

Summer 1993

# Disentitling the poor: waivers and welfare “reform”

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## Recommended Citation

Bennett, Susan, and Kathleen A. Sullivan. "Disentitling the poor: waivers and welfare “reform” ". *University of Michigan Journal of Law Reform* 26 (1993) 741-784.

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## DISENTITLING THE POOR: WAIVERS AND WELFARE "REFORM"

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Susan Bennett\*  
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While policymakers debate the parameters of national "welfare reform," Aid to Families with Dependent Children (AFDC) is undergoing a radical transformation.<sup>1</sup> With a lack of coordination reminiscent of the familiar complaint, "the left hand doesn't know what the right hand is doing," a presidential working group meets to carve out the details of a campaign promise to transform welfare "as we know it," while the Department of Health and Human Services, which supervises the administration of the AFDC program, grants approval to states racing to exempt themselves from existing federal statutory requirements before the implementation of new federal initiatives. By the time the lawmakers agree on a plan to reform AFDC, they may no longer recognize the AFDC program that they plan to reform.

AFDC traditionally has been characterized as a cooperative federal-state program. The basic framework of the program is set forth in the Social Security Act<sup>2</sup> and in federal implementing regulations issued by the United States Department of Health and Human Services (HHS).<sup>3</sup> AFDC is administered by each state, with certain costs reimbursed by the federal government. States may make their own AFDC rules, provided that those rules do not conflict with the federal statute or regulations.<sup>4</sup>

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The authors wish to acknowledge the generous assistance of Mark Greenberg, Jean Koh Peters, Stephen Robinson, Robert Solomon, and Stephen Wizner who read and provided thoughtful comments on earlier drafts of this paper.

1. AFDC is the basic federal need-based income transfer program for dependent children and their caretaker relatives.
2. 42 U.S.C. §§ 601-617 (1988).
3. See, e.g., 45 C.F.R. §§ 201-282 (1992).
4. See *King v. Smith*, 392 U.S. 309, 316 (1968).

States are required to submit plans to HHS to ensure that their programs comply with federal regulations, and must seek HHS approval each time that they attempt to amend their state plan.<sup>5</sup>

Since 1962, the Social Security Act has included a provision permitting the Secretary of HHS to grant waivers from the requirements of the statute to states for "experimental, pilot, or demonstration project[s]" that would promote the objectives of the Act.<sup>6</sup> The states sought these waivers with gradually increasing frequency until 1992,<sup>7</sup> when the Bush administration invited the states to submit waiver requests to "promote experiments with welfare reform."<sup>8</sup> States responded in large numbers to the President's invitation. Since January 1992, at least thirty states have submitted requests for approval of one or more demonstration projects to initiate changes in their AFDC programs.<sup>9</sup>

There is considerable evidence that waiver requests are not being scrutinized sufficiently. From 1990 through mid-1993, HHS had denied no state approval to conduct a demonstration project and to date has disapproved only one state project.<sup>10</sup>

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5. See 42 U.S.C. § 604 (1988); 45 C.F.R. §§ 201.2–201.10, 205.5 (1993); Adele M. Blong & Timothy J. Casey, *AFDC Program Rules for Advocates: An Overview* 27 CLEARINGHOUSE REV. 1164, 1167 (1994).

6. Public Welfare Amendments of 1962, Pub. L. No. 87-543, tit. 1, § 122, 76 Stat. 172, 192 (codified as amended at 42 U.S.C. § 1315 (1988)).

7. U.S. DEPT OF HEALTH & HUMAN SERVS., AFDC RESEARCH AND DEMONSTRATION PROJECTS (1991) [hereinafter 1991 REPORT]; U.S. DEPT OF HEALTH & HUMAN SERVS., AFDC RESEARCH & DEMONSTRATION PROJECTS (1990) [hereinafter 1990 REPORT]; U.S. DEPT OF HEALTH & HUMAN SERVS., ANNUAL REPORT OF SECTIONS 1110 AND 1115, AFDC RESEARCH AND DEMONSTRATION PROJECTS (1989) [hereinafter 1989 REPORT].

8. President Bush announced his intention to make the waiver approval process quicker and easier in his 1992 State of the Union Address. *Transcript of Bush's State of Union Message: 'Let's Build on Our Strengths'*, N.Y. TIMES, Jan. 29, 1992, at A17.

9. See CENTER ON SOCIAL WELFARE POLICY & LAW, REPORT ON AFDC § 1115 APPLICATIONS SUBMITTED TO HHS FROM JANUARY 1992–JANUARY 1993 [hereinafter 1992 AFDC § 1115 APPLICATIONS]; CENTER ON SOCIAL WELFARE POLICY & LAW, RECENT DEVELOPMENTS IN THE USE OF HHS WAIVER AUTHORITY (1993) [hereinafter RECENT DEVELOPMENTS].

10. Consistent with President Bush's invitation, HHS did not deny any state approval to conduct a demonstration project until July 30, 1993, when the Clinton Administration turned down Illinois' Relocation to Illinois demonstration project. A review of data collected by the Center on Social Welfare Policy and Law, 1992 AFDC § 1115 APPLICATIONS, *supra* note 9; RECENT DEVELOPMENTS, *supra* note 9, and documents produced by HHS in response to the authors' request under the Freedom of Information Act revealed no case prior to August 30, 1993 where a state request to conduct a demonstration project was refused. Most proposed state demonstration projects entailed at least several specific waiver requests. The data collected by the authors revealed two cases where HHS refused to grant a particular waiver in connection with a demonstration project. In both cases, however, the project was approved and other requested waivers were granted.

Waivers also are granted relatively quickly, sometimes within thirty days of a state request.<sup>11</sup> Waivers sometimes have been approved before a state has obtained the necessary state legislative approval.<sup>12</sup> Although the state projects approved by HHS invariably are characterized as welfare reform experiments, the agency requires little articulation of the hypotheses a state intends to test, or the procedures by which it will evaluate those hypotheses.<sup>13</sup> The agency does not generate a written record of the standards by which it evaluated the proposal, nor the reasons for its approval, other than standard approval letters and agreements.<sup>14</sup> The agency even has approved waivers for states to undertake demonstration projects which imposed conditions that subsequently were held to be unconstitutional.<sup>15</sup> The combination of these factors raises serious doubts about the quality of HHS decisionmaking.

Some features of the approved state projects depart drastically from the core values of the AFDC program.<sup>16</sup> Projects have

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11. See Michael Wiseman, *Welfare Reform in the States: The Bush Legacy*, FOCUS, Spring 1993, at 23-25 (noting that in 1992, HHS approved demonstration projects in at least six states in the month in which the approval was sought or in the next month: California (Assistance Payments Demonstration Project), Georgia (Primary Prevention Initiative Demonstration Project), Maryland, (Primary Prevention Initiative Demonstration Project), Michigan (To Strengthen Michigan Families), Missouri (People Attaining Self Sufficiency), and Wisconsin (The Parental and Family Responsibility Initiative)).

12. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, for a listing of proposals submitted from January 1992 to January 1993.

13. See, e.g., CENTER ON SOCIAL WELFARE POLICY & LAW, A FAIR CHANCE: CONNECTICUT'S WELFARE REFORM PROPOSAL (1993) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter CONNECTICUT PROPOSAL]; *HHS Approves Iowa Family Investment Program Demonstration Project*, SUMMARIES FROM THE LIBR. BULL. (Center on Social Welfare Policy & Law, New York, N.Y.), Aug., 1993, at 1 [hereinafter *HHS Approves Iowa Project*]; Letter from Adele M. Blong and Mary R. Mannix, Center on Social Welfare Policy & Law, to Elizabeth Barnes, Program Research & Evaluation Branch, HHS (May 18, 1993) (on file with the *University of Michigan Journal of Law Reform*).

14. In a Freedom of Information request to HHS, the authors requested documents generated in response to AFDC demonstration projects for which waivers were sought from 1988-1993. The agency produced documents other than standard approval letters and agreements for only 1 of 26 projects reported.

15. See, e.g., *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993).

16. Included among the core values of the AFDC program as expressed in the Social Security Act and interpreted by HHS and the courts are the following: that dependent children be cared for in their own homes, that children should not be penalized for the behavior of their parents, that administration be uniform within each jurisdiction, that recipients be treated equitably, and that benefit reductions be accompanied by fair process. See *infra* part II.B. See generally CENTER ON SOCIAL WELFARE POLICY & LAW, THE NEED TO RATIONALIZE HHS DECISIONMAKING UNDER § 1115 (1993) [hereinafter HHS DECISIONMAKING] (arguing that the lack of guidelines for approval of projects

been approved which impose residency requirements or lower benefits for recent state entrants,<sup>17</sup> limit the amount of time that a recipient can collect AFDC benefits,<sup>18</sup> authorize the reduction of assistance to families whose children are truant,<sup>19</sup> implement across-the-board reductions in benefits to AFDC recipients,<sup>20</sup> and eliminate procedures designed to assure fair process to recipients before the imposition of sanctions.<sup>21</sup>

The current surge of AFDC waivers has been undertaken without regard to standards or discernible procedures ordinarily featured in administrative agency decisionmaking. Waivers have been granted without any attempt by HHS to define the

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leads to a disregard for the needs of children and caretakers); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (questioning the assumptions underlying the Learnfare and Family Cap demonstration projects); Alice Bussiere, *States Experiment on AFDC Families Through "Waivers"*, YOUTH L. NEWS, Sept.-Oct. 1992, at 1 (describing the history of waivers and several current proposals).

17. See Stephen Loffredo, *"If You Ain't Got The Do, Re Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POL'Y REV. 147, 165-69 (1993). A Wisconsin AFDC benefit demonstration project precludes benefits if the applicant has not been a state resident for at least two months prior to the application for benefits. *Id.* at 165. A California project caps the benefits of applicants with less than one year of residency at the state's regular benefit level or the benefit level of the applicant's former state, whichever is lower. *Id.* at 165-66.

18. In 1993, HHS approved demonstration projects in Connecticut, Iowa, Vermont, and Wisconsin which imposed time limits on AFDC. See RECENT DEVELOPMENTS, *supra* note 9; CONNECTICUT PROPOSAL, *supra* note 13. HHS approved Wisconsin's Work Not Welfare project in October, 1993. CENTER ON SOCIAL WELFARE POLICY & LAW, HHS APPROVES WISCONSIN PROJECT THAT TIME LIMITS AFDC BENEFITS 1 (1993). The Wisconsin project is the most onerous of these projects. Whereas the Vermont, Iowa, and Connecticut proposals will substitute a community service assignment for AFDC benefits after those benefits have been received for a certain period, the Wisconsin proposal will simply terminate AFDC benefits after a recipient has collected a maximum of 24 months of benefits. *Id.*

19. The Wisconsin Welfare Reform Project, which was approved by HHS in 1988, with additional waivers granted in December 1989 and June 1990, requires mandatory school attendance for AFDC benefits. 1991 REPORT, *supra* note 7; 1990 REPORT, *supra* note 7; 1989 REPORT, *supra* note 7. The Maryland Primary Prevention Initiative (approved June 30, 1992), and the Virginia Incentives to Advance Learning (approved Sept. 8, 1992), impose similar restrictions. U.S. DEP'T OF HEALTH & HUMAN SERVS., ANNUAL REPORT OF SECTION 1115 AFDC RESEARCH AND DEMONSTRATION PROJECTS IN FISCAL YEAR 1992 (1993).

20. The California Welfare Reform Demonstration Project, which was approved by HHS on July 14, 1992, immediately reduced most AFDC grant payments by 10% with an additional 15% reduction after six months of coverage. 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 9.

21. See for example, the Maryland Primary Prevention Initiative, the Iowa Family Investment Program Demonstration Project, the New Jersey Family Development Program, and the Wisconsin Welfare Reform Project. *Id.* at 23-24, 30-31, 48-50; Iowa Family Investment Program (Apr. 27, 1993) (on file with the *University of Michigan Journal of Law Reform*).

types of projects that promote the objectives of the public assistance titles of the Social Security Act. Furthermore, aspects of some of the state reform projects appear merely to be attempts to reduce benefits under the guise of experimentation.<sup>22</sup>

The number of waivers HHS has approved in the 1990s, the failure of the agency to articulate procedures or standards for reviewing waiver applications, and the speed with which HHS has approved demonstration projects<sup>23</sup> has led many advocates for the poor to question whether these applications are being scrutinized sufficiently.<sup>24</sup> The sanctioning of inconsistent rules throughout the country affects both the administration of AFDC, which is becoming increasingly decentralized, and the program itself because the rules approved reflect no coherent national vision. The number and extent of the agency's waiver approvals represent a profound shift in federal welfare policy, complicating current efforts at national welfare reform. Additionally, because the Act historically has played a major role in checking state abuses of the AFDC program, HHS's willingness to exempt states from the basic requirements of the statute is particularly troubling.

This Article examines the purposes underlying the statutory grant of authority to HHS to exempt states from the requirements of the statute, the important role that the Social Security Act has played as a source of rights for welfare recipients, the current wave of exemptions granted by HHS, and the lack of standards for review of state waiver proposals. Finally, this Article recommends the development of procedures and standards for review by HHS and urges that adherence to the core values of the AFDC program is essential in evaluating the appropriateness of a waiver request.

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22. See, for example, the California plan discussed *supra* note 20.

