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Welfare's "Condition X"

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Welfare's "Condition X"

Under the Social Security Act,¹ the Department of Health, Education and Welfare (HEW) provides more than half the funds for state welfare programs. The largest component is Aid to Families with Dependent Children (AFDC);² HEW grants go to low-income families that meet a level of need determined by the states and in which one parent has deserted or is dead, incapacitated, or unemployed.³ The Social Security Act sets certain minimal eligibility criteria, but the state may further narrow the classes of eligible families. So long as the state plan does not contravene any of the enumerated federal conditions, section 602(b) stipulates that HEW "shall" approve it.⁴

Nevertheless, HEW has added a requirement—Condition X—to those established by the statute.⁵ When a state exercises its statutory option to prescribe stricter eligibility criteria than the ones outlined in the federal act, HEW approves the plan "only if the classification effecting such [additional] limitation is a rational one in the light of the purposes of public assistance programs."⁶ On occasion, HEW has invoked Condition X in disapproving state welfare schemes. But, largely because the Social Security Act does not expressly authorize the Department to impose such a minimal-rationality requirement, the agency has relied on X only erratically, without ever clearly articulating either the origins or the import of the doctrine.⁷

1. 42 U.S.C. §§ 301-1394 (1964), *as amended*, (Supp. I, 1965).

2. Title IV of the Act, now 42 U.S.C. §§ 601-09 (1964), *as amended*, (Supp. I, 1965).

3. 42 U.S.C. § 606-07 (1964).

4. Among the conditions are the following: (1) a uniform, state-wide plan; (2) state participation; (3) administration by a single state agency; (4) fair hearing for individuals denied welfare; (5) "proper" administrative methods; (6) state agency reports to HEW; (7) taking into account other income of a child or relative claiming aid in determining family need, with a discount allowed up to \$50 per month of earned income for each child under 18; (8) confidentiality of records; (9) opportunity to all individuals to apply for welfare; (10) notification to law enforcement officials of parental desertion; and (11) developing services for both children and parents to promote family welfare. 42 U.S.C. § 602(a), *as amended*, (Supp. I, 1965).

In addition, a state may not impose a residence requirement of more than one year. 42 U.S.C. § 602(b) (1964).

5. "Condition X" is the name HEW has given the doctrine. For the derivation of the term, *see* F. White, Memorandum, *Equitable Treatment Under the Public Assistance Titles*, Nov. 5, 1963, at 5 [hereinafter cited as *White Memo*]. The Memorandum was drawn up by a research assistant for HEW and does not represent Department policy.

6. A. Willcox, Memorandum Concerning Authority of the Secretary, Under Title IV of the Social Security Act, to Disapprove Michigan House Bill 145 on the Ground of its Limitations on Eligibility, March 25, 1963, at 1 [hereinafter cited as *Willcox Memo*].

7. In the 1930's HEW invalidated a Georgia quota system which contained racial limitations. W. BELL, *AID TO DEPENDENT CHILDREN* 35 (1965). In another early use, X terminated federal aid to an Arizona welfare program which denied aid to Indians. Willcox

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I. The Bases for Condition X

HEW's authority to apply Condition X flows from two sources. First, the Social Security Act itself should be read impliedly to require the Department to ensure that AFDC funds go only to state plans rationally related to the purposes of the federal statute. Second, HEW must apply Condition X in order to prevent violations of constitutional guarantees at either the federal or state level in the administration of welfare programs.

The Statutory Basis. So far, HEW has rationalized its use of Condition X by invoking the requirement in section 602(a)(5) that state plans must "provide such methods of administration . . . as are found by the Secretary to be necessary for . . . *proper* and efficient operation" From the word "proper," the agency claims the power to pass on the merits of state welfare eligibility criteria.⁸ The argument is unpersuasive; the section clearly refers to procedural matters—the "methods of administration"—and not to substantive standards for eligibility.⁹ Alternatively, another justification has drawn on the section 602(a)(4) right to a hearing for those denied welfare; the guaranty "could have little meaning," the argument runs, "if the treatment accorded to the

