

# 1975 Developments in Welfare Law-Aid to Families With Dependent Children

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# 1975 DEVELOPMENTS IN WELFARE LAW—AID TO FAMILIES WITH DEPENDENT CHILDREN

With the financial collapse of New York City in 1975, pleas for reduced welfare expenditures intensified.<sup>1</sup> Efforts by the states to narrow the scope of Aid to Families with Dependent Children (AFDC) included restrictive legislation designed to limit the class of eligible recipients,<sup>2</sup> force employable recipients into the labor market,<sup>3</sup> disregard the actual motives of recipients who reduced their assets by applying presumptions of fraudulent intent,<sup>4</sup> and decrease income exemptions.<sup>5</sup> Congress and the Department of Health, Education and Welfare (HEW) also took measures to reduce costs by attempting to enforce child support obligations,<sup>6</sup> restrict resource exemptions,<sup>7</sup> and decrease administrative errors.<sup>8</sup> In general, the courts resisted such cost-saving devices when they conflicted with the interests of individual recipients<sup>9</sup> or unduly narrowed the class of beneficiaries.<sup>10</sup> This Note surveys these recent developments in the AFDC program.<sup>11</sup>

## I

### QUALITY CONTROL

There were significant developments in 1975 in federal efforts to reduce erroneous payments and eligibility determinations made by states participating in the AFDC program. HEW continued in its efforts, which began in the early nineteen-sixties,<sup>12</sup> to protect the federal treasury from incorrect state-authorized payments by promulgating new quality control regulations.<sup>13</sup> These regulations

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<sup>1</sup> N.Y. Times, Jan. 4, 1976, § 1, at 1, col. 8; *id.* Sept. 15, 1975, § 1, at 1, col. 5; *id.* Oct. 17, 1975, § 1, at 1, col. 6.

<sup>2</sup> See notes 227, 249, 298 and accompanying text *infra*.

<sup>3</sup> See notes 284-85 and accompanying text *infra*.

<sup>4</sup> See note 189 and accompanying text *infra*.

<sup>5</sup> See note 78 and accompanying text *infra*.

<sup>6</sup> See notes 164-71 and accompanying text *infra*.

<sup>7</sup> See notes 58-62 and accompanying text *infra*.

<sup>8</sup> See note 13 and accompanying text *infra*.

<sup>9</sup> See generally notes 53-97, 219-319 and accompanying text *infra*.

<sup>10</sup> See generally notes 219-319 and accompanying text *infra*.

<sup>11</sup> The following survey parallels in format and serves to update Note, *1974 Developments in Welfare Law—Aid to Families With Dependent Children*, 60 CORNELL L. REV. 857 (1975).

<sup>12</sup> See Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825, 852-53 (1974).

<sup>13</sup> 45 C.F.R. §§ 205.40-.41 (1975) (quality control and federal financial participation); *id.* § 206.10 (eligibility determination); *id.* § 233.10 (coverage and eligibility).

furthered the development of standards for evaluating the accuracy of administrative decisions on AFDC claims.

The quality control system in AFDC is designed to identify and reduce the incidence of incorrect determinations through the use of a statistically reliable sample of cases. By 1976, states must reach a target level case error<sup>14</sup> rate of three percent for ineligibility, five percent for overpayments, and five percent for underpayments.<sup>15</sup> To the extent that a state's positive error rate exceeds the tolerance levels for ineligibility and overpayment, a fiscal sanction of withholding federal matching funds is imposed.<sup>16</sup>

The 1975 revisions of the quality control program introduced several major changes. The former regulations made no attempt to provide workable definitions of such key concepts as "case error," "overpayment," and "ineligibility." In order to eliminate the resulting confusion, the new regulations introduce definitions of these and other terms.<sup>17</sup> These definitions should resolve a number of

<sup>14</sup> "Case error" is defined in the new regulation as "an overpayment, underpayment or payment for ineligibility, as defined in this section." *Id.* § 205.40(a)(2). See notes 20-21 and accompanying text *infra*.

<sup>15</sup> 45 C.F.R. § 205.41(a) (1975).

<sup>16</sup> *Id.* §§ 205.41(b)-(c). For the purpose of determining the amount to be excluded from the federal share when the penalty is imposed, case error rates for ineligibility and overpayments (percentages) are converted into dollar amounts. *Id.* § 205.41(d). Payments for emergency assistance, AFDC foster care and presumptive eligibility, and vendor payments are excluded from the penalty provision. *Id.*

No penalty is imposed for failure to reach the underpayment tolerance level. Moreover, states are not even required to report erroneous denials or terminations of assistance. The emphasis of the quality control program is on positive errors, which deplete the federal treasury. Although HEW contends that the quality control program is designed to serve the dual purposes of maintaining the integrity of the public fisc and assuring that states devote their limited resources to eligible individuals (see 40 Fed. Reg. 21,737 (1975)), the principal objective of the program, as it is currently designed, is not to encourage accuracy but to reduce expenditures.

AFDC quality control has also been sharply criticized for its failure to provide incentives for reducing negative errors. See Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 808-09 (1974). Although HEW has agreed to consider the suggestion, drawn in response to its new regulations, that states whose underpayment rates are less than the 5% tolerance level be allowed to offset underpayments against ineligibility and overpayment disallowances (see 40 Fed. Reg. 32,956 (1975)), its present position is that underpayments will be corrected by the states in the process of reducing overpayments. 39 Fed. Reg. 37,195 (1974). Available statistics, however, do not support this optimism. STAFF OF JOINT ECONOMIC COMM., 93D CONG., 2D SESS., HANDBOOK OF PUBLIC INCOME TRANSFER PROGRAMS: 1975, at 160 (Joint Comm. Print 1974) [hereinafter cited as HANDBOOK]. Moreover, it has been argued that the unavoidable result of interest in and sanctions for positive errors will be an increase in negative errors, because all doubts will be resolved against the recipient. Mashaw, *supra*, at 809.

<sup>17</sup> 45 C.F.R. § 205.40(a) (1975).

issues encountered under the prior system. For example, it is now clear that a payment to a household in which no member is eligible for assistance constitutes an erroneous determination of eligibility, whereas a payment to an entire household in which some but not all of the members are eligible is an overpayment.<sup>18</sup> Payments less than five dollars in error need no longer be reported as case errors.<sup>19</sup>

In an effort to furnish standards for determining when a case error exists and avoid penalizing states for reasonable delays, an administrative grace period has been established during which states will not be subject to fiscal sanctions for failing to adjust for changes in a recipient's circumstances.<sup>20</sup> After the change occurs, the states are given an additional month in which to discover and correct the error, unless a fair hearing has been requested prior to termination or reduction of assistance. A fair hearing decision affecting the recipient's eligibility or benefit level is considered a change in circumstances for purposes of the grace period; the state then has roughly one month in which to adjust the recipient's grant.<sup>21</sup>

The new regulations, by changing the standard against which quality control reviewers compare actual assistance determinations, also afford the states somewhat greater flexibility in altering their AFDC plans. Quality control reviewers, in determining whether a case error has been made, must now compare the state's determinations in the sample group to "permissible state practices,"<sup>22</sup> as defined in the regulations,<sup>23</sup> rather than to the state plan, as formerly required. As a result, states are now able to put proposed AFDC

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<sup>18</sup> *Id.* §§ 205.40(a)(3)-(4).

<sup>19</sup> *Id.* §§ 205.40(a)(4)-(5).

<sup>20</sup> *Id.* § 205.40(a)(2). Although *id.* § 206.10(a)(9)(ii) (1975) requires prompt reconsideration of a case only where the welfare agency has knowledge of the recipient's change in circumstances, the grace period begins to run in the month immediately following the month in which the change actually occurs, notwithstanding the agency's lack of knowledge of the change. For example, if there is an increase in a recipient's wages in June, the agency has until August 1 to adjust his grant before overpayments will be counted as case errors. Whether the agency discovers the increase by August 1 is immaterial. Reconsideration of the case, however, is not required until the agency actually discovers the increase in wages. A knowledge provision was omitted from the grace period in order to encourage states to develop methods of detecting changes in a recipient's circumstances. 40 Fed. Reg. 32,954-55 (1975).

<sup>21</sup> 45 C.F.R. § 205.40(a)(2) (1975). The practice of allowing the states a limited period of time in which to correct errors and avoid financial penalties is based on the realization that states need time to discover changes in a recipient's circumstances and to make appropriate adjustments. *See* 40 Fed. Reg. 32,954 (1975). With respect to hearing decisions, however, states do not need additional time in which to discover the "change in circumstances." No reason exists, other than the simplicity of a uniform rule, for allowing states a full month or more in which to respond to hearing decisions without incurring fiscal sanctions.

<sup>22</sup> 45 C.F.R. § 205.40(a) (1975).

<sup>23</sup> *Id.* § 205.40(a)(7).

amendments or regulations into effect without having assistance payments based on the new rules classified as case errors.<sup>24</sup>

Anticipating the impact of cutbacks in federal funding for administrative errors in excess of the tolerance levels, some states have attempted to impose full financial responsibility for case errors on the local agencies actually making the eligibility and payment decisions. California, for example, instituted a practice of requiring its counties to reimburse the state for the percentage of state and federal contributions lost to erroneous welfare payments.<sup>25</sup> The extent of the states' power to fix responsibility for case errors upon local governments, in an attempt to increase the accuracy of administrative decisions, is an unresolved question which promises to receive increased attention as the full quality control penalties become operative in 1976. To date, *County of Marin v. Martin*<sup>26</sup> is the only reported case to directly address this issue. In *County of Marin*, a California state court, construing the federal regulations as well as state law to place "at least a substantial part of blame for the administrative errors at issue"<sup>27</sup> upon the state, rejected the state's attempt to shift the responsibility for erroneous payments to the county welfare agencies. The court, however, reserved the question of whether the responsibility for improper welfare payments could be apportioned in a reasonable and equitable manner among federal, state, and local agencies.<sup>28</sup>

## II

### DISALLOWANCE PROCEDURES

Under the Social Security Act, states wishing to participate in the federal AFDC program must submit a plan to the Secretary of HEW for approval.<sup>29</sup> Once approved, federal funds are furnished until the state plan is formally disapproved.<sup>30</sup> If at any point its plan

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<sup>24</sup> *Id.*; 40 Fed. Reg. 32,955 (1975). If the proposals are not approved by HEW, the federal government follows its normal practice of withholding its share of the payments made under the proposals.

<sup>25</sup> See *County of Marin v. Martin*, 43 Cal. App. 3d 1, 6-7, 117 Cal. Rptr. 364, 368 (1st Dist. 1974).

<sup>26</sup> 43 Cal. App. 3d 1, 117 Cal. Rptr. 364 (1st Dist. 1974).

<sup>27</sup> *Id.* at 8, 117 Cal. Rptr. at 369. The court relied on 45 C.F.R. § 201.10(b) (1975) (requiring states to carry out an approved quality control program), and *id.* §§ 205.200-202 (requiring states to fix standards for employment, training, and conduct of local personnel).

<sup>28</sup> 43 Cal. App. 3d at 10, 117 Cal. Rptr. at 370.

<sup>29</sup> 42 U.S.C. § 601 (1970); 45 C.F.R. § 201.3 (1975).

<sup>30</sup> 42 U.S.C. § 604(a) (1970). Federal regulations require each state to submit all relevant changes in its AFDC program to HEW for review. 45 C.F.R. § 201.3(f) (1975).

is disapproved, a state is given notice of alleged noncompliance with minimum federal standards and an opportunity for a hearing.<sup>31</sup> Federal funds are discontinued if after notice and hearing the state plan is found not to conform to federal requirements.<sup>32</sup> The administrative procedures to which a state is entitled before federal funding is cut off are outlined in the Social Security Act<sup>33</sup> and in regulations promulgated by HEW.<sup>34</sup>

Federal funding under approved state plans is not, however, unrestricted. Fiscal sanctions are imposed by several provisions of the Act<sup>35</sup> and by HEW<sup>36</sup> for a state's failure to satisfy specific federal requirements. Designed to provide incentives for complying with these requirements while avoiding the harsh result of cutting off federal funds entirely, these penalty provisions reduce the amount of federal reimbursement that noncomplying states may claim.<sup>37</sup> For example, as of January 1, 1977, a state may lose five percent of its federal AFDC subsidy for failing to maintain an effective program for child support.<sup>38</sup> And under the quality control program, states with positive error rates exceeding the tolerance levels established by HEW are subject to financial penalties.<sup>39</sup>

Since reducing federal funding to force states to comply with federal requirements is a relatively new development in the AFDC program, there is no statutory requirement for notice and hearing in cases where the federal share of AFDC payments is reduced, rather than terminated.<sup>40</sup> In 1975, administrative procedures for reconsidering federal reductions were formalized for the first time by HEW.<sup>41</sup>

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<sup>31</sup> 42 U.S.C. §§ 604(a), 1316(a) (1970).

<sup>32</sup> *Id.* Only once has HEW actually withheld federal funds from a state after a formal hearing. Because the sanction is drastic, the agency is extremely reluctant to exercise its power. Instead, HEW usually attempts to secure compliance through informal negotiations. See *Rosaldo v. Wyman*, 397 U.S. 397, 426 (1970) (concurring opinion, Douglas, J.); G. COOPER & P. DODYK, *CASES AND MATERIALS ON INCOME MAINTENANCE* 343, 352 (2d ed. 1973).

<sup>33</sup> 42 U.S.C. § 604(a) (1970).

<sup>34</sup> 45 C.F.R. § 213 (1975).

<sup>35</sup> In addition to the reduction provisions for child support and quality control programs (see notes 38-39 and accompanying text *infra*), the federal share of AFDC payments may be reduced for failure to certify to the local employment office at least 15% of the Work Incentive Program registrants (42 U.S.C. § 603(c) (1970)), for failure to provide family planning services to AFDC recipients (42 U.S.C. § 603(f) (Supp. IV, 1974)), and for failure to furnish child health screening and corrective treatment services (*id.* § 603(g)).

<sup>36</sup> 45 C.F.R. §§ 205.41(b)-(c) (1975).

<sup>37</sup> See 42 U.S.C. § 603 (1970 & Supp. IV, 1974); 45 C.F.R. §§ 205.41(b)-(c) (1975).

<sup>38</sup> 42 U.S.C. § 603(h) (Supp. IV, 1974). See note 164 and accompanying text *infra*.

<sup>39</sup> 45 C.F.R. §§ 205.41(b)-(c) (1975).

<sup>40</sup> See 42 U.S.C. § 1316(d) (1970).

<sup>41</sup> 45 C.F.R. § 201.14 (1975). The new procedures apply to any reduction in federal

Under the new reconsideration procedures, a state whose claim for federal funds is partially denied by the Regional Commissioner of the Social and Rehabilitation Service (SRS) is issued a disallowance letter, explaining in detail the reasons for the reduction and the evidence used to reach the decision.<sup>42</sup> If the state is dissatisfied with the reduction in its grant, it may request reconsideration from the Administrator of SRS.<sup>43</sup> The Regional Commissioner forwards a record of all material bearing on the reconsideration to the Administrator, who in turn informs the state of all items in the record.<sup>44</sup> The state may submit additional written evidence and arguments in support of its request for reconsideration,<sup>45</sup> and may obtain an informal conference with the Administrator to explain its position.<sup>46</sup> If the Administrator requests additional information or documents, these materials are made available to the state.<sup>47</sup> All of the documents, correspondence, and other materials constitute the record of the reconsideration proceedings,<sup>48</sup> upon which the Administrator's final decision is based.<sup>49</sup>

The procedures for reconsidering disallowances are less exacting than the procedures for discontinuing federal funds entirely.<sup>50</sup> Formal adjudicatory proceedings, including the opportunity to confront and cross-examine witnesses and present oral argument, are not available to states contesting reductions.<sup>51</sup> Doubts have been expressed as to whether the new procedures comport with the due process clause;<sup>52</sup> at this point, the issue remains unresolved.

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funding authorized by §§ 3, 403, 422, 455, 603, 1003, 1403, 1603, 1903, or 2003 of the Social Security Act. *Id.* It is not clear whether the new procedures will also be applied to reductions under the quality control program. *See id.* § 205.41(b)-(c) (1975); note 16 and accompanying text *supra*.

<sup>42</sup> 45 C.F.R. § 201.14(b) (1975).

<sup>43</sup> *Id.* § 201.14(c).

<sup>44</sup> *Id.* §§ 201.14(d)(2)-(3).

<sup>45</sup> *Id.* § 201.14(d)(4).

<sup>46</sup> *Id.* § 201.14(d)(7).

<sup>47</sup> *Id.* § 201.14(d)(9).

<sup>48</sup> *Id.* § 201.14(d)(10).

<sup>49</sup> *Id.* § 201.14(d)(11). According to HEW, a state may obtain judicial review of the Administrator's decision in the United States Courts of Appeals pursuant to 42 U.S.C. §§ 1316(3)-(4) (1970). *See* 40 Fed. Reg. 34,597 (1975).

<sup>50</sup> Compare 45 C.F.R. § 213 (1975) (conformity hearing procedures) with 45 C.F.R. § 201.14 (1975) (procedures for reconsidering reductions in federal funding).

<sup>51</sup> *See* 45 C.F.R. § 201.14 (1975).

<sup>52</sup> It was argued when the regulation was proposed that the due process clause requires additional procedures, such as the right to confront and cross-examine witnesses, and engage in formal oral arguments. 40 Fed. Reg. 34,597 (1975).

