § 1383(a)(1) (1976) ("Benefits under this subchapter shall be paid at such time or times and in such installments as will best effectuate the purposes of this subchapter, as determined under regulations . . .").

75. E.g., *Shaw v. Weinberger*, 395 F. Supp. 268, 270 (W.D.N.C. 1975):

Although the enabling statute [42 U.S.C. § 1383(a)(4) (1976)] allowed wide discretion on the part of the Secretary, even discretion as to whether to make such payments at all, his decision to award these benefits created a property interest in the payments. The procedure through which applications are processed must therefore comply with the dictates of due process.

76. 20 C.F.R. § 416 (1978).

77. Congress established the Legal Services Corporation by enacting the Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996-2996I (1976). Congress first expressly authorized and funded legal services on a national scale in the Economic Opportunity Amendments of 1966, Pub. L. No. 89-794, §§ 2(a)(2), 215, 80 Stat. 1451 (1966) (repealed 1974). For an analysis of basic structural characteristics of the U.S. legal services program, see Bamberger, *The American Approach: Public Funding, Law Reform, and Staff Attorneys*, 10 CORNELL INT'L L.J. 207 (1977). For a brief history of the U.S. program, see Hollingsworth, *Ten Years of Legal Services for the Poor*, in *A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS* 285 (1977). For an evaluation of the Legal Services Corporation approach, see George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 700-09 (1976). See also M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *TOWARD EQUAL JUSTICE* 451-523 (1975); N. TROCKER, *EMPFEHLEN SICH IM INTERESSE EINER EFFEKTIVEN RECHTSVERWIRKLICHUNG FÜR ALLE BÜR-*

for indigent persons and receive compensation from public funds.⁷⁸ This arrangement produces easier access to lower courts⁷⁹ but fewer opportunities to achieve system-wide change by successive appeals of test cases. Horizontal coverage of legal needs is thus attained at the expense of vertical coverage, court decisions rarely having as sweeping an effect as in the United States.⁸⁰

Adoption of the Carter proposal would have reduced this difference only slightly and in a very indirect manner. A unitary federal system would provide more visibility to legal services lawyers. But the substitution of a single federal system for fifty state systems would also reduce the number of problem areas on which these attorneys concentrate.

3. Benefit Structure

Benefit structure is the result of government legal programming efforts as modified by judicial decisions. Several benefit structure characteristics distinguish the American and West German systems. Eligibility requirements present a threshold difference. In the United States, requirements are complex and eligibility is separately determined for each program. A person may be eligible for food stamps yet be ineligible for SSI benefits. By contrast, West German eligibility requirements are minimal, coordinated, and apply uniformly to applicants for all types of benefits.

The benefit structures of the U.S. and West German systems also differ in the adequacy of payments. When measured against state needs standards and the federal poverty standard,⁸¹ American welfare payments generally are inadequate,⁸² with the exception of SSI benefits.⁸³ Although West

GER ÄNDERUNGEN DES SYSTEMS DES KOSTEN- UND GEBÜHRENRECHTS?, in 51-1 VERHANDLUNGEN DES EINUNDFÜNFZIGSTEN DEUTSCHEN JURISTENTAGES B36-B47 (1976).

78. See Schlesinger, *The German Alternative: A Legal Aid System of Equal Access to the Private Attorney*, 10 CORNELL INT'L L.J. 213 (1977); M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *supra* note 77, at 386-96; H.-H. SCHROEDER-HOHENWARTH, *DAS ARMENRECHT IN DER BUNDESREPUBLIK DEUTSCHLAND UNTER BESONDERER BERÜCKSICHTIGUNG WIRTSCHAFTLICHER UND RECHTSVERGLEICHENDER ASPEKTE* (1976); N. TROCKER, *supra* note 77, at B7-B22.

