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MAJOR CHANGES IN THE STRUCTURE OF THE AFDC PROGRAM SINCE 1935*

Irene Lurie†

Cash benefits provided by federal, state, and local government income maintenance programs in the United States amounted to $83 billion in 1972.[1] The four public assistance programs, financed by all three levels of government, together with the general assistance programs, financed solely by the states and localities, accounted for $11 billion of these expenditures; Aid to Families with Dependent Children (AFDC), one of the four public assistance programs, made cash payments of $7 billion.[2] Yet while AFDC is only a small component of the total income maintenance system, it is the focus of substantial controversy.

AFDC is criticized as being both inadequate and inequitable, and many critics argue that AFDC has increased dependency on welfare by encouraging marital instability, migration to urban ghettoes, and withdrawal from the labor force.[3] On the other hand,

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[1] Old Age, Survivors, Disability, and Health Insurance accounted for half of these expenditures, railroad and public employee retirement accounted for $14.6 billion, payments to veterans totalled $6.3 billion, unemployment benefits totalled $5.7 billion, and workmen's coompensation and temporary disability benefits amounted to $3.4 billion. 36 Soc. Sec. Bull., Oct. 1973 at 48.

[2] Old Age Assistance payments were $1.9 billion, payments under Aid to the Permanently and Totally Disabled were $1.4 billion, Aid to the Blind amounted to $106 million, and general assistance payments were $741 million. *Id.* at 70.

[3] Much of this criticism stems from the extremely rapid growth of the program over the past decade. From 1960 to 1972, the number of AFDC recipients rose from 3 million to 11 million and payments increased almost seven-fold. *Id.* at 69-70. This increase has raised many questions in the minds of the public, Congress, and scholars concerning the structure of the program and has created severe disagreements over the appropriate changes which should be made. Yet while there is much rhetoric about a crisis in welfare, and many policies proposed on the basis of this rhetoric, too little is known about the causes of the increase in welfare dependency.

Broadly speaking, there are three sets of factors which could explain the growth of the AFDC program: (*1*) changes in people's behavior concerning family formation and dissolution, fertility, work effort, migration, and the decision to apply for welfare; (2) changes in aggregate economic conditions which affect the financial position of low income people; and (*3*) changes in the structure of the program made by legislatures, courts, and welfare departments at all levels of governments.

the major changes in the structure of AFDC have had the effect of liberalizing the program considerably. A very brief account of the origin of the AFDC program is provided in section I. Section II describes the changes in the criteria used to determine whether a family is eligible for AFDC, and section III describes changes in the rules used to compute payments. In recent years, social services and training have been provided along with money payments, and these programs are discussed in section IV. The last section analyzes some of the problems involved in administering the AFDC program.

I

THE MOTHERS' PENSION MOVEMENT

AFDC grew out of the mothers' pension movement of the early twentieth century. Until the mothers' pension laws, children who could not be supported by their widowed, disabled, or deserted parent were placed in institutions. At the turn of the century, it was realized that children would receive better care by remaining with their mother if she provided a good home. In 1909, President Theodore Roosevelt called the White House Conference on the Care of Dependent Children which stressed the importance of home life for children and recommended that aid be given to maintain suitable homes for the rearing of children. The Conference stimulated a variety of children's organizations, women's organizations, parent-teacher associations, labor unions, and other groups to lobby for mothers' pensions in state legislatures. Missouri and Illinois enacted the first legislation in 1911, and other states followed with unusual speed. By 1920, there were mothers' pension laws in forty-one states, and by the end of 1931, mothers' pension acts had been passed in all states except Georgia and South Carolina.[4] In 1934, an estimated 109,000 families and 280,000 children were receiving approximately $37.5 million in aid. The average payment per family was approximately $29 per month.[5]

The Depression increased the need for pensions, but local governments, which financed the program in the majority of states, faced a severe shortage of funds and consequently were forced to curtail assistance expenditures. The federal government responded

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[4] A. EPSTEIN, INSECURITY, A CHALLENGE TO AMERICA 624-29 (1938).

[5] P. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES 186-87 (1936).

with the Social Security Act of 1935[6] which, in addition to establishing Old Age and Survivors Insurance and unemployment insurance, provided for grants to be made to the states so that they could continue to give aid to families with children. While the federal government assumed some of the cost of Aid to Dependent Children, as it was then called,[7] responsibility for designing and administering the program remained with the state and local governments. Congress gave relatively little attention to AFDC in drafting the Social Security Act, anticipating that a fully developed social security program would provide for widows and orphans and that the need for AFDC would "wither away."

II

ELIGIBILITY REQUIREMENTS

The Social Security Act of 1935 defined a dependent child as

> a child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, . . . in a place of residence maintained by one or more of such relatives as his or their own home.[8]

While the definition of a dependent child has not changed significantly, other changes have considerably broadened the coverage of the program.[9] The age limitation has been gradually raised from under sixteen to under twenty-one years of age if the child is regularly attending school.[10] The needs of the relative with whom the child is living may be taken into account in determining the amount of the payment to the family.[11] Since 1962, states have been permitted, but not required, to give aid to the spouse of the relative with whom the child is living.[12] In 1961, states were given the option of extending aid to children who met the eligibility requirements for Aid to Dependent Children but who had been

[6] Ch. 531, 49 Stat. 620 (codified at 42 U.S.C. §§ 301-1396g (1970)).

[7] Aid to Dependent Children became Aid to Families with Dependent Children in 1962. *See* Act of July 25, 1962, Pub. L. No. 87-543, § 104(a)(2), 76 Stat. 185 (codified at 42 U.S.C. § 602 (1970)).

[8] Ch. 531, § 406(a), 49 Stat. 629.

[9] For descriptions of the program in its early years, see E. BURNS, THE AMERICAN SOCIAL SECURITY SYSTEM (1949), and L. MERIAM, RELIEF AND SOCIAL SECURITY (1946).

[10] 42 U.S.C. § 606(a)(2)(B) (1970).

[11] 42 U.S.C. § 606(b)(1) (1970).

[12] *Id.*

placed in foster homes or child care institutions.[13] The 1967 amendments made the extension of AFDC to these children mandatory on the states.[14] Finally, in 1968, the Emergency Assistance program was added to AFDC in an attempt to meet the immediate needs of a family in a crisis.[15] This was an important addition to the program, since the regular AFDC application procedure precludes immediate payments.[16] Emergency Assistance is intended to be a stop-gap measure for an indigent family; therefore, the eligibility criteria are rather broad and open to liberal interpretation.[17]

Until 1961, aid could be provided only to families which were poor because of the death, disability, or absence of the primary earner. In response to the 1960-61 recession, the federal law was amended so that states, if they desired, also could provide aid to families with children which were poor because of the *unemployment* of a parent.[18] This addition marked a significant deviation from the previous objective of AFDC, which was to provide aid only to families which were *incapable* of supporting themselves. The 1967 amendments restricted the unemployed parent provision to unemployed fathers.[19] States still are not required to extend aid to

[13] Act of May 8, 1961, Pub. L. No. 87-31, § 2, 75 Stat. 76 (codified at 42 U.S.C. § 608 (1970)).

[14] Act of Jan. 2, 1968, Pub. L. No. 90-248, tit. II, § 208(a), 81 Stat. 892 (codified at 42 U.S.C. § 602(a)(20) (1970)).

[15] *Id.* § 206(b) (codified at 42 U.S.C. § 606(e) (1970)).

[16] S. REP. No. 744, 90th Cong., 1st Sess. 165-66 (1967). Under the normal application procedure for AFDC, the local agency must make an eligibility determination not in excess of 30 days after receipt of the application. 45 C.F.R. § 206.10(a)(3) (1973).

[17] *See* 42 U.S.C. § 606(e)(1) (1970); 45 C.F.R. § 233.120(a)(1)-(5) (1973). Emergency Assistance includes cash grants and payments in kind (social services and medical assistance) and is available to any "needy child" under the age of 21 who is living with a relative if the child has no "available resources" and the assistance is "necessary to avoid destitution." 42 U.S.C. § 606(e)(1) (1970). In addition, the state of destitution must not be the result of the child's or the relative's refusal of employment or training without good cause. *Id.* The program is also designed to cover migrant workers if the state so chooses. *Id.* § 606(e)(2). Finally, a family unit can rely upon Emergency Assistance for only one month in any consecutive 12-month period. *Id.* § 606(e)(1); 45 C.F.R. § 233.120(b)(3) (1973). This would seem to be in accordance with the congressional intent to meet only a family's immediate emergency needs which cannot be covered by the regular AFDC cash grant services. *See* S. REP. No. 744, *supra* note 16, at 165-66. If the needs of the family continue beyond the Emergency Assistance period, the unit should have a determination on its application for regular AFDC assistance.

[18] Act of May 8, 1961, Pub. L. No. 87-31, § 1, 75 Stat. 75 (codified at 42 U.S.C. § 607 (1970)).