## III

## ELIGIBILITY CONDITIONS RELATED TO NEED

A. *Federal Control Over Need and Amount of Assistance*

In determining whether a household is financially eligible for AFDC, and, if so, how much it should receive, a state must take into consideration all of the household's currently available income and resources, unless the income or resource is expressly exempted by federal law.<sup>53</sup> One such exemption is the reserve rule.<sup>54</sup> That provision permits states to exclude some of the applicant's resources in determining need, thus allowing individuals to qualify for assistance while retaining minimal assets.<sup>55</sup>

Until 1975, federal control over the amount and type of resources that AFDC recipients could reserve was minimal. This was in keeping with the well-established federal policy of leaving determinations of need and amount of assistance to the individual states.<sup>56</sup> The applicable regulation simply provided that in addition to the home, personal effects, automobile, and income-producing property allowed by the state, the resources reserved to meet the household's current and future needs could not exceed a value of \$2,000 per individual.<sup>57</sup>

In 1975, HEW promulgated a more detailed resource regulation, intended to make major changes in the resource limit for AFDC recipients and decrease state discretion in determining who is

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<sup>53</sup> 42 U.S.C. §§ 602(a)(7), (a)(8)(B)(i) (1970); 45 C.F.R. § 233.20(a)(3)(ii) (1975). The household's nonexempt or "countable" income may not exceed the "standard of need" defined by the state. The standard of need represents the amounts needed to purchase basic maintenance items, such as food, shelter, utilities, clothing, and furniture, and typically varies with the number of persons in the household, number of rooms occupied, and other factors. In general, AFDC benefits are computed by comparing the household's total nonexempt income and resources to the state's standard of need; all or part of the difference is paid to the household. See generally HANDBOOK, *supra* note 16, at 145-47, 149-51, 161-63; G. COOPER & P. DODYK, *supra* note 32, at 259-60.

<sup>54</sup> 42 U.S.C. § 602(a)(8)(B)(i) (1970); 45 C.F.R. § 233.20(a)(3)(i) (1975).

<sup>55</sup> Such a reserve is exempt, having no effect on the individual's eligibility for AFDC or his payment level. 45 C.F.R. § 233.20(a)(3)(i) (1975).

<sup>56</sup> See *King v. Smith*, 392 U.S. 309, 318-19 (1968). Although states exercise considerable discretion in defining need, federal regulations place some limitations on that discretion. See, e.g., 45 C.F.R. § 233.20 (1975).

<sup>57</sup> 45 C.F.R. § 233.20(a)(3)(i) (1974) (repealed). The states vary considerably in the extent to which and the conditions under which the home, automobiles, insurance, income-producing property, and other real and personal property may be held by AFDC recipients. See HANDBOOK, *supra* note 16, at 146-47, 158-59.

needy.<sup>58</sup> The federal ceiling on the amount of personal property that may be reserved dropped by almost one-fourth to \$2,250 for a family of four, with an additional one hundred dollars for each additional eligible individual.<sup>59</sup> Market values must be attached to personal effects and income-producing property and counted against the reserve ceiling.<sup>60</sup> The items excluded from the personal property reserve are limited to the reasonable value of a home, wedding and engagement rings, heirlooms, car of limited value, and equipment and material necessary for employment or rehabilitation.<sup>61</sup> For the first time, a ceiling of \$1,200 is placed on the value of an automobile needed for employment or training; if its retail value exceeds \$1,200, the excess value is counted against the personal property reserve.<sup>62</sup>

Essentially two reasons were given by HEW for the more restrictive controls over the resource reserve.<sup>63</sup> First and foremost was the desire to reduce welfare expenditures by implementing a more

<sup>58</sup> 45 C.F.R. § 233.20(a)(3)(i) (1975).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* The new regulation greatly increases the number of property appraisals that caseworkers must undertake. Not only must previously exempt personal effects, income-producing property, and automobiles be evaluated, but the home must be appraised to determine whether it exceeds a "reasonable value." *Id.* In response to criticism that the new regulation imposes an undue burden on local welfare agencies, HEW stated:

[The] problem of property valuation cannot be avoided in any system that seeks to separate those who are truly needy from those who are not. The problems of valuation are, indeed difficult ones, but they are problems which are inherent in our present system of welfare.

40 Fed. Reg. 30,965 (1975).

Whether or not a given home has a reasonable value promises to be a difficult question. HEW's comments on the regulation afford some assistance in defining standards for ascertaining the reasonable value of a home:

A "reasonable value" would be one which prevents a public assistance recipient from owning a home of such high value that payments, taxes, maintenance, etc., would absorb a disproportionate amount of the assistance grant or which represents a large equity that could be used for living expenses. At the same time, the reasonable value would not be so low that it would increase the recipients' cost for necessary housing.

*Id.* at 30,964.

<sup>61</sup> 45 C.F.R. § 233.20(a)(3)(i) (1975). Much more was excluded under the prior regulation. See text accompanying note 57 *supra*.

<sup>62</sup> 45 C.F.R. § 233.20(a)(3)(i) (1975). Although HEW has never attempted to define "income" or "resources," some guidance was given in the requirement that income and resources could not be considered in determining AFDC eligibility or amount of payments unless "currently available." 45 C.F.R. § 233.20(a)(3)(ii) (1974) (repealed).

The new regulation relaxes this requirement. Income and resources are to be considered available "both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance . . ." 45 C.F.R. § 233.20(a)(3)(ii)(D) (1975).

<sup>63</sup> 40 Fed. Reg. 30,963 (1975). Although other reasons were given, they all amount to the two outlined in the text accompanying notes 64-65 *infra*.

stringent asset test.<sup>64</sup> Second was the desire to promote public confidence in the welfare system by ensuring that some distinction would continue to exist between AFDC recipients and the working public and by preventing AFDC households from acquiring or maintaining unnecessary items at the public expense.<sup>65</sup>

The regulation also provides that "[r]eal and personal property shall be valued at their gross market value including encumbrances[,]" rather than at the resale value of the property to the individual.<sup>66</sup> In response to sharp criticism of the decision to depart from the former rule of equity valuation,<sup>67</sup> the following justification was given:

Although excluding encumbrances has the possible effect of hiding the amount of cash that an individual could receive if he sold the item it nonetheless serves the justifiable purpose of deterring the recipient from possessing encumbered items which place a drain on his limited budget. Large monthly payments on encumbrances are counterproductive to the goal of making the recipient independent of the welfare system, and results [*sic*] in funds provided for basic necessities being diverted to meet payments on non-essential amenities.<sup>68</sup>

The new regulation was scheduled to go into effect on June 17, 1975.<sup>69</sup> On June 16, however, a federal district court in *National Welfare Rights Organization v. Weinberger*<sup>70</sup> issued a temporary restraining order enjoining its enforcement pending a hearing on its validity.<sup>71</sup> Among other arguments, the plaintiffs asserted that the Social Security Act gives the states, not the federal government, the

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<sup>64</sup> 40 Fed. Reg. 30,963 (1975).

<sup>65</sup> *Id.*

<sup>66</sup> 45 C.F.R. § 233.20(a)(3)(i) (1975).

<sup>67</sup> The provision has been condemned as being unjust and inconsistent with both the Social Security Act and federal regulations. See 40 Fed. Reg. 12,507, 30,964 (1975); Brief for Appellants at 18-21, *National Welfare Rights Org. v. Mathews*, No. 75-1741 (D.C. Cir. Feb. 20, 1976) (on file at the *Cornell Law Review*); notes 72-73 *infra*.

<sup>68</sup> 40 Fed. Reg. 30,964 (1975). The argument that AFDC recipients with heavily encumbered property are less likely to achieve independence from the welfare system has little merit. In determining benefit levels, indebtedness is not deducted. The only difference between recipients who have purchased items on credit and those who have not is that the latter will not be obligated to allocate a significant portion of their assistance checks toward the payment of bills and therefore will have more cash on hand to spend on daily maintenance needs, such as food and clothing, if they choose. Whether or not this difference alone increases the likelihood of independence is highly questionable.

<sup>69</sup> *Id.* at 12,508.

<sup>70</sup> 9 CLEARINGHOUSE REV. 225 (D.D.C. June 16, 1975). After the temporary restraining order was issued, the regulation was republished in the *Federal Register* with further explanation of its purpose and effect. 40 Fed. Reg. 30,963 (1975).

<sup>71</sup> 9 CLEARINGHOUSE REV. 225 (D.D.C. June 16, 1975).

exclusive power to set resource limits<sup>72</sup> and prohibits gross market valuation without regard to encumbrances.<sup>73</sup> The plaintiffs' arguments were rejected by the district court in August.<sup>74</sup> On appeal, the Court of Appeals for the District of Columbia Circuit upheld the power of the federal government to establish resource limits, but declared the fair market value rule to be inconsistent with the Social Security Act, and struck down the regulation for failing to comply with the Administrative Procedure Act.<sup>75</sup>

## B. Countable Income

### 1. Benefits From Other Assistance Programs

A large number of households receiving AFDC benefits include at least one individual receiving benefits from another assistance program,<sup>76</sup> such as Social Security or the Supplemental Security Income Program (SSI). The question has frequently arisen in recent

<sup>72</sup> *Id.*; Brief for Appellants, *supra* note 67, at 14-17. When the Social Security Act was first proposed in 1935, attempts to set federal standards of eligibility and benefit levels were rejected. The determination of need for AFDC purposes was intentionally left to the states. H.R. REP. NO. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. NO. 628, 74th Cong., 1st Sess. 36 (1935). This position was reaffirmed in 1939, with specific reference to resource reserves. See 84 CONG. REC. 6704, 6924 (1939). And it has not changed in recent years. See S. REP. NO. 1230, 92d Cong., 2d Sess. 478 (1972). Although HEW has regulated state practice to a certain extent in areas related to need (see, e.g., 45 C.F.R. §§ 233.20(a)(1), (a)(2), (a)(3)(ii), (a)(3)(iv), 233.90(a) (1975)), it has never attempted to establish a standard relating to need determinations as narrow and specific as the new resource regulation. This regulation, it was argued, impermissibly intrudes upon a well-established area of state discretion. Brief for Appellants, *supra* note 67, at 17.

<sup>73</sup> 9 CLEARINGHOUSE REV. 225 (D.D.C. June 16, 1975); Brief for Appellants, *supra* note 67, at 18-21. Section 402(a)(7) of the Social Security Act requires each state "in determining need [to] take into consideration any other income and resources" of AFDC applicants. 42 U.S.C. § 602(a)(7) (1970) (emphasis added). Whether or not an individual is needy depends upon his ability to purchase daily maintenance items; the value of his property is relevant only to the extent that it can be converted into cash to meet financial needs. The case law provides strong support for this interpretation of the statute. See Brief for Appellants, *supra* note 67, at 20-21. Although discouraging welfare recipients from acquiring heavily encumbered assets may be a worthwhile goal, it should not be achieved by manipulating the reserve rule in a way that is not authorized by the statute.

Appellants also pointed out that the new resource valuation rule was inconsistent with the requirement that only actually available income and resources be considered in determining need, this requirement being continued in the challenged regulation. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1975); Brief for Appellants, *supra* note 67, at 19-20.

<sup>74</sup> The court concluded that the regulation was authorized under 42 U.S.C. § 1302 (1970), giving HEW the power to promulgate regulations implementing certain provisions of the Social Security Act. 9 CLEARINGHOUSE REV. 596 (D.D.C. Aug. 1, 1975).

<sup>75</sup> National Welfare Rights Org. v. Mathews, No. 75-0956 (D.C. Cir. Feb. 20, 1976).

<sup>76</sup> Between 60% and 75% of households on any form of assistance receive benefits from more than one program. STAFF OF JOINT ECONOMIC COMM., 93D CONG., 1ST SESS., HOW PUBLIC WELFARE BENEFITS ARE DISTRIBUTED IN LOW INCOME AREAS 2 (Comm. Print. 1973).

years whether such non-AFDC income should be taken into account when calculating a household's AFDC benefit level.<sup>77</sup> A number of states have assumed that such income is available to meet the needs of other members of the household and have reduced AFDC grants accordingly.<sup>78</sup>

A Connecticut regulation, for example, provided that Social Security benefits received by a mother as representative payee for her children could be included as income to the mother to the extent that the Social Security benefits exceeded the budgeted needs of the children under AFDC.<sup>79</sup> Although the Social Security regulations allow the representative payee to use part of the benefits for his own support if the needs of the child have been met,<sup>80</sup> the courts have held that states cannot assume that such income is in fact available to meet the needs of the parent or the rest of the household.<sup>81</sup> The parent has the option of removing the child from the assistance unit. The child's needs will thereby not be considered in calculating the AFDC unit's benefits and the child's Social Security income will be completely disregarded, unless it is actually being used to support other household members.<sup>82</sup>

When an individual receiving benefits from another assistance program is removed from the AFDC unit, there are two possible

<sup>77</sup> See notes 81, 85-97 and accompanying text *infra*.

<sup>78</sup> See, e.g., CAL. ELIGIBILITY AND ASSISTANCE STANDARDS § 44-115.8, quoted in *Cooper v. Carleson*, 107 Cal. Rptr. 502, 504 n.1 (1973); S. DAK. DEP'T OF WELFARE REGS. § 111-5A-19, quoted in *Howard v. Madigan*, 363 F. Supp. 351, 353 (D.S.D. 1973).

<sup>79</sup> CONN. WELFARE MANUAL REGS. § 335.16(V1), quoted in *Johnson v. Harder*, 383 F. Supp. 174, 177 n.4 (D. Conn. 1974), *aff'd*, 512 F.2d 1188 (2d Cir. 1975).

<sup>80</sup> 20 C.F.R. § 404.1607 (1975) provides:

If current maintenance needs of a beneficiary [of OASDI] are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary.

The regulation is part of a group of regulations setting forth the fiduciary duties of a representative payee. *Id.* §§ 404.1601-.1610 (1975). The representative payee is required to use the benefits "only for the use and benefit of such beneficiary in the manner and for the purposes determined by him to be in the beneficiary's best interest." *Id.* § 404.1603 (1975).

<sup>81</sup> *Johnson v. Harder*, 383 F. Supp. 174 (D. Conn. 1974), *aff'd*, 512 F.2d 1188 (2d Cir. 1975); *Howard v. Madigan*, 363 F. Supp. 351 (D.S.D. 1973).

<sup>82</sup> *Johnson v. Harder*, 383 F. Supp. 174 (D. Conn. 1974), *aff'd*, 512 F.2d 1188 (2d Cir. 1975); *Howard v. Madigan*, 363 F. Supp. 351 (D.S.D. 1973). The cases have adopted the approach endorsed by John L. Costa, Commissioner of the Social and Rehabilitative Service, in State Letter No. 1088, Sept. 25, 1970, quoted in 383 F. Supp. at 180:

In view of the statutory requirement that a child's OASDI benefits be for his "use and benefit" alone, the representative payee may not be required to use such benefits for other members of the child's family. Thus, if a child's monthly OASDI benefit exceeds his AFDC payment, the payee must have the option of removing the child together with his income from the AFDC family budget unit.

methods of determining the AFDC unit's benefit level. Either the AFDC unit's benefits can be calculated as a prorated share of the payments the entire household would receive if all of its members were included within the AFDC unit, or the AFDC unit can be treated as a separate household with no non-AFDC recipient residing in the home. Many states, recognizing the economies of scale, do not increase benefits proportionately when the size of the household increases.<sup>83</sup> In these states, the amount of the AFDC unit's benefits will be adversely affected if the unit's benefits are prorated rather than calculated as a separate household.<sup>84</sup>

In *Nelson v. Likins*,<sup>85</sup> the Eighth Circuit Court of Appeals affirmed a district court decision<sup>86</sup> that had preliminarily enjoined Minnesota's practice of prorating the needs of AFDC beneficiaries where a non-AFDC recipient receiving SSI benefits resided in the household.<sup>87</sup> The court held that the AFDC unit must receive the same benefits that would be received by a similarly sized AFDC unit that was not sharing its household with a non-AFDC recipient.<sup>88</sup> The court based its decision on a provision of the Social Security Act requiring payments to SSI recipients to be disregarded in determining AFDC benefits.<sup>89</sup> It rejected the economies of scale argument for prorating allowances on the ground that the argument assumed the non-AFDC recipient actually paid his share of the household's expenses, the assumption itself being in violation of the statute.<sup>90</sup>

<sup>83</sup> CAL. WELF. & INST'NS CODE § 11450 (West 1972); N.Y. SOC. SERV. LAW § 131-a(3) (McKinney 1976).

<sup>84</sup> In New York, for example, a two-person AFDC household with no income receives \$150 per month as a basic allowance, excluding housing costs and special items of need. A three-person household receives \$200. N.Y. SOC. SERV. LAW § 131-a(3) (McKinney Supp. 1976). If one of the three is dropped from the AFDC unit and the remaining individuals' needs are prorated, the unit's grant for basic needs will amount to \$133. But if the two AFDC recipients are treated as a two-person household, they will receive \$150 for their basic needs.

<sup>85</sup> 510 F.2d 414 (8th Cir. 1975) (mem.).

<sup>86</sup> *Nelson v. Likins*, 389 F. Supp. 1234 (D. Minn. 1974), *aff'd*, 510 F.2d 414 (1975).

<sup>87</sup> In *Nelson*, one of the plaintiff's sons was too old to receive AFDC but due to a physical impairment received SSI benefits. *Id.* at 1236.

<sup>88</sup> *Id.* at 1238-39.

<sup>89</sup> 42 U.S.C. § 602(a)(24) (Supp. IV, 1974) requires a state AFDC plan to provide: [I]f an individual is receiving benefits under subchapter XVI of this chapter [SSI], then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the family under this subchapter and his income and resources shall not be counted as income and resources of a family under this subchapter . . . .