79. See N. TROCKER, *supra* note 77, at B40, B43.

80. See *id.* at B43, B45-B46.

81. See note 11 *supra*.

82. [D]espite the receipt of transfer income, many persons remain in poverty. The low level of AFDC benefits in certain states contributes to this problem. For example, 37 states paid less than the full basic needs standard, as established by the state, in July 1972. In the 18 states with payment maximums under \$200 per month for families of four, the average payment standard was \$142 or approximately \$1,700 per year, 40 percent of the poverty line. While participation in several programs must be considered when assessing the economic well-being of welfare recipients, such participation is uneven, with some recipients doing relatively well and others receiving benefits from only one or two programs. Taken together, low AFDC benefits in some states and

German benefits are not generous, they are adequate in most situations.⁸⁴ The Carter reform proposal would have done little to reduce this disparity in benefit levels. It would have increased payments to AFDC recipients in twelve Southern states,⁸⁵ and benefit levels would have exceeded existing general assistance in forty-four states.⁸⁶ Yet the proposal would not have established anything approaching an adequate national standard.

A further difference between the two systems is that the U.S. system places much greater emphasis on recipients' obtaining employment. Persons receiving AFDC benefits must register for employment programs as a condition to eligibility for benefits.⁸⁷ Registrants are then placed in private sector jobs, institutional and work experience training programs, or the large public service employment program run by the U.S. Government.⁸⁸ Monetary incentives are paid to those who participate.⁸⁹ Those who refuse work under the program are subject to loss of benefits.⁹⁰

uneven participation in other income support programs mean that many recipients remain below the poverty line.

M. BARTH, G. CARCAGNO & J. PALMER, TOWARD AN EFFECTIVE INCOME SUPPORT SYSTEM 97 (1974).

83. The SSI program, unlike AFDC and food stamps, incorporates a cost of living adjustment clause. This helps SSI benefits keep pace with inflation in the U.S. economy. See 42 U.S.C. § 1382f (1976).

84. See K. PETERSEN, note 48 *supra*; F. KLANBERG, ARMUT UND ÖKONOMISCHE UNGLEICHHEIT IN DER BUNDESREPUBLIK DEUTSCHLAND (1978). Petersen's work gives the most detailed description of the way in which benefit levels are established, including details on the components of the "needs basket," see note 50 *supra*. Klanberg's work is the most comprehensive discussion of the adequacy of benefit levels and the different ways to measure them.

Under 1977 average benefit levels, see note 50 *supra*, a family of four would receive DM 997 per month in continuous support. (This amount excludes rent and heating support payments as well as special support assistance, all of which may total DM 400-500 depending on individual circumstances.) By contrast, under 1972 average benefit levels, a family of four would receive DM 705 per month in continuous support. *Regelsätze nach § 22 des Bundessozialhilfegesetzes im Bundesgebiet und in Berlin (West)*, 25 NACHRICHTENDIENST DES DEUTSCHEN VEREINS FÜR ÖFFENTLICHE UND PRIVATE FÜRSORGE 190 (1972). The average earnings in 1977 of all industrial workers, both male and female, were DM 2002 per month, compared to DM 1394 per month in 1972. BUNDESMINISTER FÜR ARBEIT UND SOZIALORDNUNG, ARBEIT UND SOZIALSTATISTIK: HAUPTERGEBNISSE 1978, at 88.

85. *Cf.* N.Y. Times, Apr. 1, 1979, § 1, at 1, col. 2 (city ed.) (Sen. Moynihan opposes most recent Carter plan because it would increase the share of federal funds directed to Southern states, where benefit levels are lower).

86. For an analysis of the fiscal effect of the Carter proposal in different regions of the United States, see ADMINISTRATION PROPOSAL, *supra* note 60, at 53-54.

87. 42 U.S.C. § 602(a)(19)(A)(1976); 45 C.F.R. § 224.20(a) (1978). Certain classes of persons are exempt from the registration requirement. 42 U.S.C. §§ 602(a)(19)(A)(i)-(vi) (1976); 45 C.F.R. § 224.20(b) (1978).

88. 42 U.S.C. §§ 632(b), 633(a)(1976); 45 C.F.R. §§ 224.40-.45 (1978).

89. 42 U.S.C. § 634 (1976) (incentive payments of \$30 per month plus allowances for transportation and other costs). See also *id.* § 602(a)(19)(D)(incentive payments and allowances exempt from consideration as income or assets in determining eligibility for AFDC).