23. Some states' waiver applications were granted within 30 days of their request to HHS. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9; Wiseman, *supra* note 11. Although the average length of the waiver review process is probably three to four months, this may overstate the actual time that HHS deliberates upon AFDC requests. Many demonstration projects include Medicaid extensions for working AFDC recipients and therefore require the approval of the Health Care Financing Administration, which administers the Medicaid program, in addition to the Administration for Children and Families, the division of HHS which oversees the AFDC program.

24. See, e.g., HHS DECISIONMAKING, *supra* note 16, at 1 (noting the lack of "standards to rationalize the decisionmaking process and of a clearly defined review process").

## I. THE DEVELOPMENT OF HHS WAIVER AUTHORITY UNDER THE SOCIAL SECURITY ACT

Section 1115 of the Social Security Act grants HHS the authority to waive the federal statutory requirements imposed upon states under the AFDC program.<sup>25</sup> Authority is vested in the Secretary of HHS to waive any state plan requirement under any of the public assistance titles which she deems necessary to carry out any experimental, pilot or demonstration project that "is likely to assist in promoting the objectives" of any such title.<sup>26</sup>

As President Kennedy stated in proposing the legislation to Congress:

No study of the public welfare program can fail to note the difficulty of the problems faced or the need to be imaginative in dealing with them. Accordingly, I recommend that amendments be made to encourage experimental, pilot or demonstration projects that would promote the objectives of the assistance titles and help make our welfare programs more flexible and adaptable to local needs.<sup>27</sup>

The President proposed a number of substantive changes in the AFDC program which were designed to increase the number of individuals eligible to receive assistance under the program and to increase the amount of benefits. In addition to the waiver provision, President Kennedy proposed reducing or eliminating residency requirements in AFDC and in federal programs for the aged, blind, and disabled, disregarding all actual work expenses, and permitting children to save money for educational, employment or medical needs without having that amount deducted from their public assistance grants.<sup>28</sup>

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25. 42 U.S.C. § 1315 (1988).

26. 42 U.S.C. § 1315(a) (1988).

27. Message from the President of the United States, Public Welfare Program, H.R. DOC. NO. 325, 87th Cong., 2d Sess., reprinted in 108 CONG. REC. 1404, 1405 (1962).

28. *Id.* at 1405. A provision which allowed children to save money without treating it as an available resource was never enacted. Cf. *Mercado v. Commissioner*, 607 A.2d 1142 (Conn. 1992) (holding that under current regulations, savings of dependent minor children for the purpose of paying for their college education must be included in their families' resources in determining eligibility for AFDC benefits); Lynne Tuohy, *Ruling Penalizes Family of Girl Who Saved for College*, THE HARTFORD COURANT, May 12, 1992, at A1 (discussing the *Mercado* case).

Kennedy's message emphasized that the nation must be prepared to spend more money in the short term on preventive poverty measures as a way of alleviating poverty and reducing costs in the long run.

The steps I recommend to you today to alleviate these problems will not come cheaply. They will cost more money when first enacted. But they will restore human dignity; and in the long run, they will save money . . . . Communities which have—for what ever motives—attempted to save money through ruthless and arbitrary cutbacks in their welfare rolls have found their efforts to little avail. The root problems remained.<sup>29</sup>

In contrast to Kennedy's preventive, investment-oriented approach to welfare reform, many of the state "demonstration projects" for which HHS has granted waivers in the 1990s have exempted states from basic AFDC statutory requirements. A clear indication of the shift in philosophy from Kennedy's investment-oriented approach of the 1960s to the deficit-driven philosophy of the nineties is that one of the few principles that HHS has articulated in reviewing requests for waivers is that each proposal reflect "cost neutrality."<sup>30</sup> The federal share of the state's AFDC costs, if the project for which the waiver is sought is approved, must be no more than the costs of the state's plan without the project.<sup>31</sup> This principle essentially mandates that any effort by a state to provide more generous benefits than those currently provided by the Social Security Act be accompanied by provisions which restrict eligibility by reducing the number of recipients or the amount of benefits. Indeed, many state projects for which waivers have been granted include a mixture of targeted benefit increases and reductions.<sup>32</sup>

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29. Message from the President of the United States, *supra* note 27, at 1407.

30. See Wiseman, *supra* note 11, at 19.

31. See *id.* (citing EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT—FISCAL YEAR 1993 pt. 1 (1992)).

32. The Connecticut waiver application, for example, proposes to expand AFDC eligibility to two parent families, and increase asset limits and earned income disregards (the amount a family can earn without having their benefits reduced). The state also proposed to eliminate most exemptions from work requirements and impose stiffer penalties for noncompliance. See CONNECTICUT PROPOSAL, *supra* note 13. New Jersey's Family Development Program denies benefits to children born to AFDC recipients but expands certain earned income disregards. 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 30.

The legislative history to the 1962 amendments to the AFDC program gives little guidance as to the types of statutory provisions that could be waived as "necessary to carry out a demonstration project which may promote the objectives of any such title."<sup>33</sup> The one example cited in the House report is that the single state plan requirement may preclude meaningful experiments, which by their nature, require a smaller sample population than the entire class of eligible recipients in a state. Advocates have urged that Congress merely "contemplated projects that experimented with techniques of administration and the delivery of assistance and services defined by Congress. There was no suggestion that Congress envisioned projects that limited the statutory entitlements of program beneficiaries."<sup>34</sup>

Advocates for the poor have not been successful, however, in convincing courts that the Secretary's power to waive basic statutory entitlements should be limited. In *Aguayo v. Richardson*,<sup>35</sup> for example, welfare recipients and welfare rights organizations challenged the Secretary's decision to grant New York State a series of waivers to establish a work relief program for AFDC recipients in New York City and eight counties outside of the city. The plaintiffs argued that section 1115 did not permit the Secretary to waive any requirements of the AFDC statute that would curtail or deny assistance to applicants or recipients of AFDC.<sup>36</sup> Judge Friendly, in rejecting the plaintiffs' argument, held that the legislative history established that "[t]he public assistance titles of the Social Security Act contain a number of requirements on the States for approval of a state plan' which 'often stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients.'"<sup>37</sup>

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33. S. REP. NO. 1589, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 1943, 1943; CONF. REP. NO. 2006, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 1943, 1979.

34. CENTER ON SOCIAL WELFARE POLICY & LAW, OVERVIEW OF THE LAW GOVERNING WAIVER OF FEDERAL REQUIREMENTS APPLICABLE TO STATE AFDC PROGRAMS 2-3 (1993).

35. 473 F.2d 1090 (2d Cir. 1973).

36. The program included, for example, a requirement that AFDC recipients age 15 or older participate in a youth employment component, even if the recipients attended school full time. The recipient's family faced a reduction in the grant if the young person failed to attend. The program also required counseling for any family that included truant children and imposed sanctions for families whose children failed to attend. *Id.* at 1096. To this extent, the program is a precursor to current learnfare proposals.

37. *Id.* at 1105 (quoting S. REP. NO. 1589, 87th Cong., 2d Sess. 19-20, reprinted in 1962 U.S.C.C.A.N. 1943, 1961-62).

The court went on to hold that "[t]he limitation, and the only limitation imposed on the Secretary was that he must judge the project to be 'likely to assist in promoting the objectives' of the designated parts of the Social Security Act."<sup>38</sup> The court, although temporarily enjoining implementation of the sanction provisions of the work relief program because of the substantial constitutional issues raised, went on to find that the Secretary had a rational basis for approving the waiver request.<sup>39</sup>

Similarly, in *Crane v. Mathews*,<sup>40</sup> the court rejected arguments that the Secretary exceeded his authority in approving a waiver of the then-statutory prohibition on Medicaid copayments. As the result of the waiver, a Georgia demonstration project was permitted to employ copayments in order to discourage a perceived overutilization of medical services by Medicaid recipients. The court held that only when the Secretary's determination was "arbitrary, capricious, and lacking a rational basis" would a reviewing court overturn the Secretary's decision to grant a waiver.<sup>41</sup> The court acknowledged that an attack on the Secretary's authority faces a "very grave obstacle," which the plaintiffs had not overcome through their attempt to show a lack of good faith by the Secretary.<sup>42</sup> Although finding that the Secretary had authority to grant the waiver, the court nevertheless enjoined the project, after its implementation had begun, for failure to comply with federal regulations concerning

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38. *Id.* (quoting *California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491 (N.D. Cal. 1972)).

39. *Id.* at 1112. A federal court would have difficulty finding that similar sanction provisions raised constitutional issues today. *Cf. Bowen v. Gilliard*, 483 U.S. 587, 603, 604, 609 (1987) (rejecting claims that statutes requiring the transfer of child support payments to the state and the inclusion in the family unit of children receiving such payments violated the Due Process and Takings Clauses). Modern commentators believe that the Court sounded the death knell of equal protection claims for welfare recipients in *Dandridge v. Williams*, 397 U.S. 471 (1970), when it held that:

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

*Id.* at 487. See generally Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1283 (1993) (noting that the Supreme Court has not invalidated a poverty classification in over 20 years).

40. 417 F. Supp. 532 (N.D. Ga. 1976).

41. *Id.* at 542.

42. *Id.* at 539.

the protection of human subjects in federally supported research projects.<sup>43</sup>

In 1983, HHS amended its regulations specifically to exempt changes in benefit programs from its regulations protecting human research subjects.<sup>44</sup> The only limitation that HHS had ever recognized in passing on waiver requests, and the only significant source of protection for recipients, thus was eliminated.

## II. THE SUPREMACY OF THE SOCIAL SECURITY ACT AND AFDC ADMINISTRATION

### A. *The Ambivalent Effort to Enforce National Standards in the AFDC Program*

From its very beginning, the Social Security Act contemplated a mechanism for promoting the federalism aspect of the cooperative federalism which the Supreme Court would first interpret a generation later.<sup>45</sup> Federal financial participation, the federal contribution of a fixed dollar amount per dependent child, with states and localities adding their own self-determined shares, came at a price. In return for federal participation, the states were required to submit to the federal Social Security Board a state plan, the document guaranteeing conformity to nationalized standards of statewide administration. Initially, state plan standards were minimal, the only absolute requirements being that the states contribute funds, that they operate their aid programs from a central state agency, that they impose

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43. *Id.* at 543-47 (discussing 45 C.F.R. § 46.101 (1976)). Regulations in effect at the time of the litigation required that projects supported by HHS involving human subjects be submitted to an Institutional Review Board (IRB) for certification that human subjects were minimized, that the risks to the subjects were reasonable in relation to the benefits to the subjects, that the privacy and safety of subjects was protected, and that the informed consent of subjects was obtained. *Id.* at 544 (citing 45 C.F.R. § 42.102(b)(1), (3) (1976)).

44. *See* 45 C.F.R. § 46.101(b)(5) (1983).

45. In *King v. Smith*, 392 U.S. 309 (1968), the Supreme Court first articulated its understanding of the relationship between the states and the federal government in the administration of the AFDC program as one of cooperative federalism. *Id.* at 316. Under cooperative federalism, the states received federal funds for the distribution of assistance, and in return were required to submit their administrative plans to the executive department, then the Department of Health, Education, and Welfare for approval. *Id.*

no residency requirement in excess of one year, that the programs exist in every county, and that individuals have access to an administrative hearing system to contest denials of claims.<sup>46</sup> Certification of these standards on paper compelled federal approval.<sup>47</sup> If a state's implementation of its approved plan violated any of the structural guidelines of Title IV-A, the potential penalty was the withholding of the federal matching funds.<sup>48</sup>

This price was imposed upon the states with a significant degree of ambivalence. The few sections of the statute that imposed any type of mandatory structure upon the states were designed to correct some of the worst abuses of discriminatory exclusion and under funding perpetrated by the Act's predecessors, the mothers' pension programs.<sup>49</sup> Compromises necessary to shore up the tenuous support for the children's assistance part of the Act, however, undercut its remedial intent. The initial federal matching formula was set at a penurious level, well below that of any other federal-benefit reimbursement formula.<sup>50</sup> This, combined with the requirement that states

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46. Social Security Act of 1935, ch. 531, tit. IV, § 402(a)(1)-(4), (b), 49 Stat. 620, 627-28 (1935) (codified as amended at 42 U.S.C. § 602(a)(1)-(4), (b) (1988)). Amendments in 1950 extended the right of a fair hearing to persons whose claims were "not acted upon with reasonable promptness." Social Security Act Amendments of 1950, ch. 809, tit. III, §§ 321(a), 402(a), 64 Stat. 477, 549 (codified as amended at 42 U.S.C. § 602(a)(4) (1988)).

47. Section 402(b) of Title IV requires the approval of a state plan if it complies with all of the elements contained in § 402(a), provided it does not impose residency requirements exceeding the boundaries set forth in § 402(b).

48. See § 404, 49 Stat. at 628-29 (authorizing the Commissioner of the Social Security Bureau, after notice and the provision of an opportunity for a hearing, to withhold payments from any state whose administration fails to conform to the Bureau's approved plan).