42 U.S.C. § 1382a(a)(2)(A) (Supp. IV, 1974) requires reductions in SSI grants where the recipient resides in the household of another.

<sup>90</sup> 389 F. Supp. 1234, 1238-39 (D. Minn. 1974). See also *Barton v. Fahey*, 2 CCH Pov. L. REP. ¶ 19,707 (Sup. Ct. N.Y. 1974); *Barton v. Lavine*, 2 CCH Pov. L. REP. ¶ 20,448 (Sup. Ct. N.Y.), *aff'd*, 46 App. Div. 2d 981, 363 N.Y.S.2d 556 (1974).

Although federal regulations require Social Security benefits to be included as countable income to the beneficiary in determining the beneficiary's eligibility for and amount of AFDC assistance,<sup>91</sup> a federal district court recently departed from this provision in a case where the plaintiffs' entitlement to Social Security benefits was based on their enrollment as full-time college students under age twenty-two.<sup>92</sup> In *Elam v. Hanson*,<sup>93</sup> the plaintiffs were unmarried mothers between the ages of eighteen and twenty-two who were receiving Social Security benefits as children of their fathers.<sup>94</sup> In processing their applications for AFDC, the Ohio Department of Public Welfare treated their Social Security benefits as available income. The court, finding that the purpose of Social Security student benefits is to provide an education for the recipients rather than to assist in the care of dependent children,<sup>95</sup> concluded that the families' AFDC grants could not be reduced as a result of their receipt of Social Security.<sup>96</sup> Reasoning that the two programs are designed to meet

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The Social Security Act does not specify how benefits other than SSI should be treated when received by an AFDC household. Although the *Nelson* decision was based on the language of the Social Security Act, its rationale applies to other types of benefits as well, e.g., Social Security, at least where the non-AFDC recipient has no obligation to support other members of the household. According to *Nelson*, since the prorating of household expenses assumes that the non-AFDC recipient actually pays his share of the household's expenses, and since states are not allowed to assume that non-AFDC assistance is available to other members of the household (see notes 81-82 and accompanying text *supra*), the prorating of expenses in shared households is impermissible under the *Nelson* rationale regardless of the source of non-AFDC benefits. This analysis is consistent with *Van Lare v. Hurley*, 421 U.S. 338 (1975), which prohibits the prorating of shelter allowances where a nonlegally responsible individual resides in the AFDC household, unless the lodger actually contributes to the household's needs.

<sup>91</sup> 45 C.F.R. § 233.20(a)(4)(i) (1975) provides that in determining an individual's need and amount of assistance "[a]ll income must be included such as social security . . ."

<sup>92</sup> 42 U.S.C. § 402(d)(1)(B)(i) (1970).

<sup>93</sup> 384 F. Supp. 549 (N.D. Ohio 1974).

<sup>94</sup> *Id.* at 550. Although Social Security children's benefits normally terminate when the child reaches age 18 (42 U.S.C. § 402(d)(1)(B)(i) (1970)), the plaintiffs' benefits were continued because of their status as full-time college students.

<sup>95</sup> 384 F. Supp. at 552. The court reasoned that the two programs were not duplicative. See 45 C.F.R. § 233.20(a)(3)(vii) (1975).

<sup>96</sup> In this case, the Court does not believe that Congress could have intended by one project to aid OASDI [Social Security] recipients who desire education by providing benefits while they pursue a full-time course of study and then by another program to reduce the amount of benefits paid on behalf of dependent children of that OASDI recipient. It amounts to the federal government holding out a promise of aid for education with one hand and at the same time with the other hand having the state government, spurred by federal regulations, destroying that promise of aid. The Court finds that Congress has provided two assistance programs aimed at two distinct needs. Assistance for the one need, maintaining the family unit where one parent is unmarried, should not be reduced because a separate need of that parent for education is also present at the same time.

384 F. Supp. at 553.

two distinct needs, education and maintenance of the family unit, the court held that the plaintiffs' Social Security payments must be totally disregarded in determining their eligibility for and the amount of their AFDC benefits.<sup>97</sup>

## 2. Tax Refunds

Whether tax refunds should be classified as countable income, exempt income, or resources, is a question that has recently troubled a number of courts.<sup>98</sup> Its resolution is significant for the employed AFDC recipient. If tax refunds are treated as countable unearned income, the recipient's grant will in most states be subject to a dollar for dollar reduction for the month in which the tax refund is received.<sup>99</sup> If instead the tax refunds are classified as earned income, the first thirty dollars of the refund plus one-third of the remainder will be exempted from the recipient's countable income and will not be used to reduce his AFDC grant.<sup>100</sup> A third

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<sup>97</sup> *Id.* The court's holding is not only inconsistent with federal regulations (*see* note 91 and accompanying text *supra*), but is premised on a highly questionable interpretation of the purpose of a student's Social Security benefits. Old age and survivors' benefits were designed to enable the beneficiary to meet his basic maintenance expenses by replacing the income of a deceased or retired wage earner on whom the beneficiary was dependent. *Delnov v. Celebrezze*, 347 F.2d 159, 161 (9th Cir. 1965); *Garner v. Richardson*, 333 F. Supp. 1191, 1195 (N.D. Cal. 1971). Children's benefits are no exception; their purpose is "to provide at least some measure of income and security to those who have lost a wage-earner on whom they depended." *Davis v. Richardson*, 342 F. Supp. 588, 593 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972). Congress has at times extended the coverage of Old Age and Survivors Insurance with the express purpose of reducing the cost of public assistance. *See, e.g.*, S. REP. No. 1669, 81st Cong., 2d Sess. 2 (1950). This assumes that Social Security beneficiaries will either be rendered ineligible for public assistance or have their grants reduced.

Student's benefits, introduced in 1965, merely represent an extension of the period of dependency from age 18 to 22 if the child is in school. Their purpose is no different from that of children's benefits: to replace the income of a deceased wage earner upon whom the child depends for support. *See* S. REP. No. 404, 89th Cong., 1st Sess. 96-97 (1965). AFDC is similarly designed to meet basic maintenance needs. *See* 42 U.S.C. § 601 (1970).

Since the court in *Elam* misconstrued the purpose of student benefits and therefore concluded that the two programs were not duplicative, it is unlikely that the case will be followed by other courts.

<sup>98</sup> *See* notes 107-15 and accompanying text *infra*.

<sup>99</sup> *See* 42 U.S.C. § 602(a)(7) (1970); 45 C.F.R. § 233.20(a)(3)(ii) (1975). Those states that do not pay AFDC recipients their full standard of need have the option of subtracting countable income from either the state's standard of need or its payment level. 45 C.F.R. § 233.20(a)(3)(ii)(B) (1975). *See also* *Jefferson v. Hackney*, 406 U.S. 535 (1972). In the states that subtract countable income from the standard of need before applying the reduction factor, each dollar added to the recipient's countable income will not result in a dollar-for-dollar reduction in his grant; rather, for every additional dollar added, the grant will be reduced by some amount less than a dollar, depending on the state's percentage reduction factor. For an illustration of the difference between the two systems *see id.* at 539-40 n.6; *HANDBOOK*, *supra* note 16, at 161-63.

<sup>100</sup> *See* 42 U.S.C. § 602(a)(8)(ii) (1970); 45 C.F.R. § 233.20(a)(11)(ii)(b) (1975); note 131 and accompanying text *infra*.

possibility, at least until recently,<sup>101</sup> is that tax refunds will be treated as income, but income that is exempt. A tax refund under this possibility would have no effect on the recipient's grant.

Until recently, federal regulations provided that "only such net income as is actually available for current use on a regular basis" could be considered by the state in establishing financial eligibility for AFDC and the amount of the assistance payment.<sup>102</sup> Since tax refunds are received only once a year, there was some question whether they were available "on a regular basis" and therefore countable.<sup>103</sup> On the other hand, if tax refunds are treated as resources, which need only be "currently available,"<sup>104</sup> in most states the recipient will be entitled to apply the refund toward his individual personal property reserve.<sup>105</sup> So long as the ceiling<sup>106</sup> on the reserve is not exceeded, the refund will have no effect on the recipient's grant.

The courts are split on the proper classification of tax refunds. In *Kaisa v. Chang*,<sup>107</sup> a federal district court held that tax refunds are not available on a regular basis, and therefore must be treated as resources, subject to exemption by applying the funds toward the individual resource reserve.<sup>108</sup> In *Walker v. Juras*,<sup>109</sup> on the other hand, the Oregon Court of Appeals determined that the possibility of receiving tax refunds annually constitutes sufficient regularity to

<sup>101</sup> See text accompanying note 126 *infra*.

<sup>102</sup> 45 C.F.R. § 233.20(a)(3)(ii)(C) (1974) (repealed in 1975 and replaced by *id.* § 233.20(a)(3)(ii)(D) (1975)).

<sup>103</sup> See notes 107-11 and accompanying text *infra*.

<sup>104</sup> 45 C.F.R. § 233.20(a)(3)(ii)(D) (1975).

<sup>105</sup> See notes 53-57 and accompanying text *supra*. Only a few states, including New York, do not allow AFDC recipients to reserve resources for future needs. See 18 NYCRR §§ 352.11 (Oct. 31, 1974), .15 (June 30, 1975), .22 (July 31, 1973), .23 (March 31, 1975), .24-.28 (Sept. 30, 1975); HANDBOOK, *supra* note 16, at 158-59.

<sup>106</sup> According to federal regulations, state ceilings on resource reserves may not exceed \$2,250 for a family of four, with an additional \$100 for each additional eligible individual. 45 C.F.R. § 233.20(a)(3)(1) (1975); See notes 58-75 and accompanying text *supra*.

<sup>107</sup> 396 F. Supp. 375 (D. Hawaii 1975).

<sup>108</sup> *Id.* See also *County of Alameda v. Carleson*, 5 Cal. 3d 730, 749, 488 P.2d 953, 966, 97 Cal. Rptr. 385, 398 (1971), *appeal dismissed*, 406 U.S. 913 (1972).

The Hawaii court interpreted the regulation limiting countable income to "net income [that] is actually available for current use on a regular basis" (45 C.F.R. § 233.20(a)(3)(ii)(c) (1974)) as establishing three independent tests that must be satisfied before tax refunds could be classified as income to the recipient: refunds must be (1) actually available, (2) for current use, (3) on a regular basis. 396 F. Supp. at 377. Although the state welfare agency failed to argue that refunds were available on a regular basis, arguing instead that regularity of receipt was not required, the court noted that "[g]iven the uncertainty of receiving any tax refund and the fact that even if received, it can be expected, at most, once annually, such an argument would be unpersuasive." *Id.*, n.13.

<sup>109</sup> 16 Ore. App. 295, 518 P.2d 663 (1974).

satisfy the regular basis test.<sup>110</sup> The court held that refunds should therefore be treated as countable income and used to reduce the recipient's grant.<sup>111</sup>

The only court that has considered the argument that tax refunds should be classified as earned income, subject to the thirty dollars plus one-third disregard, flatly rejected it.<sup>112</sup> In *Richards v. Lavine*,<sup>113</sup> the Appellate Division of the New York Supreme Court held that tax refunds attributable to imprecisions in the tax liability projection method used by employers must be treated as resources. And since New York is one of the few states that does not allow recipients to accumulate a resource reserve,<sup>114</sup> the refunds directly reduce the size of AFDC grants.<sup>115</sup>

Although the courts have attached different labels to tax refunds, the rationale underlying at least two of the above decisions has been to avoid duplicating assistance grants.<sup>116</sup> In *Walker*, the court expressed concern that AFDC recipients would elect to claim fewer dependents than they are entitled to claim, thereby decreasing their net income during the taxable year and increasing their assistance grants.<sup>117</sup> Implicit in the court's opinion is an intent to prevent windfalls: if such tax refunds are not used to reduce the grant in the following year, recipients claiming fewer dependents will receive higher total payments over the two years than similarly situated recipients claiming the full number of dependents.<sup>118</sup>

The court in *Richards* expressly stated that its decision to treat

<sup>110</sup> *Id.* at 298, 518 P.2d at 665. The court did not even consider whether the tax refunds were resources rather than income; the issue framed by the court was simply whether the refunds were countable or exempt income. *Id.* at 297, 518 P.2d at 664.

<sup>111</sup> *Id.* at 298, 518 P.2d at 665.

<sup>112</sup> *Richards v. Lavine*, 48 App. Div. 2d 204, 369 N.Y.S.2d 31 (3d Dep't 1975). See language quoted in text accompanying note 121 *infra*. The opinion contains no discussion of the question of regular availability.

<sup>113</sup> 48 App. Div. 2d 204, 369 N.Y.S. 2d 31 (3d Dep't 1975).

<sup>114</sup> Although the state does allow recipients to retain such resources as a home, a car necessary for transportation, and personal effects, there is no provision for setting aside real or personal property for present or future use. 18 NYCRR §§ 352.11 (Oct. 31, 1975), .15 (June 30, 1975), .22 (July 31, 1973), .23 (Mar. 31, 1975), .24-.28 (Sept. 30, 1975).

<sup>115</sup> 48 App. Div. 2d at 205, 369 N.Y.S.2d at 32.

<sup>116</sup> See *Richards v. Lavine*, 48 App. Div. 2d 204, 206, 369 N.Y.S.2d 31, 33 (3d Dep't 1975); *Walker v. Juras*, 16 Ore. App. 295, 297-98, 518 P.2d 663, 664-65 (1974). In *Kaisa*, the court focused exclusively on the question of whether tax refunds were available on a regular basis. It is not clear from the facts given whether the court's decision allows duplications in AFDC grants. 396 F. Supp. 375 (D. Hawaii 1975).

<sup>117</sup> 16 Ore. App. at 297-98, 518 P.2d at 664-65.

<sup>118</sup> This argument assumes that grants are calculated on the basis of the number of exemptions actually claimed by the recipient, rather than the maximum number of exemptions that the recipient is entitled to claim. See *id.* at 298 n.2, 518 P.2d at 665 n.2.

the tax refunds as non-exempt resources was designed to avoid duplications of assistance grants.<sup>119</sup> Since New York calculates AFDC grants on the basis of the recipient's projected tax liability with maximum exemptions,<sup>120</sup> any refund due to imperfect projections, and not to the difference between the number of exemptions claimed by the recipient and the maximum number of exemptions for which he was credited, will be used to reduce the recipient's grant; otherwise, the recipient is not placed in the same position as similarly situated individuals whose projections were accurate. In explaining why such refunds should be used to reduce the recipient's grant, dollar for dollar, rather than be treated as earned income, the court stated:

Although the original source of these sums was wages or salaries, these amounts were withheld from the paychecks of petitioners who, in turn, were immediately reimbursed therefor by increases in their assistance grants from the department. Accordingly, these portions of the refunds are actually duplications of sums already paid to petitioners, and, as such, they amount to windfalls for which petitioners have incurred no expense other than those which have been considered in determining the size of their . . . grants.<sup>121</sup>

As a result of New York's practice of crediting AFDC recipients with the maximum number of exemptions in calculating grants, refunds due to claiming fewer than the maximum number of exemptions, on the other hand, do not constitute duplications and therefore are not, as the court acknowledged,<sup>122</sup> countable income or resources in New York.<sup>123</sup>

Whether tax refunds constitute duplications of grants already received will probably continue to be a determinative question when courts classify tax refunds as income or resources. Because this question depends on how the state initially computes the recipient's tax liability in determining his net income for AFDC purposes,<sup>124</sup> the courts cannot be expected to agree upon the correct classifica-

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<sup>119</sup> 48 App. Div. 2d at 206, 369 N.Y.S.2d at 33.

<sup>120</sup> See *id.* at 205, 369 N.Y.S.2d at 32-33; letter from Abe Lavine, Commissioner of N.Y. State Dep't of Social Services, to County Dep't of Social Services, Transmittal No. 75 ADM-35, Apr. 18, 1975.

<sup>121</sup> 48 App. Div. 2d at 206, 369 N.Y.S.2d at 33.

<sup>122</sup> *Id.* at 205, 369 N.Y.S.2d at 32-33.

<sup>123</sup> See *id.*; letter from Abe Lavine, *supra* note 120.

<sup>124</sup> Compare, for example, the practice in New York of crediting AFDC recipients with the maximum number of dependency exemptions to which they are entitled, with the more common practice of subtracting taxes from the recipient's gross income based on the number of exemptions actually claimed.

tion of tax refunds. On the other hand, whether tax refunds are available on a regular basis, formerly a prerequisite to their treatment as countable income,<sup>125</sup> has become a moot question under a new federal regulation, effective June 17, 1975, which merely requires that net income be "available for current use" for it to be countable.<sup>126</sup> The court's decision in *Kaisa*,<sup>127</sup> which held that tax refunds are not regularly available and therefore to be treated as resources rather than as countable income,<sup>128</sup> may no longer be valid.<sup>129</sup>

### 3. Public Service Employment Income

In order to increase the work incentive for welfare recipients, in 1967 Congress amended the Social Security Act to require that states disregard the first thirty dollars of an AFDC family's earnings and one-third of the remainder each month in determining the amount of payments to which the AFDC family is entitled.<sup>130</sup> As a result, families with earned income receive a higher total income (including AFDC) than families without earned income.<sup>131</sup> This disregard, however, applies only to AFDC recipients employed in the regular economy.<sup>132</sup> As part of the Work Incentive Program (WIN) enacted in 1967,<sup>133</sup> Congress provided for the establishment of special work projects, designed for AFDC recipients for whom jobs in the regular economy were not available.<sup>134</sup> Placements were

<sup>125</sup> See 45 C.F.R. § 233.20(a)(3)(ii)(c) (1974) (repealed); notes 107-11 and accompanying text *supra*.