[19] Fathers are defined as unemployed if they work less than 100 hours a month. Fathers must be unemployed for 30 days and must meet a specified test of recent and substantial attachment to the labor force. They cannot be receiving unemployment insurance and must be registered with the state employment office. 45 C.F.R. § 233.100 (1973). The Supreme

unemployed fathers, and only twenty-four had an unemployed father segment of AFDC in mid-1973, providing aid to a total of 113,000 families.[20]

Since the early days of the program, states have considered a family's assets in determining its need for assistance.[21] The amount of assets which recipients were permitted to hold varied considerably, as it does today. All states permit recipients to own the house in which they are living, and the majority of states set no maximum on the value of the house. It is difficult to generalize about the other asset limitations. Many states exempt personal effects, automobiles, and income-producing property such as tools, equipment, and livestock. The limit on the value of other assets varies from about $150 to $3,000, with a median limit of about $1,000. If families have assets in excess of these amounts, they are ineligible for AFDC until they liquidate their excess assets and consume the proceeds.[22]

Certain eligibility requirements are imposed not so much to define the eligible population as to restrict or mold its behavior. AFDC payments inherently provide an incentive for the poor to alter their behavior—to migrate, withdraw from the labor force, desert their families, and have children. To counteract these incentives, governments have imposed residence and work requirements and have required that women take legal steps to obtain support from deserting fathers. Some of these restrictions are imposed by the federal government and some by the states, with the result that the restrictions, and the strictness with which they are enforced, vary from one jurisdiction to another.

The Social Security Act of 1935 prohibited a state from requiring that residents live in the state for more than one year before applying for assistance.[23] This maximum became the standard rule, and in the mid-1960's, when the durational residence requirement was being successfully challenged in the courts, four-fifths of the

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Court, in Davidson v. Francis, 409 U.S. 904 (1972), affirmed a lower court's holding that states may provide benefits to workers who are on strike or who have been dismissed for misconduct. *But see Developments in Welfare Law—1973,* 59 CORNELL L. REV. 859, 878 (1974).

[20] U.S. Dep't of Health, Education & Welfare, Public Assistance Statistics May 1973, Sept. 10, 1973, table 8 (NCSS Report A-2).

[21] The 1939 amendments to the Social Security Act required states, in determining need, to take into consideration any other income and resources of any child claiming aid to dependent children. For some examples of states' asset limitations in 1940, see L. MERIAM, *supra* note 9, at 59-60.

[22] *See generally* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT (1973).

[23] Act of Aug. 14, 1935, ch. 351, § 402(b), 49 Stat. 627.

states imposed a requirement of one year.[24] The durational residence requirement was declared unconstitutional by the Supreme Court in *Shapiro v. Thompson*,[25] on the ground that it violated the equal protection clause by depriving welfare recipients of their right to travel.[26] Following this decision, New York, Connecticut, Colorado, Rhode Island, Utah, and West Virginia passed "emergency" residence requirements, arguing that they were necessary to prevent financial catastrophe resulting from rising welfare costs. The Court held these laws unconstitutional in 1972.[27]

Several restrictions are placed on the mother's behavior toward the father of her children and other men. In 1950, the Act was amended to require states to "provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect to a child who has been deserted or abandoned by a parent."[28] The law-enforcement agency then has the opportunity, if it wishes, of trying to obtain a financial contribution from the father. Given the importance of desertion in causing families to qualify for AFDC, it is not surprising that some attempt is made to induce the father to support his family. On the other hand, it is unfortunate that eligibility is often contingent upon a mother's naming a man whom, for personal reasons, she may have no desire to see prosecuted.

The 1967 amendments increased the ability of the states to secure support from parents of AFDC children. States are required to establish a program for determining the paternity of illegitimate children and for securing support for these children and for children who have been deserted.[29] The state welfare agencies are to make cooperative arrangements with the appropriate courts and law enforcement officials for accomplishing this function. States are

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24 *See generally* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT (1967).

25 394 U.S. 618 (1969).

26 The statutory prohibition of benefits to residents of less than one year is a classification constituting an "invidious discrimination" denying the plaintiffs the equal protection of the law. The Court in *Shapiro* recognized a legitimate state interest in safeguarding against the fraudulent receipt of welfare benefits, but refused to accept means which inhibit the migration of needy persons into a state. *Id.* at 629, 630-33. The implication of this decision, in its broadest construction, is that any state regulation that impinges on the so-called basic constitutional right of freedom to travel would be illegal.

27 *E.g.*, Dunn v. Rivera, 404 U.S. 1054 (1972), *aff'g mem.* 329 F. Supp. 554 (D. Conn. 1971).

28 Act of Aug. 28, 1950, ch. 809, tit. III, § 321(a), 64 Stat. 549 (codified at 42 U.S.C. § 602(a)(11) (1970)). This provision is discussed in detail in M. MCKEANY, THE ABSENT FATHER AND PUBLIC POLICY IN THE PROGRAM OF AID TO DEPENDENT CHILDREN (1960).

29 42 U.S.C. § 602(a)(17), (18) (1970).

also required to increase their efforts to find parents against whom a court order has been issued or a petition for an order of support has been filed.[30] They must submit the names of these parents to the Department of Health, Education, and Welfare (HEW). The Internal Revenue Service will then assist HEW in finding the addresses of these parents.[31]

This legislation has not been very effective in securing support from absent parents. In 1971, only thirteen percent of AFDC families received child support or alimony payments.[32] One explanation for this result is the lack of financial incentives to spur either the families or the local governments to secure support. AFDC payments are reduced by a dollar for every dollar of support from absent parents, so that support payments do not increase a family's total income. And since local governments finance a relatively small share of AFDC expenditures, an extra dollar of support means a relatively small cost savings to them.

The mothers' pension acts restricted aid to families which provided a good environment for the children. This tradition has had a significant impact on the eligibility requirements for AFDC, for it has provided a rationale for denying aid to certain families. In the 1950's, when the number of blacks and illegitimate children receiving AFDC began to rise rapidly, "suitable homes" provisions were developed by some states to deny aid to families with illegitimate children.[33] Defining a home as unsuitable if it contained illegitimate children both imposed sanctions on unacceptable moral behavior and excluded a disproportionate number of blacks from the program. This rule came under sharp attack in the early 1960's, and it is no longer used to deny aid to illegitimate children. Ten states still require that the home be suitable, but suitability is defined in terms of the quality of care received, not a child's legitimacy.[34]

A variant of the "suitable homes" provision was the "substitute parent" policy which evolved in some states. "Substitute parent" rules prohibited an able-bodied father or any other man from living, or sometimes spending too much time, with the mother.[35]

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[30] *Id.* § 602(a)(21).

[31] *Id.* § 610(a).

[32] U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, FINDINGS OF THE 1971 AFDC STUDY, PART II, FINANCIAL CIRCUMSTANCES table 62 (1971).

[33] For a detailed discussion of the suitable homes policies, see W. BELL, AID TO DEPENDENT CHILDREN (1965).

[34] U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *supra* note 22, at 20, 36, 40, 48, 50, 52, 54, 58, 70, 74.

[35] For a discussion of substitute parent policies, see W. BELL, *supra* note 33.

This was usually done by defining a man in the house as a "substitute parent" even though he was neither the mother's husband nor the father of the children. The children were then not considered dependent because they were not "deprived of parental support or care by reason of the . . . continued absence from the home . . . of a parent."[36] These rules came under repeated attack for infringing the civil liberties of the mother and for impeding her attempts to establish a relationship with a man who eventually could eliminate her need for welfare.

The validity of the "substitute parent" rule came before the Supreme Court in *King v. Smith.*[37] The Court found that an Alabama regulation denied AFDC payments to the children of a mother who "cohabit[ed]" in or outside her home with any single or married able-bodied man,[38] thereby denying aid to an otherwise eligible needy child because his "substitute parent" was not absent from the home. The Court held that the state's interest in discouraging immorality and illegitimacy was not a relevant criterion on which to predicate the grant or denial of benefits; therefore, it was not a proper justification for AFDC disqualification.[39] Finally, the Court pointed out that Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures which punish dependent children, and that the method used by Alabama conflicted with the Social Security Act.[40] The decision affected eighteen other states and the District of Columbia, all of which had some version of the man-in-the-house rule.

In *Lewis v. Martin,*[41] the Court went a step further and ruled against the "man assuming the role of spouse" rule. Under this regulation, the income of a man who is married to or cohabiting with an AFDC mother is counted in determining the family's need for welfare, even if he is not legally obligated to support her children.[42] The Court decided that, in the absence of proof of actual contribution, a state may not consider a child's resources to include either the income of a nonadopting stepfather who is not legally obligated to support the child or the income of a man assuming the role of spouse, whatever the nature of his obligation

[36] 42 U.S.C. § 606(a)(1) (1970).
[37] 392 U.S. 309 (1968).
[38] *Id.* at 311.
[39] *Id.* at 313, 320, 326-27.
[40] *Id.* at 327-33.
[41] 397 U.S. 552 (1970).
[42] *Id.* at 553-54.

to support.[43] The case was decided on statutory grounds, not on broad constitutional ones.

