LAW AND SOCIAL WORK PRACTICE

2nd Edition

Raymond Albert

Springer Series on Social Work

Albert R. Roberts, Ph.D., Series Editor
Graduate School of Social Work, Rutgers,
The State University of New Jersey

1984 **Clinical Social Work in Health Settings: A Guide to Professional Practice with Exemplars,** *Thomas Owen Carlton, D.S.W.*

1987 **Information and Referral Networks: Doorways to Human Services,** *Risha W. Levinson, D.S.W.*

1988 **Social Work in the Workplace: Practice and Principles,** *Gary M. Gould, Ph.D., and Michael Lane Smith, Ph.D.*

1990 **Social Work Practice in Maternal and Child Health,** *Terri Combs-Orme, Ph.D.*

1990 **Program Evaluation in the Human Services,** *Michael J. Smith, D.S.W.*

1990 **Evaluating Your Practice: A Guide to Self-Assessment,** *Catherine Alter, Ph.D., and Wayne Evens, M.S.W.*

1990 **Violence Hits Home: Comprehensive Treatment Approaches to Domestic Violence,** *Sandra M. Stith, Ph.D., Mary Beth Williams, Ph.D., and Karen Rosen, M.S.*

1991 **Breast Cancer in the Life Course: Women's Experiences,** *Julianne S. Oktay, Ph.D., and Carolyn Ambler Walter, Ph.D.*

1991 **Victimization and Survivor Services: A Guide to Victim Assistance,** *Arlene Bowers Andrews, Ph.D.*

1992 **The Family Functioning Scale: A Guide to Research and Practice,** *Ludwig L. Geismar, Ph.D., and Michael Camasso, Ph.D.*

1994 **Dilemmas in Human Services Management: Illustrative Case Studies,** *Raymond Sanchez Mayers, Ph.D., Federico Souflee, Jr., Ph.D., and Dick J. Schoech, Ph.D.*

1994 **Managing Work and Family Life,** *Viola M. Lechner, D.S.W., and Michael A. Creedon, D.S.W.*

1996 **Total Quality Management in Human Service Organizations,** *John J. Gunther, D.S.W., and Frank Hawkins, D.S.W.*

1997 **Multicultural Perspectives in Working with Families,** *Elaine P. Congress, D.S.W.*

1997 **Research Methods for Clinical Social Workers: Empirical Practice,** *John S. Wodarski, Ph.D.*

1997 **Elder Abuse and Neglect: Causes, Diagnosis, and Intervention Strategies, 2nd Edition,** *Mary Joy Quinn, R.N., M.A., and Susan Tomita, M.S.W., Ph.D.*

1998 **The Privatization of Human Services**
Volume 1: Policy and Practice Issues
Volume 2: Cases in the Purchase of Services
Margaret Gibelman, D.S.W., and Harold W. Demone, Jr., Ph.D.

1998 **The Changing Face of Health Care Social Work: Professional Practice in the Era of Managed Care,** *Sophia F. Dziegielewski, Ph.D., L.C.S.W.*

1999 **Making TQM Work: Quality Tools for Human Services Organizations,** *John Gunther, D.S.W., and Frank Hawkins, D.S.W.*

1999 **Homeless Families with Children: A Subjective Experience of Homelessness,** *Namkee G. Choi, M.S.W., Ph.D., and Lidia J. Snyder, M.S.W.*

2000 **Evidence-Based Social Work Practice with Families: A Lifespan Approach,** *Jacqueline Corcoran, Ph.D.*

2000 **Law and Social Work Practice: A Legal Systems Approach, 2nd Edition,** *Raymond Albert, M.S.W., J.D.*

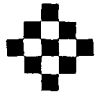
Professor Raymond Albert, JD, MSW, is Director of the Law and Social Policy Program at Bryn Mawr College Graduate School of Social Work and Social Research, where he has been working with students and colleagues to make sense of socio-legal issues since 1980. In addition to this second edition, Professor Albert has written chapters dealing with legal aspects of social services, such as "Legal Aspects of High Tech Home Care" in *Current Practices in High-Tech Home Care,* and "Legal Issues in Custodial Grandparenting" in *Grandparents Raising Children: Theoretical, Empirical, and Clinical Perspectives.* He is also the co-editor of the Special Issue on "Confidentiality" for the *Journal of Law and Social Work* and authored a chapter therein, "Deconstructing *Jaffe v. Redmond.*" Professor Albert's research interests, in addition to those built around the nexus between law and social work, include the "legalization" of issues effecting the elderly, and poverty dynamics and working class black males.

This page intentionally left blank

LAW AND SOCIAL WORK PRACTICE

2ND EDITION

RAYMOND ALBERT, MSW, JD



SPRINGER SERIES ON SOCIAL WORK

Springer Publishing Company, Inc.
536 Broadway
New York, NY 10012-3955

Acquisitions Editor: Bill Tucker
Production Editor: Jeanne W. Libby
Cover design by James Scotto-Lavino

00 01 02 03 04 / 5 4 3 2 1

Library of Congress Cataloging-in-Publication-Data

Albert, Raymond.
Law and social work practice : a legal systems approach / Raymond Albert. — 2nd ed.
p. cm. — (Springer series on social work)
Includes bibliographical references and index.
ISBN 0-8261-4891-3 (Hardcover)
1. Law—United States. 2. Public welfare—Law and legislation—United States. 3. Social workers—Legal status, laws, etc.—United States. 4. Social workers—United States—Handbooks, manuals, etc. I. Title. II. Series.
KF390.S6 A4 2000
344.73'03—dc21 99-053870
CIP

Printed in the United States of America

To Susan Gadiel and
Richard Goldstein

This page intentionally left blank

Contents

Contributors

Angelo Adson
Child Guidance Resource Centers
Director of Pulaski Project
Philadelphia, PA

Cynthia Bangs
Program Supervisor
Providence House
Trenton, NJ

Margo Campbell
Consultant
Wayne, PA

Anna Forbes
Alliance for Microbicide Development
Silver Springs, MD

Lani Golay
Consultant
Wynnewood, PA

Robert Long
Center for Mental Health Policy and Services Research
University of Pennsylvania
Philadelphia, PA

Robert Madden
St. Joseph College
West Hartford, CT

Catherine Ormerod
Director of Educational Programs
Living Beyond Breast Cancer
Ardmore, PA

Ilene Warner
Alden Geriatric Consultants, Inc.
Media, PA

Mary J. Wyszomirski
Arts and Policy Administration Program
Ohio State University
Columbus, OH

This page intentionally left blank

Foreword

This collaborative volume integrates the knowledge base and practice skills of both the social work and legal professions. It will serve as a framework to future social workers to improve opportunities for full entitlements, comprehensive welfare benefits, affordable and subsidized housing, accessible legal advocacy, and social justice.

Welfare reform legislation impacts on meeting basic human needs by providing food, clothing, and shelter to millions of American citizens and newly arrived refugees. All too often, generalizations on social welfare policy are false because social welfare policy is complex, varied from state to state, delayed in implementation due to bureaucratic obstacles, and differentially applied to long-term state residents versus relatively recent arrivals.

Professor Raymond Albert is to be applauded for an extremely well-written and exceptionally thorough revision of his classic, *Law and Social Work* (1986). This timely and inclusive volume reflects excellence throughout. It is the best text on social work and the law that I have read. All of the following important topics are given up-to-date and comprehensive coverage in the 21 chapters: The legislative process; the stages of legislative advocacy; Case law developments and legal reasoning; the five judicial decisions that collectively are the pillars of welfare reform; civil procedures; Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996; the implementation of legislation at the end of the 1990s; the administrative process and regulatory agencies; legal research techniques and resources; court expert testimony and concepts of evidence; privileged communications between social workers and clients, and the implications of the landmark *Jaffe v. Redmond* decision; sociolegal practices; the Violence Against Women Act of 1994 and the implications of this remedy for battered women and sexual assault victims;

legal liability for negligent and abusive treatment of the elderly in nursing homes; lobbying at charitable organizations; and the impact of lobbying reform on nonprofit agencies.

Professor Albert is the leading expert in the United States on social work and the law, social policy, and community practice. He has approximately 20 years experience teaching in this area to graduate students in social work. For the past 12 years, he has directed and developed new courses in the graduate program in Social Policy and the Law at Bryn Mawr College. Even though I have taught courses on social welfare policy, mental health policy, and social policy and social services many times during the past 20 years, I learned a significant amount from reading this volume. Since it is double the size of the first edition, and thoroughly up-to-date, it is like a brand new first edition. Graduate students have been subjected to a bewildering number of policy books attempting to explain the history and development of specific policies as well as controversial issues. Most of these books are lacking clear explanations of the strengths and weaknesses of different social welfare policies, as well as the implications of Case law and significant judicial decisions. This landmark volume documents the benefits and harm done by welfare reform legislation, and ways to overcome the barriers to public legal services, necessary welfare benefits, and affordable subsidized housing.

There is an emerging trend within graduate social policy courses to integrate social welfare issues with a legalistic perspective and legislation. Professor Albert has selected the most important policies and legislation for the next decade, and he aptly analyzes them from a legal framework. His brilliant and illuminating discussion focuses on the impact welfare reform legislation has on family well-being, homelessness, income below the poverty line, child welfare, and caseload size. This volume is reflective of the new trend in teaching policy from a legalistic approach. By understanding more about the judicial and legislative process, students will be better prepared to understand how to affect legislative change. Conservatives make the claim of success because caseload size is down in certain jurisdictions. Progressives acknowledge that caseloads may be down. However, nobody has complete data on what appears to be escalating: the number of children growing up in poverty; foster care; family homelessness; domestic violence; and the poor getting poorer.

It is extremely important for our graduate students to learn more about the integration of the law, judicial decisions, and legislation, and social welfare policy. This book will be instrumental in preparing future social workers to increase social justice and affect legislative changes in the 21st century. I highly recommend that all social work professors adopt this book for the Integrative Seminar and the Social Work and the Law course, as well as the second required book for Social Welfare Policy. It is also a valuable resource for all social workers, social work educators, policy analysts, legislative aides, legislative researchers, attorneys, magistrates, and political scientists.

ALBERT R. ROBERTS, PH.D.
Professor of Social Work and Criminal Justice
Livingston College Campus
Rutgers University
Piscataway, NJ

Social Work Series Editor
Springer Publishing Company

This page intentionally left blank

Preface

FOCUS AND OBJECTIVES OF THE TEXT

Law and Social Work Practice: A Legal Systems Approach is grounded in an examination of legal processes—courts, legislatures, and administrative agencies—and their interdependence. The orientation is unique among texts that address the overlap of social work and law.

What do I mean by a "legal systems approach?" Put simply, an inquiry based on the processes by which courts, legislatures, and administrative agencies resolve problems. The plan is based on my conviction (and experience teaching law to social workers) that an in-depth appreciation of these processes is the most effective strategy to comprehend fully the legal context of social services.

The components of the legal system comprise the structure of law. Once the reader learns that judicial decisions, legislative rules, and regulations are interrelated—that a court gives meaning to statutes or to regulations when it must interpret them and that this interpretative act effectively modifies the legislation or regulation in a way that has implications for how the legislature or regulatory agency might create future law—then the reader is able to understand this interaction in relation to the legal context of any area of practice.

ORGANIZATION OF THE TEXT

The text's 21 chapters are grouped into three parts.

Part I is the core of the text, and its nine chapters introduce the reader to the legal systems approach. In the course of learning about legal processes, the reader also acquires proficiency in legal analysis: reading judicial decisions, legislation, and regulations and

appreciating how each of these documents interact. Moreover, part I is organized around an exploration of the 1996 welfare reform law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereafter PRWORA). My intention is to examine how the legal system deals with it; in other words, to view different aspects of law through the prism of welfare reform.

Chapter 1 introduces the notion of law in the social environment. The reader learns that the interaction between law and society has consequences for law formulation and implementation. The materials describing the section of the PRWORA that denies welfare benefits to persons convicted of drug felonies certainly reveal Congress' disdain for drug-abusing welfare cheats and the concomitant attempt to use the law to enforce this moral stance. That there is no empirical basis for this provision is beside the point; it is clear that Congress had other goals in mind, and PRWORA was simply the means to achieve those goals.

Chapters 2 and 3 explore the judicial process. Specifically, chapter 2 examines the nature of case law. Following a discussion about how to read a judicial decision, the reader learns how judicial decisions are transformed into a body of related rules. Case law development and legal reasoning are also discussed. The chapter focuses on five judicial opinions that comprise the so-called pillars of welfare reform: *King v. Smith, Shapiro v. Thompson, Goldberg v. Kelly, Wyman v. James,* and *Dandridge v. Williams.* These decisions, collectively, are the framework for welfare rights, and they are important not only because they remain good law after two decades, but because they are at risk following the enactment of the PRWORA. Additionally, the cases are offered as an example of case synthesis, an analytical approach to discerning the themes that tie together a collection of judicial opinions.

Chapter 3 continues the judicial process examination, but focuses on civil procedure. The reader learns about the structure of a lawsuit, with special attention to the details of a complaint and of an appellate brief. The facts used for this examination are based on a California case that challenges residency requirements similar to those enacted in the PRWORA. These residency rules allow for two-tier welfare benefit levels—one level for long-time residents; another, for newcomers. The complaint led to a judicial decision in the federal District Court, *Roe v. Anderson,* which appears in this chapter. The appellate brief for the eventual appeal of this decision (which

was renamed *Saenz v. Roe*) to the United States Supreme Court is included, along with the Court's final decision.

Chapters 4 through 6 deal with the legislative process. Chapter 4 examines the stages of this process in relation to the legislative history of the PRWORA, including excerpts from some of the floor debate. The Act's purposes are stated, as well as the related Congressional findings. The findings are especially revealing in terms of Congress' assumptions about the legislation's targeted population and the causal link between the law and the behavioral changes to be induced in this population. President Clinton's remarks upon signing the PRWORA are included, and these remarks provide further insight into the intent of this revolutionary statute. Following the discussion of the process for enacting substantive legislation, the chapter focuses on a related second stage—appropriating funds for substantive law via the Congressional budget cycle. The chapter ends with a discussion of how to read a statute.

Chapter 5 explores the prospect of statutory interpretation. That is, how a court makes sense of legislation and the impact on both case law development and on the refinement of legislation. The search for legislative intent is the focus of this enterprise, and this chapter discusses how a court goes about the task and the tools it elects to use. The discovery of legislative intent is illustrated through an examination of one of the aforementioned welfare reform pillars, *Dandridge v. Williams,* which upheld the constitutionality of limits on family welfare benefits.

Chapter 6 discusses the implementation of legislation, with special attention to how courts and the executive branch affect statutory implementation. Again, the PRWORA is the legislation in question, and the chapter examines the way two judicial decisions are likely to affect it: *City of Chicago* deals with the constitutionality of PRWORA provisions that deny cash assistance to legal residents; *Saenz v. Roe.* explores the United States Supreme Court's analysis of the legality of PRWORA requirements regarding residency requirements for receipt of welfare. Next, there is an illustration of how administrative review affects statutory implementation. Specifically, there is an Opinion of the Attorney General of the state of Pennsylvania and his analysis of the constitutionality of a Pennsylvania law containing provisions similar to those just mentioned. The chapter ends with a discussion of the interdependence of legal processes—the convergence

of judicial, legislative, and administrative processes—based on a comprehensive analysis of welfare litigation developments since the enactment of PRWORA. Challenges to the Act or to the regulations issued in connection with it are fully discussed.

Chapter 7 details the administrative process, including the stages by which regulations are promulgated. Attention is given to the various types of regulatory rules as well. An examination of how courts interpret regulations is based on the decision *Anderson v. Edwards,* wherein the United States Supreme Court addressed the criteria for determining the level of benefits to be awarded to a household.

Each chapter in part I ends with a section entitled "Issues for Discussion," which contains several questions that should focus discussion and analysis of the concepts and cases in the chapter.

Part II of the text focuses on the skill dimension of the social work and law connection. Attention is given to selected concepts and skills needed for practice where social work and law overlap.

Chapter 8 discusses social work advocacy in legislative and administrative processes. Tactics for legislative advocacy, for presenting testimony, and for negotiating the administrative process are addressed. In addition to the discussion about offering legislative testimony, there are samples of such testimony taken from the Congressional debate regarding PRWORA.

Chapter 9 examines legal research resources and techniques.

Chapter 10 examines court testimony and concepts of evidence.

Chapters 11 and 12 address the topic of privilege communications from two perspectives. Chapter 11 examines the nature of the phenomenon and its requirements. Chapter 12 explores the social work privilege in federal courts, as announced in the landmark *Jaffee v. Redmond* decision. An attempt is made to deconstruct the decision to expose the court's underlying assumptions about the privilege, generally, and the social worker-client relationship, specifically.

Finally, part III of the text provides a survey of selected topics for sociolegal practice. The objective is to discuss selected case law in several areas where social work and law converge. No attempt is made to cover the full array of sociolegal topics; such a goal would be overwhelming and, more important, not entirely relevant. Rather, I have selected areas that promise to pose significant challenges for practice; in short, topics that I believe are on the immediate horizon. While some might disagree with the areas selected, I hope that

the discussion is useful nonetheless. Each chapter examines key principles within the selected substantive area to give the reader a sense of the relevant legal issues. No attempt is made to provide exhaustive coverage; rather the intent is to afford an opportunity to evaluate the likely trend of the law in the area under discussion and the implications for practice. Each chapter ends with one or two judicial opinions that illustrate the issues raised in the chapter.

The topics, in their order of appearance, are as follows: Chapter 13 provides a framework for thinking about legal content in social work education, generally, and for interprofessional practice, specifically. Chapter 14 explores second parent adoptions and the implications for same-sex relationships. Chapter 15 explores the federal legislative remedy for spousal abuse—the Violence Against Women Act of 1994. Chapter 16 provides a discussion of informed consent to medical treatment. Chapter 17 explores the controversial area of liability for negligent treatment of nursing home residents. Chapter 18 evaluates the conditions under which the death penalty may be imposed on juveniles. Chapters 19 and 20 are devoted to a topic of critical importance for social welfare agencies: lobbying. Chapter 19 examines charitable organizations and lobbying, while Chapter 20 discusses policy images and constituent policy in relation to lobbying reform and the impact on nonprofit agencies. Finally, Chapter 21 discusses the increasingly limited access to justice experienced by the poor by examining restrictions on the Community Legal Service program.

Again, no attempt is made in part III to cover all the case law in a given area, but a careful reading of the case descriptions and of the illustrative cases will certainly convey the legal context of each area. Readers are invited to use their newly acquired competency in legal research to delve further into any topic.

USE OF THE TEXT IN THE SOCIAL WORK CURRICULUM

The text can support a number of courses within the undergraduate or graduate curriculum (and the Instructor's Manual should facilitate this task). It is a good resource for any of the "social work and law" courses. It also is an effective text for any policy or practice

course, because the students are introduced to a topic—welfare reform, generally; the PRWORA of 1996, specifically—that lends itself to discussion from both a policy and practical perspective. Finally, the text supplies important background content for courses with a special focus on law and social services, such as, courses on "Juveniles and the Law," or "Politics of Welfare Reform," or "Social Legislation," to name just a few, or for foundation courses in social welfare policy and services.

A NOTE ON THE EDITING OF MATERIALS

The judicial decisions have been edited. In keeping with the typical conventions in this regard, the reader is advised that:

- the elimination of one or more paragraphs in a decision is indicated by three asterisks;
- the deletion of several words within a sentence or several sentences within the same paragraph is indicated by ellipses (. . .);
- all footnotes in every judicial decision have been omitted; and
- any text added to a decision that is not part of the original text is indicated by brackets [ ].

The editorial strategy was designed to eliminate extraneous materials while retaining the core text of the decision. The official citation for each decision is supplied, through which the reader may resort to the full text of any decision.

Acknowledgments

The author acknowledges several people whose assistance proved invaluable in the production of this text. Dr. Al Roberts, who generously provided the foreword, has been a constant source of encouragement and has witnessed the text's evolution between editions. Bill Tucker, Springer Publishing Company Managing Editor, has been wonderfully helpful and patient during the text's gestation, and his efforts to move the text toward a timely publication are much appreciated. Anonymous reviewers supplied comments that certainly improved portions of the text, and I am grateful for their energy and enthusiasm. Finally, my thanks to the contributors to part III of the text, whose contributions reward the effort to make sense of the social work and law connection.

This page intentionally left blank

PART I

An Introduction to Legal Processes

This page intentionally left blank

1

Law and the Social Environment

To define law is often to talk simultaneously about functions. The law is what the law does, so to speak, and this assertion influences ideal conceptions and future uses of law. What is law? How do we think about it? How do we use the law and evaluate the subsequent results? What is the interaction between the law and societal norms and values? What are the limits of law?

This chapter will explore these questions, and an illustration of their relevance will be found in an examination of provisions of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which denies cash assistance and benefits to drug felons. The use of law in this instance brings into focus the effort by lawmakers to somehow regulate (or punish) certain behavior of public assistance recipients and raises legitimate questions about the connection between the means and end of law.

CHARACTERISTICS OF LAW

Law is typically thought of as of rules of indeterminate source that are invoked to be applied to a conflict between two parties, with the hope of achieving a legal remedy and perhaps even justice. If this common-sense conceptualization is accurate, one might even argue that the rules' origins are irrelevant—their appearance on the scene when needed is all that matters. This construction of law is neither good nor bad, per se; the challenge remains to evaluate the outcome of applying law in our daily life.

The search for a definition of the law may be ultimately misleading, however, akin to mistaking a shadow for its source: any conception of the law may be at odds with the reality of law in action. Yet, one might argue that the search performs a function, such as highlighting the

interplay between legal rules and their unfolding in a social environment. Our reservations notwithstanding, then, consider the following definitions and perspectives offered by Kidder (1983, pp. 20–31) and by Hanks, Herz, and Nemerson (1994, pp. 459–989).

Law as a Modern Process

Donald Black [1972] gives us: '*Law is governmental social control . . . the normative life of a state and its citizens.*' For him, law is a specialized form of social control, involving governments, definitions of citizenship, and formality. . . .

Law as All Forms of Social Control

Malinowski [1926, 1961] . . . [defined law as] '*a body of binding obligations regarded as rights by one party and acknowledged as the duty by the other, kept in force by the specific mechanism of reciprocity and publicity inherent in the structure of society*' . . . Like Black's definition, it spells out the basic elements of his theory about how law works in society.

Law as Authorized Physical Force

E. Adamson Hoebel [1954] . . . insist[ed] that without physical force there is no law. His definition: '*A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.*' . . . Hoebel's definition incorporates the concept of *social norm* . . . he is telling us that law, like other social norms, places demands on people to make choices of action they otherwise might not make.

Law, Coercion, and Specialization

Weber [1954] took great pains to include law in his general theory of society. . . . It may sound like Hoebel's . . . but it contains some subtle differences that show a different conception of law: '*An order shall be called law where it is guaranteed by the likelihood that (physical and psychological) coercion aimed at bringing about conformity with the order, or at avenging its violation, will be exercised by a staff of people especially holding themselves ready for this purpose.*' . . . Patriotism, economic

incentives, and participatory goals are all used, as Weber's definition brings out, to obtain conformity with law.

Law as Justice

Philip Selnick [1961] . . . considers justice to be at the very center of any adequate definition . . . If we define law as '*governmental social control,*' we cannot then distinguish between legal and illegal acts of government officials: '*The essence of legality lies not in the exercise of power and control, but in the predictable restraint on those using that power.*' . . . Law, then, is an organized way to produce justice.

Law as Custom Reinstituted

For Paul Bohannan [1967], '*Law is custom recreated by agents of society in institutions specifically meant to deal with legal questions.*' . . . Custom develops when isolated norms in a group become *institutionalized.* . . . Law is a later development made necessary by the growing inability of custom to support those institutions. Law [thus] *reinstitutionalizes* the norms of custom.

These definitions imply that law cannot be understood apart from its place in the social order. This notion is familiar and has been expressed in alternative perspectives on law and society, such as law as social control (Parsons, 1962), as the reconciliation of divergent social interests (Pound, 1943) or group interests (Cowan, 1958), as a weapon in social conflict (Turk, 1976), as something that can reflect the socialization of its principal technicians (Tapp & Levine, 1974), and as the end product of interconnected social systems (Vanyo, 1971). These viewpoints underscore that any definition of law must be both subtle and complex.

In addition to the above constructs, Hanks, Herz and Nemerson (1994) supply an introduction to certain jurisprudential "schools of thought" that lay bare assumptions about law and its role in civil society and offer a way of conceiving law in action.

Natural Law and Legal Positivism

Natural law theories share the fundamental premise that law and morality are inextricably intertwined, with the latter setting certain

absolute limits on the former. [N]atural law postulates that the quest for 'logical consistency' . . . must be halted when it conflicts with standards of morals and justice. . . . Legal positivism stands diametrically opposed to natural law [and] holds that no reference need be made to morality or natural justice in either the definition of 'law' or in a determination of whether or not a given rule is a 'valid rule of law.' It includes the doctrine that although law and morals may often overlap or be causally related, there is no necessary or conceptual connection between them; law derives its binding quality solely because it proceeds from the dominant political authority in civil society.

Legal Realism

Legal Realism is without question the most important and influential movement in American legal thought in the 20th century, or perhaps in any century. [Its] achievements . . . must be measured not simply by a body or school of jurisprudential writings, but by casebooks, by empirical research projects, by changes in legal education, and by reform work such as that embodied in the Uniform Commercial Code. . . . All legal realists, whatever their differences, believed that judges, like legislatures, should properly decide cases to accord with, in [Oliver Wendell] Holmes' phrase, the 'felt necessities of the time.' the best judges were those who were willing to change legal rules to adapt to changing social needs. . . . [S]ocial scientific methods [also] became important for [this school of jurisprudence] . . . and with it came a blurring of the distinction between law and social sciences. . . .

Critical Legal Studies

The following propositions . . . fairly state the Critical Legal Studies (CLS) view of law and the judicial process:

- No distinctive mode of legal reasoning exists to be contrasted with political dialogue.
- Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.

Law is not so much a rational enterprise as a vast exercise in rationalization.
Legal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes.
A plausible argument can be made that any such outcome has been derived from the dominant legal conceptions.
Legal doctrine is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorizing, describing, organizing, and comparing; it is not a methodology for reaching substantive outcomes.

Feminist Jurisprudence and Critical Race Theory

Feminist Jurisprudence and Critical Race Theory are the projects (both would reject the label 'school') of two groups of outsiders, women and people of color. They share (together with CLS) a common goal: 'to challenge existing distributions of power.' [footnote omitted] Both are burgeoning, formidable, but still nascent; both are, therefore, to some extent still inner-directed: asking, that is, whether theirs is 'simply' the voice of the outsider wishing to 'get in' or whether, on the contrary, theirs is ineradicably the distinct voice of gender and race (or, of course, both) wishing to recast the legal landscape altogether.

Law and Economics

During the last 30 years, economic analysis of law has been widely adopted as an informing and useful way of assessing legal rules. The *positive* (or *descriptive*) version of economic analysis seeks to describe and explain judicial decisions. In its strongest form, it holds that the common law can be explained as a continuing judicial attempt (not necessarily conscious) to achieve economic efficiency. The *normative* economic approach argues that cases *should* be decided so as to achieve economic efficiency.

SOURCES AND FUNCTIONS OF AMERICAN LAW

The American legal system is comprised of the federal system and each of the 50 state systems. Although this may seem cumbersome

initially, the reality is that they are structurally similar; and each has a constitution as well as processes for making, finding, and enforcing law.

The arrangement exists because of the way the U.S. Constitution assigns governmental powers to the three governmental branches: judicial, legislative, and executive. The legal rules that emerge from each are based on a different source of Constitutional authority. The concept of "authority to enact law" is important in our governmental scheme; it specifies each branch's scope, power, and, ultimately, legitimacy (Freedman, 1978). There are four sources of authority for both federal and state systems, and each may be thought of as producing a "type" of law: constitutional, judicial or common law, legislative or statutory law, and administrative or regulatory law.

Constitutional Law

The U.S. Constitution is supreme in relation to the other types. It is the foundation for all levels of the legal system. It articulates, among other things, the scope and functions of government; its counterpart is the state constitution.

Judicial or Common Law

Generally characterized as judge-made law, the common law is also referred to as decision making by *precedent* and is based on the doctrine of *stare decisis* (deciding based on settled rules). In this way a decision, once announced, guides a subsequent court when it decides an identical or similar situation. Precedent also stipulates that judicial decisions be followed by so-called inferior courts; that is, a higher court's decision in a particular system (state or federal) will be followed by all lower courts.

Legislative or Statutory Law

Enacted by legislatures, this type appears as statutes or, on the local level, ordinances. Legislation can be repealed or amended and is interpreted by the judiciary to ensure consistency with the federal constitution.

Administrative or Regulatory Law

To implement legislative goals, administrative agencies issue regulations that have the force of law. Regulations, however, must follow the legislation's intent and are invalid if they stray from it.

The arrangement may produce different types of law, but this does not mean that each is solely independent. The constitution structures the relationship between these sources of authority through its provisions for checking the power exercised by any one branch. The result is a significant degree of institutional interdependence. Mermin (1982, p. 5–8) reflects below on this phenomenon.

*Law and the Legal System: An Introduction**

Let me now explore one general aspect of this relation: What does law do for people in our society—or, putting it in terms of what the legal agencies are supposed to do or are trying to do (sometimes successfully), what are the social functions of our law?

You probably think first about the dispute-settling function. We do tend to think about the courts and their business of settling disputes. These may be disputes between private parties, or between a private party and a government unit or official, or between different government units or officials. Many government administrative agencies also engage in adjudicative dispute settling. But it is worth remembering that private individuals functioning in the area of labor arbitration and commercial arbitration already account for a larger number of dispute settlements per year than do all the courts of the nation. Here too, however, the courts play a role—they can be called on to enforce the arbitration award, and sometimes to enforce an agreement to arbitrate.

Another function we tend to think of right away is maintaining order, through the bulk of criminal law, against violence or aggravated harm to persons or property, by the threat of the penalties of imprisonment and/or fines. This of course includes the policing function as well as the court's role in trials and sentencing, and the operations of other officials such as prosecutors and parole and probation personnel. Maintaining order also involves protection (through sedition, treason, and related laws) against that extreme threat to

---

* From Samuel Mermin, *Law and the Legal System: An Introduction,* 2nd edition, pp. 5–8, 1982, Little, Brown & Co., Inc., Boston, MA. Reprinted by permission of Little, Brown & Co.

order, the violent overthrow of government. Thus, the law legitimates certain uses of force by government but not (save exceptional circumstances, such as legitimate self-defense) by private parties.

But there is much more to our legal system than settling disputes and maintaining order. For one thing, the legal system constitutes a framework within which certain common expectations about the transactions, relationships, planned happenings, and accidents of daily life can be met (and this force for predictability and regularity can itself be viewed as a species of maintenance of order). We expect that our customary ways of behavior will be facilitated and not disrupted by law without strong reason; we expect that those who have suffered personal injuries (particularly those who were without fault) will be compensated for their injuries under the laws of tort; that those who have made promises will be held to their promises (or, if not, be required to make recompense) under the laws of contract; that those who own property can get the law to enforce their expectations that they have exclusive rights in it and are free to dispose of it as they wish. All of these expectations have to be somewhat qualified since the rights involved (especially those of property) have been subjected to conditions and exceptions. That is, the nature of the expectations is partly a product of conditioning by the legal system, thereby illustrating what was referred to before as the interaction of law and society.

In both constitution and statute there are functions of yet another sort: provisions aimed at securing efficiency, harmony, and balance in the functioning of the government machinery. Here I am thinking of the constitutional separation of powers by which specific kinds of power are allocated to specific branches to government with an attempt to avoid undue concentration in any one branch. And I think of other provisions for planning the affairs of government—statutes such as the Full Employment Act and government reorganization acts, and the fiscal planning represented by budgets for the raising (taxation, borrowing) and spending of public money. I think of a different kind of planning too, exemplified by zoning and other land use controls, conservation laws, and environmental protections. I think also (because the legal machinery requires maintaining legal skills for its maintenance) of provisions governing the qualifications of lawyers, judges, and other government officials for their respective vocations. There are, moreover, measures that build into the system agencies to make continuing assessments and proposals for improvement of the system; e.g., the state legislative councils and judicial councils, the commissioners on uniform state laws, the federal

judicial conferences, and the Administrative Conference of the United States.

In the Constitution can be seen another vital function of our law: Protection of the citizen against excessive or unfair government power. This refers mainly to the Bill of Rights, which includes such basic rights as freedom of speech, press, and religion, the right to privacy and against unreasonable searches and seizure, the privilege against self-discrimination, and the right of jury trial for crime. (Remember that the due process clause is construed by the courts to assure both fair procedure and freedom from arbitrariness in the substance of government requirements.) A standard for equality of treatment applies to the states through the equal protection clause of the Fourteenth Amendment and is, to some uncertain extent, applicable to the federal government through the due process clause of the Fifth Amendment. (Also included in the due process protection against both governments are property rights, as well as life and liberty.)

Our legal system is concerned, too, with protecting people against excessive or unfair private power. In addition to antitrust law protection against private monopolistic power there are a number of specialized protections. For example, an employer's power is curbed by laws, such as those compelling the payment of minimum wages, or prohibiting discrimination in employment, or compelling collective bargaining with unions; a corporation's power in the sale of its securities is curbed by SEC requirements. Analogous restrictions apply through a host of regulator laws and administrative commissions at both federal and state levels.

Somewhat overlapping in function with these laws are some that are aimed at assuring people an opportunity to enjoy the minimum decencies of life by protecting their economic and health status. These functions have been more prominent in the later history of our society. I have in mind laws on unemployment insurance, social security, Medicare, public housing, welfare, and antipoverty programs, as well as older statues, like those on bankruptcy and garnishment. I would also include measures for psychic health, by which I mean not only government services for the poor who are mentally ill, but also to measures attempting to eliminate various external sources of psychic distress. These include laws and decisions discouraging discrimination, giving redress for injuries to reputation and invasions of privacy, enlarging opportunities for recreation, and reducing the pollution of air, water, and landscape.

One other point: Is there any sense in which it is true that law has an ethical or moral function? The answer, I think, is definitely yes.

Most of the functions already mentioned have a clear ethical dimension. Thus, in settling disputes, the law aims at a result that is fair and socially desirable. A good deal of criminal law carries out ethical precepts of conduct—many of which are in the Ten Commandments. In tort law, many of the principles concerning either negligent or intentional infliction of injury may be traced to the Golden Rule. The obligation to keep one's promises is an ethical obligation. Similarly, the agencies I mentioned as being concerned with improving the legal system have had as goals not only increased efficiency but also more socially desirable results. Ethical or humanitarian motivation has been at least one of the sources of the mentioned legislation aimed at raising the standard of living of the disadvantaged, and legislation protecting people against unfair exercise of public or private power. Much legislation and general legal principles use explicitly ethical terms in laying down standards of conduct—phrases like "good faith," "not profiting by one's own wrong," "fair and equitable," "unjust enrichment." The Constitution itself, as we have seen, speaks in terms of equality and (as a judicial interpretation of due process) fairness. Hence it is altogether misleading to say, as some have said, that legal duties have nothing to do with moral duties.

LIMITS OF THE LAW

That the law is expected to fulfill many roles has both positive and negative aspects—positive, because it can be responsive to evolving social needs; negative, because of the prospect of unanticipated results. Any effort to articulate a universally acceptable use of law will produce some flip-flopping, some going back and forth between treating legal rules as unchangeable or as malleable. A constantly changing social environment simply compounds this reality. But each problem is unique and must be understood on its own terms. This assertion is perhaps most apparent in relation to the longstanding problem of poverty in America, which evidences the problem and prospects of the law's social functions, and the following excerpt illustrates one instance where the law was used to achieve ostensibly proper ends. The outcome of this effort, however, reinforces the idea that the law can be used in the service of questionable aims.

In July 1996, as the welfare reform bill was making its way through Congress and toward its eventual enactment a month later, Senator

Gramm introduced an amendment to the bill that was subsequently enacted as Section 115, Title I, of Pub. L. No. 104-193, which sought to sanction welfare recipients convicted of a drug-related felony offense. The Senator's intention was to incorporate a provision that would deny assistance to "an individual convicted (under federal or state law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance" (Sec. 115, Title I, Pub. L. 104-193, codified as 42 USC 862a). The analysis below addresses the propriety, wisdom, and punitive aspects of this controversial legislative goal.

*Welfare Reform—Punishment of Drug Offenders—Congress Denies Cash Assistance and Food Stamps to Drug Felons—Personal Responsibility and Work Opportunity Reconciliation Act of 1996**

> Illegal drug use among Americans has, on average, fallen off considerably since 1979 [Currie, 1993; Substance Abuse and Mental Health Services Administration, 1996]. Yet among the nation's urban poor, the rate of drug use—of heroin and cocaine in particular—continues to escalate [Currie, 1993; Substance Abuse and Mental Health Services Administration, 1996; Wilson, 1996]. Across the country, legislators have responded to this problem by imposing increasingly harsh punishments on drug offenders. The growing concentration of drugs in poor urban areas, however, is both a testament to the limitations of this sort of punitive response and an indication that policymakers serious about reversing this trend should consider carefully whether initiatives to expand penalties for drug offenses will reduce the demand for drugs in these communities.
>
> No deliberation of this kind accompanied the attachment of the Gramm Amendment to the sweeping welfare reform legislation signed into law by President Clinton in August 1996. This amendment, proposed by Senator Phil Gramm of Texas and passed through

---

* From Recent Legislation, 110 Harvard Law Review 983 (1997). Reprinted by permission of Harvard Law Review Association.

(Note: The bibliographic references in the footnotes for this article have been inserted instead in the text, according to the APA style manual. Any nonbibliographic exposition associated with the footnotes has been omitted, except where it was needed to amplify a particular point, in which case it was inserted, but set off by brackets.)

the Senate to the Conference Committee with bipartisan support permanently denies cash assistance and food stamps to anyone convicted under state or federal law of a felony offense that "has as an element the possession, use, or distribution of a controlled substance" [Personal Responsibility and Work Opportunity Reconciliation Act of 1996]. [The statute exempts some federal benefits, including emergency medical services, "short-term, noncash, in-kind emergency disaster relief," prenatal care, job training, and drug treatment programs (sec. 115(f)), and does not apply to "convictions occurring on or before [the law's] enactment" (sec. 115(d)(2)). It also contains a state opt-out clause, (sec. 115(d)(1)(A)), although, given the strong stigmatization of drug felons, no state is likely to choose this option.] Because of this provision's seeming harmony with the overall spirit of the welfare reform package, legislators failed to assess the measure on its own terms: as an augmentation of the statutory punishment inflicted on drug offenders. As a consequence, Congress unwisely approved a measure that serves no legitimate punitive purpose and that may well increase the incidence of drug use and dealing among the very group most vulnerable to the lure of drugs: the urban poor.

Forty years of research have demonstrated that people living with a "surplus of vulnerability" [Chein, et al, 1964]—in lives of poverty, unemployment or underemployment, limited education, bleak prospects, and little sense of identity or purpose [Currie, 1993, p. 67]—are most susceptible to the temptation of drugs [Currie, 1993, p. 75–77]. For some residents of "unstable, disorganized, and deprived communities," drugs "become a way of getting away from daily problems, medicating emotional anguish, relieving stress, escaping pain—a strategy of 'palliative coping'" [Currie, 1993, p. 113]. For others—women in particular [Rank, 1994; The Real War on Crime, 1996]—selling drugs is a way to make ends meet at times when the cost of housing, clothing, and feeding dependents is overwhelming [Wilson, 1996, p 58].

Not every user or dealer turns to drugs out of desperation or despair—but many do. And many people with a history of involvement with drugs have already demonstrated that they lack meaningful alternatives. Depriving prior offenders of access to welfare at moments when they most need outside help will actively undermine any efforts on the part of such individuals to avoid a return to drugs [Currie, 1993, p 107, 121].

Denying welfare benefits to drug offenders will also take a disproportionate toll on African-Americans and Hispanics. Not only are

members of these groups already overrepresented among the ranks of the poor [Ehrenreich, 1995; The Real War on Crime, 1996, p. 105], but the government officials responsible for enforcing drug laws focus disproportionate attention on African-American and Hispanic communities. Although African-Americans make up only 12% of the U.S. population [The Real War on Crime, 1996, p. 115], they constituted 55% of the 280,000 people convicted of felony drug crimes in state court in 1992 [Office of Justice Programs, 1996, p. 3, 15]. Today, almost 90% of those individuals sentenced to state prison for drug possession are African-American or Hispanic [Widener, 1996, p. 46, 47]. The combination of racial bias in law enforcement and poverty virtually guarantees that the weight of the Gramm Amendment will fall most heavily on African-Americans and Hispanics. This effect is certain to reinforce the sense of disaffection and abandonment that many members of these groups already feel [Remnick, 1996, p. 98–99], and thus to aggravate the problem of drug use in poor minority communities.

Defenders of the Gramm Amendment may argue that, as with the welfare reform package as a whole, this provision will actually encourage drug offenders to take "responsibility" for their own situations [Dole's Statement on Measure, 1996; President Clinton's Announcement on Welfare Legislation, 1996]. The very name of the package the Personal Responsibility and Work Opportunity Reconciliation Act [Pub. L. No. 104–193, 1996]-attests to the strength of this belief. However, the conception of responsibility used to justify the general elimination of guaranteed federal assistance is significantly different from that demanded of drug offenders by the Gramm Amendment [Smiley, 1992, p. 74–75]. The former conception is an exhortation to future praiseworthy conduct. It assumes both that individuals are equipped to create their own life circumstances and that to be the causal agent of one's own circumstances is a good to be encouraged. In contrast, the latter conception—the same deployed to attach guilt or blame to criminals and other wrongdoers—is backward looking, an insistence on moral accountability for one's own past actions. [One could argue, given the tone and effect of the 1996 welfare package as a whole, that a punitive impulse against the poor in general did not distinguish the Gramm Amendment, but actually colored the drafting and passage of the entire bill. There is, however, no constitutional right to welfare. [See *Dandridge v. Williams,* 397 U.S. 471, 486-87 (1970).] Thus, although the provisions of the Act are certainly ungenerous and embody a strong element of moral censure, the Act does not deprive recipients of anything to which they would necessarily

have been otherwise entitled. It is therefore not, strictly speaking, punitive. The Gramm Amendment, in contrast, does deny to a particular group—drug offenders—something to which they would otherwise have been statutorily entitled—welfare payments.] It is this conception that drives the Gramm Amendment, which requires proof of only one past criminal conviction to exact a price that looks very much like an additional punishment for past wrongdoing.

Constrained only by the Eighth Amendment ban on cruel and unusual punishment, Congress is entitled to legislate any punishment it sees fit for the violation of a federal crime. This power extends even to the passage of cumulative statutory penalties, so that a single criminal conviction may carry multiple punishments. Yet responsible legislators ought still to consider whether adding to the punishment for any given offense is good criminal justice policy. In the case of drug policy, this inquiry should involve two prongs: whether the policy will effectively reduce the incidence of drug crimes, and whether it will further any legitimate goal of punishment. The denial of welfare benefits to drug offenders fails on both counts.

First, this policy will not reduce the incidence of drug crimes. Although providing welfare for people in high-risk communities will not solve the nation's drug problem, denying public assistance to all drug felons seems certain to trap those most at risk in a downward spiral of repeat offending. Of course, this argument presumes that one's material circumstances significantly influence one's choices, a view inconsistent with the radically individualist moral theory informing the Gramm Amendment [In this respect, the Amendment is in harmony with the welfare reform package in general.] On this theory, character and strength of will fully account for one's circumstances and social context is irrelevant [Van Inwagen, 1986, p. 241, 241–242]. From this perspective, the Gramm Amendment does not punish people whose social context makes them more susceptible to the appeal of illegal substances, but rather establishes the appropriate incentive structure to help the morally weak avoid further transgressions.

Yet, popular though this view may be, an individualist moral ideal does not in itself constitute a sufficient basis for policy, particularly if its invocation will disserve important governmental interests. Although one might argue that disproportionate drug use among the urban poor attests to the moral weakness of members of this group, this pattern also supports the contrary conclusion—borne out by extensive research into the causes of drug use [Currie, 1993, p. 75–76]—that social context plays a much greater role in moral choices than radical individualists acknowledge [Currie, 1985, p. 144–146; The Real War

on Crime, 1996, p. 27–30, 105]. The well-documented relationship between poverty and crime in general [Currie, 1985, p. 144–145] further reinforces the intuition that poor people, regardless of their moral character, are more likely to turn to crime or drugs for survival or escape.

If the rate of felony drug convictions and the level of recidivism remain as high as they were in the late eighties and early nineties, the Gramm Amendment will permanently deny welfare eligibility to as many as 200,000 people per year. This denial will serve no legitimate punitive purpose [Kadish, Schulhofer, & Paulsen, 1983, p. 187–210]—and thus will fail the second prong of the inquiry.

Given the extremely harsh sentences that drug offenders already face, the Amendment cannot sincerely be viewed as a deterrent; if the threat of life in prison without parole will not deter, the threat of loss of access to public assistance is unlikely to do so. Likewise, the measure will have little rehabilitative effect, given that denial of assistance to drug felons makes it more likely, not less, that those affected will return to selling or using drugs. Although the motivation behind the measure certainly suggests a desire for vengeance the Amendment cannot adequately be described as retribution for the drug crime itself, as only those drug offenders who are economically marginal enough to be otherwise eligible for federal assistance will ever feel its "unpleasant" [Hart, 1968] effects. [One could argue that the provision's underinclusiveness does not in itself negate any retributive effects. However, that this provision extends in practice only to poor offenders suggests that the real motivation behind it is not the desire to punish drug offenders per se, but rather to punish those poor people who through "moral weakness" succumb to the temptation of drugs.]

Finally, given the zeal with which drug laws are currently enforced, it is an open question whether the provision will be a money-saving device, as any savings that the government will realize by denying welfare benefits to drug offenders will in all probability be more than offset by the increased costs to the criminal justice system likely to result from increased drug use among the urban poor.

In the past decade, legislators caught up in the militaristic spirit of the "war on drugs" [Baum, 1996, p. xi] have found virtually no punitive response to drug offenders too draconian to merit political support. Despite—or perhaps because of—this display of machismo, the drug trade has flourished in the nation's poorest communities. If Congress lacks the courage to reorient drug strategy away from its excessive focus on the identification, arrest, and punishment of drug offenders, it should at least refrain from passing laws that serve no

legitimate punitive purpose and that are likely to exacerbate the very conditions that drive people to use drugs in the first place.

The above discussion indicts Section 115, Title I, Pub. L. 104-193 for its wrongheaded attention to punishment outside the context of effective drug enforcement. By focusing on welfare recipients and using Section 115 to deny benefits, the law really serves no legitimate purpose, and its unsavory instrumental dimensions are clearly exposed. Indeed, one might properly argue that its effect may well be the opposite of its intentions.

It is worth underscoring, however, that states are allowed to override the aforementioned provision, and indeed—due to the advocacy of state-based welfare-rights advocates—many states have done so already. As a later chapter dealing with legislative advocacy will make evident, social workers can play critical roles in offering testimony about the adverse consequences of legislation, as was apparently the case in the instance of Section 115, Title I of Pub. L. 104-193.

ISSUES FOR DISCUSSION

1. Mermin asks: "Is there any sense in which it is true that law has an ethical and moral function?" Is there? What evidence supports your position?
2. Consider the issues inherent in Section 115, Title I, Pub. L. 104–193. What are the underlying assumptions of this legislative provision, and how do these assumptions inform overall statutory goals, if at all? What are the implications for advocacy in the face of such legislation?
3. Consider some issue for which you advocated social change: When you say there "ought to be a law," what are you saying about the functions you assume the law should perform?
4. You have a conception of law—its aims, functions, goals, consequences. You also have an appreciation of what is referred to as "policy." In what sense do both law and policy converge—and with what results?

2

The Judicial Process Part One: The Nature of Case Law

Courts, through their decisions, produce case law according to rules grounded in the doctrine of precedent. The result is a system that celebrates both stability and flexibility. The consequences for the development of law are significant because what is produced is the framework for the elaboration of legal rules within a particular substantive area.

This chapter will address questions, such as: what is case law? How do decisions become settled within the context of stare decisis? *How does case law reflect the process by which judges reach decisions? How does the court engage in legal reasoning, and how does this affect the evolution of case law? To better appreciate the meaning of these questions, we will examine several cases that illustrate the process of case law synthesis:* King v. Smith, Shapiro v. Thompson, Goldberg v. Kelly, Wyman v. James, *and* Dandridge v. Williams. *Handed down between 1968 and 1971, these decisions frame the way we conceptualize the rights of welfare recipients. What are those rights? What are the threats to their vitality? The cases in question are all the more significant because the Supreme Court, through its interpretation of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, will have an opportunity to reconsider the scope and durability of these precedents.*

CASE LAW AND THE DOCTRINE OF PRECEDENT

Courts hear an array of disputes and resolve them by referring to rules gleaned from prior cases. The disputing parties end up in court because they cannot (or will not) resort to force, because they cannot reach a mutually acceptable compromise, because they feel entitled to their "day in court," or some combination of all of these.

Motivation notwithstanding, they seek a court-imposed solution. In so doing, the parties may agree more or less with the judicial remedy, but their ultimate satisfaction with the outcome will depend on whether they feel they are treated fairly. And in our legal system, fairness is conveyed when similar disputes receive similar treatment.

This method of dispute resolution produces "case law"—where rules applied in a dispute today are gleaned from earlier disputes between A and B and, consequently, may also become relevant to future conflicts between C and D. Case law development is encapsulated in the concept of precedent, which focuses on consistency of result. "The force of precedent in law," according to Llewellyn (1930), "is heightened by . . . that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances. As the social system varies we meet infinite variations as to what men or treatments or circumstances are to be classed as 'like'; but the pressure to accept the views of the time and place remains."

The emphasis on settled rules aside, case law development also is flexible. For example, factual differences will emerge occasionally and prompt the court to "distinguish" an apparently relevant precedent, or if the distinction is compelling, the court may even "overrule" a precedent. These results may seem contradictory, but as Bodenheimer, Oakley, and Love (1980, p. 62–64) discuss, they are really indications of a flexibility that stems from two sources.

> First, judges [decide cases] . . . according to the claims of the parties and the unique facts . . . [Given two fact situations, there may be sufficient shades of differences that one side may argue that the similarity between their particular facts and previous facts is less than it appears, and there is really something unique about their case, enough to distance themselves from the facts for an earlier decision.]
>
> Lawyers call reliance on these differences as a means of avoiding the authoritative effect of the prior decision the process of "distinguishing" a precedent. [Theoretically] . . . virtually every precedent can arguably be "distinguished" from a subsequent case. . . .
>
> The problem of determining whether a preceding judicial decision is really "on point" and not factually distinguishable from the legal dispute in which it is cited as a precedent has two dimensions. It involves not only the question of what the facts were in the preceding case, but also which of the facts of the preceding case were actually relied upon by the court in deciding the case. It also involves the

question whether the decision in the preceding case, if articulated in general terms which went beyond the facts actually then in issue, ought to be controlling in a subsequent case involving different facts. This second dimension calls for a determination of the *ratio decidendi* (a Latin phrase meaning "the reason for the decision") or the "holding" of the prior case. (Both terms are discussed in more detail below.)

This leads us to the second fundamental reason for the flexibility of the authoritative force of precedent. Even when the controlling facts and *ratio decidendi* . . . are indisputably applicable to and dispositive of a subsequent lawsuit, an American court will not automatically follow precedent. . . . This is not to say that American courts never follow precedent. They almost always do, and they frequently invoke the doctrine of *stare decisis,* which seems to say they must. . . . Even though the doctrine of *stare decisis* may be as important in America for its exceptions as for its rule, its exceptions are not without limit.

CASE LAW AND "*RES JUDICATA,*" "REVERSAL," AND "OVERRULING"

Judicial decisions influence both the immediate disputing parties and those who follow in their steps. The effect is best appreciated when understood in relation to several related concepts—*res judicata,* reversal, and overruling, which Jones, Kernochan, and Murphy (1980, p. 7–8) discuss below.

Every final decision of an appellate court has a twofold impact or effect: (1) as an authoritative settlement of the particular controversy then before the court; and (2) as a precedent or potential precedent for future cases. A Latin tag has been attached by lawyers to each of these effects, *stare decisis,* as we have seen, to the impact of the decision as precedent, *res judicata* to its effect as a settlement of the immediate controversy. It is essential in legal analysis that these Latin terms and the concepts they symbolize not be confused. By way of illustration, let us suppose a simple case. *P,* a former surgical patient, sues the *D Hospital* to recover damages for injuries caused, according to *P's* allegations, by *D Hospital's* negligence in the maintenance of its operating room. The trial court judgment is in favor of the defendant, and this judgment is affirmed by the supreme court of the state, the court of last resort in the jurisdiction, on the ground, clearly stated

in the opinion of the court, that a hospital is a "charitable corporation" and, as such, enjoys immunity from suits for negligence. This decision is a final and conclusive settlement of the controversy between *P* and *D Hospital;* the case, . . . is now *res judicata,* and the losing party, *P,* cannot have it tried, or bring his claim again.

Now, to make plain the difference between *res judicata* and *stare decisis* as legal terms of art, let us suppose further that the same state supreme court, two years later and in another hospital case, is persuaded that the principle of charitable immunity from suit for negligence is not a sound legal doctrine for present-day conditions and so overrules *P v. D Hospital* and finds in favor of the injured plaintiff in the new case. This overruling decision is a deviation from the norm of *stare decisis,* of course, but American courts of last resort have never regarded precedents as absolutely binding—only as "generally" binding—and have reserved to themselves a largely undefined authority to overrule even clear precedents when considerations of public policy require a change in the case law.

What, however, of the particular claim of *P* against the *D Hospital?* Now that the supreme court of the jurisdiction has changed the law and flatly "overruled" the decision that was reached in *P's* case 2 years ago, it might seem that *P* should be able to bring his suit again and prevail in his claim. The answer is clear, and adverse to *P.* His particular claim has been finally and conclusively settled against him; *P* is barred by the doctrine of *res judicata* from ever suing on that claim again. The final decision of a court of last resort is, we observe, more conclusive and permanent in its aspect (*res judicata*) as a settlement of a particular case than it is in its aspect (*stare decisis*) as a general law for the future.