Memo 1; see pp. 1227-28 infra. In the 1950's, HEW announced that state AFDC plans denying aid to families with illegitimate children would violate X. W. BELL, *supra*, 67-75. In 1960 Louisiana announced that it was cutting off some 22,000 children, mostly Negro, from its AFDC rolls because the children were living in "unsuitable homes." HEW held a hearing, but did not strike down the Louisiana plan. Instead, Secretary Flemming issued a ruling that in the future no state could deny AFDC to a family because the child was in an unsuitable home so long as the child continued to live in the home. Instead, steps "should be taken to correct the situation, or, in the alternative, to arrange for other appropriate care of the child"; meanwhile, AFDC should continue. Flemming Ruling, State Letter No. 452; HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION pt. IV, § 3435.4 [hereinafter cited as FEDERAL HANDBOOK]. In 1963 Michigan adopted an AFDC program for families with an unemployed parent. Since unemployment was defined in terms of eligibility for unemployment compensation under Michigan laws, the statute failed to cover certain occupations. HEW ruled that the definition of unemployment violated X. *See Willcox Memo.*

In refusing federal aid to these programs, HEW never offered either a clear explanation of Condition X or a comprehensive and consistent explanation of HEW's authority to promulgate it. (Indeed, at times it was not entirely clear that HEW was applying X; it must have been, though, because the state plans violated no statutory criteria.) One commentator suggests that HEW has acted politically in using X. Thus, HEW did not invalidate Louisiana's "unsuitable home" plan outright, but instead issued a prospective ruling because President Eisenhower did not want to hurt Republican chances in the 1960 election; the Michigan plan was struck down because President Kennedy did not mind giving Governor Romney a hard time. STEINER, SOCIAL INSECURITY 100, 101-07 (1965).

We are indebted to the Center on Social Welfare Policy and Law, Columbia University School of Social Work, for providing much of the material and background information on Condition X and its use in AFDC and other welfare programs.

8. In a recent transmittal to the states, HEW seemingly justified the Condition under the "proper" clause of 42 U.S.C. § 602(a)(5) (1964). Transmittal No. 77, FEDERAL HANDBOOK pt. IV, § 2220 (March 18, 1966) [hereinafter cited as Transmittal No. 77]. The justification was given in an interdepartmental memorandum on X. *White Memo 5-6.*

9. 42 U.S.C. § 602(a)(5) (1964), *as amended*, (Supp. I, 1965).

individual who appeals were measured against arbitrary standards."¹⁰ This suggestion is equally unappealing; the hearing requirement, fairly construed, simply assures individual applicants the right to demonstrate their eligibility under criteria already established by the state.

A stronger statutory argument for Condition X is that HEW has an implied administrative power to ensure the use of federal funds in a manner rationally related to the goals of the federal program. Section 601 specifies the purpose of the Act as

encouraging the care of dependent children in their own homes or in the homes of relatives . . . [first] to help maintain and strengthen family life and [second] to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.¹¹

Although section 602(b) states that the HEW Secretary "shall approve" state plans which violate none of the conditions enumerated in section 602(a), this seemingly mandatory language should be harmonized with the purposes announced in section 601, which authorizes the yearly appropriation of funds to finance state plans "approved by the Secretary." Congress could hardly have intended in section 602 to compel HEW to channel these funds to state programs at loggerheads with the federal policy announced in section 601. The Secretary should have the inherent authority to reject a state plan which bears no rational relation to any purpose of the federal act.

Congress has approved such a reading of the statutory language to reconcile the apparent conflict between the adjoining sections. Even if re-enactments of sections 601 and 602¹² provide only the slight prop of "legislative acquiescence," Congress has on other occasions effectively ratified HEW orders promulgated under Condition X.¹³ For example, when Louisiana severed some 20,000 youngsters (mostly Negro) from the welfare rolls in 1961 by denying benefits to children in "unsuitable homes," HEW responded with the "Flemming ruling," which an-

10. White *Memo* 6.

11. 42 U.S.C. § 601 (1964).

12. In 1962 Congress re-enacted the welfare programs, including AFDC (formerly ADC). 76 Stat. 185 (1962).

13. See White *Memo* 8-11.

It would be difficult to find a clearer case of Congressional acquiescence in an administrative interpretation. With full knowledge, Congress twice gave thorough consideration to states' fiscal problems resulting from the interpretation [of HEW's precursor in applying X to state plans which excluded Indians].