The states have long been concerned that AFDC recipients might take unjustified advantage of the program by reducing their work efforts. Many have required that recipients accept jobs if they are available, some specifying that the jobs must be "suitable" or "reasonable" and that child care arrangements must be available.[44] Some states have used this work requirement not only to lower welfare expenditures, but also to guarantee an ample supply of short-term labor, particularly during harvest time.[45]

In 1968, as the AFDC caseload expanded rapidly, Congress amended the Social Security Act to increase the incentives for recipients to seek employment. The amendments (*1*) reduced the tax rate on earnings implicit in the AFDC benefit schedule, (*2*) established the Work Incentive (WIN) Program, a manpower program designed specifically for AFDC recipients, and (*3*) required that the states refer all "appropriate" recipients to the WIN program.[46] Except for the explicit exclusion of (*1*) children under sixteen, or over sixteen and attending school, (*2*) people old, ill, or incapacitated or who live far from a WIN program, and (*3*) people needed in the home because of the illness or incapacity of someone in the household, "appropriate" recipients were not defined.[47] Unemployed fathers were to be given first priority for referral. Although the law did not require that mothers be referred to the WIN program, the states could impose such a requirement provided that adequate day care was available. If an appropriate recipient refused, without good cause, to participate in a WIN program or to accept a job, that individual was to be excluded in determining the amount of the family's AFDC benefit. The rest of the family, however, was to remain eligible for AFDC.[48]

A casual reading of the legislation would suggest that many adult recipients would be referred for WIN, but the requirement

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[43] *Id.* at 559-60.

[44] In 1967, 24 states had some sort of a work requirement. *See generally* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *supra* note 24.

[45] For an account of how welfare has been used to provide a source of low-wage labor, see F. PIVEN & R. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971).

[46] Act of Jan. 2, 1968, Pub. L. No. 90-248, tit. II, §§ 202(b), 444(a),(b), 81 Stat. 881, 884-89, 890 (codified at 42 U.S.C. §§ 602 (a)(8), (19), 630-44 (1970)).

[47] *Id.* § 444(b)(19)(A)(iv)-(vii) (codified at 42 U.S.C. § 602(a)(19)(A)(iv)-(vii) (1970), *as amended,* (Supp. II, 1972)).

[48] 45 C.F.R. § 233.11(d) (1973). The family unit still receives aid, but the amount of aid will be reduced since the standard of need for the unit is reduced.

that welfare agencies refer only those recipients judged "appropriate" has resulted in widely differing policies and probably a lower rate of referral than that anticipated by the framers of the law. Only one-quarter of the recipients who have been assessed for participation in WIN have been found appropriate for referral,[49] and even fewer actually have been referred. As might be expected, child care responsibilities and poor health have been the major reasons for a recipient being found inappropriate. Of those persons referred for WIN, less than three-fifths have actually enrolled in the program, while the remainder have been referred back to the welfare departments because they have been unsuitable, because slots have not been open, because they have failed to attend interviews, or because they have refused to participate in the program.[50]

Congressional disappointment with the WIN program stimulated the so-called Talmadge amendment of 1971.[51] The amendment requires that all AFDC mothers register for manpower services, training, and employment with the Department of Labor, except those who have children under six years of age or who are ill, disabled, or caring for someone who is ill or disabled.[52] Children aged sixteen or more who are not in school are also required to register as are all fathers.[53] In the first year of the new program, the number of people required to register was estimated to be 1.2 million.[54]

III

The Computation of AFDC Payments

The AFDC payments given to families who meet these eligibility requirements are determined by a complicated set of rules. Some of the rules are made by the federal government and are uniform nationwide, while others are made by the states and vary considerably. Broadly speaking, benefits are computed by comparing a family's "countable income" to a "cost standard," and by paying all or a part of the difference between them. This section

[49] S. Levitan, M. Rein & D. Marwick, Work and Welfare Go Together 93-94 (1972).

[50] *Id.* at 94-95.

[51] Act of Dec. 28, 1971, Pub. L. No. 92-223, 85 Stat. 803 (codified in scattered sections of 42 U.S.C. (Supp. II, 1972)). The amendment became effective on July 1, 1972.

[52] 42 U.S.C. § 602(a)(19) (Supp. II, 1972).

[53] *Id.*

[54] *Hearings on the Work Incentive Program Before the Senate Comm. on Finance*, 92d Cong., 2d Sess. 51 (1972).

will trace some of the changes that have occurred in the definition of countable income, in the development of cost standards, and in the methods used by some of the states to limit payments to less than the difference between them.

A. *The Definition of Countable Income*

The countable income of a family is the total income reported[55] by the family less specified amounts which can be deducted, or "disregarded."[56] Prior to the 1967 amendments, the income of AFDC recipients was disregarded only in limited circumstances and generally at the option of the states. In 1962, states were given the option of permitting "all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child."[57] In 1965, states were permitted to disregard $5 of income per month in computing the AFDC benefit. They were also given the option of disregarding the earnings of children up to $50 per child and $150 per household per month.[58] States were required to disregard work expenses, although they were left with responsibility for determining what may be counted as a work expense.[59] Finally, some income of AFDC recipients was disregarded according to the requirements of other programs, including the Economic Opportunity Act,[60] the Manpower Development and Training Act,[61] and the Elementary and Secondary Education Act.[62]

The 1967 amendments lowered the tax on the earnings of

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[55] All of a family's earnings and property income must be reported. Families must also report transfer income in cash or kind from private sources and cash payments from governments. In-kind transfers from governments such as the benefits from food stamps, public housing, and Medicaid are not reported as income. 45 C.F.R. § 233.20 (1973).

[56] The amount of income which may be disregarded is one of the primary determinants of the "tax rate" on income implicit in the AFDC payment schedule. The tax rate is the rate at which payments are reduced as income increases. When some of an increase in income is disregarded, the AFDC payment is reduced by less than the total increase in income. Disregards, in other words, lower the tax rate on income. The other determinant of the tax rate is the method used by the state to limit payments to less than the difference between the cost standard and countable income. These methods are discussed below. *See* notes 80-107 and accompanying text *infra.* For estimates of actual AFDC tax rates in 23 states see Lurie, *Estimates of Tax Rates in the AFDC Program,* XXVII NAT'L TAX J. 93 (1974).

[57] Act of July 25, 1962, Pub. L. No. 87-543, tit. I, § 106(b), 76 Stat. 188. As of 1973, 18 states had some sort of provision for exempting income for a child's future identifiable needs, which were usually defined as education or training. *See generally* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *supra* note 22.

[58] Act of July 30, 1965, Pub. L. No. 89-97, tit. IV, §§ 403(b), 410, 79 Stat. 418, 423.

[59] 42 U.S.C. § 602(a)(7) (1970).

[60] *Id.* §§ 2701-2994.

[61] *Id.* §§ 2571-2628.

[62] 20 U.S.C. §§ 241a-241*l*, 331a, 332a, 332b, 821-887b (1970).

AFDC recipients with the explicit objective of increasing the incentive to work.[63] The amendments require that the states disregard the first $30 of a family's earnings and one-third of the remainder each month in determining the amount of the payment.[64] No limitation is placed on the amount of earnings which must be subject to the one-third disregard. The amendments also require that all of the earnings of a child attending school full time or a part-time student who is not a full-time employee be disregarded completely.[65] The provisions of the law other than the Social Security Act requiring that earnings be disregarded were made ineffective. States could begin using the disregards immediately and were required to use them by July 1969.

The "$30 and one-third" rule and the other earnings disregards increased the AFDC payments made to families with earnings.[66] It also raised the earnings level at which a family's benefit falls to zero, or the "break-even point."[67] Therefore, al-

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[63] *See* 42 U.S.C. § 602 (1970).

[64] *Id.*

[65] *Id.*

[66] In other words, the increased disregards reduced the implicit tax rate on earnings. Connecticut, for example, had a cost standard of $257 in 1967 and paid the entire difference between this amount and a family's income. Payments were reduced by $1 for every dollar increase in income, and income was therefore taxed at a 100% rate. The $30 and one-third disregard would reduce the tax rate to zero on the first $30 and 67% on the remainder. Indiana, in comparison, had a cost standard of $271 for a family of four in 1967, but paid a maximum of only $103. Before the amendments, a family would receive $103 if its income was between zero and $168, implying a tax rate of zero on income within this range. Beyond $168, the payment would be reduced $1 for every dollar increase in earnings, implying a 100% tax on earnings. If the $30 and one-third disregard had been used with this cost standard and maximum, a family would have received $103 if its earnings were between zero and $282, implying a zero tax rate within that income range. Beyond $282, the payment would be reduced by 67 cents for every dollar increase in earnings.