One other nicety in legal terminology should be noted at this point. We have just said that the state supreme court, in the later hospital case, "overruled" its decision in *P v. D Hospital.* It would have been seriously inaccurate usage if we had said that the state supreme court had "reversed" *P v. D Hospital.* And this error in usage might have led to a substantial error in problem analysis, because "reverse," as a legal word of art, carried with it the idea that a court judgment has been set aside, and is no longer effective, as between the parties in controversy. In short, "reversal" and "overruling" are not to be used interchangeably. . . . "Reversal" has reference to the action of an appellate court on a lower court's judgment in the same particular controversy. When an appellate court reviews the judgment of a lower court in a case and concludes that the lower court reached an erroneous result in the case, the appellate court will "reverse," that is,

> set aside, the lower court's judgment. When a court of last resort "overrules" one of its past decisions, the conclusiveness of that earlier decision as a settlement of its particular controversy is not affected, but the overruled decision is no longer an authoritative precedent. [pp. 7–8]

CASE LAW, *RATIO DECIDENDI*, AND *DICTA*

Ratio decidendi and *dicta* are important because they explicate the operation of precedent and *stare decisis* and shed light on the way law evolves. Both concepts illuminate the manner in which judicial decisions become binding. As Bodenheimer (1974) states:

> [N]ot every statement made in a judicial decision is an authoritative source to be followed in a later case. . . . Only those statements in an earlier decision which may be said to constitute the *ratio decidendi* of that case are held to be binding, as a matter of general principle, in subsequent cases. Propositions not partaking of the character of *ratio decidendi* may be disregarded by the judge deciding the later case. Such nonauthoritative statements are usually referred to as *dicta*. . .
>
> It is widely conceded, however, that not every proposition of law formulated by a court . . . possesses the authority belonging to the *ratio decidendi*. . . .
>
> [M]ost judges will hold that the *ratio decidendi* of a case is to be found in the general principle governing an earlier decision, as long as the formulation of this general principle was necessary to the decision of the actual issue between the litigants. Nonetheless, even though the majority of today's judges may theoretically agree on the basic method for finding the *ratio decidendi*, they may come to widely diverging conclusions in concrete cases calling for the application of this method. . . . [pp. 432–435]

CASE LAW, *STARE DECISIS*, AND THE COURT HIERARCHY

The doctrine of *stare decisis*, derived from a Latin phrase meaning "to stand by precedents and not to disturb settled points," simultaneously reinforces the "binding effect" of judicial decisions and

emphasizes the way legal rules become authoritative in a particular jurisdiction (a geographic area). The resulting uniformity is due to the structural demand that lower courts follow the rules announced by higher tribunals.

Court systems exist at the federal and at the state level. Although each varies slightly, their hierarchy is similar. Lower level decisions can be reviewed by higher levels, and the process ends with some "court of last resort." And each lower level court is bound by the precedents established in a higher level. For example, a federal trial court (i.e., District Court) is bound by the rulings of the federal Circuit Court of Appeals for its circuit. A state's highest appellate court, usually referred to as a Supreme Court, announces decisions that must be followed by all lower state courts.

State Court Structure

"Inferior" or "Petty" Courts

The lowest court is designated to handle very minor disputes, usually involving small amounts of money. These "petty" courts generally take the form of a "Justice of the Peace," a "District Justice," or a "Municipal Court." Their jurisdiction (the matters they may hear) is cast in terms of the dollar amount in dispute; that is, the claims can only be heard by these courts if they don't exceed a certain dollar amount. (Small claims disputes are a prime example.) Though referred to as "inferior," they are the forum where most "everyday disputes" are heard. They thus provide necessary access for those who otherwise might be locked out of the civil process.

Trial Courts of General Jurisdiction

The next level is the court of general jurisdiction, the one empowered to hear all cases without regard to money limitations. Again, the names vary; some are referred to as "Superior Courts," others, "Courts of Common Pleas."

Appellate Courts

These courts review lower court decisions. They are intermediary tribunals and are most often known as "Courts of Appeal." Their decisions are reviewed by the state's highest court.

Supreme Court

The state Supreme Court is the state's "court of last resort." It reviews all lower level decisions and announces the final word on the state's law.

Federal Court Structure

The federal hierarchy is like the state's in that there are trial and appellate levels. Unlike the states, however, each level is referred to by the same name in each of the country's geographical regions.

District Court

These are the federal trial courts. They are courts of general jurisdiction, although there are some cases that they alone can hear (e.g., so-called "federal questions" and disputes where the amount in controversy exceeds $10,000). There are 95 judicial districts in the United States.

Courts of Appeal

Known as Circuit Courts of Appeal, these intermediate appellate tribunals hear appeals from the District Courts. The country is divided into 11 circuits.

U.S. Supreme Court

The ultimate "court of last resort," the Supreme Court announces the "law of the land." It hears appeals from lower level federal courts and from state supreme courts. It may also hear, at its discretion, cases that petition for a "writ of certiorari."

THE DEVELOPMENT OF CASE LAW AND THE JUDICIAL FUNCTION

Common Law Traditions

Case law evolves from decision making based on precedent. But what happens when the court encounters a situation where there are no prior rules to which it can turn? The lack of available precedent

certainly compounds judicial decision making, but judges *must* decide. Under these circumstances—referred to as "cases of first impression"—the court determines the principles that, in its judgment, seem applicable and fashions them for the immediate facts. The impetus for such refashioning varies, but the primary aim is to reconcile the existent law with the court's view of the fact. These judge-made rules are referred to as the common law. As Holtzoff (1966) points out:

> Common law has been molded over the centuries by judges, step by step, growing from one specific case to another. . . . The analytical process by which it has evolved in the course of centuries is a triumph of inductive logic. . . . [A] judge determines on the basis of former precedents, social needs, and a sense of justice, in cases of first impression, what the governing rule of law should be. A judge may make law by building on prior material and may at times even modify it in the light of new requirements and changing conditions. His function of formulating law is, however, limited in the sense that he may not suddenly bring about far-reaching and drastic changes in basic theories, or adopt a novel approach or a new fundamental alteration in rights and liabilities. . . .
>
> In this respect law formed by judges differs drastically from law enacted by legislators. Judges proceed gradually, as actual cases are presented to them. On the other hand, legislators are not restricted in this manner. They have the choice of either enacting detailed modifications in existing law, or proceeding without regard to prior legislation and making extensive changes, or even introducing new methods and novel approaches. . . . Once a statute is enacted by the legislature, it is rigid. The rule prescribed by it cannot be changed, except by subsequent action of the legislative body. By contrast the common law has the virtue of flexibility and capacity for continuous adjustment to shifting conditions and changing needs. Judges have it in their power by judicial decision in individual cases to make necessary modifications as time progresses. This process never stops or ends. (pp. 23–25)

Judicial creativity in the development of the common law is an appropriate judicial function, but as Holtzoff states above, the opportunity to "create" new law does not mean that judicial law making is unlimited. The development of common law occurs within the context of certain constitutional constraints, and these curb any

tendencies toward excessive creativity. Notwithstanding, it is difficult to expose inappropriate judicial decision making. Judges are sufficiently aware of their role to avoid stepping beyond their constitutionally defined functions, but they also have sole responsibility to find and apply the law. And to do this, they must reconcile the long-standing tension inherent in the judicial function: responsiveness versus constraint.

Common Law and Legislation

A court can also turn to legislation in its search for legal doctrine. Indeed, legislation is frequently a "codified" version of prior common law rules. This method for rule selection also relies on the doctrine of precedent. The practice is not new, as Pound (1908) cites:

> (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or coordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases that it covers expressly. (pp. 383–386)

There are some instances, however, where both common law and legislation seem equally compelling. These cases are difficult to decide because the court may not simply resort to the assumption of legislative superiority and is forced to confront its view of the judicial function. For example, the court may decide that the legislative rule is too ambiguous to apply—a situation that can arise with very new legislation. It may then determine that the best thing to do is apply the common law rules that preceded the legislation.

Judicial and legislative responsibilities occasionally overlap on a particular issue in a dispute. When this occurs, the court treats as irrelevant the fact that the legislature decided to address an issue on which it, too, is competent. The court's decision in these cases, and the rationale it offers, reveals a lot about its view of the relationship between common law and legislation.

CASE LAW DEVELOPMENT AND THE LEGAL REASONING PROCESS

To make sense of case law development and synthesis requires competency in legal reasoning. On a practical level, "legal reasoning" can be thought of as "thinking like a lawyer." The method, put simply, epitomizes the process by which the legal system receives and resolves disputes.

The legal system assumes that problem solving should be rational; every solution should be based on a reason. Legal reasoning, whether dealing with judicial decisions, legislation, or regulations, seeks to reconcile particular facts with general rules. It follows a clear pattern, that is, problem solving by example, from case to case. But what is its impact? To what extent does the legal system's conduct match its rhetoric about rule-based decision making? These questions, though not new, are important because, as Levi (1949, p. 1–9) suggests below, they help legitimize the way legal institutions address social problems. His analysis is both descriptive and critical. It shows the process of legal reasoning and the firm grasp it has on legal decision making, yet alerts us to the shortcomings as well.

AN INTRODUCTION TO LEGAL REASONING*

> It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack. In an important sense, legal rules are never clear, and if a rule had to be clear before it could be imposed, society would be impossible.

---

* Edward Levi, An Introduction to Legal Reasoning, pp. 1–9. University of Chicago: Chicago, IL. Reprinted by permission.

The mechanism accepts the differences of view and ambiguities of words. It provides for the participation of the community in resolving the ambiguity by providing a forum for the discussion of policy in the gap of ambiguity. On serious controversial questions, rules make it possible to take the first step in the direction of what otherwise would be forbidden ends. The mechanism is indispensable to peace in a community.

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This is a method of reasoning necessary for the law, but it has characteristics which under other circumstances might be considered imperfections.

These characteristics become evident if the legal process is approached as though it were a method of applying general rules of law to diverse facts—in short, as though the doctrine of precedent meant that general rules, once properly determined, remained unchanged, and then were applied, albeit imperfectly, in later cases. If this were the doctrine, it would be disturbing to find that the rules change from case to case and are remade with each case. Yet this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step on the legal process.

The determination of similarity or difference is the function of each judge. Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference. It is not alone that he could not see the law through the eyes of another, for he could at least try to do so. It is rather that the doctrine of dictum forces him to make his own decision.

Thus it cannot be said that the legal process is the application of known rules to diverse facts. It is, however, a system of rules; the rules are discovered in the process of determining similarity or difference. But if attention is directed toward the finding of similarity or difference, other peculiarities appear. The problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings the general rule into play.

Therefore, it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them. But this kind of reasoning is open to the charge that it is classifying things as equal when they are somewhat different, justifying the classification by rules made up as the reasoning or classification proceeds. In a sense all reasoning is of this type, but there is an additional requirement that compels the legal process to be this way. Not only do new situations arise, but in addition, people's desires change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. And this is true even where legislation or a constitution is involved. The words used by the legislature or the constitutional convention must come to have new meaning. Furthermore, agreement on any other basis would be impossible. In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.

But attention must be given to the process. An argument as to whether the law is certain, unchanging, and expressed in rules, or uncertain, changing, and only a technique for deciding specific cases misses the point. It is both. Similarly it is not helpful to dispose of the process as a wonderful mystery possibly reflecting a higher law, by which the law can remain the same and yet change. The law forum is the most explicit demonstration of the mechanism required for a moving classification system. The folklore of law may choose to ignore the imperfections in legal reasoning, but the law forum itself has taken care of them.

What does the law forum require? It requires the presentation of competing examples. The forum protects the parties and the community by making sure that the competing analogies are before the

court. The rule which will be created arises out of a process in which if different things are treated as similar, at least the differences have been urged. In this sense the parties as well as the court participate in the law making. In this sense, also, lawyers represent more than the litigants.

Reasoning by example in the law is a key to many things. It indicates in part the hold which the law process has over the litigants. They have participated in the law making. They are bound by something they helped to make. Moreover, the examples or analogies urged by the parties bring into the law the common ideas of the society. The ideas have their day in court, and they will have their day again. This is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot be completely so. Moreover, the hearing in a sense compels at lease vicarious participation by all the citizens, for the rule which is made, even though ambiguous, will be law to them.

Reasoning by example shows the decisive role that the common ideas of the society and the distinctions made by experts can have in shaping the law. The movement of common or expert concepts into the law may be followed. The concept is suggested in arguing difference or similarity in a brief, but it wins no approval from the court. The idea achieves standing in the society. It is suggested again to a court. The court this time reinterprets the prior case and in doing so adopts the reflected idea. In subsequent cases, the idea is given further definition and is tied to other ideas which have been accepted by courts. It is now no longer the idea which was commonly held in the society. It becomes modified in subsequent cases. Ideas first rejected but which gradually have won acceptance now push what has become a legal category out of the system or convert it into something which may be its opposite. The process is one in which the ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions. Erroneous ideas, of course, have played an enormous part in shaping the law. An idea, adopted by a court, is in a superior position to influence conduct and opinion in the community; judges, after all, are rulers. And the adoption of an idea by a court reflects the power structure in the community. But reasoning by example will operate to change the idea after it has been adopted.

Moreover, reasoning by example brings into focus important similarity and difference in the interpretation of case law, statutes, and the constitution of a nation. There is a striking similarity. It is only folklore which holds that a statute if clearly written can be completely

unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as in case law. Hence reasoning by example operates with all three, there are important differences. What a court says is dictum, but what a legislature says is a statute. The reference of the reasoning changes. Interpretation of intention when dealing with a statute is the way of describing the attempt to compare cases on the basis of the standard thought to be common at the time the legislation was passed. While this is the attempt, it may not initially accomplish any different result than if the standard of the judge had been explicitly used. Nevertheless, the remarks of the judge are directed toward describing a category set up by the legislature. These remarks are different from ordinary dicta. They set the course of the statute, and later reasoning in subsequent cases is tied to them. As a consequence, courts are less free in applying a statute than in dealing with case law. The current rationale for this is the notion that the legislature has acquiesced by legislative silence in the prior, even though erroneous, interpretation of the court. But the change in reasoning where legislation is concerned seems an inevitable consequence of the division of function between court and legislature, and, paradoxically, a recognition also of the impossibility of determining legislative intent. The impairment of a court's freedom in interpreting legislation is reflected in frequent appeals to the constitution as a necessary justification for overruling cases even though these cases are thought to have interpreted the legislation erroneously.

Under the United States experience, contrary to what has sometimes been believed when a written constitution of a nation is involved, the court has greater freedom than it has with the application of a statute or case law. In case law, when a judge determines what the controlling similarity between the present and prior case is, the case is decided. The judge does not feel free to ignore the results of a great number of cases which he cannot explain under a remade rule. And in interpreting legislation, when the prior interpretation, even though erroneous, is determined after a comparison of facts to cover the case, the case is decided. But this is not true with a constitution. The constitution sets up the conflicting ideals of the community in certain ambiguous categories. These categories bring along with them satellite concepts covering the areas of ambiguity. It is with a set of these satellite concepts that reasoning by example must work. But no satellite concept, no matter how well developed, can prevent the court from shifting its course, not only by realigning cases which impose certain restrictions, but by going beyond realignment back to

the overall ambiguous category written into the document. The constitution, in other words, permits the court to be inconsistent. The freedom is concealed either as a search for the intention of the framers or as a proper understanding of a living instrument, and sometimes as both. But this does not mean that reasoning by example has any less validity in this field.

It may be objected that this analysis of legal reasoning places too much emphasis on the comparison of cases and too little on the legal concepts which are created. It is true that similarity is seen in terms of a word, and inability to find a ready word to express similarity or difference may prevent change in the law. The words which have been found in the past are much spoken of, have acquired a dignity of their own, and to a considerable measure control results. As Judge Cardozo suggested in speaking of metaphors, the word starts out to free thought and ends by enslaving it. The movement of concepts into and out of the law makes the point. If the society has begun to see certain significant similarities or differences, the comparison emerges with a word. When the word is finally accepted, it becomes a legal concept. Its meaning continues to change. But the comparison is not only between the instances which have been included under it and the actual case at hand, but also in terms of hypothetical instances which the word by itself suggests. Thus the connotation of the word for a time has a limiting influence—so much so that the reasoning may even appear to be simply deductive.

But it is not simply deductive. In the long run a circular motion can be seen. The first stage is the creation of the legal concept which is built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an effect. The concept sounds like another, and the jump to the second is made. The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.

The process is likely to make judges and lawyers uncomfortable. It runs contrary to the pretense of the system. It seems inevitable, therefore, that as matters of kind vanish into matters of degree and then entirely new meanings turn up, there will be the attempt to escape to some overall rule which can be said to have always operated and which will make the reasoning look deductive. The rule will be useless. It will have to operate on a level where it has no meaning. Even

when lip service is paid to it, care will be taken to say that it may be too wide or too narrow but that nevertheless it is a good rule. The statement of the rule is roughly analogous to the appeal to the meaning of a statute or of a constitution, but it has less of a function to perform. It is window dressing. Yet it can be very misleading. Particularly when a concept has broken down and reasoning by example is about to build another, textbook writers, well aware of the unreal aspect of old rules, will announce new ones, equally ambiguous and meaningless, forgetting that the legal process does not work with the rule but on a much lower level.

THE ANALYSIS OF A JUDICIAL OPINION

The Structure of a Judicial Opinion

A judicial opinion must be analyzed to discover the court's rule selection and its accompanying rationale. Every opinion specifies the parties, the facts, the issues before the court, the lower court decisions, the court's decision or holding, and the court's reasoning for its decision.

Reading Judicial Opinions

Aside from the structural elements of an opinion, there are considerations about its substance. What is the court trying to say? Why? With what effect? The answers emerge from an understanding of, among other things, the dispute, the parties and their claims, the dispute's procedural route, the facts, and the court's judgment on them.

"Briefing" is a technique designed to break down an opinion into its component parts and is the basis for fully grasping the decision. The technique relies on a series of questions that may be used to capture the opinion's essential elements.

- Who are the parties in the dispute? What does each want?
- On what legal theory does each base its claims?
- How was the dispute handled in lower courts? Who appealed and why?
- What are the facts, as the court describes them?
- What is the legal issue the court is being asked to decide?

- What is the court's decision? (Also known as the *holding,* which is sometimes designated by a phrase such as "the court holds that . . .") Essentially, to "hold" is to "declare the conclusion of law reached by the court as to the legal effects of the facts decided" (Black, 1968).
- What reasons does the court offer to support its decision? What are its sources of authority (precedents)?
- How does the dissenting (or concurring) opinion, if there is one, depart from the majority?
- To what extent does the decision follow from the cited precedents? How does the court discuss precedents? Does it persuasively discuss its treatment of precedents?
- What guidance will the opinion offer future courts? How will this decision be treated as a precedent in the future?

Each of the above questions can be answered after reading any opinion. The goal is to understand its meaning, scope, and impact. The latter questions will be particularly helpful in assessing the opinion in relation to divergent rule interpretations and for reconciling an opinion with cases that precede or follow it.

THE SYNTHESIS OF CASE LAW

Welfare Reform: Whence It Came (1968–1971)

To know the law in a particular field, you must appreciate how all the related cases are put together. This task is accomplished by "synthesizing" the cases: looking for the strands that tie the cases together and understanding the factors that contribute to their growth and change.

The following five cases are often considered the pillars of welfare reform. They were handed down by the United States Supreme Court between 1968 and 1972 and constitute a framework of rights for welfare recipients. Specifically, the cases lay out principles that articulate what welfare recipients can expect: there is no "right" to welfare; no residency requirements or morality tests for receipt of welfare; and agencies may not exercise unlimited discretion but may institute certain procedures to aid their attempts to administer

welfare programs. The decisions are good law and have been so for over two decades. Their existence will be affected, however, by the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Review the previous section on reading judicial opinions and "brief" each case. Analyze each case individually and in relation to those that precede it. Moreover, consider Levi's discussion about legal rules, their development, and the conditions under which they change.

KING v. SMITH, 392 U.S. 309 (1968)
UNITED STATES SUPREME COURT

Mr. Chief Justice Warren delivered the opinion of the Court.

Alabama, together with every other State, Puerto Rico, the Virgin Islands, the District of Columbia, and Guam, participates in the Federal Government's Aid to Families With Dependent Children (AFDC) program, which was established by the Social Security Act of 1935. 49 Stat. 620, as amended, 42 U.S.C. 301-1394. This appeal presents the question whether a regulation of the Alabama Department of Pensions and Security, employed in that Department's administration of the State's federally funded AFDC program, is consistent with Subchapter IV of the Social Security Act, 42 U.S.C. 601-609, and with the Equal Protection Clause of the Fourteenth Amendment. At issue is the validity of Alabama's so-called "substitute father" regulation which denies AFDC payments to the children of a mother who "cohabits" in or outside her home with any single or married able-bodied man. Appellees brought this class action against appellants, officers, and members of the Alabama Board of Pensions and Security, in the United States District Court for the Middle District of Alabama, under 42 U.S.C. 1983, seeking declaratory and injunctive relief. A properly convened three-judge District Court correctly adjudicated the merits of the controversy without requiring appellees to exhaust state administrative remedies, and found the regulation to be inconsistent with the Social Security Act and the Equal Protection Clause. We noted probable jurisdiction, and, for reasons which will appear, we affirm without reaching the constitutional issue.

The AFDC program is one of three major categorical public assistance programs established by the Social Security Act of 1935. See U.S. Advisory Commission Report on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance 57 (1964) (hereafter cited as Advisory Commission Report). The category

singled out for welfare assistance by AFDC is the "dependent child," who is defined in 406 of the Act, 49 Stat. 629, as amended, 42 U.S.C. 606 (a) (1964 ed., Supp. II), as an age-qualified "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" any one of several listed relatives. Under this provision, and, insofar as relevant here, aid can be granted only if "a parent" of the needy child is continually absent from the home. Alabama considers a man who qualifies as a "substitute father" under its regulation to be a nonabsent parent within the federal statute. The State therefore denies aid to an otherwise eligible needy child on the basis that his substitute parent is not absent from the home.

Under the Alabama regulation, an "able-bodied man, married or single, is considered a substitute father of all the children of the applicant . . . mother" in three different situations: (1) if "he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation"; or (2) if "he visits [the home] frequently for the purpose of cohabiting with the child's natural or adoptive mother"; or (3) if "he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere." Whether the substitute father is actually the father of the children is irrelevant. It is also irrelevant whether he is legally obligated to support the children, and whether he does in fact contribute to their support. What is determinative is simply whether he "cohabits" with the mother.

The testimony below by officials responsible for the administration of Alabama's AFDC program establishes that "cohabitation," as used in the regulation, means essentially that the man and woman have "frequent" or "continuing" sexual relations. With regard to how frequent or continual these relations must be, the testimony is conflicting. One state official testified that the regulation applied only if the parties had sex at least once a week; another thought once every three months would suffice; and still another believed once every six months sufficient. The regulation itself provides that pregnancy or a baby under six months of age is prima facie evidence of a substitute father.

The AFDC program is based on a scheme of cooperative federalism. . . . It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). . . . The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW. . . . One of the statutory requirements is that "aid to families with

dependent children . . . shall be furnished with reasonable promptness to all eligible individuals . . . ." 64 Stat. 550, as amended, 42 U.S.C. 602 (a) (9) (1964 ed., Supp. II). As noted above, 406 (a) of the Act defines a "dependent child" as one who has been deprived of "parental" support or care by reason of the death, continued absence, or incapacity of a "parent." 42 U.S.C. 606 (a) (1964 ed., Supp. II). In combination, these two provisions of the Act clearly require participating States to furnish aid to families with children who have a parent absent from the home, if such families are in other respects eligible.

The State argues that its substitute father regulation simply defines who is a nonabsent "parent" under 406 (a) of the Social Security Act. 42 U.S.C. 606 (a) (1964 ed., Supp. II). The State submits that the regulation is a legitimate way of allocating its limited resources available for AFDC assistance, in that it reduces the caseload of its social workers and provides increased benefits to those still eligible for assistance. Two state interests are asserted in support of the allocation of AFDC assistance achieved by the regulation: first, it discourages illicit sexual relationships and illegitimate births; second, it puts families in which there is an informal "marital" relationship on a par with those in which there is an ordinary marital relationship, because families of the latter sort are not eligible for AFDC assistance.

We think it well to note at the outset what is not involved in this case. There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program. . . . Further, there is no question that regular and actual contributions to a needy child, including contributions from the kind of person Alabama calls a substitute father, can be taken into account in determining whether the child is needy. In other words, if by reason of such a man's contribution, the child is not in financial need, the child would be ineligible for AFDC assistance without regard to the substitute father rule. The appellees here, however, meet Alabama's need requirements; their alleged substitute father makes no contribution to their support; and they have been denied assistance solely on the basis of the substitute father regulation. Further, the regulation itself is unrelated to need, because the actual financial situation of the family is irrelevant in determining the existence of a substitute father.

Also not involved in this case is the question of Alabama's general power to deal with conduct it regards as immoral and with the problem of illegitimacy. This appeal raises only the question whether the State may deal with these problems in the manner that it has here—by flatly denying AFDC assistance to otherwise eligible dependent children.

Alabama's argument based on its interests in discouraging immorality and illegitimacy would have been quite relevant at one time in the history

of the AFDC program. However, subsequent developments clearly establish that these state interests are not presently legitimate justifications for AFDC disqualification. Insofar as this or any similar regulation is based on the State's asserted interest in discouraging illicit sexual behavior and illegitimacy, it plainly conflicts with federal law and policy.

A significant characteristic of public welfare programs during the last half of the 19th century in this country was their preference for the "worthy" poor. Some poor persons were thought worthy of public assistance, and others were thought unworthy because of their supposed incapacity for "moral regeneration." . . . This worthy-person concept characterized the mothers' pension welfare programs, which were the precursors of AFDC. . . . Benefits under the mothers' pension programs, accordingly, were customarily restricted to widows who were considered morally fit.

In this social context it is not surprising that both the House and Senate Committee Reports on the Social Security Act of 1935 indicate that States participating in AFDC were free to impose eligibility requirements relating to the "moral character" of applicants. H. R. Rep. No. 615, 74th Cong., 1st Sess., 24 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 36 (1935). See also 79 Cong. Rec. 5679 (statement by Representative Jenkins) (1935). During the following years, many state AFDC plans included provisions making ineligible for assistance dependent children not living in "suitable homes." As applied, these suitable home provisions frequently disqualified children on the basis of the alleged immoral behavior of their mothers.

In the 1940s, suitable home provisions came under increasing attack. Critics argued, for example, that such disqualification provisions undermined a mother's confidence and authority, thereby promoting continued dependency; that they forced destitute mothers into increased immorality as a means of earning money; that they were habitually used to disguise systematic racial discrimination; and that they senselessly punished impoverished children on the basis of their mothers' behavior, while inconsistently permitting them to remain in the allegedly unsuitable homes. In 1945, the predecessor of HEW produced a state letter arguing against suitable home provisions and recommending their abolition. Although 15 States abolished their provisions during the following decade, numerous other States retained them.

In the 1950s, matters became further complicated by pressures in numerous States to disqualify illegitimate children from AFDC assistance. Attempts were made in at least 18 States to enact laws excluding children on the basis of their own or their siblings' birth status. All but three attempts failed to pass the state legislatures, and two of the three successful bills were vetoed by the governors of the States involved. In 1960, the federal agency strongly disapproved of illegitimacy disqualifications.

Nonetheless, in 1960, Louisiana enacted legislation requiring, as a condition precedent for AFDC eligibility, that the home of a dependent child be "suitable," and specifying that any home in which an illegitimate child had been born subsequent to the receipt of public assistance would be considered unsuitable. Louisiana Acts, No. 251 (1960). In the summer of 1960, approximately 23,000 children were dropped from Louisiana's AFDC rolls. Bell, supra, at 137. In disapproving this legislation, then Secretary of Health, Education, and Welfare Flemming issued what is now known as the Flemming Ruling, stating that as of July 1, 1961,

> A State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.

Congress quickly approved the Flemming Ruling, while extending until September 1, 1962, the time for state compliance. 75 Stat. 77, as amended 42 U.S.C. 604 (b). At the same time, Congress acted to implement the ruling by providing, on a temporary basis, that dependent children could receive AFDC assistance if they were placed in foster homes after a court determination that their former homes were, as the Senate Report stated, "unsuitable because of the immoral or negligent behavior of the parent." S. Rep. No. 165, 87th Cong., 1st Sess., 6 (1961). See 75 Stat. 76, as amended, 42 U.S.C. 608.21

In 1962, Congress made permanent the provision for AFDC assistance to children placed in foster homes and extended such coverage to include children placed in childcare institutions. 76 Stat. 180, 185, 193, 196, 207, 42 U.S.C. 608. See S. Rep. No. 1589, 87th Cong., 2d Sess., (1962). At the same time, Congress modified the Flemming Ruling by amending 404 (b) of the Act. As amended, the statute permits States to disqualify from AFDC aid children who live in unsuitable homes, provided they are granted other "adequate care and assistance." 76 Stat. 189, 42 U.S.C. 604 (b). See S. Rep. No. 1589, 87th Cong., 2d Sess., 14 (1962).

Thus, under the 1961 and 1962 amendments to the Social Security Act, the States are permitted to remove a child from a home that is judicially determined to be so unsuitable as to "be contrary to the welfare of such child." 42 U.S.C. 608 (a) (1). The States are also permitted to terminate AFDC assistance to a child living in an unsuitable home, if they provide other adequate care and assistance for the child under a general welfare program. 42 U.S.C. 604 (b). See S. Rep. No. 1589, 87th Cong., 2d Sess., 14

(1962). The statutory approval of the Flemming Ruling, however, precludes the States from otherwise denying AFDC assistance to dependent children on the basis of their mothers' alleged immorality or to discourage illegitimate births.

In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC. In light of the Flemming Ruling and the 1961, 1962, and 1968 amendments to the Social Security Act, it is simply inconceivable, as HEW has recognized, that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children. Alabama may deal with these problems by several different methods under the Social Security Act. But the method it has chosen plainly conflicts with the Act.

Alabama's second justification for its substitute father regulation is that "there is a public interest in a State not undertaking the payment of these funds to families who because of their living arrangements would be in the same situation as if the parents were married, except for the marriage." In other words, the State argues that since in Alabama the needy children of married couples are not eligible for AFDC aid so long as their father is in the home, it is only fair that children of a mother who cohabits with a man not her husband and not their father be treated similarly. The difficulty with this argument is that it fails to take account of the circumstance that children of fathers living in the home are in a very different position from children of mothers who cohabit with men not their fathers: the child's father has a legal duty to support him, while the unrelated substitute father, at least in Alabama, does not. We believe Congress intended the term "parent" in 406 (a) of the Act, 42 U.S.C. 606 (a), to include only those persons with a legal duty of support.

The Social Security Act of 1935 was part of a broad legislative program to counteract the depression. Congress was deeply concerned with the dire straits in which all needy children in the Nation then found themselves. In agreement with the President's Committee on Economic Security, the House Committee Report declared, "the core of any social plan must be the child." H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). The AFDC program, however, was not designed to aid all needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that "the work relief program and . . . the revival of private industry" would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: "Many of the children included in relief families present no other problem than that of

providing work for the breadwinner of the family." Ibid. Implicit in this statement is the assumption that children would in fact be supported by the family "breadwinner."

The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as "[o]ne clearly distinguishable group of children." H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). This group was composed of children in families without a "breadwinner," "wage earner," or "father," as the repeated use of these terms throughout the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word "parent." 49 Stat. 629, as amended, 42 U.S.C. 606 (a). A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent.

The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child. The State correctly observes that the fact that the man in question does not actually support the child cannot be determinative, because a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance. On the question whether the man must be legally obligated to provide support before he can be regarded as the child's parent, the State has no such cogent answer. We think the answer is quite clear: Congress must have meant by the term "parent" an individual who owed to the child a state-imposed legal duty of support.

It is clear, as we have noted, that Congress expected "breadwinners" who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was legally obligated to support his children. We think it beyond reason to believe that Congress would have considered that providing employment for the paramour of a deserted mother would benefit the mother's children whom he was not obligated to support.

By a parity of reasoning, we think that Congress must have intended that the children in such a situation remain eligible for AFDC assistance notwithstanding their mother's impropriety. AFDC was intended to provide economic security for children whom Congress could not reasonably expect would be provided for by simply securing employment for family breadwinners. We think it apparent that neither Congress nor any reasonable person would believe that providing employment for some man who is

under no legal duty to support a child would in any way provide meaningful economic security for that child.

A contrary view would require us to assume that Congress, at the same time that it intended to provide programs for the economic security and protection of all children, also intended arbitrarily to leave one class of destitute children entirely without meaningful protection. Children who are told, as Alabama has told these appellees, to look for their food to a man who is not in the least obliged to support them are without meaningful protection. Such an interpretation of congressional intent would be most unreasonable, and we decline to adopt it.

Our interpretation of the term "parent" in 406 (a) is strongly supported by the way the term is used in other sections of the Act. Section 402 (a) (10) requires that, effective July 1, 1952, a state plan must:

> provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent." 64 Stat. 550, 42 U.S.C. 602 (a) (10).

The "parent" whom this provision requires to be reported to law enforcement officials is surely the same "parent" whose desertion makes a child eligible for AFDC assistance in the first place. And Congress obviously did not intend that a socalled "parent" who has no legal duties of support be referred to law enforcement officials (as Alabama's own welfare regulations recognize), for the very purpose of such referrals is to institute nonsupport proceedings. Whatever doubt there might have been over this proposition has been completely dispelled by the 1968 amendments to the Social Security Act, which provide that the States must develop a program:

> (i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and
>
> (ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support) . . . ." 402 (a), as amended by 201 (a) (1) (C), 81 Stat. 878, 42 U.S.C. 602 (a) (17) (1964 ed., Supp. III).

The pattern of this legislation could not be clearer. Every effort is to be made to locate and secure support payments from persons legally obligated to support a deserted child. The underlying policy and consistency in statutory interpretation dictate that the "parent" referred to in these statutory provisions is the same parent as that in 406 (a). The provisions seek to secure parental support in lieu of AFDC support for dependent children. Such parental support can be secured only where the parent is under a

state-imposed legal duty to support the child. Children with alleged substitute parents who owe them no duty of support are entirely unprotected by these provisions. We think that these provisions corroborate the intent of Congress that the only kind of "parent," under 406 (a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him. Consequently, if Alabama believes it necessary that it be able to disqualify a child on the basis of a man who is not under such a duty of support, its arguments should be addressed to Congress and not this Court.

Alabama's substitute father regulation, as written and as applied in this case, requires the disqualification of otherwise eligible dependent children if their mother "cohabits" with a man who is not obligated by Alabama law to support the children. The regulation is therefore invalid because it defines "parent" in a manner that is inconsistent with 406 (a) of the Social Security Act. 42 U.S.C. 606 (a). In denying AFDC assistance to appellees on the basis of this invalid regulation, Alabama has breached its federally imposed obligation to furnish "aid to families with dependent children . . . with reasonable promptness to all eligible individuals. . . ." 42 U.S.C. 602 (a) (9) (1964 ed., Supp. II).

We think it well, in concluding, to emphasize that no legitimate interest of the State of Alabama is defeated by the decision we announce today. The State's interest in discouraging illicit sexual behavior and illegitimacy may be protected by other means, subject to constitutional limitations, including state participation in AFDC rehabilitative programs. Its interest in economically allocating its limited AFDC resources may be protected by its undisputed power to set the level of benefits and the standard of need, and by its taking into account in determining whether a child is needy all actual and regular contributions to his support.

All responsible governmental agencies in the Nation today recognize the enormity and pervasiveness of social ills caused by poverty. The causes of and cures for poverty are currently the subject of much debate. We hold today only that Congress has made at least this one determination: that destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father. Affirmed.

SHAPIRO v. THOMPSON, 394 U.S. 618 (1969)
UNITED STATES SUPREME COURT

Mr. Justice Brennan delivered the opinion of the Court.

. . . [This] is an appeal from a decision . . . holding unconstitutional a

State . . . statutory provision which denies welfare assistance to residents of the State . . . who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance. We affirm. . . . [Note: Pennsylvania and the District of Columbia cases, based on similar provisions, were heard with Connecticut's, but the decision below addresses only the Connecticut legislation. The Court found the state or district statutes unconstitutional in all cases.]

I.

[T]he Connecticut Welfare Department invoked 172d of the Connecticut General Statutes to deny the application of appellee Vivian Marie Thompson for assistance under the program for Aid to Families with Dependent Children (AFDC). She was a 19-year-old unwed mother of one child and pregnant with her second child when she changed her residence in June 1966 from Dorchester, Massachusetts, to Hartford, Connecticut, to live with her mother, a Hartford resident. She moved to her own apartment in Hartford in August 1966, when her mother was no longer able to support her and her infant son. Because of her pregnancy, she was unable to work or enter a work training program. Her application for AFDC assistance, filed in August, was denied in November solely on the ground that, as required by 172d, she had not lived in the State for a year before her application was filed. She brought this action in the District Court for the District of Connecticut where a three-judge court, one judge dissenting, declared 172d unconstitutional. 270 F.Supp. 331 (1967). The majority held that the waiting-period requirement is unconstitutional because it "has a chilling effect on the right to travel." *Id.*, at 336. The majority also held that the provision was a violation of the Equal Protection Clause of the Fourteenth Amendment because the denial of relief to those residents in the State for less than a year is not based on any permissible purpose but is solely designed, as "Connecticut states quite frankly," "to protect its fisc by discouraging entry of those who come needing relief." *Id.*, at 336337. We noted probable jurisdiction.

II.

There is no dispute that the effect of the waiting-period requirement in [this] case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may

depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life. . . . [T]he District Court found that appellees met the test for residence in their jurisdictions, as well as all other eligibility requirements except the requirement of residence for a full year prior to their applications. On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.

III.

Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare assistance during their first year of residence in a State are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from entering the jurisdiction by denying them welfare benefits during the first year, state programs to assist longtime residents will not be impaired by a substantial influx of indigent newcomers.

There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions. In the Congress, sponsors of federal legislation to eliminate all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits. See, e. g., Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 309-310, 644 (1962); Hearings on H. R. 6000 before the Senate Committee on Finance, 81st Cong., 2d Sess., 324-327 (1950). The sponsor of the Connecticut requirement said in its support: "I doubt that Connecticut can and should continue to allow unlimited migration into the state on the basis of offering instant money and permanent income to all who can make their way to the state regardless of their ability to contribute to the economy." H. B. 82, Connecticut General Assembly House Proceedings, February Special Session, 1965, Vol. II, pt. 7, p. 3504. . . .

We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without

the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute. But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the *Passenger Cases,* 7 How. 283, 492 (1849):

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as Mr. Justice Stewart said for the Court in *United States v. Guest:*

> The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.". . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

Thus, the purpose of deterring the immigration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *United States v. Jackson* (1968).

Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation,

therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. If the argument is based on contributions made in the past by the long-term residents, there is some question, as a factual matter, whether this argument is applicable in Pennsylvania where the record suggests that some 40% of those denied public assistance because of the waiting period had lengthy prior residence in the State. But we need not rest on the particular facts of these cases. Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

In sum, neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.

IV.

Appellants next advance as justification certain administrative and related governmental objectives allegedly served by the waiting-period requirement. They argue that the requirement (1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages early entry of new residents into the labor force.

At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley v. Natural Carbonic Gas Co.* (1911), *Flemming v. Nestor* (1960), *McGowan v. Maryland* (1961). The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. Cf. *Skinner v. Oklahoma* (1942), *Korematsu v. United States* (1944), *Bates v. Little Rock* (1960), *Sherbert v. Verner* (1963).

The argument that the waiting-period requirement facilitates budget predictability is wholly unfounded. The records in all three cases are utterly devoid of evidence that either State or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. None of the appellants takes a census of new residents or collects any other data that would reveal the number of newcomers in the State less than a year. Nor are new residents required to give advance notice of their need for welfare assistance. Thus, the welfare authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance. In these circumstances, there is simply no basis for the claim that the one-year waiting requirement serves the purpose of making the welfare budget more predictable. In Connecticut and Pennsylvania the irrelevance of the one-year requirement to budgetary planning is further underscored by the fact that temporary, partial assistance is given to some new residents and full assistance is given to other new residents under reciprocal agreements. Finally, the claim that a one-year waiting requirement is used for planning purposes is plainly belied by the fact that the requirement is not also imposed on applicants who are long-term residents, the group that receives the bulk of welfare payments. In short, the States rely on methods other than the one-year requirement to make budget estimates. . . .

The argument that the waiting period serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny. The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance under these three statutes, and the facts relevant to the determination of each are directly examined by the welfare authorities. Before granting an application, the welfare authorities investigate the applicant's employment, housing, and family situation and in the course of the inquiry necessarily learn the facts upon which to determine whether the applicant is a resident.

Similarly, there is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits; for less drastic means are available, and are employed, to minimize that hazard. Of course, a State has a valid interest in preventing fraud by any applicant, whether a newcomer or a longtime resident. It is not denied, however, that the investigations now conducted entail inquiries into facts relevant to that subject. In addition, cooperation among state welfare departments is common. . . .

We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.

Accordingly, the judgment [is] affirmed.

GOLDBERG v. KELLY, 397 U.S. 254 (1970)
UNITED STATES SUPREME COURT

Mr. Justice Brennan delivered the opinion of the Court.

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program. Their

complaint alleged that the New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law. At the time the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid. However, the State and city adopted procedures for notice and hearing after the suits were brought, and the plaintiffs, appellees here, then challenged the constitutional adequacy of those procedures. * * *

Pursuant to subdivision (b), the New York City Department of Social Services promulgated Procedure No. 68-18. A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses. However, the letter does inform the recipient that he may request a post-termination "fair hearing." This is a proceeding before an independent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld. . . . A recipient whose aid is not restored by a "fair hearing" decision may have judicial review.

I.

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits. The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination "fair hearing" with the informal pre-termination review disposed of all due process claims. The court said: "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is

destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." *Kelly v. Wyman,* 294 F.Supp. 893, 899, 900 (1968). The court rejected the argument that the need to protect the public's tax revenues supplied the requisite "overwhelming consideration." "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance. . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." *Id.,* at 901. Although state officials were party defendants in the action, only the Commissioner of Social Services of the City of New York appealed. We noted probable jurisdiction, 394 U.S. 971 (1969), to decide important issues that have been the subject of disagreement. . . . We affirm.

Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. **Such benefits are a matter of STATUTORY ENTITLEMENT for persons qualified to receive them** [emphasis added]. [In a footnote, the Court says at this point: It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity."] Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that

> society today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long-term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L. J. 733 (1964).]

[The] termination [of these entitlements, such as public assistance] involves state action that adjudicates important rights. The constitutional challenge

cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro v. Thompson,* 394 U.S. 618, 627 n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner,* 374 U.S. 398 (1963); or to denial of a tax exemption, *Speiser v. Randall,* 357 U.S. 513 (1958); or to discharge from public employment, *Slochower v. Board of Higher Education,* 350 U.S. 551 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah v. Larche,* 363 U.S. 420, 440, 442 (1960).

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. n11 Cf. *Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1967). Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare

guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "the stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." 294 F.Supp., at 904-905.

II.

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear

in mind that the statutory "fair hearing" will provide the recipient with a full administrative review. Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Cf. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

. . . The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decision-maker by the caseworker has its own

deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . . Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama,* 287 U.S. 45, 68-69 (1932). We do **not** say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires [emphasis added]. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. . . . Affirmed.

[Justice Black dissented, objecting to the majority's engagement in what he deemed a legislative function and arguing that they gave the due process clause an overbroad reading simply because the majority believed the government's conduct unfair. Moreover, he believed that the majority's decision would lead to more rigid—not less rigid—eligibility procedures, a result that would be the opposite of what the majority intended. Finally, Black argued that inasmuch as the welfare state was a nascent experiment, the Court should not render a decision that would freeze into constitutional structure a determination best left to the legislature.]

WYMAN v. JAMES, 400 U.S. 309 (1971)
UNITED STATES SUPREME COURT

Mr. Justice Blackmun delivered the opinion of the Court.

This appeal presents the issue whether a beneficiary of the program for Aid to Families with Dependent Children (AFDC) may refuse a home visit by the caseworker without risking the termination of benefits.

The New York State and City social services commissioners appeal from a judgment and decree of a divided three-judge District Court holding invalid and unconstitutional in application § 134 of the New York Social Services Law, § 175 of the New York Policies Governing the Administration of Public Assistance, and §§ 351.10 and 351.21 of Title 18 of the New York

Code of Rules and Regulations, and granting injunctive relief. *James v. Goldberg,* 303 F.Supp. 935 (SDNY 1969). This Court noted probable jurisdiction but, by a divided vote, denied a requested stay. 397 U.S. 904. [Note: The legislation in question provides: "The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board . . . or required by the circumstances of the case, in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary. . . . The circumstances of a person receiving continued care shall be reinvestigated as frequently as the rules of the board or regulations of the department may require."]

The District Court majority held that a mother receiving AFDC relief may refuse, without forfeiting her right to that relief, the periodic home visit which the cited New York statutes and regulations prescribe as a condition for the continuance of assistance under the program. The beneficiary's thesis, and that of the District Court majority, is that home visitation is a search and, when not consented to or when not supported by a warrant based on probable cause, violates the beneficiary's Fourth and Fourteenth Amendment rights.

Judge McLean, in dissent [in the District Court decision below], thought it unrealistic to regard the home visit as a search; felt that the requirement of a search warrant to issue only upon a showing of probable cause would make the AFDC program "in effect another criminal statute" and would "introduce a hostile arm's length element into the relationship" between worker and mother, "a relationship which can be effective only when it is based upon mutual confidence and trust"; and concluded that the majority's holding struck "a damaging blow" to an important social welfare program. 303 F.Supp., at 946.

I.

. . . The pertinent facts . . . are not in dispute.

Plaintiff Barbara James is the mother of a son, Maurice, who was born in May 1967. They reside in New York City. Mrs. James first applied for AFDC assistance shortly before Maurice's birth. A caseworker made a visit to her apartment at that time without objection. The assistance was authorized.

Two years later, on May 8, 1969, a caseworker wrote Mrs. James that she would visit her home on May 14. Upon receipt of this advice, Mrs. James telephoned the worker that, although she was willing to supply information

"reasonable and relevant" to her need for public assistance, any discussion was not to take place at her home. The worker told Mrs. James that she was required by law to visit in her home and that refusal to permit the visit would result in the termination of assistance. Permission was still denied.

On May 13 the City Department of Social Services sent Mrs. James a notice of intent to discontinue assistance because of the visitation refusal. The notice advised the beneficiary of her right to a hearing before a review officer. The hearing was requested and was held on May 27. Mrs. James appeared with an attorney at that hearing. They continued to refuse permission for a worker to visit the James home, but again expressed willingness to cooperate and to permit visits elsewhere. The review officer ruled that the refusal was a proper ground for the termination of assistance. His written decision stated:

> The home visit which Mrs. James refuses to permit is for the purpose of determining if there are any changes in her situation that might affect her eligibility to continue to receive Public Assistance, or that might affect the amount of such assistance, and to see if there are any social services which the Department of Social Services can provide to the family.

A notice of termination issued on June 2.

Thereupon, without seeking a hearing at the state level, Mrs. James, individually and on behalf of Maurice, and purporting to act on behalf of all other persons similarly situated, instituted the present civil rights suit under 42 U. S. C. § 1983. She alleged the denial of rights guaranteed to her under the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Fourteenth Amendments, and under Subchapters IV and XVI of the Social Security Act and regulations issued thereunder. She further alleged that she and her son have no income, resources, or support other than the benefits received under the AFDC program. She asked for declaratory and injunctive relief. A temporary restraining order was issued on June 13, *James v. Goldberg*, 302 F.Supp. 478 (SDNY 1969), and the three-judge District Court was convened.

II.

The federal aspects of the AFDC program deserve mention. They are provided for in Subchapter IV, Part A, of the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U. S. C. §§ 601-610 (1964 ed. and Supp. V). Section 401 of the Act, 42 U. S. C. § 601 (1964 ed., Supp. V), specifies its purpose, namely, "encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent

children and the parents or relatives with whom they are living to help maintain and strengthen family life. . . ." Section 405, 42 U. S. C. § 605, provides that

> Whenever the State agency has reason to believe that any payments of aid . . . made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative . . . in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments . . . or in seeking the appointment of a guardian . . . or in the imposition of criminal or civil penalties. . . .

III.

When a case involves a home and some type of official intrusion into that home, as this case appears to do, an immediate and natural reaction is one of concern about Fourth Amendment rights and the protection which that Amendment is intended to afford. Its emphasis indeed is upon one of the most precious aspects of personal security in the home: "The right of the people to be secure in their persons, houses, papers, and effects. . . ." This Court has characterized that right as "basic to a free society." *Wolf v. Colorado,* 338 U.S. 25, 27 (1949); *Camara v. Municipal Court,* 387 U.S. 523, 528 (1967). And over the years the Court consistently has been most protective of the privacy of the dwelling. See, for example, *Boyd v. United States,* 116 U.S. 616, 626-630 (1886); *Mapp v. Ohio,* 367 U.S. 643 (1961); *Chimel v. California,* 395 U.S. 752 (1969); *Vale v. Louisiana,* 399 U.S. 30 (1970). . . .

IV.

This natural and quite proper protective attitude, however, is not a factor in this case, for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term. It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context. We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is

not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

V.

If however, we were to assume that a caseworker's home visit, before or subsequent to the beneficiary's initial qualification for benefits, somehow (perhaps because the average beneficiary might feel she is in no position to refuse consent to the visit), and despite its interview nature, does possess some of the characteristics of a search in the traditional sense, we nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness. It is **unreasonableness** which is the Fourth Amendment's standard [emphasis added]. *Terry v. Ohio,* 392 U.S. 1, 9 (1968); *Elkins v. United States,* 364 U.S. 206, 222 (1960)....

There are a number of factors that compel us to conclude that the home visit proposed for Mrs. James is not unreasonable: [emphasis added]

1. The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the child and, further, it is on the child who is dependent. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.
2. The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses. Surely it is not unreasonable, in the Fourth Amendment sense or in any other sense of that term, that the State have at its command a gentle means, of limited extent and of practical and considerate application, of achieving that assurance.
3. One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same. It might well expect more, because of the trust aspect of public funds, and the recipient, as well as the caseworker, has not only an interest but an obligation.

4. The emphasis of the New York statutes and regulations is upon the home, upon "close contact" with the beneficiary, upon restoring the aid recipient "to a condition of self-support," and upon the relief of his distress. The federal emphasis is no different. It is upon "assistance and rehabilitation," upon maintaining and strengthening family life, and upon "maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . ." 42 U. S. C. § 601 (1964 ed., Supp. V); *Dandridge v. Williams,* 397 U.S. 471, 479 (1970), . . . It requires cooperation from the state agency upon specified standards and in specified ways. And it is concerned about any possible exploitation of the child.
5. The home visit, it is true, is not required by federal statute or regulation. But it has been noted that the visit is "the heart of welfare administration"; that it affords "a personal, rehabilitative orientation, unlike that of most federal programs"; and that the "more pronounced service orientation" effected by Congress with the 1956 amendments to the Social Security Act "gave redoubled importance to the practice of home visiting." Note, Rehabilitation, Investigation and the Welfare Home Visit, 79 Yale L. J. 746, 748 (1970). The home visit is an established routine in States besides New York.
6. The means employed by the New York agency are significant. Mrs. James received written notice several days in advance of the intended home visit. The date was specified. Section 134-a of the New York Social Services Law, effective April 1, 1967 sets the tone. Privacy is emphasized. The applicant-recipient is made the primary source of information as to eligibility. Outside informational sources, other than public records, are to be consulted only with the beneficiary's consent. Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden. HEW Handbook of Public Assistance Administration, pt. IV, §§ 2200 (a) and 2300; 18 NYCRR §§ 351.1, 351.6, and 351.7. All this minimizes any "burden" upon the homeowner's right against unreasonable intrusion.
7. Mrs. James, in fact, on this record presents no specific complaint of any unreasonable intrusion of her home and nothing that supports an inference that the desired home visit had as its purpose the obtaining of information as to criminal activity. She complains of no proposed visitation at an awkward or retirement hour. She suggests no forcible entry. She refers to no snooping. She describes no impolite or reprehensible conduct of any kind. She alleges only, in general and nonspecific terms, that on previous visits and, on information and belief, on visitation at the home of other aid recipients, "questions

concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility." Paradoxically, this same complaint could be made of a conference held elsewhere than in the home, and yet this is what is sought by Mrs. James. The same complaint could be made of the census taker's questions. See Mr. Justice Marshall's opinion, as United States Circuit Judge, in *United States v. Rickenbacker*, 309 F.2d 462 (CA2 1962), cert. denied, 371 U.S. 962. What Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind.

8. We are not persuaded, as Mrs. James would have us be, that all information pertinent to the issue of eligibility can be obtained by the agency through an interview at a place other than the home, or, as the District Court majority suggested, by examining a lease or a birth certificate, or by periodic medical examinations, or by interviews with school personnel. 303 F.Supp., at 943. Although these secondary sources might be helpful, they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits, or of impending medical needs. And, of course, little children, such as Maurice James, are not yet registered in school.
9. The visit is not one by police or uniformed authority. It is made by a caseworker of some training whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility. As has already been stressed, the program concerns dependent children and the needy families of those children. It does not deal with crime or with the actual or suspected perpetrators of crime. The caseworker is not a sleuth but rather, we trust, is a friend to one in need.
10. The home visit is not a criminal investigation, does not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would join her, is not in aid of any criminal proceeding. If the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect. And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow, then, even assuming that the evidence discovered upon the home visitation is admissible, an issue upon which we express no opinion, that is a routine and expected fact of

life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.

11. The warrant procedure, which the plaintiff appears to claim to be so precious to her, even if civil in nature, is not without its seriously objectionable features in the welfare context. If a warrant could be obtained (the plaintiff affords us little help as to how it would be obtained), it presumably could be applied for ex parte, its execution would require no notice, it would justify entry by force, and its hours for execution would not be so limited as those prescribed for home visitation. The warrant necessarily would imply conduct either criminal or out of compliance with an asserted governing standard. Of course, the force behind the warrant argument, welcome to the one asserting it, is the fact that it would have to rest upon probable cause, and probable cause in the welfare context, as Mrs. James concedes, requires more than the mere need of the caseworker to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it. In this setting the warrant argument is out of place.

It seems to us that the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his "rights" in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So here Mrs. James has the "right" to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved.

VI.

. . . Mrs. James is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted. Her wishes in that respect are fully honored. We have not been told, and have not found, that her refusal is made a criminal act by any applicable New York or federal statute. The only consequence of her refusal is that the payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits. . . .

VII.