<sup>126</sup> 45 C.F.R. § 233.20(a)(3)(ii)(D) (1975). See note 62 *supra*.

<sup>127</sup> 396 F. Supp. 375 (D. Hawaii 1975).

<sup>128</sup> *Id.* at 378.

<sup>129</sup> Note, however, that the regulation governing attribution of a lodger's income to the AFDC unit continues to require that "only such net income as is actually available for current use on a regular basis will be considered . . ." in determining AFDC financial eligibility and the amount of the assistance payment. 45 C.F.R. § 233.90(a) (1975). This regulation, entitled *Factors specific to AFDC*, may be read by the courts as controlling all questions of countable income in the context of AFDC.

<sup>130</sup> 42 U.S.C. § 602(a)(8)(A)(ii) (1970). Prior to the 1967 amendments, the income of AFDC families was disregarded only in a few limited circumstances. See Lurie, *supra* note 12, at 835.

<sup>131</sup> For example, suppose a family of four with no income receives a monthly AFDC allowance of \$250. If one of the household members begins earning \$90 a month, \$50 (*i.e.*, \$30 plus one-third of the remainder) will be disregarded in calculating the family's new monthly allowance. The family's grant will therefore be reduced by \$40 to \$210 in most states (see notes 53, 99 and accompanying text *supra*), but the family's total income (AFDC plus earnings) will rise to \$300, rather than remain at the previous level of \$250.

<sup>132</sup> 42 U.S.C. § 602(a)(8)(A)(ii) (1970) expressly exempts from operation of the \$30 and one-third disregard income derived from special job training or public service programs.

<sup>133</sup> For a discussion of the WIN program, see notes 266-69 and accompanying text *infra*.

<sup>134</sup> 42 U.S.C. §§ 632(b)(3), 633(e) (1970).

to be made with public agencies and certain nonprofit organizations, and participants were to perform useful work that would not otherwise be performed by regular employees.<sup>135</sup> Income derived from participation in a special work project became subject to a twenty percent disregard.<sup>136</sup>

In 1971, Congress abolished the special work projects program of WIN and replaced it with a new program entitled Public Service Employment (PSE).<sup>137</sup> The only significant difference between the two programs is in the funding arrangements between the employers, the states, and the federal government.<sup>138</sup> Instead of requiring states to reimburse the Secretary of Labor for federal funds advanced to employers, as under the special work projects program,<sup>139</sup> PSE requires the federal government to pay directly to the employer one hundred percent of program costs (including wages) during the first year, seventy-five percent during the second year, and fifty percent during the third year.<sup>140</sup>

In the process of substituting PSE for the special work projects program, the twenty percent disregard applicable to income derived from special work projects was dropped from the Social Security Act and no new incentive provision was added.<sup>141</sup> A closely related provision, section 602(a)(19)(D), however, remains intact.<sup>142</sup> Section 602(a)(19)(D) states that income earned from participation in a "special work project" shall be disregarded for AFDC purposes.<sup>143</sup> Under the prior law, this section had been read in conjunction with the twenty percent disregard provision, thereby preventing welfare

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<sup>135</sup> *Id.* § 633(e)(1).

<sup>136</sup> Participants in special work projects were entitled to supplementary welfare grants to provide them with a total income equal in amount to the AFDC grant they would have received had they not been participating in WIN, plus 20% of their earnings. *Id.* § 602(a)(19)(E). Although the total income of an individual employed on a special work project was less than the total income of an individual earning the same monthly wages but employed in the private sector of the economy, participants in special work projects were still better off than nonworking families. The 20% disregard, like the \$30 and one-third disregard, was designed to provide a financial incentive for accepting employment.

<sup>137</sup> 42 U.S.C. §§ 632(b)(3), 633(e) (Supp. IV, 1974).

<sup>138</sup> Compare 42 U.S.C. §§ 602(a)(19)(E), 633(e)(2) (1970) with 42 U.S.C. § 633(e)(2) (Supp. IV, 1974).

<sup>139</sup> See Act of Jan. 2, 1968, Pub. L. No. 90-248, § 204(b), 81 Stat. 891 (formerly codified in 42 U.S.C. § 602(a)(19)(E) (1970)), repealed by Act of Dec. 28, 1971, Pub. L. No. 92-223, § 3(a)(5), 85 Stat. 804.

<sup>140</sup> See 42 U.S.C. § 633(e)(2)(A) (Supp. IV, 1974).

<sup>141</sup> See 42 U.S.C. § 602(a)(19) (Supp. IV, 1974). The incentive provision was part of the funding provision, which was totally overhauled by the 1971 amendments. See 42 U.S.C. § 602(a)(19)(E) (1970).

<sup>142</sup> See 42 U.S.C. § 602(a)(19)(D) (Supp. IV, 1974).

<sup>143</sup> See *id.*; note 145 *infra*.

recipients from receiving full AFDC payments in addition to special work projects income.<sup>144</sup> As the Act now reads, section 602(a)(19)(D) arguably requires a one hundred percent disregard of PSE income.<sup>145</sup>

The proper interpretation of section 602(a)(19)(D) has been widely litigated in recent months, and the district courts have reached conflicting results.<sup>146</sup> At least one court has held that the Social Security Act requires PSE wages to be totally disregarded in determining benefit levels for AFDC purposes.<sup>147</sup> The court found the language of section 602(a)(19)(D) to be unambiguous, leaving no room for interpretation.<sup>148</sup> Other courts have concluded that the true intent of Congress in passing the 1971 amendments was to eliminate disregards for PSE income altogether, and that section 602(a)(19)(D) was left unrepealed because of congressional oversight.<sup>149</sup>

<sup>144</sup> See *Betts v. Weinberger*, 391 F. Supp. 1122, 1125 (D. Vt. 1975); *Linkenhoker v. Weinberger*, 387 F. Supp. 449, 454-55 (D. Md.), *vacated as moot*, 529 F.2d 51 (1975).

<sup>145</sup> 42 U.S.C. § 602(a)(19)(D)(i) (Supp. IV, 1974) provides:

[I]n come derived from a special work project under the program established by section 632(b)(3) of this title shall be disregarded in determining the needs of an individual under section 602(a)(7) of this title . . . .

42 U.S.C. § 602(a)(19)(B) (Supp. IV, 1974) is also relevant: "[A]id under the [AFDC] plan will not be denied . . . by reason of an individual's participation on a project under the program established by section 632(b)(2) or (3) of this title . . ." Although it could be argued that the reference to a "special work project" rather than PSE renders § 602(a)(19)(D) inapplicable to PSE income, the argument is inconclusive; §§ 602(a)(19)(B) and (D) also refer to "the program established by section 632(b)(3)"—the section authorizing the PSE program.

<sup>146</sup> See notes 147-49, 153 and accompanying text *infra*.

<sup>147</sup> *Dunbar v. Weinberger*, 2 CCH Pov. L. REP. ¶ 20,039 (D. Mass. Aug. 7, 1974).

<sup>148</sup> There is no room for interpretation of § 602(a)(19)(D). It either applies as clearly stated or it does not apply at all. It is not within the province of this Court to say that the section is of no effect. Whether or not the result it creates was anticipated or intended by Congress is a matter of speculation. . . . If the effect of § 602(a)(19)(D) is an undesirable one, it is within the province of Congress, not the Court, to remedy it. *Dunbar v. Weinberger*, Civil No. 74-862-F (D. Mass., Aug. 7, 1974) (unpublished).

The court in *Dunbar* noted that the original bill replacing the special work projects program with the PSE program amended § 602(a)(19)(D) to delete any reference to a disregard of earnings. S. 1019, 92d Cong., 1st Sess., 117 CONG. REC. 4380 (1971). The amendment to § 602(a)(19)(D), however, was specifically rejected by the House Conference Committee. H.R. REP. NO. 747, 92d Cong., 1st Sess. 2 (1971). Although the report provides no explanation of the alteration, Congressman Mills, in support of the report, made the following comment: "And I also want to make clear that there is nothing in this bill which would affect the earnings disregard provision in present law." 117 CONG. REC. 46,774 (1971). The court, applying the rule of construction that legislation should be interpreted to give it some meaning, concluded that PSE workers were entitled to a 100% disregard of PSE payments. *Dunbar v. Weinberger*, 2 CCH Pov. L. REP. ¶ 20,039 (D. Mass. 1974).

<sup>149</sup> *Betts v. Weinberger*, 391 F. Supp. 1122 (D. Vt. 1975); *Linkenhoker v. Weinberger*, 387 F. Supp. 449 (D. Md. 1975); *Ray v. Weinberger*, 9 CLEARINGHOUSE REV. 151 (E.D. Pa. Mar. 12, 1975). All three courts employed essentially the same reasoning in holding that PSE participants were not entitled to any disregard of their earned income.

Both positions find some support in the legislative history of the 1971 Social Security Amendments.<sup>150</sup> Neither position, however, fits comfortably into the AFDC statutory scheme.<sup>151</sup> The Supreme Court's recent summary affirmance of *Betts v. Mathews*,<sup>152</sup> holding that PSE wages should not be disregarded when calculating AFDC payments, settles the issue.<sup>153</sup>

## IV

### ELIGIBILITY CONDITIONS UNRELATED TO NEED

#### A. *Child Support Amendments*

In 1973, households whose eligibility for AFDC was based on the continued absence of a parent from the home constituted 80.2 percent of the total number of AFDC recipients.<sup>154</sup> This category of

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Congress, in passing the 1971 amendments, expressed deep concern for the rapidly increasing costs of AFDC. Since a 100% disregard of PSE income would increase rather than decrease the cost of AFDC, the courts concluded that Congress could not have intended to reach that result. *See, e.g., Linkenhoker v. Weinberger*, 387 F. Supp. 449, 453 (D. Md. 1975). Congress also expressed a preference for private employment over public employment. *See Ray v. Weinberger*, 9 CLEARINGHOUSE REV. 151 (E.D. Pa. Mar. 12, 1975). Since the 100% disregard greatly exceeds the work incentive applied to income derived from employment in the private sector of the economy (*see* notes 130-31 and accompanying text *supra*), employable AFDC recipients would be encouraged to seek public service employment rather than private employment, in order to qualify for the 100% disregard. This result, the courts argued, would directly conflict with the express policy of encouraging PSE participants to move into the regular economy. *See Ray v. Weinberger*, 9 CLEARINGHOUSE REV. 151 (E.D. Pa. Mar. 12, 1975).

In further support of their decisions not to apply § 602(a)(19)(D) to PSE income, the courts pointed to the close relationship prior to the 1971 amendments of §§ 602(a)(19)(D) and 602(a)(19)(E), which contained the 20% disregard provision. *See* notes 142-44 and accompanying text *supra*. Under the prior law, § 602(a)(19)(E) prevented participants in special work projects from receiving a double recovery under § 602(a)(19)(D). The only reasonable conclusion, the courts stated, was that § 602(a)(19)(D) was simply overlooked by Congress and should have been repealed along with § 602(a)(19)(E). Moreover, § 602(a)(19)(D) refers to special work projects rather than PSE, and therefore does not apply to PSE income. *See Linkenhoker v. Weinberger*, 387 F. Supp. 449, 453-54 (D. Md. 1975); note 145 *supra*.

<sup>150</sup> The relevant legislative history is discussed in notes 148-49 *supra*.

<sup>151</sup> The position of the majority of the courts requires §§ 602(a)(19)(B), (D) to be read out of the statute. On the other hand, allowing PSE workers to receive full AFDC checks as well as their earned income is inconsistent with the federal policies of reducing AFDC expenditures and favoring employment in the regular economy. *See* note 149 *supra*.

<sup>152</sup> 2 CCH Pov. L. REP. ¶ 21,739 (U.S. Nov. 17, 1975).

<sup>153</sup> *Id.*

<sup>154</sup> S. REP. NO. 1356, 93d Cong., 2d Sess. 42 (1974). The other categories of AFDC recipients consist of children deprived of parental support because of a parent's death, mental or physical incapacity, and, in some states, unemployment. *See HANDBOOK, supra* note 16, at 143.

recipients has grown steadily in recent years.<sup>155</sup> In an effort to reduce the mushrooming cost of AFDC by deterring parents from abandoning their families,<sup>156</sup> Congress enacted a major amendment to the Social Security Act, which went into effect on July 1, 1975.<sup>157</sup> This child support bill establishes a comprehensive program for determining the paternity of illegitimate children receiving AFDC and for enforcing support obligations owed by absent parents to AFDC children.<sup>158</sup> The program is designed to ensure that parents who are able to support their children, but have failed to do so, shoulder the burden that otherwise falls on the welfare system.<sup>159</sup>

Although the Social Security Act had previously required states participating in the AFDC program to establish agencies for securing child support,<sup>160</sup> the old provisions were not effectively implemented in most states.<sup>161</sup> Moreover, attempts by the states to condition AFDC eligibility on the mother's cooperation in support proceedings were struck down by the courts<sup>162</sup> as inconsistent with the Social Security Act.<sup>163</sup>

<sup>155</sup> In 1961, only 66.7% of AFDC recipients based their eligibility on the absence of a parent from the home. S. REP. NO. 1356, 93d Cong., 2d Sess. 42 (1974).

<sup>156</sup> *Id.*

<sup>157</sup> Act of Jan. 4, 1975, Pub. L. No. 93-647, § 101, 88 Stat. 2351, *as amended*, Act of Aug. 9, 1975, Pub. L. No. 94-88, tit. 2, 89 Stat. 433 (to be codified in scattered sections of 42 U.S.C.).

<sup>158</sup> See notes 164-71 and accompanying text *infra*.

<sup>159</sup> See 120 CONG. REC. H 12,587 (daily ed. Dec. 20, 1974) (remarks of Representative Pettis).

<sup>160</sup> As early as 1952, state welfare agencies were required to give prompt notice to law enforcement officials of AFDC children deserted by one of their parents. See 42 U.S.C. § 602(a)(11) (1970). The Social Security Amendments of 1967 established child support and paternity units within the welfare agencies, and required the agencies to utilize reciprocal arrangements with other states to secure support payments. See 42 U.S.C. §§ 602(a)(17)-(18) (1970).

<sup>161</sup> S. REP. NO. 1356, 93d Cong., 2d Sess. 46 (1974). HEW supervision of state child support programs was at best perfunctory. *Id.* The law contained no mechanisms specifically designed to encourage effective child support programs. The new child support law attempts to correct these deficiencies by establishing a separate unit within HEW to supervise state child support programs and by imposing financial penalties on noncomplying states. See note 164 and accompanying text *infra*.

<sup>162</sup> See, e.g., *Shirley v. Lavine*, 365 F. Supp. 818 (N.D.N.Y. 1973), *aff'd per curiam sub nom. Lascaris v. Shirley*, 420 U.S. 730 (1975); *Meyers v. Juras*, 327 F. Supp. 759 (D. Ore.), *aff'd mem.*, 404 U.S. 803 (1971); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal.), *aff'd mem. sub nom. Carleson v. Taylor*, 404 U.S. 980 (1971); *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill.), *aff'd mem. sub nom. Weaver v. Doe*, 404 U.S. 987 (1971).

<sup>163</sup> Section 402(a)(10) of the Social Security Act (42 U.S.C. § 602(a)(10) (1970)) provides that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." This section has been interpreted by the Supreme Court as prohibiting states participating in the AFDC program from imposing eligibility criteria unrelated to need in addition to the federal eligibility standards, in the absence of authorization from Congress. Although the states retain considerable discretion in establishing standards of need and levels of benefits (see *King v. Smith*, 392 U.S. 309, 318-19 (1968); note 303 and accom-

The new law establishes a federal child support unit within HEW to supervise states' efforts to collect child support payments and impose financial penalties on noncomplying states.<sup>164</sup> The unit must also establish a federal information bank, the "Parent Locator Service,"<sup>165</sup> designed to obtain and transmit information as to the whereabouts of absent parents, including the most recent address and place of employment. Collection of support payments is facilitated by enabling states to enforce support orders in federal

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panying text *supra*), the remaining eligibility conditions must, as a general rule, be consistent with and no broader than federal standards. *But see* New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973) (holding that states are free to establish work programs to supplement WIN); Wyman v. James, 400 U.S. 309 (1971) (permitting states to terminate AFDC assistance if the parent refuses to submit to a home visit required under state law).

The federalization of eligibility conditions unrelated to need began with *King v. Smith*, 392 U.S. 309 (1968), in which the Supreme Court struck down a state regulation that denied AFDC to children of a mother who cohabited with a man who was not the father of her children. Finding that such households were eligible for AFDC under federal standards (assuming other eligibility criteria were met), the Court held that the state regulation, although it furthered the state's interest in discouraging immorality and illegitimacy, was fatally inconsistent with federal law and policy and therefore invalid under the supremacy clause.

The principle established in *King* was reaffirmed by the Court in *Townsend v. Swank*, 404 U.S. 282 (1971) (holding that states could not exclude college students under age 21 from AFDC coverage), and again in *Carleson v. Remillard*, 406 U.S. 598 (1972) (holding that states could not define "continued absence" from the home to exclude parents in military service). As it was summarized in *Townsend*:

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

404 U.S. at 286. The cases cited in note 162 *supra* relied on the principle established in the *King-Townsend-Remillard* trilogy.

<sup>164</sup> The child support unit's duties include setting minimum standards for state child support programs, reviewing and evaluating state plans, conducting annual audits of state child support programs, and providing technical assistance to the states. 42 U.S.C. § 652(a) (Supp. IV, 1974). If as a result of its audit the unit finds that a state is not complying with its approved plan or the minimum federal standards, 5% of the federal funds to which the state would otherwise be entitled are withheld for the year. *Id.* § 603(h).