[67] Furthermore, the earnings disregard raises the break-even point above the level of the cost standard. In designing the 1967 amendments, Congress either could have provided payments to all families whose income fell between the cost standard and the break-even point or limited payments to certain families within this range. The House Ways and Means Committee, in its *Report* on H.R. 12080 of August 7, 1967, stated that giving payments to all families whose income fell between the cost standard and the break-even point would cost $160 million a year more than the solution which was adopted. H.R. REP. No. 544, 90th Cong., 1st Sess. 107 (1967). The solution, chosen in the interest of economy, was to specify in the amendments that a family may not become eligible for AFDC until its income before deducting $30 of earnings and one-third of the remainder falls below the cost standard.

The $30 and one-third disregard is used to determine the amount of a family's payment but not its initial eligibility. The resulting inequity is that a family with a previous income below the cost standard but a current income above it may receive benefits, while a family with the same current income but no recent month with income below the cost standard cannot receive benefits. Nor is the second family eligible for Medicaid, unless the state provides Medicaid for the "medically needy." Families thus are provided an incentive for reducing their income temporarily below the cost standard in order to establish eligibility.

though they were designed to *reduce* welfare costs by increasing recipients' financial incentive to work, the 1967 amendments had the side effect of *increasing* the payments made to families with earnings and increasing the income level at which families leave the program.[68] Not surprisingly, this increase in the break-even point was followed by rapid growth in the AFDC caseload.

Federal law places no limitations on the amount of income subject to the $30 and one-third disregard in determining the payment.[69] The Supreme Court has ruled that states cannot impose such a limitation, nor can they cut off payments at some gross income level if this level is below the break-even point implied by the $30 and one-third disregard.[70] Some states, however, will not make payments which are below some minimum amount in order to avoid the relatively high administrative cost of keeping a family on welfare when its benefit is small.

The 1967 amendments did not alter the requirement that work expenses be taken into consideration in determining AFDC payments.[71] The issue that then arose was whether work expenses should be deducted from earnings before or after the deduction of $30 and one-third of remaining earnings. Under the federal individual income tax, the expenses of earning income are deducted from gross income in computing taxable income, which is considered the measure of the ability to pay taxes. If public assistance were to follow the same rule and use income net of work expenses as a measure of the need for welfare, work expenses would be deducted from earnings before the deduction of $30 of earnings

The amendment attempts to discourage the deliberate reduction of income by prohibiting the states from disregarding the earnings of persons who stop working or reduce their earnings "without good cause." 42 U.S.C. § 602(a)(8)(C) (2) (1970). This sanction has little force, however, because persons who stop working have no earnings to disregard.

[68] There is a fixed relationship between the payment made to families with no income, the tax rate on income, and the break-even point—the lower the tax rate, the higher the break-even point. For a full discussion of this relationship, see C. Green, Negative Taxes and the Poverty Problem 62-67 (1967).

[69] 42 U.S.C. § 602(a)(8) (1970).

[70] Engelman v. Amos, 404 U.S. 23, *aff'g per curiam* 333 F. Supp. 1109 (D.N.J. 1971), upheld this interpretation of the Social Security Act. At issue was New Jersey's "administrative ceiling" regulation. The regulation provided, in effect, that when the "available adjusted income" of a family exceeds a set amount, called the "administrative ceiling," the family is declared to be ineligible for AFDC. New Jersey Categorical Assistance Budget Manual § 615 (1969-70). In a per curiam opinion, the Court affirmed a district court decision in which the ceiling was held to be inconsistent with the Social Security Act because the state did not deduct from income the $30 and one-third earnings disregard as set forth by the Act and eligibility was determined on the basis of gross, instead of net, income. 404 U.S. at 23-24.

[71] *See* 42 U.S.C. § 602(a)(7) (1970).

and one-third of the remainder. However, HEW issued regulations requiring the states to deduct work expenses from earnings *after* \$30 and one-third of remaining earnings have been deducted.[72] Thus, in effect, recipients are completely reimbursed for their work expenses. Payments calculated by deducting work expenses from income after the deduction of the \$30 and one-third disregard will be greater than payments calculated by first deducting work expenses, the excess being an amount equal to one-third of work expenses.[73] This excess can be substantial even when work expenses are not unreasonably high,[74] and several states were slow to comply with the federal regulation concerning the treatment of work expenses. By the end of 1971, however, all states were obeying the regulation.

B. *Methods of Limiting Payments*

From the inception of the program, many states limited payments to less than the full difference between a family's countable income and the total income which the state determined it needed to achieve a satisfactory standard of living. A variety of methods have been used. Until 1951, states were permitted to have waiting lists for AFDC, and some families who were in need, according to the criteria established by the states themselves, were given no payments at all.[75] Since the early days of the program, some states have imposed a maximum on the amount that could be paid to a family, regardless of the difference between its income and need.[76]

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[72] 45 C.F.R. § 233.20(a)(7)(i) (1973).

[73] For example, assume a recipient earns \$90 per month and has work expenses of \$9. If the work expenses are deducted first, the recipient will have \$56 of his earnings disregarded (\$9 + \$30 + ⅓(\$90 − \$9 − \$30)). On the other hand, if work expenses are deducted after the application of the \$30 and one-third rule, the recipient may disregard \$59 (\$30 + ⅓(\$90 − \$30) + \$9). Of course, this differential becomes more important as the work expenses increase.

[74] For example, a family which spends \$100 on child care, \$30 on work clothes, and \$50 on taxes will receive \$60 more under the former method than under the latter.

[75] Eleven states had waiting lists, either statewide or in one or more localities, in 1947. *See* E. BURNS, *supra* note 9, at 323. Since July 1, 1951, aid has been required to "be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a) (10) (1970). This change was added pursuant to the 1950 amendments to the Social Security Act. Act of Aug. 28, 1950, ch. 809, § 321, 64 Stat. 551.

[76] In Dandridge v. Williams, 397 U.S. 471 (1970), the Court ruled that the maximum imposed by Maryland on a family's welfare benefit was not prohibited by the Social Security Act, even though the maximum was substantially less than the standard of need for large families. The plaintiffs argued that a maximum violated the equal protection clause of the Constitution (as well as the supremacy clause). The Court held that, so long as there is some "reasonable basis" for a state law or regulation, there is no violation of the equal protection

Some states continue this practice today. Another early method which is still used today is to pay a percentage of the difference between the family's countable income and its need.[77] A third method is to calculate the difference between income and need and then pay all families this difference less some stipulated amount. Recently, as will be described below, some states have adopted the practice of reducing the standard of need itself and paying families the full difference between income and the reduced standard.[78]

Although it may appear unreasonable that states should set cost standards and then give families less than the amount that they need according to those standards, a useful purpose is served by such a practice. By making the cost standard, which is used to determine eligibility, high relative to payment levels, the state can spread limited funds among more people. That is, the state can make relatively small payments to a large number of families.[79]

C. *Cost Standards*

The procedures used by the states to determine how much total income a family needs to achieve a satisfactory standard of living have become increasingly standardized. In the early days of the program, a family's income requirements were determined by asking each family how much it spent for food, clothing, housing, and other items. The discretion given the caseworker and the

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clause merely because the law is imperfect or unwise. *Id.* at 485-87. The Court gave great weight to Maryland's finite financial resources and found tbat this, coupled with other "legitimate state interests," provided a "reasonable basis" for the limit on benefits. *Id.* at 483-84, 486, 487.

[77] For a description of the use of both of these methods during the program's first decade, see E. Burns, *supra* note 9, at 326-31.

[78] In July 1972, 13 states paid the full difference between countable income and the cost standard; 10 states paid a percentage of the difference; 18 states imposed a maximum limit on the payment; one state reduced payments by a flat amount which varied by family size; and 18 states used a reduced cost standard. *See generally* U.S. Dep't of Health, Education & Welfare, State Maximums, Other Limitations, and Effect of Federal Matching Provisions on Public Assistance Money Payments, July 1972, Feb. 14, 1973 (NCSS Report D-3).

[79] Two of the methods used to limit payments also have the side effect of lowering the marginal tax rate on income. If recipients with no income are paid a maximum amount which is less than the cost standard, their income can increase with no reduction in the payment they receive until their countable income equals the difference between the maximum and the cost standard. This means that they are taxed at a zero rate within this range. The tax rate is also reduced if recipients are paid a percentage of the difference between their countable income and the cost standard. Because they are only paid a percentage of this difference, their payment is only reduced by a percentage of an increase in their countable income. Reducing the payment by a percentage of the increase in income is equivalent to taxing income at that percentage. In sum, the tax rate on income is lowered below 100% both by disregarding some items of income and by limiting payments in these two ways.

resulting inequities in treatment led the Federal Bureau of Public Assistance in 1947 to require the states to establish standards for the income needed to purchase basic consumption items. Over the next two decades, states established cost standards for food, clothing, personal care, and, in some states, for rent and other shelter costs. These standards generally varied according to the size of the family and the age, sex, and activities of its members. Considerable discretion and complexity remained, however, and in 1966 HEW required that the states establish a single cost standard for all basic items except shelter, with variation only by family size.[80]

The development of cost standards has not, however, removed all discretion from the caseworker. Many states recognize "special needs," such as special diets and transportation expenses, that arise for people in specified circumstances. Payments for special needs are made in addition to payments for basic needs and provide the flexibility to help families in unusual circumstances. Because reliable data are not collected on special needs, it is impossible to determine their importance as a share of total AFDC payments.