Our holding today does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances. The early morning mass raid upon homes of welfare recipients is not unknown. See *Parrish v. Civil Service Comm'n,* 66 Cal. 2d 260, 425 P. 2d 223 (1967); Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L. J. 1347 (1963). But that is not this case. Facts of that kind present another case for another day.

We therefore conclude that the home visitation as structured by the New York statutes and regulations is a reasonable administrative tool; that it serves a valid and proper administrative purpose for the dispensation of the AFDC program; that it is not an unwarranted invasion of personal privacy; and that it violates no right guaranteed by the Fourth Amendment.

Reversed and remanded with directions to enter a judgment of dismissal.

It is so ordered.

[Justices Douglas dissented, and would have affirmed the judgement below. Justices Marshall and Brennan also dissented, arguing that they would find a nonconsensual home visit to be in violation of the federal regulations. They also indicated they would reach the constitutional question, finding the home visit a search that, absent a warrant, was unreasonable.]

DANDRIDGE v. WILLIAMS, 397 U.S. 471 UNITED STATES SUPREME COURT (1970)

Mr. Justice Stewart delivered the opinion of the Court.

This case involves the validity of a method used by Maryland, in the administration of an aspect of its public welfare program, to reconcile the demands of its needy citizens with the finite resources available to meet those demands. Like every other State in the Union, Maryland participates in the Federal Aid to Families With Dependent Children (AFDC) program, 42 U. S. C. § 601 et seq. (1964 ed. and Supp. IV), which originated with the Social Security Act of 1935. Under this jointly financed program, a State computes the so-called "standard of need" of each eligible family unit within its borders. See generally *Rosado v. Wyman.* Some States provide that every family shall receive grants sufficient to meet fully the determined standard of need. Other States provide that each family unit shall receive a percentage of the determined need. Still others provide grants to most families in full accord with the ascertained standard of need, but impose an upper limit on the total amount of money any one family unit may receive. Maryland, through administrative adoption of a "maximum grant

regulation," has followed this last course. This suit was brought by several AFDC recipients to enjoin the application of the Maryland maximum grant regulation on the ground that it is in conflict with the Social Security Act of 1935 and with the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court convened pursuant to 28 U. S. C. § 2281, held that the Maryland regulation violates the Equal Protection Clause. 297 F.Supp. 450. This direct appeal followed, 28 U. S. C. § 1253, and we noted probable jurisdiction, 396 U.S. 811.

The operation of the Maryland welfare system is not complex. By statute the State participates in the AFDC program. It computes the standard of need for each eligible family based on the number of children in the family and the circumstances under which the family lives. In general, the standard of need increases with each additional person in the household, but the increments become proportionately smaller. The regulation here in issue imposes upon the grant that any single family may receive an upper limit of $250 per month in certain counties and Baltimore City, and of $240 per month elsewhere in the State. The appellees all have large families, so that their standards of need as computed by the State substantially exceed the maximum grants that they actually receive under the regulation. The appellees urged in the District Court that the maximum grant limitation operates to discriminate against them merely because of the size of their families, in violation of the Equal Protection Clause of the Fourteenth Amendment. They claimed further that the regulation is incompatible with the purpose of the Social Security Act of 1935, as well as in conflict with its explicit provisions.

In its original opinion the District Court held that the Maryland regulation does conflict with the federal statute, and also concluded that it violates the Fourteenth Amendment's equal protection guarantee. After reconsideration on motion, the court issued a new opinion resting its determination of the regulation's invalidity entirely on the constitutional ground. Both the statutory and constitutional issues have been fully briefed and argued here, and the judgment of the District Court must, of course, be affirmed if the Maryland regulation is in conflict with either the federal statute or the Constitution. We consider the statutory question first, because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander v. TVA*, 297 U.S. 288, 346-347 (Brandeis, J., concurring); *Rosenberg v. Fleuti*, 374 U.S. 449.

I.

The appellees contend that the maximum grant system is contrary to § 402 (a)(10) of the Social Security Act, as amended, which requires that a state plan shall

> provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.

The argument is that the state regulation denies benefits to the younger children in a large family. Thus, the appellees say, the regulation is in patent violation of the Act, since those younger children are just as "dependent" as their older siblings under the definition of "dependent child" fixed by federal law. See *King v. Smith,* 392 U.S. 309. Moreover, it is argued that the regulation, in limiting the amount of money any single household may receive, contravenes a basic purpose of the federal law by encouraging the parents of large families to "farm out" their children to relatives whose grants are not yet subject to the maximum limitation.

It cannot be gainsaid that the effect of the Maryland maximum grant provision is to reduce the per capita benefits to the children in the largest families. Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments. . . . It is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the family grant that is affected. Whether this per capita diminution is compatible with the statute is the question here. For the reasons that follow, we have concluded that the Maryland regulation is permissible under the federal law. * * *

Congress was itself cognizant of the limitations on state resources from the very outset of the federal welfare program. The first section of the Act, 42 U. S. C. § 601 (1964 ed., Supp. IV), provides that the Act is

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and 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. . . .

Thus the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds.

The very title of the program, the repeated references to families added in 1962, Pub. L. 87-543, § 104 (a)(3), 76 Stat. 185, and the words of the

preamble quoted above, show that Congress wished to help children through the family structure. The operation of the statute itself has this effect. From its inception the Act has defined "dependent child" in part by reference to the relatives with whom the child lives. When a "dependent child" is living with relatives, then "aid" also includes payments and medical care to those relatives, including the spouse of the child's parent. 42 U. S. C. § 606 (b) (1964 ed., Supp. IV). Thus, as the District Court noted, the amount of aid "is . . . computed by treating the relative, parent or spouse of parent, as the case may be, of the 'dependent child' as a part of the family unit." 297 F.Supp., at 455. Congress has been so desirous of keeping dependent children within a family that in the Social Security Amendments of 1967 it provided that aid could go to children whose need arose merely from their parents' unemployment, under federally determined standards, although the parent was not incapacitated. 42 U. S. C. § 607 (1964 ed., Supp. IV).

The States must respond to this federal statutory concern for preserving children in a family environment. Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family. We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments. The strong policy of the statute in favor of preserving family units does not prevent a State from sustaining as many families as it can, and providing the largest families somewhat less than their ascertained per capita standard of need. Nor does the maximum grant system necessitate the dissolution of family bonds. For even if a parent should be inclined to increase his per capita family income by sending a child away, the federal law requires that the child, to be eligible for AFDC payments, must live with one of several enumerated relatives. The kinship tie may be attenuated but it cannot be destroyed.

The appellees rely most heavily upon the statutory requirement that aid "shall be furnished with reasonable promptness to all eligible individuals." 42 U. S. C. § 602 (a)(10) (1964 ed., Supp. IV). But since the statute leaves the level of benefits within the judgment of the State, this language cannot mean that the "aid" furnished must equal the total of each individual's standard of need in every family group. Indeed the appellees do not deny that a scheme of proportional reductions for all families could be used that would result in no individual's receiving aid equal to his standard of need. As we have noted, the practical effect of the Maryland regulation is that all children, even in very large families, do receive some aid. We find nothing in 42 U. S. C. § 602 (a)(10) (1964 ed., Supp. IV) that requires more than

this. So long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated.

This is the view that has been taken by the Secretary of Health, Education, and Welfare (HEW), who is charged with the administration of the Social Security Act and the approval of state welfare plans. The parties have stipulated that the Secretary has, on numerous occasions, approved the Maryland welfare scheme, including its provision of maximum payments to any one family, a provision that has been in force in various forms since 1947. Moreover, a majority of the States pay less than their determined standard of need, and 20 of these States impose maximums on family grants of the kind here in issue. The Secretary has not disapproved any state plan because of its maximum grant provision. On the contrary, the Secretary has explicitly recognized state maximum grant systems.

Finally, Congress itself has acknowledged a full awareness of state maximum grant limitations. In the Amendments of 1967 Congress added to § 402 (a) a subsection, 23:

> [The State shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." 81 Stat. 898, 42 U. S. C. § 602 (a)(23) (1964 ed., Supp. IV).

This specific congressional recognition of the state maximum grant provisions is not, of course, an approval of any specific maximum. The structure of specific maximums Congress left to the States, and the validity of any such structure must meet constitutional tests. However, the above amendment does make clear that Congress fully recognized that the Act permits maximum grant regulations.

For all of these reasons, we conclude that the Maryland regulation is not prohibited by the Social Security Act.

II.

Although a State may adopt a maximum grant system in allocating its funds available for AFDC payments without violating the Act, it may not, of course, impose a regime of invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Maryland says that its maximum grant regulation is wholly free of any invidiously discriminatory purpose or effect, and that the regulation is rationally supportable on at least four entirely valid grounds. The regulation can be clearly justified, Maryland argues, in terms of legitimate state interests in encouraging

gainful employment, in maintaining an equitable balance in economic status as between welfare families and those supported by a wage-earner, in providing incentives for family planning, and in allocating available public funds in such a way as fully to meet the needs of the largest possible number of families. The District Court, while apparently recognizing the validity of at least some of these state concerns, nonetheless held that the regulation "is invalid on its face for overreaching," 297 F.Supp., at 468—that it violates the Equal Protection Clause "because it cuts too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply. . . ." 297 F.Supp., at 469.

. . . [T] he concept of "overreaching" has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. . . .

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426.

To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. See *Snell v. Wyman,* 281 F.Supp. 853, aff'd, 393 U.S. 323. It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. *Goesaert v. Cleary,* 335 U.S. 464; *Kotch v. Board of River Port Pilot Comm'rs,* 330 U.S. 552. See also *Flemming v. Nestor,* 363 U.S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

Under this long-established meaning of the Equal Protection Clause, it is clear that the Maryland maximum grant regulation is constitutionally

valid. We need not explore all the reasons that the State advances in justification of the regulation. It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor. By combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner. * * *

The judgment is reversed.

[Justice Douglas dissented, arguing that the regulation was inconsistent the terms and purposes of the Social Security Act was a sufficient basis for ruling, and he would not reach the equal protection issue. Justice Marshall also dissented, arguing, like Douglas, that the regulation was inconsistent with the Social Security Act, but he would reach the constitutional issue and would find that the regulation violated the equal protection clause.]

ISSUES FOR DISCUSSION

1. Differentiate between "holding" and "dicta" and consider the consequences for *stare decisis.*
2. What is the scope of *stare decisis?* Does the concept have meaning if it only requires a court to adhere to a holding that it thinks outmoded or unjust, or is there something more to it?
3. How is it possible that case law development enshrines both stability and flexibility?
4. What do the welfare reform cases stand for? Collectively, what measure of protection do they afford welfare recipients? Why are they still good law?

3

The Judicial Process Part Two: Introduction to Civil Procedure

A civil lawsuit begins with two disputing parties bringing their conflict to court for a resolution. Civil procedure structures how the dispute moves through a process that begins with a complaint and ends with a decision by a judge. In short, the civil process organizes how parties get to court, what happens once they get there, and what occurs after a decision is rendered.

How are lawsuits structured and what is the process by which they are resolved? We will explore this question through the lens of a case that challenged the residency requirements of California's welfare reform legislation, along with the complaint and an appellate brief associated with the case. When Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, they enabled states to structure two-tiered benefits system—one for long-term residents, another for so-called "newcomers." This chapter will discuss the case of Roe v. Anderson, *as it makes its way through the judicial hierarchy to the United States Supreme Court. The complaint for the case lays out the key features of the civil process, while the brief offers insight into the sorts of arguments that the Court will confront. The chapter ends with the Supreme Court final decision, which was renamed* Saenz v. Roe.

THE STRUCTURE OF A CIVIL LAWSUIT

Judicial decisions originate in a single dispute. The dispute travels a straightforward route procedurally; one party complains, the other responds, they proceed to trial and present evidence to support

their version of the truth, the judge announces a reasoned outcome, which may be appealed, and the decision becomes another rule of law in a long line of legal doctrine.

A full treatment of the civil process is beyond this text's scope, and no attempt will be made here to replicate all of that content. (Nor will attention be given to criminal procedure.)

The outline below, based roughly on facts of the *Roe v. Anderson* (1997) case, illustrates the requisite steps for bringing a civil suit. The lawsuit deals with the constitutionality of a California law regarding residency requirements for receipt of cash assistance. The state was emboldened by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which allowed similar restrictions.

FACTS

1. Jane Roe is impoverished and depends upon public assistance to feed, shelter, and clothe her family. She seeks to apply for subsistence benefits through the Temporary Assistance to Needy Families (TANF) program formerly known as Aid to Families with Dependent Children (AFDC) program. She resides in California, her native state. She moved to Oklahoma and has now returned to California with her husband to seek employment. She has recently moved to the state of California searching for employment and a better life for herself and her unborn child.
2. Under section 11450.03(a) of the California Welfare and Institutions Code, Jane Roe is denied standard California TANF benefits because she has not resided in California for 12 consecutive months immediately prior to applying for aid.
3. Because of the durational residency requirement, she can receive only the amount of TANF she could have received in her prior state of residence. Under the provision, Roe can receive $307, the maximum TANF grant in Oklahoma for a family of three, compared to the standard California benefit of $565 for a family of three.
4. Jane Roe alleges that the residency requirement violates her rights to equal protection, to travel, and to the privileges and immunities guaranteed under the United States Constitution.

5. Jane Roe alleges that because of the state's unconstitutional actions, she (and other persons in her situation) is denied sufficient subsistence income to maintain herself and her soon-to-be-born child in decency. As a result, she and her family are threatened with irreparable injury from homelessness, hunger, illness, and exposure to the elements.

PRE-TRIAL STAGE

1. Whom to sue?
   Jane Roe sues the department responsible for implementing or enforcing the statute in question.
2. On what legal theory to sue?
   On behalf of herself and other similarly situated California and out-of-state residents, Jane Roe seeks injunctive relief compelling defendants to cease implementing the durational residency requirement in Section 11450.03(a), and to cease denying full California TANF benefits to bona fide residents, based solely upon the duration of their residence in this state. She hopes to rely on *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322 (1969), in which a similar requirement was found impermissible, because it violated the equal protection clause of the 14th Amendment.
3. Where to bring her suit?
   As a California resident, Jane Roe brings suit in a federal District Court in that state. This court is said to have *jurisdiction* over the parties and the subject matter.
4. Jane Roe files a *complaint.*
   Jane Roe, through her attorney, will begin the suit by *serving a summons* and *complaint* on the defendant. The complaint is part of the *pleadings,* which are designed to identify the issues in the case and to specify all the facts necessary to state the plaintiff's cause of action or the defendant's *defense.* The Complaint is supplied in full in the next section.
5. The defendant *answers* the complaint.
   The defendant receives Roe's complaint, and it must answer to avoid a *default judgment* (an automatic "win"). The answer can be used in several ways: (1) to deny Roe's allegations; (2) to assert an *affirmative defense;* or (3) to serve a *motion to dismiss*

(there are other grounds for this motion, but this example will suffice for now.)

6. Roe's *reply* to defendant's answer.
   Roe will reply to defendant's answer if: (1) it contains a *counter claim;* (2) it asserts an affirmative defense; (3) it contains a motion to dismiss; or (4) the court orders Roe to reply.
7. The parties proceed to *discovery.*
   Discovery allows each side to obtain relevant information about the litigation. The activity saves time and costs and can narrow the precise issues on which both sides disagree. Discovery devices include, for example, written *interrogatories, depositions,* or physical or mental examinations of persons.
8. The parties attempt to settle before trial.
   Both sides determine whether it is in their interest to settle the dispute without trial. If they can't agree, they proceed to trial.

(The following stages illustrate the typical process where a jury trial is involved. The *Roe v. Anderson* case was brought as a class action suit [plaintiff sues for herself and on behalf of others similarly situated] in a federal District Court and was not heard before a jury.)

The Trial Stage

9. The parties select a jury.
   Not all cases are jury cases. When one arises, the parties, through *voir dire,* select the members.
10. The parties present their opening arguments.
    Both sides state the facts they intend to prove at trial. The plaintiff presents first.
11. The parties present their cases.
    The plaintiff begins by introducing appropriate evidence and examining witnesses. *Direct examination* involves questioning one's own witnesses; *cross-examination,* the other side's.
12. Motions to dismiss or for *directed verdict.*
    Following the plaintiff's presentation, the defendant may request a *motion to dismiss* or for a *directed verdict.* Both imply that the plaintiff has failed to prove her facts. The plaintiff, too, may make such motions after the defendant's presentation. If all motions are denied, both sides move to the next step.

13. Both sides present their closing arguments to the jury.
14. *Charge to the jury*
    The *charge to the jury* is the judge's instructions on the applicable law. Often both sides will submit charges they want the judge to use, and (s)he can decide whether to use them. The jury uses the judge's instructions in their deliberations.
15. *Verdict* of the jury.
    The jury's verdict is the result of its deliberations. It is typically a *general verdict,* which announces the verdict on all issues.
16. The court enters its *judgment* on the case.
    The trial court's *judgment* is the final statement on the dispute. It states the rights and responsibilities for each. (It may be a written opinion.)

(Plaintiff Roe won at the trial stage. The case, *Roe v. Anderson,* moved to the next level, the Circuit Court of Appeals for the Ninth Circuit, and again, Roe prevailed. The state then appealed to the next and final level, the United States Supreme Court.)

Appeals Stage

17. Filing for *appeal,* submission of accompanying *briefs,* and oral argument.
    The losing party may notify the court of its intention to seek a review of the decision by a higher tribunal. The party bringing the *appeal* (the *appellant*) files a *brief* (an argument on the lower court's error in the interpretation of the law) with the higher court. The party against whom the appeal is brought (the *appellee*) will file a reply brief. Both sides then make their oral argument to the appellate court and then await its decision.
18. Decision of appellate court.
19. The parties submitted briefs to the United States Supreme Court, which heard oral arguments on January 13, 1999. The final decision—the law of the land—was announced on May 17, 1999 and is described below. (Note: After this case was argued, petitioner Rita L. Saenz replaced Eloise Anderson as Director, California Department of Social Services, so the final decision was renamed *Saenz v. Roe.*)

BEGINNING THE CIVIL PROCESS: THE COMPLAINT FROM *ROE v. ANDERSON*

The following complaint was submitted to the federal District Court in the case of *Roe v. Anderson,* and it is presented here to illustrate the structure and format of this device. Perhaps the most revealing aspect of the document is its statement of the relevant facts and law and how the facts give rise to a legal injury for which the law ought to provide a remedy. The complaint, then, is a request that the court supply that remedy.

Following the complaint, the resulting District Court decision will be examined. The level of detail in the opinion reinforces the connection between the facts and the court's application of the law to the facts.

Finally, there is the (edited) *amicus* brief submitted on behalf of Ms. Roe (the respondent) by social scientists in *Anderson v. Roe,* as the case was known when it was appealed to the United States Supreme Court. (Roe won in the federal District Court and in the Court of Appeals, and the state [Anderson] appealed to the United States Supreme Court—hence, the shift in the name of the case to *Anderson v. Roe.*) It is supplied here to demonstrate the structure and nature of an appellate brief. With its focus on social science data, the document is atypical, but nonetheless instructive.

THE COMPLAINT

I. Preliminary Statement

1. Plaintiffs are impoverished women who are expecting children. They depend upon public assistance to feed, shelter, and clothe themselves. Plaintiffs are would be applicants for subsistence benefits through the Temporary Assistance to Needy Families (TANF) program formerly known as Aid to Families with Dependent Children (AFDC) program.
2. Plaintiffs are residents of California. Plaintiff Roe is a native Californian. Ms. Roe was born in California, moved to Oklahoma, and has now returned to California with her husband to seek employment. Plaintiff Doe has recently moved to the

state of California searching for employment and a better life for herself and her unborn child.

3. Under section 11450.03(a) of the California Welfare and Institutions Code, added by Section 37.5 of Chapter 722 of the Statutes of 1992 ("Section 11450.03(a)") reprinted at 10 West's Cal. Legis. Serv. 1992, p. 2897, 2931, plaintiffs are denied standard California TANF benefits because she has not resided in California for 12 consecutive months immediately prior to applying for aid.
4. Because of the durational residency requirement, each plaintiff can receive only the amount of TANF she could have received in her prior state of residence. Under the provision, plaintiff Roe can receive $307, the maximum TANF grant in Oklahoma for a family of three, compared to the standard California benefit of $565 for a family of three. Plaintiff Doe can receive only $330 compared to the standard California benefit of $456 for a family of two.
5. The residency requirement violates plaintiffs rights to equal protection, to travel, and to the privileges and immunities guaranteed under the United States Constitution. A similar requirement was found impermissible in *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322 (1969).
6. Because of defendants' unconstitutional actions, plaintiffs are denied sufficient subsistence income to maintain themselves and soon to be born child in decency. As a result, plaintiffs and their soon to be born children are threatened with irreparable injury from homelessness, hunger, illness, and exposure to the elements.
7. On behalf of themselves and similarly situated California and out-of-state residents, plaintiffs seeks injunctive relief compelling defendants to cease implementing the durational residency requirement in Section 11450.03(a), and to cease denying full California TANF benefits to bona fide residents based solely upon the duration of their residence in this state.

II. JURISDICTION AND VENUE

8. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1361, and 1343(a)(3). This suit is brought, pursuant to 42

U.S.C. § 1983, to redress the deprivation under color of state law of rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States.

9. Plaintiffs' claims for injunctive and declaratory relief against defendants are based on the equal protection and privileges and immunities clauses of the United States Constitution, on the constitutional right to travel, and on 42 U.S.C. § 1983. Plaintiffs seek relief pursuant to 28 U.S.C. § 2201 and § 2202, 28 U.S.C. § 1361, and Rules 57 and 65 of the Federal Rules of Civil Procedure.
10. An actual controversy has arisen and now exists between plaintiffs and defendants relating to their respective rights and duties.
11. Venue is proper under 28 U.S.C. § 1391(b) because the acts giving rise to this action occurred in this district and because many class members, as well as defendants, reside or are found in this district.

III. PARTIES

Plaintiffs

12. Plaintiff Brenda Roe is a California resident and lives in Long Beach, California in Los Angeles County. She will apply for TANF benefits on April 8, 1997. She is currently being housed by a homeless shelter. She, her husband, and unborn child will be otherwise eligible for TANF, but will not be able to provide for life's necessities if she is unable to receive the full California TANF grant of $565 per month.
13. Plaintiff Anna Doe is a California resident who currently lives in Hollywood, California in Los Angeles County. She is 5 months pregnant at this time, but will apply for TANF benefits in April, 1997. She and her unborn child will be otherwise eligible for TANF, but will not be able to provide for life's necessities if she is unable to receive the full California TANF grant of $456 per month.

B. Defendants

14. Defendant Eloise Anderson is the Director of the California Department of Social Services. She is responsible for enforcement, operation, and execution of all laws pertaining to the

administration of California's public assistance programs, including TANF. She is sued in her official capacity.

15. Defendant California Department of Social Services (DSS) is the single state agency responsible for the administration and oversight of welfare programs in California, including TANF.
16. Defendant Craig Brown is the Director of the California Department of Finance. He is responsible for the oversight and approval of any rule, regulation, or communication that could result in increased costs in the administration of California welfare programs. He is sued in his official capacity and is joined as a party for purposes of relief only.
17. Defendant Pete Wilson is the Governor of the State of California and as such is the supreme executive officer for the State of California charged with the duty of seeing that all provisions of the law of California are faithfully executed. Cal. Const. Art. V, §1. Defendant Wilson certified the State Plan for Provision of Public Assistance Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. He is sued in his official capacity.

IV. Class Action Allegations

18. Plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class consists of all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after April 1, 1997, and who will be denied full California AFDC or TANF benefits because they have not resided in California for 12 consecutive months immediately preceding their application for aid.
19. Plaintiffs are informed and believe and on the basis of that belief allege that the size of the class is so numerous that joinder of all members is impracticable. The identities and numbers of potential class members can be ascertained from DSS records. DSS has estimated that the class consists of at least 50,000 members on any given day.
20. There are questions of law or fact common to the class in that all class members have been denied full TANF benefits by

defendants, solely because they had not resided in California for 12 consecutive months before applying for aid. Common issues of law and fact predominate over any individual questions, and adjudication of the rights of the class is superior to other methods of adjudicating the controversies herein described.

21. The claims of the named plaintiffs are typical of those of the class they seek to represent.
22. The named plaintiffs will fairly and adequately represent the interests of the class.
23. Defendants have acted and refused to act on grounds applicable to all class members, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

V. Factual Allegations

A. Statutory Framework

24. Section 11450.03(a) of the California Welfare and Institutions Code mandates that no otherwise eligible family that has resided in the state for less than 12 consecutive months immediately before applying may receive an AFDC grant at a level of assistance any greater than that which the family could have received had they remained in the state from which they had migrated. The pertinent language provides:

> Notwithstanding the maximum aid payments specified in paragraph (1) of the subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state or prior residence.
>
> Section 37.5, ch. 722, Stats. 1992, reprinted at vol. 10, 1992 West's Cal. Leg. Serv. 1992, p. 2897, 2931, codified as Cal. Welf. & Inst. Code § 11450.03.

25. With the enactment of the new federal welfare law, the Personal Responsibility and Work Opportunity Budget Reconciliation Act (PRWOBRA), the state has decided it can proceed once more with implementation of section 11450.03. On March 3,

1997, defendant California Department of Social Services (CDSS) issued All-County Letter 97-11 specifically directing the counties to begin applying the new state durational residency requirement to families who apply for AFDC benefits on or after April 1, 1997. State Temporary Assistance to Needy Families (TANF) Plan 26. As amended by the PRWOBRA, Title IV, Part A, § 401 of the Social Security Act (SSA), 42 U.S.C. § 601 et seq., requires each state to submit a State Temporary Assistance to Needy Families (TANF) Plan. On October 9, 1996, the State Department of Social Services submitted its Temporary Assistance to Needy Families (TANF) plan to the U.S. Department of Health and Human Services. In its initial TANF plan, California specifically expresses its intent to implement section 11450.03 of the Welf. and Inst. Code. The TANF plan expressly relies on the language from the amended SSA § 402(a)(1)(B)(i) in announcing its intention to implement Welf. & Inst. Code § 11450.03.

B. Operation of the Residency Requirement

27. All-County Letter 97-11, issued by defendant CDSS to county welfare agencies, describes operation of the residency requirement. In brief, families who have resided in California for less than 12 consecutive months immediately preceding their application for aid will receive a so-called "Relocation Family Grant," which is calculated as "either the California computed grant, or the "Maximum Aid Payment (MAP) amount from the prior state of residence, whichever is less."
28. Subsistence benefit levels in TANF are set by the states. States may enact varying TANF benefit levels based on a variety of factors, including the cost of living in each state.
29. In California, the standard TANF grant for a family of three is $565 and for a family of 2 is $456.
30. Before Section 11450.03(a) went into effect on April 1, 1997, all otherwise identical California residents were eligible for the same TANF benefits. Under Section 11450.03(a), however, newcomers to California and recent applicants for aid who have lived in California for less than 12 consecutive months may not receive aid that exceeds the amount they could have received in their prior state of residence.

B. Named Plaintiff's Allegations

Brenda Roe

30. Plaintiff Roe was born in Orange, California, but moved away shortly thereafter and has spent most of her life in Oklahoma. Ms. Roe and her husband Mike decided to move to California after losing their shared apartment and after Mike lost his job at a steel mill. Ms. Roe and her husband arrived in Needles, California in early March, 1997. Ms. Roe became ill and had to be hospitalized. She was told by her doctor that she had a high risk pregnancy and would require constant monitoring and she should not be left alone. After explaining her situation to the caseworker at the Needles, she and her husband were given bus tickets to Long Beach.
31. Ms. Roe applied for TANF benefits on March 27, 1997, but was told that she would not be eligible until she was 6 months pregnant and that due to the fact that she has been in the county of Los Angeles less than 15 days she could not apply until April 8, 1997. She will return to apply on April 8, when she will have been in the county for 15 days and she will also be 6 months pregnant. She is eligible for TANF. She and her husband are receiving temporary hotel vouchers from a local Long Beach shelter. However, these vouchers will end on March 31, 1997 and Ms. Roe and her husband will have to seek help from another shelter.
32. When Ms. Roe applies for aid on April 8, 1997, under the residency requirement, she will only be eligible to receive $307 a month in TANF. She and her husband have been looking for apartments in the Long Beach area, but have not found even a one-bedroom unit for less than $450 per month. Ms. Roe and her husband have no alternatives and will be on the streets unless they are able to get the full monthly TANF grant of $565.

Anna Doe

33. Plaintiff Anna Doe came to California in January, seeking a better life for herself and her unborn child. Ms. Doe had been living in Washington, DC prior to coming to California. Ms. Doe lived with friends when she initially came to California and worked as a telemarketer. Ms. Doe had to resign from

that job due to its stressful nature and to protect the health of her baby. She has looked for other jobs, but has been unable to find one.

34. Ms. Doe has applied and is receiving general relief. Next month she will be eligible to apply for and receive TANF benefits since she will be 6 months pregnant. Ms. Doe is currently living in a shelter. She has looked for apartments but the price range she has found is at $350 for a single apartment and $450 to $570 for a one-bedroom apartment. Ms. Doe has no alternative for income and she will be on the streets when her time at the shelter runs out. She will be out on the streets unless she is able to get the $456 benefit.

C. Class Allegations

35. Named plaintiffs are informed and believe and on the basis of such information and belief allege that the problems described above are typical of the problems which will be encountered by thousands of new residents throughout California who will receive reduced TANF grant levels because they have not resided in California for 12 consecutive months prior to the date they apply for TANF.
36. Those affected by the residency requirement came to California or would like to move to California for many reasons. Some came to seek employment. Others came to escape abusive domestic situations, to reunite with their families, or to care for relatives. Many were not even on TANF in their previous states.
37. Because even the standard California grant for longtime residents is significantly below the federal poverty line, the further reductions imposed by the residency requirement cause irreparable injury to the class members, who are unable to feed, shelter, clothe, and care for their families on their reduced grants.

VI. Claims for Relief

First Claim for Relief

(Violation of the Equal Protection Clause of the United States Constitution)

38. Plaintiffs reallege and incorporate by reference each and every allegation in paragraphs 1 through 37 as though fully set forth herein.
39. Defendants' payment of differing TANF benefits to otherwise identical California residents, based solely upon the duration of their residence in California and their prior state of residence, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Second Claim for Relief

(Violation of the constitutional right to travel)

40. Plaintiffs reallege and incorporate by reference each and every allegation in paragraphs 1 through 39 as though fully set forth herein.
41. Defendants' payment of lower TANF benefits to new residents than to other Californians, with the single stated purpose of deterring the migration of poor people, violates the right to travel guaranteed by the United States Constitution.

Third Claim for Relief

(Violation of the Privileges and Immunities Clause of the United States Constitution)

42. Plaintiffs reallege and incorporate by reference each and every allegation in paragraphs 1 through 41 as though fully set forth herein.
43. Defendants' payment of lower TANF benefits to new residents than to other Californians violates the Privileges and Immunities Clause of the United States Constitution, Article IV, §2, cl.1.

Prayer for Relief

WHEREFORE, plaintiffs pray for the following relief:

1. Issue a preliminary and permanent injunction prohibiting defendants Anderson and DSS from denying full California TANF benefits to California residents based solely on the duration of their residence in California;

2. Declare that defendants' policies and practices described above violate 42 U.S.C. § 1983, the guarantees secured by the Privileges and Immunities and Equal Protection clauses of the United States Constitution, and the constitutional right to travel;
3. Order this action to be maintained as a class action with respect to the class identified herein;
4. Award plaintiffs the costs of suit and reasonable attorneys fees pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 2412(b), (d);
5. Grant such other relief as this court may deem just and proper.

Respectfully submitted,
American Civil Liberties Union of Southern California
NOW Legal Defense and Education Fund
American Civil Liberties Union of San Diego and Imperial Counties
American Civil Liberties Union of Northern California
Dated: March 31, 1997
By: Mark D. Rosenbaum, Attorneys for Plaintiffs

The following opinion is the District Court decision handed down in response to the above complaint.

ROE v. ANDERSON
966 F. Supp. 977 (1997)
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Opinion by: David F. Levi
Memorandum of Opinion and Order

This case again presents the question of the constitutionality of a one-year durational residency requirement for full welfare benefits. A California statute, enacted in 1992, provides that "families that have resided in this state for less than 12 months" and who qualify for welfare shall receive benefits no greater than the "maximum aid payment that would have been received by that family from the state of prior residence." Cal. Welf. & Inst. Code § 11450.03. Under this provision, California residents who have migrated to California from states that provide a lower level of benefits

than California would receive that lower level of benefits through the first year of their residency in California. The State first sought to implement this residency limitation in 1992. At that time, the court found that such a distinction among California residents, based on the duration of their residency, was unconstitutional under a line of Supreme Court cases addressing durational residency provisions in a variety of contexts. See *Green v. Anderson,* 811 F. Supp. 516 (E.D. Cal. 1993), aff'd, 26 F.3d 95 (9th Cir. 1994), vacated as unripe sub nom *Anderson v. Green,* 513 U.S. 557, 115 S. Ct. 1059, 130 L. Ed. 2d 1050 (1995). Because the controlling legal principles and precedents have remained unchanged, the court reaches the same conclusion and again finds that § 11450.03 makes an unconstitutional distinction between California residents based on the length of their residency.

Section 11450.03 was enacted in 1992 in conjunction with a California experimental work incentive project under the Aid to Families with Dependent Children (AFDC) program. Section 11450.03 is only effective upon approval by the Secretary of Health and Human Services. Approval was given by the Secretary, in the form of a waiver, in October 1992. The court entered an injunction prohibiting implementation of § 11450.03 on January 28, 1993. *Green,* 811 F. Supp. at 523. Subsequently, in a parallel litigation that challenged the Secretary's grant of waivers needed for the California welfare experiment—including the waiver for the durational residency limitation—the Court of Appeals vacated the Secretary's waivers. See *Beno v. Shalala,* 30 F.3d 1057 (9th Cir. 1994). By its own terms, § 11450.03 then ceased to apply in the absence of approval by the Secretary. Accordingly, having granted California's petition for certiorari in *Green v. Anderson,* the Supreme Court found that the constitutionality of § 11450.03 no longer presented a justiciable controversy. *Green v. Anderson,* 513 U.S. 557, 1, 115 S. Ct. 1059, 1060, 130 L. Ed. 2d 1050 (1995).

In February 1996, the Secretary again granted the necessary waivers for the California welfare experiment with the exception of the waiver permitting the State to distinguish between old and new residents. The Secretary expressly declined to renew this waiver, and without the waiver § 11450.03 was a dead letter. There the matter stood until August 1996 when Congress enacted a new federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 42 U.S.C. §§ 601, et seq. The PRWORA significantly increased the states' discretion to design their federally supported welfare plans without seeking waivers from the Secretary. The Act superseded the AFDC program with a new program entitled Temporary Assistance to Needy Families (TANF). The Act specifically authorized the states to apply a one-year durational residency requirement of the kind embodied in Cal. Welf. & Inst. Code § 11450.03. See 42 U.S.C. § 604(c). In October 1996 the State of California submitted its

TANF plan to the United States Department of Health and Human Services. The plan included a durational residency limitation consistent with California law and § 604(c). On February 28, 1997, in All-County Letter 97-11, the California Department of Social Services instructed the counties to implement § 11450.03 as of April 1, 1997. Pls.' Ex. 3.

This action was filed on April 1, 1997, by plaintiffs Brenda Roe and Anna Doe. Brenda Roe was a resident of Oklahoma until early 1997. When her husband lost her job, the Roes decided to move to California to pursue employment. Ms. Roe was six months pregnant as of April 8, 1997. Ms. Roe states that because of complications that developed in her pregnancy after their move to California, Mr. Roe cannot leave her unattended and therefore cannot work. Ms. Roe was informed by the State social services office that she would be limited to the Oklahoma monthly grant level of $307 when she became eligible for AFDC at the six-month point of her pregnancy as compared to the California grant level of $565. According to Ms. Roe, the monthly rents in the community in which they now reside, Long Beach, California, are $300 for a studio apartment and $450 to $650 for a one-bedroom apartment. Ms. Roe avers that at the time she and her husband decided to move to California she did not know anything about AFDC or TANF and had never been on welfare.

Anna Doe recently moved to Los Angeles County from Washington, DC. At the time of her move she was pregnant. She states that she came to California to look for a better job. According to her declaration, she obtained a job when she first arrived in California but later stopped working because she found the job too stressful. She has been living in a shelter. She became eligible for AFDC in April 1997 at the six-month point of her pregnancy. Under the two-tier system, her grant would be limited to $330 per month, the Washington, DC level, as opposed to $456 per month, the California AFDC benefit for a single parent residing in Los Angeles County. According to Ms. Doe, the rents for apartments in her area range from $450 to $570 a month.

On April 1, 1997, a temporary restraining order was entered by the court enjoining implementation of § 11450.03. The parties stipulated that the temporary restraining order would remain in effect until resolution of plaintiffs' motion for preliminary injunction. On April 23, 1997, on the stipulation of the parties, the court permitted the action to be maintained as a class action and certified a class of plaintiffs defined as "all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after April 1, 1997, and who will be denied full California AFDC or TANF benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid." Plaintiffs now move for a preliminary injunction

prohibiting defendants from implementing the durational residency requirement in § 11450.03.

Plaintiffs make a number of factual contentions about the effect of § 11450.03 and the characteristics of the population of new residents that are relevant to their motion. As to the effect of § 11450.03, plaintiffs' exhibits demonstrate that the disparity between the California level and the level of the other forty-nine states will vary a good deal depending on the state of prior residence. For example, a four-member family in Los Angeles would receive a monthly AFDC benefit of $673, but if the family recently moved from Mississippi—which provides the lowest benefit level for a family of four of all of the states—the monthly benefit would be limited to $144. The cost of living in the various states may also affect a comparison of the relative benefit levels. According to the declaration of Robert Greenstein, filed by plaintiffs, when housing costs are factored in, California benefit payments rank 18th in the nation. Greenstein Decl. P 28; tbl. 1. Thus, although in absolute terms California benefit levels rank as the sixth highest grant level in the United States, see *id.* P 29, Mr. Greenstein concludes that "because California's housing costs are high relative to most states and because welfare families in California are less likely than welfare families in any other state to live in subsidized housing, the residency requirement will place many recently arrived welfare families on an inferior footing relative to welfare families in the state from which the newcomers moved." *Id.* P 29.

Finally, on the question of the disparity between the AFDC grants of new and old California residents, plaintiffs offer that the disparity likely will increase under the PRWORA. The new welfare legislation permits the states to use federal funds for purposes other than cash assistance, such as to create new programs or to provide assistance not in the form of a cash grant. Thus, states may reduce their cash grants, while increasing other services, but it would be the lower cash grant that California would look to in calculating benefits for the first year of residency in California. Furthermore, because the new federal law eliminates the requirement that the states maintain a single statewide system, plaintiffs predict that in some of the states benefit levels may vary from county to county, increasing the possible variation and disparity.

As to the characteristics of the population of new residents, plaintiffs make the case that persons do not move from state to state to seek higher AFDC benefits. According to the declaration of Professor Joel F. Handler, the "welfare magnet" hypothesis is incorrect. Indeed, Professor Handler suggests that "non-AFDC-eligible people were more likely to move to higher benefit states than AFDC-eligible people . . . —exactly the opposite of the correlation that would be predicted by a 'welfare magnet' effect."

Handler Decl. P 10. Professor Handler also states "that less than half of the AFDC-eligible population that moved to a higher-benefit state actually went on welfare within the first two years of their move." *Id.* Plaintiffs also submit the declaration of Professor John Hartman. Professor Hartman undertakes a review of the relevant statistical studies and performs his own analysis of the data he considers most reliable. Professor Hartman concludes that "welfare benefits appear to exert no impact on the residential choices made by poor people. And, when the indigent relocate, they have no greater propensity to consume welfare benefits than the poor who are already within a state's borders." Hartman Decl. P 49.

Although not taking direct issue with most of plaintiffs' factual contentions, defendants provide a number of qualifications. On the question of disparity in benefits, defendants note that the lower benefit level that new residents experience may be offset in part by supplementary benefit programs, such as homeless assistance, that California provides to the needy without respect to the length of their residency. In addition, new residents would receive full Medicaid benefits and food stamps and in fact would receive an additional dollar of food stamp benefits for every three dollars of reduction in their AFDC grant. Wagstaff Decl. P 8. Notwithstanding these additional ameliorating facts, defendants do not disagree with plaintiffs' contention that there will be disparities, even significant disparities, among California AFDC recipients as between newcomers and recipients who have resided in the state for one year. Indeed, defendants could hardly argue otherwise given defendants' position that the overriding purpose of § 11450.03 is to limit California's welfare expenditures. Defs.' Opp. at 25.

On the question of the "welfare magnet" hypothesis, defendants submit no declarations but briefly discuss a study published by the Brookings Institution that concludes that the poor do move to states with higher benefit levels. This study is criticized by Professor Hartman and the critique is a telling one that goes unanswered. Although defendants do not concede that the "welfare magnet" hypothesis is invalid, it is apparent from their pleadings that defendants do not view the hypothesis as critical to the constitutionality of the residency requirement. Rather, defendants' argument is a straightforward one that does not depend on empirical support: the State of California spends an enormous sum of money each year on AFDC, some $2.9 billion; the State has the right and the duty to control the expense of the AFDC program in any way that it can; § 11450.03 by reducing the payments to new residents will save the State some $10.9 million in the 1997–1998 fiscal year and therefore is an appropriate exercise of State budgetary authority so long as the residency requirement does not amount to a penalty on migration under *Shapiro v. Thompson,* 394 U.S. 618, 22 L.

Ed. 2d 600, 89 S. Ct. 1322 (1969), and the cases following Shapiro. The State defendants contend that § 11450.03 is not unconstitutional under Shapiro because new residents receive the same level of cash benefits as they would have received in the state of their prior residency.

In *Green v. Anderson,* 811 F. Supp. 516 (E.D. Cal. 1990), the court previously reviewed the relevant Supreme Court case law and concluded that the two-tier system under § 11450.03 was unconstitutional. In a subsequent case presenting much the same issue, the Supreme Court of Minnesota reached the same conclusion as to a similar provision in Minnesota law. See *Mitchell v. Steffen,* 504 N.W.2d 198 (1993), cert. denied, 510 U.S. 1081, 127 L. Ed. 2d 93, 114 S. Ct. 902 (1994). There have been no developments in the case law that would question the analysis in Green or Mitchell. The court will not repeat but now adopts its discussion in Green of the Supreme Court's right of migration and equal protection cases in which the Court set aside as unconstitutional distinctions drawn among residents of a state—all of whom are bona fide residents—based on the incipiency or duration of their residency. As the Supreme Court stated in *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 904, 90 L. Ed. 2d 899, 106 S. Ct. 2317 (1986), the right of migration "protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents." The Supreme Court has found such distinctions invalid in the context of welfare benefits, *Shapiro v. Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), nonemergency medical care, *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 39 L. Ed. 2d 306, 94 S. Ct. 1076 (1974), the right to vote, *Dunn v. Blumstein,* 405 U.S. 330, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972), rebates from state oil revenues, *Zobel v. Williams,* 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982), and veteran preferences, *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985) and *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 90 L. Ed. 2d 899, 106 S. Ct. 2317 (1986). See also *Williams v. Vermont,* 472 U.S. 14, 86 L. Ed. 2d 11, 105 S. Ct. 2465 (1985) (tax credits). The Court has only upheld such distinctions where there was a genuine question as to whether the new residents were bona fide residents of the State, a concern that is not present in this case. See *Sosna v. Iowa,* 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975) (divorce); *Starns v. Malkerson,* 401 U.S. 985, 28 L. Ed. 2d 527, 91 S. Ct. 1231 (1971), summarily aff'g 326 F. Supp. 234 (Minn. 1970) (three-judge court) (in-state tuition).

The central analytical dispute here is whether the appropriate comparison is between new residents of California and the residents of their former states or between new residents and other longer term residents of California. The State defendants argue that so long as the benefit provided

to new residents of California is the same as that provided to residents of their former states, there is no penalty on migration and no violation of equal protection. Plaintiffs contend that the appropriate comparison is among California residents, some of whom are new arrivals and others of whom have been in the State for a longer period, and that no significant distinctions can be drawn among bona fide residents based on the length or onset of their residency in California.

The Supreme Court has resolved the question of which groups to compare. In case after case, the Court has determined that the appropriate comparison is among recent residents to California and other residents of California and not to residents of other states. The Court explained in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985), that "the State may not favor established residents over new residents" and in *Soto-Lopez* that the State may not treat new residents differently, "because of the timing of their migration, from other similarly situated residents." *Soto-Lopez*, 476 U.S. at 904. Moreover, the decision in *Zobel v. Williams*, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982), rests entirely on a comparison of new and older Alaska residents, each of whom received a bounty from oil revenues that no other state provided to its residents.

The court acknowledges that the states have broad latitude to design benefit programs. Moreover, both the Congress and the State of California, and several other states, consider that it is an appropriate cost saving measure to limit the benefits of new residents to those they would have received in the state of their prior residence. Facing a similar congressional permission in Shapiro, however, the Supreme Court held that "Congress may not authorize the States to violate the Equal Protection Clause." 94 U.S. 631 at 641. In light of established Supreme Court precedent, the distinction drawn by § 11450.03 between new and old residents of California must be found unconstitutional.

Plaintiffs demonstrate that they face the possibility of irreparable injury if the injunction is not issued. Both of the named plaintiffs have been unable to locate housing in California that they could afford on the reduced grant. Others within the class may face lower benefit levels depending on the state of their prior residence. Although any disruption to a State program is of concern, the record as it now stands does not suggest that the State will be unduly harmed by the issuance of an injunction. The record does not support a finding that there will be an influx of poor persons to California because of California's benefit levels. Moreover, the State may save a comparable amount of money by a very minor reduction in the benefits paid to all AFDC recipients.

Plaintiffs' motion for preliminary injunction is therefore granted. The court orders:

Pending judgment in this action, defendants and their agents, assignees, and successors in interest are enjoined from implementing: 1) Section 11450.03(a) of the California Welfare and Institutions Code; 2) regulations promulgated pursuant to § 11450.03(a) of the California Welfare and Institutions Code, including but not limited to M.P.P. E.A.S. § 89-110.4; and 3) All-County Letter (ACL)97-11 to the extent that the ACL denies standard California AFDC or TANF benefits to members of the plaintiff class or determines any AFDC or TANF benefits in whole or in part by reference to the AFDC or TANF grant of any other state or territory.

It is so ordered.

Dated: 2 June 1997.

David F. Levi

United States District Judge

Following are excerpts from the appellate brief submitted to the United States Supreme Court in connection with the above decision. As a social science brief, it focuses on presenting empirical evidence to refute the proposition that poor persons migrate to obtain higher welfare benefits. The brief is unusual, and distinguished from the typical appellate briefs, which argue divergent interpretations of rules of law. About a dozen briefs, including this one, were submitted to the court prior to the oral argument held on January 13, 1999. (The cover page, the table of contents and authorities, the list of *amici curiae,* and the footnotes have been omitted.)

BRIEF OF SOCIAL SCIENTISTS AS *AMICI CURIAE* IN *ANDERSON v. ROE*
BRIEF OF SOCIAL SCIENTISTS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici are social scientists and other scholars in the fields of law, economics, history, social work, women's studies, and public policy. They are professors and researchers at leading institutions throughout the United States. They have researched, written, and taught in all areas of poverty studies, and have specialized in social welfare policy. In particular, many of the *amici* have studied the changes to the welfare system initiated by passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601 *et* seq. (Supp. II 1996), and have evaluated the empirical support—or lack thereof—for these changes. Because of this

expertise, *amici* here provide the Court with their understanding of the issues raised in this case. A complete list of *amici* is set forth in the Appendix.

STATEMENT OF THE CASE

In 1992, California amended its welfare regulations to limit the amount of benefits that a new resident in the state could receive during her first twelve months of residency. Specifically, the law limited a family's benefits during the first twelve months of residency to an amount not to exceed "the maximum aid payment that would have been received by that family from the state of prior residence." Cal. Wel. & Inst. Code § 11450.03(a). In a decision holding that this durational residency requirement was unconstitutional, the district court reviewed the legislative history of the law and found that its purpose appeared to be "to deter migration by poor people into the State." *Green v. Anderson,* 811 F. Supp. 516, 521, n. 14 (E.D. Cal. 1993), aff'd, 26 F.3d 95 (9th Cir. 1994), cert. granted, 513 U.S. 922 (1994), and vacated as unripe, 513 U.S. 557 (1995). The law was not implemented due to the subsequent vacatur of the necessary federal approval.

Four years later, Congress radically altered all federally sponsored welfare programs. The old system, Aid to Families with Dependent Children (AFDC), was replaced with a new program, Temporary Assistance for Needy Families (TANF). Under the TANF structure, states are given block grants to help fund their welfare programs, which are to be developed on a state-by-state basis. The new welfare law permits a state operating a TANF program to "apply to a family the rules (including benefit amounts) of the [TANFI program . . . of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. § 604(c) (Supp. II 1996). The legislative history indicates that this provision was enacted due to a belief that "some families move across State lines to maximize welfare benefits" and that "States that want to pay higher benefits should not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States." H.R. Rep. No. 104-65 1, at 1337 (1996), reprinted in 1996 U.S.C.C.A.N. 2183, 2396.

Given this development, in October 1996, California submitted a TANF plan to the United States Department of Health and Human Services which included such a durational residency requirement. *Roe v. Anderson,* 966 F. Supp. 977, 979 (E.D. Cal. 1997), aff'd, 134 F.3d 1400 (9th Cir. 1998), cert. granted, 119 S.Ct. 31(1998). The plan was approved and went into effect on April 1, 1997. *Id.* at 979-80. This restriction was struck down as unconstitutional by the United States District Court and the United States Court of Appeals for the Ninth Circuit, but petitioners now ask the

Court to reverse the lower courts and uphold the California statute limiting the level of welfare benefits for new state residents.

SUMMARY OF ARGUMENT

The California durational residency statute, Cal. Wel. & Inst. Code § 11450.03 ("the statute"), provides that families eligible for welfare assistance who have resided in the state for less than twelve consecutive months immediately before applying for aid cannot receive assistance in an amount higher than the maximum aid that that family would have received from the state of prior residence. Under the statute, families that have lived in California for at least twelve months receive an amount that the state deems necessary for subsistence; families coming from a state with higher benefits receive the same level. Families coming from a state with lower benefits receive that lower level despite the fact that the members of these families are bona fide residents of California and are identical to similarly situated persons who have resided in California for at least twelve months. * * *

This durational residency restriction for receipt of welfare benefits is based on a theory of "welfare magnets"—that welfare-eligible families move to a new state due to the enticement of higher welfare benefits, and that fewer poor people will move to a state if they are not immediately eligible for the higher level of benefits. This statute is unconstitutional because it is impermissibly intended to eliminate migration and because there is no compelling state interest in drawing a distinction in the level of welfare payments between California state residents who have lived in the state for more than twelve months and those who have lived there for less than twelve months. *Attorney General v. Soto-Lopez,* 476 U.S. 898, 911 (1986); *Shapiro v. Thompson,* 394 U.S. 618, 632-33 (1969). The statute is based upon insupportable myths, rather than "reasonable empirical judgments," which are required under even a rational basis test. *Mathews v. Lucas,* 427 U.S. 495, 510 (1976).

The stated rationale for the statute is based upon a series of assumptions which are empirically false. First, most adults who receive welfare benefits are, in fact, connected to the labor market: they receive welfare for relatively short periods to cover discrete emergencies and it is therefore unlikely that they would migrate to California in search of welfare benefits. Furthermore, the most recent empirical studies find no support for the welfare magnet thesis, and instead demonstrate that poor families that migrate are no more likely to begin receiving welfare benefits than are poor families who have lived in the state for longer periods of time. Finally,

when one takes into account the differences in costs of living, the benefit differentials between the states are not sufficiently substantial to encourage migration. For all of these reasons, the fear of creating a welfare magnet provides neither a compelling state interest nor a rational basis for providing lower welfare benefits to newer state residents than to longer-term residents.

ARGUMENT

I.

MOST ADULT WELFARE RECIPIENTS ARE LINKED TO THE LABOR MARKET AND WOULD NOT BE MOTIVATED TO MOVE BY A HIGHER WELFARE BENEFIT LEVEL

A. Most Welfare Recipients Cycle On and Off Assistance for Short Periods to Assist with Discrete Emergencies and This Cycle is Not Compatible with the Welfare Magnet Thesis.

The prevailing myth about welfare is that recipients are primarily young black women who have lots of children, are long-term dependents, and pass this dependency from generation to generation. See Lucie B. White, *No Exit: Rethinking "Welfare Dependency" From a Different Ground,* 81 Geo. L. J. 1961, 1966–70 (1993). These generalizations are demonstrably false. In fact, the welfare rolls are mixed racially and the average welfare family is about the same size or smaller than is the average nonwelfare family. Joel F. Handler & Yeheskel Hasenfeld, *We the Poor People* 45 (1997). In 1995, the average size of the welfare family was 2.8; 72.8% of AFDC families consisted of one or two children, and 88.3%, of three or fewer children. *1998 Green Book,* Table 7-19, at 440.

Long-term dependency is also a myth. Contrary to the popular view of long-term dependency, the reality is of people cycling on and off welfare. Handler & Hasenfeld at 46. While long-term reliance on welfare may be suggested by an analysis that looks only at one point in time and which includes long-term recipients, most recipients stay on welfare during each episode for a relatively short time. *1998 Green Book* at 532. More than half (55.8%) of welfare episodes end within 12 months, 70% within 24 months, and almost 83% within 4 years. *Id.* at 53 1-32 and Table 7-52, at 534. Counting multiple spells, 30% of recipients are on welfare less than two years, 50% less than four years, and only about 15% stay on welfare continuously for five years. Mark Greenberg, *Beyond Stereotypes: What State AFDC Studies on Length of Stay Tell Us About Welfare as a "Way of Life"* (1993).

Although people leave the welfare rolls for a variety of reasons, the most significant single reason is employment. Kathleen Harris, *Work and Welfare Among Single Mothers in Poverty*, 99 Am. J. Soc. 317 (1993). In fact, most welfare recipients combine work with welfare, if for no other reason than that they cannot survive on welfare alone. Kathryn Edin & Laura Lein, *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work* (1997). See also Kathryn Edin & Christopher Jencks, *Reforming Welfare*, in Christopher Jencks, *Rethinking Social Policy* 204–235 (1992).