49. For a comprehensive history of the mothers' pension movement, see WINIFRED BELL, *AID TO DEPENDENT CHILDREN* 3-19 (1963). The first mothers' pension program began in Illinois in 1911. Forty-eight states and the District of Columbia had passed legislation implementing such programs by 1935. Mark H. Leff, *Consensus for Reform: The Mothers' Pension Movement in the Progressive Era*, 47 SOC. SERV. REV. 397, 400-01 (1973). The programs were designed to enable "deserving" destitute mothers to care for their children at home, rather than place them in institutions. The criteria for eligibility and the selective application processes, however, guaranteed that white widows primarily were served, while minority mothers or mothers with illegitimate children were closed out of the program. *Id.* at 414.

50. The original formula for federal contribution per dependent child arose out of a carelessness which, according to one observer of the genesis of the Social Security Act, typified Congress' view of Title IV as a sideshow to the Old Age Security component of the Act. See EDWIN WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 162-65 (1962). It was not until the 1950 amendments to the Act that the federal government assumed additional payments for the administration of the program. Social Security Act Amendments of 1950, ch. 809, tit. III, §§ 321, 402(a), 64 Stat. 477, 549 (codified as amended at 42 U.S.C. § 602(a)(4) (1988)).

choosing to participate must provide assistance in all political subdivisions, and the Act's silence concerning the amount of assistance payments, tempted some states to stretch payment levels as thinly as possible. Some states conserved their funds officially by setting payments at very low levels, and unofficially by permitting intake workers to delay applications, and therefore disbursements, by instituting waiting lists for applications, and by treating requests to apply as mere inquiries.<sup>51</sup> The Act's major accommodation to the states was the *carte blanche* it gave each grantee to "impose such other eligibility requirements—as to means, moral character, etc.—as it sees fit."<sup>52</sup> This allowed southern states to perpetuate the same patterns of racial exclusion that they had in the past.<sup>53</sup>

Even when states were permitting county welfare offices to exclude virtually all black families from the program, few federal conformity hearings were held to investigate violations of state plans.<sup>54</sup> The absence of substantive standards in the Act and of a strong political consensus, left the Bureau of Public Assistance and the Children's Bureau with little statutory guidance, and even less political support, for enforcing any equitable norms. Although Congress addressed some of the early abuses of the benefits application process by amending the Act,<sup>55</sup> its inaction on even the most blatant forms of racially discriminatory administration of AFDC left any monitoring to

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51. See generally BELL, *supra* note 49, at 45–46.

52. S. REP. NO. 628, 74th Cong., 1st Sess. 36 (1935).

53. See BELL, *supra* note 49, at 44–45, 63–68, 75.

54. See *id.* at 223 n.33 (noting that only 16 conformity hearings were held between 1935 and 1961); Robert Cover, Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 91 (1967) (same).

55. The House Ways and Means Committee's report on H.R. 6000, the Social Security Act Amendments of 1949, noted that some agencies had stopped taking applications because their jurisdictions provided too little money to cover all eligible persons, and that "applicants who have already been found eligible are kept waiting for assistance until persons on the rolls die or cease to receive assistance for other reasons." H.R. REP. NO. 1300, 81st Cong., 1st Sess. 43 (1949). The Senate Finance Committee's report on H.R. 6000 noted that the amendment required states to amend their state plans to specify that "all individuals wishing to make application for assistance shall have an opportunity to do so and that assistance shall be furnished with reasonable promptness to all eligible individuals" and extended the requirement to Title IV-A, the AFDC program. The report also noted that the Senate version changed the House's "promptly" to "with reasonable promptness." S. REP. NO. 1669, 81st Cong., 2d Sess. 170–71 (1950); see also Social Security Act Amendments of 1950, ch. 809, tit. III, §§ 321(a), 402(a), 64 Stat. 477, 549 (codified as amended at 42 U.S.C., § 602(a)(4) (1988)).

the bifurcated administration of the children's public assistance and child welfare programs.

The Flemming Ruling of 1961, whereby the Secretary of Health, Education, and Welfare (HEW) forbade the exclusion of needy children from the program on the basis of judgments about the morality of their home environments, constituted the first real attempt by a unified federal welfare executive to impose national standards on state programs.<sup>56</sup> When, in 1968, the Supreme Court reinforced the Flemming Ruling, it both recognized the Social Security Act as a source of rights against the states, and supported a new and fragile concept of federal supremacy in welfare administration.<sup>57</sup>

This brief background illustrates that a centrally articulated, centrally imposed norm of welfare fairness was slow to develop and slower to implement. Even the most superficially innocuous of the Act's principles—the equitable treatment of individual applicants in a system of uniform statewide administration—was designed to correct serious race-based and value-laden disparities in the distribution of benefits. What is so shocking to advocates who understand the hard-won history of these basic tenets is how lightly the rush to welfare reform has cast them aside.

### *B. Recent Reform Experiments and the Sacrifice of National Standards*

The desire for cost containment drives, and indeed always has driven, much of welfare reform. The perception that welfare costs are spiraling out of control lies close to the heart of reform proposals. Some states have responded to this perception by instituting across-the-board percentage cuts in AFDC, which do not require federal approval.<sup>58</sup> States also may control entry

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56. For a description of how the federal executive used the threat of financial sanctions to force Louisiana to retract its "suitable home" policy, see BELL, *supra* note 49, at 142-45.

57. See *King v. Smith*, 392 U.S. 309, 333 (1968) (holding that the inconsistency between Alabama's regulatory definition of "parent" and the Social Security Act's definition rendered the regulation invalid); see also Note, *Welfare's "Condition X"*, 76 YALE L.J. 1222, 1228-33 (1967) (outlining the manner in which HEW review of state eligibility criteria could affect state welfare practices).

58. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding Texas's "ratable reduction" of 25% from the standard of need for payments to all AFDC recipients, as

into the program by failing to increase their standard of need, the largely hypothetical figure for the actual cost of living which states must articulate, but which their payment levels need not meet.<sup>59</sup> Between 1991 and 1992, six states actually lowered their AFDC payment levels and thirty-five states effectively lowered them by not increasing them, while only eleven states raised them.<sup>60</sup>

It is the fear of loss of control, rather than of simple fiscal distress, that seems to inspire the desire for the kind of changes for which states must ask permission. The tenor of the proposals results from popular hypotheses for the causes of the increasing costs and growing caseloads. Central among these is the thesis that transfer payments motivate behavior that swells caseloads: migration across state lines to get bigger benefits; entry into the status of single parenthood, through either unwed motherhood or marital separation, to qualify initially for the benefit; and production of more babies to qualify

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opposed to a 5% reduction for recipients in the federal disability program and no reduction for recipients in the old age assistance program); *Rosado v. Wyman*, 397 U.S. 397, 408 (1970) (stating that “[S]tates have traditionally been at liberty to pay as little or as much as they choose”). Every state has set its payment levels well below the federal poverty guideline. The median state benefit for a family of three in 1991 provided 41% of the guideline. STAFF OF HOUSE COMM. ON WAYS & MEANS, 102D CONG., 2D SESS., OVERVIEW OF ENTITLEMENT PROGRAMS—1992 GREEN BOOK 637 (1992) [hereinafter, 1992 GREEN BOOK]. One limitation on states’ absolute freedom to set their AFDC payment levels is provided in the 1988 maintenance of effort amendment to Medical Assistance, or Title XI of the Social Security Act, 42 U.S.C. § 1396a(c) (1988), which dictates the withholding of approval for state medical assistance plans for states whose AFDC payment levels fall below those in effect on May 1, 1988. California applied to the Health Care Financing Administration for a waiver of the maintenance of effort provision because the reduction in its AFDC payments of 1.3% planned for 1993 would reduce payments below the critical level, following as it did the decreases of 4.4% in 1991 and 4.5% in 1992. See 1992 AFDC §1115 APPLICATIONS, *supra* note 9, at 10.

59. See *Rosado v. Wyman*, 397 U.S. 397 (1970) (interpreting the Social Security Act as requiring only that the state publish its baseline standard of need); see also 42 U.S.C. § 602(h) (1988) (requiring states to reevaluate and report to HHS their need payment standards at least once every three years in accordance with a schedule established by the Secretary). A state may exclude from the program any family with an unadjusted gross income, excluding some special income from dependent children and earned income tax credit refunds, exceeding 185% of its standard of need. See 42 U.S.C. § 602(a)(18) (1988); 45 C.F.R. § 233.20(a)(3)(xiii) (1992). Most states’ standards of need have remained constant for the last two years. 1992 GREEN BOOK, *supra* note 58, at 641–42.

60. 1992 GREEN BOOK, *supra* note 58, at 643–45. “States,” for these purposes, may mean jurisdictions. For example, New York City’s standards of need and payment differ from standards in operation in other parts of the state. *Id.* Between 1970 and 1992, the median state AFDC benefit for a family of three eroded in constant dollars by 43%. *Id.* at 645.

for incremental increases in benefits.<sup>61</sup> The thesis implicitly acknowledges that the legacy of the loose federalized structure of AFDC and of the program's history of extreme deference to the states is one of serious systemic weakness—benefits are penurious, and vary enormously from state to state. Of course, the thesis blames the recipient, not the system, for the behavior purportedly induced by the systemic weaknesses.

Of the punitive waiver-based programs born of the behavioral thesis, the most controversial program is the family cap, which withholds increases in the basic grant for children born after the family has entered the AFDC program. Four states applied to HHS in 1992 and 1993 for approval of some version of the family cap; three proposals have been approved, with action on another one pending.<sup>62</sup> Another controversial measure involves residency status. Acting on the belief that more generous welfare benefits attract opportunists from bordering states, five states have requested, and two have received, permission to adopt two-tier welfare payment rates, with the lower tier reserved for new residents.<sup>63</sup>

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61. For a summary and analysis of recent welfare reform proposals which are predicated on an assumption that assistance payments influence behavior, see Williams, *supra* note 16.

62. Wisconsin's family cap proposal, approved on April 10, 1992, was the first to be approved by HHS. The targeted group consists of teenagers living in six counties plus Milwaukee, who have children after July 1, 1993, and who apply for AFDC benefits for these children. See Wisconsin Parental and Family Responsibility Demonstration Project Application (Mar. 13, 1992) (on file with the *University of Michigan Journal of Law Reform*). Those applicants will receive half the incremental increase for the second child and no increases for subsequent children. See *id.* at 2; see also Administration for Children and Families, Wisconsin Waiver Approval with Terms and Conditions, pt. III, at 2 (Apr. 10, 1992) (on file with the *University of Michigan Journal of Law Reform*). New Jersey's Family Development Program, eliminates any increase in the monthly grant for children born after the family starts receiving assistance. See New Jersey Family Development Program Waiver Request 7 (submitted June 5, 1992, approved July 20, 1992) (on file with the *University of Michigan Journal of Law Reform*). The Georgia plan provides Medicaid and child support enforcement, but denies additional payments for children born into families receiving AFDC for more than 24 months. See Georgia Personal Accountability and Responsibility Project at II-4 (submitted May 17, 1993, approved Nov. 1993) (on file with the *University of Michigan Journal of Law Reform*). Still awaiting federal approval is the Arkansas plan, which extends Medicaid coverage but provides no additional payments for additional children born to mothers over age 16. See Arkansas Reduction in AFDC Birth Rates Project 5 (Jan. 14, 1993) (on file with the *University of Michigan Journal of Law Reform*).

63. Four of the five states requesting authority to provide lower grants to new residents have targeted residents living in the state for fewer than 12 months. The proposals limit grantee benefits to the level of payments in their last state of residence or the new state of residence, whichever is lower. See California Assistance Payments Demonstration Project 10 (Sept. 16, 1992) (on file with the *University of Michigan*

A corollary of the thesis that the availability of welfare induces behavior that prompts people to apply for, or continually to receive, welfare is the notion that manipulation of welfare payments can provide negative and positive incentives for behavior that will enable recipients to forswear welfare. The programs based on this theory of incentives target undesirable circumstances, such as truancy from school and gaps in preventive medical care, as the results of presumed irresponsible parenting behavior. One of the first positive and negative incentive programs was learnfare, in which a family's monthly AFDC payment was reduced or enhanced depending upon the school attendance record of the family's children.<sup>64</sup> Other

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*Journal of Law Reform*); Illinois Relocation to Illinois Project 2 (Oct. 1, 1992) (on file with the *University of Michigan Journal of Law Reform*); Iowa Family Investment Program, *supra* note 21, at 75; Wyoming Relocation Grant Project 3 (Dec. 24, 1992) (on file with the *University of Michigan Journal of Law Reform*). The Wisconsin plan requires six months of residency before the state will disburse benefits at Wisconsin's payment level. See Administration for Children and Families, Waiver Terms and Conditions, pt. IV, at 2 (July 27, 1992) (on file with the *University of Michigan Journal of Law Reform*). Of the five proposals, Wisconsin's was approved, *id.*, as was Iowa's, Waiver Terms and Conditions (Aug. 13, 1993). California's two-tier payment plan was approved by HHS, see Administration for Children and Families, Waiver with Terms and Conditions (Oct. 29, 1992) (on file with the *University of Michigan Journal of Law Reform*), but enjoined in January 1993, see *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993) (enjoining the two-tier program preliminarily upon a finding that California's durational residency requirement would result in the possibility of irreversible injury to the plaintiffs). The Illinois and Wyoming proposals were denied by HHS.