90. *Id.* § 602(a)(19)(F); 45 C.F.R. §§ 224.50-.51 (1978).

The West German system places less emphasis on work requirements. The public jobs program is more limited in scope, offering only small-scale, specialized work testing on the local level.⁹¹ Withholding of benefits from families is illegal,⁹² making it possible to use this penalty only against single persons and childless couples.

The Carter proposal would have increased this disparity between the U.S. and West German systems by setting up a much larger involuntary public employment program.⁹³ The program would have reduced benefits during the job search period of eight weeks to between thirty-one and forty-one percent of the poverty level.⁹⁴

B. ADMINISTRATION

Welfare administration is an area in which the American and West German systems exhibit a number of differences that complement the varying patterns of legal programming in the two nations. These differences affect both the level and structure of administration.

Vertically decentralized administration is common to both systems, with state and local governments serving as the principal administrators of welfare programs in both nations. In the United States, the Federal Government administers SSI,⁹⁵ but state and local governments operate the most comprehensive programs—AFDC and food stamps.⁹⁶ In West Germany, local governments administer all programs⁹⁷ except for certain institutional and other more expensive forms of welfare, which the state government or its subunits administer.⁹⁸

91. BSHG §§ 19-20.

92. *Id.* § 25(3). As to recipients other than families, the withholding of benefits is discretionary. *Id.* § 25(2).

93. See H.R. 9030, *supra* note 9, §§ 901-916; ADMINISTRATION PROPOSAL, *supra* note 60, at 90-101.

94. H.R. 9030, *supra* note 9, § 2105(d).

95. 42 U.S.C. § 1383b (1976).

96. The basic statutory pattern is to require the states to submit plans to the appropriate federal cabinet secretary in order to receive federal funds under the particular program. 7 U.S.C.A. § 2019(e)(West 1973 & Supp. 1979)(food stamps); 42 U.S.C. § 602(a)(1976)(AFDC). The plans must conform to statutory and regulatory specifications in order to receive the secretary's approval and federal funding. 7 U.S.C.A. § 2019(e)(West 1973 & Supp. 1979)(food stamps); 42 U.S.C. §§ 602(b), 603(a)(1976)(AFDC). The Federal Government thus exercises a large measure of control over the administrative structure established by a state, but ultimate responsibility rests with the state government. "It is at the State level where most of the crucial decisions relating to AFDC eligibility and operations are made, either by the administering agency or by the State legislature." AFDC ADMINISTRATION, *supra* note 43, at 15.

97. BSHG § 96. West Germany has a very highly developed system of delegated administration. See C. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE 129-34 (1968).

98. BSHG § 100.

The effect of vertically decentralized administration is quite different in the two countries. In the United States, the large number of participating governmental units⁹⁹ and the wide variation in state and local administrative practices fragments welfare administration. Adoption of the Carter proposal would have resulted in a concentration of administrative responsibility in the U.S. Government.¹⁰⁰ States could have elected only to perform the "intake" function,¹⁰¹ a limitation that provoked a great deal of opposition from the states during congressional consideration of the Carter bill.¹⁰² By making the Federal Government the administrator of welfare programs, the Carter proposal would have lessened the structural similarity of the two welfare systems,¹⁰³ but would have increased the efficiency of the U.S. system.

A characteristic of the U.S. system not found in West Germany is a horizontally decentralized administrative authority. The categorical character of U.S. assistance causes each program to have its own administrative structure, procedures, rules, forms, and administrators.¹⁰⁴ For example,

99. "In 1977, more than 3,070 federal, state, and local governments were involved in administering the welfare system." ADMINISTRATION PROPOSAL, *supra* note 60, at 104.

In West Germany 1 federal, 11 state, and 542 local governments were involved in administering the welfare system in 1976. [1977] STATISTISCHES JAHRBUCH FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 51-55; BSHG § 96(1). Because local jurisdictions in the larger territorial states are subdivided, eight additional administrative authorities must be added to the count at the state level. See O. MERGLER, G. ZINK, E. DAHLINGER & H. ZEITLER, *supra* note 51, at § 96, annot. 23. In sum, there were 562 governmental units administering the welfare system in West Germany. Both the smaller number of governmental units at the state and national levels in West Germany and the concentration of all welfare functions in a single local agency for each geographical area help create a more cohesive administrative structure than that in the United States.