The principal reason why these individuals return to welfare lies in the characteristics of the low-wage labor market—jobs disappear, wages are low, there are often no benefits or benefits for only the employee, or there are problems with transportation, child care, and health care. Handler & Hasenfeld at 48-53. These women prefer to work but have low levels of education and the positions available to them are as cashiers, nursing aides, food service personnel, janitors, maids, and machine operators. *Id.* at 49-50. The pay is low, typically minimum wage, and most families are worse off if they rely on work only. *Id.* See also Edin & Lein at 127-136. When jobs disappear or there are child care, transportation or other difficulties, these women often turn to welfare, primarily because most of these poor women are not eligible for Unemployment Insurance. See Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 Stan. L. & Pol'y Rev. 53, 61-63 (1998). See also Martin Maim, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. Mich. J. L. Ref. 131 (Fall 1995 & Winter 1996). Still, despite these odds, most welfare recipients work, and eventually exit welfare permanently via a job. Handler & Hasenfeld at 5 1-53. * * *

B. Adults in the Welfare Population Are Motivated to Move to Find Work or Support From Family and Friends.

Several studies show that the poor migrate primarily to be close to family or friends or for better job opportunities, and with little knowledge of welfare rules and benefits. Paul Voss et al., *Interstate Migration and Public Welfare: The Migration Decision Making of a Low Income Population*, in *Community, Society and Migration* (P.C. Jobes et al. eds., 1993); Carol Stack, *Call to Home: African-Americans Reclaim the Rural South* (1996). One recent study of individuals' choices of location and decisions to change location did not find a significant relationship between welfare benefits and decisions to move. Carole Roan Gresenz, *An Empirical Investigation of the Role of AFDC Benefits in Location Choice* (Labor and Populations Working Paper Series No. 97-05, 1997). The study did find, however, that decisions to move or not to move were affected by labor market considerations and that

individuals were less likely to move to states with higher unemployment rates. . . .

Poor families migrate for reasons of family, friends, and job opportunities because even in the high benefit states, welfare recipients cannot survive on welfare alone. Benefits, including food stamps, do not provide minimally adequate subsistence and cover less than two-thirds of the average recipient family's expenses. Sanford Schram & Joe Soss, *The Real Value of Welfare: Why Poor Families Do Not Migrate,* Pol. & Soc'y, at 18 (forthcoming March 1999) (manuscript on file with authors). Recipients rely on support from relatives and friends, as well as jobs, in addition to welfare. Kathryn Edin and Laura Lein, *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work* (1997). Another reason that poor families do not cross state borders in search of welfare is that over the past several years, there have been great changes in state welfare eligibility rules and disqualifications which have created considerable uncertainty. A recipient family can lose benefits entirely by making the wrong decision. Poor families are more likely to choose the security of family and friends than to gamble on uncertain higher welfare benefits. Schram & Soss at 24.

II.

THE THEORY OF WELFARE MIGRATION BASED ON HIGHER BENEFITS IS A MYTH

Recent empirical studies disprove the welfare magnet myth. Social scientists have utilized large data pools to evaluate and compare the movement patterns of welfare-eligible and non-eligible families. They have compared these patterns to welfare benefit levels and cost-of-living variables, especially housing costs. Based on these comprehensive studies, leading scholars have concluded that there is no empirical support for the theory of welfare migration, and that past studies supporting the theory were flawed in their methodology. See *Roe v. Anderson,* 966 F. Supp. at 982 (citing Handler Decl. ¶ 10). * * *

III.

BENEFIT LEVELS DO NOT CREATE AN INCENTIVE TO MIGRATE WHEN COST-OF-LIVING VARIABLES ARE CONSIDERED

The magnet theory is predicated on the notion that there are incentive effects created by the difference in benefit levels. The theory assumes,

therefore, the existence of such variation between the states. However, appropriate social science analysis of the level of AFDC benefits, both in nominal terms and adjusted for the cost-of-living, in the continental forty-eight states and Washington, DC, reveals that "there is far less variation in the real value of benefits across the states than is often assumed, perhaps not much more than state variation in the cost-of-living, suggesting that the welfare migration story may in fact be lacking a strong causal agent." *Id.* at 217. When food stamp benefits are factored in, there is even less variation between the states. *Id.* at 219. A new state resident in California who receives lower benefits than her non-migrant counterpart due to the lower benefit level in her prior state of residence will be forced to survive on a benefit amount that does not reflect the higher cost-of-living in her new home state.

When more refined measures of costs-of-living are utilized, differences in benefit levels virtually disappear. These refined analyses focus on the relative costs of those items upon which poor families spend the majority of their limited income, such as food and housing. Such analyses are necessary in order to understand the situation faced by poor families in California, where housing costs are higher than housing costs in all but four other states and the District of Columbia. *Fair Market Rents for the Section 8 Housing Assistance Payments Program—Fiscal Year 1999,* 63 Fed. Reg. 52,858 (1998) (to be codified at 24 C.F.R. pt. 888). Furthermore, as of 1995, only 9% of California's AFDC families received housing assistance, as compared to the national average of 22.5%. U.S. Dep't of Health and Human Services, *Aid to Families with Dependent Children, Characteristics and Financial Circumstances of AFDC Recipients* at Table 4 (1995).

California's high housing costs have a significant effect on the welfare magnet thesis. For example, in 1996, the average amount of combined monthly benefits (i.e., AFDC and food stamps) provided by the states was $682.10. Sanford Schram & Joe Soss, *The Real Value of Welfare: Why Poor Families Do Not Migrate,* Pol. & Soc'y, Table 1, at 33 (forthcoming March 1999) (manuscript on file with authors). California offered $852.00 in combined benefits that year.

Thus, a recipient moving from a state offering "average" combined benefits would have received $169.90 more in California. However, the Schram and Soss analysis demonstrates that, across the nation, each additional dollar of benefits was associated with a gain of 62 cents in additional housing costs. This relationship suggests that the recipient who moved to California would have incurred additional housing costs of approximately $105.34 per month. Consequently, the average net gain from moving to California would have been only $64.56 per month, or $14.90 per week.

Amici acknowledge that there are analyses suggesting that benefit levels might encourage migration. See, e.g., Peterson & Rom, *supra.* These studies,

however, are deeply flawed in that they rely on an overall cost-of-living index rather than a measure of the cost of the market goods which most directly affect welfare recipients. Schram & Soss at 25. Specifically, their approach ignores the established fact that, compared to the general population, welfare recipients use a disproportionate amount of their welfare benefits (including food stamps) to cover food and housing costs. *Id.* at 24-25. For example, "[i]n 1995, more than half of all poor renter households, regardless of welfare receipt, spent over 50 percent of their income for housing," and most welfare families do not receive housing subsidies. *Id.* at 26. Looking at housing costs alone (based on Fair Market Rent estimates created by the United States Department of Housing and Urban Development), Schram and Soss found, contrary to the magnet thesis, that housing costs vary much more across states than do welfare benefits and that the incentives to move based upon welfare benefits are therefore negligible when housing costs are considered in the equation. *Id.* at 26-30. Over all, a family's net gain in benefits in 1996 based on a move to California from a state with the average amount of combined benefits would have been $64.56 per month. See *supra* note 4. Given that the average welfare family's combined budget (packaging welfare with work, support from family and friends, etc.) is approximately $1,000 per month, Edin & Lein, *supra,* this amount seems "hardly a lucrative payoff for uprooting one's family and spending the resources needed to move to a new state." Schram & Soss at 28. * * *

IV.

CONCLUSION

It is clear that most welfare recipients are linked to the labor market, and that these individuals are motivated to move to find better job opportunities or to be near family and friends, rather than to seek higher welfare benefits. Leading scholars, utilizing recent, large data pools, conclude that there is no empirical support for the welfare migration thesis. The myth of welfare migration is further debunked when social scientists calculate the cost-of-living differences for those items upon which poor families spend the majority of their income, such as housing, as the differences in state welfare benefit levels are then rendered illusory.

The welfare migration thesis taps into deep-seated anxieties. It feeds into the stereotype of welfare recipients as self-seekers abusing the system. It serves as a justification for state politicians to lower welfare benefits and to discriminate against outsiders. When the empirical evidence is examined,

however, there is not only no compelling state interest but not even a rational basis for providing lower welfare benefits to poor single mothers and their children who migrate to the state and who, for a variety of reasons, find themselves just as much in need as similarly situated longer-term residents. The California residency rule will impose a severe financial burden on such a family, without proper state justification. Poor families should not be made to suffer in this way.

For these reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,
Lawrence S. Lustberg
Counsel of Record
Lori Outzs Borgen
Gibbons, Del Deo, Dolan,
Griffinger & Vecchione
Dated: December 4, 1998

Having heard the oral argument associated with the above brief, the Supreme Court handed down its final decision in the (now renamed) case, *Saenz v. Roe.*

SAENZ v. ROE, 119 S. CT. 1518 (1999)
SUPREME COURT OF THE UNITED STATES

Opinion By: Stevens

In 1992, California enacted a statute limiting the maximum welfare benefits available to newly arrived residents. The scheme limits the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family's prior residence. The questions presented by this case are whether the 1992 statute was constitutional when it was enacted and, if not, whether an amendment to the Social Security Act enacted by Congress in 1996 affects that determination.

I.

California is not only one of the largest, most populated, and most beautiful States in the Nation; it is also one of the most generous. Like all other States, California has participated in several welfare programs authorized by the Social Security Act and partially funded by the Federal Government.

Its programs, however, provide a higher level of benefits and serve more needy citizens than those of most other States. In one year the most expensive of those programs, Aid to Families with Dependent Children (AFDC), which was replaced in 1996 with Temporary Assistance to Needy Families (TANF), provided benefits for an average of 2,645,814 persons per month at an annual cost to the State of $2.9 billion. In California the cash benefit for a family of two—a mother and one child—is $456 a month, but in the neighboring State of Arizona, for example, it is only $275.

In 1992, in order to make a relatively modest reduction in its vast welfare budget, the California Legislature enacted § 11450.03 of the state Welfare and Institutions Code. That section sought to change the California AFDC program by limiting new residents, for the first year they live in California, to the benefits they would have received in the State of their prior residence. Because in 1992 a state program either had to conform to federal specifications or receive a waiver from the Secretary of Health and Human Services in order to qualify for federal reimbursement, § 11450.03 required approval by the Secretary to take effect. In October 1992, the Secretary issued a waiver purporting to grant such approval.

On December 21, 1992, three California residents who were eligible for AFDC benefits filed an action in the Eastern District of California challenging the constitutionality of the durational residency requirement in § 11450.03. Each plaintiff alleged that she had recently moved to California to live with relatives in order to escape abusive family circumstances. One returned to California after living in Louisiana for seven years, the second had been living in Oklahoma for six weeks and the third came from Colorado. Each alleged that her monthly AFDC grant for the ensuing 12 months would be substantially lower under § 11450.03 than if the statute were not in effect. Thus, the former residents of Louisiana and Oklahoma would receive $190 and $341 respectively for a family of three even though the full California grant was $641; the former resident of Colorado, who had just one child, was limited to $280 a month as opposed to the full California grant of $504 for a family of two.

The District Court issued a temporary restraining order and, after a hearing, preliminarily enjoined implementation of the statute. District Judge Levi found that the statute "produces substantial disparities in benefit levels and makes no accommodation for the different costs of living that exist in different states." Relying primarily on our decisions in *Shapiro v. Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), and *Zobel v. Williams,* 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982), he concluded that the statute placed "a penalty on the decision of new residents to migrate to the State and be treated on an equal basis with existing residents." *Green v. Anderson,* 811 F. Supp. 516, 521 (ED Cal. 1993). In his view,

if the purpose of the measure was to deter migration by poor people into the State, it would be unconstitutional for that reason. And even if the purpose was only to conserve limited funds, the State had failed to explain why the entire burden of the saving should be imposed on new residents. The Court of Appeals summarily affirmed for the reasons stated by the District Judge. *Green v. Anderson,* 26 F.3d 95 (CA9 1994).

We granted the State's petition for certiorari. 513 U.S. 922 (1994). We were, however, unable to reach the merits because the Secretary's approval of § 11450.03 had been invalidated in a separate proceeding, and the State had acknowledged that the Act would not be implemented without further action by the Secretary. We vacated the judgment and directed that the case be dismissed. *Anderson v. Green,* 513 U.S. 557, 130 L. Ed. 2d 1050, 115 S. Ct. 1059 (1995) (per curiam). Accordingly, § 11450.03 remained inoperative until after Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 PRWORA, 110 Stat. 2105.

PRWORA replaced the AFDC program with TANF. The new statute expressly authorizes any State that receives a block grant under TANF to "apply to a family the rules (including benefit amounts) of the [TANF] program . . . of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. § 604(c) (1994 ed., Supp. II). With this federal statutory provision in effect, California no longer needed specific approval from the Secretary to implement § 11450.03. The California Department of Social Services therefore issued an "All County Letter" announcing that the enforcement of § 11450.03 would commence on April 1, 1997.

The All County Letter clarifies certain aspects of the statute. Even if members of an eligible family had lived in California all of their lives, but left the State "on January 29th, intending to reside in another state, and returned on April 15th," their benefits are determined by the law of their State of residence from January 29 to April 15, assuming that that level was lower than California's. Moreover, the lower level of benefits applies regardless of whether the family was on welfare in the State of prior residence and regardless of the family's motive for moving to California. The instructions also explain that the residency requirement is inapplicable to families that recently arrived from another country.

II.

On April 1, 1997, the two respondents filed this action in the Eastern District of California making essentially the same claims asserted by the plaintiffs in *Anderson v. Green,* but also challenging the constitutionality of PRWORA's approval of the durational residency requirement. As in

Green, the District Court issued a temporary restraining order and certified the case as a class action. The Court also advised the Attorney General of the United States that the constitutionality of a federal statute had been drawn into question, but she did not seek to intervene or to file an amicus brief. Reasoning that PRWORA permitted, but did not require, States to impose durational residency requirements, Judge Levi concluded that the existence of the federal statute did not affect the legal analysis in his prior opinion in Green.

He did, however, make certain additional comments on the parties' factual contentions. He noted that the State did not challenge plaintiffs' evidence indicating that, although California benefit levels were the sixth highest in the Nation in absolute terms, when housing costs are factored in, they rank 18th; that new residents coming from 43 States would face higher costs of living in California; and that welfare benefit levels actually have little, if any, impact on the residential choices made by poor people. On the other hand, he noted that the availability of other programs such as homeless assistance and an additional food stamp allowance of $1 in stamps for every $3 in reduced welfare benefits partially offset the disparity between the benefits for new and old residents. Notwithstanding those ameliorating facts, the State did not disagree with plaintiffs' contention that § 11450.03 would create significant disparities between newcomers and welfare recipients who have resided in the State for over one year.

The State relied squarely on the undisputed fact that the statute would save some $10.9 million in annual welfare costs—an amount that is surely significant even though only a relatively small part of its annual expenditures of approximately $2.9 billion for the entire program. It contended that this cost saving was an appropriate exercise of budgetary authority as long as the residency requirement did not penalize the right to travel. The State reasoned that the payment of the same benefits that would have been received in the State of prior residency eliminated any potentially punitive aspects of the measure. Judge Levi concluded, however, that the relevant comparison was not between new residents of California and the residents of their former States, but rather between the new residents and longer term residents of California. He therefore again enjoined the implementation of the statute.

Without finally deciding the merits, the Court of Appeals affirmed his issuance of a preliminary injunction. *Roe v. Anderson*, 134 F.3d 1400 (CA9 1998). It agreed with the District Court's view that the passage of PRWORA did not affect the constitutional analysis, that respondents had established a probability of success on the merits and that class members might suffer irreparable harm if § 11450.03 became operative. Although the decision of the Court of Appeals is consistent with the views of other federal courts

that have addressed the issue, we granted certiorari because of the importance of the case. We now affirm.

III.

The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. *United States v. Guest,* 383 U.S. 745, 757, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966). Indeed, as Justice Stewart reminded us in *Shapiro v. Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), the right is so important that it is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all." *Id.,* at 643 (concurring opinion).

In Shapiro, we reviewed the constitutionality of three statutory provisions that denied welfare assistance to residents of Connecticut, the District of Columbia, and Pennsylvania, who had resided within those respective jurisdictions less than one year immediately preceding their applications for assistance. Without pausing to identify the specific source of the right, we began by noting that the Court had long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.,* at 629. We squarely held that it was "constitutionally impermissible" for a State to enact durational residency requirements for the purpose of inhibiting the migration by needy persons into the State. We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause "unless shown to be necessary to promote a compelling governmental interest," *id.,* at 634, and that no such showing had been made.

In this case California argues that § 11450.03 was not enacted for the impermissible purpose of inhibiting migration by needy persons and that, unlike the legislation reviewed in Shapiro, it does not penalize the right to travel because new arrivals are not ineligible for benefits during their first year of residence. California submits that, instead of being subjected to the strictest scrutiny, the statute should be upheld if it is supported by a rational basis and that the State's legitimate interest in saving over $10 million a year satisfies that test. Although the United States did not elect to participate in the proceedings in the District Court or the Court of Appeals, it has participated as amicus curiae in this Court. It has advanced the novel argument that the enactment of PRWORA allows the States to adopt a "specialized choice-of-law-type provision" that "should be subject to an intermediate

level of constitutional review," merely requiring that durational residency requirements be "substantially related to an important governmental objective." The debate about the appropriate standard of review, together with the potential relevance of the federal statute, persuades us that it will be useful to focus on the source of the constitutional right on which respondents rely.

IV.

The "right to travel" discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

It was the right to go from one place to another, including the right to cross state borders while en route, that was vindicated in *Edwards v. California,* 314 U.S. 160, 86 L. Ed. 119, 62 S. Ct. 164 (1941), which invalidated a state law that impeded the free interstate passage of the indigent. We reaffirmed that right in *United States v. Guest,* 383 U.S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966), which afforded protection to the "'right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia.'" 383 U.S. at 757. Given that § 11450.03 imposed no obstacle to respondents' entry into California, we think the State is correct when it argues that the statute does not directly impair the exercise of the right to free interstate movement. For the purposes of this case, therefore, we need not identify the source of that particular right in the text of the Constitution. The right of "free ingress and regress to and from" neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." 383 U.S. at 758.

The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." *Paul v. Virginia,* 75 U.S. 168, 8 Wall. 168, 180, 19 L. Ed. 357 (1869) ("Without some provision . . .

removing from citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists"). It provides important protections for nonresidents who enter a State whether to obtain employment, *Hicklin v. Orbeck,* 437 U.S. 518, 57 L. Ed. 2d 397, 98 S. Ct. 2482 (1978), to procure medical services, *Doe v. Bolton,* 410 U.S. 179, 200, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973), or even to engage in commercial shrimp fishing, *Toomer v. Witsell,* 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948). Those protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." 334 U.S. at 396. There may be a substantial reason for requiring the nonresident to pay more than the resident for a hunting license, see *Baldwin v. Fish and Game Comm'n of Mont.,* 436 U.S. 371, 390-391, 56 L. Ed. 2d 354, 98 S. Ct. 1852 (1978), or to enroll in the state university, see *Vlandis v. Kline,* 412 U.S. 441, 445, 37 L. Ed. 2d 63, 93 S. Ct. 2230 (1973), but our cases have not identified any acceptable reason for qualifying the protection afforded by the Clause for "the 'citizen of State A who ventures into State B' to settle there and establish a home." *Zobel,* 457 U.S. at 74 (O'Connor, J., concurring in judgment). Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State.

What is at issue in this case, then, is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . .

Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases,* 83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394 (1873), it has always been common ground that this Clause protects the third component of the right to travel. Writing for the majority in the Slaughter-House Cases, Justice Miller explained that one of the privileges conferred by this Clause

"is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." *Id.*, at 80. Justice Bradley, in dissent, used even stronger language to make the same point:

> The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. *Id.*, at 112-113.

That newly arrived citizens "have two political capacities, one state and one federal," adds special force to their claim that they have the same rights as others who share their citizenship. Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in Shapiro, see *supra*, at 8-9, but it is surely no less strict.

V.

Because this case involves discrimination against citizens who have completed their interstate travel, the State's argument that its welfare scheme affects the right to travel only "incidentally" is beside the point. Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. See *Dunn v. Blumstein*, 405 U.S. 330, 339, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972). But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

It is undisputed that respondents and the members of the class that they represent are citizens of California and that their need for welfare benefits is unrelated to the length of time that they have resided in California. We thus have no occasion to consider what weight might be given to a citizen's length of residence if the bona fides of her claim to state citizenship were questioned. Moreover, because whatever benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such

as a divorce or a college education, that will be enjoyed after they return to their original domicile. See, e.g., *Sosna v. Iowa,* 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975); *Vlandis v. Kline,* 412 U.S. 441, 37 L. Ed. 2d 63, 93 S. Ct. 2230 (1973).

The classifications challenged in this case—and there are many—are defined entirely by (a) the period of residency in California and (b) the location of the prior residences of the disfavored class members. The favored class of beneficiaries includes all eligible California citizens who have resided there for at least one year, plus those new arrivals who last resided in another country or in a State that provides benefits at least as generous as California's. Thus, within the broad category of citizens who resided in California for less than a year, there are many who are treated like lifetime residents. And within the broad sub-category of new arrivals who are treated less favorably, there are many smaller classes whose benefit levels are determined by the law of the States from whence they came. To justify § 11450.03, California must therefore explain not only why it is sound fiscal policy to discriminate against those who have been citizens for less than a year, but also why it is permissible to apply such a variety of rules within that class.

These classifications may not be justified by a purpose to deter welfare applicants from migrating to California for three reasons. First, although it is reasonable to assume that some persons may be motivated to move for the purpose of obtaining higher benefits, the empirical evidence reviewed by the District Judge, which takes into account the high cost of living in California, indicates that the number of such persons is quite small—surely not large enough to justify a burden on those who had no such motive. Second, California has represented to the Court that the legislation was not enacted for any such reason. Third, even if it were, as we squarely held in *Shapiro v. Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), such a purpose would be unequivocally impermissible.

Disavowing any desire to fence out the indigent, California has instead advanced an entirely fiscal justification for its multitiered scheme. The enforcement of § 11450.03 will save the State approximately $10.9 million a year. The question is not whether such saving is a legitimate purpose but whether the State may accomplish that end by the discriminatory means it has chosen. An evenhanded, across-the-board reduction of about 72 cents per month for every beneficiary would produce the same result. But our negative answer to the question does not rest on the weakness of the State's purported fiscal justification. It rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: "That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence." *Zobel,* 457 U.S. at 69. It is

equally clear that the Clause does not tolerate a hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence. Thus § 11450.03 is doubly vulnerable: Neither the duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits. Nor do those factors bear any relationship to the State's interest in making an equitable allocation of the funds to be distributed among its needy citizens. As in Shapiro, we reject any contributory rationale for the denial of benefits to new residents:

> But we need not rest on the particular facts of these cases. Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. 394 U.S. at 632-633.

See also *Zobel*, 457 U.S. at 64. In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens.

VI.

The question that remains is whether congressional approval of durational residency requirements in the 1996 amendment to the Social Security Act somehow resuscitates the constitutionality of § 11450.03. That question is readily answered, for we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.

Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination." *Williams v. Rhodes*, 393 U.S. 23, 29, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968) (footnote omitted). Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.

"Section 5 of the Fourteenth Amendment gives Congress broad power indeed to enforce the command of the amendment and 'to secure to all persons the enjoyment of perfect equality of civil rights and the equal

protection of the laws against State denial or invasion. . . .' *Ex parte Virginia,* 100 U.S. 339, 346, 25 L. Ed. 676 (1880). Congress' power under § 5, however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.' *Katzenbach v. Morgan,* 384 U.S. 641, 651, n. 10, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966). Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment. See, e.g., *Califano v. Goldfarb,* 430 U.S. 199, 210, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977); *Williams v. Rhodes,* 393 U.S. 23, 29, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968)." *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 732-733, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982).

The Solicitor General does not unequivocally defend the constitutionality of § 11450.03. But he has argued that two features of PRWORA may provide a sufficient justification for state durational requirements to warrant further inquiry before finally passing on the section's validity, or perhaps that it is only invalid insofar as it applies to new arrivals who were not on welfare before they arrived in California.

He first points out that because the TANF program gives the States broader discretion than did AFDC, there will be significant differences among the States which may provide new incentives for welfare recipients to change their residences. He does not, however, persuade us that the disparities under the new program will necessarily be any greater than the differences under AFDC, which included such examples as the disparity between California's monthly benefit of $673 for a family of four with Mississippi's benefit of $144 for a comparable family. Moreover, we are not convinced that a policy of eliminating incentives to move to California provides a more permissible justification for classifying California citizens than a policy of imposing special burdens on new arrivals to deter them from moving into the State. Nor is the discriminatory impact of § 11450.03 abated by repeatedly characterizing it as "a sort of specialized choice-of-law rule." California law alone discriminates among its own citizens on the basis of their prior residence.

The Solicitor General also suggests that we should recognize the congressional concern addressed in the legislative history of PRWORA that the "States might engage in a 'race to the bottom' in setting the benefit levels in their TANF programs." Again, it is difficult to see why that concern should be any greater under TANF than under AFDC. The evidence reviewed by the District Court indicates that the savings resulting from the discriminatory policy, if spread equitably throughout the entire program, would have only a minuscule impact on benefit levels. Indeed, as one of the legislators apparently interpreted this concern, it would logically prompt the States to reduce benefit levels sufficiently "to encourage

emigration of benefit recipients." But speculation about such an unlikely eventuality provides no basis for upholding § 11450.03.

Finally, the Solicitor General suggests that the State's discrimination might be acceptable if California had limited the disfavored subcategories of new citizens to those who had received aid in their prior State of residence at any time within the year before their arrival in California. The suggestion is ironic for at least three reasons: It would impose the most severe burdens on the neediest members of the disfavored classes; it would significantly reduce the savings that the State would obtain, thus making the State's claimed justification even less tenable; and, it would confine the effect of the statute to what the Solicitor General correctly characterizes as "the invidious purpose of discouraging poor people generally from settling in the State."

Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." U.S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523, 79 L. Ed. 1032, 55 S. Ct. 497 (1935).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

(Chief Justice Rehnquist and Justice Thomas joined in a dissenting opinion, which is not included here.)

ISSUES FOR DISCUSSION

1. How closely does the complaint in *Roe v. Anderson* coincide with the judicial decision of the case?
2. How does the court in *Roe v. Anderson* discuss the precedent, *Shapiro v. Thompson*?
3. Discuss the link between the empirical evidence discussed in the social science brief and the final decision in *Roe v. Anderson.*
4. What does *Saenz v. Roe* stand for, and what is the basis for the court's decision?

4

The Legislative Process

How do problems get to government? What happens once they get there? What difference does it make? These are the questions that frame our understanding of the legislative process. Legislation plays multiple roles in society, not the least of which is to articulate competing policy choices that embody discrepant assumptions or values within the wider society. Congress played out this type of debate in 1995 and 1996, as it dealt with the legislative manifestation of President Clinton's campaign pledge to "end welfare as we know it." The result was the Personal Responsibility and Work Opportunity Act of 1996, a piece of legislation that ended the 60-year-old entitlement program, Aid to Families with Dependent Children (AFDC), and imposed requirements that were designed to foster a level of personal responsibility that Congress and the American electorate perceived as absent among welfare recipients.

To illustrate the stages of the legislative process, this chapter will examine selected portions of the legislative history—excerpts of the actual debate within Congressional hearings—of this landmark welfare legislation. A close analysis of the materials reveals the tension between members of Congress wanting to punish indolent welfare recipients versus those wanting to prevent a wholesale dismantling of an important safety-net program. The mean-spirited nature of the legislation is also apparent, as one appreciates that Congress truly believed the assorted myths and stereotypes that typically surface in public discourse about welfare reform. Also included are President Clinton's remarks upon signing the law. The chapter ends with a discussion of the second stage of the legislative process—the steps for appropriating funding for legislation—and a brief summary of the federal government budget process.

LEGISLATIVE AUTHORITY, STRUCTURE AND FUNCTION

State and federal legislatures have similar structures. Both have two chambers (Nebraska, with only one chamber, is the exception among the states), which provide for different tenures for its members, that

is, varying terms of office for senate versus house of representatives (e.g., the U.S. Senate members are elected for six-year terms; House members, for two years). There are currently 100 members of the U.S. Senate and 435 members of the U.S. House of Representatives. The size for each state chamber varies. Each legislature exercises its lawmaking authority as stated in the state or federal constitution. For example, Article One of the U.S. Constitution defines the scope of Congressional lawmaking authority: "All legislative Powers herein granted shall be vested in a congress of the United States, which shall consist of a Senate and House of Representatives. . . . [It] shall make all Laws which shall be necessary and proper for carrying into Execution [their enumerated] Powers, and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof" (U.S. Constitution, Article I).

The authority to act, however, does not speak to the issue of competency: Can an institution do well what it has the exclusive power to do? We turn to them to address numerous social problems, but in so doing we threaten to strain their competency. The prospect is both positive and negative. On the one hand, legislatures are perceived as the rule-making mechanism closest to the people and, consequently, express the vagaries of public opinion (Hurst, 1982). On the other hand, legislatures are also settings for compromise (Dworkin, 1979, Nunez, 1972). The rules that emerge typically reflect the negotiations among diverse and competing interests. Thus, one of the most attractive legislative features, representation of public interests, can produce two seemingly incompatible tendencies: receptivity to evolutionary social norms and a narrowing of that receptivity caused by the need to reach a consensus on competing normative views.

Finally, the legislative function also incorporates a concern for implementation of legislative goals (Baum, 1980, Sabatier & Mazmanian, 1980). Legislatures must rely heavily on administrative agencies for policy implementation, so the connection between legislative intention and implementation cannot be overstated. This remains the case especially for judicial interpretation of legislation, where a court seeks to apply a rule of law derived from a statute. In these circumstances, the court is compelled to discern and articulate the legislature's will. "[S]tatutes are binding statements of law," argue Hanks, et al. (1994, p. 227–228). "One can imagine a differ-

ent system, but in the one we have, legislatures can overturn decisions by courts but courts cannot rewrite or ignore legislature. This is the principle of 'legislative supremacy.' Subject to constitutional limitations, statutes trump other sources of law."

THE DESIGN OF LEGISLATION

Some Preliminary Considerations

An examination of the lawmaking process can begin with several questions that defy easy answers: How do problems get to government? What happens once they get there? What difference does it make? (Jones, 1980) The temptation to supply simple answers should be resisted, as the questions imply a complicated subtext. Once the underlying complexity surfaces, attention shifts to a recognition that these quite complicated questions require similarly complex responses. Put another way, there are certain "initial realities," which Jones (1977) describes below, that should inform our understanding of lawmaking. These realities tend to frame the way society perceives problems that warrant legislative attention, a phenomenon that occasionally lays the groundwork for certain preconceptions about both the problem and the structure of the legislative response. Among these "realities" are the following:

1. Events in society are interpreted in different ways by different people at different times.
2. Many problems may result from the same event.
3. People have varying degrees of access to the policy process in government.
4. Not all public problems are acted on in government.
5. Many private problems are acted on in government.
6. Many private problems are acted on in government as though they were public problems.
7. Most problems aren't solved by government though they are acted on there.
8. Policymakers are not faced with a given problem.
9. Most decision making is based on little information and poor communication.

10. Programs often reflect an attainable consensus rather than a substantive conviction.
11. Problems and demands are constantly being defined and redefined in the policy process.
12. Policymakers sometimes define problems for people who have not defined problems for themselves.
13. Many programs are developed and implemented without the problem every having been clearly defined.
14. Most people do not maintain interest in other people's problems.
15. Most people do not prefer large policy change.
16. Most people cannot identify a public policy.
17. All policy systems have a bias.
18. No ideal policy exists apart from the preferences of the architect of that system.
19. Most decision making is incremental in nature (Jones, 1977; p. 8)

An illustration of the interplay between the social realities that inform legislation and the legislative process itself is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Enacted as P.L. 104-193, the new law signaled, in the rhetoric of President Clinton, an "end to welfare as we know it." Hailed as a major reform effort, the new law effectively ended the 60-year entitlement program, Aid to Families with Dependent Children (AFDC), and substituted requirements designed to promote a level of personal responsibility that the law's sponsors and the electorate believed was absent within the AFDC population. The public's image of poor mothers, along with a desire to reignite a presumably dormant work ethic, certainly exposed societal assumptions about how best to treat this group (Murphy, 1998).

Introduced in the 104th Congress, the PRWORA also embodied the conservative majority's world-view as encapsulated in the so-called "Contract with America," a compendium of proposals that comprised the legislative framework of the Republican majority (Loury, 1998). Perhaps ironically, this new law supplanted the last welfare-reform initiative, the 8-year-old Family Support Act of 1988 (P.L. 100-485), and invoked a new approach to work and welfare (Schoen, 1997).

STAGES OF LEGISLATIVE PROCESS
PART ONE: ENACTING SUBSTANTIVE LEGISLATION

Following are the steps preceding the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), along with a brief description of the title and the table of contents for the first Title of the Act—the provisions for Temporary Assistance to Needy Families (TANF). The Act's structure is unremarkable and relatively typical.

The stages are depicted rather straightforwardly and illustrate how an idea makes its way through the legislative process. There are also selected portions from debate, as recorded in the Congressional Record which can reviewed by locating the text in the section designated by the citation (e.g., 06/27/96 142 Cong Rec H 7105 refers to information located in volume 142 of the House version of the Congressional Record, for the date of June 6, 1996; other letters designate locations of other sources—"S," "E," and "D" refer to Senate, Extended Remarks, and Daily Digest, respectively). The selected Congressional Record debate and remarks about PRWORA are set apart below by *italics* and are offered to supply a sense of the exchange between members of Congress and their associated proclivities in relation to an undoubtedly controversial bill. The longer remarks contain viewpoints as the bill moved toward approval by both chambers. (Recall that the House and the Senate introduce separate versions of a bill, and both must be reconciled in a final version that becomes enacted.) Subsequent, and shorter, comments are associated with the conference report (the final version on which both chambers agree). The legislative history ends, fittingly, with remarks of President Clinton upon signing the bill into law on August 22, 1996.

Perhaps the most revealing aspect of the bill's travel through the legislative process is the fact that Congress appears occasionally perplexed about the ends it seeks to achieve: Elimination of poverty? Modification of behavior of poor people? Penalizing indolent behavior? Sanction out-of-wedlock birth? Strengthen the related institutions of marriage and family? Provide some measure of a "safety net"? As the rhetorical flourishes in the Congressional Record suggests, Congress thought it was doing all of these things—at the behest of their constituencies, out of some notion of family and

social preservation, out of a desire to remedy the ill effects of 30 years of entitlement-based cash assistance, to forever change the paradigm regarding the federal government's role in social welfare, and to facilitate budget relief and reverse the pattern of accelerated spending for welfare.

Whatever their explicit or inarticulate goals, it is clear that Congress attempted to bring this legislation into existence within the context of what Ellwood (1988) refers to as the conflict of value tenets and helping conundrums. Only time will tell if Congress effectively navigated this maze of conflicting perspectives. The value conflicts embodied in the Congressional debate reflect America's ambivalent and occasionally mean-spirited approach to welfare. Ellwood (1988, p. 16–25) sees

> . . . recurring themes in public and academic discussion of what it is Americans believe. Four basic tenets seem to underlie much of the philosophical and political rhetoric about poverty.
>
> - Autonomy of the individual. Americans believe that they have a significant degree of control over their destinies and, at a minimum, that people can provide for themselves if they are willing to make the necessary sacrifices. The rags-to-riches American dream pervades our culture. Rugged individualists win respect even if their behavior borders on the eccentric or even the criminal.
> - Virtue of work. The work ethic is fundamental to our conceptions of ourselves and our expectations of others. People ought to work hard not only to provide for their families, but because laziness and idleness are seen as indications of weak moral character. The idle rich command as much disdain as jealousy; the idle poor are scorned.
> - Primacy of family. The nuclear family is still the primary social and economic unit, and, certainly, its foremost responsibility is to raise children. Families are expected to socialize children, to guard their safety, to provide for their education, to impose discipline and direction, and to ensure their material well-being while they are young. The husband and wife are also expected to support each other.
> - Desire for and sense of community. The autonomy of the individual and primacy of the family tend to push people in individualistic and often isolating directions. But the desire for community

remains strong in everything from religion to neighborhood. Compassion and sympathy for others can be see as flowing from a sense of connection with and empathy for others.

Both liberal and conservative academics agree that any poverty policy inevitably poses some difficult conundrums, [which] suggest that poverty policy must always be an awkward compromise among competing values and perspectives. [The] three helping conundrums:

- Security-Work Conundrum: When you give people money, food, or housing, you reduce the pressure on them to work and care for themselves. . . . [This conundrum], therefore, suggests a direct conflict between our desire to help those in need and our desire to encourage work and self-support.
- Assistance-Family Structure Conundrum: [T]he economic insecurity of single parent-families leads to a natural desire to provide some level of support through welfare, yet such aid creates a potential incentive for the formation and perpetuation of single-parent families.
- Targeting-Isolation Conundrum: A natural goal of policy is to target services to those who are most in need, but the more effectively you target, the more you tend to isolate the people who receive the services from the economic and political mainstream. . . . Yet when we target people, we often label them, change the rules, lower their incentives, and break down the political links that help maintain public support for aid. (pp. 16–25)

PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996

AN ACT

To provide for reconciliation pursuant to section 201(a)(1) of the concurrent resolution on the budget for fiscal year 1997.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

TITLE I—BLOCK GRANTS FOR TEMPORARY ASSISTANCE FOR NEEDY FAMILIES

TITLE I—BLOCK GRANTS FOR TEMPORARY ASSISTANCE FOR NEEDY FAMILIES

Sec. 101. FINDINGS.

The Congress makes the following findings:

(1) Marriage is the foundation of a successful society.

(2) Marriage is an essential institution of a successful society which promotes the interests of children.

(3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children.

(4) In 1992, only 54 percent of single-parent families with children had a child support order established and, of that 54 percent, only about one-half received the full amount due. Of the cases enforced through the public child support enforcement system, only 18 percent of the caseload has a collection.

(5) The number of individuals receiving aid to families with dependent children (in this section referred to as "AFDC") has more than tripled

since 1965. More than two-thirds of these recipients are children. Eighty-nine percent of children receiving AFDC benefits now live in homes in which no father is present.

(A)

(i) The average monthly number of children receiving AFDC benefits—

(I) was 3,300,000 in 1965;

(II) was 6,200,000 in 1970;

(III) was 7,400,000 in 1980; and

(IV) was 9,300,000 in 1992.

(ii) While the number of children receiving AFDC benefits increased nearly threefold between 1965 and 1992, the total number of children in the United States aged 0 to 18 has declined by 5.5 percent.

(B) The Department of Health and Human Services has estimated that 12,000,000 children will receive AFDC benefits within 10 years.

(C) The increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women. Between 1970 and 1991, the percentage of live births to unmarried women increased nearly threefold, from 10.7 percent to 29.5 percent.

(6) The increase of out-of-wedlock pregnancies and births is well documented as follows:

(A) It is estimated that the rate of nonmarital teen pregnancy rose 23 percent from 54 pregnancies per 1,000 unmarried teenagers in 1976 to 66.7 pregnancies in 1991. The overall rate of nonmarital pregnancy rose 14 percent from 90.8 pregnancies per 1,000 unmarried women in 1980 to 103 in both 1991 and 1992. In contrast, the overall pregnancy rate for married couples decreased 7.3 percent between 1980 and 1991, from 126.9 pregnancies per 1,000 married women in 1980 to 117.6 pregnancies in 1991.

(B) The total of all out-of-wedlock births between 1970 and 1991 has risen from 10.7 percent to 29.5 percent and if the current trend continues, 50 percent of all births by the year 2015 will be out-of-wedlock.

(7) An effective strategy to combat teenage pregnancy must address the issue of male responsibility, including statutory rape culpability and prevention. The increase of teenage pregnancies among the youngest girls is particularly severe and is linked to predatory sexual practices by men who are significantly older.

(A) It is estimated that in the late 1980s, the rate for girls age 14 and under giving birth increased 26 percent.

(B) Data indicates that at least half of the children born to teenage mothers are fathered by adult men. Available data suggests that almost 70 percent of births to teenage girls are fathered by men over age 20.

(C) Surveys of teen mothers have revealed that a majority of such mothers have histories of sexual and physical abuse, primarily with older adult men.

(8) The negative consequences of an out-of-wedlock birth on the mother, the child, the family, and society are well documented as follows:

(A) Young women 17 and under who give birth outside of marriage are more likely to go on public assistance and to spend more years on welfare once enrolled. These combined effects of "younger and longer" increase total AFDC costs per household by 25 percent to 30 percent for 17-year olds.

(B) Children born out-of-wedlock have a substantially higher risk of being born at a very low or moderately low birth weight.

(C) Children born out-of-wedlock are more likely to experience low verbal cognitive attainment, as well as more child abuse, and neglect.

(D) Children born out-of-wedlock were more likely to have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves.

(E) Being born out-of-wedlock significantly reduces the chances of the child growing up to have an intact marriage.

(F) Children born out-of-wedlock are three times more likely to be on welfare when they grow up.

(9) Currently 35 percent of children in single-parent homes were born out-of-wedlock, nearly the same percentage as that of children in single-parent homes whose parents are divorced (37 percent). While many parents find themselves, through divorce or tragic circumstances beyond their control, facing the difficult task of raising children alone, nevertheless, the negative consequences of raising children in single-parent homes are well documented as follows:

(A) Only 9 percent of married-couple families with children under 18 years of age have income below the national poverty level. In contrast, 46 percent of female-headed households with children under 18 years of age are below the national poverty level.

(B) Among single-parent families, nearly one half of the mothers who never married received AFDC while only one fifth of divorced mothers received AFDC.

(C) Children born into families receiving welfare assistance are three times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare.

(D) Mothers under 20 years of age are at the greatest risk of bearing low birth weight babies.

(E) The younger the single-parent mother, the less likely she is to finish high school.

(F) Young women who have children before finishing high school are more likely to receive welfare assistance for a longer period of time.

(G) Between 1985 and 1990, the public cost of births to teenage mothers under the aid to families with dependent children program, the food stamp program, and the Medicaid program has been estimated at $120,000,000,000.

(H) The absence of a father in the life of a child has a negative effect on school performance and peer adjustment.

(I) Children of teenage single parents have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves.

(J) Children of single-parent homes are three times more likely to fail and repeat a year in grade school than are children from intact two-parent families.

(K) Children from single-parent homes are almost four times more likely to be expelled or suspended from school.

(L) Neighborhoods with larger percentages of youth aged 12 through 20 and areas with higher percentages of single-parent households have higher rates of violent crime.

(M) Of those youth held for criminal offenses within the State juvenile justice system, only 29.8 percent lived primarily in a home with both parents. In contrast to these incarcerated youth, 73.9 percent of the 62,800,000 children in the Nation's resident population were living with both parents.

(10) Therefore, in light of this demonstration of the crisis in our Nation, it is the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests and the policy contained in part A of title IV of the Social Security Act (as amended by section 103(a) of this Act) is intended to address the crisis.

(The remaining titles are not included here.)

LEGISLATIVE HISTORY

ACTIONS:
Committee Referrals:
NOT REFERRED TO COMMITTEE UPON INTRODUCTION
Legislative Chronology:
1st Session Activity:
2nd Session Activity:
06/27/96 142 Cong Rec H 7105
Reported in the House, (H. Rept. 104651)
07/17/96 142 Cong Rec H 7745

It was made in order that for consideration of the bill that the first reading of the bill be dispensed with, that all points of order against consideration of the bill be waived, that general debate be confined to the bill and be limited to two hours equally divided and controlled by the Chairman and ranking minority member of the Committee on the Budget, that after general debate the Committee of the Whole rise without motion, and that no further consideration of the bill be in order except pursuant to a subsequent order of the House. [An excerpt from the discussion follows.]

The Clerk read the title of the bill.

THE CHAIRMAN. Pursuant to the order of the House of today, the bill is considered as having been read the first time.

The gentleman from Ohio (Mr. Kasich) and the gentleman from Minnesota (Mr. Sabo), will each control 60 minutes. The Chair recognizes the gentleman from Ohio (Mr. Kasich).

MR. KASICH. Madam Chairman, I yield myself such time as I may consume.

Madam Chairman, today we have the beginning of a debate that really represents wonderful news for America. Frankly, the third time, they say in lore, is always a charm. Well, this is the third time we are going to bring to the floor, and we are going to pass, a welfare reform bill that ends welfare as we know it and provides a new level of opportunity for all Americans, opportunity for people who find themselves in need of assistance and opportunity for those folks who get up and go to work every morning and ask nothing from their government other than to have their level of taxation kept at a minimum and to have the maximum amount of personal liberty.

Now, Madam Chairman, this welfare bill that we are about to consider today is something that I think Americans have been asking for virtually all of my adult life. And let me tell my colleagues what it is about. If is founded on the basis of Judeo-Christianity. Judeo Christianity says it is a sin not to help people who need help, but it also says it is equally a sin to continue to help people who need to learn how to help themselves.

What we have in this bill is a generous amount of continued assistance for those people who find themselves in real need. I was born and raised in a community where we had a public housing development just down the street, and we always believed that it was necessary that people get the kind of help they need to lift themselves up by their bootstraps, to get the kind of help from those people in our society who have been successful, who have been blessed; and that from those people who are the most successful there is a need and a reason and, frankly, an ultimatum in some respects to make sure that we help those who, through no fault of their own, find themselves dependent.

Now, at the same time, we also believed in the community where I was born and raised that we need to give people an opportunity to be able to lift themselves out of these situations that make them dependent. I think we all recognize in this country that if we have a program that traps people in dependence, it is wrong.

In other words, we do not want to have created a welfare system in our country where people have learned to depend on it and not to be able to depend on themselves. Frankly, it is not fair to those folks. It is certainly not fair to their children, who get raised in an environment where they seem to get confused about the issue of dependency and independence. I believe virtually everybody in this country wants to be independent from help from others. I believe that virtually everybody in this country wants to have a job. But I think that we have created some systems, including the current welfare system, that have provided too many of the wrong incentives for people to avoid work or to be lulled into a sense of dependency. It is wrong. It is wrong for the people on the system. It is wrong for their children.

So what we attempt to do in this welfare bill is to provide generous amounts of money so that the children of people on welfare can be taken care of while the people who are on welfare get trained and get a job. We say at the end of the day, you must go and find a job. We will train you. We will help you find a job. And at the end of the day, you are going to have to get off of welfare and you are going to have to go to work. I think that is what most people in this country want.

Second, however, it will not just be a victory for those who have found themselves trapped in the system that in some respects has robbed themselves and their children of the independence that they dream about. But this is a bill that in my judgment is a terrific victory for those who struggle every day to make ends meet.

There are the mothers and fathers who take their kids to day care. These are the mothers and fathers who on every paycheck sit down and try to figure out how they can make their ends meet. And these are people who do not get anything from the Government. They do not get food stamps. They do not get any form of welfare, any kind of subsidy from the Federal Government. These people get up and they go to work every day, and they struggle every day just to keep their heads above water. Frankly, they are the ones that are truly the American heroes in this country.

It is not the people who struck it rich and made a million dollars or in some cases made billions of dollars. It is not the NBA players who are signing contracts

for $105 million. They are not our heroes. Our heroes are the mothers and fathers who fight their way off welfare. They are the mothers and fathers who have never been on it and work hard to stay off of it, and all they want to do is to raise their children in a Godfearing country with decent values and security.

This bill today represents a terrific victory for those people who get up every day and go to work. That is who we are passing this bill for, for those who find themselves stuck in a system that has not allowed them to become independent and, second, for those Americans who go to work every day, the real American heroes.

This bill is compassionate for those who really need the help. We recognize there are people in our society who, no matter what happens, are not ever going to get a job. Do you know what? We have got provisions that protect them. We recognize there are some people who will never become independent. That is a fact of life. We have got to deal with it. But we also recognize that, if we have a strong training, if we have a strong child care section and if we have a strong work requirement and we say to people, at some point you must go to work, we think that is also compassionate.

So, we think we have a welfare bill that is balanced. We think also we have a welfare bill that essentially speaks to what Americans all across this country have wanted, help those who need help, but force those who need to learn how to help themselves to go to work. That is what this bill does. It is reinventing welfare as we know it.

As the American people find out what is in this bill, and this bill will pass the House, it will pass the Senate, and it will be sent to the President, we hope and pray he will sign it. If he does, it is going to be a victory for everybody in this country, those concerned about those that cannot help themselves, those who need to learn to start helping themselves, and those who get up every day and work hard to make sure that they are independent.

This is a good bill for America. This is a great day for the House. Let us keep our fingers crossed because the third time can be a charm.

Madam Chairman, I yield the balance of my time to the gentleman from Kansas (Mr. Roberts), chairman of the Committee on Agriculture, and I ask unanimous consent that the gentleman from Kansas be permitted to yield time to additional speakers.

THE CHAIRMAN. Is there objection to the request of the gentleman from Ohio?

There was no objection.

MR. SABO. Madam Chairman, I ask unanimous consent to yield my first 30 minutes to the gentlewoman from California (Ms. Roybal-Allard) and that she have the authority to yield time.

THE CHAIRMAN. Is there objection to the request of the gentleman from Minnesota?

There was no objection.

THE CHAIRMAN. The gentlewoman from California (Ms. Roybal-Allard) is recognized for 30 minutes.

MS. ROYBAL-ALLARD. Madam Chairman, I yield 2 minutes to the gentleman from Arizona (Mr. Pastor).

MR. PASTOR. Madam Chairman, I want to thank my colleague for yielding the 2 minutes.

We heard the chairman of the Committee on the Budget talk about a victory for America as we debate this bill and the consequences of it. I have to tell my colleagues that they are going to hear some Members speak to inform us that this victory is not shared by all Americans. Americans who work hard, Americans who want to take care of the families, people who have been in this country for many years but because of their status as legal immigrants will not be able to share this victory.

There are a number of us who are concerned both on the substitute and also concerned with the base bill. We feel that the treatment of legal immigrants is very unfair. There is a misconception in this country, there is a misconception in this House that legal immigrants are people who recently came over and are here legally only for one reason, to get on public assistance. That is not the case. We will hear tonight that many of these people have been here for many, many years, have worked hard, have raised their children, and now, in many cases, will need the services and the opportunities that they have earned.

We will also hear that there will be many children that will be put in very hard situations by these bills. As adults, as Americans, as parents, as family members, we are concerned about the children that will not savor this taste of victory.

We will hear about other parts of the bills that will affect people on domestic violence, entitlements and will not savor the taste of victory.

So, Madam Chairman, we will rise in opposition to both bills.

MR. ROBERTS. Madam Chairman, I yield 4 minutes to the distinguished gentleman from Michigan (Mr. Camp), a former member of the sometimes powerful House Committee on Agriculture, a current valued member of the Committee on Ways and Means.

(MR. CAMP asked and was given permission to revise and extend his remarks.)

MR. CAMP. Madam Chairman, today Congress is again attempting to end welfare as we know it. Over the last 19 months, my colleagues and I have twice written, debated, and adopted welfare reform legislation only to have our efforts vetoed by the President. How many more families will be trapped in the current system while time wastes in Washington?

Our current welfare system has deprived hope, diminished opportunity and destroyed lives. After 30 years and billions and billions of dollars, I ask, has the Federal Government solved the problems of poverty and dependency?

Just spending more money on the Washington welfare system will not work. Just spending more money on the current system will not help children. We need to

start over. The bill before us today is a fresh start. It accomplishes five important goals for welfare reform.

First, it requires work in exchange for benefits. It encourages independence and self-reliance for able-bodied people. To help those that work, the bill provides more child care funding than current law and more than the President's proposal for working families. We have a moral obligation to improve the lives of our children, and we must do all we can to change the culture of poverty that our current welfare laws have created.

Second, this legislation also time limits welfare benefits to 5 years. While the goal is to move all families from welfare to work, some families may need more time or more help. So we retain an effective safety net. Our bill allows a hardship exemption from the time limit for up to 20 percent of those on welfare. The hard-working families in the Fourth Congressional District of Michigan and across the country believe welfare should be a hand up, not a handout. They very much support the requirement that able-bodied welfare recipients work for the benefits so generously provided by the American taxpayer.

Third, we do not give welfare to felons and noncitizens. Many people are not aware, the Federal Government sends checks to convicted felons serving time in prison. Cannot these tax dollars be better spent helping those families truly in need? Also many noncitizens have a proud tradition of hard work and achievement. They come to America to share in the American dream, which does not and should not include welfare dependency.

Fourth, this legislation also provides States with the flexibility to meet the needs of its citizens. My State of Michigan, under the leadership of Gov. John Engler, and other States, have made tremendous strides in moving people from welfare to work. These accomplishments, however, have come in spite of the Federal Government and the current welfare laws.

For too long the Federal Government has maintained policies which have created a culture of poverty, dependence and despair. This bill brings control of welfare back to the people where it belongs.

It is important to remember what the Government's role in promoting independence should be. While legislators can design programs to help those struggling to gain financial security, the Government cannot make them succeed. Changing one's attitude is something that can only be accomplished by that individual.

Personal responsibility is the focus of this legislation. Individuals must accept responsibility for their actions and work with Government programs to improve their lives.

The current Washington-based welfare system demands no responsibility, no work ethic, no learning, no commitment and, in the end, no pride. Instead, it promotes illegitimacy, rewards irresponsibility and discourages self-esteem. Our families and our children deserve better.

I urge my colleagues to support the bill.

MS. ROYBAL-ALLARD. Madam Chairman, I yield myself 1 1/2 minutes.

Madam Chairman, I, like other Members of this body, am in strong support of welfare reform. But I am not for reform regardless of the consequences. For that reason, I rise in strong opposition to H.R. 3734.

This bill will have many unintended consequences to women, children and families in this country. One of those consequences is its impact on victims of domestic violence. Current studies reveal that 25 to 60 percent of participants in welfare-to-work programs are victims of domestic abuse. For these women, the welfare system is often the only hope they have for escape and survival. This bill will effectively shred that safety net.

By eliminating the guarantee status of AFDC and imposing inflexible time limits and work requirements, H.R. 3734 will force many battered women to stay with their batterers or return to them for financial support.

With the passage of the Violence Against Women Act, Congress has taken a strong stance against domestic violence. Let us not turn our backs on the victims of this deplorable crime. The lives of battered women and their children depend on it.

I hope that my colleagues will vote no on H.R. 3734.

MR. ROBERTS. Madam Chairman, I yield 2 minutes to the distinguished gentleman from Tennessee (Mr. Wamp).

MR. WAMP. Madam Chairman, I thank the gentleman for yielding the time.