64. Wisconsin's learnfare program, in effect since 1989 in six Wisconsin school districts, including Milwaukee, reduces families' grants for each child who fails to meet attendance requirements. See *Kronquist v. Whitburn*, No. 89-C-1376 (E.D. Wis. July 23, 1992) (stipulation for final judgment). Ohio's Learning, Earning and Parenting (LEAP) program, also in operation since 1989, provides monthly bonuses or deductions of \$62 for participating teenage parents who meet or fall short of standards for school attendance. LEAP is mandatory for all teen parents who receive AFDC and have not received a high school diploma or GED certificate. See DAN BLOOM, MANPOWER DEMONSTRATION RESEARCH CORP., LEAP—INTERIM FINDINGS ON A WELFARE INITIATIVE TO IMPROVE SCHOOL ATTENDANCE AMONG TEENAGE PARENTS at xv (1993). Virginia's VITAL program and Illinois' One Step at a Time Project use incentives of grant increases and bonuses to enhance school attendance. See Virginia Incentives to Advance Learning, 1115 Demonstration Project Waiver Request 6, (June 23, 1992) approved Sept. 1992) (on file with the *University of Michigan Journal of Law Reform*); Illinois One Step at a Time Project 5 (Oct. 6, 1992) (approval pending) (on file with the *University of Michigan Journal of Law Reform*). Still other states have initiated learnfare by mandating school attendance under the JOBS program, a condition which requires federal waiver of the exemption of children 16 years old and younger from JOBS. Programs of this type for which waivers have been granted include Illinois' Youth Employment and Training Initiative (submitted Oct. 6, 1992, approved Jan. 1993) (on file with the *University of Michigan Journal of Law Reform*); Missouri's People Attaining Self Sufficiency Project (PASS) (submitted July 31, 1992, approved Oct. 1993) (on file with the *University of Michigan Journal of Law Reform*). Approval is pending for Oklahoma's learnfare Project (submitted Dec. 28, 1992) (on file with

programs, such as Maryland's Primary Prevention Initiative, reduce grants to families if the parents cannot prove conformity to a schedule of immunizations and appointments for primary medical care.<sup>65</sup> The incentive-based (or disincentive) plans differ from the family cap and from the barriers to in-state migration plans in that they address behaviors removed from the core entry issues of residency and birth status. They do, however, share the underlying thesis that welfare produces socially undesirable effects and that behavior responds to money.

The evidence of every hypothesis for welfare-induced behaviors has been shown to be empirically weak or nonexistent. The Mecca, or welfare magnet theory, has been studied most intensively in Wisconsin, where barriers to in-migration for the state-funded general assistance program were enacted and litigated as early as 1988.<sup>66</sup> Students of the welfare migration debate in Wisconsin have noted that its politicization caused significant related issues, such as the number of recipients who left the state, to go unnoted.<sup>67</sup> Analyses of data drawn from interviews conducted in 1986 with applicants for AFDC in Wisconsin suggested that about thirty percent of recent

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the *University of Michigan Journal of Law Reform*), which also incorporates the JOBS waiver for children under age 16. Maryland's Primary Prevention Initiative eliminates special needs grants for school supplies for children who fail to maintain an 80% attendance rate at school. See Maryland Primary Prevention Initiative, at II-4 to II-5 (submitted May 22, 1992, approved June 30, 1992) (on file with the *University of Michigan Journal of Law Reform*).

65. Maryland's initiative combines learnfare, with "medfare," or "immunofare." Families lose special medical needs allowances for each child for whom the caretaker cannot certify a medical checkup every six months and immunizations for a child between ages 6 and 18 months. For a child between ages 19 months and 7 years, the caretaker must prove annual checkups and the completion of immunizations. Maryland Primary Prevention Initiative, *supra* note 64, at II-4 to II-5. Georgia's Preschool Immunization Project imposes sanctions for an AFDC caretaker's failure to immunize a child under the age of seven. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 11.

66. See *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992) (upholding the state's statutory 60 day waiting period for general assistance benefits for new residents). About two weeks before the issuance of the decision, the state legislature amended its public assistance code to authorize the distribution of differential rates of AFDC benefits to long-term and new residents, pending HHS approval and a favorable decision by the state supreme court on the issue. Act of June 3, 1991, § 10, 1991 Wis. Laws 313. HHS granted approval on July 27, 1992. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 45. No litigative challenge to the two-tiered AFDC system has been raised. For a discussion of the constitutional problems raised by differential benefits schemes based on residency and on waiting periods, see *infra* part III.B.

67. See PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS: A NEW CASE FOR NATIONAL STANDARDS 47-49 (1990).

migrants had been motivated, in part, to move to the state by its relatively more generous benefits. This represented about three percent of the total applicant pool. Even these results were clouded by the difficulty in isolating welfare benefits as a primary motive for migration.<sup>68</sup> Similarly, although few dispute that long-term recipients account for a large percentage of the AFDC caseload at any given time, and that these recipients' backgrounds are characterized by single parenthood and by limited job skills and education,<sup>69</sup> no study has proven conclusively that welfare reciprocity by itself promotes illegitimate births or continued dependence on welfare.<sup>70</sup>

It is worth noting that recent increases in the number of food stamp recipients have been greater than increases in the number of AFDC recipients and yet have provoked far less vociferous an outcry.<sup>71</sup> Eligibility for food stamps is far less narrowly controlled than for any other public benefit; one can be a member of the able-bodied poor and still receive food stamps. Yet no one has called for cutting back food stamp benefits across the board, for tying receipt of food stamps to uncompensated community service,<sup>72</sup> or for a "two years, up or out" limit on receipt.

There are undoubtedly several reasons for the relative public

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68. See Robert Moffitt, *Welfare Reform: An Economist's Perspective*, 11 YALE L. & POL'Y REV. 126, 137 (1993) (finding "few consistent studies indicating that AFDC has an impact on migration"); Thomas Corbett, *The Wisconsin Welfare Magnet Debate: What is an Ordinary Member of the Tribe to Do When the Witch Doctors Disagree?*, FOCUS, Fall & Winter 1991, at 19, 21 (citing a 1986 survey conducted for the Wisconsin Expenditure Commission by Paul Voss).

69. See 1992 GREEN BOOK, *supra* note 58, at 685-88.

70. See, e.g., Greg J. Duncan et al., *Welfare Dependence Within and Across Generations*, 239 SCIENCE 467 (1988) (drawing from a 19 year Panel Study of Income Dynamics to suggest that intergenerational poverty cannot be assumed to be a given, because only 20% of daughters of "highly dependent" welfare recipients, defined as those receiving welfare in each year of the two studied three-year periods, became similarly "highly dependent" on welfare receipt); Moffitt, *supra* note 68, at 137; William S. Wilson & Kathryn S. Neckerman, *Poverty and Family Structure: The Widening Gap between Evidence and Public Policy Issues in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T* 233-59 (Sheldon H. Danziger & David H. Weinberg eds., 1986) (summarizing findings that there is no appreciable correlation between the amount of benefits, the number of illegitimate births, and the increased incidence of family dissolution).

71. For fiscal years 1988 to 1991, the national average of the number of persons (including both parents and children) receiving AFDC each month increased by 15.3%. 1992 GREEN BOOK, *supra* note 58, at 665. The national average of the number of persons receiving food stamps during the same period increased by 19.8%. *Id.* at 1633.

72. Food stamp applicants and recipients are required to register for work. 7 U.S.C. § 2015 (1988); 7 C.F.R. § 273.7 (1993).

equanimity towards the explosion in food stamp use. To all outward appearances, food stamps cost states and localities nothing. Although the costs of larger caseloads to the city or county departments of social services, which administer food stamps in tandem with AFDC and Medicaid, may be considerable, they are hidden. Indeed, the broad availability of food stamps to persons who qualify for no other federal or state program acts to assuage the public conscience, as it hides the real damage done by many states' recent elimination, or severe curtailment, of their general relief programs.<sup>73</sup> Most critically, food stamps differ from AFDC in two important respects. First, as an in-kind benefit, exchangeable only for food, food stamps allow little discretion to the user. Second, the very universality of access to the benefit actually lessens the stigma of receipt. In contrast, AFDC affords a visible, and visibly despised group—single mothers, perceived, however inaccurately, to be underage, unwed, and black—carte blanche to spend cash benefits. However meager these benefits may be, AFDC is vulnerable to attack from those who believe that unmonitored distribution to the profligate poor can only encourage waste, dependency, and immorality.<sup>74</sup>

### III. CURRENT WELFARE WAIVERS AND THE ABROGATION OF PRINCIPLES

#### A. *The Waiver of Statewideness and Equal Treatment*

As noted earlier, one of the first requirements written into the Social Security Act was that states administer their AFDC

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73. In 1991, 14 of the 28 statewide general assistance programs cut their benefits. In 1992, eight more states reduced benefits. See STEVEN D. GOULD ET AL., CENTER ON BUDGET & POLICY PRIORITIES & CENTER FOR THE STUDY OF THE STATES, *THE STATES AND THE POOR: BUDGET DECISIONS HURT LOW INCOME PEOPLE IN 1992* 36 (1993). When the District of Columbia rolled back cost-of-living increases for its AFDC benefits by four percent in 1991, the committee report on the legislation noted that the cut would be cushioned by the increase in food stamps that would accompany the decrease in income. See COMMITTEE ON HUMAN SERVS., COUNCIL OF THE DISTRICT OF COLUMBIA, REPORT ON BILL 9-159, THE "PUBLIC ASSISTANCE ACT OF 1982, BUDGET CONFORMITY AMENDMENT ACT OF 1991" 6 (1991).

74. A third reason may be that food stamps are supported by the farm lobby not as a welfare program but as a subsidy to agriculture. Cf. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* 120 (1987) (arguing for universal assistance programs that enjoy the commitment and support of a broad constituency as the only way to help the disadvantaged).

programs across the entire jurisdiction.<sup>75</sup> The requirement that states allow all persons wishing to apply for aid to do so, and furnish assistance to "all eligible individuals," followed soon after.<sup>76</sup> These principles of statewideness and equal treatment subsequently were expanded by regulations covering all aspects of the program.<sup>77</sup> Echoing the message of *King v. Smith*,<sup>78</sup> the AFDC regulations prohibit states from limiting public assistance coverage beyond what the Act or its legislative history dictates.<sup>79</sup> Early in the program's history its administrators fought to insinuate norms of equitable practice into the administrative guidelines and ultimately the core statute of AFDC. These norms included fairness in the geographical distribution of benefits from the state level down, and fairness in the distribution of benefits within each local program. These norms substituted all too effectively for constitutional principles of equal protection.<sup>80</sup> In *King v. Smith*,<sup>81</sup> for example, when the plaintiffs called upon the Supreme Court to adjudicate the substitute father rule as a violation of equal protection, the Court was able to evade any constitutional ruling by relying on Title IV-A.<sup>82</sup> Indeed, the litigants who prepared *Kelly v. Wyman*,<sup>83</sup> saw the Court's growing reliance on the Social Security Act as a positive development. They tailored their strategy in the case toward reinforcing the Act as the primary source of authority for federal entitlements.<sup>84</sup>

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75. Social Security Act of 1935, ch. 531, tit. IV, § 402(a)(1), 49 Stat. 620, 627 (codified as amended at 42 U.S.C. § 602(a)(1) (1988)).

76. Social Security Act Amendments of 1950, ch. 809, § 329(b), 64 Stat. 477, 549-50 (codified as amended at 42 U.S.C. § 602(a)(10)(A) (1988)).

77. See, e.g., 45 C.F.R. § 233.10(a)(1) (1993) (requiring states to demonstrate that any classifications of eligible recipients must be "reasonable" and must not discriminate); *id.* § 206.10(a)(1) (requiring states to allow anyone who wants to apply for AFDC to do so "without delay").

78. 392 U.S. 309 (1968).

79. 45 C.F.R. § 233.10(a)(1)(ii)(A) (1992).

80. See DANIEL J. BAUM, *THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE* 7-8 (1974) (referencing a Letter from Edwin Yourman, former Asst. Gen. Counsel for Social Security, HEW, to Baum (May 22, 1973)).

81. 392 U.S. 309 (1968).

82. The Court in *King* ruled that Alabama's substitute father rule, which presumed the responsibility for parental support of a male who cohabited with the natural mother, violated § 406(a) of the Social Security Act, 42 U.S.C. § 602(a)(9) (1969), which define the "dependent child" as one who is "deprived of parental support." *King*, 392 U.S. at 333.

83. 294 F. Supp. 893 (S.D.N.Y. 1968), *aff'd sub nom.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

84. See Sylvia Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 815 (1990).

*B. The Waiver of Substantive Protections and  
Constitutional Guarantees*

*1. The Right to Mobility to Secure A Better Life*—That there is no federal constitutional right to welfare benefits is virtually axiomatic; that indigent families have the right to travel to secure welfare benefits is equally well-established. The prohibition on the imposition of residency requirements lasting more than one year was written into the original Act.<sup>85</sup> The Supreme Court has interpreted the U.S. Constitution as guaranteeing an affirmative right to travel to benefit from superior economic opportunity as, first, an incident of national citizenship,<sup>86</sup> and later, as an absolute right in the context of welfare receipt.<sup>87</sup>

Although residency requirements in public assistance programs have long been declared unconstitutional, states recently have attempted to revive them.<sup>88</sup> Whereas the residency requirements struck down in the early 1970s denied any assistance to recent entrants, the new residency requirements generally pay lower benefits to those residing in the state for less than a specified period.<sup>89</sup> Lower benefits generally are based on the benefits payable in the state from which the recipient emigrated. The new residency requirements are becoming an increasingly popular way for states to cut public assistance costs.