While HEW regulates the *form* of the states' cost standards, at no time has it regulated their level. In 1967, however, Congress required the states to update their cost standards to allow for changes in the cost of living. According to section 402(a)(23) of the Social Security Act, each state must

> provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.[81]

States are not required to continue updating their cost standards for inflation occurring after that date.[82] The responses of the

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[80] For a description of the development of cost standards, see Winston & White, *Simplifying Need Determination in Public Assistance*, 5 WELFARE IN REV. 1-5 (1967). Some states continue to vary standards according to the age of the family members.

[81] 42 U.S.C. § 602(a)(23) (1970).

[82] *Id.* Compliance with the amendment would require increased state expenditures of widely varying amounts. Requiring states to update their cost standards for inflation occurring "since such amounts were established" means that some states would have to increase standards by more, over the long run, than others. States which had recently increased their standards by amounts less than the increase in the cost of living would have to update less than states which had not recently updated and which would therefore have to update by an amount equal to the full iucrease in the cost of living. Furthermore, the

states, HEW, and the courts to this congressional mandate are described here. While these responses are only a small chapter in the history of AFDC, they are discussed in detail because they illustrate the reluctance of government to pursue policies which increase welfare costs.

The impact of section 402(a)(23) on the case load and on payments could have been staggering, because many states had not recently increased their cost standards to keep pace with the rising cost of living. Undersecretary of Health, Education, and Welfare Wilbur Cohen, testifying before the Senate Finance Committee in 1967, said that only twenty-five states had increased their standards within the previous two years and several had not changed their standards in ten years.[83] Increases in the standard would have made more families eligible, and if no restrictive compensating action were taken, such increases also would have raised payments to families already on the rolls.

HEW's desire to update cost standards did not survive the change in administrations. The Nixon Administration was reluctant to force the states to increase their cost standards at a time when welfare was already a growing financial burden and sweeping reforms were under consideration. The July 1, 1969, deadline for updating passed with little response by the states, and of the states which did respond, many did so incorrectly or inadequately. On July 25, 1969, HEW, after prodding from the National Welfare Rights Organization, listed thirty-nine states which had failed to comply with HEW's terms on updating.[84] Only in October 1969 did HEW give the states its interpretation of section 402(a)(23) and list the acceptable methods for determining the required increase in standards. The agency remained reluctant, however, to take action

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amendment takes no account of the variation in the level of prevailing benefits. Thus, if two states are required to update their standards by the same percentage, a high-benefit state will have to increase standards by a larger dollar amount than a low-benefit state. In this way, greater dollar increases in expenditures are required of states already making high payments than are required of states with low payments. In spite of the differential impact on the states, there was not much resistance by the states on the grounds that the amendment was inequitable. As the following discussion will show, states have been so successful in avoiding the major thrust of the amendment that they have not bothered contesting the details. *See* notes 83-107 and accompanying text *infra*.

[83] *Hearings on H.R. 12080 Before the Senate Comm. on Finance*, 90th Cong., 1st Sess., pt. 1, at 259 (1967) (statement of W. Cohen, Undersecretary, U.S. Dep't of Health, Education & Welfare).

[84] Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration*, 118 U. PA. L. REV. 1143, 1154 (1970).

against the noncomplying states. "[E]ssentially, the administrators were engaged not in implementing the law but in effectuating a delaying action."[85]

The October memorandum to the states left them with considerable discretion in interpreting the updating requirement and with the opportunity to devise ways of avoiding it. States desiring to resist making additional payments in response to the updating requirement had several approaches from which to choose, although it was not known whether any of them would be permissible. For example, in October 1967, twenty-seven states imposed a maximum on the amount that could be paid to a family and five paid a percentage of the difference between countable income and the cost standard. Four states paid the full difference between income and a percentage of the cost standard.[86]

States have interpreted section 402(a)(23) in several ways. All states eventually increased their cost standard, or what will be called below the "full" cost standard. In order to avoid a larger case load and higher benefits, however, many states have changed their method of determining payments and, indirectly, their method of determining eligibility. These changes have permitted states to reduce payments if they wish and to restrict eligibility. Welfare recipients have responded by challenging the states in the courts, and the issue has reached the Supreme Court twice, in *Rosado v. Wyman*[87] and *Jefferson v. Hackney*.[88]

Rosado v. Wyman, decided in April 1970, arose out of a change in the method by which New York computed the needs of welfare recipients. New York had calculated need as the sum of "basic needs," which reflected only the number and age of the children in the family, and "special needs," which varied according to the particular circumstances of the individual family. In 1969, it adopted a system fixing maximum allowances per family based on the number of family members. These maximums did not take into account the amounts which had previously been given for special needs, although a routine quarterly lump-sum payment was instituted in lieu of special needs grants. The net effect was to decrease benefits by about $40 million.[89]

In its decision invalidating the New York procedure, the

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[85] *Id.* at 1156.

[86] U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, MONEY PAYMENTS TO RECIPIENTS OF SPECIAL TYPES OF PUBLIC ASSISTANCE, OCTOBER 1967 at 24, table 4.

[87] 397 U.S. 397 (1970).

[88] 406 U.S. 535 (1972).

[89] 397 U.S. at 407.

Supreme Court made a distinction between changing the cost standard and changing the level of benefits. It ruled that section 402(a)(23) required states to increase *cost standards,* and that New York's lower standard therefore was not permissible.[90] But from an examination of the section's legislative history, the Court could find no clear indication that Congress intended states to increase *benefits.*

Congress had indeed rejected several amendments which would clearly have required increased benefits and instead chose language which was ambiguous.[91] But if states were not required to increase payments, what was Congress's purpose in updating the standards? The Supreme Court concluded that

> [i]t has the effect of requiring the States to recognize and accept the responsibility for those additional individuals whose income falls short of the standard of need as computed in light of economic realities and to place them among those eligible for the care and training provisions.[92]

In short, updating standards is supposed to increase the number of eligible families.

In order to avoid making higher payments, states could pay less than full need. They could continue to use maximums, provided that these were updated, or they could use a percentage reduction, also called a "ratable reduction." As the Court stated:

> A "ratable reduction" represents a fixed percentage of the standard of need that will be paid to all recipients. In the event that there is some income that is first deducted, the ratable reduction is applied to the amount by which the individual or family income *falls short of need.*[93]

But in response to the updating requirement, many states started to apply a ratable reduction to the *standard itself* instead of to the difference between income and the standard. They reduced the standard by some percentage and then made payments equal to the difference between income and this reduced standard. Obviously such a procedure could completely nullify the requirement that states update their cost standards.

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[90] *Id.* at 416, 419.

[91] As the Supreme Court stated eloquently, the intention of Congress could not be inferred from the legislative history of the bill:

> The background of § 402(a)(23) reveals little except that we have before us a child born of the silent union of legislative compromise. Thus, Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding.

Id. at 412.

[92] *Id.* at 413.

[93] *Id.* at 409 n.13 (emphasis added).

HEW supported this procedure, even though it appears to be in direct conflict with the meaning of section 402(a)(23). In January 1970, the Department issued State Letter 1074, which recognized that states were using a reduced standard and requested that states report both the "full" standard and the "payment level" or reduced standard.[94] States were given permission to compute the payment by comparing countable income to either the standard or the payment level. In taking this action, HEW accepted the states' method of avoiding the use of the updated standard.

HEW maintains that the full, and presumably updated, standard is used to determine eligibility and that the lower standard is used to determine the payment. It can thereby claim that states with two standards are complying with *Rosado v. Wyman*, which requires that states update their standard of eligibility but does not require them to increase payments.[95] HEW defines the full standard as

> the amount with which income from all sources is compared to determine whether or not [initial] financial eligibility exists. Use of the full standard for this purpose . . . is mandatory only for AFDC applicant families with earned income who have not received assistance in any of the four preceding months.[96]

Families which have not received AFDC within four months are not permitted to deduct $30 and one-third of remaining earnings when comparing income to the full standard.[97] If their countable income *before* the earnings disregard is less than the full standard, they are considered eligible. According to this HEW definition, "eligibility" does not mean that a family receives a payment, but only that it can deduct $30 and one-third of remaining earnings in determining whether it should receive a payment.[98]

The payment standard is defined as "the amount from which

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[94] U.S. Dep't of Health, Education & Welfare, State Letter No. 1074, Jan. 8, 1970 (on file at the *Cornell Law Review*).

[95] 397 U.S. at 412-15, 419.

[96] U.S. Dep't of Health, Education & Welfare, Public Assistance Programs: Standards for Basic Needs, July 1972, May 14, 1973, at 12 (NCSS Report D-2).

[97] *See* note 67 *supra*.