<sup>165</sup> 42 U.S.C. § 653 (Supp. IV, 1974). Any "authorized person," as defined by the Act, may request information from the service for use in locating an absent parent and enforcing support obligations. Among the individuals given access to the service are parents or guardians of children, other than AFDC recipients, who are not but should be receiving child support payments. *Id.* § 653(c)

The original child support bill dramatically expanded access to welfare records. Previously, the contents of AFDC records could be disclosed only for purposes directly connected with the administration of AFDC. *See* 42 U.S.C. § 602(a)(9) (1970). The child support bill allowed information concerning AFDC recipients to also be disclosed to "public officials" who needed the information "in connection with their official duties." 42 U.S.C. § 602(a)(9) (Supp. IV, 1974). Act of Aug. 9, 1975, Pub. L. No. 94-88, tit. 2, § 207, 89 Stat. 436, repealed this broad provision and replaced it with a much narrower and more specific one authorizing disclosure of welfare records in any investigation, prosecution, or civil or criminal proceeding directly connected with the administration of federally subsidized assistance programs. 42 U.S.C.A. § 602(a)(9) (Supp. 1976).

courts,<sup>166</sup> use the collection mechanisms of the Internal Revenue Service,<sup>167</sup> and garnish the wages of federal employees.<sup>168</sup>

Included among the child support provisions are three new eligibility conditions that AFDC applicants or recipients must now satisfy. First, each applicant or recipient must assign to the state all rights to support on behalf of himself and any other family member.<sup>169</sup> Second, the recipient or applicant must cooperate with the state in establishing the paternity of illegitimate children and in obtaining support payments, unless the parent has good cause for not cooperating.<sup>170</sup> Finally, applicants or recipients are required to furnish the Social Security account number of every member of the household.<sup>171</sup>

The statute expressly provides that failure of an AFDC parent to comply with either the assignment or the cooperation condition renders only the parent and not the children ineligible for assistance.<sup>172</sup> If other eligibility criteria are met, the children of a non-complying parent continue to receive AFDC in the form of protective payments.<sup>173</sup> Unlike the requirements of assignment and cooperation, however, the statute does not authorize protective payments to the children of applicants who fail to furnish the required Social Security numbers;<sup>174</sup> a parent's failure to comply with this condition apparently renders the entire household ineligible for assistance.<sup>175</sup>

<sup>166</sup> 42 U.S.C. § 660 (Supp. IV, 1974).

<sup>167</sup> *Id.* § 652(b).

<sup>168</sup> *Id.* § 659. Under the child support law, the federal government reimburses states for 75% of their child support program costs as compared to the old reimbursement rate of 50%. *Id.* § 655. Localities collecting assigned support payments for the state, and states collecting support payments for other states, are given bonus payments. *Id.* § 658(a).

<sup>169</sup> *Id.* § 692(a)(26)(A).

<sup>170</sup> *Id.* § 602(a)(26)(B); 42 U.S.C.A. § 602(a)(26)(B) (Supp. 1976). By making cooperation a federally mandated condition of eligibility for aid, Congress rendered the conflict over the validity of state-imposed disclosure and cooperation requirements moot. *See* note 162 and accompanying text *supra*; Note, *1974 Developments in Welfare Law*, *supra* note 11, at 871-75.

Although the original bill made no provision for waiving the requirement when parental cooperation would not serve the best interests of the child, this flaw has been corrected by Act of Aug. 9, 1975, Pub. L. No. 94-88, tit. 2, § 208, 89 Stat. 436. Noncooperation is now permitted for "good cause." 42 U.S.C.A. § 602(a)(26)(B) (Supp. 1976).

<sup>171</sup> 42 U.S.C. § 602(a)(25) (Supp. IV, 1974).

<sup>172</sup> *Id.* § 602(a)(26).

<sup>173</sup> *Id.* As protective payments, children's benefits are paid either to a concerned individual other than the parent for use of the children or directly to the persons furnishing food, housing, and other goods and services to the children. *See* 42 U.S.C. § 606(b)(2) (1970).

<sup>174</sup> *See* 42 U.S.C. § 602(a)(25) (Supp. IV, 1974).

<sup>175</sup> Although neither the statute nor the regulations are explicit on this point, the absence of an express provision limiting the consequences of failure to furnish Social Security numbers to ineligibility of the parent and not the children may be viewed by the states as an authorization to deny assistance to the entire household.

A probable area of litigation involves the fluid concept of "cooperating" with the state. Although the HEW regulations offer the states some guidance in administering the requirement,<sup>176</sup> no limitations are placed on the states' power to deny aid to applicants whose conduct fails to conform to state definitions of cooperation.<sup>177</sup> A more precise definition of cooperation and permissible exceptions to the requirement will therefore have to be furnished by the courts.<sup>178</sup>

In an effort to circumvent earlier court decisions invalidating state-imposed conditions of cooperation,<sup>179</sup> at least one state imposed civil and criminal sanctions on uncooperative AFDC mothers.<sup>180</sup> Since parents are now required under federal law to cooperate with the state in locating absent parents and in obtaining support payments,<sup>181</sup> state laws forcing parental cooperation through punitive sanctions have arguably been preempted.

The Supreme Court's short per curiam opinion in *Roe v. Norton*<sup>182</sup> may have some bearing on the question of preemption. In *Norton*, AFDC mothers of illegitimate children challenged a Connecticut statute requiring unmarried mothers to identify the fathers of their children under threat of imprisonment or a fine for contempt.<sup>183</sup> A three-judge district court held that the statute did not

<sup>176</sup> 45 C.F.R. § 232.12(b) (1975) provides:

"Cooperate" includes the following:

- (1) Appearing at the offices of the State or local agency or the child support agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by him, that is relevant to achieving the objectives of [identifying and locating absent parents, establishing the paternity of illegitimate children, and obtaining support payments];
- (2) Appearing as a witness at court or other hearings or proceedings necessary to achieving the [above] objectives . . .
- (3) Providing information, or attesting to the lack of information, under penalty of perjury; and
- (4) After an assignment under § 233.11 has been made, paying to the child support agency any child support payments received from the absent parent which are covered by such assignment.

<sup>177</sup> See 42 U.S.C. § 602(a)(26)(B) (Supp. 1V, 1974); 45 C.F.R. § 232.12(b) (1975).

<sup>178</sup> Another issue raised by the cooperation requirement is the constitutionality of compelling disclosure by unmarried mothers of the names of the fathers of their children. For a summary of the questions involved, see Note, *1974 Developments in Welfare Law*, *supra* note 11, at 875-76. Although the Supreme Court had the opportunity to decide at least some of these constitutional questions in *Roe v. Norton*, 422 U.S. 391 (1975), the case was decided on statutory rather than constitutional grounds. See notes 182-86 and accompanying text *infra*.

<sup>179</sup> See note 162 and accompanying text *supra*.

<sup>180</sup> See CONN. GEN. STAT. ANN. § 52-440 (1975), which provides for a fine, imprisonment, or both for failure to disclose information about the biological father of illegitimate children or for failure to prosecute a paternity action.

<sup>181</sup> See note 170 and accompanying text *supra*.

<sup>182</sup> 422 U.S. 391 (1975).

<sup>183</sup> *Id.* at 392.

conflict with the Social Security Act,<sup>184</sup> but the Supreme Court vacated the judgment and remanded the case for further consideration in light of the new federal law, which the Court pointed out does not impose comparable punitive sanctions on noncooperating parents. In the event that a criminal proceeding was pending under the Connecticut statute, the district court was also directed to reconsider the case in light of two Supreme Court cases outlining the circumstances under which state court proceedings may be enjoined by federal courts.<sup>185</sup>

*Roe v. Norton* may be interpreted as suggesting that additional penalties imposed for failure to cooperate with the state are preempted by, and therefore impermissible under, the Social Security Act.<sup>186</sup> Because of the brevity of the opinion, however, its implications are not yet clear.

#### B. *Presumptions of Fraudulent Intent*

Most states deny AFDC eligibility to applicants who have transferred property without receiving fair consideration in order to qualify for assistance.<sup>187</sup> Some states also deny eligibility to applicants who have voluntarily terminated their employment or reduced their earning capacity for the purpose of meeting AFDC income tests.<sup>188</sup> These restrictions are intended to prevent the disbursement of public funds to voluntarily impoverished individuals who would otherwise be independent of the welfare system. All doubts are usually resolved against the applicant by establishing a presumption that a transfer of property or termination of employment within a given period of time before applying was undertaken with the intent to qualify for assistance.<sup>189</sup> Such presumptions, whether rebuttable

<sup>184</sup> *Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973). The court also upheld the statute against claims that it violated the equal protection and due process clauses of the United States Constitution, and that it impermissibly invaded the constitutional right of privacy. For an analysis of the issues presented and their resolution by the district court, see Note, *1974 Developments in Welfare Law*, *supra* note 11, at 875-77.

<sup>185</sup> 422 U.S. at 393. The two cases cited by the Court were *Younger v. Harris*, 401 U.S. 37 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). *Younger* set forth the rules applicable to enjoining state criminal prosecutions, and *Huffman* extended the *Younger* rules to civil nuisance proceedings.

<sup>186</sup> An alternative interpretation is that the Court simply refused to rule on the issue because of the new federal law, which was enacted after the three-judge district court decision. This interpretation, however, does not explain why the Court wrote the per curiam opinion or why the *Younger* and *Huffman* cases were cited as material.

<sup>187</sup> See HANDBOOK, *supra* note 16, at 148.

<sup>188</sup> See, e.g., N.Y. SOC. SERV. LAW § 131(11) (McKinney 1976), discussed in notes 203-07 and accompanying text *infra*.

<sup>189</sup> See, e.g., FLA. STAT. ANN. § 409.185(1)(b) (1973); N.Y. SOC. SERV. LAW § 131(11) (McKinney 1976).

or irrebuttable, have recently come under attack as inconsistent with the Social Security Act and violative of due process.<sup>190</sup>

In the leading case of *Owens v. Roberts*,<sup>191</sup> a Florida statute and regulation restricting property transfers were invalidated on constitutional and statutory grounds. The statute established a rebuttable presumption that all transfers of property made within two years prior to the date of application for assistance were undertaken with the intent to qualify for welfare.<sup>192</sup> The corresponding regulation converted the rebuttable presumption into an irrebuttable presumption by providing that a transfer of property worth over \$600 for less than its fair market value disqualified an applicant for two years from the date of transfer.<sup>193</sup> Although the two named plaintiffs strikingly illustrated the inequities generated by the presumption of fraudulent intent,<sup>194</sup> both were denied benefits solely because they had transferred property in the recent past for less than its assessed value.<sup>195</sup>

A three-judge federal district court struck down the transfer provisions on essentially two grounds. First, both the regulation and the statute were found to violate due process.<sup>196</sup> The court held the irrebuttable presumption established by the regulation to be arbitrary, irrational, and often contrary to fact.<sup>197</sup> The statute itself, which created a rebuttable presumption, was invalidated for lack of

<sup>190</sup> See notes 191-215 and accompanying text *infra*.

<sup>191</sup> 377 F. Supp. 45 (M.D. Fla. 1974).

<sup>192</sup> FLA. STAT. ANN. § 409.185(1)(b) (1973).

<sup>193</sup> FLA. DEP'T OF HEALTH AND REHABILITATIVE SERVICES, FAMILY SERVICES DIVISION ch. V, § II, *quoted in* *Owens v. Roberts*, 377 F. Supp. 45, 48 n.3 (M.D. Fla. 1974).

<sup>194</sup> One sold her home for half of its assessed value in order to pay her husband's funeral expenses. The other, whose health was failing, sold her business equipment (furniture) on doctor's orders; since there was no market for used furniture, she was only able to secure one-third of its assessed value. 377 F. Supp. at 50-51.

<sup>195</sup> *Id.* The plaintiffs were applicants for Old Age Assistance and Aid to the Totally and Permanently Disabled (both federally subsidized programs). The court's analysis of the issues, however, applies to AFDC as well.

<sup>196</sup> *Id.* at 51-54.

<sup>197</sup> *Id.* at 52. See also *Garcia v. Silverman*, 393 F. Supp. 590 (E.D. Wis. 1975) (invalidating irrebuttable presumption that public assistance applicants who had voluntarily terminated their employment more than once within prior year were unwilling to comply with state's work rule and therefore ineligible for assistance).

The well-selected plaintiffs in *Owens* made the court's conclusion more compelling: The only factor which distinguishes these named plaintiffs from other individuals who are eligible for assistance is that these plaintiffs, under economic duress, made innocuous transfers of property for less than fair market value. Yet the plaintiffs, being elderly, disabled, unemployed and unemployable, and plainly impoverished, were nevertheless denied assistance. The arbitrariness and irrationality of this conclusive and automatic attribution of fraudulent intent without considering such factors as economic coercion, ignorance or the good faith of the claimant plainly flies in the face of the altruistic purpose underpinning welfare legislation.

a rational connection between the fact proved (prior transfer of property) and the fact presumed (fraudulent intent).<sup>198</sup> The court found it more likely that applicants liquidate assets "in order to subsist temporarily" than to qualify for public assistance.<sup>199</sup> Second, the court struck down the transfer provisions as being inconsistent with the Social Security Act.<sup>200</sup> Noting that federal law places no such penalties upon the failure to explain why an asset was transferred, the court concluded on the basis of the *King-Townsend-Remillard* trilogy<sup>201</sup> that the provisions must fall.<sup>202</sup>

The validity of the court's due process analysis in *Owens* has been seriously undermined by the Supreme Court's recent decision in *Lavine v. Milne*,<sup>203</sup> upholding the constitutionality of a New York statutory provision creating a presumption of fraudulent intent similar to the presumption at issue in *Owens*. The New York statute involved in *Milne* denies eligibility for a period of seventy-five days to all AFDC or general assistance applicants who voluntarily terminate their employment or reduce their earning capacity for the purpose of qualifying for assistance.<sup>204</sup> The statute also provides

<sup>198</sup> 377 F. Supp. at 53-54. See also *Gardner v. Lavine*, 2 CCH Pov. L. REP. ¶ 20,646 (Sup. Ct. N.Y., Feb. 24, 1975), which followed *Owens* in holding that New York's restrictions on property transfers, to the extent that they created a presumption of fraud, violated the due process clause.

<sup>199</sup> 377 F. Supp. at 53.

Besides economic pressures, many other considerations, including sound business practice, which have no connection at all with intent to defraud the welfare authorities, may dictate that transfer of an asset is appropriate. The "generality of experience" manifestly contradicts the conclusion that fraud may be inferred from the mere transfer of property.

*Id.* (footnotes omitted).

<sup>200</sup> *Id.* at 55.

<sup>201</sup> These major cases are *King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971); and *Carleson v. Remillard*, 406 U.S. 598 (1972). For a discussion of the doctrine developed in these cases see note 163 *supra*.

<sup>202</sup> 377 F. Supp. at 55. See also *Robertson v. Lavine*, 71 Misc. 2d 757, 337 N.Y.S.2d 237 (Sup. Ct. N.Y. 1972) (conditioning AFDC eligibility upon securing fair consideration for transfers of property violates Social Security Act).

The *Owens* court emphasized the inconsistency between the Florida provisions and the federal regulation providing that "[m]ethods of determining eligibility must be consistent with the objective of assisting all eligible persons to qualify . . ." 45 C.F.R. § 233.10(a)(1)(vii) (1975), quoted in 377 F. Supp. at 54-55. The court also pointed out that the federal regulations governing welfare fraud (45 C.F.R. § 235.110 (1975)) placed the duty of investigating such fraud on the state welfare authorities, rather than requiring individual applicants to explain why a transfer of property or other transaction was not fraudulent. 377 F. Supp. at 55. The court, however, made no attempt to reconcile its holding with the two Supreme Court cases that depart from the *King-Townsend-Remillard* rationale: *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405 (1973); *Wyman v. James*, 400 U.S. 309 (1971). See note 163 *supra*.

<sup>203</sup> 96 S. Ct. 1010 (1976).

<sup>204</sup> Any person who voluntarily terminated his employment or voluntarily reduced

that any person who applies for public assistance within seventy-five days after voluntarily terminating his employment or reducing his earning capacity will be "deemed" to have done so "for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person."<sup>205</sup> This latter provision was struck down by a three-judge district court<sup>206</sup> on the same due process ground used by the *Owens* court to invalidate the rebuttable presumption: an insufficient connection between the fact proved (voluntary termination of employment or reduction in earning capacity) and the fact presumed (intent to qualify for welfare).<sup>207</sup>

The Supreme Court, however, unanimously rejected the lower court's due process analysis in a brief but far-reaching opinion.<sup>208</sup> Stressing that applicants for public assistance must bear the burden of proving their eligibility, the Court construed the language at issue as creating a mere "circumlocutory direction to welfare authorities" to make the "normal assumption that an applicant is not entitled to benefits unless and until he proves his eligibility."<sup>209</sup> Since the applicant already had the burden of proof, the provision does not, according to the Court, create a rebuttable presumption:

Although the District Court found this to be an unconstitutional

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his earning capacity for the purpose of qualifying for home relief or aid to dependent children or a larger amount thereof shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or regulation.

N.Y. SOC. SERV. LAW § 131(11) (McKinney 1976).

<sup>205</sup> Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person.

*Id.*

<sup>206</sup> *Milne v. Berman*, 384 F. Supp. 206 (S.D.N.Y. 1974).