Only one reported case has upheld a welfare rule authorizing the payment of less generous benefits to recent state entrants,<sup>90</sup> whereas two reported cases have struck down differential payment schemes as unconstitutional,<sup>91</sup> and additional actions

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85. See The Social Security Act of 1935, ch. 531, tit. IV, § 402(b), 49 Stat. 620, 628 (codified as amended at 42 U.S.C. § 602(b) (1988)).

86. See *United States v. Guest*, 383 U.S. 745, 757-59 (1966) (confirming that private citizens conspiring to prevent a citizen from traveling from state to state are guilty of conspiring to hinder a citizen in exercising a constitutional right); *Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) (interpreting the Privileges and Immunities Clause of the U.S. Constitution as guaranteeing the right to interstate travel with respect to a California statute making it a misdemeanor knowingly to bring an indigent person into the state).

87. See *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969).

88. See Loffredo, *supra* note 17, at 163-67.

89. See *supra* note 63 and accompanying text.

90. See *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992).

91. See *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993); *Mitchell v. Steffen*,

are pending.<sup>92</sup> In the face of the serious constitutional issues raised by these proposals, HHS for the first time has denied a state's request to conduct a demonstration project.<sup>93</sup> In disapproving recent requests for waivers, HHS has indicated that it will not approve any additional residency projects until the constitutional questions are resolved.<sup>94</sup> Having previously approved such projects in Wisconsin, Minnesota, and California, however, HHS has not reconsidered any waivers that it previously granted.

2. *The Right to Equal Treatment Regardless of Birth Status*—The Supreme Court has long prohibited states from penalizing children because of accidents of birth. Illegitimacy<sup>95</sup> and parental immigration status<sup>96</sup> are two conditions for which children obviously cannot answer and for which states cannot make them suffer. When the Court has viewed disparate treatment of children as the result of birth status, it has accorded children with protections that it withheld when it chose to view similar discriminations as mere relative deprivations of needs.<sup>97</sup>

504 N.W.2d 198 (Minn. 1993).

92. See, e.g., *Aumick v. Bane*, No. 2881-93 (N.Y. Sup. Ct. filed Mar. 18, 1993) cited in INDEX & SUMMARY OF WELFARE CASES (Center on Social Welfare Policy & Law, New York, N.Y.), Jan.-Dec. 1993.

93. The Illinois Relocation to Illinois project was disapproved on July 30, 1993. RECENT DEVELOPMENTS, *supra* note 9, at 1. HHS also denied a waiver request by Wyoming to conduct a similar experiment in the context of approving its "New Opportunities and New Responsibilities" project. *Wyoming New Opportunities and New Responsibilities Project Approved by HHS*, LIBR. BULL. (Center on Social Welfare Policy & Law, New York, N.Y.), Oct. 29, 1993, at 7-8.

94. See RECENT DEVELOPMENTS, *supra* note 9, at 2.

95. See *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (stating "we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships"); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (holding that illegitimate children are persons under the Equal Protection Clause of the Fourteenth Amendment).

96. See *Plyler v. Doe*, 457 U.S. 202 (1982), in which the Court stated:

Persuasive arguments support the view that a State may withhold its beneficence from [illegal aliens] whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. . . . [T]he children . . . "can affect neither their parents' conduct nor their own status.

*Id.* at 219-20 (quoting *Trimble v. Gordon*, 430 U.S. at 770).

97. Compare *Plyler v. Doe*, 457 U.S. 202 (1982) (condemning Texas's withholding of equal educational opportunity from students whose parents were undocumented aliens) with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), (denying claims that students had a constitutional right to equal educational opportunity and

Put differently, children should not suffer for their status, or for the status or behavior of their parents. This historically had been the approach taken by the Act's administrative enforcers and judicial interpreters. As the Court noted in its endorsement of HEW's rejection of the suitable home rule, "it is simply inconceivable . . . that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children."<sup>98</sup>

Yet the various family cap and punitive "fare-type" programs serve only to disqualify needy children in retaliation for the behavior of other family members. That the disqualification is relative, amounting to a diminution of the family's grant, and not absolute, is unimportant in light of the programmatic principles articulated in *King* and the constitutional principles stated in *Plyler*.

New Jersey's Family Development Act<sup>99</sup> contains, among other elements, the first family cap program to receive federal waiver approval. The family cap provision of the act is one of the few enacted and approved welfare experimentation packages which has met with any litigative challenge. Here the challenge came in two forms. First, an administrative complaint filed shortly after the passage of the act with HHS's Department of Civil Rights Enforcement which as of the date of this writing, still is awaiting resolution.<sup>100</sup> Second, a class action filed in federal district court to enjoin the "Child Exclusion" as violating the Act's guarantees of equal treatment, the Administrative Procedure Act, and the federal and state constitutions.<sup>101</sup>

The New Jersey cap excludes from the AFDC household, and thus denies benefits to any child born to an adult woman receiving AFDC. The provision clearly is aimed at deterring pregnancy, by denying to the afterborn child and her family

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that the students in question were absolutely deprived of this right). Arguably, the students from San Antonio's Edgewood neighborhood in *Rodriguez* were suffering from the accident of being born into a property-tax poor district, just as the students in *Plyler* were denied a free public education by accident of their parents' immigration status. The plight of the students in *Rodriguez*, however, was framed in a discourse of fundamental rights and the substantive equal protection doctrine to which the Court was growing increasingly hostile. The students for whom a different argument was advanced in *Plyler* benefited from the lessons learned by their predecessors' misfortune.

98. *King v. Smith*, 392 U.S. 309, 326 (1968).

99. N.J. Stat. Ann. §§ 44:10-19 to 10-33.

100. Administrative Complaint to HHS (June 26, 1992) (on file with the *University of Michigan Journal of Law Reform*).

101. *C.K. v. Shalala*, No. 93-5354 (D.N.J. filed Dec. 1, 1993).

benefits that the child would have enjoyed had she been conceived before her family began receiving assistance.<sup>102</sup>

HHS subsequently approved a similar cap as part of a demonstration project in Wisconsin. The provision denies an AFDC family the incremental increase in benefits to cover the needs of a child born after her mother began receiving assistance. An exception exists if the child was conceived before the mother began receiving assistance, during a period of nonpayment that lasted at least six months, or as the result of rape or incest.<sup>103</sup>

Any constitutional justification for a family cap can be based only on the most superficial reading of the limited applicable law. In *Dandridge v. Williams*,<sup>104</sup> the Supreme Court upheld Maryland's own version of the family cap, a limitation on incremental increases in AFDC payments for children born into large families. The case is cited constantly, one might say tiresomely, for the propositions that the Constitution provides no guarantee of economic rights and that states are free to set their own benefit levels. It also is cited to justify the imposition of the most minimal review of any classifications which states make in the process of administering their welfare programs. *Dandridge* constitutes the last word on judicial scrutiny of most states' welfare decisions; indeed, so final a last word that the judiciary seems to have treated it as a eulogy.<sup>105</sup>

*Dandridge* should not be read, however, as an endorsement

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102. As Professor Williams notes:

The underlying goal of Family Cap programs is for people to plan for their children; the assumption is that middle-class people are intelligent enough to refrain from having children when they cannot support them and that poor women should do likewise. The unspoken motivation is far less racially benign: the stereotypical AFDC mother is African American, urban, lazy, and a "bad mother" who gets pregnant to obtain more AFDC benefits. It follows, according to the argument, that the denial of these additional benefits will curb the pregnancies that the policymakers find so troubling.

Williams, *supra* note 16, at 737.

103. CENTER ON SOCIAL WELFARE POLICY & LAW, HHS APPROVES WISCONSIN PROJECT THAT TIME LIMITS AFDC BENEFITS 2 (1993) [hereinafter WISCONSIN PROJECT].

104. 397 U.S. 471 (1970).

105. See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1518-22 (1991) (describing Justice Stewart's opinion in *Dandridge* as positing the Court's inability to enforce basic fairness or even rationality in welfare policy); *id.* at 1528 (stating that Justice Rehnquist's opinion in *Jefferson v. Hackney*, 406 U.S. 535 (1972), compounds the Court's professed helplessness by assuming helplessness in the face of the previous decision in *Dandridge*).

of the constitutionality of family caps. The *Dandridge* Court never dealt with the issue of whether the withholding of additional benefits from children born after the capped limit impermissibly penalized children by dint of their birth order. Nor did the majority opinion address the question of whether Maryland's AFDC cap violated the corresponding statutory provision that requires states to afford every eligible potential recipient of the benefit the opportunity to apply. Rather, the Court framed the issue in terms of the states' rights to spread out welfare benefits as they wished among large and small families, which are constitutionally unprotected groups. This approach allowed the Court to avoid the problem of a scheme that withheld funding from a dependent child simply because she had the misfortune of being born after seven equally dependent siblings.

This issue may be less avoidable in the litigation challenging the current cap in New Jersey.<sup>106</sup> Whereas the Supreme Court in *Dandridge* could characterize the cap at issue as having the relatively benign purpose of apportioning benefits equally between larger and smaller families, the New Jersey provision penalizes welfare recipients who have additional children while on welfare, regardless of the size of their families. It thus penalizes children born to such families.

3. *The Right to Process before the Imposition of Sanctions*—The Social Security Act has long respected the importance of process to participants in the AFDC system. The Act's respect for process extends even beyond the guarantees of the Federal Constitution. Thirty-three years before the Court recognized public assistance payments as property protected from arbitrary governmental action by the Fourteenth Amendment, Title IV-A of the Act provided a fair hearing for aggrieved AFDC recipients.<sup>107</sup> In 1950, Congress extended to applicants the right of redress through a fair hearing, not only for the denial of claims, but also for unreasonable agency delay in processing them.<sup>108</sup> In addition to providing the fair hearing to contest the absolute deprivation of AFDC benefits, Congress recently has established another forum—a conciliation procedure—for recipients enrolled in the JOBS program.<sup>109</sup> This extension of informal process covers not only terminations from

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106. See *supra* notes 99–102 and accompanying text.

107. Social Security Act of 1935, ch. 531, § 402(a)(4), 49 Stat. 620, 627.

108. Social Security Act Amendments of 1950, ch. 809, § 321(a), 64 Stat. 477, 549.

109. See 42 U.S.C. § 682(h)(1988); 45 C.F.R. § 250.36 (1992).

the program, but also any issue arising out of its implementation. It also guarantees formal fair hearing adjudication for disputes unresolvable through conciliation.<sup>110</sup>

The conciliation process has fallen victim to state reform efforts through the waiver approval process. At least four states have been exempted from the conciliation requirements.<sup>111</sup> The states which have been granted waivers abrogating JOBS conciliation requirements also have been granted waivers eliminating one or more exemptions from JOBS requirements. For example, a number of states have received waivers eliminating the JOBS exemption for minors in school to establish learnfare programs or to condition a minor's parents' receipt of AFDC benefits on school attendance.<sup>112</sup> Similarly, while a parent providing full time care to an infant under one-year-old is exempt from JOBS requirements,<sup>113</sup> some states have received waivers permitting them to require such parents to participate in employment or training programs.<sup>114</sup>

Likewise, each of the states which have been granted waivers abrogating JOBS conciliation requirements have been granted waivers increasing the sanctions for noncompliance with employment, training, or school attendance requirements. The existing sanctions under federal law are not insubstantial. For the first violation without good cause, an individual may have her needs eliminated from the household's grant until her failure to comply ceases. In the case of a second violation, the grant is reduced for three months or until the failure to comply ceases. In the case of any subsequent violations, benefits are reduced for six months or until the failure to comply ceases.<sup>115</sup> In contrast, Iowa has been granted approval to impose a limited-benefit plan as a sanction for families which fail to cooperate with its Family Investment Program. This sanction provides three months of benefits, followed by three months of benefits for the children only, followed by the permanent termination

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110. See 42 U.S.C. § 682(h) (1988); 45 C.F.R. § 250.36 (1992).

111. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 23, 30, 47 (describing projects in Maryland, New Jersey, and Wisconsin which included waivers of conciliation requirements); *HHS Approves Iowa Project*, *supra* note 13, at 1 (describing the Iowa project, which included a waiver of the conciliation requirements).

112. Maryland and Wisconsin each received waivers of the minor student exemptions to run learnfare projects through JOBS. Maryland also received approval to limit the definition of "good cause" for noncompliance. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 23, 48-50.

113. 45 C.F.R. § 250.30(b)(9) (1992).

114. See, for example, the New Jersey Family Development Plan. 1992 AFDC § 1115 APPLICATIONS *supra* note 9, at 30.

115. 45 C.F.R. § 250.34(a)(1) (1992).

of benefits. HHS has waived JOBS conciliation requirements and JOBS provisions recognizing good cause for failure to comply for the Iowa project.<sup>116</sup>

Procedural protections have proven crucial to prevent the wrongful termination of benefits. Evaluations of the LEAP program, a learnfare demonstration project in Ohio which is being hailed as a successful model of reform in national hearings on welfare reform,<sup>117</sup> suggest that teenagers were sanctioned for absence from school at a higher rate than adults were in workfare programs.<sup>118</sup> Further, when Wisconsin was forced by court order to establish procedures for its learnfare program,<sup>119</sup> the sanction rate dropped drastically; nearly 85% of the sanctions proposed by the local department of social services prior to the establishment of procedures were later determined to be improper.<sup>120</sup>

When the history of this period of welfare administration is written, the elimination of informal processes of dispute resolution, combined with the stiffer sanctions and the elimination of exemptions for minors, mothers of infants, and other vulnerable populations,<sup>121</sup> will no doubt be criticized as inflicting serious harm on poor women and children.