[98] *See* U.S. Dep't of Health, Education & Welfare, *supra* note 96, at 12. The rationale for this distinction is based on the concept of the $30 and one-third disregard as a work incentive for welfare recipients and not as an additional benefit for the working poor who are just over the eligibility limits. For example, if a state's full standard is $200 per month, a family which earns $225 per month would not be eligible for AFDC since it would not be eligible for the income disregard. However, if a member of a family which was already on AFDC began earning $225 per month, that family could still receive AFDC until its earned revenue level reached the break-even point. *See* note 67 *supra*.

income 'available for basic needs' is subtracted to determine the amount of assistance to which an individual or family is entitled."[99] Income available for basic needs is income less all permitted deductions, including the $30 and one-third earnings disregard. The state may pay all or part of the difference between the payment standard and income available for basic needs.

If the full standard is higher than the payment standard, which is the case when a ratable reduction is applied to the cost standard, a family which is eligible according to the full standard may not receive any payment. This situation will result when the family's income less disregards except the $30 and one-third disregard is less than the full standard, but its income less *all* disregards is greater than the payment standard.[100] A state may therefore update the full cost standard by the required amount, but deny payments to some families whose incomes are below the full standard. The legality of a ratably reduced cost standard came before the Supreme Court in *Jefferson v. Hackney*,[101] decided in May 1972. The Court held that a reduced cost standard was consistent with section 402(a)(23).[102] Mr. Justice Rehnquist, writing for the majority, indicated that the Court was unconvinced by the argument made in *Rosado* that, if the legislation is to have any meaning, the effect of updating cost standards is to increase the number of eligible families:

> The cost-of-living increase that Congress mandated would, of course, generally tend to increase eligibility, but there is nothing in the legislative history indicating that this was part of the statutory purpose. . . . The Court [in *Rosado*] mentioned widened eligibility simply as one of several possible effects that *might* follow from the statute as so construed.[103]

Justice Rehnquist wrote that the purpose of section 402(a)(23) stated in *Rosado* was to require the states to "lay bare the extent to which their programs fall short of fulfilling actual need; [and] . . . to prod the States to apportion their payments on a more equitable

[99] *See* U.S. Dep't of Health, Education & Welfare, *supra* note 96, at 12.

[100] For example, suppose the full standard is $400 per month and the payment standard is $200 per month. Assume further that the family earns $360 per month. The family would be "eligible" in the sense that it could deduct $30 of its earnings and one-third of the remainder in calculating its countable income. With this disregard, the family has countable income of $220 per month ($360 − $30 − ⅓($360 − $30)). But this is $20 more than the payment standard, and the family, although "eligible," will not receive any benefit.

[101] 406 U.S. 535 (1972).

[102] *Id.* at 539-45.

[103] *Id.* at 543-44 & n.11 (emphasis in original).

basis."[104] A ratably reduced cost standard, he argued, both exposes the level of unmet need and apportions the limited welfare benefits more equitably than the former system of maximum grants.[105] But, as the dissenters pointed out, a state which increases its cost standard and then determines both payments and eligibility on the basis of a reduced standard has done nothing more than a "meaningless exercise in bookkeeping."[106]

Although the updating requirement was contravened, the AFDC benefit schedule has been significantly and effectively liberalized since 1967. Many states increased their cost standards without compensating measures to limit payments, and all states with maximums increased them. As a result, payments to families with no income have increased in most states, and the income levels at which families become eligible have increased in all states. The most dramatic changes in the benefit schedule are due to the $30 and one-third earnings disregard, which has raised the earnings level at which families leave the program above the full cost standard, by a considerable amount in some states. Between 1967 and 1972, the earnings level at which families leave AFDC doubled in about twenty states and increased by more than fifty percent in many others.[107]

IV

Social Services and Training

While some social services have always been given to AFDC recipients in the process of administering the money payments, Congress did not provide for federal financial support of such social services until 1956. The 1962 amendments to the Social Security Act liberalized the federal matching provisions and per-

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[104] *Id.* at 542.

[105] *Id.* at 543.

[106] *Id.* at 567 (Marshall, J., dissenting). The Court was also asked to rule on a second issue. The standard for AFDC recipients is reduced to 75% of the full standard while it is reduced only to 95% of the full standard for the blind and disabled and not reduced at all for tbe aged. The plaintiffs claimed that this differential violated the equal protection clause, because the proportion of AFDC recipients who are black or Mexican-American is higher than the proportion of recipients in the adult categories. The Court did not regard the statistical evidence as establishing a prima facie case of discrimination in violation of the equal protection clause.

[107] *See generally* U.S. Dep't of Health, Education & Welfare, *supra* note 96; Lurie, *Legislative, Administrative, and Judicial Changes in the AFDC Program, 1967-1971* in Joint Economic Comm., 93d Cong., 1st Sess., Studies in Puplic Welfare (Comm. Print 1973).

mitted HEW to require the states to provide certain minimum services.[108] Services could be provided both to recipients and to people who were likely to become recipients. The 1967 amendments broadened the program of services that states were required to provide. These provisions emphasized services which would increase the employment of welfare recipients. Services such as employment counseling, job referral, employability testing, and day care were to complement the WIN program and the $30 and one-third earnings disregard. The states were specifically required to offer family planning information and services.[109] Because the states might not have the ability to provide services in sufficient quantity, they were given permission to purchase services from other sources, including government agencies and private organizations.[110] The amendments also required that services for AFDC families be furnished by the same organizational unit as that providing child welfare services.[111]

Traditionally, caseworkers in welfare agencies have administered money payments and provided social services as a single function. As the caseworker inquired about the family's financial situation, he would learn about its problems and attempt to help solve some of them. In providing social services, caseworkers often would gain additional information about the eligibility of the family and factors which could affect the amount of its payment. With the increased interest of professional social workers in working with welfare recipients and with the amendments providing the funds to pay them, the combined administration of payments and services began to appear undesirable. Trained social workers want to provide services, not compute welfare benefits, and the need to make welfare agencies attractive to them prompted HEW to favor separation of the administration of payments and services. Social workers also felt that their effectiveness would be reduced if recipients believed that information given to them could be used to reduce their payments or remove them from the rolls.

During the late 1960's, HEW encouraged separation by funding numerous demonstration projects. Although separation initially was voluntary, most states were willing to take some steps toward

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[108] Act of July 25, 1962, Pub. L. No. 87-543, § 101, 76 Stat. 173-82.

[109] Act of Jan. 2, 1968, Pub. L. No. 90-248, tit. II, § 201(a)(1)(C), 81 Stat. 877 (codified at 42 U.S.C. § 602(a)(15) (1970)).

[110] 42 U.S.C. §§ 602(a) (13), 603(a)(3) (1970).

[111] *Id.* § 602(a)(15)(F).

separation.[112] Administrative regulations issued by HEW made separation mandatory beginning January 1, 1973.[113]

The 1962 amendments increased the federal matching share of expenditures for services to seventy-five percent, available on an open-ended basis.[114] Federal expenditures for services grew slowly in the early 1960's, but accelerated rapidly during the end of the decade, rising from $230 million in 1968 to $535 million in 1970 and then to approximately $1.7 billion in 1972. Faced with projected expenditures of $4.7 billion in 1973,[115] Congress imposed a $2.5 billion ceiling on federal outlays for social services.[116]

It is difficult to determine to what extent these increased expenditures for services actually represent increased services provided to AFDC recipients. HEW staff members admit that these figures seriously overstate the amount of services delivered, and that most of the caseworkers' time is still spent determining eligibility and payment levels. The federal government pays seventy-five percent of the states' expenditures on services but only fifty percent of expenditures for administration,[117] so that states have an incentive to bill caseworkers' time as services instead of administration. Consequently, the actual amount of caseworkers' time devoted to services remains unknown.

Two other features of the federal law cause these data on expenditures to overstate the increase in services provided to welfare recipients. First, the federal government will fund services for people who are not on welfare but who are potential recipients. Second, services can be purchased from other government agencies and from private organizations. As a result, funds for social ser-

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[112] HEW reported that in April 1971, 16 states had completely separated the provision of services and payments and an additional 14 had achieved "substantial" separation. Only three states had reported no progress in this organizational change. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, SECOND ANNUAL REPORT TO THE CONGRESS ON SERVICES TO FAMILIES RECEIVING AFDC 9-10 (1971).

[113] 45 C.F.R. § 205.102 (1973). Separation is defined as "the administration and operation of the services function independently from the assistance payments function, with separate lines of authority for each function." *Id.* Coordination between the two functions is provided by the requirement that a single person at the state level be responsible for both.

[114] Act of July 25, 1962, Pub. L. No. 87-543, tit. 1, §§ 101(a)(2), (b)(2)(A), 76 Stat. 174, 180 (codified at 42 U.S.C. § 603(a)(3) (1970)).

[115] These expenditure data are from *Hearings on Open-Ended Federal Matching of State Social Service Expenditures Authorized Under the Public Assistance Titles of the Social Security Act Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.*, 92d Cong., 2d Sess., 6 (1972).