Id. 11.

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nounced a prospective disapproval of all such denials.¹⁴ Congress modified the ruling to give the states added time to comply, but never questioned HEW's authority to act.¹⁵ The floor manager of the bill in the Senate stated that the legislation did nothing more than override "the effective date" of the agency ruling.¹⁶

An implied statutory authorization for HEW to examine state welfare plans for minimal rationality and furtherance of federal policy also flows from the consideration that such programs are otherwise unlikely to undergo any scrutiny at all. The agency cannot depend on individual litigation to serve the reviewing function. The applicant whom the state declares ineligible will be reluctant and ill-equipped to attack the substantive provisions of the program; despite legal aid, the very poor still find private actions too difficult and time-consuming to pursue, especially where the state is the adversary. A lawsuit if begun becomes moot when the complainant moves or gets a job, or when the state, fearing an adverse outcome, suddenly reverses itself and admits the plaintiff to the welfare rolls. The court may decide for the plaintiff, but on a technical basis, pertinent only to the claim under dispute rather than to the substantive issues. Years may pass before a court ever passes on the validity of the state program.¹⁷

On the other hand, when HEW invokes Condition X to disapprove

14. See note 7 *supra*.

15. Now 42 U.S.C. § 604(b) (1964).

16. 107 CONG. REC. 6388 (1961) (remarks of Senator Byrd). For history of this provision, see SENATE FINANCE COMM., ADC BENEFITS TO CHILDREN OF UNEMPLOYED PARENTS, S. REP. NO. 165, 87th Cong., 1st Sess., 6 (1961).

In the 1960 amendments to the Old Age Assistance Program of the Social Security Act, Congress added an explicit statutory provision resembling X. State plans must include reasonable standards, consistent with the objectives of this subchapter, for determining eligibility for and the extent of such assistance. . . .

42 U.S.C. § 302(a)(10)(B) (1964).

It might seem that Congress enacted Condition X into the law for that program alone, and so has not for any other. But it is not at all clear that Congress had anything like X in mind. The only legislative discussion referred to financial standards. HOUSE COMM. ON WAYS AND MEANS, SOCIAL SECURITY AMENDMENTS OF 1960, H. R. REP. NO. 1799, 86th Cong., 2d Sess., 132 (1960). In any case, the failure to amend the program (then ADC) at the same time to include such a provision clearly is not attributable to any conscious intent to deny HEW the authority to use X in the AFDC program; Congress was immersed in debate over a medicare-type proposal and was not considering AFDC at all. See also SENATE FINANCE COMM., SOCIAL SECURITY AMENDMENTS OF 1960, S. REP. NO. 1856, 86th Cong., 2d Sess. (1960).

In 1962 Congress added an identical provision in a new Title XVI of the Act, now 42 U.S.C. §§ 1381-85. Title XVI simply incorporated all the conditions from the enumerated programs; thus the "reasonable standard" provision was simply copied from the Old Age Assistance Program. There was no contemplation of, or discussion of, AFDC, and no consideration of Condition X. See SENATE FINANCE COMM., PUBLIC WELFARE AMENDMENTS OF 1962, S. REP. NO. 1589, 87th Cong., 2d Sess., at 34 (1962).

17. The problems of judicial review for the individual welfare recipient are fully discussed in Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967).

a state classification, the state can secure quick and effective review of the disputed criterion's validity. Section 1316 of the Act provides for an agency hearing when HEW rejects a proposed state plan or an amendment to an existing plan, from which the state can appeal to a federal Court of Appeals.¹⁸ HEW can, moreover, avoid unnecessary disruption of existing programs by delaying the effective date of its order in appropriate circumstances until the hearing and appeal have been completed.

Another reason to interpret the Act to authorize Condition X is the usefulness of the doctrine as a tool of administrative expertise. The Social Security Act is unusually complex, and HEW has inherited the primary responsibility for interpreting and applying the statute. HEW's determination—with a full hearing and findings of fact—whether a state's conditions are consistent with the purposes of the federal act provides a record for judicial review which often will present a fuller development of the issues than private litigation.