100. H.R. 9030, *supra* note 9, §§ 2131-2145.

101. *Id.* § 2138.

102. The National Governors' Association is concerned about a number of common problems:

One of our major concerns is the very limited role left to the States in the administration of cash assistance. The administration proposal would take from the States and localities their responsibility for eligibility determination and cash payment, and at best, would leave the States with client interviews and the processing of applications.

We feel that it is necessary for this legislation to offer the States more flexibility in administration.

Joint Hearings, supra note 10, at 1,429 (statement of Gov. Hugh Carey).

103. Nationalization of welfare administration would not be easy to achieve in West Germany. Under GG art. 87(3), nationalization would be permitted only if "urgent need" (*dringender Bedarf*) existed and if the *Bundesrat*, the chamber of the *Länder*, consented. Since the German Federal Constitution is built on the principle that the federal law is to be administered by the states in their own right, GG art. 83, it is unlikely that the *Bundesrat* would consent to nationalization.

104. See COMMISSION ON FEDERAL PAPERWORK, ADMINISTRATIVE REFORM IN WELFARE 25-30 (1977) [hereinafter cited as ADMINISTRATIVE REFORM].

HEW supervises state administration of the AFDC program, but the Department of Agriculture oversees the food stamp program. In addition, there is little interagency administrative coordination.¹⁰⁵ This balkanized administration reinforces the centrifugal effect of widely dispersed legal programming authority in the United States. It also produces a "showcase" effect, focusing public attention on each program and its beneficiaries as a separate entity rather than on the welfare system as a whole.¹⁰⁶ This showcase effect hardens political opposition to welfare programs and polarizes public debate on welfare reform.

Despite the strong administrative role of local governments, administration of the West German system is sufficiently unitary to avoid the fragmentation and showcase effect of the American system. Because there is only one program for all recipients, which makes only a few internal distinctions among groups of beneficiaries, potentially vulnerable groups are less conspicuous and the showcase effect is avoided. It is toward this kind of pattern that the U.S. system would have moved had American programs been consolidated in the manner proposed by the Carter reform bill.

One way in which the American system adapts to its more fragmented administration is by a higher degree of legalization—formalization of policies and procedures in order to standardize administration and reduce discretionary authority of government officials.¹⁰⁷ Congress and HEW have established detailed standards governing the substantive terms and procedural operation of state AFDC plans.¹⁰⁸ In West Germany, on the other hand, more centralized legal programming largely obviates the need for a highly legalized welfare system.

The Carter reform proposal would have further formalized substantive rights under U.S. law, thereby widening this difference between the two systems. Yet federalization of welfare programs would have also reduced the degree of procedural legalization in two ways, narrowing the difference between the U.S. and West German systems in this respect. First, a federal agency administering a uniform national system would have been less likely to question decisions made by its own administrators than decisions made by state and local officials administering the present system. Second, Congress would have been less likely to resort to the legislative process to

105. "[W]ith only one significant exception, . . . there is no regular, formal or informal means to coordinate the regulatory processes for income security programs that are administered by different agencies. The one exception is the WIN program which is a legislatively mandated joint effort." ADMINISTRATIVE REFORM, *supra* note 104, at 46.

106. See C. LEMAN, WELFARE REFORM AND THE WORKING POOR 103-10 (1977) (unpublished Ph.D. dissertation in the Harvard University Libraries).

107. See note 73 *supra* and accompanying text.

108. See note 72 *supra* and accompanying text.

modify a federal program and would have probably relied instead on more flexible oversight procedures.