[116] The ceiling was imposed in an amendment to the State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (codified in scattered sections of 26, 31, 42 U.S.C.).

[117] 42 U.S.C. § 603(a)(3)(B) (1970).

vices under the public assistance titles can be used for services provided outside the welfare agencies that have little direct impact on welfare recipients. For example, funds can be given to correctional institutions and drug treatment centers even though the majority of the people served by those funds are not on welfare. In some places funds can be used to purchase day care services for women who are not on welfare. Published data do not permit an estimate of the extent to which expenditures for services are being used to help people who are not on welfare, but non-welfare services outlays may have become considerable in the past few years.

The effectiveness of social services in reducing welfare dependency has yet to be conclusively demonstrated. Even if all the expenditures billed as services were actually being used to provide services, they may have had little impact on the case load. One study found that social service activity in Wisconsin is "little more than a relatively infrequent, pleasant chat. It is somewhat supportive. It is rarely threatening but also not too meaningful in the sense of either helping poor people get things they need or in changing their lives."[118] Caseworkers were found to be useful in helping recipients take advantage of the Medicaid program, but had little else of a tangible nature to offer them.[119] Recipients' employability seemed unaffected by the services.[120] Other evaluations of the effect of services on welfare recipients confirm these findings.[121]

Increasing emphasis is being placed on training AFDC recipients in an attempt to reduce their need for welfare. Community work and training programs established in 1962 provided employment and training for welfare recipients, but states were not required to establish programs and few recipients participated. The WIN program established in 1967 was applied mandatorily to the states and, as discussed above, to certain AFDC recipients.[122] It was designed to provide on-the-job training, institutional and work experience training, work projects for people for whom a regular job cannot be found, and direct referral to jobs for people who do not require training. Coupled with the $30 and one-third earnings

[118] J. HANDLER & E. HOLLINGSWORTH, THE "DESERVING POOR," A STUDY OF WELFARE ADMINISTRATION 127 (1971).

[119] *Id.* at 126.

[120] *Id.* at 151-53.

[121] For a discussion of several other evaluations of social services, see S. LEVITAN, M. REIN & D. MARWICK, *supra* note 49, at 26-35.

[122] *See* notes 46-48 and accompanying text *supra*.

disregard, it was expected to increase the employment of welfare recipients significantly.

Experience with the WIN program has been disappointing to its framers. Only a small proportion of recipients were referred to the program.[123] Fewer were actually enrolled in WIN projects—only 317,000 people between October 1968, when the program began, and September 1971. Projects providing institutional training, including remedial education, have been most common. Few participants have received on-the-job training, and there has been almost no emphasis on creating jobs through special work projects.[124]

Of the 200,000 people who were no longer in the WIN program as of September 1971, the vast majority had not completed it successfully. Only one-fifth of the enrollees, 43,000, were placed in jobs and were considered to have successfully completed the program by remaining employed in the three-month to six-month period of "job entry."[125] Furthermore, some people placed in a job did not earn high enough wages to move them off the welfare rolls. From the beginning of the program through June 1972, 46,700 families left welfare because of employment or increased earnings due to participation in WIN. More than half of these families were receiving AFDC under the unemployed father segment and therefore were headed by a male.[126] Families headed by women, which comprise the bulk of the welfare population, had only a slim chance of being brought out of welfare dependency by the WIN program.

The Talmadge amendment,[127] stimulated by dissatisfaction with WIN, makes several significant changes in the program. The requirement that recipients register for the program has been described above.[128] To encourage the states to provide the supportive services recipients need to participate in the program, the

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[123] *See* notes 49-53 and accompanying text *supra*.

[124] S. Levitan, M. Rein & D. Marwick, *supra* note 49, at 84-88, 97.

[125] *Id.* at 97. The period of job entry, as defined by the Department of Labor, is the period after enrollees are placed in a job but before they terminate the program.

[126] These data refer to people who left welfare within six months of completing their training, or roughly during the period of "job entry." *See generally* U.S. Dep't of Health, Education & Welfare, Assessments Completed and Referrals to Manpower Agencies Under Work Incentive Program for AFDC Recipients, July 1969-June 1972 (NCSS Report E-5) (on file at the *Cornell Law Review*). Data for the July-September 1970 quarter were not reported and were interpolated from the preceding and following quarters.

[127] Act of Dec. 28, 1971, Pub. L. No. 92-223, 85 Stat. 803 (codified in scattered sections of 42 U.S.C. (Supp. II, 1972)).

[128] *See* notes 52-53 and accompanying text *supra*.

federal matching share for supportive services, including child care, is increased from 75 percent to 90 percent, and states are financially penalized if they provide supportive services to less than 15 percent of the people who register.[129] To place greater emphasis on employment-based training, at least 33 percent of WIN expenditures must be for on-the-job training and public service employment.[130] Finally, in order to encourage private employers to hire WIN participants, they are given a tax credit equal to 20 percent of wages paid to WIN participants in the first year of employment, provided those participants are retained on the job for a second year.[131] There has as yet been insufficient experience with "WIN II," as it is called, to determine whether it will be effective in reducing AFDC recipients' need for assistance.

V

THE ADMINISTRATION OF AFDC

Welfare administration traditionally has been a function of local government. Today, state governments administer the AFDC program in thirty states; in twenty states the program is administered by the counties under the supervision of the states.[132] In both cases, however, contact with applicants and recipients is made by the local welfare offices, which often have considerable control over how the program is administered. The ultimate administrative responsibility rests with the caseworkers who have direct contact with the applicants and recipients, and in some localities they are given considerable discretion in determining whether families are eligible for assistance and the amount of their payments. As a result, there are wide variations in the rules and procedures for determining eligibility and payments, both among and within states.

A. *The Simplified Method of Eligibility Determination*

The development of cost standards has considerably simplified the process of computing benefits. Fewer changes have been made in the procedure for obtaining information about applicants and recipients. Information is generally obtained by questioning applicants and recipients when they come to the welfare agency and by

[129] 42 U.S.C. § 603(c), (d)(1) (Supp. II, 1972).
[130] *Id.* § 31(b).
[131] INT. REV. CODE OF 1954, §§ 50A, 50B.
[132] U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *supra* note 22, at 1.

visiting their homes and attempting to verify the information they provide.[133] But this highly individualized treatment is costly, and in 1969, HEW required the states to test the "simplified method" of determining eligibility. The distinguishing features of the simplified method are that the statements of the applicant or recipient are to be accepted as true and are to be obtained by an application form, not a personal interview. However, concern over the large number of ineligible families receiving AFDC and the high rate of over-payment led HEW, in 1973, to revoke the regulations requiring eventual adoption of the simplified method.[134]

B. *Quality Control*

Decentralization, the wide discretion given to caseworkers, and the cumbersome methods used to obtain information from applicants and recipients provide considerable opportunity for error in determining eligibility and payments. In an effort to maintain this error within tolerable limits, HEW requires that the states have a system of "quality control." Quality control is the systematic review of the accuracy or quality of caseworkers' decisions on eligibility and payment levels. According to HEW, quality control is not designed to identify fraud by individual families in order to prosecute them. "It is concerned with individual case errors in the case sample only insofar as they reflect problems in overall agency administration that require corrective action."[135] As quality control in industry is designed to maintain the quality of the product being produced, so quality control in welfare is supposed to maintain and improve the administration of the program. Separate procedures have been developed to deal with fraud, which will be discussed later.[136]

States were first encouraged to have a quality control program in 1964, after a nationwide review of the eligibility of AFDC

[133] In Wyman v. James, 400 U.S. 309 (1971), the Court ruled that the periodic home visits by caseworkers in connection with AFDC were a reasonable administrative tool, which served a valid and proper administrative purpose. Such visits are not unwarranted invasions of personal privacy and violate no fourth amendment rights. The termination of assistance to a recipient who refuses to permit a caseworker in the home is therefore proper. *Id.* at 317-18, 324-25.

[134] For another account, see Lurie, *supra* note 107, at 95-96.

[135] U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, QUALITY CONTROL IN PUBLIC ASSISTANCE (QC MANUAL) I-1 (1972).

[136] *See* notes 153-58 and accompanying text *infra*.

families found that 5.4 percent of them were ineligible.[137] For the remainder of the 1960's, quality control consisted primarily of checking a sample of the caseworkers' records to determine whether the correct decisions had been made on the basis of information contained in the record. Recipients generally were not reinterviewed to check the accuracy of information in the record.

At the end of the decade, it became clear that quality control was not detecting inaccuracies in determinations of eligibility and payments. A quality control study in New York City in 1969 found an ineligibility rate of 1.2 percent, but the General Accounting Office reinterpreted the data and found a rate of 10.7 percent.[138] As a result of this study and others, HEW revised the quality control system that states were required to use. Adoption of the new system was required by October 1970.