The Constitutional Basis. HEW may justify on two bases the use of Condition X to determine whether a state program, either on its face or as applied, violates the Constitution. First, the Department should examine the state programs it funds for possible unconstitutionality if it is itself to act within constitutional limits. Without Condition X, HEW might finance a state program meeting all the enumerated requirements in section 602(a), but still, say, discriminating against Negroes. Such federal financing of unconstitutional state action would violate the Fifth Amendment under *Simkins v. Moses H. Cone Memorial Hospital*.¹⁹ There the Fourth Circuit invalidated a federal statute authorizing funds for state use in building hospitals because the law permitted the construction of "separate but equal" facilities. The court held both that state maintenance of the segregated hospital violated the Fourteenth Amendment equal protection clause and that federal

18. 42 U.S.C. § 1316 (Supp. I, 1965).

19. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). *Cf.* *Burton v. Wilmington Park Authority*, 365 U.S. 715, 725 (1961):

As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

For discussion, see Reich, *Midnight Welfare Searches and the Social Security Act*, 72 *YALE L.J.* 1347, 1359 (1963).

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provisions authorizing such maintenance independently violated the Fifth Amendment due process clause.

Second, HEW may examine state plans simply to enforce the Fourteenth Amendment limitations on state action. No authority either recognizes or denies the inherent power of a federal agency to pass on the constitutionality of state programs to which the agency distributes federal funds.²⁰ In such circumstances, the controlling consideration should be the wisdom and appropriateness of such agency review. Since the alternative of relying on piecemeal private litigation promises at best piecemeal judicial review, and since HEW must for independent reasons make a systematic inspection of state welfare schemes,²¹ the Department should apply Condition X at the constitutional level to ensure federal scrutiny of such programs.

For both statutory and constitutional reasons, therefore, HEW has the power to invoke Condition X in supervising state AFDC plans. The 1954 decision in *Arizona v. Ewing*²² shows the doctrine in operation at both levels. There HEW's predecessor, the Federal Security Agency, refused to fund an Arizona welfare program excluding reservation Indians from coverage. Although the court rejected the FSA theory that the state program was racially discriminatory, it found that the exclusion (premised on federal ability to support the Indians) was arbitrary, and denied Arizona's claim that FSA had no power to disapprove the plan merely for its arbitrariness: "[T]he Administrator

20. Administrative agencies "commonly" hold that they have no power to hold statutes unconstitutional, 3 K. DAVIS, ADMINISTRATIVE LAW § 20.04 (1958). But Professor Davis notes that

[a] fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation. . . . We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation.

Id. 74.

In other words, though an agency cannot determine that the legislation under which it acts is constitutional (in HEW's case, the Social Security Act), it can determine the constitutionality of particular situations under its control. The latter power seems settled under *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (NLRB may determine whether respondent company can constitutionally be held to be within "interstate commerce").

The NLRB may have performed a function not significantly different from HEW's application of X when it extended the duty of fair representation first enunciated by the Supreme Court in *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). Professor Sovern argues that in the *Hughes Tool* case, *Metal Workers Local 1*, 147 N.L.R.B. 1573 (1964), the Board went beyond the *Steele* duty of fair representation for non-members and seemed to rely directly on the Constitution in finding a union duty (fairly) to process members' grievance complaints. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT at ch. 6, n.34 (footnotes at 38) (1966). See *id.*, ch. 6.

21. See pp. 1225-26 *supra*.

22. Civil No. 2008-52 (D.D.C. 1954) (unreported). The case was affirmed, but on a jurisdictional ground not reaching the merits, *Arizona v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954).

could not, constitutionally, or under the terms of the statute, itself, probably for that matter, approve a plan predicated . . . upon the present statute. . . ."

II. Possible Applications of Condition X

HEW should apply Condition X in its dual role to clarify the outlines of federal welfare policy and to help sharpen the contours of relevant constitutional provisions. Under the equal protection clause of the Fourteenth Amendment, a state may not limit welfare payments in an invidious manner once it elects to maintain the program, even though it could validly abandon the system entirely.²³ Classifications that fail to promote the purposes of the act they supposedly serve violate the clause, at least where they also bear no discernible relation to any other valid state policy. Even where state action furthers a welfare purpose, HEW may still invoke X at the constitutional level if the state conduct violates some other constitutional provision. And even if state action passes all constitutional tests, HEW may still apply Condition X statutorily to suspend federal payments if the state plan conflicts with the purposes of the federal act.²⁴