A feature that sharply distinguishes U.S. welfare administration from the West German model is the vigorous American self-policing effort—attempts to detect error and fraud. Self-policing is an integral part of U.S. welfare administration.¹⁰⁹ It operates anonymously and automatically,¹¹⁰ whereas in West Germany self-policing is more individualized and is usually activated by specific suspicions.¹¹¹ U.S. officials have programmed computers to check lists of recipients against government payroll records and against lists of recipients in other states.¹¹² Computers also perform de novo review of case decisions in order to locate error and fraud within the administrative process, whereas the West German system lacks systematic review of individual case decisions.

This difference between the two systems would have been heightened by the Carter reform bill. By establishing a nationwide computer network through which all welfare claims would have been processed, the Carter proposal would have expanded U.S. self-policing capabilities. This computer network would have made it possible to check welfare rolls against other official records more exhaustively and to reorganize and expand quality control review of caseworker decisions. By requiring recipients to report their income regularly, the reform bill would also have changed the func-

109. All three major federal programs have self-policing components. Federal statutes expressly provide for self-policing of the food stamp program and the work incentive component of AFDC. 7 U.S.C.A. § 2025(d) (West Supp. 1979)(food stamp program); 42 U.S.C. § 641 (1976)(WIN program). The Secretary of HEW has used his broad authority over administration of the AFDC and SSI programs to establish self-policing efforts covering these programs. 42 U.S.C. §§ 602(a)(5), 1302, 1383b (1976).

For a review of U.S. self-policing efforts over the last 15 years and a description of current programs, see AFDC ADMINISTRATION, *supra* note 43, at 202-51. For a statistical analysis of U.S. self-policing efforts, see OFFICE OF THE INSPECTOR GENERAL, DEP'T OF HEALTH, EDUCATION, AND WELFARE, ANNUAL REPORT 1977. This report estimated the monetary loss from fraud, abuse, and waste at between \$6.3 billion and \$7.4 billion out of \$136.1 billion in federal expenditures during fiscal 1977, or between 4.7% and 5.4%. *Id.* at 1-3. Losses in the AFDC program were estimated at \$669 million, *id.* at 91, and losses in the SSI program were set at \$334 million, *id.* at 92.

110. In the AFDC quality control program, state personnel, following federal guidelines, regularly select a random sample of active cases. The state officials then review case records kept by the welfare agency, interview the recipient, and verify eligibility and payment status. After completing these steps, the reviewer summarizes his findings on a schedule prescribed by HEW and forwards the information to the Federal Government. AFDC ADMINISTRATION, *supra* note 43, at 223-25. The food stamp and SSI self-policing programs operate in a similar manner. *Id.* at 242-44.

111. There is some self-policing through the General Accounting Office of the states and through internal audits. Both are irregular efforts that are not comparable to U.S. self-policing activities.

112. See N.Y. Times, Feb. 28, 1978, at 30, col. 1.

tion of U.S. self-policing from a cost allocation tool to a pure management tool.

C. FINANCING

Financing is a third area of difference in the structure of the U.S. and West German welfare systems. As with legal programming and administration, the contrasts between the two systems relate primarily to the level of governmental responsibility and the structure of welfare financing arrangements.

Direct responsibility for financing welfare programs in the United States usually rests with state and local governments.¹¹³ Two important exceptions to this pattern are federal grants-in-aid to state programs, such as AFDC grants,¹¹⁴ and federal preemption of state programs, such as by SSI.¹¹⁵ States are free to supplement federal SSI payments either directly or through the Federal Government, but the Federal Government provides the major share of assistance directly to recipients.

In West Germany, as in the United States, principal financial responsibility for welfare programs lies with state and local governments.¹¹⁶ The only programs financed directly by the Federal Government are housing assistance¹¹⁷ and family allowances.¹¹⁸ But unlike the U.S. grants-in-aid approach, the West German National Government exercises much less indirect influence over state and local financing of welfare programs. State and local governments receive funds through general revenue sharing plans,¹¹⁹ thereby avoiding categorical restrictions on use of the funds such as those imposed as part of the U.S. grants-in-aid approach.

An important concomitant to the contrast between grants-in-aid and revenue sharing is the difference between program-by-program financing in the United States and system-wide financing in West Germany. Budget proposals, funding debates, appropriations, and disbursement of funds are all organized on a programmatic basis in the United States.¹²⁰ Conversely, in West Germany all of these functions are conducted for the welfare sys-

113. *E.g.*, N.Y. SOC. SERV. LAW §§ 153, 356 (McKinney 1976).