#### IV. THREE OPTIONS FOR THE INSTITUTION OF A WAIVER PROCESS

##### A. *The Nature of Concerns About Current Agency Practice*

Although many of the AFDC demonstration projects that HHS has approved since 1990 have included features that benefitted

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116. *HHS Approves Iowa Project*, *supra* note 13.

117. *Hearings Before the Subcommittee on Human Resources of the House Comm. on Ways & Means*, 103d Cong., 2d Sess. (1994) (statement of Judith M. Gueron, President, Manpower Demonstration Project).

118. *See* BLOOM, *supra* note 64.

119. *See* *Kronquist v. Goodrich*, No. 89-C-1376 (E.D. Wis. Oct. 23, 1990) (stipulation to vacate preliminary injunction based on the parties' agreement to new procedures for determining noncompliance and notice requirements) (on file with the *University of Michigan Journal of Law Reform*); *see also* 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 50 (summarizing the issues discussed in *Kronquist* relating to the process for determining noncompliance with learnfare requirements).

120. *See* 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 50.

121. Other typical waiver requests include eliminating JOBS exemptions for pregnant women and for those temporarily disabled. *See, e.g.*, CONNECTICUT PROPOSAL, *supra* note 13, at IV-38.

recipients, the same projects often have denied recipients substantive protections guaranteed in the AFDC statute.<sup>122</sup> That the projects could violate the underlying principles of AFDC, and yet still be approved, is the result of recent legislative and jurisprudential developments that have vitiated the purpose and enforceability of the statute. The last major wave of disentanglement occurred in the 1980s as Congress passed sweeping changes in the AFDC statute. The ease with which Congress eliminated benefits offered in the Social Security Act reveals the limits of the Act as a source of substantive entitlements.<sup>123</sup> In upholding the changes to the Social Security Act against constitutional attack and giving the least generous reading to the statutory changes, the Supreme Court made clear that recipients could no longer rely on a beneficial reading of the Act to protect them against benefit reductions.<sup>124</sup> Although by the late 1980s Congress had made some effort to restore benefits in the Tax Equity and Fiscal Responsibility Act of 1982<sup>125</sup> and the Family Support Act of 1988,<sup>126</sup> the limits on the ability of the AFDC statute to guarantee recipient rights had become apparent.

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122. A number of projects have liberalized categorical eligibility standards to permit two parent families to receive AFDC benefits and have extended earned income disregards. New Jersey, for example, adopted these innovations while simultaneously denying benefits to children born to mothers already receiving AFDC. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 30.

123. In 1981, the Reagan administration proposed sweeping changes in the AFDC statute which reduced some of the benefits offered in the statute. These changes were passed by the 97th Congress with little opposition. See, e.g., Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2304, 95 Stat. 857 (codified as amended at 42 U.S.C. § 602(a)(17) (1988)) (adding the "lump sum rule" which disqualified households receiving excess income for the number of months equaling the amount of the excess income divided by the applicable standard of need); § 2301 (codified as amended at 42 U.S.C. § 602(a)(8)(A)(ii) (1988)) (limiting work expense deductions to \$75 per month and child care deductions to \$160 per month).

124. One example is the "actual availability" principle which limited states ability to attribute only that income actually available to support a dependent child. During the 1980s, the actual availability principle gave way to deeming rules which attributed the income of stepparents, siblings, grandparents, and alien sponsors whether or not such income was actually available. See 42 U.S.C. §§ 602(a)(7)(31), (38)–(39) (1988); 42 U.S.C.A. § 602(f)(2) (West Supp. 1993); see also *Bowen v. Gilliard*, 483 U.S. 587 (1987) (determining that recipients did not have a constitutionally protected property interest in receiving the full amount of support payments assigned to the state in exchange for AFDC benefits).

125. Pub. L. No. 97-248, 91 Stat. 324 (codified as amended in scattered sections of 26 U.S.C.).

126. Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.).

Now that accountability to federal principles is no longer an issue, states have rushed to use waivers to disentitle the poor even further. The disappearance of procedural protections for the individual recipient mirrors the disappearance of process in the generation and approval of the recent welfare reform programs. Policymakers at both the state and federal levels have eschewed the establishment of procedures or standards for waiver approvals.<sup>127</sup> HHS has refused both to give notice to the public of the process it employs in granting waivers and to articulate the standards for approval of projects. The failure to articulate procedures for review of state waiver requests has excluded recipients' voices from the process. Profound harms have resulted from the failure to formalize standards for review. The harms that have been visited upon recipients through the waiver process may be linked to the lack of procedure and standards for review.

In *The Alchemy of Race and Rights*, Patricia Williams comments on the importance of formal rules in minimizing harm to disempowered groups. She relates an anecdote concerning the opposing reactions she (an African-American law professor) and a white male colleague had to the experience of negotiating with a landlord when arriving in a new city. While she signed a detailed, lengthily negotiated lease with friends who rented her an apartment, her colleague "handed over a \$900 deposit in cash, with no lease, no exchange of keys, and no receipt to strangers with whom he had no ties other than a few moments of pleasant conversation."<sup>128</sup> She concludes that empowered people are comfortable with less formality and less procedure. In fact, empowered people often prefer informality as a means to establish trust between themselves and the other person with

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127. The Bush administration purposely avoided articulating guidelines or standards for approval of waiver requests, as it anticipated a need for maximum flexibility and felt that justifications for projects could change from time to time. Telephone Conversation with Elizabeth Barnes, Chief Program Review Officer, Administration of Children and Families. Recent news reports suggest that the Clinton administration does not want to be perceived as backing away from its promise to "end welfare as we know it." See, e.g., Jason DeParle, *Clinton Idea Used to Limit Welfare*, N.Y. TIMES, June 2, 1993, at A12. After a letter from advocacy groups urging HHS to establish procedures for review of waiver applications, HHS announced it was streamlining the process to make it easier for states to obtain waiver review. See Letter from Adele M. Blong, Center on Social Welfare Policy & Law, to Donna Shalala, Secretary of HHS (Mar. 23, 1993) (on file with the *University of Michigan Journal of Law Reform*); Press Release from HHS (Aug. 18, 1993) (on file with the *University of Michigan Journal of Law Reform*).

128. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-47 (1991).

whom they are dealing. In contrast, those whose experiences have left them more vulnerable to being victimized rely on formal process both for protection and as a means of being perceived as an equal player.<sup>129</sup>

The only acknowledged players in the waiver review process are HHS and the state governments, actors which, at least in theory, have relatively equal bargaining power. Williams might analyze the absence of rules governing the waiver approval process as promoting the sort of informality that meets the needs of these relatively equal actors. The problem is that the interests of a profoundly less powerful group, the recipient community, are those most affected by the AFDC changes that emerge, and recipient voices are excluded from the process. Ironically, when states complained that review takes too long and that the process needs to be streamlined, HHS responded by establishing concurrent review of Medicaid and AFDC waivers.<sup>130</sup>

The history of welfare litigation repeatedly has demonstrated that without an established process and standards for review, otherwise reasonably benign eligibility conditions inflict serious harms on recipients. The failure to articulate standards and review procedures inevitably results in recipients suffering arbitrary terminations. AFDC eligibility rules generally permit the sanctioning of recipients who fail to "comply," for example, by completing a monthly report, cooperating in pursuing responsible relatives for support, or participating in work activity "without good cause."<sup>131</sup> Without regulations requiring a pretermination inquiry and an identification of what constitutes "good cause," such eligibility rules become excuses to deny benefits to recipients.<sup>132</sup>

While media attention has focused on the substance of state demonstration projects and the waivers granted in connection

129. This is not to suggest that poor people prefer formal process but simply to note that the poor and racial minorities may be more vulnerable in settings where the process is less formal.

130. See Press Release from HHS, *supra* note 127.

131. See, e.g., 45 C.F.R. § 250.34 (1992); 7 C.F.R. § 273 22(d)(4) (1993).

132. See Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 N.Y.U. REV. L. & SOC. CHANGE 231 (1989-90) (describing "churning," or the administrative closing of public assistance cases). Even with such standards, states routinely issue termination notices to recipients not in compliance without determining whether the recipient had good cause for the failure to comply. See, e.g., *Doston v. Duffy*, 732 F. Supp. 857, 867 (N.D. Ill. 1988) (requiring written standards for administering state AFDC programs).

with them,<sup>133</sup> the recent waiver decisions are equally troubling because of a discernible lack of process and a failure to articulate standards governing the decision to approve a waiver.<sup>134</sup> Process and substance are inevitably intertwined here; the lack of process has profoundly affected the quality of the review of requests for waivers and has led to the approval of harmful reductions or restrictions of recipients' benefits.

### B. Sources for a Waiver Procedure and Standards

Administrative law provides one source for thinking about the procedures HHS might usefully apply to its review of a state's request for a waiver. Every court that has passed on the question has found that the decision to grant such a waiver is reviewable under the Administrative Procedure Act (APA).<sup>135</sup>

It follows then that the agency must make a record sufficient to "show that the agency has considered the relevant factors and to enable a reviewing court adequately to review whether the agency's decision was arbitrary or capricious."<sup>136</sup>

The only court to consider a claim concerning the adequacy of the agency record held that the minimal record routinely generated by HHS in approving a waiver request was sufficient. In *Beno*, California welfare advocates, on behalf of a class of state AFDC recipients, challenged HHS's decision to grant waivers to California which, inter alia, reduced benefits by 1.3% statewide, except for a small control group, and authorized an additional 5% reduction in benefits.<sup>137</sup> The plaintiffs sought review under the APA, claiming that the Secretary's decision exceeded her authority under Section 1315 because she had

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133. See, e.g., Williams, *supra* note 16, at 720; Bussiere, *supra* note 16, at 1; Mark Greenberg, *Ending Welfare Law as We Know it: The New World of Welfare Waivers*, NEWSLETTER OF THE INTERUNIVERSITY CONSORTIUM ON POVERTY L., Nov. 1993, at 1; Wiseman, *supra* note 11, at 18.

134. See HHS DECISIONMAKING, *supra* note 16, at 1.

135. 5 U.S.C. §§ 551-576, 701-706 (1988); see *Aguayo v. Richardson*, 473 F.2d 1090, 1103 (2d Cir. 1973); *Beno v. Shalala*, No. S-92-2135 (E.D. Cal. July 1, 1993) (opinion denying defendant's motion to dismiss and denying plaintiffs' request for a preliminary injunction) (appeal pending in the 9th Cir., No. 16-411); *Crane v. Matthews*, 417 F. Supp. 532, 539 (N.D. Ga. 1976); *CWRO v. Richardson*, 348 F. Supp. 491, 493 (N.D. Cal. 1972).

136. *Beno*, No. S-92-2135, at 14.

137. This benefit reduction was justified as an experiment to determine whether decreasing AFDC benefits would act as a work incentive.

authorized a waiver for a project inconsistent with the objectives of the Social Security Act and approved a target population that was larger than was necessary to carry out any legitimate work incentive experiment.<sup>138</sup>

The plaintiffs' complaint did not challenge the procedures the Secretary employed to review the waiver application. At oral argument on a preliminary injunction motion, however, the plaintiffs for the first time claimed that the Secretary was required to make explicit findings that the project furthered the objectives of the Social Security Act and that the extent and duration of the waivers were necessary.<sup>139</sup> In denying the plaintiffs' request for preliminary relief, the district court upheld the Secretary's decision despite an almost nonexistent record.<sup>140</sup> For example, because plaintiffs' counsel had written to the Secretary raising numerous objections to the waiver request and the Secretary nonetheless granted the waiver, the court concluded that the Secretary must have considered the objections, even though no document existed revealing the factors the Secretary considered.<sup>141</sup>

Despite this setback in the only case challenging the sufficiency of the Secretary's procedure, administrative law decisionmaking models could be grafted usefully onto the waiver review process. The determination to grant waivers to a state might be termed informal adjudication because a particular state project is at issue. Alternatively, the agency's waiver review process could be characterized as specific rulemaking because the effect of a waiver decision, depending on the scope of the project, has more or less general applicability within the covered jurisdiction and has prospective effect.<sup>142</sup> Characterizing the decision either as rulemaking or adjudication, however, suggests a model for procedures that might be employed usefully by HHS.

1. *Rulemaking as a Model for Procedure*—Rulemaking provides one model for procedures which might be employed by HHS in reviewing a state's request for a waiver. Under the

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138. *Beno*, No. S-92-2135, at 18.

139. *Id.* at 13.

140. The record consisted of the state's waiver application, the Secretary's letter granting the application, and a letter from the plaintiffs' counsel, objecting to various aspects of the state's proposed demonstration project. *Beno*, No. S-92-2135, at 16.

141. *Id.* at 18; see also *Aguayo v. Richardson*, 473 F.2d 1090, 1103 (2d Cir. 1972).