I want to just speak a moment to the separation of policy versus politics in this debate, because we know it is sound policy to address the welfare system in this country, replacing welfare with a working populous of able-bodied people. But there is also a political equation here. There has been for many months. We know that welfare reform has been passed twice by this Congress and vetoed both times. But our President, Bill Clinton, came into these chambers and delivered the State of the Union address in January, and he challenged us to send a clean welfare reform bill back to him. There were some politics associated with whether or not he might sign it, take the credit and all of that. I want to say that as a freshman Member of this body, many of us have been very unfortunately blamed for some of the misfires of the last few months. We have been called unreasonable, radical, extremist. We, many of us, went to the leadership of our side, our party, Members like the gentleman from Nevada (Mr. Ensign) myself, and said let us disconnect Medicaid, health care for the poor, from welfare and do what the President asked us to do and send a clean welfare reform bill, and as the gentleman from Ohio (Mr. Kasich) articulated, the President is expected to sign this bill because we are sending him substantive welfare reform, effective and efficient welfare reform, but we are sending him the clean bill that he asked for. We did make that decision on this side of the aisle to disconnect the two so that he could not say I do not want Medicaid attached to this.

This comprehensive bill provides the job training, the child care, the career education, those components that we all believe should accompany a comprehensive

welfare reform bill. This is going to be one of the greatest successes of this Congress. Yes, he will get credit, but we will get credit. We are doing the people's business.

MS. ROYBAL-ALLARD. Madam Chairman, I yield 2 minutes to the gentlewoman from California (Ms. Lofgren).

MS. LOFGREN. Madam Chairman, I, until this Congress, was a member of the local government that had responsibility for administering the welfare program, and I felt, coming here, that there were a lot changes I want to make. There is no doubt that a lot of things need to be fixed in welfare programs in this country. We need to put people back to work, we need to have expectations for work, we need to pay attention to child care, we need to change the whole system. But what concerns me is that once again the bill that we will deal with goes too far.

As you know, I think, and I want to talk about legal immigrants, not illegal immigrants because they are eligible for nothing and should be eligible for nothing, but I want to talk about what is fair to taxpayers, and I will give my colleagues a couple of examples.

In my district there are large numbers of Vietnamese freedom fighters, people who fought communism who came to this country as originally refugees, ultimately became residents, and under the bill before us, if after paying taxes for years and years and years, 14 years, they get a stroke, they cannot get nursing home coverage.

Let me talk about another example. An immigrant who comes in with her husband, and her husband works for 50 years and dies, and then as she is an old person, she is 65, she has a stroke, and she is not eligible to get the kind of nursing home care that the widow of every other taxpayer in America can look to get.

Now, I do not think that is fair. There are some abuses among immigrant groups, and there are necessary steps that need to be taken, and in fact the Deal bill earlier this year did deal with those. But this is unfair. I think when we look at our taxpayers, if they are legal residents or citizens, we ought to make sure that people who have worked hard and paid their taxes are treated fairly, and this so-called reform bill fails in that regard.

MR. ROBERTS. Madam Chairman, I yield 3 1/2 minutes to the distinguished gentleman from Virginia (Mr. Goodlatte) and take the House's time to thank him for his contributions in increasing the trafficking penalties and bringing integrity to the food stamp reforms that we have passed in the Committee on Agriculture and hope to pass on the House floor.

MR. GOODLATTE. Madam Chairman, I thank the chairman of the Committee on Agriculture for his kind words.

Madam Chairman, I rise in support of the welfare reform bill under consideration today, especially the reforms to the Food Stamp Program. The Food Stamp Program provides benefits to more than 27 million people each month at a cost this year of more than $26 billion. It is growing out of control and badly in need of reform.

*The Committee on Agriculture held eight hearings during the 104th Congress to review the Food Stamp Program, and many of the reforms included in this bill are based on the testimony received in these hearings. Witnesses appearing before the committee and the subcommittee on department operations, nutrition and foreign agriculture represented a wide variety of organizations. They included the administration, the General Accounting Office, the U.S. Department of Agriculture Office of Inspector General, the United States Secret Service, Governors, State and local welfare administrators. Representatives from organizations providing direct food assistance to needy families testified. Testimony was also received from grocers, agricultural organizations, churches and advocacy groups. * * **

Madam Chairman, I urge my colleague to support this bill. The welfare system, including the Food Stamp Program, needs significant reform, and it is accomplished in this bill.

MS. ROYBAL-ALLARD. Madam Chairman, I yield 2 minutes to the gentlewoman from Texas (Ms. Jackson-Lee).

(Ms. Jackson-Lee of Texas asked and was given permission to revise and extend her remarks.)

MS. JACKSON-LEE. Madam Chairman, I want real welfare reform. All of us have tried to work to respond to those who would come in good faith. But I want to simply appeal to the women of America, the families of America. This Republican bill cuts some almost $60 billion from individuals across this Nation who, each time we ask them, they say I would like to work, I would like to get off welfare, and, yes, as an American I want to contribute to what America has to offer.

But these children are the ones that we are speaking about, children who may not have the child care necessary for their parents to transition from welfare to work because we lessen the opportunity for those families to have transitional child care. If the money runs out in the State, folks, if the bucket is empty, then they do not have an opportunity to go to work if the children are not cared for.

And then when we look at Medicaid, we find that Medicaid will not be available for a period of time for those families. Medicaid equals health care. It is important to recognize that we are concerned about those families when we have a 5-year limit cutoff whether they will have the inability to carry Medicaid to insure good health for their children and for themselves.

This is a bad bill. The Republican bill is a repeat, a deja vu, of cutting billions of dollars, but yet not responding to the fact that we all can compromise together insuring that families have child care and job training and, yes, work. This is short on work, and then when it is short on work, it is short on opportunity to protect our children. We do not give them good health care, we do not provide safe and warm places for them to stay while those parents, those mothers, are going out to work.

I am reminded that my constituents to a one want welfare reform. I have voted for good welfare reform. Let us go back to the table and not cut $60 billion just to

make us feel good. Let us make sure that we work for the American people, who want real welfare reform.

Madam Chairman, I rise today to speak on H.R. 3734, the Republican welfare budget reconciliation, because of my concerns regarding some of the reform provisions.

While this effort at welfare reform contains both a few improvements and some further steps backward, it still poses dangers to children. This bill will abandon the basic Federal assurances of aid for poor children and families, make deep cuts in food stamp and SSI benefits. This bill would cause older children to lose their AFDC benefits, and provide inadequate child care funding for parents who are required to work, and it would eliminate almost all help for legal immigrants in need.

Welfare reform is synonymous with women and children which means that the $53 billion in spending cuts over 6 years will hurt them disproportionately. This bill will reduce food stamps by $23.2 billion, it will reduce Supplemental Security Income (SSI) by $9.6 billion and aid to legal immigrants by $17.1 billion.

In the State of Texas alone, 137,641 children would be denied aid by the year 2005 because of the federally mandated 5-year limit on receiving welfare benefits. There will be 46,986 babies in Texas who would be denied aid in the next 4 years because they were born in families already on welfare, and another 89,327 children in Texas would be denied aid if the State froze its spending on cash assistance at the 1994 levels.

This bill would lead another 60,000 Texas children into poverty.

This legislation is decidedly more mean spirited in its methods than any I have seen to date. It narrows the definition of disability for poor children seeking to qualify for Supplemental Security Income (SSI). This bill would withhold vital cash aid for children with a wide range of serious disabilities including mental retardation, tuberculosis, autism, serious mental illness, head injuries, and arthritis.

Food stamp benefits would be cut severely, and the Federal guarantee of food aid could be eliminated on the State level as an option given to them by this legislation. The cuts to the Food Stamp Program would hurt 14 million children.

The victims of domestic violence and their children would still have no assurance that, if they escape the violence, they could at least survive with cash assistance until they are able to find work. This would cause many women and their children being forced by harsh economic realities back into the abusive environment they were attempting to escape.

I would like to caution my colleagues to carefully consider their vote on this bill. I will continue to be committed to working for compassionate and fair welfare reform. * * *

07/17/96 142 Cong Rec H 7762

House completed two hours of general debate

07/17/96 142 Cong Rec H 7779

H. Res. 482, resolution providing for further consideration of the bill, reported in the House (H. Rept. 104686)

07/18/96 142 Cong Rec H 7903

House agreed to the amendment in the nature of a substitute made in order by the rule, by voice vote

07/18/96 142 Cong Rec H 7796

House agreed to H. Res. 482, rule providing for further consideration of the bill, by a recorded vote of 358 yeas and 54 nays (Roll No. 327)

The Speaker pro tempore (Mr. Kolbe). Pursuant to House Resolution 482 and rule XXIII, the Chair declares the House in the Committee of the Whole House on the State of the Union for the further consideration of the bill, H.R. 3734.

Accordingly the House resolved itself into the Committee of the Whole House on the State of the Union for the further consideration of the bill (H.R. 3734) to provide for reconciliation pursuant to section 201(a)(1) of the concurrent resolution on the budget for fiscal year 1997, with Ms. Greene of Utah in the chair. [An excerpt of the debate follows.]

THE CHAIRMAN. When the Committee of the Whole rose on Wednesday, July 17, 1996, all time for general debate pursuant to the previous order of the House had expired.

Pursuant to House Resolution 482, there will be 2 additional hours of general debate. The gentleman from Ohio (Mr. Kasich) and the gentleman from Minnesota (Mr. Sabo) will each control 1 hour.

MR. SABO. Madam Chairman, I ask unanimous consent that the gentleman from Texas (Mr. Archer) be allowed to control the time for the gentleman from Ohio (Mr. Kasich) temporarily and be allowed to yield time.

THE CHAIRMAN. Is there objection to the request of the gentleman from Minnesota?

There was no objection.

THE CHAIRMAN. The Chair recognizes the gentleman from Texas (Mr. Archer).

MR. ARCHER. Madam Chairman, I yield myself such time as I may consume.

Madam Chairman, since 1965, roughly 30 years ago, government in this country has spent $5.5 trillion on welfare programs, more than has been spent on all of the wars fought in this century. Yet people are poorer and more dependent than ever. Despite our best efforts, despite the expenditure of these massive amounts of money, we have lost the war on poverty.

Madam Chairman, today, we stand on the threshold of a new effort, an effort that can win the war.

With the vote we take today, we recognize that the Great Society's welfare programs have not helped people. They have destroyed people. They have not kept families together. They have torn them apart.

These policies haven't turned urban areas of America into shining cities on a hill. They have made them into war zones where law-abiding citizens are afraid to go out at night.

They have led to the creation of two Americas. One marked by hope and opportunity. The other by despair and decay.

In short, the welfare state has created a world in which children have no dreams for tomorrow and parents have abandoned their hopes for today.

The people trapped in welfare, the mothers, the children, the fathers, are our fellow citizens, one and all. We have a moral obligation to them, as Americans, to lend a helping hand.

For the people on welfare aren't abusing welfare, as much as welfare is abusing them.

We are on the threshold of improving America by fixing our failed welfare state. We're improving America for the children on welfare, for the parents on welfare, and for ourselves.

Our reforms are based on five pillars. The pillars represent the values that made America great.

One—we think people on welfare should work for their benefits. A welfare worker I spoke with told me the biggest beneficiaries of work aren't the moms or the dads. Yes, they benefit. But she said it's the children who watch their parents get up each morning, go to a job, and return home at night who are the big winners. These children get better grades in school, have fewer problems with crime, and are less likely to end up on welfare because the values and virtues of work, not idleness, are instilled in them at a young age.

Two—Time limit benefits. Welfare should be a temporary helping hand, not a way of life.

Three—Provide no welfare for felons and noncitizens. America always has been and always will be the land of opportunity for immigrants. But it's not right to ask hardworking, taxpaying Americans to support noncitizens who come here and then go on welfare.

Four—Return power and control of welfare to the states and communities where help can best be delivered. We must remove Washington's control over welfare. This city built the failed welfare state. It's time to get Washington out of the welfare business.

Five—Reward personal responsibility and fight illegitimacy. We shouldn't have a welfare system that promotes illegitimacy and discourages marriage. It's time to change signals and return to old fashioned values.

Madam Chairman, today's vote will be historic.

It represents the biggest, most helpful change to social policy in America since the 1930s.

This vote recognizes that America is a caring country, that Americans are a giving people, and that welfare recipients are capable of success if we would only let them try.

Our colleague, J.C. Watts, has a wonderful way of expressing it. He says America's welfare recipients are eagles waiting to soar.

Madam Chairman, I think it's time we removed the heavy hand of the Federal Government from their wings. We must let our fellow citizens on welfare reach new heights as they climb the economic ladder of life.

That's what this bill does. It helps people to help themselves. It restores hope and it provides opportunity. It's strong welfare reform and it's what the American people have wanted for years.

Madam Chairman, there is no good reason why this bill should not be passed by the Congress and signed into law. The American people expect nothing less, and families on welfare deserve much, much more than the sad status quo.

For the sake of all Americans, I hope the President will let this bill become law.

Madam Chairman, I reserve the balance of my time.

MR. SABO. Madam Chairman, I yield 2 minutes to the gentleman from California (Mr. Matsui).

MR. MATSUI. Madam Chairman, yesterday we heard the chairman of the Budget Committee say that this debate was really about Judeo-Christian ethics. That is why I was somewhat disappointed last night when I read Congress Daily. In the Congress Daily we talked about welfare reform and we talked about what this debate was really all about. The chairman of the subcommittee that has jurisdiction over welfare was quoted as stating from a political point of view, the President of the United States is in a box.

Madam Chairman, that is what this debate is all about—to jeopardize 9 million children who will be affected by this bill just to put the President of the United States in a box.

What kind of people would draft legislation for political purposes to affect so many children of America? This bill is weak on work and tough on America's children.

The Congressional Budget Office, their own agency, hired by the Republican House and Senate, has said that the 1.7 million jobs that the Republicans say will be created by a woman going off welfare is an illusion. It is deceptive, it is not going to happen, because they do not provide the resources for it. Their own agency has said they will not obtain those 1.7 million jobs. So this is not a jobs bill. This is not a bill to get people off of welfare into work.

But the worst part of this bill is what it will do to children. Because of those time limits and because of the fact that the Republican bill prohibits the States from using Federal funds for vouchers or any kind of assistance after a woman meets those time limits, she will then become destitute, she will become homeless, her children will probably have to go into foster care, even though she might be a good mother.

This is what this is all about. It is about politics to hurt America's children. I urge a "no" vote on this legislation.

MR. ARCHER. Madam Chairman, I yield 2 1/2 minutes to the gentlewoman from Connecticut (Mrs. Johnson), the chairman of the Subcommittee on Oversight of the Committee on Ways and Means, the chairman of the Committee on Standards of Official Conduct, a person who is so greatly respected on our committee and has given such great service to this House, the country, in all of those roles.

MRS. JOHNSON. Madam Chairman, I rise in strong support of this bill, and I could not disagree more with the preceding speaker. We have to change the future. Welfare cannot be a way of life for either women or children. It is not a satisfactory way of life. There is no hope, there is no opportunity when you are on welfare.

Now, remember, under this bill at the end of 5 years you get Medicaid, nutrition assistance, housing assistance, energy assistance, all those programs that provide services, on a means-tested basis. In addition, 20 percent of the whole caseload can be carried forward. So we are not talking about a draconian system; we are talking about reform and creating hope and opportunity in our welfare system for both the women and children on welfare.

This bill, let me show you, will allow States, for instance, to be free of the rigid law that now governs income disregards.

The woman is on welfare and starts earning money, and we right away start reducing benefits. Under this reform bill States will have complete freedom to design a fairer system. They may choose to keep her benefits up, and, as her salary goes up, to then decline her benefits. States have the power to help her get a good start in those 5 years. They have the power to educate and train, but to combine that with work experience. Under this program, women on welfare could immediately go to work for half a day in new day care centers, use State day care subsidies to give informed leadership to those centers as skilled master teachers. Let welfare mothers, who are good care providers, be the soldiers in those day care centers and then in the afternoon go on to education and training centers while other welfare recipients staff the day care centers. It will cut the cost of day care and it will allow the money to be used powerfully in the transition period. This gives opportunity to States to create the kind of humane and supportive system women need to literally change their lives.

In addition, the terrible decline in the cities is in part the result of nonpayment of rent. Part of the problem of our cities is that if a welfare recipient fails to pay their rent, it takes at least 6 months to solve the problem and sometimes much more than that. Under this new system, States can say you miss a month's rent? Fine, we will pay it directly now until you get on your feet. So we can prevent the degradation of our housing stock in the cities just by requiring personal responsibility on the part of welfare recipients and providing States the flexibility to create a more realistic support system, under the umbrella of Federal concern, compassion and support.

MR. SABO. Madam Chairman, I yield myself such time as I may consume.

Madam Chairman, if I might inquire of the chairman of the Committee on Ways and Means, we are curious if there is a final version of the bill and if there is a final summary of the last minute changes?

MR. ARCHER. Madam Chairman, will the gentleman yield?

MR. SABO. I yield to the gentleman from Texas.

MR. ARCHER. Madam Chairman, the Committee on Rules had the statutory language of the bill. That was made a part of the rule we voted on.

MR. SABO. Is there a summary of the last minute changes that were made?

MR. ARCHER. Not to my knowledge, although the gentleman is aware that this bill did not come out of the Committee on Ways and Means; it came out of his committee, the Committee on the Budget.

MR. SABO. Well, it has been substantially changed since it came through the Committee on the Budget. Many of us are curious what the final form of the bill is.

Madam Chairman, I yield 2 minutes to the gentlewoman from California (Ms. Woolsey).

(Ms. Woolsey asked and was given permission to revise and extend her remarks.)

MS. WOOLSEY. Madam Chairman, we all agree that welfare does not work, the welfare system does not work for the taxpayers, and it does not work for the families who are on welfare, and we all agree that the welfare system must be overhauled. It must be overhauled so that it helps recipients get jobs and stay off welfare permanently. But that is the easy part.

The challenge and responsibility we face as legislators, however, is finding the answers to, what if's. What if a mother on welfare cannot find a job? What if she is not earning enough to take care of her family? What if her benefits are cut off and she is unable to provide her children with food, with clothes, and with health care?

Madam Chairman, this bill does not even attempt to answer these, what if's. In fact, the majority has gone out of its way to prevent States from meeting the basic needs of children, children whose parents are unable to get a job.

This bill says to poor children, do not get hungry, do not get sick, and, for Pete's sake, do not get cold, because your time is up, and we do not think you are important enough to provide you with the basics that you need to survive.

Madam Chairman, no other Member of this body knows better than I do that this is the wrong way to fix welfare. As a single mother with three small children, working, many years ago, I could not have stayed in the work force if I did not have the safety net of health care, child care, and food that the welfare system provided for my family.

*So I urge my colleagues, do not take this vote lightly. Your vote today will have consequences, consequences for children long after election day, and it will be too late to answer the, what if's tomorrow. * * **

07/18/96 142 Cong Rec H 7796

The Chair overruled a point of order under section 425 of the Budget Act against consideration of the bill on the basis that all points of order against consideration of the bill were waived by a previous order by unanimous consent on July 17 and held that a point of order under section 426 of the Budget Act against H. Res. 482 would not be timely after the adoption of that resolution. The point of order asserted that, under section 425m the bill constituted an unfunded intergovernmental mandate, and further, under section 426, the House is prohibited from considering a rule providing for it.

07/18/96 142 Cong Rec S 8155

House requested the concurrence of the Senate

07/18/96 142 Cong Rec H 7908

House rejected the Tanner Amendment in the nature of a substitute that sought to reform the nation's welfare system, provide vouchers to assist children whose parents are denied benefits, and include provisions for children of noncitizens to receive food stamps, by a recorded vote of 168 yeas and 258 nays (R 9221; D 15937) (Roll No. 329)

07/18/96 142 Cong Rec H 7907

House agreed to the Ney Amendment that requires able-bodied food stamp recipients between the ages of 18 and 50 with no dependents to work at least 20 hours a week or lose eligibility, by a recorded vote of 239 yeas and 184 nays (R 21314; D 26169) (Roll No. 328)

07/18/96 142 Cong Rec H 7989

House rejected the Tanner motion to recommit the bill to the Committee on the Budget with instructions to report it back to the House forthwith with the following amendment: in section 408(a)(8)(A) of the Social Security Act, as proposed to be proposed to be added by section 4103(a)(1), insert "cash" before "assistance to a family", by a recorded vote of 203 yeas and 220 nays (R 7220; D 1950) (Roll No. 330)

07/18/96 142 Cong Rec H 7990

Passed in the House, by a recorded vote of 256 yeas and 170 nays (R 2264; D 30165) (Roll No. 331)

07/18/96 142 Cong Rec E 1325

Remarks by Rep. Kennedy RI

07/22/96 142 Cong Rec E 1337

Remarks by Rep. Forbes NY

07/22/96 142 Cong Rec E 1334

Remarks by Rep. Packard CA

07/22/96 142 Cong Rec E 1337

Remarks by Rep. Stokes OH

07/23/96 142 Cong Rec S 8532

Passed in the Senate, after striking all after the enacting clause and inserting in lieu thereof, the text of S. 1956, Senate companion measure, as amended, by a recorded vote of 74 yeas and 24 nays (Vote No. 232)
07/23/96 142 Cong Rec S 8532

Senate insisted on its amendment, requested a conference with the House thereon, and the Chair appointed the following conferees on the part of the Senate: from the Committee on Budget: Senators Domenici, Nickles, Gramm, Exon, and Hollings; from the Committee on Agriculture, Nutrition and Forestry: Senators Lugar, Helms, Cochran, Santorum, Leahy, Heflin, and Harkin; from the Committee on Finance: Senators Roth, Chafee, Grassley, Hatch, Simpson, Moynihan, Bradley, Pryor, and Rockefeller; and from the Committee on Labor and Human Resources: Senators Kassebaum and Dodd
07/24/96 142 Cong Rec H 8329

It was made in order in the House to disagree with the Senate amendment to the bill, and agree to a conference—appointed as conferees Reps. Kasich, Archer, Goodling, Roberts, Bliley, Shaw, Talent, Nussle, Hutchinson, McCrery, Bilirakis, Smith of TX, Johnson of CT, Camp, Franks of CT, Cunningham, Castle, Goodlatte, Sabo, Gibbons, Conyers, de la Garza, Clay, Ford, Miller of CA, Waxman, Stenholm, Kennelly, Levin, Tanner, Becerra, Thurman, and Woolsey
07/24/96 142 Cong Rec H 8329

House agreed to Sabo motion to instruct conferees to do everything possible within the conference to eliminate any provisions in the House and Senate bills which shift costs to States and local governments and result in an increase in the number of children in poverty; maximize the availability of food stamps and vouchers for goods and services for children to prevent any increase in the number of children thrown into poverty while their parents make the transition from welfare to work; ensure that the bill preserves Medicaid coverage so that the number of people without access to health care does not increase and more children and old people are not driven into poverty; and that any savings go to Federal deficit reduction, by a recorded vote of 418 yeas (R 2280; D 1900) (Roll No. 353)
07/24/96 142 Cong Rec S 8668

Remarks by Sen. Murray WA
07/24/96 142 Cong Rec S 8672

Remarks by Sen. Murray WA
07/24/96 142 Cong Rec S 8672

Remarks by Sen. Pell RI
07/25/96 142 Cong Rec D 816

Conferees met to resolve differences
07/25/96 142 Cong Rec S 8929

Remarks by Sen. Bingaman NM
07/25/96 142 Cong Rec E 1375
Remarks by Rep. Packard CA
07/26/96 142 Cong Rec E 1386
Remarks by Rep. Manzullo IL
07/30/96 142 Cong Rec H 8981
Conference report reported in the House (H. Rept. 104725)
07/30/96 142 Cong Rec E 1409
Remarks by Rep. Jacobs, Jr. IN
07/31/96 142 Cong Rec S 9318
A unanimous-consent agreement was reached in the Senate providing for consideration of the conference report on the bill
07/31/96 142 Cong Rec H 9403
House agreed to H. Res. 492, waiving a requirement requiring a two-thirds vote to consider a rule on the same day it is reported from the Committee on Rules, by voice vote
07/31/96 142 Cong Rec H 9403
House agreed to H. Res. 495, the rule waiving points of order against consideration of the conference report, by a recorded vote of 281 yeas and 137 nays (Roll No. 382)
07/31/96 142 Cong Rec D 852
House Rules Committee granted a rule waiving all points of order against the conference report on the bill, by a vote of 6 to 3
07/31/96 142 Cong Rec D 853
Conferees agreed to file a conference report
07/31/96 142 Cong Rec H 9565
H. Res. 495, resolution waiving points of order against the conference report, reported in the House (H. Rept. 104729)
07/31/96 142 Cong Rec H 9424
House agreed to the conference report on the bill, by a recorded vote of 328 yeas and 101 nays (R 2302; D 9898) (Roll No. 383)
08/01/96 142 Cong Rec S 9347
Remarks by Sen. Domenici NM
08/01/96 142 Cong Rec S 9415
Senate agreed to the conference report, by a recorded vote of 78 yeas and 21 nays (R 530; 2521) (Vote No. 262)
08/01/96 142 Cong Rec E 1454
Remarks by Rep. Gillmor OH

MR. GILLMOR. Mr. Speaker, I am happy to vote for this conference report H.R. 3734 reforming our Nation's outdated welfare system. The current welfare program has been the biggest social and financial failure in the history of the country. We are replacing it with a program of hope and responsibility.

It is a good thing we have Presidential elections occasionally. The President, who is now in an election, has said he will sign welfare reform after vetoing it two times before.

Over the past 30 years more than $5 trillion has been spent on welfare. That figure is more than the national debt. During that time the poverty rate went up, not down. More children are in poverty, more families have broken up than before the current program was adopted.

The American people have consistently said they believe in helping others and that there should be a safety net in society. They also do not want this help to be wasted on outdated formulas. This bill restores the promise of hope for the families on welfare and the trust between taxpayers and the managers of our welfare program.

In the final analysis, it is clear Republican leadership was necessary to finally tackle this problem. I am happy we were able to lead the President to reform instead of standing in the way.

08/01/96 142 Cong Rec E 1451

Remarks by Rep. Hastert IL

MR. HASTERT. Mr. Speaker, today I join a bipartisan majority of the House to return our Nation's welfare system to what it was meant to be: a hand-up, not a hand-out.

Almost everyone I talk with understands that our current welfare system is inefficient, unfair and damaging to those it is supposed to help. We all agree that helping those who by no fault of their own have fallen on hard times is the right thing to do. But the current system doesn't do that. It traps families in a cycle of hopelessness and despair—destroying initiative and responsibility.

The historic welfare reform bill we passed today is based upon the principle that welfare should not be a way of life and that we should promote work instead of welfare. It also recognizes that we in Illinois are better able to help the poor without the interference of huge, inflexible, Washington bureaucracies. We need a plan based upon Illinois values and Illinois needs, not on a Washington bureaucrat's regulations.

Can any serious person argue that the federalization of poverty by Washington has worked? The idea that just spending more and more money and handing people government checks is the answer to poverty is a cruel hoax on both the needs and the taxpayers who are trying to help them. We have spent $5.4 trillion dollars since Lyndon Johnson began the 'War on Poverty.'

Despite this enormous commitment by the American people, an amount greater than our entire national debt, the result has been more broken families, exploding illegitimacy, a drug epidemic that is destroying generations, rising crime rates and schools that are war zones. By creating a culture of poverty, we have destroyed the very people we have sought to help.

The welfare reform package provides $4.5 billion in increased child care funding which will enable parents to return to work, and attacks the unacceptable 50

percent illegitimacy rate for families on welfare by strengthening efforts to identify fathers and force them to pay child support.

This legislation is an important acknowledgment that the moral health of America is no less important than its military or economic strength. We cannot have a healthy moral environment to raise children in our communities when 12-year olds are having babies, 15-year olds are killing each other, 17-year olds are dying of AIDS, and 18-year olds are graduating without diplomas. Our accomplishment today helps restore the moral health of this great Nation.

Eighteen months ago, the new Republican Congress set out to reform the destructive welfare system. We asked ourselves whether we had the courage to tackle this difficult issue and give our children hope, rather than an endless cycle of dependency. We knew we would face a chorus of special interests who benefit from the status quo and would accuse us of being cruel and heartless. But we listened to the common sense of the American people who see through the misinformation and distortion and we kept our promise. I am pleased that President Clinton finally joined our cause today and agreed to sign this long overdue reform.

08/01/96 142 Cong Rec E 1453

Remarks by Rep. Morella MD

MRS. MORELLA. Mr. Speaker, I rise in support of the Personal Responsibility and Work Opportunity Act.

In charting the course of welfare reform, we have come a long way since the introduction of welfare reform legislation in the 103d Congress. The Congress passed a bill 16 months ago that would have hurt children, allowed States to abdicate their responsibility without any maintenance of effort requirement, and cut funding for job training, child care, child nutrition, and work programs. I voted against the original House-passed bill because its cuts were too extreme. The bipartisan bill before us today incorporates the improvements of the original conference report, the Governors' recommendations, and the most critical improvements contained in the Castle-Tanner bill that I helped to draft. For too long families have been discouraged from working by our welfare system. Unlike the original bill, the bill before us today will help welfare recipients and their children build a better future because recipients will be working, equipped with the training and child care they need to be successful.

I support welfare reform that moves recipients from welfare to work and encourages personal responsibility. This legislation does that, allowing States to try new approaches that meet the needs of their recipients. States are already experimenting with welfare reform. Forty States have waivers given by this administration, and the results are encouraging.

In giving leeway and dollars to States, however, we must protect children. This legislation does that by maintaining the current child welfare and foster care entitlement for children. Previous versions of welfare reform had converted this critical safety net into a block grant, and I strongly encouraged my colleagues to

retain the entitlement status of child protective services. This bill also contains kinship care language modeled after legislation that I have introduced. This language insures that State plans for foster care and adoption assistance protect families and use adult relatives as the preferred placement for children separated from their parents when such relatives meet child protection standards. This legislation also includes the original Women's Caucus child support enforcement provisions. We will soon be able to finally crack down on deadbeat parents by enacting penalties with real teeth and establishing Federal registries to help track deadbeats.

This legislation also maintains the link between Medicaid and welfare. The children of any family eligible for AFDC as of July 1, 1996, will remain eligible for Medicaid whether or not their family continues to receive welfare benefits, and States may also continue Medicaid eligibility for parents who are no longer eligible for AFDC. This legislation also provides families with Medicaid coverage for a year after they leave welfare for work.

This legislation does not convert child nutrition programs, the WIC Program, or the food stamp program into block grants to States, unlike previous welfare legislation. Instead of reducing the earned income tax credit as previous legislation did, this legislation incorporates the administration's recommendations to expand it.

I have actively urged my colleagues to increase child care funding in welfare reform. Following up on a meeting with Department of Health and Human Services Secretary Donna Shalala, I, along with members of the Congressional Caucus for Women's Issues, sent a letter to the House leadership urging them to provide States with more child care resources, to maintain the health and safety standards set by States, and to give States the flexibility to allow women with children under 6 to work 20-hour workweeks. I am pleased that all of these recommendations have been included in this legislation. This bill directs $20 billion to child care spending over the next 6 years—an increase of $3.5 billion in child spending over 6 years.

These child care funds will allow women to enter the work force and help States to meet their work force participation requirements.

I remain concerned about the food stamp cuts contained in this legislation. Last month, I voted against the Kasich amendment that added these cuts. I also worry about the restrictive prohibitions on benefits for legal immigrants. As this legislation is enacted, I will carefully monitor the effects of these provisions with the intent of remedying them legislatively if necessary.

Today's vote marks a historic opportunity to change our welfare system so that we move families into work while maintaining a safety net to protect our Nation's children. It also marks the willingness of this legislative body to incorporate important changes, and I thank my colleagues for incorporating many of the changes I have requested.

08/02/96 142 Cong Rec S 9622

Remarks by Sen. Brown CO
08/02/96 142 Cong Rec E 1495
Remarks by Rep. McCarthy MO
09/03/96 142 Cong Rec D 879
Signed by the President on August 22, 1996 (P.L. 104193)

REMARKS BY PRESIDENT CLINTON AT THE WELFARE REFORM BILL SIGNING

THURSDAY, AUGUST 22, 1996

PRESIDENT CLINTON: Thank you very much. (Continued applause.) Thank you very much. Lilly, thank you. Thank you, Mr. Vice President. To the members of the Cabinet, all the members of Congress who are here, thank you very much. I'd like to say to Congressman Castle that I'm especially glad to see you here, because 8 years ago about this time, when you were the governor of Delaware and Governor Carper was the congressman from Delaware, you and I were together at a signing like this. Thank you, Senator Long, for coming here. The you Governors Romer, Carper, Miller and Caperton.

And I'd also like to thank Penelope Howard and Janet Farrell for coming here. They, too, have worked their way from welfare to independence, and we're honored to have them here.

I'd like to thank all the people who worked on this bill, who have been introduced, from our staff and Cabinet. But I'd also like to especially thank Bruce Reed who had a lot to do with working on the final compromises of this bill. I thank him.

Lilly Hardin was up there talking, and I want to tell you how she happens to be here today. Ten years ago, Governor Castle and I were asked to cochair a governors task force on welfare reform, and we were asked to work together on it. And when we met at Hilton Head in South Carolina, we had a little panel, and 41 governors showed up to listen to people who were on welfare from several states.

So I asked Carol Rascoe to find me somebody from our state who had been in one of our welfare reform programs and had gone to work. And she found Lilly Hardin and Lilly showed up at the program. And I was conducting this meeting, and I committed a mistake that they always tell lawyers never to do: never ask a question you do not know the answer to. (Laughter.) But she was doing so well talking about it, as you saw how well spoken she was today, and I said "Lilly, what's the best thing about being off welfare?" And she looked me straight in the eye and said "When my boy

goes to school and they say 'What does your momma do for a living?' he can give an answer." I have never forgotten that. (Applause.)

And when I saw the success of all of her children and the success that she's had in the past 10 years I can you you've had a bigger impact on me than I've had on you. And I thank you for the power of your example, for your families, and for all of America. Thank you very much. (Applause.)

What we are trying to do today is to overcome the flaws of the welfare system for the people who are trapped on it. We all know that the typical family on welfare today is very different from the one that welfare was designed to deal with 60 years ago. We all know that there are a lot of good people on welfare who just get off of it in the ordinary course of business, but that a significant number of people are trapped on welfare for a very long time, exiling them from the entire community of work that gives structure to our lives.

Nearly 30 years ago Robert Kennedy said "Work is the meaning of what this country is all about. We need it as individuals. We need to sense it in our fellow citizens. And we need it as a society and as a people." He was right then, and it's right now. From now on our nation's answer to this great social challenge will no longer be a never-ending cycle of welfare: it will be the dignity, the power, and the ethic of work. Today we are taking an historic chance to make welfare what it was meant to be: a second chance, not a way of life. The bill I am about to sign, as I have said many times, is far from perfect. But it has come a very long way.

Congress sent me two previous bills that I strongly believe failed to protect our children and did too little to move people from welfare to work. I vetoed both of them. This bill had broad bipartisan support and is much, much better on both counts.

The new bill restores America's basic bargain of providing opportunity and demanding in return responsibility. It provides $14 billion for child care, $4 billion more than the present law does. It is good because without the assurance of child care it's all but impossible for a mother with young children to go to work.

It requires states to maintain their own spending on welfare reform, and gives them powerful performance incentives to place more people on welfare in jobs. It gives states the capacity to create jobs by taking money now used for welfare checks and giving it to employers as subsidies, as incentives to hire people. This bill will help people that go to work so they can stop drawing a welfare check and start drawing a paycheck.

It's also better for children. It preserves the national safety net of food stamps and school lunches. It drops the deep cuts and the devastating changes in child protection, adoption and help for disabled children. It preserves the national guaranty of health care for poor children,

the disabled, the elderly and people on welfare—the most important preservation of all.

It includes the tough child support enforcement measures that as far as I know every member of Congress and everybody in the administration and every thinking person in the country has supported for more than 2 years now. It's the most sweeping crackdown on deadbeat parents in history. We have succeeded in increasing child support collection 40 percent. But over a third of the cases where there are delinquencies involve people who cross state lines. For a lot of women and children, the only reason they're on welfare today, the only reason, is that the father up and walked away when he could have made a contribution to the welfare of the children. That is wrong. If every parent paid the child support that he or she owes legally today, we could move 800,000 women and children off welfare immediately.

With this bill, we say, if you don't pay the child support you owe, we'll garnish your wages, take away your driver's license, track you across state lines, if necessary make you work off what you owe. It is a good thing, and it will help dramatically to reduce welfare, increase independence and reinforce parental responsibility. (Applause.)

As the vice president said, we strongly disagree with a couple of provisions of this bill. We believe that the nutritional cuts are too deep, especially as they affect low-income working people and children. We should not be punishing people who are working for a living already; we should everything we can to lift them up and keep them at work and help them to support their children.

We also believe that the congressional leadership insisted on cuts and programs for legal immigrants that are far too deep. These cuts, however, have nothing to do with the fundamental purpose of welfare reform. I signed this bill because this is a historic chance where Republicans and Democrats got together and said: "We're going to take this historic chance to try to recreate the nation's social bargain with the poor. We're going to try to change the parameters of the debate. We're going to make it all new again and see if we can't create a system of incentives, which reinforce work and family and independence." We can change what is wrong. We should not have passed this historic opportunity to do what is right.

And so, I want to ask all of you, without regard to party, to think through the implications of these other nonwelfare issues on the American people, and let's work together in good spirits and good faith to remedy what is wrong. We can balance the budget without these cuts. But let's not obscure the fundamental purpose of the welfare provisions of this legislation, which are good and solid, and which would can give us at least the chance to end the terrible, almost physical isolation of huge numbers of poor people

and their children from the rest of mainstream America. (Applause.) We have to do that. (Applause.)

Let me also say that there's something really good about this legislation. When I sign it, we all have to start again. And this becomes everybody's responsibility. After I sign my name to this bill, welfare will no longer be a political issue. The two parties cannot attack each other over it. The politicians cannot attack poor people over it. There are no encrusted habits, systems and failures that can be laid at the foot of someone else. We have to begin again. This is not the end of welfare reform; this is the beginning. (Applause.) And we have to all assume responsibility. (Applause.)

Now that we are saying with this bill we expect work, we have to make sure the people have a chance to go to work. If we really value work, everybody in this society—businesses, nonprofits, religious institutions, individuals, those in government—all have a responsibility to make sure the jobs are there. * * *

Every employer in this country that ever made a disparaging remark about the welfare system needs to think about whether he or she should now hire somebody from welfare and go to work, go to the state and say, "Okay, you give me the check, I'll use it as an income supplement, I'll train these people, I'll help them to start their lives, and we'll go forward from here." Every single person needs to be thinking, every person in America tonight who sees a report of this, who's ever said a disparaging word about the welfare system, should now say, "Okay, that's gone. What is my responsibility to make it better? (Applause.)

Two days ago we signed a bill increasing the minimum wage here and making it easier for people in small businesses to get and keep pensions. Yesterday we signed the Kassebaum-Kennedy bill, which makes health care more available to up to 25 million Americans, many of them in lower-income jobs, where they're more vulnerable.

The bill I'm signing today preserves the increases in the Earned Income Tax Credit for working families. It is now clearly better to go to work than to stay on welfare, clearly better. Because of actions taken by the Congress in this session, it is clearly better. And what we have to do now is to make that work a reality.

I've said this many times, but you know, most American families find that the greatest challenge of their lives is how to do a good job raising their kids and do a good job at work. Trying to balance work and family is the challenge that most Americans in the workplace face. Thankfully, that's the challenge Lilly Hardin's had to face for the last 10 years. That's just what we want for everybody. We want at least the chance to strike the right balance for everybody.

Today we are ending welfare as we know it, but I hope this day will be remembered not for what it ended, but for what it began: A new day that

offers hope, honors responsibility, rewards work, and changes the terms of the debate so that no one in America ever feels again the need to criticize people who are poor or on welfare, but instead feels the responsibility to reach out to men and women and children who are isolated, who need opportunity, and who are willing to assume responsibility, and give them the opportunity and the terms of responsibility. (Applause.)

STAGES OF LEGISLATIVE PROCESS PART TWO: APPROPRIATING FOR LEGISLATION

The process for enacting substantive legislation is the first of a two-part process. The second stage signals the legislature's intention to allocate funding to implement its legislative initiatives. Hetzel (1980, p. 813–814) describes this process, which he labels the "two-congress procedure," in detail below.

> The factor that differentiates the work of these two Congresses is the committee system. While one committee is responsible for substantive legislation in a particular field, an entirely different committee, composed of different members and often possessed of a different philosophy, is responsible for providing funds for that same legislation.
>
> Although the development of regulatory legislation is an important function of Congress, the creation and funding of federal programs constitutes an even more important part of the work that Congress performs. Congress determines the actual level of funding for a program by a separate appropriation act enacted after the measure creating the program has become law.
>
> Once approved by Congress and signed by the President, these [laws, which have an accompanying recommended price tag that has been prepared by the subcommittee of origin for the law] become the authorizing legislation for a specific program and the budget authority for federal expenditures for that purpose.
>
> The executive branch agency that will be responsible for administering the program now becomes involved. The agency studies the legislation and develops plans to implement the new program. Legislative hearings are again held at the subcommittee level, usually with testimony from the administering agency, but this time before an appropriations subcommittee. This second bill is the appropriations bill. It specifies how much money is to be made available by the Treasury to carry out the purposes of the first act. Such amounts may

be less than that authorized but may not exceed the authorization. From the subcommittee, the bill goes to the committee, the entire house, the other house, and the President as before.

The procedure for considering appropriations is much the same as that for considering authorizations. One of the important differences, however, lies in the interrelation of the actions of the two houses. Traditionally, all appropriations bills originate in the House of Representatives. Most of the initial work and study must necessarily be done there. The Senate, therefore, often functions as a sort of court of last resort. Supporters of programs that were cut from appropriations bills in the House press their case in the Senate. The Senate also examines the appropriations bills to determine if cuts should be made from the House version.

While bills containing authorizations tend to focus on one program or a group of related programs, appropriations bills almost always group together programs by the same administrative agency and often combine appropriations for several different agencies in one bill. Serious dispute between the two chambers . . . is almost preordained. Conference committees established to resolve these differences hold considerable power in molding federal policy and programs.

As illustrated in the PRWORA, then, substantive legislation must be reconciled with budgetary imperatives (recall that the synopsis for H.R. 3734, the bill that became PRWORA, was "a bill to provide for the reconciliation pursuant to section 201(a)(1) of the concurrent resolution on the budget for fiscal year 1997"). The justification for this approach can be found in the structure of the congressional budget process, as Dove (1997, p. 64) describes below.

The Congressional Budget and Impoundment Control Act was enacted in 1974 as a means for Congress to establish national budget priorities and the appropriate level of total revenues, expenditures, and debt for each year. Moreover, it provided for strict time limits in dealing with Presidential attempts to impound funds already appropriated either through deferrals or rescissions.

The Act has been amended so as to curb the practice of imposing unfunded Federal mandates on States and local governments, as well as to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits. There has also been added to the statutes a provision allowing the two Houses of Congress to vote in an expeditious manner to reject rules issued by executive agencies.

Congress acts on a concurrent resolution on the budget in the spring of each year. This resolution sets levels of new budget authority and spending, revenue, and debt levels. However, Congress may adopt a later budget resolution that revises or reaffirms the most recently adopted budget resolution.

One of the mechanisms Congress uses to enforce projected budget authority and spending, revenue, and debt levels is called the reconciliation process. Under reconciliation, Congress in a budget resolution directs one or more legislative committees to report bills or recommend changes in laws that will achieve the levels of spending and revenues set by the budget resolution. The directions to the committees specify the total amounts that must be changed but leave to the discretion of the committees decisions about the changes that must be made to achieve the required levels.

If only one committee has been directed to recommend changes, that committee reports its reconciliation legislation directly to the floor for consideration. If, however, more than one committee has been directed to make changes, the committees report the recommended changes to the Committee on the Budget. That committee then reports an omnibus reconciliation bill to the floor for consideration by the whole Senate or House.

HOW DOES THE GOVERNMENT CREATE A BUDGET?*

The President and Congress both play major roles in developing the Federal budget.

THE PRESIDENT'S BUDGET

The law requires that, by the first Monday in February, the President submit to Congress his proposed Federal budget for the next fiscal year, which begins October 1.

The White House's Office of Management and Budget (OMB) prepares the budget proposal, after receiving direction from the President and consulting with his senior advisors and officials from Cabinet departments and other agencies.

---

* Source: *A Citizen's Guide to the Federal Budget* (http:www.access.gpo.gov/usbudget/fy2000)

The President's budget—which typically includes a main book and several accompanying books—covers thousands of pages and provides reams of details.

The Budget Process

Through the budget process, the President and Congress decide how much to spend and tax in any one fiscal year. More specifically, they decide how much to spend on each activity, ensure that the Government spends no more and spends it only for that activity, and report on that spending at the end of each budget cycle.

The President's budget is his plan for the next year. But it's just a proposal. After receiving it, Congress has its own budget process to follow. Only after the Congress passes, and the President signs, the required spending bills has the Government created its actual budget.

Action in Congress

Congress first must pass a "budget resolution"—a framework within which the members will make their decisions about spending and taxes. It includes targets for total spending, total revenues, and the deficit, and allocations within the spending target for the two types of spending—discretionary and mandatory—explained below.

- Discretionary spending, which accounts for one third of all Federal spending, is what the President and Congress must decide to spend for the next year through the 13 annual appropriations bills. It includes money for such activities as the FBI and the Coast Guard, for housing and education, for space exploration and highway construction, and for defense and foreign aid.
- Mandatory spending, which accounts for two thirds of all spending, is authorized by permanent laws, not by the 13 annual appropriations bills. It includes entitlements—such as Social Security, Medicare, veterans' benefits, and Food Stamps—through which individuals receive benefits because they are eligible based on their age, income, or other criteria. It also includes interest on the national debt, which the Government pays to individuals and institutions that hold Treasury bonds and other Government securities. The President and Congress can change the law in order to change the spending on entitlements and other mandatory programs—but they don't have to.

Think of it this way: For discretionary programs, Congress and the President must act each year to provide spending authority. For mandatory programs, they may act in order to change the spending that current laws require.

Currently, the law imposes a limit, or "cap," through 2002 on total annual discretionary spending. Within the cap, however, the President and Congress can, and often do, change the spending levels from year to year for the thousands of individual Federal spending programs.

In addition, the law requires that legislation that would raise mandatory spending or lower revenues—compared to existing law—be offset by spending cuts or revenue increases. This requirement, called "pay-as-you-go," is designed to prevent new legislation from increasing the deficit.

Once Congress passes the budget resolution, it turns its attention to passing the 13 annual appropriations bills and, if it chooses, "authorizing" bills to change the laws governing mandatory spending and revenues.

Congress begins by examining the President's budget in detail. Scores of committees and subcommittees hold hearings on proposals under their jurisdiction. The House and Senate Armed Services Authorizing Committees and the Defense and Military Construction Subcommittees of the Appropriations Committees, for instance, hold hearings on the President's defense plan. If the President's budget proposed changes in taxes, the House Ways and Means and the Senate Finance Committees would hold hearings. The Budget Director, Cabinet officers, and other Administration officials work with Congress as it accepts some of the President's proposals, rejects others, and changes still others. Congressional rules require that these committees and subcommittees take actions that reflect the budget resolution.

If you read through the President's budget, the budget resolution, or the appropriations or authorizing bills that Congress drafts, you will notice that the Government measures spending in two ways—"budget authority" and "outlays."

Budget authority (or BA) is what the law authorizes the Federal Government to spend for certain programs, projects, or activities. What the Government actually spends in a particular year, however, is an *outlay*. To see the difference, consider what happens when the Government decides to build a space exploration system.

The President and Congress may agree to spend $1 billion for the space system. Congress appropriates $1 billion in BA. But the system may take 10 years to build. Thus, the Government may spend $100

million in outlays in the first year to begin construction and the remaining $900 million over the next nine years as construction continues.

MONITORING THE BUDGET

Once the President and Congress approve spending, the Government monitors the budget through:

- agency program managers and budget officials, including the Inspectors General, or IGs;
- OMB;
- congressional committees; and
- the General Accounting Office, an auditing arm of Congress.

This oversight is designed to:

- ensure that agencies comply with legal limits on spending, and that they use budget authority only for the purposes intended;
- see that programs are operating consistently with legal requirements and existing policy; and, finally,
- ensure that programs are well managed and achieving the intended results.

The Government has paid more attention to good management of late, through the work of Vice President Gore's National Partnership for Reinventing Government and implementation of the 1993 Government Performance and Results Act. This law is designed to improve Government programs by using better measurements of their results in order to evaluate their effectiveness.

For fiscal 2000—that is, October 1, 1999 to September 30, 2000—the major steps in the budget process are outlined in Table 4.1.

HOW TO READ A STATUTE OR BILL

Legislation (or proposed legislation, i.e., a bill) contains certain structural features, the key components of which are as follows:

- *Identifying designation:* House or Senate Bill number or Public Law number. Both state and federal bills or statutes have similar designations.

TABLE 4.1 Major Steps in the Budget Process

Formulation of the President's Budget for fiscal year 2000	Executive Branch agencies develop requests for funds and submit them to the Office of Management and Budget. The President reviews the requests and makes the final decisions on what goes in his budget.	February–December 1998
Budget preparation and transmittal	The budget documents are prepared and and transmitted to Congress.	December 1998–February 1999
Congressional action on the budget	Congress reviews the President's budget, develops its own budget, and approves spending and revenue bills.	March–September 1999
The fiscal year begins.		October 1, 1999
Agency program managers execute the budget provided in law.		October 1, 1999 September 30, 2000
Data on actual spending and receipts for the completed fiscal year available		October–November 2000

- *Title:* the legislation's subject—"A Bill to . . ."; "An Act to . . ."
- *Enacting clause:* a statement that the legislature adopts as law the language that follows this clause—"Be it enacted by . . . that . . ." Essentially, that which follows this clause is the law the legislature wishes to enact.
- *Purpose or findings:* the facts and issues that comprise the reason for the legislation; the "evil" the legislation seeks to address. Because it follows the "enacting clause," the purpose is part of the legislation and is frequently codified as such.
- *Definitions:* terms that have special meanings within the statute.
- *Purview:* the body of the law; it contains the substantive provisions, the available remedies under, and provisions for administrative implementation or enforcement.

- How does one make sense of these elements? The analytical process is similar to the one described for the analysis of judicial opinions. The component parts must be understood to really grasp the whole document. Naturally, the actual text of the legislation is the logical place to begin the analysis. But the text is not always transparent. While no perfect formula exists for statutory analysis, Statsky (1984, p. 43–62) offers the following guidelines for uncovering the meaning of legislation.

Statutory text is unclear: The ambiguity is sometimes by design; but more often than not it is due to poor draftsmanship or the limitations of language. The search for meaning will require interpretation.

Legislative intent will always be beyond our grasp: Under the best circumstances intent will be elusive. The documents that comprise the legislative trial can put "intent" within our reach, but on the more complicated issues, it can easily elude our grasp.

Statutes should be read one word at a time: Proceed through them line by line, attending to each punctuation mark and qualification.

"Brief" each statute: "Briefing" techniques are as relevant . . . to better grasp the whole by analyzing its component parts. The briefing should allow you to know: the citation, the parties to whom the statute is addressed, the references to related legislation, the conditions that make the statute operative, the conduct explicitly included or excluded, the mandatory or discretionary provisions, the penalties, and the general purpose of the statute.

ISSUES FOR DISCUSSION

1. What was the problem that Congress was asked to address in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996?
2. What problem did they address, how did it differ, if at all, from what they were asked to do?
3. Assume someone from another country asks you to explain how Congress feels about addressing the problem of poverty in America. Your only evidence is the debate, described in this chapter, associated with PRWORA. What is your response?
4. How are the two legislative processes—for enacting substantive legislation and for the budget—related to each other?

5

The Interpretation of Legislation: The Search for Legislative Intent

When we evaluate policy, we typically assert conclusions about its propriety or adverse consequences; whether it is good or bad. In either case, we usually assume that we know the reasons for the policy's existence, which we often glean from our understanding of the intentions of those who enacted the policy (i.e., the legislature). How does a legislature articulate its intentions? Can one learn such intentions through scrutiny of the language of the legislation, or through some other means? Is the intent we seek of the legislature, as a whole, or do we think we want to know what's on the minds of individual legislators? Given the legislative preoccupation with compromise, can one really discern what a legislature, or an individual legislator, intends?

This chapter explores the notion of legislative intent, including different perspectives or approaches. Moreover, to illustrate how courts grapple with the problem, the chapter will end with the case of Dandridge v. Williams, *which deals with the legality of regulations that impose a maximum grant award for welfare recipients.*

CONCEPTUALIZING LEGISLATIVE INTENT

"Legislative intent" is a well-traveled road, complete with unexpected detours, poor design, misleading guideposts, inadequate illumination, and numerous points still "under construction." A reading of the literature dealing with statutory interpretation might lead the casual reader to conclude that "legislative intent" is accessible to even the most amateur investigator. The analytical problem arises when

one considers that the concept of "legislative intent," as applied by a court when it endeavors to discern statutory objectives, differs from the evidence, so to speak, of "legislative intent" that one observes when one witnesses a legislative body in action. In this latter instance, legislative members intend primarily to reach compromise to achieve their desired ends. Unfortunately, this outcome is accomplished through reliance on vague language, which then poses challenges to the judge responsible for making sense of the ambiguous rule. The conundrum is longstanding, as Sinclair (1997, p. 1329) demonstrates:

> In 1579, following the case of *Eyston v. Studd* [2 Plow. 459, 75 Eng. Rep. 688 (1574)], Edmund Plowden, court reporter, wrote a theory of statutory interpretation that has become a historical monument. When faced with an interpretive difficulty, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know . . . then you must give yourself such an answer as you imagine he would have done, if he had been present. . . . And therefore when such cases happen which are within the letter, or out of the letter, of a statute, and yet don't directly fall within the plain and natural purport of the letter, but are in some measure to be conceived in a different idea from that which the text seems to express, it is a good way to put questions and give answers to yourself thereupon. . . .

Despite its inherently unreliable nature, courts are preoccupied with legislative intent because they must defer to legislative wisdom where legislation is concerned. After all, legislatures, not courts, make law. "United States courts," according to Sinclair (1997, p. 1331), "have taken as aximatic that the intention of the legislature should govern the interpretation and application of statutes. This follows conceptually from the principle of legislative supremacy, a principle at the very foundation of our democratically ordered society."

Administrative agencies also resort to constitutionally inspired restraints. They may issue regulations, but only those that express the enabling legislation's purposes will be legally valid. An agency doing otherwise is acting *ultra vires* (beyond its scope of authority). Thus, the search for "legislative intent" is a method both courts and agencies use to contain possible impulses to act beyond their constitutionally granted authority.