Midnight Raids. One practice of dubious validity under Condition X is the "midnight welfare raid." Some county welfare boards employ "sneak attacks," occasionally late at night, to ferret out violations of welfare eligibility provisions. A common objective is to catch a supposedly husbandless mother living with a man.²⁵ These degrading intrusions frustrate the explicit AFDC statutory purpose of enabling the parent "to attain or retain capability for . . . maximum self-support and personal independence"²⁶

Furthermore, as Professor Reich has argued,²⁷ welfare raids violate the Fourth Amendment. Public assistance recipients cannot be said to

23. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 405 (1963):

[I]n *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) the Court recognized with respect to Federal Social Security benefits that "[t]he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary government action afforded by the Due Process Clause."

24. Instead of the current sporadic enforcement of X, HEW should apply X in a more vigorous and uniform fashion. HEW should hold a hearing whenever a state plan "colorably" violates X. The state plans and conditions discussed in the text immediately following this footnote are among those thought to be colorable violations of the Condition. HEW should set up an office to examine claims by individual welfare recipients that the state condition under which they have been excluded violates X.

25. See *Parrish v. Alameda Civil Serv. Comm'n*, 57 Cal. Rptr. 623, 425 P.2d 223 (1967).

26. 42 U.S.C. § 601 (1964).

27. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

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consent to such invasions of their homes except on the grossest of fictions. Welfare searches may not seek evidence for criminal prosecutions, but they surely resemble a proceeding for forfeiture of benefits.

HEW has announced that states may not adopt enforcement procedures that invade the privacy or violate the constitutional rights of recipients.²⁸ "By way of illustration," the agency has warned against such tactics as "entering a home by force, or without permission, or under false pretenses, making home visits outside of working hours, and particularly making such visits during sleeping hours. . . ."²⁹ But the ruling and illustrations do not cover searches where the welfare investigator "requests" admittance. The limit is unsound. As the California Supreme Court held last March, such requests are inherently coercive.³⁰ HEW can and should proscribe all state welfare raids rather than merely frown upon them "by way of illustration."

Conditioning Welfare on Return to Another State. In 1962 a New York welfare official denied AFDC assistance to an otherwise eligible mother on the ground that, although she met the residence requirement, her own "best interest" required that she return to her native state.³¹ As an inducement, the New York agency offered to pay transportation costs. HEW should subject such repatriation schemes to Condition X scrutiny. At the statutory level HEW should first determine whether the state in fact has the best interests of the welfare recipient at heart or merely seeks to cleanse its welfare rolls by farming out "undesirables" to other states. The latter objective, if truly the motivating force underlying such rules, bears no relation to any purpose of the federal statute. Second, even where HEW finds a state promoting repatriation plans in good faith, the Department should still determine whether such a state policy conflicts with the federal objective of fostering independence in aid recipients. It seems within the scope of HEW's expertise in administering the federal act to decide that telling people where they ought to live does not imbue them with a sense of responsibility for managing their own affairs.

The repatriation plans may also call for the application of Condition X in its constitutional form. The right of an American to live in whatever state he chooses is a privilege of national citizenship established

28. Transmittal No. 77.

29. *Id.*

30. *Parrish v. Alameda Civil Serv. Comm'n*, 57 Cal. Rptr. 623, 628-30, 425 P.2d 223, 229 (1967).

31. *In re Appeal of Minnie Lee Nixon*, N.Y. Dept. of Social Welfare (Dec. 1, 1964). Upon a rehearing by the Department, Mrs. Nixon received her grant; the Department did not reach the substantive constitutional issues.

by *The Slaughter-House Cases*.³² A state inducement to forego the privilege may constitute a deprivation within the Fourteenth Amendment prohibition or an unconstitutional condition in derogation of the right.

Minor Unmarried Mother Rule. Louisiana requires an unwed mother under twenty-one to live with her own mother in order to receive AFDC payments, unless her mother's community would experience "moral outrage" at her presence.³³ In addition, the state gives aid to the girl only where both the father of her child has deserted her and her own father has deserted her mother.³⁴ What relation these restrictions can have to the purposes of the federal program is a riddle. The rules seek to deter illegitimacy, but the most charitable conclusion possible is that they have hit upon an awkward way of going about it. They cannot be justified as promoting the "best interests" of the baby, since once the child's parents and grandparents fail to satisfy a complex web of living-arrangement requirements, he himself loses all state aid.