142. For a discussion of the distinction between adjudication and rulemaking decisions, see 1 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 2.3 (1985).

APA, an agency is required to give notice of a proposed rule in the Federal Register and allow no less than thirty days for public comment.<sup>143</sup>

The only time that Congress addressed the procedure governing waivers, it prescribed a similar process. From 1977 to 1980 the Social Security Act and its implementing regulations mandated procedures for granting waivers.<sup>144</sup> The statute, and the Secretary's regulations which tracked the statute, permitted proposed demonstration projects to take effect if the Secretary approved the project no earlier than thirty days from the date that the application was submitted. If the Secretary took no action within sixty days, the state was authorized to proceed with the project. The Secretary, however, was required to publish a summary of the proposed project, make copies available to the public, and receive and consider comments submitted with respect to the application. No such procedure has been employed with respect to waivers granted since 1980.<sup>145</sup>

Although the APA exempts matters relating to benefits from the APA's rulemaking procedures, HHS (then HEW) directed all of its departments to follow "the public participation procedures of 553."<sup>146</sup> Agencies are free to adopt such policies foregoing the APA's subject matter exceptions and such voluntary abrogations are then generally enforceable. Under ordinary administrative law principles, a rule promulgated by HHS without following the procedures in section 553 would be void, because the agency has agreed voluntarily to follow the procedures.<sup>147</sup>

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143. 5 U.S.C. § 553 (1988).

144. Social Security Amendments of 1977, Pub. L. No. 95-216, tit. IV, 91 Stat. 1554, 1562 (codified as amended at 42 U.S.C. § 1315(b) (1988)). This section has been described as governing WIN demonstration projects. See Bussiere, *supra* note 16, at 2. The statutory language is not limited to waivers in connection with WIN demonstrations. The legislative history is silent on the reasons that the procedure was added, or why the statute contained a sunset provision expiring in 1980.

145. This process may have existed more in theory than in practice. Despite the existence of regulations requiring the publication of proposed demonstration projects in the Federal Register, 45 C.F.R. § 282.38 (1993), a search of the Federal Register revealed no announcement of proposals during this period.

146. See 1 KOCH, *supra* note 142, at § 3.36.

147. See, e.g., Ohio Dep't of Human Servs. v. United States, 862 F.2d 1228, 1233 (6th Cir. 1988) (refusing to allow HHS to rely on the benefits exemption because the agency voluntarily had agreed to follow notice and comment procedures). The agency retreated from its position somewhat in 1982, announcing that it would decline to follow notice and comment procedures where it would "cause delay or would impair the attainment of program objectives or would have other disadvantages that outweigh

Because HHS has failed to publish, provide for, or respond to public comment on state waiver proposals, the existing process for waiver review has ignored almost completely the perspectives of recipients and their advocates. The waiver review process easily could accommodate the notice and comment procedures of the APA without sacrificing efficiency.

There is some evidence that a more public process would increase efficiency by assisting the agency in uncovering flaws in proposed projects prior to the implementation of the project or litigation challenging the project.<sup>148</sup> In several early cases challenging the Secretary's authority to grant waivers, litigation delayed implementation of a demonstration project.<sup>149</sup> Even where litigation did not succeed in blocking a particular project, claims raised by litigants frequently resulted in the agency altering the project to some degree.<sup>150</sup> It simply is inefficient to rely on litigation to deal with objections to a demonstration project when a notice and comment procedure might well resolve them.

2. *Informal Adjudications and Standards for Review*—As noted above, Congress prescribed a rulemaking-type procedure the only time that it considered the process applicable to waiver reviews. It seems clear, however, that the form of administrative decision making that HHS currently employs in reviewing waiver applications is an informal adjudication model that involves a case-by-case determination, without trial-type procedures.

One problem with an informal rulemaking model, particularly given the increasing number and scope of state waiver requests, is that case-by-case review masks the extent to which waiver decisions impact overall policy. In the context of the cooperative federalist system of AFDC administration, for example, how does the broad willingness of the government to grant waivers

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the benefits of receiving public comment." 1 KOCH, *supra* note 142, at § 3.36. None of the decisions concerning whether HHS has followed the requisite procedures under the APA have acknowledged the agency's subsequent statement.

148. HHS appears to have invested so little in its waiver approval process that it has not even consistently defended its decision to grant a waiver. In *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), for example, California AFDC recipients challenged aspects of California's Assistance Payments Demonstration Project which provided lower AFDC payments to families who were recent state entrants. The district court invited HHS, although not a named defendant, to submit briefs, because the court's decision might implicate the agency's waiver authority. *Id.* at 517 n.3. HHS failed to respond to the court's invitation. *Id.*

149. *See, e.g., Aguayo v. Richardson*, 352 F. Supp. 462, 465 (S.D.N.Y. 1972).

150. *See, e.g., Aguayo v. Richardson*, 473 F.2d 1090, 1096-97 (2d Cir. 1973).

affect the overall administration of AFDC? To what extent does the increasing divergence of state eligibility rules from those promulgated in the federal statute and regulations complicate agency oversight of state programs? Promulgating a set of standards to govern waiver decisions might help ensure that these broader consequences of individual decisions are considered.

The only significant source of rules to govern informal adjudications is the protection afforded by the Constitution against deprivations of property without due process.<sup>151</sup> *Goldberg v. Kelly* established that welfare benefits were protected property and that the loss of benefits was of such a dire consequence as to require the opportunity for a pre-termination hearing.<sup>152</sup> The lesson from *Goldberg* and subsequent decisions is that more process is due when the stakes are highest.<sup>153</sup>

It is difficult to translate rules governing informal adjudications affecting an individual's access to welfare benefits into procedures to govern waiver decisions. One reason is that individual recipients are not parties to the waiver approval process. Furthermore, less process is due individual recipients with respect to congressionally mandated mass changes in benefit programs.<sup>154</sup>

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151. See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

152. 397 U.S. 254, 262 (1970). In the more than 20 years since *Goldberg v. Kelly* was decided, scholars have debated its meaning. The debate has centered on whether the decision was about "new property," a theory of entitlement to welfare benefits, or merely a recognition of the need for a more just process. One commentator has suggested that when the government acts to inflict serious injury on someone, it must give her a fair opportunity to be informed of what is occurring and to object to the government's action. Law, *supra* note 84, at 823. Justice Brennan, who authored the *Goldberg* decision, later indicated that the decision rested on the "brutal need" of the plaintiffs, that is, that more stringent procedures are required to terminate welfare benefits than the Supreme Court has imposed in other contexts because "brutal need" was at stake. William J. Brennan, Jr., Reason, Passion, and the Progress of the Law, The Forty-Second Annual Benjamin N. Cardozo Lecture (Sept. 17, 1987), reprinted in 10 CARDOZO L. REV. 3, 20-21 (1988). Sylvia Law points to the risks of reliance on the brutal need analysis, see Law, *supra* note 83, at 818, while others call Brennan's "brutal need" analysis somewhat revisionist. See Owen Fiss, *Reason in All its Splendor*, 56 BROOK. L. REV. 789, 795 (1990).

153. Thus, the Court refused to extend the pretermination hearing requirement to Social Security disability benefits in *Mathews v. Eldridge*, 424 U.S. 319, 339 (1976). The Court in *Mathews* developed a balancing test to determine the amount of process due by weighing the importance of the private interests at stake, the risk of erroneous deprivation, the value of additional procedures, and the interest of the state in efficient administration. *Id.* at 335.

154. See *Atkins v. Parker*, 472 U.S. 115, 130 (1985) (holding that recipients were

Nevertheless, with respect to reducing entitlements authorized by Congress, "brutal need" is at stake. Further, the changes imposed through waivers are not mandated by Congress.<sup>155</sup> In the context of agency decisions respecting individuals, brutal need triggered the opportunity to be heard and to object before harm occurred. Here, at a minimum, due process should translate into notice that the waiver application is being considered, public notice of the process by which waivers are granted, standards of review to govern waiver approvals, and a record sufficient to permit judicial review of whether the standards were followed.<sup>156</sup>

This process, like a rulemaking process, would serve the value of efficiency. One reason that agencies promulgate rules is to avoid revisiting issues on a case-by-case basis.<sup>157</sup> It would save agency resources to announce principles governing waiver decisions, rather than revisiting this question each time that a state requests a particular waiver.

One basic criterion for review should be that states ensure that they have appropriate legislative authority and that their proposals are not otherwise unlawful.<sup>158</sup> In at least several instances states have submitted requests for waivers to conduct state demonstration projects prior to enacting the necessary state legislation.<sup>159</sup> Furthermore, at least one waiver request

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not entitled to an individualized notice explaining congressionally mandated reductions in Food Stamp benefits).

155. But see Loffredo, *supra* note 39, at 1296-99, for a compelling critique of the ability of the democratic process to protect the interests of recipients.

156. Our notion of standards would apply special scrutiny when HHS considers whether to grant authority to a state to deny benefits that Congress has conferred in the Social Security Act. Given the huge potential for harm inherent in reducing substantive entitlements under the Act, HHS should be especially wary of a state's request to reduce entitlements and should require a showing of the need for such a demonstration project. Rather than encouraging benefit reductions through cost neutrality principles, HHS should acknowledge that AFDC benefits currently fail to meet even brutal need standard in most states, due to the decline in benefits in real dollar terms since *Goldberg* was decided in 1970. Standards should be articulated which preserve recipients' meager benefits and respect their due process rights.

157. See *Heckler v. Campbell*, 461 U.S. 458, 467 (1983).

158. See CENTER ON SOCIAL WELFARE POLICY & LAW, IMPROVEMENTS IN AFDC THROUGH HHS POLICY DEVELOPMENT: RECOMMENDATIONS FOR ACTIONS HHS CAN TAKE TO IMPROVE AFDC 4 (1993).

159. See, e.g., 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 10, 44 (describing the California Welfare Reform Demonstration Project and the Wisconsin Parental and Family Responsibility Demonstration Project). For example, Vermont requested several waivers for a project which its legislature initially failed to pass. See CENTER ON SOCIAL WELFARE POLICY & LAW, DESCRIPTION OF THE VERMONT FAMILY INDEPENDENCE PROJECT (1993) [hereinafter VERMONT PROJECT]. Wisconsin, at the direction of its

approved by HHS was subsequently struck down by a reviewing court as violating the Constitution.<sup>160</sup>

3. *Rules Governing Human Experimentation as a Source of Waiver Procedures*—a. *Myth, Reality, and the Ethic of Experimentation*—Although the desire to control costs drives many efforts at welfare reform, these motives almost never are acknowledged in demonstration project proposals. The willingness of the government to entertain demonstration projects results in a kind of doublespeak where empowerment or self-sufficiency rhetoric is used to justify proposals aimed purely at cutting costs.<sup>161</sup>

The notion of a demonstration project as a discrete experiment often bears little resemblance to the broad-based changes implemented through the waiver process. States routinely request, and are routinely granted, waivers to conduct demonstration projects statewide, with only a very small control group or none at all.<sup>162</sup> Although waivers are granted to conduct demonstrations statewide, often the state proposes to study only a fraction of the recipients affected by the project. Most waivers are granted for at least three to five years and the trend seems to be to grant waivers for considerably longer periods.<sup>163</sup>

States do not request the minimum number of waivers necessary to conduct their proposed demonstration projects. Instead, they increasingly seem to be requesting as many waivers as they can get approved. In some cases states seek waivers without indicating why they need them, or what they propose to do once the waivers are granted. For example, among the more than forty waivers Connecticut sought in connection with its welfare demonstration project, A Fair

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state legislature, sought a waiver to conduct a vehicle asset limit demonstration project prior to the introduction of implementing legislation. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9, at 44.

160. See *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993).

161. See Declaration of Jay Katz in Support of Plaintiff's Request for a Preliminary Injunction, *Beno v. Shalala*, No. S-92-2135 (E.D. Cal. July 1, 1993) (stating that "[b]ecause the research design is so patently flawed, California's plan raises my suspicions that what is proposed is not in fact a research study intended to yield significant new information, but simply an excuse to reduce welfare benefits.")

162. Connecticut, for example, has requested waivers for two separate projects: a time-limited experiment to be implemented in the New Haven area, and a comprehensive package of changes, including benefit increases, broader JOBS participation requirements, and stiffer sanctions for noncompliance, to be implemented statewide. See CONNECTICUT PROPOSAL, *supra* note 13, at IV-6 to IV-10.

163. On April 12, 1993, HHS granted seven year waivers to Vermont. VERMONT PROJECT, *supra* note 159, at 1 (1993). In October 1993 it authorized an 11 year experiment in Wisconsin. WISCONSIN PROJECT, *supra* note 103, at 1.

Chance, is a request to waive all exemptions from JOBS requirements, including those for minors in school, the temporarily disabled, third trimester pregnant women, people with children under the age of one, and people already working at least part-time who have children under the age of six.<sup>164</sup> Connecticut offers no explanation of what it plans to require of these previously exempt groups, except to say that it wants to foster an ethic that work is the norm, not the exception.<sup>165</sup> Of course, if the waivers are granted, the state can impose any requirements it wishes on these groups.

The research questions identified in the states' waiver requests often are too vague for meaningful evaluation.<sup>166</sup> In most cases the project is approved for implementation before the means of evaluation have been identified. Failure to formulate the research design before the project is implemented increases the risk that the project will not be fashioned properly to test the hypotheses on which it is based.