The search for intent is particularly compelling because the application of a statute can be adversely affected if competing or contradictory meanings are assigned to it. It is also important because of the relative "superiority" of statutes in relation to common law. Courts, for example, interpret a statute's meaning against a very complicated background, including the documents compiled in the legislative history, the court's assessment of the social-political climate that gave rise to the statute, the so-called "evil" the legislation was designed to remedy, and the court's view of its law-making function. Moreover, as Slawson (1992, p. 383–384) argues, the interpretation impulse is not limited to a particular level of the judiciary, with the result that the practice has found its way into Supreme Court decision making:

> Using legislative history to interpret statutes is now normal practice in the federal system. Agencies and courts do it routinely. Presumably so do lawyers advising clients, because they know they must if their advice is to be reliable. Despite the concerned opposition of Justice Scalia, legislative history is now used by at least one Justice in virtually every decision of the United States Supreme Court in which the meaning of a federal statute is an issue, and if one Justice uses it, usually they all do.
>
> Despite the widespread use of legislative history, there are no rules or even guidelines for its use other than the so-called plain meaning rule, which is largely ineffective. As far as I know, there is not a single instance in which a court or agency has been reversed for using legislative history incorrectly. Its widespread use, together with this lack of control, has had major adverse effects.
>
> This greatly increased use of legislative history reflects a crisis of confidence. Public officials and members of the public no longer generally believe in the capacity of government to deal effectively with large social problems. Judges and agency members are increasingly reluctant to accept responsibility for making difficult policy decisions or to offer reasoned justifications upon which they might later be criticized. Legislative history provides these people with an "out." They can use it to deflect responsibility onto past Congresses. The only justifications they need offer are the past Congresses' supposed intents.
>
> Members of Congress can make law by "manufacturing" legislative history, thereby evading the Constitutional requirements for legislating that assure that laws receive the appropriate representative consent.

This, plus the inability to predict how courts and agencies will use legislative history, have stripped Congress of a large measure of the control over the laws that the Constitution intends it to have. Agency lawmaking has also suffered in important respects. The Constitutional and administrative requirements for delegated lawmaking serve to enhance the quality of agency-made laws and to keep them under judicial, congressional, and public control. All these benefits are lost when agencies make law by reference to legislative history. Because researching legislative history is generally so time consuming, the costs of obtaining reliable legal advice have substantially increased. Under some circumstances, they have become prohibitive for all but a relatively few wealthy organizations and the federal government itself.

None of these problems can be addressed without an authoritative theory of legislation, which would encompass both how legislation is produced and how its meaning is determined. Without such a theory, there is no basis for deciding what should be counted as legislative history and what should not, or how legislative history should or should not be used.

STRATEGIES FOR IDENTIFYING LEGISLATIVE INTENT

Courts rely on several devices to ensure that they remain within their constitutional boundaries when they engage in statutory interpretation. No strategy is inherently better than another to achieve this end, nor does one approach suggest itself above any other. Indeed, the court knows only that it must exercise self-restraint, as therein lies its claim to legitimacy. Following are four examples of judicial strategies for uncovering legislative intent. Though not an exhaustive list, they offer some insight into the court's self-imposed constraints.

Reliance on Selected Analytical Orientations

The courts' deference to legislation further underscores its law-finding, as opposed to a law-making, function. Three basic approaches, according to Bodenheimer, et al. (1980), have been traditionally adopted by courts: the literal plain-meaning approach, the qualified plain-meaning approach, and the social-purpose approach. These

are neither exclusive nor exhaustive. The *plain-meaning* approach emphasizes giving meaning to whatever is plainly stated in the legislation, with no concern for the effect. The *qualified plain-meaning* approach attempts to read the statute as a whole and thereby give it meaning, unless such a broad construction produces inconsistency or absurdity. The so-called *social-purpose* approach is built around four considerations: (1) the common law prior to the legislation in question; (2) the "mischief" or "defect" not addressed by the common law; (3) the text of the legislation that has been enacted to remedy the defect; and (4) the lawmakers' intent, in terms of the public good they sought to advance by enacting the remedial legislation.

Techniques of Statutory Interpretation and Judicial Restraint

Courts employ certain "rules of thumb" to make sense of legislation. These devices are helpful and are used in conjunction with the aforementioned approaches. The techniques are numerous, so no attempt will be made here to illustrate them all. Rather, the following examples, "canons of construction" supplied by Llewellen (1950 pp. 395–396), illustrate the tension inherent in statutory interpretation.

> When it comes to presenting a proposed statutory construction in court, there is an accepted conventional vocabulary. As in argument over points of case law, the accepted convention still, unhappily, requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point [as indicated below]. . . .

Thrust	*Parry*
1. A statute cannot go beyond its text.	To effect its purpose a statute may be implemented beyond its text.
2. Statutes are to be read in the light of the common law and a statute affirming the common law rule is to be construed in accordance with the common law.	The common law gives way to a statute which is inconsistent with it and when a statute is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law.

3. Where design has been distinctly stated, no place is left for construction.	Courts have the power to inquire into real (as distinct from ostensible) purpose.
4. Titles do not control meaning; preambles do not expand scope; section headings do not change language.	The title may be consulted as a guide when there is doubt or obscurity in the the body; preambles may be consulted to determine rationale, and thus the true construction of terms; section headings may be looked upon as part of the statute itself.
5. If language is plain and unambiguous it must be given effect.	Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose. (pp. 395–396)

Extrinsic Aids and the Appropriate "Level" of Legislative Intent

Though the above rules keep courts from straying too far afield, they must decide ultimately. The task becomes difficult, however, when sensitive social problems find their way into court. Under some circumstances, a court turns to certain extrinsic aids, such as legislative documents (e.g., hearings, reports, etc.) to aid its efforts to unearth legislative desires. But such documents may also yield divergent interpretations, especially when one considers, as Nunez (1972, pp. 128–135) argues below, that the court may not be clear about the level of intent it is trying to comprehend.

> In truth, there is not one, but three legislative intents, two of which can usually be proven to exist, while one is most often created by legal fiction. [I will try to] lay out in a systematic pattern the three legislative documents as extrinsic aids in finding specific legislative intent.
>
> 1. Legislative intent concerning solution of a general social problem. For example, a statute enacted in response to the pollution problem is not intended to be used with respect to other social problems in which pollution plays an insignificant role. Mr. Justice Cardozo, speaking of the importance of the larger social problem, stated that "the meaning of a statute is to be

looked for, not in any single section, but in all the parts together and in their relation to the end in view."

2. Legislative intent concerning the general purposes of a specific statute. For example, a Selective Service statute intended to recruit men for military service is not intended to be employed to suppress political dissent. "[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."
3. Legislative intent concerning the meaning of a specific statutory word or phrase. It is this category that is usually thought of when the words "legislative intent" are debated. There is often a need to know whether the statute coves the particular case in mind, or whether the administrator possesses the specific power he wishes to exercise. Because most of the debate in the profession is focused upon this single category of legislative intent, the debaters are pressed to prove the existence or nonexistence of this single category of intent. If, in the debate, the concept of intent in this category is rejected, then all legislative intent is apparently rejected, and the legislative process appears as a mindless operation.

At the beginning of each debate on the existence or nonexistence of legislative intent, we should start with these questions: Which intent? At what level of generality? Are we interested in the larger social policy, the general purpose of the statute, or the meaning of specific words?

It is possible for a legislature to have a clear and discernible intent concerning the social policy and the general purpose of the statute, and yet not have devoted a single moment of thought to the specific meaning of a word or phrase. Among the documents there may be evidence of specific intent; most often there is none. If the specific legislative intent does not exist and yet we act as though it does, we are acting upon a legal fiction. And even when legislative intent exists on a higher level of generality, it is still likely to be a legal fiction when applied to a word or phrase.

Statutory Interpretation and the Rule of Law

The challenge of legislative intent will persist, given the increasing number of rules that emerge from the legislative and regulatory process. Against the backdrop of the aforementioned approaches, Slawson (1992, pp. 419–424, reprinted with permission) offers below

an alternative approach worth considering. Arguing that his theory of law-as-statute is both "normative and descriptive," he proposes that we keep in mind the different readers and objective of legislation and the implications for statutory interpretation under the rule of law.

> The theory of law as statute which I am about to construct is both normative and descriptive. It is normative in that it conforms to the requirements of any satisfactory authoritative theory. It is descriptive of statutory interpretation as it was practiced in the federal system prior to the extensive use of legislative history.
>
> *1. Defining the Reader*
>
> Different readers will often give the same text different meanings. If the goal of uniformity is to be achieved, therefore, the authoritative theory of statutory interpretation must dictate just one person, real or imagined, whose understanding everyone must accept. A plausible candidate for this role is the legislature that enacted the statute, but this will be rejected because it would reduce the present theory to the theory of law as legislative intent. Since there is no other plausible actual candidate for this role, the only alternative left is to create an imagined reader, with whatever characteristics we wish to ascribe to him. This approach parallels that taken by contract law.
>
> Laws in our society are read and interpreted almost exclusively by lawyers. Others obtain their understanding of the law from them. Of course there are exceptions to this generality, but they are very few, and generally the nonlawyers who read statutes (accountants, for example) have received some training in the law. The imagined person, therefore, should be a lawyer. Moreover, he should be a lawyer learned in the area of law under analysis: an immigration lawyer for an immigration law, a tax lawyer for a tax law, and so forth. The lawyer's learning of his specialized area should include a reasonable understanding of the customs, traditions, and history of the area, but it should not be deemed to include legislative history as such. This the lawyer would be required to research, if it were deemed relevant, just as he would be required to research the relevant case law and the statutes.
>
> One might object that the imagined reader should be a layperson rather than a lawyer, or a lawyer of reasonable general competence rather than a lawyer specializing in the field, because the law ought to be understandable to as broad a sector of the population as possible. Such objections might once have been valid, but no

longer. If today's complex statutes were to be interpreted by a reasonable layperson, most of them would be gibberish. Even as a lawyer of reasonable general competence would understand them, many would still be baffling, and almost all of them would convey much less information than they would if interpreted by specialists. For example, surely no one other than an appropriate specialist could adequately understand the partnership provisions of the Internal Revenue Code or the immigration and nationalization statutes.

2. Defining the Object

It might seem obvious that the object of statutory interpretation is the meaning of the statute, but as we saw earlier, the meaning of the statute is not the object of interpretation under the theory of law as legislative intent. The object of inquiry there is the intent of the enacting legislature, and yet the endeavor is still commonly called "statutory interpretation." The confusion derives from the failure to distinguish between meanings and intentions.

The meaning of what a person says or writes is one thing. His intentions in speaking or writing it are another. Although under ordinary circumstances we expect them to be similar, there is no logical necessity for them to be, and intent is not necessarily even evidence of meaning. Intentions are facts. We will never know, for example, exactly what Abraham Lincoln intended when he delivered the Gettysburg Address—or when he wrote it on the back of an envelope, at which time his intentions may have been slightly different—but we know that he must have had some intentions and that whatever they were, no theory of meaning or of history or of anything else can change them. They are fact just as much as Abraham Lincoln himself was. The meaning of something, on the other hand, is almost infinitely variable. Meaning is theory dependent, context dependent, and dependent upon numerous other things. For example, a person speaking in a language foreign to him may intend to say one thing but mistakenly say something very different. The meaning of what he says is different from his intentions because he is insufficiently familiar with the language in which he has spoken. Thus language itself is part of the context that determines the meaning of an expression.

It is possible, of course, to have a theory of meaning that equates meaning with intentions. This is what the theory of law as legislative intent does, and this is also what people ordinarily do in face-to-face conversation. But there is no logical necessity for the equation, and it cannot be assumed without creating a great deal

of confusion. The result of assuming it is to conflate meanings and intentions. The same confusion between meanings and intentions that currently exists for statutory interpretation was present around the turn of the century, when the objective theory of interpretation was adopted into the law of contracts. Contracts had previously been regarded as consisting of the "meeting of the minds" of the parties. Learned Hand was a leading exponent of the new theory. He once said, evidently trying to state as emphatically as he could that meaning and intention are different under the objective theory, that even if "twenty bishops" were to testify that the parties to a contract had intended something different, their agreement would still mean for legal purposes what it would to a reasonable person under the circumstances.

The object of interpretation under the theory of law as statute shall be the meaning of the statutory language. As already stated, this meaning shall be that which the statutory language would have to a reasonable lawyer within the appropriate specialty. I will now proceed to analyze when and how legislative history might be used to help determine this meaning.

3. Limiting the Use of Legislative History Under the Theory of Law as Statute

It is helpful at this point to draw a distinction between vagueness and ambiguity. A statute is vague if its meaning is imprecise or indefinite: Its meaning does not control the decision of the person applying it. A statute is ambiguous, on the other hand, if it can have two or more meanings. This distinction accords with the dictionary definitions of the terms, and it is the same distinction that has been drawn by contracts scholars and language philosophers.

Vagueness is inevitable and ever-present. It varies only in degree. Precision (the opposite of vagueness) and comprehensiveness are tradeoffs, and statutes need to have substantial comprehensiveness if they are to serve the purposes for which they are intended. So if statutory language is comprehensive enough to cover a substantial range of possibilities, it cannot also provide clear answers for all of them. Ambiguity, on the other hand, is rare except when it is intended (as in a pun, for example), and it is never intended (never properly intended, at least) in a statute. * * *

Is there any legitimate use of legislative history under the theory of law as statute? There is one, I think. It could properly be used to disclose and, if advisable, correct mistakes in statutory language. Since ambiguities are almost always mistakes, legislative history

should be usable for the purpose of resolving ambiguities. Of course, ambiguities are not the only kinds of mistakes that can occur in statutes, and legislative history should also be considered usable for the others. For example, it could be used for resolving contradictions and dispelling confusion. Absent some independent reason for concluding otherwise, however, it should not be usable for the purpose of reducing vagueness, because vagueness in statutory language is never, in itself, evidence of a mistake. Rather, it measures the length to which the legislature chose to go in determining the outcomes of future cases. Any outcomes not determined by the statute were presumably intentionally left for the agency to determine, if there is one, and if not, for the courts to determine, in either case as a matter of delegated lawmaking.

Unlike the possible ways of limiting the use of legislative history considered earlier, this one could be effective. Essentially all it requires is an ability to distinguish vagueness from ambiguity or other kinds of mistakes in drafting, and this is not difficult. Judges and commentators have generally not made this distinction, at least not recently. On the contrary, they generally use "ambiguous" to include a failure of the statute to resolve the issue for any reason. The Court thus used "ambiguous" in all but one of the decisions treated earlier. There should be no problem in changing this usage, however, once attention is drawn to it.

Precedent for limiting the use of legislative history in this fashion can be found in contract law, which imposes essentially the same limitation on the availability of the reformation remedy. A party is entitled to have the court "reform" (i.e., rewrite) his contract if, but only if, he can prove that both parties agreed to something, but by mistake it appeared in the contract differently. Experience with the reformation remedy in contract law also provides some evidence that a similar limitation for statutory interpretation could be effective. The reformation remedy has not been widely exploited to rewrite contracts illegitimately.

4. Serving the Principles of Legislative Supremacy and the Rule of Law

Does it violate the legislative supremacy principle to give primacy of place to the meaning of the statute rather than to the legislative intent? No, although it serves that principle less slavishly by qualifying it with the principle of the rule of law. The legislature is still recognized as supreme, but it is constrained to rule through law. The two principles can be collapsed into one, if we like, in the

statement that the legislature is the supreme lawmaker. It may not have any authority at all to govern by other means.

Laws can be distinguished from other means of governance by their possession of the attributes of accessibility, uniformity, durability, and—probably, anyway—conformity with generally accepted moral norms. In our system the last attribute is largely, if not entirely, subsumed under the requirement that a law meet all constitutional requirements unless it is itself a constitutional law. The theory of law as statute is superior to the theory of law as legislative intent in its service of the principle of the rule of law in at least two important respects. First, it explicitly recognizes the rule of law, whereas the theory of law as legislative intent does not. And second, statutes are generally much more accessible than legislative history, not only because research into the latter is generally difficult and expensive, but also because legislative history characteristically lacks logical coherence both internally and with regards to the statute, and this lack makes it difficult to comprehend.

Furthermore, the theory of law as statute is also superior to the theory of law as legislative intent in its service of the legislative supremacy principle. The principle of consent by silence upon which the latter theory rests is unrealistic, and the difficulties in determining the legislative intent if this principle is discarded are practically insurmountable. Under the theory of law as statute, on the other hand, the assumption is that absent mistakes in drafting or similar errors, the legislative intent is expressed in the statute, and under our system of government, at least, this assumption is quite realistic. [footnotes omitted]

LEGISLATIVE INTENT IN ACTION: A CASE EXAMPLE

The above inventory of strategies illustrates conventional judicial methods for making sense of legislative rules. The phenomenon, as previously discussed, is grounded in the constitutional arrangement of institutional functions. The potential confusion that occasionally arises from this enterprise notwithstanding, judicial self-control is the *sina qua non* of institutional legitimacy. The court must attend to myriad issues when construing a statute, especially where the legislation's constitutionality is at issue, and the decision below, *Dandridge v. Williams,* 397 U.S. 471 (1970) is illustrative in this regard. In this

case, Maryland regulations set a maximum amount for the welfare grant. In finding that the state could so do, the Court construed the Social Security Act. The Court's reasoning is instructive, not only because it illuminates their interpretation of the Act but also because the decision is still good law.

DANDRIDGE v. WILLIAMS, 397 U.S. 471 (1970)
UNITED STATES SUPREME COURT

(See text of opinion in chapter 2)

ISSUES FOR DISCUSSION

1. Compare and contrast the various strategies for interpreting legislation.
2. What do these statutory interpretation approaches say about the judicial function?
3. Are you convinced that the above strategies can really help the court effectively exercise self-restraint when it encounters a statute?
4. How does the court construe legislation in *Dandridge?* What strategy does it use?

6

The Implementation of Legislation

The legislative process ends with a statute that must be implemented. The challenge is to put the law into effect in a way that is consistent with the legislature's intentions, while simultaneously recognizing that law is implemented within a political context. The resulting contradictions can be baffling and significantly influence the manner in which implementation unfolds.

This chapter examines legislative implementation from several perspectives, all of which are built around the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). First, Baltimore Mayor Curt Schmoke analogizes the implementation of the welfare reform law to a football game, arguing that we are in the first quarter of the (implementation) game, so to speak, and it is too early to declare victory. His comments are especially compelling, given the fact that the number of current Baltimore welfare recipients greatly exceeds the number of anticipated low-skill, entry-level job openings that will be required to move them off the welfare rolls. Next, is an examination of two decisions that illuminate the PRWORA's implementation problems: City of Chicago v. Shalala *addresses the constitutionality of PRWORA provisions regarding the denial of cash assistance and food stamps to legal residents; and* Saenz v. Roe *(initially argued before the United States Supreme Court at* Anderson v. Roe*) deals with the legality of residency requirements that were inspired by the new Act. Next, there is an example of administrative evaluation of legislation based on an Opinion supplied by the Pennsylvania Attorney General regarding the legality of Pennsylvania's Act 35, the state counterpart to the PRWORA. Ultimately, the Attorney General's opinion provides another perspective on implementation issues. The chapter ends with an in-depth discussion of the interdependency of legal processes (i.e., the interaction of courts, legislatures, and administrative agencies) that focuses on the myriad litigation developments since the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.*

A FRAMEWORK FOR ANALYZING THE IMPLEMENTATION OF LEGISLATION

The legislative process culminates in a statute that is implemented by an administrative agency. Although the point is perhaps obvious by now, the link between the lawmaking stages and law implementation cannot be overstated.

What is the nature of the bridge between legislative intent and statutory implementation? Sabatier and Mazmanian (1980) have considered this question and conclude that policy outcome is dependent on an array of variables that interact with the lawmaking process. Their analysis pulls together these variables in a coherent framework, which they suggest captures the conditions that link the two. "Implementation is the carrying out of a basic policy decision," they argue, "usually made in a statute . . . that . . . 'structures' the implementation process. . . . In our view, the crucial role of implementation analysis is to identify the factors that affect the achievement of statutory objectives throughout this entire process. These can be divided into three broad categories: (1) the tractability of the problem(s) being addressed by the statute; (2) the ability of the statute to favorably structure the implementation process; and (3) the net effect of a variety of 'political' variables on the balance of support for statutory objectives" (p. 541).

The Sabatier and Mazmanian framework stresses the value of conceptualizing implementation issues *prior to* the enactment of legislation, a move that more effectively connects legislative aims with anticipated legislative outcomes. In short, one can structure the implementation process to ensure policy outcomes that reflect a predesigned orientation.

First, regarding the question of tractability, Sabatier and Mazmanian suggest that not all problems are equal; some are inherently more difficult than others. This proposition has an intuitive appeal; and one can readily identify examples of "hard" versus "easy" problems (legislation addressing the problem of poverty is likely to pose a greater legislative challenge than dealing with, say, traffic violations). The authors then go on to specify certain factors that contribute to placing problems in one of these two groups. For example, if the problem defies change, is misunderstood or ill-defined, or if the technology does not exist to institute the anticipated behavioral changes, then the

problem can be thought of as a "hard" one. They also suggest that factors, such as the size and diversity of the group whose behavior is to be changed also contribute to the determination of tractability.

Second, regarding the statute's ability to structure implementation, Sabatier and Mazmanian hold that the statute can organize the means through which policy goals are realized. "A statute constitutes the fundamental policy decision being implemented," they argue, "in that it indicates the problem(s) being addressed and stipulates the objective(s) to be pursued. It also has the capacity to 'structure' the entire implementation process through its selection of the implementing institution; through providing legal and financial resources to those institutions; through biasing the probable orientations of agency officials; and through regulating the opportunities for participation by nonagency actors in the implementation process. To the extent that the statute stipulates a set of clear and consistent objectives, incorporates a sound theory relating behavioral change to those objectives, and then structures the implementation process in a fashion conducive to obtaining such behavioral changes, the possibilities for obtaining statutory objectives are enhanced" (p. 542).

Finally, regarding the nonstatutory variables that effect implementation, essentially, these are a manifestation of the fact that statutory implementation unfolds within a dynamic and unpredictable social environment. This context represents an array of activities and ideas that supply the lifeblood for policy outputs. The authors suggest that factors such as changes in technology, media representation of the problem, public response, constituency groups, and support by officials contribute to the extent to which policy outcomes match policy objectives. The proposed factors are not exhaustive, and others may come to mind. The important point, however, is that statutory goals are framed within and interact with a larger context; and this interaction shapes the scope of goals that are ultimately implemented.

IMPLEMENTATION OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996

The practical implications of the above conceptual framework are readily apparent when one considers the social and political envi-

ronment that spawned the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). For example, a close examination of the Act's legislative findings or legislative history (see chapter 4) certainly exposes Congress' assumptions about the target population and the nature of the problem the legislation sought to ameliorate. Consider as well the following profile offered by Curt Schmoke, Mayor of the City of Baltimore, Maryland, wherein he discusses his concerns approximately 12 months after the enactment of PRWORA.

WELFARE REFORM: A WORK IN PROGRESS

Curt Schmoke, Mayor of Baltimore
Transcript of remarks delivered to the United Way of America National Conference on Welfare Reform, Washington D.C., September 29, 1997

Good afternoon. I want to begin these remarks with a simple thank you for the invitation to speak to you today. I also want to thank the United Way of America for sponsoring this important conference. More fundamentally, I thank you for all that you do nationally and locally in so many ways to help people in need and to raise public consciousness about issues that affect them. This conference is but one reflection of that commitment.

And it comes at a pivotal time: a little more than a year after President Clinton made good his promise to "end welfare as we know it" by signing into law "The Personal Responsibility and Work Opportunity Reconciliation Act of 1996."

As most of you are all too aware, under the law almost all adult welfare recipients must find work or be in some kind of "work activity" within two years, or they lose their benefits.

Moreover, they face a lifetime public assistance limit of five years.

At the signing ceremony, President Clinton heralded the new law as "the beginning of a new era in which welfare will become what it was meant to be: a second chance, not a way of life." This conference gives us an opportunity to take a hard look at whether welfare reform will become what it was meant to be. Will it truly help people move from dependence to independence and enable them to achieve a better life for themselves and their children? Or will it drive them deeper into poverty and hopelessness?

With these questions hovering in the background, I've been asked to share reflections about how cities are faring under welfare reform one year into the law. My remarks will focus on Baltimore, but I believe they can apply to many other big cities as well.

Frankly, when I was thinking about what I was going to say to you this afternoon, I wasn't quite sure what my main message should be. Should I tell you about things people like to count? I could tell you that between January 1996 and August 1997, Baltimore City's welfare caseload dropped 21 percent from almost 99,000 to a little over 78,000. If numbers were your indicator of success, the obvious conclusion would be, "Yes, welfare reform is working."

But as a former football player, I know that declaring success at this point is like declaring victory in the first quarter of the game. With welfare reform only in its "first quarter," the final outcome is nearly impossible to predict.

The mixed messages I am getting from my agency heads underscore the difficulty of trying to measure the success of welfare reform at this stage. Let me tell you about some of these conversations.

When I talk to my social services people they point to the drop in the caseload. They cite the number of welfare recipients participating in job readiness, job search, work experience and grant diversion programs—almost 8,000 as of August of this year. They tell me about agreements and contracts signed with 27 new partners in the public and private sectors to provide job placement services for welfare recipients. Tallying up such facts and figures, their assessment is that the City is making significant "progress" in implementing welfare reform.

When I talk to my employment development people I'm hearing a story with a slightly different slant. Sure, they tell me of the hundreds of welfare recipients who have gone through job training in the past year, and of the 2,500 who have found employment. And they're even proud to provide individual portraits of some of these individuals.

People like Dana, a single mother of three, who already had obtained her GED, knew WordPerfect, and typed 50 words a minute. She was assigned to train as an office clerk at a City agency, and within six weeks, was offered a full-time position. Or Lisa who used the services of one of the two full-scale career centers the City has set up for welfare recipients and attended the local community college. Lisa now has a job at Bell Atlantic, earning $19 an hour.

But my employment development people also say that such individual success stories shouldn't seduce us into thinking that moving people to self-sufficiency is an easy task. Another set of figures provides a more telling story.

To meet federal and state requirements, about 14,000 City welfare recipients must be in a job or work-related activity by January 1, 1999. Yet, an increase of only 2,800 jobs is projected for Baltimore in the types of industries and businesses that can absorb low-skill entry-level workers. And that's between 1997 and the year 2000.

What's more, with Baltimore's unemployment rate the highest of any jurisdiction in the Baltimore metropolitan area (8.5% as of July), people trying to get off welfare will face some stiff competition.

From such figures, it's obvious that on its own, Baltimore City cannot find jobs or work experiences for the large numbers of people who will be leaving the welfare rolls. A regional approach to employment will be required. That's not all. To bridge the gap between all these new job seekers and the private sector jobs that are available, we also are going to have to find a way to create more subsidized jobs.

My employment development people also remind me that the Lisas and Danas represent welfare reform's first wave—in relative terms, the easy cases. Both women had skills, motivation, a strong work ethic, and a support network. Each could easily be a "poster child" for welfare reform.

As the welfare rolls continue to drop, such "poster children" will be harder to find. Those left represent the toughest cases. Of those 14,000 welfare recipients who must get jobs or be engaged in work related activities by January 1, 1999: 52% have no high school diploma; 26% have been on the rolls for more than five years and have little or no prior work experience; an estimated 16% have drug or alcohol related problems; and 50% will require subsidized child care.

Even in a booming economy, finding jobs for such a population is highly problematic. I think we all know what will happen during an economic downturn.

When I speak to my homeless relief advisers, I get another set of perceptions, and another set of numbers. They point to an upsurge in requests for emergency shelter—from 3,000 in the first half of 1996 to 5,000 in the first half of 1997, a 40 percent increase. And they tell me that families and individuals are overwhelming the city shelters. Over the past two months, shelter operators have had to turn away people because there were no more beds available. The last time this happened was in the 1980s.

According to my homeless relief advisers, the anecdotal evidence points to some connection between what they are seeing at the shelters and the new welfare law—either because people have lost their benefits as a result of sanctions, or they didn't apply for benefits because they thought they couldn't get them, or they have had their benefits cut off from some other jurisdiction and have moved to Baltimore.

Further anecdotal evidence from another source: I recently met with a group of ministers who told me that more people are using their churches' food pantries and feeding programs than a year ago.

I fear that what we're seeing in these feeding programs and in our shelters may be part of the face of this new welfare reform.

It's a complicated face.

Like many big city mayors, I supported the need for welfare reform. We must move people from welfare to work. This nation was built on the work ethic, and work is one of the things that gives life meaning and purpose.

I agree with the President that the welfare system ought to be one that is transitional and moves people to independence, not to prolonged dependence. And I have been working diligently with my agency heads to try to make welfare reform work, as I promised the President that I would.

Our efforts to help move people from welfare to work are not confined to the City's Department of Social Services and the Office of Employment Development, our lead agencies in welfare reform. Nearly every City agency is involved. Some examples:

Our Housing Authority is helping to train welfare recipients for jobs in the construction trades and other professions. The Health Department is providing training in health-related skills, as well as treatment for welfare recipients with substance abuse problems.

Our literacy agency, Baltimore Reads, is expanding its literacy and job readiness programs to meet the needs of welfare recipients.

And two former welfare recipients are now working on my own staff.

The City is also providing bus passes for welfare recipients participating in work programs, as well as vouchers for child care services. And we've launched a pilot project to recover child support payments as a way to lessen welfare dependency.

In addition, the City is working on welfare employment strategies with such groups as the Baltimore City Private Industry Council, an alliance of business, labor, education, government, and community leaders concerned with meeting the workforce needs of the Baltimore metropolitan area.

And we're hoping the federally financed "Bridges to Work" program, which links workers from an inner-city neighborhood in East Baltimore to jobs in the outlying suburbs, will serve as a model that can be replicated elsewhere.

I've just mentioned a number of Baltimore's individual welfare reform initiatives, but I don't want to leave you with the impression that our efforts are piecemeal. Shortly after the new law went into effect, I appointed a special Welfare Reform Committee of my Human Services Subcabinet to begin developing a coordinated approach to the challenge of making welfare reform work in Baltimore City.

The committee has just drafted a plan that presents an overview of the federal and state mandated requirements for welfare reform and lays out the City's strategies for meeting them.

So yes, we in Baltimore welcome welfare reform and yes, we are responding vigorously to the challenges it poses. At the same time, I think we have to be realistic about what it takes to make welfare reform work in a city like Baltimore.

What does it take?

We must be able to offer people without skills the ability to get training. A job search without skills doesn't lead to very much. We must increase our support services, such as child care, job counseling, and drug treatment. And we must develop more innovative ways to address the transportation issue.

We need the sustained participation of private businesses in hiring and helping to train people who have been in a state of dependency for so long. Private businesses don't have to do it all, of course. But they have to do more.

We need the United Way and other organizations in the nonprofit sector to continue to keep the issue of welfare reform on the national radar screen. The United Way's statement on welfare reform and its implications for charities is a fine example of your efforts in this regard.

As we go forward with implementing the welfare reform law, we must be willing to reexamine certain of its provisions to ensure that there is an adequate safety net for vulnerable children. Neglect of little children must not be the legacy of welfare reform in America or in the City of Baltimore.

And if it turns out that five years is far too short a time-frame in which to achieve self-sufficiency, if the economy falters, if the unpredictable occurs, we must not allow the ideology of welfare reform to override the need to make pragmatic adjustments in the law.

As we undertake this bold national experiment to "end welfare as we know it," we are learning as we go along. And we must be courageous enough to change what we find doesn't work, even as we applaud what works.

When President Clinton signed the welfare reform bill, I said that my worries about the daunting challenge of moving so many people from prolonged dependence to self-sufficiency were giving me a lot of sleepless nights. Well, let me tell you, my rest isn't easy yet.

Despite the statistics, despite our real success stories, despite our earnest efforts, we still have a long way to go before we can declare welfare reform an unequivocal success. As this old football player said earlier, you don't declare victory in the first quarter of the game.

I leave you with one other thought about this bold national experiment: We must never forget that the raw materials of this experiment are real people's lives.

JUDICIAL INTERPRETATION OF PRWORA: IMPLICATIONS FOR IMPLEMENTATION

Legislative implementation can be effected by judicial construction of legislation as well as by its modification through regulations or as

a result of the conclusions of the Attorney General. In the latter instances, some legal body other than the legislature pronounces its view of legislative goals and, consequently, effects the path of implementation. Both types—judicial interpretation and administrative evaluation—will be addressed below.

Judicial Review of Legislation

Legislative implementation can be viewed on two levels. The first level is concerned with how existing case law affects the constitutionality of a statute. Judicial decisions handed down by the United States Supreme Court are important constraints on the reach of any legislation, especially if, like the PRWORA, Congress enacted the law to explicitly challenge or circumvent case law precedent. Here, Congressional will is expressed in the statute, and Congress fervently hopes that the Supreme Court will accept its conception of the Constitution. The second level focuses on a specific constitutional challenge to enacted legislation. Here, the dissatisfaction with the legislation may be grounded on alleged violations of the United States Constitution, but there is no existing case law to guide the court's decision making. In both cases, one possible outcome is the modification of the meaning of the legislation as a consequence of the court's construction of statutory language. This modification becomes especially important for subsequent interpretations of the legislation in question.

The following two judicial decisions, both handed down in 1998, illuminate the beginning steps in the implementation of PRWORA. The first, *City of Chicago v. Shalala,* is an Illinois District Court decision that deals with the constitutionality of PRWORA provisions regarding the denial of cash assistance and food stamps to legal residents. The second opinion is the United States Supreme Court decision in the *Saenz v. Roe* case.

CITY OF CHICAGO v. SHALALA (ILL. D.C.: 1998) UNITED STATES DISTRICT COURT OF ILLINOIS

Opinion by: Blanche M. Manning
Opinion: Memorandum and order

This case challenges the constitutionality of § 402 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193 110 Stat. 2260, codified at 8 U.S.C. §§ 1601, et seq. . . .

The defendants seek to dismiss the complaints filed by the City and the intervenors pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons . . . the court rejects the plaintiffs-intervenors' constitutional challenge to the Welfare Reform Act. . . .

Background

A. The Welfare Reform Act

The Welfare Reform Act is a comprehensive legislative package designed to revamp federally funded welfare programs. *Shvartsman v. Callahan,* aff'd by *Shvartsman v. Apfel.* Its provisions pertaining to legal resident aliens were drafted in light of the increasing number of immigrants on the welfare rolls and the associated sharp increases in costs and were meant to eliminate the incentive of public benefits as a motive for immigration to the United States.

Section 402 of the Welfare Reform Act added a citizenship requirement, subject to certain limited exceptions, to the eligibility criteria of: (1) the Supplemental Security Income program (SSI), 42 U.S.C. §§ 1381, et seq.; (2) the Food Stamp program, 7 U.S.C. §§ 2011, et seq.; (3) the Temporary Assistance for Needy Families program (TANF), 42 U.S.C. §§ 601, et seq., and 305 ILCS 5/4-1, et seq.; (4) the Medicaid program, 42 U.S.C. §§ 1396, et seq.; n5 and 305 ILCS 5/5-1; and (5) the Social Services Block Grant program (SSBG), 42 U.S.C. §§ 1397, et seq.

The Seventh Circuit recently upheld the constitutionality of the Welfare Reform Act, rejecting claims that the limitations on food stamp eligibility imposed by the Welfare Reform Act violated the rights of legal resident aliens to due process. See *Shvartsman v. Apfel.* In *Shvartsman,* a class of impoverished legal permanent resident aliens who had applied for citizenship before their eligibility for benefits terminated under the Welfare Reform Act claimed that the Act violated their due process rights. *Id.* Specifically, they argued that the statutory transition period, coupled with the INS's delay in processing their citizenship applications, prevented them from having a fair opportunity to prove their continuing eligibility to receive food stamp benefits.

The Seventh Circuit rejected this argument, holding that the plaintiffs had failed to establish a property interest. The court reasoned that the right to access adjudicatory procedures exists because it serves to protect the plaintiffs' underlying legal claims, not because litigants have property interests in the procedures themselves. The court also explained that the procedures necessary to recertify aliens' eligibility to receive benefits could not themselves create property rights, or the scope of the due process

clause would be "virtually boundless." Thus, the court concluded that the plaintiffs had failed to establish a property interest and, therefore, the transition procedures implementing the new citizenship requirement did not violate their due process rights. * * *

B. The Parties' Claims

[T]he court will describe the parties' claims and sort out the various bars to the plaintiffs and plaintiffs-intervenors' claims before reaching the merits of the few claims that are ultimately left. The court notes, however, that its merits analysis would have applied equally to all of the constitutional challenges to the Welfare Reform Act.

1. The Plaintiffs

In its three-count complaint, the City challenges the constitutionality of the Welfare Reform Act, arguing that it violates the Fifth Amendment due process and equal protection rights of permanent legal resident aliens by prohibiting those persons from receiving food stamps and Supplemental Security Income (SSI). The City also argues that the Welfare Reform Act purports to authorize the State of Illinois to discriminate against permanent legal resident aliens and thus violates the due process and equal protection rights of permanent legal resident aliens and violates the principle of separation of powers.

The City seeks a declaration that the Welfare Reform Act violates their rights to due process and equal protection, as well as the principle of separation of powers. They ask the court to enjoin the defendants from enforcing the Welfare Reform Act or otherwise denying benefits to previously eligible legal permanent resident aliens. . . . * * *

2. The Defendants

The defendants seek to dismiss both the City and the intervenors' complaints. . . . [T]hey note that . . . Congress has the power to condition aliens' eligibility for welfare benefits on the character and duration of their residence and to draw distinctions between aliens and citizens, citing to *Mathews v. Diaz,* 426 U.S. 67, 82-83, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976). * * *

Discussion

A. Standard on 12(b)(6) Motion to Dismiss * * *

2. TANF, Medicaid, and SSBG Claims

The rational basis standard applies because Congress has plenary powers over immigration matters, as "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell,* 430 U.S. 787, 792, 52 L. Ed. 2d 50, 97 S. Ct. 1473 (1977). Alienage-based restrictions on eligibility for welfare programs are within the ambit of immigration matters. *Mathews v. Diaz,* 426 U.S. 67, 80, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976). Indeed, the Supreme Court has

specifically noted that Congress need not "provide all aliens with the welfare benefits provided to its citizens. *Id.* at 82. Moreover, federal legislation regarding alienage-based immigration laws is not comparable to state legislation, which may be subject to different standards of review. *Abreu,* 971 F. Supp. at 810. In short, the court agrees with the detailed and well-reasoned opinions in *Abreu, Rodriguez,* and *Kiev* regarding the proper standard of review.

Because rational basis scrutiny is the appropriate standard of review, the court turns to whether the Welfare Reform Act is indeed rational. Legislation must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). The Seventh Circuit instructs that, when determining whether a statute survives rational basis review, courts do not have a "license . . . to judge the wisdom, fairness, or logic of legislative choices." *National Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1127 (7th Cir. 1995), citing *Heller v. Doe,* 509 U.S. 312, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993).

Congress enacted the Welfare Reform Act to encourage self-reliance and ease the burdens on the welfare system, stating that:

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
(2) It continues to be the immigration policy of the United States that —
    (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
    (B) the availability of public benefits not constitute an incentive for immigration to the United States.
(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.
(4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.
(5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.
(7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy. 8 U.S.C. § 1601.

Restricting noncitizens' ability to receive welfare benefits bears a rational relationship to achieving these goals as there appears to be a logical connection between the means (restricting aliens' access to welfare programs) and Congress' end (fostering self-reliance and easing the burden on the welfare system). Moreover, the fact that the Welfare Reform Act impacts certain permanent resident aliens by denying them benefits unless and until they become citizens does not affect the court's conclusion that the Welfare Reform Act survives rational basis review. It is well established that Congress may address the part of a problem that it deems the most acute. See, *Williamson v. Lee Optical Co. of Oklahoma,* 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1955); *New Orleans v. Dukes,* 427 U.S. 297 at 305, 49 L. Ed. 2d 511, 96 S. Ct. 2513.

In addition, Congressional line drawing necessarily implies that people with differing circumstances will be placed on either side of the line. *Mathews,* 426 U.S. at 83. This court is not empowered to second-guess Congress' decision as to where to place that line. Despite the fact that the plaintiffs contend that the Welfare Reform Act will harm legal resident aliens, this court cannot act as a super-Congress and rewrite legislation that is rationally related to Congress' stated purpose. *Yellow Cab Co. v. City of Chicago,* 919 F. Supp. 1133, 1138 (N.D. Ill. 1996), citing *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) [*39] (in applying the rational basis test, a court "may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations").

Finally, in the interests of completeness, the court briefly notes that it disagrees with the plaintiffs-intervenors' argument that the Welfare Reform Act should be invalidated because its alienage restrictions were based on animus toward noncitizens. It is legitimate to distinguish between citizens and aliens, as demonstrated by the fact that Title 8 of the United States Code is founded on the legitimacy of this distinction. *Mathews,* 426 U.S. at 85.

Moreover, as discussed above, the goals of the Welfare Reform Act appear to be rationally linked to the purpose identified by Congress. Thus,

the plaintiffs-intervenors cannot establish that the Welfare Reform Act is "inexplicable by anything but animus toward the class that it affects." *Romer v. Evans,* 517 U.S. 620, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855 (1996); see also *University Professionals of Illinois, Local 4100, AFT-AFT, AFL-CIO v. Edgar,* 114 F.3d 665 (7th Cir. 1997) ("whether or not we agree with a legislature's presumed judgment is of little moment, for we must only recognize the legitimacy of the retrospective logic"). Thus, the provisions of the Welfare Reform Act affecting noncitizens' ability to obtain welfare benefits must stand.

CONCLUSION

For the above reasons, the . . . court rejects the plaintiffs-intervenors' constitutional challenge to the Welfare Reform Act. Accordingly, the governments' motions to dismiss [11-1 and 31-1] are granted, and this case is dismissed with prejudice. The motions for a preliminary injunction [5-1 and 15-1] are denied as moot, as are all other pending motions.

Date: 3/31/98
Blanche M. Manning
United States District Court
[The Appendix to which the court refers, 8 U.S.C. § 1612 *et seq,* which spells out restrictions on welfare and public benefits for aliens, is omitted.]

SAENZ v. ROE, 119 S. CT. 1518 (1999) SUPREME COURT OF THE UNITED STATES

(See text of opinion in chapter 3)

ADMINISTRATIVE EVALUATION OF LEGISLATIVE IMPLEMENTATION: THE PENNSYLVANIA ATTORNEY GENERAL REVIEW OF ACT 35 (PENNSYLVANIA'S WELFARE REFORM ACT)

In addition to the example of judicial modification of legislation exemplified in the *City of Chicago v. Shalala* and *Roe v. Anderson* above, there is yet another perspective on the phenomenon of legislative implementation.

Following is the Opinion of the Pennsylvania Attorney General (in a letter to the Honorable Feather Houston, Secretary of the

Pennsylvania Department of Public Welfare) regarding the enforceability of Act 1996-35 (hereinafter Act 35), enacted by the Pennsylvania legislature in anticipation of its federal counterpart, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Attorneys General are often asked to supply an opinion regarding the legality of legislation, and in this instance Pennsylvania Attorney General Thomas W. Corbett, Jr., in a December 1996 letter, discussed his concerns about Act 35's residency requirements (which are similar to those contained in PRWORA). The critical point to appreciate is that the meaning of Act 35 is effected by not only the judicial opinions cited in the Opinion but also by the Attorney General's conclusion that certain aspects of the law are unconstitutional. The result is that the Secretary of the Pennsylvania Department of Public Welfare is prohibited from enforcing certain statutory provisions.

December 9, 1996
Honorable Feather O. Houston
Secretary
Department of Public Welfare
Room 333, Health and Welfare Building
Harrisburg, PA 17105

Dear Secretary Houston:

You have requested my opinion regarding the enforceability of the durational residency and citizenship requirements of Act 1996-35 ("Act 35"), which amended various provisions of the Public Welfare Code governing eligibility for cash and medical assistance under the Commonwealth's General Assistance program. [Note: This excerpt will discuss the residency requirements only.]

Section 11 of Act 35 amends Section 432.4 of the Public Welfare Code, 62 P.S. §432.41 to enlarge from 60 days to 12 months the period of *time* that an applicant for cash assistance must be a Pennsylvania resident before becoming eligible for benefits. Section 15 of Act 35 amends Section 442-1 of the Code, 62 P-S. §442.1. to add a requirement that an applicant for medical assistance must be a Pennsylvania resident for 90 days before becoming eligible for benefits. Section 14.1 of Act 35 amends the Code to add Section 432.22f 62 P.S. §432.22, which disqualifies for cash or medical assistance an applicant who is not a citizen of the United States.

In providing legal advice to the head of a Commonwealth agency, the Attorney General is required by Section 204(a)(3) of the Commonwealth

Attorneys Act, 71 P.S. 5732-204 (a) (3), "to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction." Since each of the foregoing provisions of Act 35 implicates a decision of the United States Supreme Court relevant to its constitutionality, it is incumbent upon me to determine whether the Supreme Court decision is "controlling" so as to compel the advice that the provision to which it relates is unenforceable.

As a threshold matter, it must be emphasized that the concept of a "controlling decision by a court of competent jurisdiction" is not susceptible to precise definition. Clearly, it cannot be construed so narrowly as to require a decision by a court of last resort holding unconstitutional the very provision on which the Attorney General's advice is sought, since that construction would render the Attorney General's advice a meaningless gesture. On the other hand, the decision said to be "controlling" must be more than merely predictive of the constitutionality of the statutory provision on which the Attorney General,'s advice is sought; it must adjudicate the constitutionality of a statutory provision materially indistinguishable from the statutory provision on which the advice is sought, and it must be rendered by a court that has jurisdiction ever the entirety of Pennsylvania.

1. RESIDENCY

In *Shapiro v. Thompson,* 394 U.S. 618 (1969), the United States Supreme Court held that a state statute that requires a minimum one-year residence in the state as a condition of eligibility for public assistance violates the Equal Protection Clause of the United States Constitution. Among the state statutes specifically invalidated was Section 432(6) of the Public Welfare Code, which required a minimum one-year residence in Pennsylvania as a condition of eligibility for cash general assistance or Aid to Families with Dependent Children.

In relation to Section 11 of Act 35, *Shapiro* presents a clear example of a "controlling decision by a court of competent jurisdiction," since it invalidated a materially identical provision of the same statute, pertaining to the same government program. That the appellees in *Shapiro* were all applicants for federally assisted rather than wholly state-funded cash assistance is of no consequence, since the Supreme Court has held that "whether or not a welfare program is federally funded is irrelevant to the applicability of the analysis." *Memorial Hospital v. Maricopa County,* 41S U.S. 250, 261 (1974) (citations omitted). The *Shapiro* decision, therefore, renders Section 11 unenforceable.

In *Memorial Hospital v. Maricopa County, id.,* the United States Supreme Court held that a state statute that requires a minimum one-year residence in the state as a condition of eligibility for medical assistance violates the Equal Protection Clause of the United States Constitution. Specifically invalidated in *Memorial Hospital* was an Arizona statute that required one-year residence in a county as a condition of eligibility for county-funded medical assistance.

On its face, the Arizona statute invalidated in *Memorial Hospital* exhibited two features that distinguish it from Section 15 of Act 35; first, its residency requirement applied to county rather than state residence; second, its residency requirement was one year rather than ninety days. Notwithstanding such differences, the *Memorial Hospital* decision may be "controlling" with respect to the constitutionality of Section 15. The key question is whether the differences are material, that is, whether either of them presents a basis on which to conclude that there is a reasonable possibility that the Supreme Court would uphold Section 15.

The decision in *Memorial Hospital* relied heavily upon the Court's analysis in *Shapiro v. Thompson.* In *Shapiro,* the Court observed that, because the right to travel interstate—more precisely described as the right to migrate from one state to another—is a fundamental right protected by the Constitution, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional," *Shapiro,* 394 U.S. at 634. The Court found that differentiating between old and new indigent residents penalized the latter for the exercise of a constitutional right by denying them aid upon which they may descend for the basic: necessities of life. The Court then examined, and found impermissible or insufficiently compelling, each of the governmental interests advanced in support of the classification.

Rejected by the Court as impermissible, because they served only to deter the exercise of the constitutional right to travel interstate, were the state objectives of preserving the fiscal integrity of public assistance programs by discouraging the immigration of indigents or by discouraging those who would enter the state solely to obtain larger benefits, and favoring old residents over new based on the contribution to the community that old residents may have made through the past payment of taxes. Rejected by the Court as insufficiently compelling were the administrative objectives at facilitating the planning of the welfare budget, providing an objective test of residency, minimizing the opportunity for fraudulently obtaining benefits from more than one jurisdiction, and encouraging early entry of new residents into the labor force.

In *Memorial Hospital,* the Court first noted that the applicability of the Arizona statute to county residency rather than state residency did not

distinguish that case from *Shapiro,* since the Arizona residency requirement operated not merely upon intrastate migration, but upon interstate migration as well. For the same reason, it is immaterial to the determination of whether the *Memorial Hospital* decision is "controlling" with respect to the constitutionality of Section 15 of Act 35 that Section 15 imposes a state rather than a county residency requirement upon eligibility for medical assistance.

The Court in *Memorial Hospital* next proceeded to emphasize that a durational residency requirement must be justified by a compelling state interest only if the residency requirement operates to penalize the exercise of the constitutional right to interstate migration. Acknowledging that *Shapiro* did not specify the level of impact on interstate migration that would constitute a penalty, the Court nevertheless concluded that "it is at least clear that medical care is as much 'a basic necessity of life,' to an indigent as welfare assistance." *Memorial Hospital,* 415 U.S., at 259. Thus, the Arizona residency requirement penalized the right to interstate migration and could survive constitutional challenge only if shown to be necessary to promote a compelling state interest.

As in *Shapiro,* the Court in *Memorial Hospital* rejected as impermissible or as insufficiently compelling each of the proffered state interests. Rejected as impermissible were the state objectives of preserving the fiscal integrity of its tree medical care program by discouraging the immigration of indigent persons generally or indigent persons who would enter the county solely to partake of its medical facilities, and favoring longtime residents because of their contribution to the community through the past payment of taxes. Rejected as insufficiently compelling were the state objectives of facilitating determination of residency, preventing fraud, and assuring budget predictability.

From the *Shapiro* and *Memorial Hospital* decisions, it is apparent that the determination of whether the *Memorial Hospital* decision controls the constitutionality of Section 15 of Act 35 rests squarely upon the determination of whether the ninety-day residency requirement of Section 15 "penalizes" the exercise of the right to interstate migration. If the ninety-day residency requirement does not rise to the level of a penalty, then strict scrutiny is avoided, and the state interests proffered in support of the requirement need only be rational.

While it is exceedingly rare for the Office of Attorney General to refer to pending litigation in rendering an official opinion, the decision of the District Court on the plaintiffs' motion for preliminary injunction in *Warrick v. Snider,* No. 94-1634 (W.D. Pa. filed June 30, 1995), underscores the importance of the "penalty" inquiry, while shedding considerable light upon the determination of whether the ninety-day residency requirement

for medical assistance in Section 15 rises to the level of a penalty. In *Warrick*, a class of indigent Pennsylvania residents challenges the sixty-day residency requirement for cash general assistance, which was enacted by Section 6 of Act 1994-49 ("Act 49"). They contend that the sixty-day residency requirement operates to penalize the exercise of their fundamental right to travel interstate, and cannot withstand strict scrutiny.

In denying the plaintiffs' motion for preliminary injunction, the District Court distinguished *Shapiro* on the ground that the statutory provisions there at issue worked to deny to new residents all benefits necessary for basic sustenance and health, for an entire year, while Act 49 denies only cash assistance for a period of only sixty days, allowing qualified new residents access to food stamps, emergency housing, medical assistance, job training, and job placement assistance. Because Act 49 provides new residents the means of obtaining what is necessary for their basic sustenance and health, and because a waiting period of two months is substantially less burdensome than a waiting period of an entire year, the District Court concluded that Act 49's durational residency requirement does not operate as a penalty on the right to interstate migration, and therefore need only be rationally related to a legitimate government purpose to survive constitutional challenge.

Holding that Act 49's sixty-day residency requirement is rationally related to the Commonwealth's legitimate governmental interest in encouraging employment, self-respect, and self-dependency, the District Court reasoned that "a social welfare structure which provides the things necessary for basic sustenance and health, and at the same time providing job training and assistance while limiting temporarily cash benefits is rationally related to the legitimate goal of encouraging welfare recipients to seek employment so as to support themselves." *Slip op.* at 19.

Ironically, if I were to conclude in this Opinion that *Memorial Hospital* is not "controlling" with respect to the constitutionality of Section 15 of Act 35, the plaintiff class in *Warrick* would become ineligible for medical assistance and a major underpinning of the District Court's decision in *Warrick* would be removed. It is my judgment, however, that *Memorial Hospital* is indeed "controlling" and that Section 15, therefore, is unenforceable.

Unlike the sixty-day residency requirement for cash assistance upheld by the court in *Warrick*, the ninety-day residency requirement for medical assistance in Act 35 is not part of a statutory scheme that provides to new residents "the things necessary for basic sustenance and health." Whereas the availability of medical assistance served to mitigate the impact of denying cash assistance to new residents under Act 49, the unavailability of cash assistance serves to compound the impact of denying medical assistance to new residents under Act 35.

Since Act 35, in contrast to Act 49, does not afford indigent new residents the means of providing for their basic sustenance and health, I conclude that the ninety-day residency requirement for medical assistance in Act 35 indeed operates to penalize the exercise of the right to interstate migration. Although admittedly less burdensome than the one-year requirement struck down in *Memorial Hospital,* it nevertheless denies medical assistance to indigent new residents while providing them no other assistance with which to meet their medical needs. I am unable, moreover, to identify any state interest served by this differential treatment of old and new residents that is any more compelling than the state interests rejected by the Supreme Court in *Shapiro* and *Memorial Hospital.*

In a series of decisions since *Shapiro* and *Memorial Hospital,* the United States Supreme Court applied rational basis analysis to invalidate state statutes that afforded preferential treatment to state residents based upon when residency was established. See *Zobel v. Williams,* 457 U.S. 55 (1982) (mineral income distributed to state residents according to years of residency); *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (*1985*) (property tax exemption afforded to Vietnam veterans who were state residents before May 8, 1976); *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898 (1986) (civil service preference afforded to veterans who were state residents at the time they entered military service). In *Zobel* and *Hooper,* the majority of justices held that the classification of residents based upon when they first established residency served no legitimate state interest. In *Soto-Lopez,* a plurality of justices applied strict scrutiny, while the concurring justices needed to form a majority followed *Zobel* and *Hooper* to hold again that the classification of residents based upon when residency was established is irrational.