114. 42 U.S.C. §§ 603(a)-(b)(1976); N.Y. SOC. SERV. LAW § 358(2)(McKinney 1976).

115. 42 U.S.C. §§ 1381a, 1382(b)(1976).

116. *See* BSHG §§ 66, 99, 100.

117. *See* Second Rent Subsidy Law (Zweites Wohngeldgesetz) [2 WoGG], Dec. 14, 1970, [1970] BGBI I 1637, *as reformulated* Aug. 29, 1977, [1977] BGBI I 1685.

118. *See* Family Allowance Law (Bundeskindergeldgesetz) [BKGG], Apr. 14, 1964, [1964] BGBI I 265, *as reformulated* Jan. 31, 1975, [1975] BGBI I 412.

119. *See* GG art. 106; T. MAUNZ, G. DÜRIG & R. HERZOG, [1978] 3 KOMMENTAR ZUM GRUNDGESETZ (commentary on GG art. 106). *See also* 5 Bundestagsdrucksache 2861, at 78-80 (outlining the U.S. system of public finance and contrasting it with the West German one).

120. *E.g.*, Departments of Labor and Health, Education, and Welfare Appropriations Act

tem as a whole. One consequence of this difference is that the U.S. pattern accentuates the showcase effect of welfare administration.¹²¹

Enactment of the Carter reform proposal would have both heightened and reduced the contrast between the U.S. and West German financing systems. Federalization of welfare programs would have involved the U.S. Government much more directly in financing the welfare system, strengthening the contrast to the decentralized financing of the West German system. Yet the Carter bill would also have eliminated program-by-program financing,¹²² making the U.S. system more closely resemble the West German counterpart in this respect.

Continuity of expenditure development is another respect in which welfare financing patterns have differed. The costs of the AFDC and food stamp programs in the United States rose sharply beginning in 1965.¹²³ West Germany has experienced a slow but more steady escalation of welfare program costs since 1963.¹²⁴ The faster pace of cost increases in the United States can be attributed to the added burden placed on the U.S. welfare system by the American social crisis of the 1960's and to the resiliency of the highly bureaucratic German welfare administration when confronted with political pressures. The effect of the Carter reform bill on this disparity in expenditure growth rates cannot be determined, since estimates of the program's added cost were highly variable and hotly disputed.¹²⁵

of 1979, Pub. L. No. 95-480, 92 Stat. 1567 (1978)(separate appropriations for SSI program, AFDC program, and work incentive program).

121. See note 106 *supra* and accompanying text.

122. H.R. 9030, *supra* note 9, § 2133.

123. "In 1965, expenditure on federal social programs directed toward low-income groups amounted to \$6 billion By 1968, federal expenditure on such programs had risen to \$12 billion By 1972, the comparable figure was \$24 1/2 billion" Skidmore, *Growth in Social Programs, 1964-74*, in R. PLOTNICK & F. SKIDMORE, *PROGRESS AGAINST POVERTY* 11 (1975). See also S. DANZIGER, R. HAVEMAN & E. SMOLENSKY, *supra* note 54, at 3 (percentage of gross national product spent on income-tested programs increased from 1.3% in 1965 to 2.8% in 1974 because of increases in number of recipients and average benefit per recipient).

124. In 1965, 0.47% of the West German gross national product was spent implementing the BSHG. Percentages in more recent years have been 0.51% in 1970, 0.60% in 1972, 0.75% in 1974, and 0.91% in 1977. Expenditures rose from DM 2.18 billion in 1965 to DM 10.90 billion in 1977. The main growth period in West German welfare system expenditures began in 1970-71 and slowed down after 1975. Growth rates ranged from a maximum of 28% per year to a minimum of 15.6% per year. See BUNDESMINISTER FÜR ARBEIT UND SOZIALORDNUNG, *SOZIALBERICHT '78*, at 170-71; *Materialband zum Sozialbudget, Bundesratsdrucksache 252/76*, at 475-76. This growth is due to the indexing of benefit levels, the addition of young or working age people to the welfare rolls, and a cost explosion in special aid expenditures, especially in the area of homemaker and attendant care services for the handicapped, due mainly to rising costs for institutionalized care (rising of the *Pflegesätze*).