*b. Human Experimentation Protocols as a Source of Recipient Protections*—Since the early 1980s, HHS has exempted itself, with respect to AFDC demonstration projects, from complying with regulations governing research on human subjects.<sup>167</sup> The protocols require that an institutional review board (IRB) certify that the project would not harm humans. If the project has the potential to do so, the regulations require the consent of the participant, that harms be minimized or outweighed by the benefits to the subject, and that participant privacy and safety be insured.<sup>168</sup> The agency has argued that obtaining IRB review and obtaining each recipient's informed consent would impose an undue burden, and would make welfare demonstration

164. CONNECTICUT PROPOSAL, *supra* note 13, at IV-25, IV-38.

165. *Id.* at IV-43.

166. Connecticut's Welfare Reform proposal, for example, proposes to test, *inter alia*, the following hypotheses:

Clients will be [sic] feel they are receiving a fairer share of what society has to offer and will feel more in control of their lives; Children will feel more hope for the future and will have a stronger belief that work is rewarded; Welfare workers will be happier with their jobs and will feel that their work is more meaningful; The general public will believe that the welfare program is more in line with society's values and will see welfare recipients as more deserving of the assistance they receive.

*Id.* at IV-43. The proposal offers no hint as to how such hypotheses will be tested.

167. See 45 C.F.R. § 46.101(b)(6) (1983).

168. *Id.* § 46.

projects essentially infeasible.<sup>169</sup> The Secretary retains the authority to require the informed consent of any participant in a research project that she determines presents a risk to the physical, mental, or emotional well-being of the participant. To date, the Secretary has not conditioned her approval of any AFDC demonstration project on the state obtaining the informed consent of the participants.<sup>170</sup>

It is difficult to justify the idea that protocols designed to insure protection of human subjects should not apply to experimentation on AFDC recipients. If, as most such proposals claim, the goals of state reform efforts truly are, to empower recipients and increase their self worth and sense of responsibility, it makes sense to obtain recipients' consent to participate in reform experiments.<sup>171</sup> Any project that includes an individualized planning process with a welfare recipient could solicit the recipient's consent to participate in the project.<sup>172</sup> Any consent, of course, must truly be voluntary.<sup>173</sup> A recipient might

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169. See Federal Defendant's Memorandum of Law in Support of their Motion to Dismiss at 49, *Beno v. Shalala*, No. S-92-2135 (E.D. Cal. July 1, 1993) (stating that "Plaintiff's interpretation of [law requiring protection of human subjects] amounts to a repeal of 1115. . . ."); *Crane v. Mathews*, 417 F. Supp. 532, 547 (N.D. Ga. 1976) (stating that the Secretary "claims that application of the regulation to section 1115 projects will have the effect of precluding the Secretary from conducting any section 1115 projects which involve diminution of benefits inasmuch as the regulation requires that informed consent be obtained from each affected individual"); see also Reply to Comments Received in Response to HHS' Decision to Exempt Itself from the Experimentation Regulations, 48 Fed. Reg. 9266 (1983). At the time that the exemption was proposed, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research raised particular concerns about research entailing the reduction of benefits to certain recipients while others similarly situated continued to receive a higher level of benefits. *Id.* at 9268. The Commission raised concerns that such projects created medical risks, as well as risks of nonphysical intrusions into personal and confidential matters, and urged review of such projects by an independent review board. *Id.* The agency rejected the Commission's suggestion, stating that all projects "could be construed as reducing benefits in one way or another." *Id.*

170. This assertion is based upon the authors' review of 26 agreements between HHS and states which were granted waivers from 1988 through 1992, produced in response to the authors' Freedom of Information Act request, and upon 1992 AFDC § 1115 APPLICATIONS, *supra* note 9.

171. It is instructive to note that when Congress considered the question of process for demonstration projects it required voluntary participation by recipients. See 42 U.S.C. § 1315(b)(2) (c) (1988); 45 C.F.R. § 282.18 (1993).

172. For example, the Vermont and Iowa projects include such provisions. VERMONT PROJECT, *supra* note 159; Iowa Family Investment Program, *supra* note 21.

173. One of the authors, as a legal services lawyer, remembers being struck by the relatively high incidence of voluntary foster care arrangements among her clients, who never seemed able to get their children back as quickly as they wanted. The National Commission for the Protection of Human Subjects of Biomedical and Behavioral

make the calculation that the benefits of the program were worth the risk of harsher sanctions for noncompliance. Having made that calculation and agreed to participate in the program, a recipient might exhibit better compliance than if the project were forced on him. A cynic would be concerned about whether states really wanted more or less universal compliance, or whether they are counting on the ability to sanction recipients as a cost saving measure.<sup>174</sup>

## CONCLUSION

Since we began this project we have had numerous opportunities to speak with advocates grappling with impending state "reform" efforts and those living with restrictions imposed upon recipients as a result of the implementation of new state eligibility rules. One of us recently had a conversation with a legal services attorney who talked about a case that was particularly frustrating to her.

A client came into her office to complain about something that had happened that "just did not seem right." As the lawyer said, it used to be that when something didn't seem right, it wasn't. But she long since has stopped trusting her instincts on this. The client is a recovering alcoholic and a recipient of AFDC who would be subject to JOBS requirements, except for her disability. The local department of Social Services recently sent the client to see a physician for medical certification of her

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Research acknowledged the problem of gaining meaningful consent from vulnerable or disadvantaged populations. The Commission proposed three ethical principles central to the protection of human research subjects: respect for persons (a charge to treat individuals as autonomous agents and protect those with diminished autonomy), beneficence (to do no harm, maximize benefits and minimize risks), and justice. NATIONAL COMM'N FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOCHEMICAL & BEHAVIORAL RESEARCH, BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH, *reprinted in* 44 Fed. Reg. 23,192 (1979).

174. The Connecticut reform proposal is instructive in this regard. One of the areas for which the state seeks waivers is called "JOBS enhancements" in the proposal. See CONNECTICUT PROPOSAL, *supra* note 13, at 35. This section reveals that most of the enhancements involve eliminating exemptions for participation in JOBS and increasing the sanctions for noncompliance. *Id.* at 36-39. In a separate document analyzing the projected costs of the proposal, the section which spells out the costs of "JOBS enhancements" is entitled "disqualifications." WELFARE REFORM: DDS APPROPRIATIONS/REVENUE (on file with the *University of Michigan Journal of Law Reform*). The disqualifications entail substantial savings.

disability. The client had been examined by the doctor who presumably returned a report to the department verifying the client's disability.

When the client went to her next recertification appointment, her worker handed her a notice that her needs would be eliminated from her grant in thirty days unless she enrolled in an alcohol rehabilitation program. Apparently, her doctor had completed the employability form indicating that part of the client's disability had to do with alcoholism. The department may require recipients to participate in alcohol treatment as a condition of eligibility.

The rules authorize the department to give a recipient thirty days to seek treatment and, if the recipient fails to comply, the department may sanction the recipient by eliminating her needs, though not those of her children, from her grant. Here, the department had collapsed the notice requiring the client to seek treatment and the notice reducing her benefits into one. She was being terminated from assistance for failing to do something which she had never been requested to do.<sup>175</sup>

This seemed unfair to the client; and the attorney identified the violation of law. The correct procedure would have been to send the client a notice telling her that she had thirty days to seek treatment and to provide the department with satisfactory assurance that she was participating in such treatment. If the thirty days passed and the department did not receive the certification, it then could send her a notice proposing to reduce her benefits.<sup>176</sup>

When the lawyer attempted to communicate the problem to the worker, however, the worker did not seem to understand what the lawyer meant. The lawyer then called the worker's supervisor, again in vain. The supervisor claimed that he had checked out this process with state officials and had been assured by the state that the local procedure was appropriate. And what was the big deal after all, the supervisor wanted to know. If the client indeed sought treatment and provided proof to the department that she was enrolled in a program then her benefits would not be reduced. If there was any dispute about

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175. Furthermore, it appears to be impermissible to sanction an unemployable recipient for failure to accept supportive services under JOBS. See 43 C.F.R. § 250.34 (1993).

176. Federal regulations as well as elementary notions of due process would require that she have at least 10 days' notice prior to the termination of her benefits. See 45 C.F.R. § 205.10(a)(4) (1993).

compliance and her benefits were cut off, she could always request a fair hearing. The problem with that approach, as the lawyer pointed out, was that if the client waited until her benefits were reduced to dispute the department's decision, the client would not be receiving aid during the hearing process. Thus, she would be fighting about whether she had complied with the department's requirements while not having enough money on which to live.

In fact, the lawyer believed that this client was very responsible. She already was checking out alcohol treatment programs. She would, no doubt, do everything she could to comply with the department's conditions.<sup>177</sup> If all went well, she probably would not be sanctioned. "I really don't have time for these due process problems," the lawyer said, "but it really makes me angry that the department doesn't seem to understand what I'm talking about. They think I'm just a crazy lawyer talking about due process."

In Connecticut, some legal services advocates attempted to respond to the state's omnibus waiver proposal before it was submitted to HHS. In order to respond to the proposal, one advocate met with a group of women who receive AFDC and wrote a letter summarizing the group's comments on the proposal. The result suggests that despite the barriers that have been erected to meaningful participation, recipients have valuable insights concerning changes in the benefit programs that affect them.<sup>178</sup>

Recipients repeatedly expressed concerns about how the proposed rule changes in the demonstration project would be implemented. For instance, the group of recipients raised questions about how fairly the proposed sanctions would be administered.<sup>179</sup> With respect to additional benefits offered in the proposal, the women were concerned that they might only be available in theory, but not in practice. In these women's experiences, workers regularly failed to tell them about benefits

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177. Whether a client is in compliance, however, is not as straightforward as it might seem. We have known clients who were participating in outpatient alcohol treatment programs, yet nonetheless were sanctioned because the department required participation in an inpatient program, which the client, fearing the loss of her housing during the period of hospitalization, refused.

178. It is important to acknowledge, however, that in this case the recipient's views were filtered by the legal services attorney who heard them and were included in the attorney's comments on the state's proposal.

179. This concern was based on the fact that the proposal would subject a greater number of recipients to work rules and impose harsher penalties for noncompliance.

that are available, so they were suspicious that anyone would be notified of the availability of these new benefits.<sup>180</sup> The women also commented on the stigma of being on welfare and the misleading and inaccurate ways in which they were portrayed in the proposal and in the welfare debate generally.<sup>181</sup>

In his first State of the Union address, President Clinton reiterated the commitment to welfare reform that he had expressed in his campaign. His administration has yet to present its reform proposal, though it plans to do so soon. Reform is already under way, however, because he has permitted state experimentation to flourish.<sup>182</sup> Trust us, President Clinton seems to be saying, our plan will be ready soon. Trust the states too; they often have great ideas.

Recipients, meanwhile, seem to be saying, trust has never worked very well for us. It is hard for us to keep track of the rules; no one tells us about the helpful ones and the harmful ones often seem to be administered unfairly.<sup>183</sup> To the extent that advocates have been successful in protecting their clients against the arbitrary practices of states and localities, they have relied upon rules, standards, and process. Advocates worry that,

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180. Uncovering theory by looking "to the bottom" is the methodology used by critical race theorists. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Lucie E. White, *No Exit: Rethinking Dependency from a Different Ground*, 81 GEO. L.J. 2001 (1993) (arguing for an effort to incorporate the stories of poor women into the debate on solutions to poverty).

181. It is too soon to tell whether these recipients' concerns had any real impact. In its final version of the proposal, the state revised some of the language it used to characterize recipients. There were no assurances offered, however, concerning how new benefits would be publicized, or how new requirements or sanctions would be administered.

182. *State of the Union: Excerpts from President Clinton's Message on the State of the Union*, N.Y. TIMES, Jan. 26, 1994, at A16 ("People want a better system, and we ought to give it to them. Last year we began this. We gave the states more power to innovate because we know that a lot of great ideas come from outside Washington, and many states are already using it.").

183. Theresa Funciello poses a riddle describing welfare in hauntingly familiar terms as follows:

Besiege the families with red tape. Find and use every opportunity to tell the parents, especially the mothers that they are inferior human beings . . . . Make sure the kids hear. At least once monthly have a politician of some stature make them the target of everyone else's woes. . . . Change the rules several times a year. Keep the rule changes complex and quasi-secret, so they can't "comply". . . . Send in researchers; study the people, make them feel like animals in a zoo. Wonder why they don't like you.

at least when it comes to approving state waivers, no one can see the core values anymore and those granting the waivers do not seem concerned about what recipients or their advocates have to say.

We do not suggest that all experimentation is harmful.<sup>184</sup> It should be recognized, however, that advocates and recipients have perspectives on the system that presidents, policymakers, and states do not. For all the rhetoric of reform and trust, of fair chances and family protection, the conclusion from below, that many of the changes approved by waivers will cause only more harm, is inescapable. Unless procedures and standards for reviewing waiver applications are put in place soon, the President may find that his administration has ended welfare as we know it in a way he never intended and in the process damage the poor families he intended to assist.

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184. In fact, many states have sought waivers which, inter alia, expanded eligibility for AFDC by, for example, liberalizing rules making benefits available to two parent families, increasing earned income disregards and increasing asset limits. See 1992 AFDC § 1115 APPLICATIONS, *supra* note 9.