<sup>207</sup> *Id.* at 211. The court noted that

Any number of reasons for terminating employment exist—desire for advancement, problems of health, family problems, transportation problems, personality conflicts, working conditions, and perhaps simply basic discontent with a job, to mention a few . . . . There may also be numerous reasons why a person who terminates his employment subsequently becomes impoverished and has to resort to a request for public assistance—general economic conditions, a decline in jobs available in a particular industry, health, or failure to receive an anticipated new position.

*Id.* at 210-11 (footnotes omitted). The court, finding that the presumption compelling an inference of fraudulent intent was arbitrary and unreasonable, concluded that the statute was unconstitutional. *Id.* at 211.

<sup>208</sup> *Lavine v. Milne*, 96 S. Ct. 1010 (1976). Justice Stevens took no part in the consideration or decision of the case.

<sup>209</sup> *Id.* at 1015.

"rebuttable presumption," the sole purpose of the provision is to indicate that, as with other eligibility requirements, the applicant rather than the State must establish that he did not leave employment for the purpose of qualifying for benefits. The provision carries with it no procedural consequence; it shifts to the applicant neither the burden of going forward nor the burden of proof, for he appears to carry the burden from the outset.

Despite the rebuttable presumption aura that the second sentence of § 131(11) radiates, it merely makes absolutely clear the fact that the applicant bears the burden of proof on this issue, as he does on all others.<sup>210</sup>

By refusing to characterize the provision as creating a rebuttable presumption, the Court was able to dismiss as irrelevant such cases as *Western & Atlantic R.R. v. Henderson*,<sup>211</sup> which invalidated rebuttable presumptions for lack of a rational connection between the fact proved and the fact presumed.<sup>212</sup> The Court held that the remaining question, whether the burden of proving the absence of fraudulent intent had been unfairly placed on applicants for public assistance, does not raise an issue of federal constitutional law:

[I]t is not for us to resolve the question of where the burden ought to lie on this issue. Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.<sup>213</sup>

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<sup>210</sup> *Id.* The Court's interpretation of the statutory provision was not convincing. Not only did it render the provision superfluous, but it disregarded altogether the federal regulation governing welfare fraud, which places the duty of investigating possible fraud on the state welfare authorities rather than requiring the individual applicant to prove the absence of a fraudulent motive. See 45 C.F.R. § 235.110(b) (1975).

<sup>211</sup> 279 U.S. 639 (1929).

<sup>212</sup> 96 S. Ct. 1010, 1015 n.9 (1976). The distinguishing feature, according to the Court, was that the rebuttable presumption cases involved shifting the burden of proof from one party to the other, whereas the statutory provision in question placed the burden of proof on the applicant from the outset.

<sup>213</sup> *Id.* at 1016. Both the *Owens* court and the lower court in *Milner* were heavily influenced by policy considerations militating against imposing the burden of proof on welfare applicants or recipients. *Owens v. Roberts*, 377 F. Supp. 45, 53 (M.D. Fla. 1974); *Milne v. Berman*, 384 F. Supp. 206, 212 (S.D.N.Y. 1974). The courts stressed that the opportunity to rebut a presumption of fraudulent intent meant little to the poor, who were "the least capable socially, intellectually, economically and physically to employ the means to rebut the presumption." 377 F. Supp. at 53. In *Milne*, the court rejected the state's argument that it was reasonable to place the burden of proving the absence of fraudulent intent on the public assistance applicant because his motive was within his knowledge alone, and instead followed *Owens* by arguing that the poverty of the individuals to whom the presumption applied deserved special attention. The court stated:

What we are concerned with here is a matter of fairness and experience, resolving itself ultimately into a question of policy. In the situation before this court, those persons to whom the presumption is directed are typically the least capable to employ the means to rebut the presumption . . . . To require these persons to prove their

The Court's disposition of the rebuttable presumption question in *Milne* forecloses a major avenue of attack on state attempts to render various types of AFDC applicants presumptively ineligible for assistance.<sup>214</sup> The only remaining argument, upheld by the court in *Owens*, is that such presumptions of fraudulent intent are inconsistent with the Social Security Act under the *King-Townsend-Remillard* rationale.<sup>215</sup>

### C. Unemployed Fathers

The AFDC-UF (unemployed fathers) program was instituted in 1961<sup>216</sup> to provide financial assistance to families with children who are needy because of their fathers' unemployment.<sup>217</sup> Although the states are not required to participate in AFDC-UF, twenty-four states have adopted the program.<sup>218</sup>

The most significant activity in AFDC-UF in recent months has centered around the definition of "unemployment"<sup>219</sup> and the rela-

innocent motives for terminating employment is effectively to deny them all chances of obtaining the benefits which they seek.

*Milne v. Berman*, 384 F. Supp. 206, 212 (S.D.N.Y. 1974).

<sup>214</sup> The Supreme Court in *Milne* also considered a second argument against the constitutionality of the New York statute. Since obtaining a fair hearing decision on the issue of the applicant's motive could take as long as 90 days, by which time the 75-day waiting period would have elapsed, the respondents argued that the hearing procedure was meaningless. They contended that the requirements of procedural due process articulated in *Goldberg v. Kelley*, 397 U.S. 254 (1970), mandated that an opportunity for a hearing be provided prior to imposing the 75-day "sanction." 96 S. Ct. at 1016. Without purporting to employ the traditional balancing test prescribed in *Goldberg* for determining whether due process required a prior hearing, the Court simply stated that

nothing in the Constitution requires that benefits be initiated prior to the determination of an applicant's qualifications at an adjudicatory hearing.

*Id.* The implications of this hasty dismissal of the procedural due process argument are not yet clear.

<sup>215</sup> Since the plaintiffs in *Milne* were applicants for Home Relief, New York's nonfederally funded general assistance program (*see* 96 S. Ct. at 1013), this argument was not available to the respondents, and remains unaffected by the Supreme Court's decision.

<sup>216</sup> Act of May 8, 1961, Pub. L. No. 87-31, § 1, 75 Stat. 75 (codified at 42 U.S.C. § 607 (1970)).

<sup>217</sup> As originally enacted, AFDC-UF applied to unemployed mothers as well as unemployed fathers. In order to eliminate the state practice of furnishing assistance to families in which the father was working but the mother was unemployed, the 1967 Social Security Amendments restricted the program to children of unemployed fathers. 42 U.S.C. § 607 (1970). A father is deemed unemployed if he works less than 100 hours a month. 45 C.F.R. § 233.100(a)(1) (1975). In order for his family to be eligible for AFDC-UF, a father must be unemployed for 30 days and must not have refused without good cause a bona fide offer of employment. He must also have had a substantial connection with the work force, and cannot be receiving unemployment compensation. All AFDC-UF applicants are required to register for the WIN program. 42 U.S.C. § 607(b) (1970).

<sup>218</sup> HANDBOOK, *supra* note 16, at 144, 156-57.

<sup>219</sup> *See* notes 224-44 and accompanying text *infra*. 42 U.S.C. § 607(a) (1970) requires the

tionship between AFDC-UF and unemployment compensation programs.<sup>220</sup> Some states have attempted to exclude from the program participants in labor strikes or fathers discharged for misconduct.<sup>221</sup> Others have limited its applicability to fathers ineligible for unemployment compensation.<sup>222</sup> Litigation in 1975 focused on whether such exclusions are consistent with the Social Security Act.<sup>223</sup>

### 1. *Definition of Unemployment*

The current HEW regulation allows states, at their option, to deny AFDC-UF to fathers who are either ineligible for state unemployment compensation or whose unemployment results from participation in a labor dispute.<sup>224</sup> This regulation was challenged in two Maryland district court cases as being incompatible with the Social Security Act.<sup>225</sup>

The first case, *Francis v. Davidson*,<sup>226</sup> [hereinafter cited as *Francis*

Secretary of HEW to prescribe standards for defining unemployment. Under the 1961 legislation, the definition of unemployment was left to the individual states. States adopted widely varying definitions, rendering uniform administration of the program impossible. See H.R. REP. NO. 544, 90th Cong., 1st Sess. 108 (1967); *Hearings on H.R. 12080 Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. 268-69 (1967) (statement of Wilbur J. Cohen, Undersecretary of HEW). Congress responded in 1967 by enacting a number of additional eligibility conditions (see note 217 *supra*), and by expressly directing the Secretary of HEW to promulgate a federal definition of unemployment. 42 U.S.C. § 607(a) (1970).

<sup>220</sup> See notes 245-65 and accompanying text *infra*.

<sup>221</sup> See, e.g., SOCIAL SERVICES ADMINISTRATION, MARYLAND DEP'T OF EMPLOYMENT AND SOCIAL SERVICES, Rule 200.A.Z.(2), quoted in *Francis v. Davidson*, 340 F. Supp. 351, 356 n.14 (D. Md.), *aff'd*, 409 U.S. 904 (1972) [hereinafter cited as *Francis I*]; Carney, *The Forgotten Man on the Welfare Roll: A Study of Public Subsidies for Strikers*, 1973 WASH. U.L.Q. 469, 479-94.

<sup>222</sup> See, e.g., *Philbrook v. Glodgett*, 421 U.S. 707 (1975) (striking down Vermont practice of denying AFDC-UF benefits to any applicant or recipient who was eligible for but not necessarily receiving unemployment compensation). The primary disqualifying factors are voluntary separation from work, discharge for misconduct, refusal of suitable work, and unemployment due to a labor dispute. See HANDBOOK, *supra* note 16, at 54.

<sup>223</sup> See notes 225-41, 245-65 and accompanying text *infra*.

<sup>224</sup> In 1973, 45 C.F.R. § 233.100(a)(1) was amended to provide:

[A]t the option of the State, such definition [of unemployment] need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

The option to exclude certain fathers from AFDC-UF was added to the regulation in response to the Supreme Court's summary affirmation of *Francis I*, 340 F. Supp. 351 (D. Md.), *aff'd*, 409 U.S. 904 (1972). The HEW regulation, as it then stood, defined unemployment exclusively in terms of the number of hours worked without reference to any reason or reasons for unemployment.

<sup>225</sup> See notes 226-41 and accompanying text *infra*.

<sup>226</sup> 379 F. Supp. 78 (D. Md. 1974). This is the same case that in *Francis I* prompted HEW in 1973 to amend its regulation to permit states to deny eligibility for AFDC-UF to fathers who were discharged for misconduct. See note 224 *supra*. Shortly after its 1972 *Francis I* decision,

II], involved Maryland's practice of excluding fathers on strike and fathers discharged from their jobs as a result of misconduct.<sup>227</sup> A three-judge panel held that the federal and state regulations authorizing such exclusions were invalid under the Social Security Act.<sup>228</sup> In striking down the exclusions, the court relied on two distinct grounds.<sup>229</sup> Citing the unqualified language of the Social Security Act providing for aid to "a needy child . . . who has been deprived of parental support or care by reason of the *unemployment* (as determined in accordance with standards prescribed by the Secretary) of his father . . .,"<sup>230</sup> the court concluded that HEW may not authorize the denial of AFDC-UF to families of fathers discharged for misconduct:

The statute relates to the unemployment of a father—and a father who is discharged for cause by his employer *is* unemployed. . . . Until the Congress amends the statute, no combination of federal and state regulations may provide that a father who is unemployed is not unemployed.<sup>231</sup>

In contrast to an individual who has been fired from his job, the court held that a person out of work because of a labor dispute need not necessarily be considered unemployed.<sup>232</sup> HEW's downfall in its treatment of strikers, however, was its failure to establish standards to guide the states in defining unemployment,<sup>233</sup> as required under the Social Security Act.<sup>234</sup> The regulation giving states the option to exclude strikers<sup>235</sup> "established no standards for the States to follow and simply permitted each State to do as it chose."<sup>236</sup> The court

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the district court enjoined the Maryland regulation. See 379 F. Supp. at 80 n.4. The state welfare officials, citing the change in the federal regulations eliminating the conflict between the two, moved in 1974 (*Francis II*) to dissolve the injunction. *Id.* at 80.

<sup>227</sup> See MD. ANN. CODE art. 95A, § 6 (1969); SOCIAL SERVICES ADMINISTRATION, MARYLAND DEP'T OF EMPLOYMENT AND SOCIAL SERVS., Rule 200.X.A.(2), quoted in *Francis I*, 340 F. Supp. 351, 356 n.14 (D. Md. 1972).

<sup>228</sup> 379 F. Supp. at 81-82.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 81, quoting 42 U.S.C. § 607(a) (1970) (emphasis in original).

<sup>231</sup> 379 F. Supp. at 81 (emphasis in original).

<sup>232</sup> *Id.* at 81-82. There is no evidence that Congress even considered the applicability of AFDC-UF to strikers when it enacted the program in 1961. See *Carney*, *supra* note 221, at 476; Comment, *Strikers' Eligibility For Public Assistance: The Standard Based on Need*, 52 J. URBAN L. 115, 123 (1974); *Francis I*, 340 F. Supp. 351, 367, 375-77 (D. Md. 1972). It has been suggested that requiring states to include strikers in their AFDC-UF programs might deter states from participating in the program. See Note, *Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 878 (1974).

<sup>233</sup> 379 F. Supp. at 81-82.

<sup>234</sup> See 42 U.S.C. § 607(a) (1970); note 219 *supra*.

<sup>235</sup> See 45 C.F.R. § 233.100(a)(1) (1975).

<sup>236</sup> 379 F. Supp. at 81.

suggested that compliance with the Act could be achieved by amending the federal regulation to (1) exclude strikers, (2) include strikers, or (3) allow states to make their own decisions within the confines of specific federal guidelines.<sup>237</sup>

In the second case, *Bethea v. Mason*,<sup>238</sup> the question was whether or not Maryland could exercise its option to exclude from AFDC-UF fathers who had voluntarily terminated their employment.<sup>239</sup> Relying on *Francis II*, the court reiterated its conclusion that the federal and state regulations, allowing fathers who were in fact unemployed to be treated as not unemployed, were inconsistent with the Social Security Act.<sup>240</sup> Both *Francis II* and *Bethea* were recently affirmed by the Fourth Circuit Court of Appeals.<sup>241</sup>

In an attempt to conform its regulations to the district court's decision in *Francis II*, HEW has proposed a new regulation<sup>242</sup> that withdraws from the states the option of excluding fathers who are unemployed because of conduct or circumstances that would result in disqualification for state unemployment compensation.<sup>243</sup> If the regulation goes into effect without substantial alteration, states will no longer be able to deny eligibility for AFDC-UF to households in which the father either has been fired or has voluntarily quit his job. The proposed regulation requires states to exclude fathers on strike

<sup>237</sup> *Id.* at 82. The three alternatives were first suggested by the court in its 1972 *Francis I* opinion. 340 F. Supp. at 367. The third alternative, however, was simply to leave the decision to the states. In its 1974 opinion, the court admitted that the third option, literally read, permitted the amendment to 45 C.F.R. § 233.100(a)(1) (1975) promulgated by HEW on July 12, 1973. The court therefore modified the language of the third alternative:

That language could have, and from hindsight should have, included as part of alternative (3) and after the words "to leave that decision to the state" the additional words "in accordance with appropriate standards established by the Secretary."

379 F. Supp. at 82. The court distinguished defining unemployment from establishing standards to guide the states in promulgating their own definitions of unemployment. *Id.* Only the latter is required by the Social Security Act. See notes 242-44 and accompanying text *infra*.

<sup>238</sup> 384 F. Supp. 1274 (D. Md. 1974).

<sup>239</sup> *Bethea* involved a different application of the same state regulation at issue in both of the *Francis* cases. See note 227 and accompanying text *supra*.

<sup>240</sup> 384 F. Supp. at 1280-81.

<sup>241</sup> *Francis v. Chamber of Commerce*, Nos. 74-1991, 74-1992, 75-1165 (4th Cir. Sept. 22, 1975). The court adopted the district court opinions in *Bethea* and *Francis II* as its own. *Id.* Maryland had filed notices of appeal of the *Francis II* decision in both the Supreme Court and the Court of Appeals, thereby protecting its right to appeal if the Supreme Court dismissed the appeal there for lack of jurisdiction, as it subsequently did. The Supreme Court, treating the papers as a petition of certiorari before judgment, also denied certiorari. 419 U.S. 1042 (1974); 420 U.S. 903 (1975).

<sup>242</sup> 40 Fed. Reg. 33,461 (1975) (proposing an amendment to 45 C.F.R. § 233.100(a)(1) (1975)).

<sup>243</sup> *Id.*

if the father's involvement in the labor dispute would render him ineligible for unemployment compensation under state law.<sup>244</sup>

## 2. Unemployment Compensation

In 1975, the Supreme Court resolved the important issue of whether families of unemployed fathers may be denied benefits under the AFDC-UF program because the father is eligible for unemployment compensation under state or federal law.<sup>245</sup> The Court's decision that unemployed fathers are entitled, at their option, to receive either AFDC-UF or unemployment compensation has far-reaching implications for the future of unemployment compensation,<sup>246</sup> and represents an additional limitation on the permissible scope of state discretion in administering AFDC.<sup>247</sup>

Section 407(b)(2)(C)(ii) of the Social Security Act requires states to deny benefits under the AFDC-UF program "with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States."<sup>248</sup> Vermont instituted a practice of denying AFDC-UF benefits to any applicant who was eligible but not necessarily receiving unemployment compensation.<sup>249</sup> Several fathers re-

<sup>244</sup> *Id.* The introductory comments to the proposal indicate that HEW adopted the third approach to participants in strikes. See note 237 and accompanying text *supra*.

The comments explain that

by tying the eligibility for AFDC-UF of a father not working as the result of participation in a labor dispute to that father's eligibility for State unemployment compensation benefits, we will define the standards which the district court stated were required by statute.