125. For one estimate of the Carter proposal's costs, see *ADMINISTRATION PROPOSAL, supra* note 60, at 37-56.

Comparison of the American and West German welfare systems thus points up a number of important structural differences. Legal programming of the U.S. system is more decentralized, more heavily influenced by decisions of both state and federal courts, and has produced inadequate benefit levels hemmed by complex eligibility and work requirements. U.S. welfare administration reflects greater horizontal fragmentation, legalization, and self-policing. Financing of the U.S. system is organized on a grant-in-aid basis rather than on revenue sharing principles as in West Germany, and expenditures have escalated much more sharply over the last fifteen years in the United States.

III IMPLICATIONS OF COMPARATIVE ANALYSIS

Underlying the structural differences between the American and West German welfare systems are four more basic political contrasts that create different climates for welfare reform, illustrate the essential character of the Carter proposal, and suggest at least a partial explanation of why Congress failed to enact it. First, state and local governments operate more independently of the national government in the United States than in West Germany, producing greater vertical fragmentation of the American political framework. Second, this fragmentation has spawned a tax system in which revenue sources for government social welfare programs can be easily identified and made the focal point of attacks on the welfare system. Third, Congress has taken a categorical approach when planning and funding legislative programs to address social problems. Fourth, the American National Government is less centralized than its West German counterpart, with a host of administrative agencies directing an array of federal programs.

All of these factors contribute to a more fragmented political situation in the United States and create a different reform context than in West Germany. Welfare reform in the United States only occurs when a high crisis threshold is surpassed as in the Great Depression¹²⁶ or during the 1960's.¹²⁷ This reform pattern of pressure politics contrasts sharply with the bureaucratic politics characteristic of West Germany. The greater political importance of social classes and trade unions in West Germany¹²⁸ has led to the

126. See F.F. PIVEN & R. CLOWARD, *REGULATING THE POOR* 45-119 (1971); F.F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 41-95 (1977).

127. *REGULATING THE POOR*, *supra* note 126, at 183-340; *POOR PEOPLE'S MOVEMENTS*, *supra* note 126, at 264-361.

128. The rate of unionization in West Germany is higher than in the United States. Average unionization of nonagricultural workers and salaried employees for the years 1965 to 1974 amounted to 39%, compared to 28-29% in the United States. E. Kassalow, *Industrial Conflict*

creation of institutional structures for dealing with political issues that might arouse class antagonisms. Conflicts over welfare policy are handled within this institutional framework and are thereby routinized and depoliticized.¹²⁹

These different reform patterns may explain the two outstanding innovations in the U.S. system: outreach programs¹³⁰ and the Legal Services Corporation.¹³¹ Both may be thought of as byproducts of abrupt, rapid modernization of U.S. welfare law. By contrast, the bureaucratic structure of the West German system diminishes the potential for such radical departures from the status quo and promotes gradual, incremental legal change.

The basic political differences underlying the structural variations in the U.S. and West German welfare systems also illuminate the Carter reform proposal as a plan for administrative reform rather than reform of the content of welfare programs. The changes the Carter plan would have made in legal programming, administration, and financing would have affected three of the four basic political differences between the two countries. By concentrating legal programming, administrative, and financing authority in the Federal Government, the Carter proposal would have substantially diminished the role of state and local governments. Local property taxes would likewise have ceased to be a source of financial support for welfare programs. And by establishing a single national program, albeit one administered by multiple federal agencies, the Carter plan would have diminished the programmatic orientation of the U.S. system. The administrative character of the Carter proposal can be seen even in the jobs component, where the most substantial changes affecting recipients would have been made. Here the principal effect of the proposal would have been to remove work-testing from the private labor market and bring it into the public sector by organizing a small public labor market.¹³²

The most substantial changes the Carter bill would have made are thus not reforms of welfare policy, but changes essentially administrative in

and Consensus in the United States and Western Europe, in 30 INDUSTRIAL RELATIONS RESEARCH ASSOCIATION PROC. (1977). Yet comparative union membership statistics are not the only indicator of the relative importance of unions. In West Germany, unions are much more significant as comprehensive social institutions. Even unions that represent relatively few employees are significant partners in collective bargaining, since bargaining results usually bind the entire labor force in that type of employment.