The new system is described in the manual on quality control prepared for the states by HEW. According to the manual, quality control consists not only of analysis of case records but of investigations of the accuracy of information provided by applicants and recipients as well.[139] A sample of active cases and of negative case actions (rejections or terminations) is drawn every six months by the state, and a full field investigation is required for all active cases in the sample. The investigator must visit the home of the recipient for an interview. He can obtain information from the recipient's relatives, landlord, employers, past employers, school records, and probation department, or from the motor vehicle department, the Social Security Administration, the Internal Revenue Service, the employment service, and credit bureaus. The term "investigation" is an appropriate one. The recipient's word is not to be accepted as true, and investigators are encouraged to utilize all these sources of information in order to discover if the recipient is hiding resources, earnings, or other factors which might make him ineligible or change his level of benefits. Investigators should talk to recipients and analyze their behavior to obtain "leads" for further investiga-

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[137] Vernier & Mugge, *Findings of the AFDC Eligibility Review*, 1 WELFARE IN REV. 1 (1963).

[138] General Accounting Office, Report to the House Comm. on Ways and Means, Monitoring of Special Review of Aid to Families with Dependent Children in New York City, Conducted by the Department of Health, Education, and Welfare and the New York State Department of Social Services, Oct. 17, 1969, in *Hearings on Problems in Administration of Public Welfare Programs Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.*, 92d Cong., 2d Sess. 12-14 (1972).

[139] *See generally* QC MANUAL, *supra* note 135.

tion. The recipient's consent for securing this collateral information should be obtained, but collateral sources of information can be consulted without the recipient's consent if the information sought is necessary for a definitive determination of eligibility and payment.[140]

The review of terminated cases and denied applications does not require a field investigation if examination of the case record indicates that the termination or rejection was appropriate. A field investigation is required only if analysis of the case record does not substantiate the correctness of the action. In contrast to the review of active cases, which can reveal overpayments and ineligibility which are costly to the government, the review of rejected or terminated families reveals incorrect decisions in which only the family loses. Although the quality control reviewer should notify the local agency when an error is discovered so that the agency can notify the family to reapply, quality control is more concerned with saving the government money than with providing welfare to all people who qualify.

The system is supposed to determine both the extent to which recipients are ineligible and assistance is erroneously denied to eligible persons and the extent of overpayments and underpayments. HEW requires that the states keep the rates of error discovered below certain "tolerance limits."[141] The limits are set at three percent for eligibility errors and five percent for payment errors.[142] When the rate of error exceeds these limits, the states must change their programs to improve the accuracy of their decisions.[143]

States have been slow to implement the quality control system. Two years after quality control became mandatory, one-third of the states did not have fully operational systems.[144] Furthermore, the rates of error are considerably greater than the "tolerance limits" set by HEW. In March 1972, 6.8 percent of the families receiving AFDC were found to be ineligible.[145] Overpayments were

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[140] *Id.*

[141] *Id.* at IV-1.

[142] *Id.*

[143] *Id.* at IV-4 to -6.

[144] U.S. Dep't of Health, Education & Welfare Press Release, Dec. 4, 1972. The General Accounting Office reviewed the operation of quality control in eight states in 1971. Their findings are reported in General Accounting Office, Report to the Congress, Problems in Attaining Integrity in Welfare Programs, March 16, 1972, in *Hearings on Problems in Administration of Public Welfare Programs*, *supra* note 138, at 17-20.

[145] U.S. Dep't of Health, Education & Welfare Press Release, Dec. 4, 1972.

made to 13.8 percent of the families and averaged $45 a month. Underpayments were made to 7.6 percent and averaged $27.[146] The welfare agencies and the families were each responsible for half of the errors made.[147]

This high rate of error led HEW, on December 4, 1972, to announce that the federal government would no longer finance payments made to ineligible cases and overpayments to eligible cases.[148] The elimination of federal funding for these cases was to become effective January 1, 1973, leaving the states virtually no time for adjustment. Faced with a reduction in federal funds of $689 million over an eighteen-month period, the states actively opposed the new regulation.[149] HEW responded by amending the regulation, which now provides that federal financing of payments to ineligible cases and of overpayments will gradually be reduced until January 1, 1975.[150] At that time, no federal funds will be available for payments involving error in excess of the quality control tolerance limits.[151] The new regulation also establishes the principle that federal funds are only available for payments made in accordance with the states' own eligibility standards.[152] Previously, federal funds were available to individuals who were ineligible under state standards but who would have been eligible if the state standards were as broad as permitted by federal law.

C. *Fraud*

Responsibility for defining, preventing, and prosecuting fraud rested entirely with the states during the first twenty-five years of the federal public assistance programs. In 1961, in response to press reports about fraud which could neither be substantiated nor refuted, HEW issued guidelines for state policies and procedures with respect to fraud. These guidelines required the states to establish a policy to deal with fraud, although they did not specify the details of such a policy. States responded with a wide variety of definitions of fraud, administrative procedures, investigatory methods, and other features of fraud control. As with most other features of public assistance, the peculiarities of each state have led

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[146] *Id.*
[147] *Id.*
[148] 37 Fed. Reg. 25,853 (1972).
[149] Thirty-four states and jurisdictions hired a law firm to contest the regulation, a highly unusual step. N.Y. Times, April 5, 1973, at 21, col. 3-4.
[150] 45 C.F.R. § 205.41 (1973).
[151] *Id.*
[152] *Id.*

to wide variation in their concern about fraud and procedures to deal with it.[153]

Since 1964, HEW has required the states to report annually on their methods of dealing with recipient fraud and the number of processed cases involving questions of fraud. States must report on the total number of cases suspected of fraud, the cases referred to law enforcement officials, and the cases prosecuted. They do not report on convictions, so that it is not known how many families were legally determined to have behaved fraudulently.

The data reported, if taken at face value, suggest that fraud is not widespread in the AFDC program. In 1964, three percent of AFDC cases were reported as involving a possible question of fraud.[154] By 1972, only two percent of the case load, or 58,850 cases, were so reported. In the latter year, the facts were sufficient to raise a question of fraud in 30,036 cases, 17,125 cases were referred to law enforcement officials, and only 7,583 were prosecuted.[155]

There is some evidence to suggest, however, that these data are not good indicators of the actual extent of fraud in AFDC. Many agencies do not refer cases to law enforcement officials if the amounts of money involved are small, if reimbursement can be arranged, or if there is special hardship. Many law enforcement officials do not prosecute for the same reasons.[156] The data on fraud also appear to be of questionable accuracy when compared to information obtained by the quality control investigations. In 1972, 2 percent of the AFDC case load was reported to involve a possible question of fraud, and in about one-half of these cases the facts were sufficient to support a question of fraud.[157] Quality control investigations in 1972 showed that 15.3 percent of the AFDC families made some sort of an "error" in providing information to the welfare agencies.[158] Many of these errors do not constitute fraud, but are unintentional mistakes made by poorly educated people who are understandably confused by the complex rules and procedures of welfare. The number of deliberate errors is un-

[153] For a history of policies toward fraud, see U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, DEVELOPMENTS IN DEALING WITH QUESTIONS OF RECIPIENT FRAUD IN PUBLIC ASSISTANCE 1951-1967 (1969).

[154] *Id.* at 9.

[155] U.S. Dep't of Health, Education & Welfare, Disposition of Public Assistance Cases Involving a Question of Fraud, Fiscal Year 1972, June 19, 1973, table 1 (NCSS Report E-7).

[156] *Id.* at 6.

[157] *Id.* table 1.

[158] U.S. Dep't of Health, Education & Welfare Press Release, Dec. 4, 1972.

known, but it seems unlikely that questions of fraud would account for only 7 percent of the errors found by quality control, which would be the case if the data on fraud reported to HEW were accurate.

The inadequacy of the data lies not solely with the reporting system but also involves substantive issues concerning government policy toward fraud. A relatively passive policy toward fraud leaves the AFDC program vulnerable to charges that fraud is widespread. Welfare fraud can easily become a political issue, and ignorance about the extent of fraud weakens public support for the program. On the other hand, the development of a clear and uniform definition of fraud and of enforcement procedures is hampered by a reluctance to make criminals out of poor people who are trying to get a few more dollars from an inadequate and inequitable welfare system. Requiring caseworkers to refer all cases of suspected fraud to law enforcement officials, regardless of special circumstances surrounding the case, eliminates a type of caseworker discretion that could be desirable. Furthermore, law enforcement agencies are often unwilling to go through lengthy and costly prosecution procedures for the small amounts of money involved in any one case. These costs of exposing and prosecuting fraud help explain the low rate of reported fraud in AFDC.

Conclusion

After reviewing the structural changes in AFDC, one must conclude that, on balance, they have contributed to the growth in case loads and costs. Many of the criteria used to determine eligibility have been broadened, cost standards have been raised, the definition of income has been liberalized, and states have been encouraged to increase their expenditures for services and training. In contrast, the WIN program, the Talmadge amendment, and the quality control system have raised expenditures, but have not, as yet, had a significant effect in reducing the size of the program. It is therefore inaccurate to attribute the increase in welfare dependency and costs solely to changes in the behavior of the poor. Governments have been responsible also and deserve their share of the blame or praise.