40 Fed. Reg. 33,461 (1975).

<sup>245</sup> *Philbrook v. Glodgett*, 421 U.S. 707 (1975).

<sup>246</sup> It has been argued that allowing unemployed fathers to choose whether to receive unemployment compensation or AFDC-UF will "shift drastically the burden of supporting families of unemployed fathers from the unemployment compensation program to the AFDC program." Brief for Appellant at 27, *Philbrook v. Glodgett*, 421 U.S. 707, 714 n.9 (1975). As a result, the public sector rather than the private sector will be forced to bear the expense, and private employers, whose obligation under unemployment compensation programs is directly related to the amount of funds paid out in claims, will receive a windfall. *Id.*

<sup>247</sup> See note 163 *supra*.

<sup>248</sup> 42 U.S.C. § 607(b)(2)(C)(ii) (1970).

<sup>249</sup> VERMONT WELFARE REG. § 2333.1 defines unemployment as follows:

An unemployed father is one whose minor children are in need because he is out of work, is working part-time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that:

(3) He is not receiving Unemployment Compensation during the same week as assistance is granted.

Quoted in *Philbrook v. Glodgett*, 421 U.S. 707, 711-12 (1975) (emphasis in *Philbrook*). The regulation had been applied by Vermont to exclude unemployed fathers who were eligible for unemployment compensation. *Id.* at 712.

ceiving state unemployment compensation challenged the state practice and the statutory provision of the Social Security Act.<sup>250</sup> In each case the amount of benefits received from unemployment compensation was significantly less than the benefits the fathers would have received under AFDC-UF.<sup>251</sup> The unemployed fathers therefore argued that they had been deprived of an income equal to the state level of benefits<sup>252</sup> in violation of the due process and equal protection clauses of the federal constitution.<sup>253</sup> A three-judge district court in 1973 avoided the constitutional questions by interpreting the statutory provision to afford unemployed fathers who are otherwise eligible for AFDC an option to receive unemployment or AFDC benefits.<sup>254</sup> The Vermont regulation as applied was struck down as being inconsistent with the Social Security Act.<sup>255</sup>

Upon appeal to the Supreme Court, the appellants, Vermont and HEW, conceded that section 407(b)(2)(C)(ii) is addressed to a "father [who] receives unemployment compensation"<sup>256</sup> rather than to a father who is *eligible* for unemployment compensation.<sup>257</sup> Nevertheless, they argued that this provision must be considered in conjunction with the entire statutory scheme. The appellants pointed out that giving applicants the option to receive AFDC-UF or unemployment, whichever is greater, is inconsistent with the approach to non-AFDC income and resources required by section 402(a)(7) of the Act.<sup>258</sup> Section 402(a)(7) requires state plans to "provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children."<sup>259</sup> The policy underlying the statutory provision is made explicit in the federal regulation requiring states to "carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability."<sup>260</sup> Appellants argued that allow-

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<sup>250</sup> *Glodgett v. Betit*, 368 F. Supp. 211 (D. Vt. 1973).

<sup>251</sup> *Id.* at 213; *Philbrook v. Glodgett*, 421 U.S. 707, 712 (1975).

<sup>252</sup> "Level of benefits" is used to refer to the maximum amount of money Vermont furnished to AFDC recipients. See note 53 *supra*.

<sup>253</sup> 368 F. Supp. 211, 213 (D. Vt. 1973). By requiring fathers who were eligible for both unemployment compensation and AFDC to collect unemployment checks, the state forced the plaintiffs to subsist on grants far below the amounts they would have received under AFDC-UF.

<sup>254</sup> *Id.* at 217-18.

<sup>255</sup> *Id.* at 218.

<sup>256</sup> 42 U.S.C. § 607(b)(2)(C)(ii) (1970) (emphasis added).

<sup>257</sup> *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

<sup>258</sup> *Id.*

<sup>259</sup> 42 U.S.C. § 602(a)(7) (1970).

<sup>260</sup> 45 C.F.R. § 233.20(a)(3)(ix) (1975).

ing unemployed fathers to decline unemployment benefits for which they are entitled in order to qualify for AFDC-UF undermines the policy requiring AFDC recipients to exhaust potential sources of income.<sup>261</sup>

The Supreme Court, affirming the judgment of the lower court, found the appellants' argument "based on intersectional harmony" unpersuasive.<sup>262</sup> But it also expressed dissatisfaction with its holding, noting that total disqualification from AFDC upon receipt of unemployment compensation is not consistent with the overall AFDC scheme.<sup>263</sup>

If § 407(b)(2) had been intended to fit smoothly into the AFDC program, then assistance payments should be *reduced* by the amount of unemployment compensation received by a father; this much the federal appellant concedes. But Congress has expressly provided otherwise: receipt of unemployment compensation results in *termination* of AFDC benefits. The appellants are simply incorrect when they characterize their construction of § 407(b)(2)(C)(ii) as consistent with the overall pattern of the AFDC program while assailing the District Court's interpretation as fundamentally disruptive; the fact of the matter is that neither construction is harmonious with the program's general approach to income and resources.<sup>264</sup>

Since the statutory language provides no basis for reducing rather than terminating AFDC-UF benefits by the amount of unemployment compensation, the Court suggested that the appellants address their arguments to Congress.<sup>265</sup>

#### D. State Supplemental Work Programs

In an effort to reduce the number of AFDC recipients by encouraging employment, Congress in 1967 amended the Social

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<sup>261</sup> 421 U.S. at 714.

<sup>262</sup> *Id.* at 715.

<sup>263</sup> *Id.* Normally, the non-AFDC income of an AFDC household is deducted from the amount of benefits a family with no income would receive (subject to certain income exemptions), and the family's grant is reduced accordingly. Benefits are terminated only if the household's income from other sources exceeds the state benefit level. Although the methods used by the states in calculating the amount of a family's benefits vary widely (*see* HANDBOOK, *supra* note 16, at 161-63), income reduces but does not terminate the grant, unless it exceeds a specified maximum. *See* note 53 *supra*.

<sup>264</sup> 421 U.S. 707, 715 (1975) (footnotes omitted).

<sup>265</sup> *Id.* at 719. The Court returned to the *King-Townsend-Remillard* trilogy (*see* note 163 *supra*) to support its finding that the Vermont practice of excluding unemployed fathers who were eligible for unemployment compensation conflicted with 42 U.S.C. § 607(b)(2)(C)(ii) (1970). 421 U.S. at 719. The Court's indication that states had little or no discretion in defining unemployment for purposes of AFDC-UF supports the district court decisions holding that states may not exclude from their coverage individuals who were discharged for misconduct. *See* notes 226-41 and accompanying text *supra*.

Security Act to establish the Work Incentive Program (WIN).<sup>266</sup> Under WIN, nonexempt persons<sup>267</sup> on AFDC rolls are referred to the Secretary of Labor for participation in a compulsory program providing them with job training or with employment in the regular economy or in special work projects.<sup>268</sup> Unless exempt, registration and participation in the WIN program are conditions of eligibility for individual AFDC benefits.<sup>269</sup>

When Congress enacted the WIN program, twenty-one states already required AFDC recipients to participate in state work programs;<sup>270</sup> twenty-three states now have work requirements in excess of WIN.<sup>271</sup> Prior to the Supreme Court's decision in *New York State Department of Social Services v. Dublino*,<sup>272</sup> lower courts had adhered to the rationale of *Townsend v. Swank*<sup>273</sup> and held that such supplemental work programs, to the extent they restricted the class of persons otherwise eligible under federal law, were preempted by WIN.<sup>274</sup> *Dublino*, however, made it clear that states are free to supplement the WIN program with additional work requirements of their own.<sup>275</sup> The Court suggested that such supplemental programs might even impose additional eligibility requirements on AFDC recipients,<sup>276</sup> so long as the particular work requirements do not conflict with specific provisions of the Social Security Act.<sup>277</sup>

In most states, not all AFDC recipients have access to a WIN

<sup>266</sup> Act of Jan. 2, 1968, Pub. L. No. 90-248, tit. 2, § 204, 81 Stat. 884 (codified in 42 U.S.C. §§ 602(a)(19)(A), 603-44 (1970)).

<sup>267</sup> Certain AFDC recipients are exempted from the WIN program. Those individuals include children under 16 or attending school full-time until age 22, the aged or incapacitated, mothers of pre-school age children, individuals needed in the home to care for ill or incapacitated household members, mothers of children whose father is registered for WIN, and individuals so remote from a WIN program as to preclude participation. See 42 U.S.C. § 602(a)(19)(A) (Supp. IV, 1974).

<sup>268</sup> *Id.* §§ 602(a)(19)(G)(ii), 632(b).

<sup>269</sup> *Id.* §§ 602(a)(19)(A), 602(a)(19)(F).

<sup>270</sup> See *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 414 (1973).

<sup>271</sup> HANDBOOK, *supra* note 16, at 156-57.

<sup>272</sup> 413 U.S. 405 (1973).

<sup>273</sup> 404 U.S. 282 (1971). See note 163 *supra*.

<sup>274</sup> See *Woolfolk v. Brown*, 456 F.2d 652 (4th Cir.), cert. denied, 409 U.S. 885 (1972) [hereinafter cited as *Woolfolk I*]; *Woolfolk v. Brown*, 358 F. Supp. 524 (E.D. Va. 1973) [hereinafter cited as *Woolfolk II*]; *Bueno v. Juras*, 349 F. Supp. 91 (D. Ore. 1972); *Jefferies v. Sugarman*, 345 F. Supp. 172 (S.D.N.Y. 1972), *rev'd*, 481 F.2d 414 (2d Cir. 1973).

<sup>275</sup> 413 U.S. 405, 422 (1973). *Dublino* casts some doubt on the continuing viability of the *King-Townsend-Remillard* test for the validity of state-imposed eligibility conditions, and has been interpreted varyingly by lower courts. See Note, *AFDC Eligibility Conditions Unrelated to Need: The Impact of Dublino*, 49 IND. L.J. 334, 344 (1974).

<sup>276</sup> 413 U.S. at 422.

<sup>277</sup> *Id.* at 422-23.

program.<sup>278</sup> The Social Security Act provides for the establishment of work incentive programs only in areas of a state where there are significant numbers of potential WIN registrants.<sup>279</sup> An individual "so remote from a work incentive project that his effective participation is precluded" is specifically exempted from the requirements of registration and participation in WIN.<sup>280</sup> *Dublino* allows states to implement supplementary work programs in "remote" localities;<sup>281</sup> an individual exempt from WIN is therefore not necessarily exempt from all work requirements.

*Woolfolk v. Brown*<sup>282</sup> [hereinafter cited as *Woolfolk III*] presents the only detailed examination since *Dublino* of the consistency between a state's work rules and the Social Security Act. Interpreting *Dublino* not to preclude specific findings of inconsistency, the court in *Woolfolk III* invalidated certain provisions of Virginia's employment program.<sup>283</sup> The major issue concerned Virginia's attempt to exempt from WIN all individuals residing in areas with no WIN program, without regard to a given AFDC recipient's distance from a WIN program.<sup>284</sup> As a result, residents of counties lacking a local

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<sup>278</sup> See *id.* at 418-19; *Woolfolk v. Davidson*, 393 F. Supp. 263, 279 (E.D. Va. 1975) [hereinafter cited as *Woolfolk III*].

<sup>279</sup> 42 U.S.C. § 632(a) (Supp. IV, 1974). Under the Department of Labor regulation governing registration for WIN, an individual is exempted from the program on the basis of remoteness if "more than a total of 10 hours would be required for a normal work or training day including round trip by reasonable [*sic*] available public transportation from his home to the WIN project." 29 C.F.R. §§ 56.4(a)(6) (1975).

<sup>280</sup> 42 U.S.C. § 602(a)(19)(A)(iii) (Supp. IV, 1974).

<sup>281</sup> 413 U.S. at 421.

<sup>282</sup> 393 F. Supp. 263 (E.D. Va. 1975). Earlier cases bearing the same name are cited herein as *Woolfolk I & II*. For a brief discussion of these cases see note 284 *infra*.

<sup>283</sup> See VA. CODE ANN. §§ 63.1-133.7 to -133.15 (Supp. 1975). The Virginia work program required every local welfare agency to determine whether or not applicants or recipients were employable. *Id.* § 63.1-133.10. All employable persons, as a condition of eligibility, had to register with the local employment office and accept reasonable employment or training. *Id.* § 63.1-133.12. The criteria for exemption from the work or training requirements paralleled those established in the Social Security Act. See note 267 *supra*; VA. DEP'T OF WELFARE, WORK RULE MATERIAL, § A, quoted in *Woolfolk III*, 393 F. Supp. 263, 270-75 (E.D. Va. 1975).

<sup>284</sup> 393 F. Supp. at 279. The work program in question was the third such program adopted by Virginia since 1967. The first and the second were struck down by the same judge in decisions prior to *Dublino*. See note 274 and accompanying text *supra*; *Woolfolk I*, 325 F. Supp. 1162 (E.D. Va. 1971), *aff'd*, 456 F.2d 652 (4th Cir.), *cert. denied*, 409 U.S. 885 (1972); *Woolfolk II*, 358 F. Supp. 524 (E.D. Va. 1973). The former work rules also excluded individuals in non-WIN localities regardless of their proximity to WIN programs; these rules were struck down on the theory that WIN preempted state work programs. Judge Merhige, in *Woolfolk I*, concluded that the Social Security Act required specific, individual findings that the applicant or recipient was exempt from WIN by reason of his location. 325 F. Supp. at 1175. But the case was decided on the ground of preemption. *Id.* at 1171. Although other objectionable aspects of the first two work programs were corrected by the third, the blanket exemption of non-WIN localities was retained. See VA. DEP'T OF WELFARE, WORK RULE MATERIAL, § A,

WIN program were, regardless of their proximity to a WIN program, required to register for and participate in the state work program rather than in WIN.<sup>285</sup>

The *Woolfolk III* court, after examining the legislative history of WIN and the applicable federal regulations,<sup>286</sup> concluded that the Social Security Act requires individual determinations of remoteness for AFDC recipients residing in counties not serviced by the WIN program, before such individuals may be subjected to state work rules.<sup>287</sup> The Virginia work rule, which exempted from WIN registration individuals neither "remote" nor otherwise exempt from WIN under federal law and forced them to register for the state program, was struck down as inconsistent with the provision of the Social Security Act specifically requiring all AFDC applicants and recipients to register for WIN unless exempt under the statute.<sup>288</sup>

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quoted in *Woolfolk III*, 393 F. Supp. 263, 270-71 (E.D. Va. 1975). The state in *Woolfolk III*, relying on *Dublino*, argued that the third work rule did not contravene specific provisions of the Social Security Act. *Id.* at 267.

<sup>285</sup> 393 F. Supp. at 279. It is not clear why the state preferred to enroll such individuals in the state work program rather than WIN. One possible explanation is administrative convenience. Under the program Virginia designed, determinations of remoteness would not have to be made on an individual basis.

<sup>286</sup> The court drew extensively from its analysis of the issue in *Woolfolk I*, 325 F. Supp. 1162, 1175-76 (E.D. Va. 1971). See note 284 *supra*. Noting that the interpretation of the remoteness exemption by HEW and the Department of Labor was ambiguous, the court turned to the legislative history of the 1967 WIN amendments. 393 F. Supp. at 278. The House Report, stating that "[a]ll adults in AFDC families . . . are expected to be considered for participation in [the WIN] program[.]" (H. R. REP. No. 544, 90th Cong., 1st Sess. 104-05 (1967)), was cited by the court in support of its view that the remoteness exemption required as a corollary that all recipients living in a non-WIN area who were not actually remote be registered for WIN. 393 F. Supp. at 279. Also cited was the Department of Labor regulation defining the remoteness exemption as encompassing only those individuals who would have to spend over ten hours on a normal working day in order to participate in the program, 29 C.F.R. § 56.4(a)(6) (1975). 393 F. Supp. at 279.

<sup>287</sup> 393 F. Supp. at 279-80.

<sup>288</sup> *Id.* After resolving the main issue in the case, Judge Merhige went on to find other specific conflicts between the work rule and WIN. The employment program made no provision for voluntary registration for WIN by exempted individuals residing in non-WIN areas. The court found that this omission conflicted with a Department of Labor regulation giving all exempt AFDC recipients the right to participate voluntarily in the WIN program, 29 C.F.R. § 56.4(f) (1975). 393 F. Supp. at 280-81.

Under the work rule, participants were required to accept jobs at wages below the lowest allowable wage for WIN participants. *Compare VA. CODE ANN. § 63.1-133.8(a)* (1975 Supp.) with 29 C.F.R. §§ 56.26(c)(1) (1975). Since the wage provisions of the state rule allowed participants to be placed in jobs considered inappropriate for WIN participants, Judge Merhige concluded that the state rule conflicted with the Social Security Act. 393 F. Supp. at 281.

Finally, the court struck down an additional eligibility condition imposed on participants in the state work program. Benefits were denied to any individual who willfully refused to accept medical or dental care, except surgery involving risk, which would render him employ-

### E. Emergency Assistance

In 1968, Congress amended the Social Security Act<sup>289</sup> to establish a new program, Emergency Assistance for Needy Families With Children (EANFC),<sup>290</sup> which provides for short-term assistance within the framework of AFDC to children of needy families facing financial emergencies.<sup>291</sup> Under the EANFC program, certain low-income families are eligible for temporary assistance if the family has no available resources and assistance is necessary to avoid destitution.<sup>292</sup> The only restriction placed on the cause of the family's financial crisis is that the destitution may not arise out of a refusal to accept employment.<sup>293</sup> The class of potential EANFC recipients is much larger than the class of AFDC families:<sup>294</sup> under federal law,

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able. VA. DEP'T OF WELFARE WORK RULE MATERIAL § E.3, *quoted in* Woolfolk III, 393 F. Supp. 273, 274 (E.D. Va. 1975). Under this provision, a participant in the state program who was considered incapacitated under federal standards would be forced to undergo medical treatment in order to remain eligible for AFDC. This eligibility condition was struck down as placing a "greater burden upon work rule participants than [was] placed upon those participating in WIN. . . ." 393 F. Supp. at 281.