The rules are also suspect constitutionally. One commentator has suggested that they may seek to eliminate Negro mothers from the welfare rolls:³⁵ presumably the white community is shocked by the presence of a young unwed mother with bastard child, while the Negro community is not.

Substitute Father Rule. Several states deny or reduce welfare where a man neither married to the mother nor father to her children lives in her home or cohabits with her there.³⁶ HEW should examine such rules at the statutory level for two reasons. First, if the regulations seek only to punish the mother for her sex life, they conflict with the federal purpose in denying aid to needy children solely because of their mother's amoral behavior. Second, in the states where the rules rest on an irrebuttable presumption that a man sleeping with a woman must be supporting her children, they may violate HEW's policy that each applicant's case must be individually evaluated.³⁷

32. 83 U.S. (16 Wall.) 36, 80 (1872).

33. LOUISIANA DEPARTMENT OF WELFARE MANUAL § 2-749C(2)(b) (reissued Jan. 1, 1966).

34. *Id.* However, if the girl's own parents are living together, the girl's child may be eligible for AFDC if the girl's parents are themselves eligible for AFDC. *Id.* § 2-749C(1)(a).

35. Interview with Edward V. Sparer, Director, Center on Social Welfare Policy and Law, Columbia University School of Social Work, in New Haven, Conn., April 1967.

36. See, e.g., ALABAMA MANUAL OF PUBLIC ASSISTANCE ADMINISTRATION pt. I, ch. II, subd. V(A); ARIZONA MANUAL OF PUBLIC ASSISTANCE § 3-403, 6(D); CALIFORNIA DEPARTMENT OF SOCIAL WELFARE MANUAL § C-155; GEORGIA MANUAL OF PUBLIC ASSISTANCE § V(3)(5); LOUISIANA MANUAL OF PUBLIC WELFARE § 2-742.2; MISSISSIPPI MANUAL OF PUBLIC WELFARE Vol. III, § D, ¶ 4512.

37. HEW has issued a ruling declaring that:

[r]educed assistance payments based on assumed receipt of support payments or any

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At the constitutional level, HEW should scrutinize the substitute father rules to determine whether the underlying presumptions are so unreasonable as to violate due process under *Mobile, J. & K.C.R.R. v. Turnipseed*.³⁸ There the Supreme Court upheld a prima facie presumption of negligence from the fact of a railroad accident, but warned that a legislative inference of the dispositive fact from mere evidence of another fact would violate due process if no "rational connection [existed] between the fact proved and the ultimate fact presumed," and if the presumption "operate[d] to preclude the party from the right to present his defense to the main fact thus presumed."³⁹ In *Heiner v. Donnan*,⁴⁰ the Court invalidated a statutory presumption that a transfer of property made within two years before the death of the donor is deemed to have been made in contemplation of death. The Court found the presumption arbitrary and irrational, and also noted that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment."⁴¹

The substitute father rule thus violates due process for two reasons. First, it creates an arbitrary presumption; there is no a priori reason to assume that a man acting as surrogate husband must also be acting as surrogate father to children he has no legal duty to support. Here the courts are likely to rely on HEW's determination of the extent to which actual practice diverges from the premise underlying the presumption. Second, even if experience shows that the presumption is not arbitrary, it still falls because the applicant may not disprove the dispositive fact presumed in her case; although the mother might establish non-support of her children, she still loses her AFDC payments because she is permitted to rebut only the fact of illegal relationship and nothing more.

Employable Mother Rule. In some states, an unemployed mother must take work whenever her welfare board determines that a "suit-

other income that is not, in fact, available are inconsistent with the welfare agency's responsibility for meeting need and strengthening family life. They result in inequity in meeting the continuing needs of the families affected.