129. See Tennstedt, *Zur Ökonomisierung und Verrechtlichung in der Sozialpolitik*, in STAATLICHE POLITIK IM SOZIALSEKTOR 139 (A. Murswieck ed. 1976).

130. See Note, *Outreach: Bringing the Eligible into Federal Assistance Programs*, 62 CORNELL L. REV. 1093 (1977).

131. See note 77 *supra*.

132. See B. FRIEDMAN & L. HAUSMAN, *WORK, WELFARE, AND THE PROGRAM FOR BETTER JOBS AND INCOME* (1977).

character. Yet the importance of these changes should not be underestimated, since each is directed at one of the most formidable obstacles to reform of the content of U.S. welfare programs. State and local governments have often resisted reforms of welfare law and administration that would impose greater financial burdens on them or require them to adopt more complicated procedures in the interest of due process. A tax system that relies in part on state and local property tax assessments to support welfare programs makes the monetary sources of welfare assistance readily identifiable to critics who wish to attack welfare programs and their high cost. Furthermore, the categorical approach of the U.S. system and the horizontal fragmentation of authority have acted as internal barriers to reform of the content of welfare programs. By breaking down these barriers to welfare reform, the Carter proposal would have made reform of the content of welfare programs more readily attainable. Yet largely because the reform plan directly challenged the strongest impediments to welfare reform in a political situation that appeared to lack the urgency of the Great Depression or the 1960's, Congress failed to enact the Carter proposal.

CONCLUSION

Comparative analysis of the U.S. and West German welfare systems serves a number of important functions. Most immediately, it highlights the structural differences between the two systems in the areas of legal programming, administration, and financing. This comparison provides an index against which reform proposals may be measured to gauge the directions in which they would shape welfare law and policy. In addition, comparative analysis suggests the deeper political differences underlying the structural contrasts in welfare systems, highlights the different reform contexts in which reform proposals are developed, and suggests the relationship between reform proposals and the basic political differences and reform contexts.

Yet despite the broad sweep of the comparative analysis developed in this Article, much remains for further study. Additional analysis could illuminate in greater detail the reasons for the structural contrasts between the two national systems, focusing also on the relationship between welfare and social insurance. The nature and effect of U.S. reform efforts as well as the U.S. system's gradual evolution toward the West German model would also benefit from further comparative study. On a broader scale, analysis of the two national welfare systems may also reveal how the confluence of several fields of law—family law, administrative law, and constitutional law—produces different patterns in the two countries. Comparative study of welfare law may also serve as an index of national social and moral development

and as a means to study the relationship between law and the state in western nations.¹³³ All of these broad concerns are far beyond the scope of this Article. But it is hoped that the present study may provide the impetus for continued comparative analysis of the U.S. and West German welfare systems.¹³⁴

133. For a seminal study of these questions, see ten Broeck, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. I-III), 16 *STAN. L. REV.* 257, 900 (1964), 17 *STAN. L. REV.* 614 (1965).

134. Traditionally studies in comparative law have focused almost completely on private law. Public law, and especially welfare law in its broadest meaning, were neglected. In recent years there have been small indications of change. See, e.g., G. IGL, B. SCHULTE & T. SIMONS, *EINFÜHRUNG IN DAS RECHT DER SOZIALEN SICHERHEIT VON FRANKREICH, GROSSBRITANNIEN UND ITALIEN* (1978); *SOZIALRECHTSVERGLEICH IM BEZUGSRAHMEN INTERNATIONALEN UND SUPRANATIONALEN RECHTS* (1978); *METHODISCHE PROBLEME DES SOZIALRECHTSVERGLEICHS* (1977). All these studies tend to concentrate on comparative social insurance.