Although these more recent decisions employed rational basis review, they cannot be said to signal a change of approach by the Supreme Court that would undermine my conclusion that the *Shapiro* and *Memorial Hospital* decisions are "controlling" with respect to the constitutionality of the durational residency requirements in Act 35. The statutes invalidated in the more recent decisions involved neither durational residency requirements nor welfare benefits; and they created classifications that, unlike those involved in *Shapiro* and *Memorial Hospital,* were permanent and would never equalize. It is always possible that the Supreme Court will depart from its prior decisions, but until it does so we are bound by them.

[The remainder of the Attorney General's Opinion discusses the constitutionality of the citizenship provisions of Act 35, i.e., those that required citizenship as a condition of eligibility for the Commonwealth's General Assistance Program. Relying principally

on *Graham v. Richardson,* 403 U.S. 365 (1971), which held that "a state statute that requires United States citizenship as a condition of eligibility for public assistance violates the Equal Protection Clause of the United States Constitution." The portion of the Opinion that discusses this case, as well as related cases and issues associated with alienage and eligibility for public assistance is omitted here.]

[The Opinion ends with the Attorney General indicating that:]

In summary, it is my opinion, and you are so advised, that controlling decisions of the United States Supreme Court render Sections 11,14.1, and 15 of Act 35 unenforceable. You are further advised that you should administer the Public Welfare Code, as amended by Act 35, as if the unenforceable durational residency and citizenship requirements of Act 35 were not enacted.

In particular, you should continue to enforce the sixty-day residency requirement for cash assistance enacted by Act 49, since it is clear that the General Assembly did not intend to repeal that requirement unless it could substitute the one-year residency requirement of Act 35.

You should also continue to enforce Section 432(3) of the Public Welfare Code, which denies general assistance to illegal aliens (emphasis added). That provision was neither repealed nor significantly amended by Act 35; it is fully consistent with Section 411 of the recent federal welfare act, and its constitutionality is not in question.

Finally, you are advised that, in accordance with Section 204 (a) (1) if the Commonwealth Attorneys Act, 71 P.S. § 732-204 (a) (1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely yours,
Thomas W. Corbett, Jr.
Attorney General

INTERDEPENDENCE OF LEGAL PROCESSES: WELFARE LITIGATION DEVELOPMENTS SINCE THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996

By Mary R. Mannix, Marc Cohan, Henry A. Freedman, Christopher Lamb, and Jim Williams*

The Personal Responsibility and Work Opportunity Reconciliation Act (PRA), enacted in August 1996, replaced the federal Aid to Families with Dependent children (AFDC) program with the Temporary Assistance for Needy Families (TANF) block grant and at the same time wiped out federal statutory and regulatory protections that had been the basis for significant welfare litigation over the past 25 years.[1] The months since enactment of the PRA have been a time of enormous transition. As states began to exercise their new authority to define the scope of their welfare programs for poor families, lawyers for these families began to confront the challenge of identifying other sources of law, such as state statutes, other federal statutes, and state and federal constitutional provisions, that can be used in litigation to protect families harmed by unfair state policies and practices. At the same time these lawyers responded to the challenges posed by diminishing resources for welfare representation. Such diminishing resources are attributable to funding cuts and Legal Services Corporation (LSC) restrictions on class actions and litigation challenging welfare reform.

I. INTRODUCTION

This article reviews welfare litigation developments since the summer of 1996 and comments on efforts to assure adequate resources for welfare representation. Overall, challenges to state policies discriminating against new state residents and to various work program requirements or abuses have emerged as major themes with significant early victories. With respect to welfare work issues, the U.S.

---

* Mary Mannix, Marc Cohan, and Christopher Lamb are senior attorneys and Henry A. Freedman is executive director of the Welfare Law Center. Jim Williams is a senior attorney at the National Employment Law Project.

Department of Labor (DOL) indication that federal employment laws generally apply to welfare recipients is a helpful advocacy tool. Other pending or recent litigation has challenged specific state policies, including child exclusion policies, child support cooperation requirements, and the elimination of the child support pass-through. With two exceptions, one initially successful and the other unsuccessful, litigation has not challenged general state TANF implementation. In the area of procedural fairness, advocates should be prepared to address notice and hearing issues, arbitrary decision making and problems arising from privatization of welfare.

All told, these developments confirm that lawyers are responding with creative and carefully targeted litigation to address the harms that welfare changes cause poor families and that in doing so welfare lawyers are strengthening and expanding partnerships with other public interest lawyers and the private bar. Developments, particularly in the area of work requirements, also underscore the critical role that individual representation will continue to play in assuring that state policies are correctly applied and that growing state discretion is not arbitrarily exercised.

Litigation developments in the past year should be seen in the context of state transitions from AFDC to TANF programs. The full range of legal issues that will arise from state TANF implementation cannot yet be identified. While most states implemented TANF before the July 1, 1997, deadline, many began their TANF programs by continuing to operate under existing state law while awaiting state legislative action. For example, California and New York, which together accounted for over 28 percent of all AFDC families in fiscal year 1995, adopted legislation overhauling their welfare systems only in August 1997. The full effects of the most significant new provisions, such as time limits on benefits and increasingly strict work participation requirements, will not be evident for some time.

The following discussion focuses on AFDC and TANF cases and selected general assistance (GA) cases identified as a part of the Welfare Law Center's welfare litigation monitoring effort. It may not include all developments, and we encourage advocates to keep us informed of their welfare litigation so that we, in turn, can include this information in our regular litigation updates.[2]

II. Discrimination Against New State Residents

Despite the strong likelihood under *Shapiro v. Thompson*[3] that such schemes are unconstitutional, at least 18 states and the District of

Columbia have adopted some sort of restrictions on benefits to new residents in their TANF programs.[4] The popularity of these policies has continued unabated despite a growing body of social science research showing that levels of public assistance benefits have little or no effect on poor persons' decisions to migrate from state to state.[5]

The most popular type of statute disfavoring new residents pays the new residents the benefit available in their former state for a period of either 6 months or a year.[6] At least one state, Rhode Island, has eschewed this multitiered approach and adopted an across-the-board 30 percent reduction in benefits to all new residents for 1 year regardless of where they previously resided.[7] Other states completely deny assistance for 30 or 60 days to new residents.[8] At least four states which pay state-financed benefits to immigrants who are ineligible for federally funded benefits deny those benefits for 6 months to a year to immigrants who are new state residents.[9] All of these variations disfavoring new residents are subject to serious federal constitutional challenges.

In the last year three more courts have joined the numerous courts already holding that paying new residents the benefits available in their former states is unconstitutional.[10] A federal district court in California[11] and a state appellate court in New York[12] both agree with earlier courts' decisions that these statutes constitute a penalty on the federal right to travel and thus are subject to strict scrutiny. The New York court also finds that the provision violates the state constitutional guarantee of aid to the needy. A Pennsylvania federal district court, on the other hand, rejects the argument that such statutes constitute a penalty on the right to travel and thus declines to apply strict scrutiny.[13] Instead the court finds that the Pennsylvania statute is not rationally related to the purpose set forth by the state in its defense. In response to Pennsylvania's claim that the statute's purpose is to encourage new residents to work, the court cites *Shapiro's* holding that such a purpose does not justify disparate treatment of new residents since the purpose of encouraging welfare recipients to work can apply equally to long-term residents.[14] It then goes on to discuss how a multitier benefit structure is particularly unsuited to this purpose since the existence and extent of any work incentive for new residents are entirely dependent on the state in which they previously resided.[15]

Over the last year no new litigation has challenged 30- or 60-day outright denials of aid to new residents. Two earlier court decisions, however, suggest that if such litigation is brought these will be harder cases than the ones challenging 1-year or 6-month multitier systems. In

1992 a divided Wisconsin Supreme Court in *Jones v. Milwaukee County,* finding that a 60-day deprivation of assistance did not constitute a penalty on the right to travel, upheld a 60-day denial of GA aid to new residents.[16] Three years later in *Warrick v. Snider* a federal district court in Pennsylvania followed *Jones* in denying a preliminary injunction in a case challenging a 60-day denial of GA benefits to new residents.[17]

Notwithstanding the *Jones* and *Warrick* decisions, a good argument remains that any denial of subsistence benefits to new residents constitutes a sufficient penalty on the right to travel to trigger strict scrutiny. The Supreme Court's decision in *Shapiro* does not turn on the length of the denial of assistance but rather on whether the denial compromised the plaintiffs' ability "to obtain the very means to subsist—food, shelter, and other necessities of life."[18] Attorneys litigating cases will have to document scrupulously that even relatively short denials of case aid can compromise poor persons' access to basic necessities, and that other available benefits are inadequate for meeting basic needs.

Neither has there been any litigation in the last year regarding denials of aid to new residents who are immigrants. Any challenges to such denials will be based on both right-to-travel law and Supreme Court precedents prohibiting state discrimination against immigrants.[19]

III. Work Programs

The PRA, of course, greatly increased—while at the same time narrowing the types of activities that can count toward the federal participation rates—the numbers of welfare recipients whom the states are required to have in work-related activities. While the states retain some latitude in creating work programs for public assistance recipients, the number of recipients in "workfare" programs is likely to increase substantially over the next few years.[20] By far the country's largest workfare program is in New York City, which has approximately 40,000 welfare recipients in its Work Experience Program (WEP).[21] Because of the size of New York's workfare program and because the city's government started rapidly expanding the program nearly two years before passage of the PRA, many workfare-related issues are already being litigated in New York, while workfare programs in other parts of the country are just getting off the ground.

The following discussion addresses litigation issues that arise around exemptions and work assignments, recent helpful DOL guidance on federal employment protections for welfare recipients,

workfare-related litigation to enforce worker protections and to challenge displacement, and sanction issues.

A. Preassignment Issues

Generally two types of issues can arise prior to a work program assignment—whether one should be given an assignment at all (i.e., whether one qualifies for an exemption) and, if one is not exempt, what assignment one should be given. Both types of issues present the potential for litigation.

With the states under pressure to meet federal participation rates, individual welfare recipients often will have to press their cases for exemptions vigorously in order to be heard.[22] Where exemption decisions appear to be routinely bad, systemic remedies may need to be pursued. In New York City, for example, a private medical contractor conducts over 80,000 work program-related medical examinations each year. Recipients complain that the examinations often last two to three minutes and that doctors refuse to consider the medical records they bring with them to the examinations. Decisions denying medical exemptions are withdrawn or overturned in fair hearings approximately half the time.[23]

Although no case challenging the routine failure to make appropriate medical-exemption decisions has yet been brought in New York, workfare participants with disabilities have sued the social services department on the related issue of the city's failure to make appropriate assignments for people who can work but who have limitations.[24] Plaintiffs in that case include a woman with severe asthma and a 57-year-old woman who has hypertension and severe back pain and who uses a cane and a back brace; both were assigned to maintenance positions exposing them to dust and fumes and requiring lifting and constant bending. Plaintiffs claim that the city is violating the state social services law and the Americans with Disabilities Act (ADA) in failing to give them work assignments consistent with their limitations. In another pending case a workfare worker is suing for monetary damages as a result of a heart attack allegedly arising from a workfare assignment he was physically incapable of performing.[25]

A very different question regarding the appropriateness of work program assignments arises when welfare recipients pursuing education or training are confronted with a demand by the social services department that they perform some other work-related activity, such as workfare. In New York City, TANF recipients in a suit against the social services department alleged that it had a policy of assigning almost all parents on public assistance to workfare in violation of

state social services law provisions which required individualized assessments and employability plans and assignments consistent with recipient preferences whenever possible. A state trial judge issued a preliminary injunction order requiring the city to comply with this law.[26] In order to obtain a right to WEP assignments whose hours did not conflict with their class schedules, welfare recipients in New York's Home Relief program, who were not subject to the same assessment and employability plan requirements as TANF recipients, utilized a state social services law provision prohibiting work-related assignments that "interfered" with education; that provision has since been repealed as part of a large welfare reform bill.[27]

B. Work Assignment Terms and Conditions

In May 1997 DOL issued for the states a guide[28] setting forth the rights of workfare workers to protections under federal employment laws including the Fair Labor Standards Act (FLSA),[29] which governs minimum-wage and overtime rights, and the Occupational Safety and Health Act (OSH Act),[30] which governs workplace health and safety, and to protections under unemployment and antidiscrimination laws.[31]

1. Department of Labor Guidance

The DOL guide advises states to consider the applicability of these laws as they design and implement work programs. As the guide states, it is a "starting point,"and it "cannot provide the answers to the wide variety of inquiries that could be raised regarding specific work programs."[32] For advocates the guide can serve as a basis for beginning a dialogue with state and local officials responsible for developing work programs and with officials of local agencies that enforce the requirements of the laws described in the DOL guide.

In New York City, for example, advocates for workers participating in New York's WEP program met with officials of the administrative agencies that enforce the requirements of workplace health and safety and antidiscrimination laws. They aimed to educate agency personnel about WEP should the agencies receive complaints directly from WEP participants concerning violations of the law. Many of the agencies have their own enforcement agendas and priorities that can be shaped by community interaction. The meetings lay the groundwork for working effectively with enforcement agencies in particular cases that may arise. The DOL guide served as a useful tool in those meetings.[33] However, while many employment laws are enforceable through administrative proceedings, in some cases advocates may

need to litigate to enforce health and safety or minimum protections for their clients.[34]

As the guide correctly points out, the federal welfare law does not exempt welfare recipients from any federal labor or employment laws. Since DOL has enforcement authority over FLSA, its interpretation of FLSA's application to work programs should carry significant weight as case law in the area develops.

The FLSA's broad definition of "employees" requires most welfare recipients participating in work programs to work for no less than the minimum wage under the statute. The only exception applies to those welfare recipients participating in programs which meet the very narrow FLSA definition for training programs, a category to which most workfare programs do not belong.

The guide advises that that the recipient's cash assistance and food stamps may be counted toward meeting the minimum-wage requirement but not other noncash benefits, such as Medicaid, child care services, and transportation. Thus recipients will have to "work off" the value of their TANF grant plus food stamps[35] divided by no less than the minimum wage to determine the number of hours of required work.[36]

The guide also discusses the OSH Act's application. Note that the Occupational Safety and Health Administration does not have jurisdiction over public-sector employers. As a result, state health and safety laws, if any, as opposed to the OSH Act, may apply to a particular workfare program. However, if the workfare participant is placed in a work program outside the public sector, such as a nonprofit agency, the OSH Act may apply.

If the jurisdiction of a federal or state health and safety agency is uncertain, informally discussing jurisdiction with the local enforcement agencies may be worthwhile since the agency likely will need time to resolve the issue through slowly moving bureaucratic channels. Local public- and private-sector unions, which frequently initiate complaints on behalf of their members, may be a good source of information about these agencies. Many localities also have committees on occupational safety and health and nonprofit groups that focus on workplace health and safety and that can serve as a resource for advocates.

While DOL does not have enforcement authority over federal employment discrimination laws, the guide advises that these laws "apply to welfare recipients as they apply to other workers."[37] TANF expressly provides that four nondiscrimination laws apply to any program or activity which receives funds under TANF: the Age

Discrimination in Employment Act;[38] Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act);[39] the ADA;[40] and Title VI of the Civil Rights Act.[41]

As with safety and health agencies, advocates should consider—before finding it necessary to invoke agency enforcement—having informal discussions about jurisdiction with local agencies that enforce antidiscrimination laws. Agency enforcement power often turns on whether an employer-employee relationship exists under the meaning of the statute the agency enforces. Advocates should be prepared to show that the agency has jurisdiction by demonstrating how the local workfare program meets the standards the local agency applies to determine if an employer-employee relationship exists.

Since most of the antidiscrimination laws, such as the Rehabilitation Act and the ADA, do not require aggrieved persons to resort to an administrative agency for a remedy, advocates may wish in certain cases to litigate to enforce their clients' rights.

Over the summer of 1997 the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and a coalition of civil rights, religious, national, and grass-roots advocacy groups defeated Republican proposals in Congress in the 1997 federal budget bill seeking to reverse the trend to apply federal employment laws to workfare workers.

This policy development has widespread public support. Despite public opinion polls showing general support for the welfare law, the public also supports employment law protections for workfare workers. A national survey in June 1997 revealed that 69 percent of the voting public agreed that workfare workers should be paid at least the minimum wage and be covered by other basic federal employment protections.[42] When probed further, 59 percent of those surveyed agreed that an exemption of workfare workers from the minimum-wage laws would undermine the wages of other workers.[43] This represents an almost two-to-one margin over the 31 percent who believed that if workfare workers were paid at minimum-wage rates the public would have to support higher welfare budgets and that welfare recipients who wanted better pay should get off welfare and find a job on their own.[44]

In 1996 there also was strong public support for an increase in the federal minimum wage (the second phase of the increase, to $5.15 an hour, took effect on September 1, 1997). Taken together, this suggests broad public support for policies that help level the playing field for welfare recipients entering the labor market and highlights the potential to integrate advocacy for low-wage workers with that of welfare recipients.

Unfortunately the fight to resist erosion of employment rights as they apply to workfare participants is not over. As of October 1997, the Republican leadership made clear their intention to revisit the DOL workfare directive as part of the federal appropriation process. Speaking before the Working Women's conference, organized by the AFL-CIO in September 1997, Vice President Al Gore, however, stated that the administration would veto any such legislation. The coalition and grass-roots advocates that fought for and helped secure the rights under the DOL directive will continue to make their voices heard.

2. Litigation to Enforce Worker Protections

Several recent court cases and administrative hearing requests have sought to enforce rights that workfare workers have under laws designed to protect their rights as workers as well as under applicable welfare statutes and regulations.[45] Almost all of these cases challenge policies or practices that discriminate against workfare workers as opposed to regular workers.

a. *Health and Safety*

Recipients required to engage in workfare are entitled to safe working conditions no worse than those enjoyed by regular employees performing similar work. In *Capers v. Giuliani* a class of workfare workers assigned to cleaning duties on city streets and by arterial highways for the New York City Departments of Sanitation and Transportation challenged the lack of adequate workplace health and safety protections.[46] Plaintiffs claimed that they were denied access to toilets, washing facilities, and drinking water; personal protective equipment; traffic safety equipment; and training and supervision. In August 1997 the *Capers* court certified a class and entered a preliminary injunction enjoining assignment of any class member to a workfare assignment until the city provided necessary health and safety protections, including access to toilets and potable water, gloves and face masks, and training regarding potential work-site hazards.

In *Capers,* by not suing directly to enforce the health and safety statute, plaintiffs avoided the question of whether the State Department of Labor has exclusive jurisdiction over the question of health and safety standards. New York State's Public Employee Safety and Health Act,[47] which is similar to the federal OSH Act,[48] sets forth health and safety requirements for workfare workers.[49] The right of action under federal and state health and safety statutes typically belongs to the enforcement agency rather than the worker. However, plaintiffs sought to enforce existing social service law prohibitions

against assignment to workfare activities that endanger the health or safety of the welfare recipient, thereby enforcing the health and safety statute indirectly.

In many states workfare workers also may file individual complaints regarding hazardous or unsafe working conditions with state enforcement agencies. In one such pending case, workfare workers challenge the state agency's refusal to permit workfare workers to designate an individual or entity authorized to represent them in dealings with the enforcement agency in the same manner as organized regular employees.[50]

Workfare workers should also be entitled to workers compensation coverage. At least one court has held that a state statutory scheme that provides lesser workers compensation benefits to dependents of workfare workers than to dependents of regular employees violates the federal and state constitutional guarantees of equal protection.[51]

b. *Wage and Hour Issues*

We are not aware of any post-PRA cases challenging the calculation of workfare hours based on less than the minimum wage. However, this issue is likely to be hotly litigated as more and more states rely on workfare to meet their participation rates and as the number of hours of participation in work activities mandated by the PRA increases from 20 to 30 for single parent households by the year 2000.[52]

Plaintiffs seeking minimum-wage protections will want to rely on both the federal FLSA[53] and applicable state minimum-wage laws. Advocates contemplating FLSA actions against state-operated workfare programs should be aware, however, that FLSA actions against states have been hindered by *Seminole Tribe of Florida v. Florida,* in which the U.S. Supreme Court held, in a 5-4 vote, that the immunity the Eleventh Amendment confers on states may not be abrogated by Congress when it is acting through the Interstate Commerce Clause.[54] Since *Seminole Tribe,* several courts have dismissed FLSA actions against states on the basis of a determination that a cause of action is not possible in federal court because Congress lacked the power to abrogate states' Eleventh Amendment immunity in enacting FLSA.[55] This suggests that advocates should look to state wage and hour law when considering challenging minimum-wage violations in workfare programs. Workfare programs with counties, municipalities, not-for-profit entities, and other private employers still may be subject to FLSA coverage.

Advocates are cautioned also that at least one court has determined that workfare workers are not employees under the FLSA.[56] However,

DOL's recent guidance indicates that workfare workers are, in most instances, employees within the FLSA definition.[57]

Workfare workers may be entitled also to have their work hours calculated in terms of the "prevailing wage" or "living wage" in the locality in which they work. Some municipalities, counties, states, or public authorities (such as school boards) have enacted prevailing- or living-wage statutes.

In *Brukhman v. Giuliani* a New York court entered a classwide preliminary injunction requiring the city defendants to calculate the hours to be worked by all workfare workers by using the prevailing rate of wage for regular workers performing similar or comparable work.[58] The court held that using only the minimum wage to calculate workfare hours violated state constitutional and statutory prevailing-wage protections. Plaintiffs also alleged that the challenged practice deprived them of due process and equal protection under law, constituted an unconstitutional taking of their property (the value of their labor) without just compensation, and unjustly enriched the city defendants.

In the earlier case of *Church v. Wing* an AFDC recipient challenged a case closing for refusing to cooperate with her workfare assignment on the basis that the county had not done a prevailing-wage determination before assigning her to workfare.[59] The *Church* court held that state law[60] imposed an absolute mandate on the county to determine and utilize the prevailing wage before making the workfare assignment; it annulled the case closing. Following *Church,* the New York State Department of Social Services directed the counties to use the prevailing wage in making workfare assignments.[61] Unfortunately the New York State legislature modified Social Services Law § 336-c, one of the two statutes relied upon in *Church;* the legislature deleted the prevailing-wage mandate and replaced it with a restriction on using less than the minimum wage to determine hours.

c. *Displacement of Paid Workers*

The federal TANF statute provides limited protections against displacement. It proscribes filling vacancies when an employee is on layoff from the same or substantially equivalent job or when the employer terminates a worker or causes an involuntary reduction of its work force in order to take workfare workers.[62] Displacement claims, however, may be made under both collective bargaining agreements as well as state and/or local laws.

In *Melish v. City of New York* [63] two unions representing municipal workers claim that the city is violating state law, which prohibits

workfare assignments that displace regular workers. Plaintiffs claim that workfare assignments include Parks Department painting and carpentry, work previously done exclusively by unionized workers. The complaint alleges that from 1988 to 1996 the number of unionized painters decreased from 30 to 5 and carpenters from 54 to 22, and that the city refuses to fill vacancies and is instead using workfare workers to do the same work.

Means other than litigation also can be used to challenge displacement. In New Jersey a union is relying on traditional union remedies and is calling for a state investigation to challenge displacement of workers at the medical records and central supplies office of the Jersey City Medical Center.[64] The union contends that 14 workers will lose their jobs or suffer reduced hours as a result of the increased use of workfare workers.

C. Sanctions for Noncompliance with Work-Related Requirements

Most legal services and legal aid programs will see workfare and other work requirement issues as welfare recipients are faced with sanctions for failing to comply with work program rules. For example, more and more terminations of aid are for failing to meet work requirements.[65] Sanctions may be quite draconian, resulting in loss of cash assistance and food stamps to the household, and medical assistance for the adult for many months.

Many of these sanctions are likely to be erroneous and may be challenged in administrative hearings and individual state court actions. LSC-restricted programs may use these hearings and court challenges to insure that work programs are operated fairly and to insure that welfare recipients who wish to attend school or training, suffer from a health problem, are needed to care for another sick household member, or are subject to illegal working conditions are not improperly subjected to a loss of assistance.

A number of the successful challenges to workfare sanctions are instructive. Recipients and their advocates have overturned sanctions for failing out of an education program attended in lieu of workfare[66] and failing to appear at a workfare appointment when the notice of appointment was never received.[67] Similarly workfare workers have argued successfully that they should not be sanctioned for rejecting an assignment that conflicts with their previously approved training or education.[68] In another case a state hearing officer lifted a sanction and exempted the recipient for 6 months so that she could tend to her wheelchair-bound daughter.[69]

IV. Other Issues

Two cases have challenged general TANF implementation.

A. Implementation Challenges

A pending New Mexico case arises out of a confrontation between the governor and legislature. After the governor vetoed state legislation adopted in response to the PRA, he and the welfare agency head implemented a new welfare system through regulations that conflict with existing state law. Members of the state legislature and welfare recipients sued to halt implementation; they claimed that the governor and secretary violated the separation-of-powers provision of the state constitution, state welfare law, and their constitutional duty to execute the law faithfully. In a September 10, 1997, bench ruling for plaintiffs the court directed the defendants to operate a welfare system consistent with state law.[70]

A Louisiana case challenged the state's submission of the state TANF plan to the U.S. Department of Health and Human Services and related actions claiming a violation of the federal TANF 45-day public comment requirement, the state Administrative Procedure Act (APA), and due process. An appellate court, upholding the lower court's adverse decision, ruled that the TANF plan was not a "rule" for APA purposes.[71]

With some success a few cases have challenged, on state APA grounds, discrete state policies implementing PRA provisions.[72]

B. Child Exclusion Policies

Before the PRA a number of states had waivers to deny a grant increase to a child conceived by and born to an AFDC recipient. The unfortunate popularity of this policy persists with 21 states reporting such policies in their TANF state plans,[73] even though research so far has revealed no difference in birthrates between welfare recipients subject to the exclusion and those not subject to it.[74] Moreover, welfare families are small, and women on welfare have a lower birthrate than American women generally.[75]

Two pending class actions challenge child exclusion policies.[76] An Indiana state court case includes claims that the policy violates federal constitutional rights to family integrity and privacy, irrationally penalizes children for their parents' behavior in violation of federal and state due process; and violates due process by not having written standards for the provision of vouchers to excluded children.[77] A New Jersey state court case claims that the policy violates state

constitutional guarantees of equal protection and privacy and that the application of the policy to those who were not adult recipients when they conceived and gave birth violates state law.[78]

C. *Child Support Enforcement*

Under AFDC one had to cooperate with the state in establishing paternity and seeking child support, but the federal regulation protected those who simply did not have information sought by the state by defining cooperation to include, under penalty of perjury, attesting to the lack of information. The PRA retains the cooperation requirement but requires that states determine whether one is cooperating in good faith by disclosing to the state the name of the absent parent and other information—subject to good-cause exceptions—the state may require.[79]

Recently some states sanctioned mothers for not giving specific information, such as the absent parent's name and social security number, even though the custodial parent did not have or could not obtain the information. Litigation in Massachusetts has forced the state to retreat from this requirement. In August 1996 a state court preliminarily enjoined the state policy; it found that the policy likely violated state statute, discriminated on the basis of sex in violation of the state equal rights amendment, and discriminated against nonmarital children in violation of state and federal equal protection guarantees.[80] Recent state regulations bar a sanction when the individual makes a good-faith effort to get the information. In 1996 a federal court in Virginia, preliminarily ruling for plaintiffs, found that the policy likely violated the then applicable federal AFDC regulation.[81] The state then got a federal waiver and adopted limited exceptions. Plaintiffs' claims that the revised policy discriminates against nonmarital children and violates equal protection are pending.

In April 1997 a unanimous U.S. Supreme Court ruled that mothers seeking child support enforcement services under IV-D of the Social Security Act may not sue under 42 U.S.C. § 1983 to have the state comply substantially with IV-D requirements. While the Court remanded for a determination of whether plaintiffs had alleged violations of specific provisions giving rise to individual rights, its decision closed the door to broad-based challenges to child support enforcement systems.[82]

D. *Child Support Pass-Through*

The PRA eliminated the AFDC $50 child support pass-through and disregard requirement and left the matter to the states. Some have

abandoned or limited the pass-through, and at least three lawsuits have resulted. A Pennsylvania state court initially granted preliminary relief in a case claiming that state law mandated continuation of the pass-through and that the state failed to follow rule-making requirements in ending the pass-through; the court subsequently ruled adversely.[83] A Louisiana state court lawsuit which included claims that emergency rule-making to end the pass-through violated the state APA and due process was unsuccessful.[84] A Kentucky case raising rule-making, due process, and breach-of-contract claims was settled with the state agreeing to pay the state share of the pass-through to class members for six months.[85]

E. Time-Limited Benefits

There is now a maximum 60-month lifetime limit on federal TANF benefits, with states allowed to grant a hardship exemption to up to 20 percent of their caseloads.[86] State time-limit policies vary widely. Although too soon to see the effects of time limits on families who are unable to find or maintain employment,[87] one recent study shows that about 40 percent of families currently receiving welfare are expected to reach the federal five-year time limit. Those most likely to be affected by time limits are families whose mothers, when beginning to receive welfare, are young, without a high school diploma, and with preschool children.[88] Formulating litigation strategies to protect families harmed by time limits remains an ongoing challenge for lawyers representing welfare recipients.[89]

Recent successful California litigation limits the scope of a general relief time limit. Under a county policy disabled general relief recipients who were not recipients of Supplemental Security Income were treated as "employable with limitations" and subject to a three-month limit, despite evidence of inability to work. Plaintiffs claimed that the policy violated the ADA, federal and state equal protection and due process guarantees, and state law. Following denial of temporary relief, the parties negotiated, and the court approved a settlement which included exemption from the time limit and related requirements, such as job search, for those with medical verification of inability to work; exclusion of months of disability from countable months for time limit purposes; class notification; and retroactive benefits for some class members.[90]

F. Drug Testing and Screening

The PRA allows states to impose drug and alcohol screening, testing, and treatment requirements on TANF participants. While so far only

seven states have testing or screening requirements in some circumstances,[91] this area raises privacy and other concerns and should be monitored.

In a case with ramifications for drug testing requirements for welfare recipients, the U.S. Supreme Court struck down a statute requiring urinalysis drug testing for candidates for public office. The Court ruled that the Fourth Amendment to the U.S. Constitution bars suspicionless searches unless there is "special need" and that the state had not shown such need. The Court noted that the state had not shown a history of drug use among public officials.[92] A California federal court enjoined use of a county drug-screening questionnaire for GA applicants as contrary to ADA regulations. The test, which incorrectly classified many people, forced disclosure of a person's status as a past or recovering substance abuser and burdened protected individuals in a manner not necessary to the GA program.[93]

G. Procedural Fairness and Due Process

Lawlessness, arbitrariness, and indeed vindictiveness too often have marred welfare administration. In its landmark decision in *Goldberg v. Kelly*, an early Welfare Law Center case, the U.S. Supreme Court held that advance notice and opportunity for a hearing had to be given before welfare benefits were allowed to be terminated.[94] The Court found that state law defining who was eligible for the benefits created a statutory entitlement for eligible claimants and that this entitlement was a "property interest" protected by the Fourteenth Amendment. This decision led to significant improvements in welfare administration.

Arbitrary administration continued to be a problem, however, and now threatens to grow. During the 1970s and 1980s pressure to reduce improper payments prompted the adoption of harsh verification practices that led to the denial of benefits to millions of eligible families.[95] Today these pressures, combined with an increasing emphasis on work requirements with far more sanctions, continue.

In addition to work requirements, at least two other aspects of the PRA and its implementation by the states encourage arbitrariness:

1. "No entitlement"

The federal statute provides that it creates no entitlement, and about half of the states have made such assertions in their own law.[96] Nonetheless, most states are continuing to provide fair hearings as they did before. Wisconsin, however, is turning administration over to local contractors and provides only a limited right of appeal to the state agency. Michigan plans to allow immediate termination

followed by reinstatement upon request for a hearing. Vermont's new policy of implementing vendor payments before providing an opportunity for a hearing is being challenged, and a federal magistrate has found jurisdiction to hear the due process claim.[97]

The Supreme Court has made clear that due process rights depend upon the nature of the interest created by the statute and may not be overcome by simply stating that recipients have "no entitlement."[98] In a recent 2–1 decision the District of Columbia Circuit held that families seeking emergency shelter did not have a property interest for due process purposes. The court concluded that while statutory language providing "no entitlement" to shelter did not itself preclude a finding of a property interest, eligible homeless families did not have an expectation of shelter sufficient to create a property interest for due process purposes even though there were objective eligibility criteria for homeless families seeking shelter. The court relied on the fact of insufficient space for all eligible families and on the unfettered discretion granted to administrators to determine who gets in. A dissenting judge argued that a property interest might be found in the city's use of a waiting list and that the city was not allowed to deny shelter to the family at the top of the list without some form of procedural due process.[99]

2. Devolution

"Devolution" of responsibility for setting standards and making decisions is occurring from the federal level to the state, then often to a county or private organization, and then to an individual worker. Anecdotal reports indicate that this has led some workers to feel free to create their own requirements. In a rural New England area, for example, a privatized job search supervisor decided to require a welfare recipient with no child care or transportation to spread out job search appointments over different days rather than allow them to be done in 1 day.

Such abuses should be subject to legal challenge, but as always inadequate resources to establish patterns and practices and legal services restrictions (discussed below) prevent many cases seeking systemic reform from being filed. One approach is to have community-based and restricted legal services programs offer individual representation, obtain relief for as many individuals as possible, and document the pattern or practice; unrestricted counsel then can be located to bring a class action.

An electronic benefit payment is introduced in state after state, the many issues it raises, such as error resolution and continuation of

due process rights, need to be addressed. While litigation of such issues is possible, "consumer-friendly" system design at the outset is far better.[100]

Privatization of the delivery of welfare services, and indeed of eligibility determination itself as implemented in Wisconsin, raises a host of new issues likely to be resolved by the courts in future years. In June 1997 the Supreme Court held that guards in a privatized prison did not have the qualified immunity protection that government employees enjoyed.[101] The next month the attorney general of Minnesota wrote:

> [T]he problem in this area is that the risk of liability is enormous, but few, if any, of the immunity doctrines which protect state and local government and their employees from the risk of retroactive financial liability can be extended to private contractors. Moreover, since mistaken eligibility determinations are typically challenged as civil rights violations under 42 U.S.C. § 1983, the state may be held accountable for the mistakes of the private vendors. . . .[102]

And in October a Washington law firm sponsored a workshop entitled "Potential Legal Surprises Facing Providers Participating in Welfare Privatization" to discuss "constitutional questions and liability, immunity, government actor, and government contractor issues."

Due process notice claims still have potency. Past court rulings that due process requires informative notice will be invoked undoubtedly in the years to come.[103] In 1997 a state court temporarily restrained reductions in benefits to persons in subsidized housing during the transition from AFDC to TANF on the ground that the notices sent did not give individualized information and information about appeal rights.[104]

Another due process claim that challenges the termination of benefits for failing to meet a new requirement of citizenship has been filed on behalf of legal immigrants who claim that they have not been given a fair opportunity to establish their eligibility because their applications for citizenship are still pending.[105]

V. Developing Resources for Welfare Litigation

Legal counseling and representation on welfare matters will be more critical than ever in the near future. Federally funded legal services programs fortunately are not barred from providing most of the counseling and representation needed. They may enforce statutes

and regulations and challenge informal policies that were not adopted after full notice and comment proceedings.[106] They may represent community organizations in litigation or in seeking to improve agency practices. For legal services programs the problem is not whether there is critical work they can perform but how to use their limited resources most effectively.

Federal restrictions prevent those programs from challenging a statute or formally promulgated regulation or from class action litigation to stop an unlawful or unconstitutional pattern and practice. Clients in such cases must be referred elsewhere. In some states legal services offices that do not receive LSC funding are providing that representation. In many other states those resources are not available. Indeed, the Welfare Law Center has been assisting local counsel in two midwestern states where the only public interest lawyers available to handle any "welfare reform" challenges work in small civil liberties offices with very full agendas.

To help assure needed representation, the Welfare Law Center inaugurated "Project Fair Play" in 1996. The center then moved on two tracks. It expanded participation in welfare class action litigation in collaboration with others. In New York City it organized a collaborative workfare project with the National Employment Law Project and the Legal Aid Society. This project brought some of the major class actions—*Davila v. Hammons, Brukhman v. Giuliani,* and *Capers v. Giuliani*—described in this article.[107] The center is also co-counsel in Rhode Island and New York cases challenging discrimination against new state residents.[108] Around the country the center has been working with providers, such as the National Immigration Law Center, American Civil Liberties Union, National Organization for Women Legal Defense and Education Fund, National Health Law Program, and local offices, to plan and conduct litigation. Especially on welfare work issues and discrimination against new state residents, the center is available to participate in welfare litigation with advocates in other states.

The center has joined others also in reaching out to the private bar to educate it about the need for pro bono assistance on welfare reform matters. Center staff members made presentations at the last two American Bar Association (ABA) Pro Bono conferences and at meetings of the American College of Trial Lawyers committee on pro bono. The center for the first time brought major law firms in as pro bono co-counsel in classic welfare litigation; Davis Polk & Wardwell, Dewey Ballantine, and Milbank Tweed Hadley & McCloy have since co-counseled with the center. Private firms are also co-counsel in a number of the cases discussed in this article.

Programs needing help from major firms on welfare cases are urged to make two contacts: (1) the Litigation Assistance Partnership Project, co-sponsored by the ABA Section on Litigation and the National Legal Aid and Defender Association, for matches with large law firms across the country,[109] and (2) the Welfare Law Center, for help in working with private firms on welfare matters.

Pro bono counsel can assist also on many matters not requiring a major time commitment. Firms can develop expertise in certain areas and then accept referrals of clients for fair hearing representation. Transactional lawyers can assist individual clients in the states where a "personal responsibility" or "self-sufficiency" agreement is developed with the welfare department and then continue to work with the individual to assure that the needed services are provided (a model being tested in Tennessee).[110] The center welcomes information that can be shared with others about successful models.

VI. Conclusion

As this article suggests, despite elimination of federal AFDC protections, litigation continues to be a critical tool to check unfair state welfare practices. In the early months of TANF implementation, litigation successfully attacked a range of policies, with notable success in the areas of discrimination against new state residents and abusive workfare policies. The Welfare Law Center, together with other public interest lawyers, is working to assure that crucial litigation can be brought and to increase private firm involvement. LSC-restricted programs can provide representation to assure that welfare laws are correctly applied and to improve agency practices; they are important partners in the effort to secure fair treatment for welfare recipients.

ISSUES FOR DISCUSSION

1. To what extent does the Sabatier and Mazmanian framework make sense?
2. Given what we know about the legislative process, is it really possible to structure the legislation in a way to ensure its ultimate implementation?
3. To what extent did Mayor Schmoke's concerns surface during the course of the House or Senate debate surrounding PRWORA?

4. How is the Circuit Court of Appeals decision in *Roe v. Anderson* likely to affect future implementation of PRWORA?
5. How is the United States Supreme Court likely to deal with residency requirements after PRWORA?
6. Is *Shapiro v. Thompson* likely to endure after PRWORA? Why?
7. What is the impact of PRWORA on child support?
8. Is *Goldberg v. Kelly* likely to endure after PRWORA?

7

The Administrative Process

Administrative agencies exist to give effect to legislative goals, a task they achieve by issuing regulations that have the force of law. The key requirement of these regulations is that they demonstrate consistency with legislative goals; that is, they reflect the intention of the legislature. The task is compounded by the fact that sometimes agencies attempt to step outside their legitimate authority and enact regulations that are disconnected with the legislation on which they are supposed to be based; and in these instances, the renegade regulations can be challenged in a court of law.

What is the process by which regulations are issued (i.e., promulgated)? What is the nexus between regulations and legislation? How does a court deal with instances when regulations are challenged, and what is the impact on the legislation from which the regulations are derived? This chapter will address these questions, along with illustrating how a judge interprets a regulation. The judicial decision in Anderson v. Edwards, *which deals with the legality of state regulations regarding the availability of household income for the purposes of determining welfare benefit levels, captures the judicial approach to interpretation of regulations.*

KEY FEATURES OF ADMINISTRATIVE AUTHORITY

Administrative agencies exist at local, state, and federal levels, and their primary charge is to implement legislative goals. They were created as a repository of the expertise required to achieve the legislature's aims and, in the process, advance the interest of the public. The institutional arrangement that produces this outcome follows from the legislature's mandate to merely make the law—a constitutionally inspired provision that recognizes that the legislature must ultimately turn to the administrative agency to implement its objectives. This situation results in agencies being responsible for enacting more law than the legislature; however, this is not to suggest that agencies operate without constraints. The reverse is true: They operate within the context of the enabling legislation that governs their activities.

Administrative agencies promulgate (issue) regulations that have the force of law to inform the public about new standards of conduct to which they must conform. Agency officials must be similarly cognizant of these changes, given their responsibility to implement the regulations. Thus, both agency officials and those effected by agency decisions must recognize the interaction between legislative goals and their accomplishment through agency regulations.

Administrative agency authority must be understood within the context of Constitutional provision for separation of governmental powers. Ours is a republican form of government, a government of the people through their representatives, and derives its power and authority therefrom. This power is distributed among three independent branches of government.

An agency must carry out its statutory mandate within the bounds of the authority delegated to it by the legislature. The regulations thus promulgated have the force of law. And when an agency exceeds its statutory authority, its conduct is *ultra vires* and void. The arrangement demonstrates, on the one hand, the tension created by our need to reconcile the administrative process with the separation of powers doctrine and, on the other hand, our determination to have some governmental institution handle complex social problems. Moreover, the delegation of authority is not unlimited. Agency conduct must be gauged against the enabling legislation's original intent and related policy goals. An agency, consequently, can only make and enforce such rules as are necessary to put into effect legislative policy. Congress and state legislatures retain jurisdiction over delegated authority through mechanisms such as legislative oversight, budget appropriations, confirmation power over executive branch officials, and the ability to rescind the delegation. The ultimate challenge is to blend legislative, judicial, and executive functions in one institution.

Tripartite Powers in Administrative Government*

Our tripartite constitutional system of checks and balances roughly assigns lawmaking power to the legislature, law-enforcing power to

---

*From Glen O. Robinson and Ernest Gellhorn, *The Administrative Process*, pp. 25–33.

the executive, and law-deciding power to the judiciary. Administrative agencies do not fit neatly into any one of these governmental groupings; their functions overlap into each. . . .

The soundness and constitutionality of this combination of powers in administrative agencies (in contrast to their functional division by the Constitution) was once seriously questioned as being logically and legally indefensible. The attack assumed, erroneously, that each governmental function is both readily distinguishable and mutually exclusive. Neither premise is sound. Many, perhaps even most traditional government bodies perform all three functions. For example, at the turn of the century Congress passed the Sherman Antitrust Act prohibiting any "restraint of trade" tending substantially to reduce competition. This law was passed by the legislature. However, the latter did not decide whether an agreement by two steel companies to fix the prices at which they would sell steel was an unlawful restraint. (The legislature could have decided that question by specifying that price-fixing is an unlawful restraint, but it did not do so.) The executive branch, acting through the Justice Department, may decide this "lawmaking" question by issuing rules against price-fixing and by prosecuting the two steel companies in our example who elected not to observe them (charging them with creating an unlawful restraint on trade). If the steel companies then decide to dispute the question, a court will "make the law," in the manner of a common law court; except that its decision will be announced as in favor of the government or of the steel companies. The nub of the matter is that at each level, be it the legislature, the executive, or the judiciary, the governmental body announces a "rule" that involves lawmaking. Its rule governs past transactions making it, in effect, retroactive. In other words, the executive and the judiciary constantly engage in lawmaking; hence it is incorrect to assert that this function is in the exclusive domain of the legislature. . . .

The constitutional division of power then does not mean that only the legislature, in contrast to the executive or judiciary, can "make the law." In the same vein, administrative agencies engage in lawmaking whenever they issue rules, enforce them, or adjudicate disputes. This does not suggest that the principle of separation of powers embodied in the Constitution is irrelevant and has no meaning in administrative law. Its great end is the dispersal of governmental authority to prevent absolutism. As Professor Jaffe observes, "Its object is the preservation of political safeguards against the capricious exercise of power; and, incidentally, it lays down the broad lines of efficient division of function." Judicial Control of Administrative Action 32

(1965). The legislature is the most "Competent" lawmaking body of government and has basic responsibility for writing the law; the courts have similar responsibility for deciding controversies. However, the Constitution is not an organization chart locking government into boxes drawn two centuries ago. When the legislature determines that an administrative agency is the best means for regulating an industry, for distributing licenses or for managing government lands, it is not straight-jacketed by governmental theories current in 1789.

The operation of the typical agency is similar to that of any ongoing enterprise. Plans are made, information sought, negotiations conducted or directions given, and specific decisions are made and implemented. Time is spent on personnel, budgets, and priorities as well as on regulatory functions, and mostly as a matter of routine. As we noted earlier, formal processes are a readily identifiable but only occasional result. They draw much of the attention of administrative law, but their practical significance should be placed in context. This is not to say that formal hearing procedures and practices are insignificant; their ultimate availability may in fact be the determining force for informal procedures. . . .

Administrative Methods

Agencies are given, by statute, a mandate to fulfill. The statutory delegation also sets out how public policy is to be formally articulated and implemented. Three basic methods are generally employed: prosecution, adjudication, and rule making.

Prosecutions

The most common method relied on to enforce agency policy is to have the agency directly (or indirectly, by referring the matter to the Justice Department) prosecute violators in court. Thus, the Cost of Living Council or the Environmental Protection Agency assure compliance with price controls or pollution requirements by seeking judicially imposed civil fines, injunctions and criminal penalties. In this circumstance the administrative agency is not distinctive from local prosecutors or the Justice Department, itself an administrative agency. In other words, administrative enforcement often is not distinctive.

Adjudications

Agencies are also frequently authorized to adjudicate and decide a matter without initial reliance on judicial authority. These administrative counterparts to judicial trials are called adjudications. At first glance many appear to be merely carbon copies of judicial trials.

They are usually open to the public and conducted in an orderly and dignified manner, though not necessarily with the formality of a judicial trial. Typically, the proceeding is initiated by the agency's filing of a complaint in a manner similar to the procedure followed in a civil action. Following the respondent's answer, discovery and prehearing conferences may be held. At the trial an administrative law judge presides by conducting the hearing and ruling on all motions. The agency is represented by counsel who presents evidence in either written or oral question-and-answer form in support of the complaint. The respondent then presents his case in the same fashion. Witnesses may be cross-examined, objections may be raised, and rulings issued. The parties usually submit briefs and proposed findings to the law judge. They may also make oral argument. Shortly after the hearing ends the judge renders a decision, usually supported by findings and a written opinion. If neither agency counsel nor respondent objects, the recommended order is customarily adopted by the agency. If there are exceptions, the agency will review the decision in the manner or an appellate court through the submission of briefs and oral argument by both parties. In general, therefore, a lawyer experienced in litigating cases in state or federal courts will not find an administrative hearing strange or unfamiliar. The parties are represented by counsel; the administrative judge is treated with deference; and the evidence is received in the usual question-and-answer form. On the other hand, variations from this general pattern are neither uncommon nor insignificant.

Many adjudicatory hearings are conducted informally without the presence of attorneys and by hearing officers without legal training. In some instances, an action may be initiated by a private party rather than by the agency, such as the granting of a license or the approval of a rate request. In addition, an administrative hearing is tried to the trial judge and never to a jury. Since many of the rules governing the admission of proof in judicial trials are designed to protect the jury from unreliable and possibly confusing evidence, these rules need not be applied with the same vigor in proceedings solely before a judge or trial examiner. Consequently, the rules of evidence applied in jury trials presided over by a judge are frequently inapplicable in an administrative trial. The trial examiner decides both the facts and the law to be applied. He is usually a lawyer and is often an expert on the very question he must decide. Courts, on the other hand, accept whatever cases the parties present. Consequently, their familiarity with the subject matter is accidental. Agencies, however, usually select their cases. Administrative trial judges and agency chiefs are

either experts or at least have a substantial familiarity with the subject matter since their jurisdictions tend to be restricted. And agencies are usually staffed by experts whose reports, commonly relating to matters adjudicated before the agencies, are made available to administrative judges and commissioners alike.

Another and more significant distinction between judicial and administrative adjudications is that agency hearings tend to produce evidence of general conditions as distinguished from facts relating solely to the respondent. This difference is attributable to one of the original justifications for administrative agencies—the development of policy. Administrative agencies more consciously formulate policy than do courts. Consequently, administrative hearings require that the hearing officer consider the impact of his decision on the general public interest as well as on the particular respondent. Testimonial evidence and cross-examination therefore often play less decisive roles in many administrative hearings.

Rule Making

Perhaps the most distinctive administrative procedure (especially as compared to the judicial process) is rule making, whereby the agency formally seeks to develop and articulate policy, which it will apply in the future. This procedure is wholly separate from adjudication. Adjudication applies (and sometimes develops) policy to a set of past actions and results in an order against (or in favor of) the injured party. The focus of rule making is wholly prospective. And where the rule is substantive (also called legislative or prescriptive) the agency will usually give interested and affected persons notice and an opportunity to be heard before the rule is finally announced. Acting as a quasi-legislative body, agencies issue three types of rules: procedural, interpretative, and substantive. [These three types are defined in the section below that deals with the rule-making process.] . . .

Judicial Review

Court review scrutinizes the fairness of agency procedures and the authority for an agency's substantive decisions. The availability and scope of review has a direct bearing not only on the matter under review, but also on general agency procedures and substantive policies. The procedural elements of most adjudicative hearings—insuring that the affected party is given notice, the opportunity to be heard, and the occasion to test unfavorable evidence—stem from constitutional standards and statutory requirements pressed on agencies during judicial review of their final orders.

The major point to note is that regardless of the form of the order or the procedure relied upon, a significant administrative sanction generally cannot be imposed without an opportunity for judicial review. There are of course exceptions. Review may not be available until after a fine or tax is paid or interim license suspended. The discretionary decision of whether to prosecute, which is usually not reviewable, may work a hardship equal to any other. The thrust of current developments, however, is to narrow the exceptions, to open up additional avenues for judicial review, and to require that judicial consideration precede administrative execution.

The function of judicial review is to assure that the administrator's action is authorized (within his delegated authority) and not an abuse of discretion (a reasonable choice supported by available evidence). It assures that, when challenged, the administrative action has not encroached excessively on private rights. Review is generally provided for by statute or by common law precedents. If the administrative sanction involves a significant personal or property interest, the right of review may also have a constitutional (due process) foundation. It is a procedure for public accountability of the administrative process and in the process legitimates the application of administrative sanctions.

On the other hand, the function of judicial review is not to insure the correctness of the administrative decision. That is a matter that the legislature has delegated to the administrator, not to the reviewing court. Rather, judicial review tests whether the agency (a) has exceeded its constitutional or statutory authority, (b) has properly interpreted the applicable law, (c) has conducted a fair proceeding, and (d) has not acted capriciously and unreasonably.

STAGES IN THE ADMINISTRATIVE PROCESS

The Administrative Procedures Act

The Administrative Procedures Act (5 U.S.C. Sec. 551 *et seq.*) grew out of the New Deal experiments with the use of administrative agencies to handle social problems. It was enacted in 1946 and welcomed as a major instrument in maintaining fairness. The Act is an important framework for guaranteeing due process in administrative procedures. The Act spells out the conditions under which the public can participate in the administrative process, either through participation in rule making, in formal hearings, or in adjudication.

The Rule-Making Process

Rule-making involves developing regulations for future implementation. The agency issues three types:

- *Procedural rules,* which identify an agency's organization, describe its method of operation, and spell out the requirements of its practice for rule making and adjudicative hearings. . . . These housekeeping rules are usually authorized by the agency's enabling act and are binding on the agency.
- *Interpretative rules,* which are issued by an agency to guide both its staff and regulated parties as to how the agency will interpret its statutory mandate. They . . . are issued only after interested persons are given notice and an opportunity to be heard.
- *Substantive rules,* which are, in effect, administrative statutes. In issuing a substantive rule, the administrator exercises lawmaking power delegated to him by the legislature. Notice and hearings must usually precede issuance of the rule. (Robinson & Gellhorn, 1972).

The rule-making process unfolds in two stages. The *first stage* deals with the proposed rules, which must be published prior to implementation to allow sufficient time for public comment. This event fulfills the requirement for notice to the public before the rule is made final and is accomplished by publishing the proposed rule. (Federal regulations are published in the *Federal Register;* state regulations are published in comparable documents, such as the *Pennsylvania Bulletin.*) The comments from interested parties generally address their perceptions about how the rules will affect them. The comment period is limited to a specified time (e.g., 30 days). Comments can be offered in writing or in some cases at a public hearing. The *second stage* deals with the compilation and analysis of public responses following the comment period. The agency then announces its final rules or regulations, which proceed through a similar notice and comment period. The process culminates in the publication of the final regulations and the date on which they will take effect.

JUDICIAL INTERPRETATION OF REGULATIONS

The following case illustrates the outcome of judicial interpretation of regulations. *Anderson v. Edwards* (1995) deals with specific portions

of a particular federal regulation regarding the availability of income within a household for the purposes of determining the level of the welfare benefit to be awarded to the household. The regulations pertain to the former Aid to Families with Dependent Children (AFDC) program. The excerpt below details the pertinent rule under consideration in *Anderson.* Specifically, the regulation spells out the conditions under which states may count income and resources controlled by persons outside the so-called "assistance unit" (AU) for the purposes of determining the benefit award to the household. The dispute at issue involved the "California Rule," which provides for the grouping into a single AU all needy children who live in the same household, whether or not they are siblings. The result of the "California Rule" was a reduction in the maximum per capita benefit due to households, the situation leading to the *Anderson* suit. The interplay between the federal regulation and their interpretation in the Supreme Court opinion is illuminating for what it says about how the Court approaches this type of interpretive enterprise and for the implications for the development of future case law.

TITLE 45—PUBLIC WELFARE
SUBTITLE B—REGULATIONS RELATING TO PUBLIC WELFARE
CHAPTER II—OFFICE OF FAMILY ASSISTANCE (ASSISTANCE PROGRAMS) ADMINISTRATION FOR CHILDREN AND FAMILIES DEPARTMENT OF HEALTH AND HUMAN SERVICES
PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS
45 CFR 233.20

§ 233.20 Need and amount of assistance.

(a) Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below: * * *

(2) Standards of assistance. (i) Specify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.