Transmittal No. 86, FEDERAL HANDBOOK pt. IV, § 3124 (July 6, 1966). HEW declared that as of July, 1967, such provisions will not be allowed. *Id.* While the language seemingly covers reduced payments on the presumption of support from a substitute father, it is not clear that the ruling was intended to cover this area. The transmittal lists a number of examples to which the ruling applies, but it does not discuss the substitute father rule. HEW should make clear that its order covers such rules, or it should independently apply X to the rules.

38. 219 U.S. 35 (1910).

39. *Id.* at 43.

40. 285 U.S. 312 (1932).

41. *Id.* at 329.

able" job is "available" to her. If she refuses the position, the state terminates her welfare. In Georgia, if she accepts the job, the state also terminates her welfare, even if she earns less than the AFDC minimal-income grant level.⁴² Such rules have a particularly severe impact in the South, where they force mothers to endure seasonal labor as field hands or domestics at wages far below the AFDC level.⁴³

The statutory relevance of Condition X is apparent. Encouraging employment does not conflict with federal statutory policy. But forcing the mother to leave her children either untended or in the care of some third party while she works outside the home hardly promotes the express section 601 purposes of "maintaining and strengthening family life" and assuring "continuing parental care and protection . . ." In addition, some states with the employable mother rule act irrationally since they allow the mother to receive income from other sources—such as social security, alimony, boarding-house lodgers, and part-time work—without either terminating or reducing AFDC benefits.⁴⁴

The constitutional relevance of Condition X is equally clear. If southern states use the rules to generate a cheap Negro labor supply, they violate the equal protection clause. The Georgia rule also denies due process by ending all AFDC assistance to a mother earning less than the welfare grant level for no legitimate state purpose.⁴⁵

Maximum Family Grants. Every state calculates payments to each family according to the number of dependent children. But several states limit the lump-sum payment that any one family may receive; their rules establish an absolute ceiling, without regard to how needy the family is or how many "surplus" children it has.⁴⁶ Again, HEW should look to possible conflicts with federal policy. Economies of scale are not unlimited; a child may be as needy in a large family as in a small one. To the extent that the rules impel large families to farm

42. Georgia's employable mother rule is now under challenge in *Anderson v. Schaefer*, Civil No. 10443 (N.D. Ga. 1967).

43. See, e.g., LOUISIANA DEPARTMENT OF PUBLIC WELFARE MANUAL § 2-337: D. Employment is available to a person within the meaning of [the rule] if:

2. the labor supply in the community does not meet the demand for the type of work that the person can do. This is true of domestic servants in most communities on a year-round basis and of other jobs on certain areas during certain seasons of the year. In such cases no specific offer of employment need be shown.

44. See Brief for Plaintiffs on their Motion for a Temporary Restraining Order and Preliminary Injunctions at 3, 17, *Anderson v. Schaefer*, Civil No. 10443 (N.D. Ga. 1967).

45. HEW has issued an "advice" to the states, recommending that employable mother rules be abandoned. FEDERAL HANDBOOK pt. IV, § 3401.1.

46. The maximum grant provision in Iowa was struck down by the Iowa Supreme Court as violating the equal protection clause of the Iowa State Constitution. *Collins v. State Board of Social Welfare*, 248 Ia. 369, 81 N.W.2d 4 (1957).

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out children to other relatives, they frustrate the section 601 purpose of maintaining "continuing parental care and protection."⁴⁷

The constitutional objections to the family maximum rule also warrant HEW's examination. If one result of the rule—and perhaps the reason for it—is to discourage welfare families from having too many children, it effectively inhibits exercise of the right to raise a family of chosen size when a couple is dependent on the state for financial support. Such a rule strikes at the family relationship on a ground that courts have increasingly regarded as invidiously discriminatory under the equal protection clause. A differentiation based solely on poverty and a chilling effect on family life together raise a Fourteenth Amendment question⁴⁸ warranting careful Condition X inspection.

47. Children may live with certain specified relatives other than their parents and still be eligible for AFDC. 42 U.S.C. § 606 (1964), *as amended*, (Supp. I, 1965).

48. Poverty is a constitutionally suspect classification in the area of obtaining criminal justice. *See, e.g.*, *Douglas v. California*, 372 U.S. 353 (1963). It is invalid in other areas, such as the right to vote. *See, e.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). It may be suspect in other important areas, such as the right to raise a family; *cf.* *Griswold v. Connecticut*, 381 U.S. 479 (1965).