The last two findings are of questionable validity under *Dublino*. Both are based on Judge Merhige's conviction that exempt AFDC beneficiaries cannot be placed "at a disadvantage when compared with those AFDC applicants or recipients for whom WIN registration is mandatory." *Id.* Nothing in *Dublino* requires participants in a state supplementary work program to be treated equally with WIN participants; to the contrary, *Dublino* expressly authorizes unequal treatment by allowing states to impose eligibility conditions in addition to those required under WIN. 413 U.S. at 422.

<sup>289</sup> Act of Jan. 2, 1968, Pub. L. No. 90-248, tit. 2, § 206, 81 Stat. 893 (codified at 42 U.S.C. §§ 603(a)(5), 606(e) (1970)).

<sup>290</sup> 42 U.S.C. § 606(e) (1970) provides:

(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment. . . .

<sup>291</sup> For a general description and analysis of the EANFC program, see Note, *Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families With Children*, 60 CORNELL L. REV. 879 (1975).

Participation in the program is optional, and states may incorporate EANFC into their AFDC plans. Twenty-nine states currently provide emergency assistance to needy families under approved plans. See HANDBOOK, *supra* note 16, at 145. Families covered by EANFC programs and the types of emergencies for which assistance is available vary from state to state. See note 298 *infra*.

<sup>292</sup> 42 U.S.C. § 606(e) (1970).

<sup>293</sup> *Id.*

<sup>294</sup> The AFDC definition of "child" is expanded under EANFC to include all individuals between the ages of 18 and 21, rather than only those attending school or vocational programs

families who do not meet the AFDC eligibility conditions in terms of need<sup>295</sup> or family composition,<sup>296</sup> may nevertheless qualify for EANFC.<sup>297</sup>

Most states participating in the EANFC program, however, do not furnish assistance to the full extent authorized by the Social Security Act.<sup>298</sup> They typically exclude from EANFC coverage either non-AFDC families or emergency needs occasioned by unenumerated causes, or both.<sup>299</sup> In light of recent litigation, such attempts by the states to narrow the scope of the EANFC program are of questionable validity.<sup>300</sup>

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on a full-time basis as is the case under the AFDC program. *See* 42 U.S.C. § 606(e) (1970). More significantly, any needy child residing with one of the relatives specified in the AFDC provisions (*see id.* § 606(a)) is deemed to be eligible for emergency assistance, whether or not the child has been "deprived of parental support or care." Thus, intact families, who are ineligible for AFDC unless the father is unemployed and the state has adopted an AFDC-UF program, may receive emergency assistance. *Id.* § 606(e).

<sup>295</sup> Although 42 U.S.C. § 606(e)(1) (1970) requires emergency assistance recipients to be "needy," "without available resources," and destitute, there is no requirement that state definitions of need or destitution parallel the state standards of need for AFDC. The legislative history of the programs arguably indicates an intent to extend EANFC to families ineligible for AFDC. The Senate Report states:

The eligible families involved [in EANFC] are those with children under 21 who either are, or have recently been, living with close relatives. The families do not have to be receiving, or eligible upon application to receive, AFDC (although they are generally of the same type), but they must be without a [*sic*] available resources and the payment or service must be necessary in order to meet an immediate need that would not otherwise be met.

S. REP. NO. 744, 90th Cong., 1st Sess. 166 (1967).

<sup>296</sup> *See* note 294 *supra*.

<sup>297</sup> *See* notes 294-95 *supra*.

<sup>298</sup> For example, the District of Columbia, Massachusetts, and Illinois provide emergency assistance only to families eligible for AFDC or general assistance. D.C. CODE ANN. § 3-209 (1973); *Baxter v. Minter*, 378 F. Supp. 1213 (D. Mass. 1974), discussed in notes 301-304 and accompanying text *infra*; *Mandley v. Trainor*, 523 F.2d F.2d 415 (7th Cir. 1975), discussed in notes 305-10 and accompanying text *infra*.

Connecticut and New York refuse to provide EANFC relief for emergencies caused by theft or diversion of a family's assistance check (*see* notes 319-20 and accompanying text *infra*); Illinois restricts EANFC to families forced out of their homes (*see* note 318 and accompanying text *infra*); and in Connecticut, a family whose destitution is due to a household member's fault is denied EANFC (*see* note 320 *infra*).

<sup>299</sup> HEW regulations, interpreting the EANFC statutory provisions as permitting but not requiring states to extend EANFC to the full extent authorized, afford states a wide range of discretion in determining the classes of families eligible for EANFC and the types of emergencies for which assistance will be provided:

A State plan . . . providing for emergency assistance to needy families with children must:

(1) Specify the eligibility conditions imposed for the receipt of emergency assistance. These conditions may be more liberal than those applicable to other parts of the [AFDC] plan . . . .

(3) Specify the emergency needs that will be met . . . .

45 C.F.R. § 233.120(a) (1975).

<sup>300</sup> *See* notes 301-323 and accompanying text *infra*.

In *Baxter v. Minter*,<sup>301</sup> the Massachusetts practice of limiting emergency assistance to persons falling under the AFDC income ceiling was upheld on the theory that states have broad discretion under federal law to establish standards of need for welfare recipients.<sup>302</sup> Relying upon the Supreme Court cases affirming a state's power to establish its own standards of need for AFDC purposes,<sup>303</sup> the federal district court concluded that the terms "needy" and "destitution," left undefined by Congress, were intended to be supplied by the states.<sup>304</sup>

In contrast to *Baxter*, the Seventh Circuit Court of Appeals in *Mandley v. Trainor*<sup>305</sup> struck down an Illinois emergency assistance program<sup>306</sup> that, *inter alia*, failed to include within its coverage non-AFDC families.<sup>307</sup> Extending the rationale of the *King-Townsend-Remillard* trilogy<sup>308</sup> to EANFC,<sup>309</sup> the court held that the

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<sup>301</sup> 378 F. Supp. 1213 (D. Mass. 1974).

<sup>302</sup> In *Baxter*, the plaintiff, whose application for emergency assistance was denied because her family's income exceeded the state's AFDC and general assistance standards of need, argued that the Massachusetts practice violated the equal protection clause and conflicted with the Social Security Act. The equal protection claim was dismissed as "insubstantial." Nevertheless, the court, assuming *arguendo* that the constitutional claim was sufficient for jurisdictional purposes, went on to consider the statutory claim of inconsistency with the Act. *Id.* at 1217.

<sup>303</sup> See *Jefferson v. Hackney*, 406 U.S. 535, 541 (1972); *Rosado v. Wyman*, 397 U.S. 397, 408 (1970); *Dandridge v. Williams*, 397 U.S. 471, 478-80 (1970).

<sup>304</sup> 378 F. Supp. at 1220. Although the legislative history of the program indicates that Congress intended to extend EANFC to families ineligible for AFDC (*see note 295 supra*), the court interpreted the legislative history to authorize broader eligibility requirements only in the context of conditions unrelated to need (*see note 294 supra*), leaving the states free to establish their own standards of need for emergency assistance. 378 F. Supp. at 1218. *But see Wagner v. Liddle*, 83 Misc. 2d 424, 372 N.Y.S. 2d 790 (Sup. Ct. N.Y., 1975) (upholding destitution as sole eligibility criterion for emergency assistance; whether or not applicant financially eligible for AFDC immaterial).

<sup>305</sup> 523 F.2d 415 (7th Cir. 1975).

<sup>306</sup> Under the Illinois EANFC program, assistance was restricted to families eligible for AFDC and was available only where an "emergent need" existed. The definition of "emergent need" was limited to several specific crisis situations. *See note 318 and accompanying text infra*.

<sup>307</sup> The second issue decided in *Mandley* is discussed in note 318 and accompanying text *infra*.

<sup>308</sup> *See note 163 supra*.

<sup>309</sup> 523 F.2d 415, 422 (7th Cir. 1975). In holding that a state may not deny AFDC to individuals who are eligible under federal standards, the AFDC cases have relied on § 402(a)(10) of the Social Security Act. This section states that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a)(10) (1970). There is no comparable provision in the emergency assistance section of the statute. *See id.* § 606(e).

In *Mandley*, the government argued that the absence of such a provision was fatal to the contention that the AFDC cases applied to emergency assistance. 523 F.2d at 422. The court, however, found the argument unpersuasive. It stated that § 602(a) and § 606(e) could not "be so neatly and completely severed." *Id.* Noting various interconnections between the emergency assistance provisions and the minimum requirements for state AFDC plans, the court interpreted § 602(a)(10) to apply, at least by analogy, to § 606(e):

state must furnish EANFC to all families eligible for emergency assistance under the federal statute, regardless of the family's AFDC status.<sup>310</sup>

Although *Baxter* and *Mandley* take inconsistent positions on the permissible scope of state discretion under the EANFC program,<sup>311</sup> they can be reconciled by interpreting the *Mandley* holding as being limited to eligibility conditions unrelated to need<sup>312</sup> and expressing no opinion on the issue of the claimant's income level raised in *Baxter*.<sup>313</sup> Since the appellants' need in *Mandley* was not questioned by the court or the parties,<sup>314</sup> and since the Supreme Court cases cited by the court in support of its holding apply only to federal eligibility conditions unrelated to need,<sup>315</sup> such an interpretation is reasonable, despite the court's failure to expressly limit its holding to non-need factors.<sup>316</sup>

Attempts by the states to limit the types of emergencies for which EANFC is available have been uniformly rejected by the courts in recent months.<sup>317</sup> In *Mandley*, the Illinois emergency assistance program was invalidated because it restricted EANFC to three narrow crisis situations, dealing primarily with evictions.<sup>318</sup> Other

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The close relationship between Sections 602(a) and 606(e) leads us to believe that Congress intended that Section 606(e) be treated in the same way as Section 606(a), which also is closely related to Section 602, despite the inclusion in Section 602(a)(10) of the phrase "families with dependent children." The Supreme Court cases listed earlier in the opinion [*Burns v. Alcala*, 420 U.S. 575 (1975); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968)] hold that Congress intended the eligibility requirements of Section 606(a) to be mandatory on the states [citations omitted]. It therefore appears that Congress intended that the eligibility provisions of Section 606(e) be mandatory on the states, just as the courts have held with respect to the eligibility requirements of Section 606(a).

*Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Baxter* holds that states may restrict their emergency assistance programs to families financially eligible for AFDC. *Mandley*, on the other hand, rejects Illinois's attempt to limit its EANFC coverage to AFDC applicants or recipients.

<sup>312</sup> See note 294 *supra*.

<sup>313</sup> See notes 301-04 and accompanying text *supra*.

<sup>314</sup> Although the facts in *Mandley* are not clear, the appellants' need seems to have been assumed by the court and by the parties. 523 F.2d at 415.

<sup>315</sup> See note 309 *supra*. The states' power to define standards of need has been firmly established and was not raised as an issue in the case.

<sup>316</sup> See 523 F.2d at 422.

<sup>317</sup> See notes 318-23 and accompanying text *infra*.

<sup>318</sup> 523 F.2d at 422. Under the Illinois EANFC program, payments were restricted to situations in which an "emergent need" existed. An "emergent need" was defined as one of the following situations:

1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
2. A court-ordered eviction occurs for reasons other than the recipient's failure to pay rent.

courts have invalidated emergency assistance regulations that excluded from their program's coverage families whose destitution was caused by theft or diversion of their public assistance grants,<sup>319</sup> catastrophes other than natural disasters,<sup>320</sup> or catastrophes other than civil disorders.<sup>321</sup> Although the grounds for these decisions have varied,<sup>322</sup> the courts have demonstrated virtually unanimous opposition to restrictions placed on the cause of the family's destitution.<sup>323</sup>

3. The AFDC family is potentially homeless due to damage to a portion of the building.

ILL. DEP'T OF PUBLIC AID, CATEGORICAL ASSISTANCE MANUAL ch. 6500, *quoted in* *Mandley v. Trainor*, 523 F.2d 415, 418-19 (7th Cir. 1975). The court struck down the regulation as inconsistent with the Social Security Act, relying on the analysis described in notes 309-10 and accompanying text *supra*. The court read the federal statute to require states to provide emergency assistance to destitute families, without regard to the cause of destitution. 523 F.2d at 422.

<sup>319</sup> *Jones v. Berman*, 37 N.Y.2d 42, 332 N.E.2d 303, 371 N.Y.S.2d 422 (1975). 18 NYCRR § 372.2(c) (July 31, 1975) (repealed) provided unconditionally that "[e]mergency assistance shall not be provided when destitution is due to loss, theft, or diversion of a grant already made." The New York Court of Appeals struck down this regulation on the ground that it added a requirement that did not exist under state law. Although the state emergency assistance provisions were virtually identical to the federal provisions, the court did not reach the question of the regulation's consistency with federal law. *Id.* at 53, 332 N.E.2d at 308, 371 N.Y.S. at 429. For an application of the *Jones* decision, see *Bryant v. Lavine*, 48 App. Div.2d 815, 370 N.Y.S.2d 721 (1975).

Prior to the *Jones* decision, at least one New York court had invalidated the regulation on the basis of the supremacy clause. *Young v. Shuart*, 67 Misc. 2d 689, 325 N.Y.S.2d 113 (Sup. Ct. N.Y., 1971), *modified*, 39 App. Div. 2d 724, 331 N.Y.S.2d 962 (1972). For an analysis of *Young*, see Note, *Meeting Short-Term Needs of Poor Families*, *supra* note 291, at 888-89.

<sup>320</sup> *Burrell v. Norton*, 381 F. Supp. 339 (D. Conn. 1974). Under 1 CONN. WELFARE MANUAL § 5030(6), *quoted in* 381 F. Supp. at 341, welfare recipients could claim EANFC where "a catastrophic event or an eviction" occurred. A catastrophic event was defined as "a situation that arises suddenly because of a natural disaster of a fire or flood over which the recipient has no control and there is a substantial destruction of food, shelter, clothing or household furnishings." 381 F. Supp. at 341. The regulation was found to create an arbitrary and irrational distinction between loss due to natural causes and loss due to other causes, such as theft, in violation of the equal protection clause. *Id.* at 342-44.

Under the Connecticut EANFC program, emergency assistance could be furnished only if the loss resulted from circumstances beyond the control of the individual. *See id.* at 341. Although the program's fault condition was not at issue in *Burrell* because the plaintiff's loss was unquestionably beyond her control, the court appeared to endorse the fault condition as an acceptable part of EANFC. *See id.* at 343. For arguments against the validity of state ENAFC programs that condition emergency assistance on lack of fault, see Note, *Meeting Short-Term Needs of Poor Families*, *supra* note 291, at 889-91.

<sup>321</sup> *Williams v. Wohlgenuth*, 400 F. Supp. 1309 (E.D. Pa. 1975). In *Williams*, a Pennsylvania regulation limiting EANFC to needs resulting from natural disasters or civil disorders was struck down as inconsistent with the Social Security Act. The court's analysis followed the same lines as *Mandley*, discussed in notes 305-10 and accompanying text *supra*.

<sup>322</sup> *See* notes 318-21 *supra*.

<sup>323</sup> *Baumes v. Lavine*, 38 N.Y.2d 296, 342 N.E.2d 543, 379 N.Y.S.2d 760 (1975), however, departs from the general trend. In *Baumes*, the court upheld the denial of EANFC to families who were without essential furniture because their previous furniture had deteriorated.

## CONCLUSION

State efforts to pare down welfare rolls by imposing additional eligibility conditions on AFDC applicants were met with resistance from the courts, particularly in the areas of EANFC, AFDC-UF, and work programs. The courts, however, were legislatively overruled by the child support bill, which can be expected to provide a fertile source of litigation. In the area of financial eligibility, the courts have exhibited a mixed response to the problems of defining countable income: the income of another member of the household will not necessarily be attributed to the AFDC recipient; yet the recipient's own income, such as tax refunds or PSE earnings, will under most circumstances be counted in determining financial eligibility. Although HEW's attempt to cut costs by lowering resource exemptions was unsuccessful, its quality control regulations should facilitate accurate determinations of eligibility, thereby removing ineligibles from the welfare rolls.

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ated. The court, obviously influenced by fear of duplicate payments and of reversion to the special grant system, held that this situation did not constitute an emergency. To qualify for EANFC, the court explained, the need must arise suddenly, out of a crisis situation; it cannot be a foreseeable need created by everyday wear and tear. *Id.*

Although the court's opinion was carefully worded to appear that it was merely adhering to a common sense definition of "emergency," the dissent pointed out that in fact the court was restricting the availability of EANFC to a limited group of causes:

On this record I would conclude that these children are destitute and whether their predicament was caused by gradual deterioration or a more dramatic natural disaster the fact remains that they now face an emergency calling for immediate relief. There is nothing in the statute which says that they are only entitled to assistance for emergencies caused by sudden and unanticipated events and the regulation which would add this sweeping restriction should be invalidated.

*Id.* at 306-07, 342 N.E.2d at 549, 379 N.Y.S.2d at 768-69 (dissenting opinion, Wachtler, J.).