(ii) In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of

the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with paragraph (a)(3)(viii) of this section. Nevertheless, if a State maintains a system of dollar maximums these maximums must be proportionately adjusted in relation to the updated standards. * * *

(viii) Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in paragraphs (a)(3)(xiv) and (a)(5) of this section and § 233.51 of this part. * * *

ANDERSON v. EDWARDS, 514 U.S. 143 (1995)
UNITED STATES SUPREME COURT

Mr. Justice Thomas delivered the opinion of the Court.

This case presents the question whether federal law governing the Aid to Families with Dependent Children (AFDC) program prohibits States from grouping into a single AFDC "assistance unit" all needy children who live in the same household under the care of one relative. Such grouping allows States to grant equal assistance to equally sized needy households, regardless of whether the children in the household are all siblings. The Court of Appeals for the Ninth Circuit concluded that federal law forbids States to equalize assistance in this manner. We disagree and accordingly reverse.

AFDC is a joint federal-state public assistance program authorized by Title IV-A of the Social Security Act, 49 Stat. 627, 42 U.S.C. § 601 *et seq.* (1988 ed. and Supp. V). As its name indicates, the AFDC program "is designed to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them." *Shea v. Vialpando,* 416 U.S. 251, 253, 40 L. Ed. 2d 120, 94 S. Ct. 1746 (1974). The program "reimburses each State which chooses to participate with a percentage of the funds it expends," so long as the State "administer[s] its assistance program pursuant to a state plan that conforms to applicable federal statutes and regulations." *Heckler v. Turner,* 470 U.S. 184, 189, 84 L. Ed. 2d 138, 105 S. Ct. 1138 (1985) (citing 42 U.S.C. §§ 602, 603).

One applicable federal rule requires state plans to provide that all members of a nuclear family who live in the same household must apply for AFDC assistance if any one of them applies; in addition, the income of all of these applicants must be aggregated in determining their eligibility and

the amount of their monthly benefits. See 42 U.S.C. § 602(a)(38) (1988 ed., Supp. V); 45 CFR § 206.10(a)(1)(vii) (1993). See generally *Bowen v. Gilliard,* 483 U.S. 587, 97 L. Ed. 2d 485, 107 S. Ct. 3008 (1987) (upholding rule against constitutional challenges). This "family filing unit rule" requires that all cohabiting nuclear family members be grouped into a single AFDC "assistance unit" (AU), defined by federal law as "the group of individuals whose income, resources and needs are considered as a unit for purposes of determining eligibility and the amount of payment." 45 CFR § 206.10(b)(5) (1993). The regulation at issue in this case—California's "non-sibling filing unit rule" (California Rule)—goes even further in this regard. It provides: "Two or more AUs in the same home shall be combined into one AU when . . . there is only one [adult] caretaker relative." Cal. Dept. of Social Servs., Manual of Policies & Procedures § 82-824.1.13, App. to Pet. for Cert. 52. In other words, the California Rule groups into a single AU all needy children who live in the same household, whether or not they are siblings, if there is only one adult caring for all of them.

The consolidation of two or more AU's into a single AU pursuant to the California Rule results in a decrease in the maximum per capita AFDC benefits for which the affected individuals are eligible. This occurs because, while California (like many States) increases the amount of assistance for each additional person added to an AU, the increase is not proportional. Thus, as the number of persons in the AU increases, the per capita payment to the AU decreases. See, e. g., *Dandridge v. Williams,* 397 U.S. 471, 473-474, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970). . . .

The situation of respondent Verna Edwards and her relatives illustrates the operation of these two rules. Initially, Mrs. Edwards received AFDC assistance on behalf of her granddaughter, for whom she is the sole caretaker. As a one-person AU, the granddaughter was eligible to receive a "maximum aid payment" of $341 per month prior to September 1991. Later, Mrs. Edwards began caring for her two grandnieces, who are siblings. Pursuant to the federal family filing unit rule, the grandnieces are grouped together in a two-person AU, which was eligible to receive $560 per month in benefits prior to September 1991. Because none of these children received any outside income, Mrs. Edwards received $901 per month in AFDC assistance on behalf of the three girls. In June 1991, however, Mrs. Edwards received notice that pursuant to the California Rule, her granddaughter and two grandnieces would be grouped together into a single three-person AU, which was eligible to receive only $694 per month. The California Rule thus reduced AFDC payments to the Edwards household by $207 per month.

On behalf of themselves and others similarly situated, Mrs. Edwards, her three relatives, and other respondents brought this action against petitioners,

the state officials charged with administering California's AFDC program, in the District Court for the Eastern District of California. Pursuant to Rev. Stat. § 1979, 42 U.S.C. § 1983, respondents sought a declaration that the California Rule violates federal law and an injunction prohibiting petitioners from enforcing it. On cross-motions for summary judgment, the District Court granted the requested relief. It found the California Rule indistinguishable in relevant respects from the Washington regulation invalidated in *Beaton v. Thompson,* 913 F.2d 701 (CA9 1990).

In a brief opinion, the Court of Appeals for the Ninth Circuit affirmed. It found the California Rule "virtually identical" to the Washington regulation that Beaton had held to be "inconsistent with federal law and regulation." *Edwards v. Healy,* 12 F.3d 154, 155 (1993). Since the Court of Appeals issued its decision, the Department of Health and Human Services (HHS)—which administers the AFDC program on the federal level—determined that its own AFDC regulations "do not conflict with the State policy option to consolidate assistance units in the same household." Transmittal No. ACF-AT-94-6 (Mar. 16, 1994), App. to Pet. for Cert. 37. Moreover, a number of federal courts of appeals and state courts of last resort have recently issued rulings at odds with the decision below. We granted certiorari to resolve this conflict, 512 U.S. 1288 (1994), and we now reverse.

In *Beaton,* the Ninth Circuit ruled that grouping into the same AU all needy children (both siblings and non-siblings alike) who live in the same household is inconsistent with three different federal AFDC regulations, namely, 45 CFR §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1) (1993). See *Beaton, supra,* at 704. Respondents rely principally on these three regulations in their submission here.

As we examine the regulations, we keep in mind that in AFDC cases, "the starting point of the . . . analysis must be a recognition that . . . federal law gives each State great latitude in dispensing its available funds." *Dandridge,* 397 U.S. at 478. Accord, *Shea,* 416 U.S. at 253 (States "are given broad discretion in determining both the standard of need and the level of benefits"). In light of this cardinal principle, we conclude that the federal regulations do not preclude the adoption of the California Rule.

According to § 233.20(a)(2)(viii), States may not reduce the amount of assistance for which AFDC applicants are eligible "solely because of the presence in the household of a non-legally responsible individual." Using the example of Mrs. Edwards and her relatives, respondents observe that, although the granddaughter received AFDC benefits of $341 per month before the two grandnieces came to live in Mrs. Edwards' household, she received only one-third of $694, or $231.33, per month after the grandnieces arrived and the California Rule took effect. See Brief for Respondents

6, 22. This reduction in the granddaughter's per capita benefits occurred, according to respondents, "solely because of the presence in the household of" the grandnieces, who are "non-legally responsible individual[s]" in relation to the granddaughter. Respondents are simply wrong. It was not solely the presence of the grandnieces that triggered the decline in per capita benefits paid to the granddaughter; rather, it was the grandnieces' presence plus their application for AFDC assistance through Mrs. Edwards. Had the two grandnieces, after coming to live in Mrs. Edwards' home, either not applied for assistance or applied through a different caretaker relative living in that home, the California Rule would not have affected the granddaughter's benefits at all.

Respondents also argue that the California Rule violates the "availability" principle, which is implemented, in one form or another, by all three federal regulations. Section 233.90(a)(1) provides that "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than [the child's parent] is not an acceptable basis for . . . assuming the availability of income" to a needy child. Likewise, § 233.20(a)(2)(viii) provides that States may "not assume any contribution from [a nonlegally responsible] individual for the support of the assistance unit." Finally, § 233.20(a)(3)(ii)(D) provides generally that States shall, "in determining need and the amount of the assistance payment," count only "income . . . and resources available for current use"; the regulation adds that "income and resources are considered available both when actually available and when [legally available]."

According to respondents, the California Rule assumes that income from relatives is contributed to, or otherwise available to, a needy child without a determination that it is actually available. If Mrs. Edwards' granddaughter were to begin receiving $75 per month in outside income, for example, the AU of which she is a part would receive $75 less in monthly AFDC benefits, and the two grandnieces would each accordingly receive $25 less in per capita monthly benefits. Thus, the California Rule assertedly "assumes," in violation of all three federal regulations, that the granddaughter will contribute $25 per month of her outside income to each grandniece and also that such income will therefore be available to each grandniece—without a case-specific determination that such contribution will in fact occur.

Respondents' argument fails for at least two reasons. First, its premise is questionable. Although in this example, the grandnieces each will nominally receive $25 less in per capita monthly benefits, they will actually receive less in benefits only if one assumes that Mrs. Edwards will expend an equal amount of AFDC assistance on each of the three children—without regard to any other relevant circumstances, such as whether one of them

receives outside income. Not only would such assumption fail to reflect reality, see, e. g., *Gilliard,* 483 U.S. at 600, n. 14, it would also be inconsistent with the duty imposed on caretakers by federal law to spend AFDC payments "in the best interests of the child[ren]" for whom they care, 42 U.S.C. § 605, a duty specifically implemented by California law, see, e. g., Cal. Welf. & Inst. Code Ann. §§ 11005.5, 11480 (West 1991). Thus, California may rationally assume that a caretaker will observe her duties to all the members of the AU and will take into account the receipt of any outside income by one child when expending funds on behalf of the AU.

Second, respondents' argument misperceives the operation of the California Rule. In the foregoing example, California would simply add the monthly income of all members of the AU—$75 (granddaughter) plus $0 (first grandniece) plus $0 (second grandniece) for a total of $75—and reduce the monthly assistance payment to the Edwards family AU accordingly. It should be clear from this example that the monthly payment to the AU is reduced not because the California Rule "assumes" that any income is available to the grandnieces, but because it places the two grandnieces into the same AU as the granddaughter (whose income is actually available to herself). What respondents are really attacking is the rule that the income of all members of the AU is combined in order to determine the amount of the assistance payment to the AU. This attack ignores the very definition of an AU: the group of individuals whose income and resources are considered "as a unit" for purposes of determining the amount of the assistance payment. 45 CFR § 206.10(b)(5) (1993). Accord, Brief for Respondents 4 ("All of the income and resources of everyone in the assistance unit are taken into consideration in establishing the benefit payment.")

Perhaps respondents are arguing that the regulations simply forbid California to combine the incomes of all needy children in a household—whether by grouping them into the same AU or otherwise. But whatever are the limits that federal law imposes on States' authority in this regard, the combination of incomes effected by the California Rule is authorized by the AFDC statute itself, which provides that a state agency "shall, in determining need, take into consideration any . . . income and resources of any child or relative claiming [AFDC assistance]." 42 U.S.C. § 602(a)(7)(A) (1988 ed. and Supp. V). In light of the "great latitude," *Dandridge,* 397 U.S. at 478, and the "broad discretion," *Shea,* 416 U.S. at 253, that States have in administering their AFDC programs, this statute is reasonably construed to allow States, in determining a child's need (and therefore how much assistance she will receive), to take into consideration the income and resources of all cohabiting children and relatives also claiming AFDC assistance.

The availability regulations are addressed to an entirely different problem, namely, the counting of income and resources controlled by persons outside the AU for the purpose of determining the amount of assistance to be provided to the AU. The regulations were adopted to implement our decisions in three AFDC cases. See 42 Fed. Reg. 6583-6584 (1977) (citing *King v. Smith,* 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128 (1968); *Lewis v. Martin,* 397 U.S. 552, 25 L. Ed. 2d 561, 90 S. Ct. 1282 (1970); *Van Lare v. Hurley,* 421 U.S. 338, 44 L. Ed. 2d 208, 95 S. Ct. 1741 (1975)). In all three cases, the State had counted as available to the AU income that was not actually or legally available because it was controlled by a person who was not a member of the AU and who was not applying for AFDC assistance. . . .

The California Rule has no such effect. The combined income of the three-person AU comprising the granddaughter and two grandnieces of Mrs. Edwards is not calculated with reference to the income either of Mrs. Edwards herself or of anyone else inside or outside the Edwards household who is not a member of the AU and who is not applying for AFDC assistance. In sum, the California Rule does not violate any of the three federal regulations on which the Court of Appeals relied. * * *

For the foregoing reasons, we conclude that the California Rule does not violate federal law. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion. It is so ordered.

ISSUES FOR DISCUSSION

1. What is the function of the public comment period? Why is it so important?
2. What types of administrative rules are there?
3. Why is the opportunity for judicial review so important in this context?
4. Do you agree with Justice Thomas' reasoning and interpretations in *Anderson*?

PART II

Skills Dimension

This page intentionally left blank

8

Social Work Advocacy in Legislative and Administrative Processes

LEGISLATIVE ADVOCACY TACTICS

Law making and law implementation lead naturally to an inquiry into possible social work roles in shaping and carrying out policy initiatives. The profession's commitment to its conceptualization of advocacy has typically thrust it into the legislative arena. Under what conditions will these efforts be successful? Following are two related viewpoints on the means by which social workers may influence lawmaking. Patti and Dear (1981) describe empirically based tactics for legislative advocacy, and Forbes provides practical advice for offering testimony in legislative or regulatory processes. Two examples of testimony that embody the principles advanced by Forbes, offered before the U.S. Senate Finance Committee and before the U.S. House of Representatives Subcommittee on Human Resources of the House Ways and Means Committee as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 worked its way through the Congressional legislative process, are also supplied. Finally, there is a discussion of advocacy tactics within the administrative or regulatory context.

Patti and Dear (1981, pp. 99–117) describe seven empirically based tactics for influencing the lawmaking process. The tactics are drawn from their study of the Washington state legislature and should highlight some of the factors that contribute to effective legislative advocacy. They are practical and essentially self-explanatory.

1. *Introduce the bill early in the session or, ideally, before the session has begun.* The authors suggest this allows the advocate to get a head start on the competition for the legislators attention. It also provides important extra time for additional research to ensure the bill is effectively drafted.
2. *Have more than one legislator sponsor a bill.* The strategy broadens the base of support and, according to the authors, can increase the likelihood that the bill will be reported out of committee—and a reported bill has a better chance of making its way through the process.
3. *Try to obtain the sponsorship of the majority party or, if possible, bipartisan sponsorship.* They conclude that bipartisan sponsorship can be particularly rewarding; it extends the influence and makes the proposal acceptable to a wider (in terms of numbers and ideology) range of legislators.
4. *Try to obtain the support of the governor and relevant state agencies.* The chief executive can throw considerable weight behind a bill he or she supports. The state agency, as an extension of the executive, also exerts enormous influence of the legislation it will be charged to implement. The authors suggest that the support of both increases the bill's chances for passage.
5. *Seek influential legislators to sponsor your bill and try to get them to exert their influence in support of it.* The legislative structure has its own hierarchy, which an advocate can effectively use to pinpoint the key members of the assembly. Knowledge of the committee structure and the seniority system, therefore, is important. But the authors are quick to emphasize that the selected legislator must be ready to use his/her apparent influence in support of your bill.
6. *Press for open committee hearings on the bill and be prepared to offer testimony at them.* Hearings not only offer an opportunity to argue the merits of your bill; they also provide important public exposure. The authors suggest that these hearings also expose potential allies and opponents. Finally, they can be used to educate legislators as well as the public by providing expert testimony on the bill's merits and consequences.
7. *Be prepared to use the amendatory process to advance the bill.* Given the high degree of compromise that occurs in the legislature, this process may offer invaluable opportunities to promote

your bill. The opportunity is not cost-free, however, and there may be some reworking of your original proposal. The authors suggest you consider the extent to which you are willing to live with the changes that may follow from this process. [pp. 99–117]

LEGISLATIVE ADVOCACY AND OFFERING TESTIMONY

By Anna Forbes

WHY LEGISLATIVE ADVOCACY

Former President John F. Kennedy once noted that, "In a democracy, every citizen regardless of his [sic] interest in politics, holds office; every one of us is in a position of responsibility. The kind of government we get depends on how we fulfill those responsibilities."

Fulfilling that responsibility doesn't end with participating in elections, although that is the crucial first step. Voting every time you have the opportunity to do so and encouraging others, including clients and co-workers, to do likewise is a fundamental part of legislative advocacy and the responsibility of every eligible citizen.

But once in place, our elected and appointed officials also need to know what we think. We give them the power to represent our opinions in Congress, State Legislatures, City Halls and Town Councils. We empower them to make administrative appointments. Those appointees, by extension, are also obligated to be responsive to our opinions. *But they cannot know what those opinions are unless we tell them!*

That's all advocacy is—expressing one's opinion and trying to generate support for that opinion from those to whom it is expressed. As social workers, we often encourage our clients to advocate on their own behalf to their family members, public benefits officers, teachers, etc. We also advocate on behalf of our clients, when necessary, to those and other authority figures. Legislative advocacy is simply the next step—advocating to the government about one's own needs or on behalf of a specific population in need.

This advocacy, telling government what we think and what we need, is also the job of a citizen. From the moment an individual declares his/her candidacy for office or is appointed to a position of authority in public service, he or she should be receptive to hearing and considering the opinions of the constituency. The constituents, for their part, have a responsibility to express those opinions.

Oscar Arias Sanchez, president of Costa Rica from 1986 to 1990 and 1987 Nobel Peace Prize Laureate, once said that, "To govern is to choose." Our legislators are constantly making choices—which resolutions to vote for and which to vote against, how much money to appropriate to what publicly funded programs, when to introduce new legislation, when to bury a bill in Committee so that it has no chance of being passed, etc. These choices need to be informed by our opinions. Once we have expressed those opinions clearly, we have the right to hold elected and appointed officials accountable for paying attention to them. And finally, to hold the office of citizenship effectively and fill the advocacy role that social work requires, we have to vote people in or out of office on the basis of how well they represent our opinions. In the words of an old political cliche, "if you can't change the minds, change the faces."

As Kennedy observed, the kind of government we get depends very directly on how we fulfill those responsibilities. That's why democracy, when taken seriously, is more work for the average citizen that other forms of government. That's also why we chose it—because it's the only system in which this level of power remains in our hands.

Testimony—A Tool for Being Heard

Opportunities to Offer Testimony

One of the ways we have of making our opinions heard (in addition to writing letters, making lobbying visits, etc.) is by offering public testimony. There are a number of circumstances in which testifying is appropriate. They include:

- testifying before Congress, the State Legislature or City Council in support of, or opposition to, a pending bill or resolution;
- testifying in connection with budget appropriations;
- testifying before regulatory agencies or other public decision making bodies;
- when someone asks you to (e.g. legislative and regulatory bodies sometimes ask experts to come and speak to them when they are trying to gather information on highly specialized areas); and
- when you are working to raise public awareness of a specific public policy issue. (e.g., when you can ask your local legislator to hold public hearings on a matter of importance to your community, and she or he agrees to do that, then you will want to present compelling testimony in support of your position at those hearings).

Who Gets to Testify?

Everyone has a right to testify at a public hearing. Do not feel that you have to have special expertise or an important title in order to testify. If you have an opinion, you have the right to express it.

Although experts are sometimes invited to submit testimony, the rest of us have to request the opportunity to do so. It pays to watch for notices of public hearings and especially to monitor legislative and regulatory developments regarding issues of great concern to you. These announcements appear in newspapers and in government journals recording the daily activities of legislative bodies (e.g. the Federal Register, which contains information about federal regulatory agencies, or the comparable publication for state agencies, such as the Pennsylvania Bulletin).

It is easy to miss such announcements, however. For this reason, it makes sense to access information published by the advocacy organizations. The newsletters, web pages, and alerts published by such organizations announce when hearings are coming up and usually tell you who to contact to request an appointment to testify. (The Children's Defense Fund is one prominent example of an advocacy organization that relies on all these strategies to inform the public about their activities and to alert the public to take action in relation to legislation that affects children.)

It is advisable to call and request an appointment to testify as soon as you learn that a hearing is being held. Often the time period for the hearing is limited and appointments are scheduled on a "first come, first served" basis. If you can't get an appointment because no more spaces are available when you call, ask to be put on a waiting list. Then go to the hearing (if at all possible) and remind the person who is running it that you asked to be put on a waiting list. Sometimes this will result in getting the opportunity to testify if others on the schedule don't show up or take less time than anticipates.

Can Anyone Testify Before Congress?

In Congressional hearings, only those invited to testify are given time to do so. But don't let this discourage you! Congressional committees are required to accept all testimony submitted by citizens and attach it to the public record of the hearing, even when the submitting individual doesn't testify verbally. This record is published and reviewed by the Congressional staff of the Committee holding the hearings. If the staff think your statement is important, they will pass it on to their Congress member to read. So your testimony may influence Congress members even if they don't hear you testify.

To be included in the Congressional hearing record, testimony must be received in advance, in clearly legible form, by the Chair of the Committee holding the hearings. It is good to mail in at least two copies of your testimony well in advance of the hearing (to assure that they receive it in time.) Then call the Committee Chair's office to verify that your testimony has been received and will be entered into the Congressional Record.

What If No One's Holding Public Hearings On My Issue?

You don't have to wait for a hearing to be called. You can work to instigate public hearings on issues of interest to you. As indicated above, you may do this just to raise awareness of the issue. You might also do it when trying to influence whether pending legislation passes or not. To instigate hearings on a bill, call the legislator who introduced the bill and ask if public hearings on it have been scheduled yet. If not, ask if they are planned and talk to the legislator's staff member about how important you think it is that public opinion on this bill be heard before it comes to a vote. Calling for hearings isn't just something you do for bills you support. It's just as important to get hearings on bills you oppose if you think public opposition to the bill is broad-based.

How to Write Testimony

There is not one standard format for public testimony, but there are some general conventions that should be observed. The sample testimony below will give you a sense of what public testimony looks like. The following are tips and techniques that can help you write effective testimony.

1. Keep it brief. Most good testimony does not exceed 4–6 pages.
2. Be sure to stick closely to the subject of the hearings. There are undoubtedly other topics you feel strongly about but this is not the time or place to raise them. Those listening to the testimony really only want to hear you talk about the designated topic and will probably stop paying attention if you start addressing other subjects.
3. Identify yourself, your position, and what your agency/private practice does. If you are testifying as an individual and not on behalf of an agency, don't hesitate to say that. In that case, just identify who you are in the context of the issue being addressed (e.g., you are concerned about this issue as a tax payer, as a woman, as a person experienced in dealing with addiction, as

a resident of a particular community, or whatever is appropriate to the issue).

4. Announce your position on the issue at the outset (e.g., you support or oppose this resolution, you seek for increased funding for X, etc.). Then you can proceed to explain why have taken this position. But first make sure they know which side you're on.
5. Effective testimony includes a
   (A) problem statement
   (B) micro example
   (C) proposed solution
   (D) persuasive argument

A problem statement is a brief summary of why you think the issue under discussion is important. Others who testify will also be discussing this. Be sure to keep your problem statement brief to avoid repeating what others have said. Just lay out, in one or two paragraphs, why you see this issue as urgent.

A micro example is that "human element" that you so often see politicians use in speeches to personalize the problem. Relate a very brief story about one person, family, or community whose plight illustrates the problem you are addressing. Keep it short but make it as vivid and compelling as possible. This is the part that often starts out with "Let me tell you about Mr. X" or "What happened to the Y family is a good example of this problem."

Proposed solution is where you tell the listeners what you want them to do. This part is strongest if you frame it positively rather than negatively. This may be a challenge when you are testifying in opposition to something but it is still possible. For example, the listener will probably feel more drawn to your position if you say "I urge you to protect the well-being of this community by voting against this resolution," or "The solution I propose will save tax-payer dollars and achieve the goal more successfully that this bill can" than if you say, "I urge you to vote against this bill because it's a terrible piece of legislation."

Persuasive argument is where you explain why your proposed solution is the best way to go. Again, remember to keep it short. Use your best arguments rather than all the arguments you can think of in support of your position. To decide which are your best arguments, evaluate which ones will be most persuasive to the particular audience you are addressing. Remember that legislators are receptive to arguments based on compassion,

fairness, and moral obligation, but that they're also heavily influenced by issues like cost-effectiveness, popularity, and efficiency.

6. Conclude by reminding the listeners again, very specifically, of what you want them to do (reiterate the proposed solution). Make sure that it is something that is within their power to do. For example, asking an Advisory Board to increase funding for a project is not effective because Advisory Boards have no direct control over funding. Asking them to recommend strongly that funding be increased, however, is appropriate because they have the power to make recommendations.

Once You've Testified, Then What?

It's a good idea to take a number of copies (usually about 20) of your testimony with you when you go to a hearing to testify. This enables you to:

1. Give copies to all the members of the body hearing your testimony. You can usually do this by offering them to the clerk (or whoever is staffing the hearing) for distribution. If no one appears to be staffing, then offer the copies to the Chair of the Committee *after* you testify. It's best not to hand them out before you testify because you want the members listening to you while you speak, not reading your testimony or other handouts.
2. Give copies to any members of the press who may be covering the hearing. Be sure that your phone number and e-mail address appear clearly on the testimony so that anyone wanting more information about your position can contact you easily.
3. Give copies to allies and potential allies you may meet at the hearing. Hearings are a good networking opportunity since they are likely to attract other people from your side as well as opponents of your point of view. You can lay the groundwork for future joint advocacy by approaching other people on your side, commenting on the testimony they presented, offering them a copy of your testimony, requesting permission to call them after the hearing to discuss the issue further, etc.
4. Leave any remaining copies you have on a back table in the hearing room for people to pick up on their way out. You never know where those copies will end up. There's always the chance that one will fall into the hands of someone who has influence or who will work with you on advancing your position. As long as everything you write in your testimony is true and well-

researched, there's no reason to be concerned about your testimony being picked up by the opposition.

Testimony can also be re-circulated after the hearings are over to further educate the public and lobby for your issue. You can:

- Publish excerpts of it in your agency's newsletter.
- Send it out to the press, accompanied by a press release announcing the fact that you testified. This is only relevant, however, if you do it the day before or the day of the hearing. After that, it's old news.
- Send it to funders and as a sample of your agency's advocacy activities.
- Send it out to allies and potential allies. This is especially appropriate if you belong to organizations, coalitions, or regional planning bodies concerned with the issue addressed in your testimony. Consider enclosing your testimony in the next membership mailing to that group. It may offer your allies new arguments to use in support of your issue and encourage them to testify, themselves, the next time public hearings come up.

Testifying publicly is a highly effective technique for influencing legislative decision making. By making a statement, we establish the ground work for holding legislators accountable. Once we have told them what we think, on the record and in a public forum, we have every right to demand responsiveness when we lose on the issue—and every right to assume that our opinions were influential when we win.

Like the vote, the opportunity to offer public testimony is a tool that is accessible free of charge and that belongs to every citizen. As such, it is ideally suited for frequent and effective use by social workers.

EXAMPLES OF LEGISLATIVE TESTIMONY

Following are two examples of testimony offered before a legislative committee; in both instances the testimony is associated with—and offered prior to the enactment of—the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The first, provided by the Urban League, lays out important principles that should inform the legislation; the second, offered by the President of Manpower Development Research Corporation, discusses welfare reform "success stories." Both illustrate the wisdom of adhering to the advice offered above and the elements of effective testimony.

MARCH 29, 1995

PREPARED STATEMENT BY AUDREY ROWE EXECUTIVE VICE PRESIDENT
NATIONAL URBAN LEAGUE BEFORE THE SENATE FINANCE COMMITTEE
ROOM 215 DIRKSEN SENATE OFFICE BUILDING

Mr. Chairman and members of this committee, as Executive Vice President of the National Urban League, I appreciate the opportunity to offer the National Urban League's perspective on what we believe should be the ultimate goal of reforming our social welfare system, and what steps we as a nation should take to achieve that goal.

The National Urban League brings its rich history and years of experience to this important debate. For more than 85 years, both the National Urban League and its network of affiliates have worked to overcome poverty, racial discrimination, and the lack of decent paying jobs. We are a nonpartisan national social service and civil rights organization with affiliates in 113 cities.

The National Urban League recognizes the need for welfare reform. We also believe that welfare reform is fundamentally an economic self-sufficiency issue. Therefore, it is crucial that approaches to reform integrate welfare and workforce policies. The public policy debate must be about preparing and enabling all citizens to participate productively in a changing global economy.

We are deeply concerned that the debate and rush to reform the "welfare" system continues to be isolated from another critical debate that is evolving with regards to fashioning a national workforce development system in other congressional committees, both on the House and Senate sides.

Mr. Chairman, as a former Commissioner of Social Services here in Washington, D.C. and most recently in Connecticut, I believe if we truly desire to move individuals and families from welfare and unemployment to economic self-sufficiency, we must combine these two debates into one, rational public policy agenda. We must bring the resources of the Finance Committee and that of the Senate Labor and Human Resources Committee together. We cannot continue to ignore the fact that the workforce receiving assistance from all entitlement programs need education and skills training to compete in the marketplace. The national debate must address how we prepare this workforce for the 21st century employers. The National Urban League believes that there is a type of welfare reform that would promote self-sufficiency. It would cost more but pay important dividends to the recipient and taxpayer over the long haul. We think what the taxpayers want is reforms to help families get off welfare and remain off welfare. Not quick fixes which have short-term benefits but will exacerbate not solve the problem.

What should be the salient feature of a welfare reform strategy? First, we believe that any reform should be based on values and principles. Our "Principles for Economic Self Sufficiency" outline what we believe are the key criteria for transforming our fragmented welfare and workforce programs into one, coherent, effective workforce development system leading to economic self Sufficiency. These 10 principles are as follows:

National Urban League Principles for Economic Self-Sufficiency

1. Federal/State policies and programs aimed at economic self-sufficiency must be designed to strengthen families. Strong family units are vital to strong communities and a strong nation. Therefore, we must develop policies and programs that maximize and maintain family stability and functioning.
2. Policies and programs aimed at economic self-sufficiency must be customer-centered. Rather than imposing a set of predetermined policies and services on persons in poverty, it is more cost-efficient to conduct a comprehensive assessment of individual needs. Both the allocation of resources and service delivery timetable should be determined accordingly.
3. All existing federal entitlement programs must be retained as entitlements. Entitlements are essential to ensure national standards for meeting basic human needs. Maintaining such standards represents both a moral obligation and a matter of national interest that cannot be left solely to the discretion of the states.
4. Racial equity in promoting economic self-sufficiency must be ensured through vigorous enforcement of applicable civil rights. Studies continue to document the existence of racism and racial discrimination in our national life. Racism continues to stifle the realization of human potential. We cannot allow these conditions to undermine our nation's commitment to equal opportunity as it implements new policies for serving the poor.
5. Education and job training must be designed to equip persons with skills that are relevant and adaptable to the changing labor market. This means that our human resource development programs must recognize trends in the global economy and the emerging requirements of the 21st century labor market. We live in an economy where the road to economic self-sufficiency is linked to education, advanced technologies, and proficiency in various skills for high performance work organizations.
6. Our system of public assistance must be dedicated to workforce preparation and participation. Eligibility for public assistance must be conditioned on participation in work-related activities. Such

participation should be based on a comprehensive assessment of employability needs that are career focused.

7. Job creation must be an integral component to a workforce preparation system. Both the government and the private sector must play key roles in developing jobs that pay a living wage for those who need them. When the private economy comes up short, especially in the inner city, then government must step in if people are to work.
8. Affordable, quality child care must be guaranteed to persons on welfare and the working poor. Lack of quality child care remains a major barrier to participation in the labor force. Eliminating this condition is essential to achieving economic self-sufficiency.
9. States must be held accountable to quality, effective services. States must have clearly defined and measurable objectives regarding economic self-sufficiency. Financial and staff resources would then be allocated in a manner that most effectively and efficiently implements the services and activities that will reach those objectives.
10. A national monitoring and evaluation system must be established to assess program implementation and outcomes. The focus of a national monitoring and evaluation system must be to determine whether or not the original objectives are being met and to determine whether operating procedures and services, as currently delivered, are the most appropriate and effective ways of reaching those objectives.

I would like to elaborate on several of these principles. Every able-bodied adult welfare recipient should be expected to work, like every other American. But if recipients are to work, they must be equipped, academically and attitudinally, to do so, or else private employers will not have them. The record of job training programs is uneven, though our Urban League affiliates and agencies, like the California-based Center for Employment and Training, have enjoyed success. We may need as well to emulate the rigorous, fast-track learning systems perfected by the military services.

The real conundrum is where the actual jobs will come from. The labor markets in some regions are probably tight enough so that job-ready recipients can find work. That is obviously the preferred route, and any reform should steer recipients that way.

But what happens when there are not enough jobs to go around. If we still expect recipients to do work, the public sector must step in. Not with workfare, but with real work structured like regular jobs to build marketable skills and attitudes.

Since public jobs would cost taxpayers extra money, it is only reasonable that they receive some discernible dividend. Caring for the nation's infra-

structure best meets the needs of recipients for respectable work and of taxpayers for added return on investment.

The urban and rural infrastructure in much of the country is in miserable shape. The nation now spends a much lower percentage of GNP on infrastructure than it used to. It shows. How much longer will we watch it disintegrate?

We now have an opportunity to respond to a national need and create jobs. Infrastructure projects create jobs, providing employment for workers at all skill levels. They also offer opportunities for apprentice-type skills training in a wide range of areas—perhaps addressing the employment needs of another emerging group—our youth.

These projects would be accompanied by child care assistance and health care so that mothers could meet their commitments and would promote positive work attitudes and values. Welfare reform which does not have a job creation strategy should not be considered real reform. But instead penalizing the least among us for being born.

Finally, we agree that there needs to be greater state flexibility. However, with this flexibility must also come monitoring and evaluation of state programs. As a former administrator, I would argue for simplification and coordination of public assistance programs. This would provide workers in welfare offices more time to assist recipients with employment barriers, and create an office environment that work, not welfare, is the goal of each applicant.

The National Urban League stands ready to work with you, members of this committee, as well as with members of the Labor and Human Resources Committee to fashion a system of economic self-sufficiency that incorporates these concerns.

DECEMBER 6, 1995

PREPARED TESTIMONY OF JUDITH M. GUERON, PRESIDENT, MANPOWER DEMONSTRATION RESEARCH CORPORATION BEFORE THE HOUSE COMMITTEE ON WAYS AND MEANS SUBCOMMITTEE ON HUMAN RESOURCES

Good morning. I am Judith Gueron, President of the Manpower Demonstration Research Corporation. I appreciate the opportunity to appear before this Committee today. The focus on welfare reform success stories is a welcome contrast to much of this year's debate, which has centered more on the failures of the system, on which level of government should be responsible for redesigning welfare programs, and on how much money the federal government should be spending. The debate has strayed from the more critical issue of how to create a welfare system that succeeds in

meeting the three goals that Americans, in numerous public opinion polls, have stated they favor: putting recipients to work, protecting their children from severe poverty, and controlling costs.

It is because these goals are often in conflict—with progress toward one or two often pulling us further from the others—that reform has been both contentious and difficult. Yet, when the dust settles in Washington, real-life welfare administrators and staff in states, counties, and cities will still face the fundamental question of how to balance this triad of conflicting public expectations.

In the past two decades, reformers have identified one approach as the most promising way to do this: redefining the bargain between government and welfare recipients so that government provides income support and a range of services to help recipients prepare for and find jobs, while recipients must participate in these activities or have their checks reduced. Sometimes recipients have been required to work for their checks—as opposed to looking for jobs or participating in education or training—but this has not been the primary focus, in part because funding has been limited.

Happily, I can report at this hearing that we now have reliable evidence that this approach—mandatory welfare-to-work programs—when it is done right offers a way to advance in meeting all three goals. Careful evaluations of large-scale programs implemented in diverse and real-world conditions have shown that those that are tough and adequately funded can be fourfold winners: they can get parents off welfare and into jobs, support children (and, in some cases, make them better off), save money for taxpayers in the long run, and make welfare more consistent with public values.

Recent interim findings from a federally funded study of three such programs—in Atlanta, Georgia; Grand Rapids, Michigan; and Riverside, California—found that they reduced the number of people on welfare by 16 percent, decreased welfare spending by 22 percent, and increased participants' earnings by 26 percent. Other data on the Riverside program showed that, over time, it saved almost $3 for every $1 it cost to operate the program. This means that, ultimately, it would actually have cost the government more—far more—had it not run the program. On any measure, this is a successful government initiative.

Not only can these programs work, but we now know some of the key ingredients of success and have strong reason to believe that other cities and states can match these achievements. In order to do so, it is necessary both to provide work-focused employment services and child care and, equally important, to fundamentally change the tone and message of welfare. When you walk in the door of a high-performance,

employment-focused program, it is clear that you are there for one purpose—to get a job. Staff continually announce job openings and convey an upbeat message about the value of work and people's potential to succeed. You—and everyone else subject to the mandate—are required to search for a job and, if you do not find one, to participate in short-term education, training, or community work experience. You cannot just mark time; if you do not make progress in the education activities, for example, staff will insist that you look for a job. Attendance is tightly monitored, and recipients who miss activities without a good reason face swift penalties.

If welfare looked like this everywhere in the country, we probably would not be reforming welfare again this year. Instead, the system would convey a radically different message to welfare recipients, and the public would see some advancement toward each of its goals.

But we are far from that point, Although the Atlanta, Grand Rapids, and Riverside programs are not the only strong ones, most welfare offices around the country do not look like the one I just described. In part this reflects a lack of know-how; in part, a conflict over goals and different views as to the causes of poverty; in part, the enormous inertia that makes it so hard to change large systems. But in part this also reflects a lack of money. Simply put, as this Committee knows, it requires a substantial up-front investment of funds to reap the downstream benefit of more people working and reduced welfare costs. Moreover, these efforts are no panacea. Even in these three locations, many people remained on welfare and many children in poverty.

While the success is only partial, it is dramatic nonetheless, posing a clear challenge to administrators and policymakers: to spread best practices to other locations and identify even more successful ways to require, encourage, and support parents in moving into the labor force.

This year's congressional debate has resonated with an almost unanimous pro-work message, and the Personal Responsibility and Work Opportunity Act of 1995 calls on states to get unprecedented numbers of people on welfare participating in work activities, eventually for 35 hours a week. While this would seem to promote the replication of the successful practices I have described, there is a real risk that it will do the reverse, and instead threaten the very work programs we are celebrating today.

I want to conclude my testimony with the three reasons for my concern.

The first is money. In work programs, time is money. Congress can legislate higher participation rates, but, as this Committee's earlier actions recognized, states will need more money up-front to make them real. Yet the bill eliminates the Job Opportunities and Basic Skills Training (JOBS) program—which funded the Grand Rapids, Atlanta, and Riverside successes—

and folds the money from JOBS into one block grant with funds from the AFDC cash grant program. Further, it freezes funding for the combined block grant at current levels, despite the requirement that states meet rates for participation in publicly supported work activities that escalate sharply in future years. Under fiscal pressure and with short time horizons, states may hesitate to make the up-front investments that can both produce future savings and transform welfare into the work-directed programs favored by most Americans. This is because, unless states are willing to raise taxes to cover the short-term costs of these programs or really can substantially reduce outlays on grants (and withstand pressure to return the savings to taxpayers), the new combined block grant for benefits and work programs may create perverse incentives as states trade off maintaining monthly benefits against expanding work programs.

The second is what we know about the feasibility of the rates in the bill. Despite their well-earned reputation for being the most mandatory in their states, the Grand Rapids and Riverside programs (as well as the one in Atlanta) would have failed the participation rates ultimately called for in the Personal Responsibility and Work Opportunity Act. Not enough people were reached; they were involved in activities that the bill does not count; and they participated for fewer hours per week than the bill accepts.

The third is the risk that meeting the bill's mandates will undermine the very successes that people in Congress and the states hope to promote. These three programs were effective because administrators made smart choices about the use of resources, the management of staff, and the message they communicated. Past research provides a warning that spreading program resources very thin or spending them on activities that do not promote unsubsidized work can reduce success. It can also reduce cost-effectiveness. Pushing for higher and higher participation rates and hours—particularly the push from 20 to 35 hours of activity in every week—requires states to dramatically increase child care outlays. Yet we have no evidence that the longer hours will lead to any corresponding increase in program accomplishments.

In conclusion, everyone claims to favor work and a new work-based bargain. But this is only talk unless there is an adequate initial investment and clear incentives for states to transform welfare. In the past, reformers have succumbed to the temptation to promise more than they have been willing to pay for. This is one of the reasons why the reality of reform has always fallen short of the rhetoric and why reform has usually generated much heat, but little light. We are now—in the successes we are celebrating today—starting to see some light. We should move toward it. Matching resources to our words is one way to do it.

SOCIAL WORK ADVOCACY AND THE ADMINISTRATIVE PROCESS

The previous description of the rule-making process (see chapter 7) clearly implies that there are certain conditions under which the rules could be modified. And an understanding of both the system's operation and its capacity for responsiveness is important for social workers. The discussion below highlights social work advocacy tactics in the rule-making process.

Participation in Administrative Hearings

Effective social work advocacy in the regulatory process will depend on the worker's ability to analyze the regulations, properly organize written comments and testimony for hearings, and engage in pre- and postnotice activities.

How to Analyze Regulations

The purpose and intent of a regulation cannot always be discerned by simply reading it. As discussed earlier, regulations are issued pursuant to a broad statutory authority, and one must have a firm understanding of this authority before challenging its validity.

Statsky's (1975) advice on this point is especially compelling:

> . . . because a regulation exists, you cannot assume that it is valid. Simply because the agency is giving an official interpretation of its regulations (in connection with the facts of your case), you cannot assume that that interpretation is correct, even though the same agency that passed the regulation is the agency that is now interpreting it.

His analytical framework is comprised of four questions, all of which are designed to provoke critical consideration of the regulation in the light of the relevant statutory authority:

1. Is there some statue in existence that gives the agency authority to pass regulations on the *general subject matter* of the regulation before you?
2. Is there a statue that is the authority for the *particular* regulation before you?

3. Is the *agency's interpretation* of its own regulation consistent with the statue upon which it is based?
4. Is *your interpretation* of the regulation consistent with the statute upon which it is based? (Statsky, 1975)

Organizing Written Comments and Testimony for Hearings

The comment period following the notice of proposed or final rules presents an opportunity for social work intervention. Social service administrators and supervisors are in an ideal position to witness regulation's potential impact on the services they deliver, and the comment period can be used to influence the scope of the rules that are ultimately implemented. A carefully drafted written response to the agency or an intelligently structured verbal presentation at a public hearing can be very influential. A related and perhaps obvious strategy is to engage in coalition-building to expand the number of individuals who send comments to the agency or offer testimony at a public hearing.

Offering testimony at a public hearing differs from written comments to the agency in that the hearing is more formal and requires a more structured response. Therefore, pay particular attention to techniques that enhance verbal presentation, such as clear identification of the agency and its representatives, coherent statement about the regulations' impact on the agency or a particular client group, and a statement of the agency's expertise that qualifies it to offer testimony on the subject matter of the regulations.

Activities Before and After the Notice and Comment Period

Certain pre- and postnotice activities help provide a link with the analysis of regulations and the responses offered during the comment period. The activities essentially stress mutual education, information-sharing, and constituency-building, and are designed to enhance communication between the administrative agency and the social worker. The accomplishment of effective client advocacy is the essential objective around which the activities are built.

The assumption underlying this strategy is that both sides have something to gain from a mutual exchange of information and concerns about a regulation's impact on service delivery. The commonality of interests can be used to facilitate negotiation on the points on which they differ.

Techniques for getting involved prior to publication of the regulations are varied and include activities such as becoming acquainted with the administrative agency's structure, decision hierarchy, jurisdiction, and policy statements; meeting with agency staff; identifying individuals within the agency who have expert knowledge in the relevant substantive areas; and researching the agency's position on the topic in question to predict potential agency decisions and to identify interest groups who seem to dominate agency decision making.

Activities following participation in the hearings can be as narrow or as comprehensive as the circumstances warrant. In the light of the above, certain activities seem *de minimus:* maintaining communications with administrative agency staff and cohort service providers; monitoring the relevant regulations and their subsequent hearings to spot actual or potential implementation problems; sharing relevant new information with agency staff; mobilizing support among other service providers to encourage their stake in the outcome; identifying actual or potential problems with regulatory enforcement to make the agency aware of such breakdowns and to prepare a foundation for any future legal challenge; and standing ready to organize service-provider pressure against a proposed or final regulation.

9

Legal Research Resources and Techniques

The increasing "legalization" of social services has contributed to the need for social workers to possess a firm grasp of how the law affects their daily practice. The legal context of social services frames the conduct and decisions of social work professionals, and legal changes routinely shape the way services are likely to be delivered. A neglected but potentially important element in educating social workers about the law is the basic skill of legal research: finding statutes, regulations, and judicial opinions and using an array of available interpretive aids.

RESOURCES FOR FINDING THE LAW

For social work professionals, legal research will typically involve searching for the legislative and regulatory context of their agency's services. These findings are only the beginning, however, as these legal rules must be understood in relation to associated judicial decisions. As the chapters in part I suggest, legal processes are interdependent. Thus, both legislation and regulations are interpreted by courts, and these interpretations have practical consequences. The practitioner doing legal research, therefore, must also find and analyze relevant judicial opinions to ensure he or she has the most recent statutory or regulatory interpretation. "Looseleaf services," such as the *Family Law Reporter,* provide further support of the primary search by allowing the researcher to discover the most recent law. And to make sure the law is still authoritative, the researcher can turn to Shepard's citation.

Legal research can be placed in three general categories: (1) primary sources (original legal documents for federal and state statutes, regulations, and judicial decisions); (2) "finding tools" (indexes, digests, "looseleaf services," citators, and similar devices that help you locate and update statutes, regulations, and judicial decisions); and (3) secondary sources (sources that help you better understand the primary sources and assist your search for and use of them). Some sources can be placed into two categories, e.g., looseleaf services and citators are both finding tools and secondary sources.

Primary Sources: Statutes and Regulations

Federal Bills

The official source for the text of these bills while they proceed through Congress is the *Congressional Record,* which records Congress' daily activities. The text will typically cover the bill's essentials, such as bill number, sponsor, and title. The full version of the bill is often published as part of the official committee hearings.

A related and unofficial source for finding the text of these bills and their legislative history is the *United States Code Congressional and Administrative News (U.S.S.C.A.N.).* Published by West Publishing Company, the *U.S.S.C.A.N.* refers you to the congressional committees that considered the bill and reprints of final committee reports.

The two above paragraphs refer to "official" versus "unofficial" sources. The difference between these two terms is based on the publisher of the legal document. An official source refers to a document published by the government. The unofficial version is published by a commercial publisher and is generally the preferred source because it is more frequently updated and it can refer the researcher to valuable collateral sources. The distinction is primarily relevant for purposes of citation. Often both official and unofficial sources are cited together.

Federal Statutes

Once enacted, a statute is published as a "slip law"—a printed copy of a bill passed by the legislature that is distributed immediately once signed by the executive—that can be found in two official sources. The *U.S. Statutes at Large* arranges the laws chronologically,

in the order they became law. The *United States Code (U.S.C.)* is arranged under fifty titles and organized by subject.

Two related and unofficial sources are the *United States Code Annotated (U.S.C.A.)* and the *United States Code Service.* The *U.S.C.A.* is organized mostly by the West Key Number System, which is described below, and includes annotations—references to related judicial decisions that have interpreted a particular section of the *U.S.C.* One can gain access to these decisions through the: (1) popular names index; (2) individual subject index for a particular title; or (3) general subject index.

Both sources can be updated. For the *U.S.C.A.*, there are the "pocket parts," "supplementary pamphlets" and "special pamphlets." Further updates of the *U.S.C.A.* and its pamphlets are provided by the *U.S.S.C.A.N.* and its supplementary pamphlets. The *United States Code Service* works like the *U.S.C.A.*, but refers to Lawyer's Cooperative materials rather than West.

Federal Regulations

The official source is the *Federal Register,* which provides a uniform system for announcing federal regulations and legal notices. It also contains helpful supplementary information, such as the name of the federal public law under which each regulation was issued.

After their issuance, federal regulations are arranged topically and published in the *Code of Federal Regulations (C.F.R.).* The *C.F.R.* is a compilation of the regulations issued in conjunction with federal statutes. It is divided into titles that encompass broad topical areas. Changes in the *C.F.R.* can be found in a monthly pamphlet called the *Cumulative List of C.F.R. Sections Affected,* which describes the *C.F.R.* sections modified by the new final or proposed regulations. A final check is provided by the *Cumulative List of Parts Affected,* which can be found in the most recent issue of the *Federal Register.*

State Statutes

The publications for state statutes are comparable to those on the federal level. There are both official and unofficial versions. The state's *Code* usually compiles state law under different topics. The unofficial publications are mostly modeled after the *U.S.C.A.*, and include references to judicial decisions and legislative history. They also contain references to relevant secondary sources such as legal periodicals

and encyclopedias. There are usually indexes that provide access to the various state law titles, and "key words" can be used to find the right volume, which in turn refers to a general subject index that can be used to find various sections of the law. They can be updated with pocket parts and supplements.

State Regulations

Many states have a system of reporting and codifying regulations that is comparable to the federal structure. Typically, there will be a publication, such as the *Pennsylvania Bulletin,* for publicizing proposed and final rules. The final regulations are likely to be compiled in a code, such as the *Pennsylvania Code,* which organizes the accumulated regulations by subject.

Judicial Decisions

Federal Decisions

The official source for U.S. Supreme Court decisions is the *United States Reports.* There are no official versions for other federal courts, and any decisions that are published can be found in the West *National Reporter System.*

There are two unofficial sources for Supreme Court decisions: the Lawyer's Cooperative *United States Supreme Court Reports* and West's *Supreme Court Reporter.* Both are annotated and used frequently. In addition to these sources, the most recent decisions are published weekly by two "looseleaf services": the *Commerce Clearing House Supreme Court Bulletin* and the *United States Law Week.*

State Decisions

The official sources report state opinions for the trial, appellate, and supreme court. The unofficial source, which is reported as part of West's *National Reporter System,* publishes only the appellate and state supreme court decisions.

The *National Reporter System,* therefore, is a particularly useful source for state decisions. It is relatively easy to use and allows access to all state appellate decisions. The *West Key Number Digest System*—subject index to case law—is the most widely used method for locating state and federal decisions. The digests are essentially subject

indexes to case law. The West system divides the entire body of case law into seven main divisions, 30 subheadings, and over 400 digest topics (and each topic is divided into numerous key numbers). Once you have located the key number that covers the point of law in which you are interested, it will give you access to all the cases that discuss that particular point.

Under the West system, there are three search methods that can be used with all West digests.

Descriptive Word Index: If you know the facts of a problem but not the name of the related case, you can find an appropriate key number through the descriptive word index. Use the subject you are searching for as the heading and then look under that to find the proper key number. A subsequent search under that number will describe other cases, if any, on point.

Table of Cases: If you know the case that deals with the issue you are researching, the table will indicate the topic and key numbers under which the various points of law in the case have been classified. Through the key number, you will also find other relevant cases.

Words and Phrases: This table lists all words and phrases that have been judicially defined. It may provide another entry into the topic area in which you are interested.

The search through the *National Reporter System* is supplemented by "advance sheets" (copies of decisions that will be subsequently printed in bound volumes) that accompany each reporter and enable the researcher to remain current. To match a decision reported in the *National Reporter System* with one of the official versions—in those instances when it is necessary to go back and forth between the two—one uses the West's *National Blue Book.*

Finding Tools

There are numerous digests, looseleaf services, popular name tables, citators, and so forth that are used to locate specific statutes, regulations, or decisions. Some have been referred to above (e.g., the "advance sheets," and the "supplementary pamphlets"), and are perhaps best thought of as providing access to primary sources. For

example, there is the *American Digest,* a comprehensive finding tool that digests cases from all federal and state courts and indexes them according to points of law. The *American Digest* is divided into units (the *Century Digest,* the *Decennial Digest,* and the *General Digest*), which cover designated time periods. The *Century Digest* covers cases between 1658 and 1897. The *Decennials* cover 10-year periods from 1897 to 1976 (e.g., the eighth *Decennial Digest* covers cases between 1966 and 1976). More recent cases are found in the *General Digest,* which appears first as a monthly supplement to the *Decennials.*

Secondary Sources

Many of the secondary sources are particularly helpful for nonlawyers. Among the most useful are citators, encyclopedias, periodicals, treatises, and looseleaf services.

Shepard's Citator

This citator can identify the treatment of a statute, a case, a regulation, or other legal authority (e.g., law review article). The task is accomplished by referring to all the places it (the statute, case, or regulation, etc.) has been mentioned (cited). This process has become known as "Shepardizing," and its importance cannot be overstated: law changes, and this citator provides a strategy to identify the most authoritative law.

Legal Encyclopedias

These are arranged alphabetically by topic and work much like a general encyclopedia. They are particularly good to get a fast overview on a particular legal topic. The two most prominent are West's *Corpus Juris Secundum* (tied to the West Key system) and Lawyer's Cooperative's *American Jurisprudence.* Both have general indexes for gaining access to the topics, and the pocket part offers updated information.

Legal Periodicals

These indexes refer to law review articles, typically but not exclusively published by law schools, which analyze an array of legal issues. The articles are located through the *Index to Legal Periodicals,* the *Current Law Index,* or the *Legal Resources Index.*

Treatises

Treatises are comprehensive treatments of a substantive topic, such as contracts or evidence.

Looseleaf Services

A looseleaf service deals with one area of law (e.g., family law), with one court or with a general legal topic. These services include important, and recent developments in statutory, regulatory, or case law. The *Clearing House Review* and the *Family Law Reporter* are two examples of such services (see Figure 9.1).

A UNIFORM SYSTEM OF CITATION

A citation is a protocol to find a legal document. Because the law evolves, it is important that there be some uniform method for finding legal rules. Generally, a citation will describe the parties, the reporter, or source where the information is located; the volume and edition of the reporter or source; the page number where the information is located; and the date. The citations are provided in both "official" and "unofficial" forms. Figure 9.1 illustrates a typical citation and its component parts. For a more complete description of the rules for citation, see *A Uniform System of Citation.*

SUGGESTED LEGAL RESEARCH TECHNIQUES

Following is an outline of legal research techniques. Collectively, they comprise a strategy for conducting rudimentary legal research.

Step One: Beginning the Search

What is the issue or problem? Specificity is key: (1) the parties involved (e.g., children and parents, worker and client, social problem etc.); (2) the procedures involved (e.g., arbitration, injunction, appeal, mediation); or (3) the substantive issue involved (e.g., child welfare, mental health, developmental disabilities).

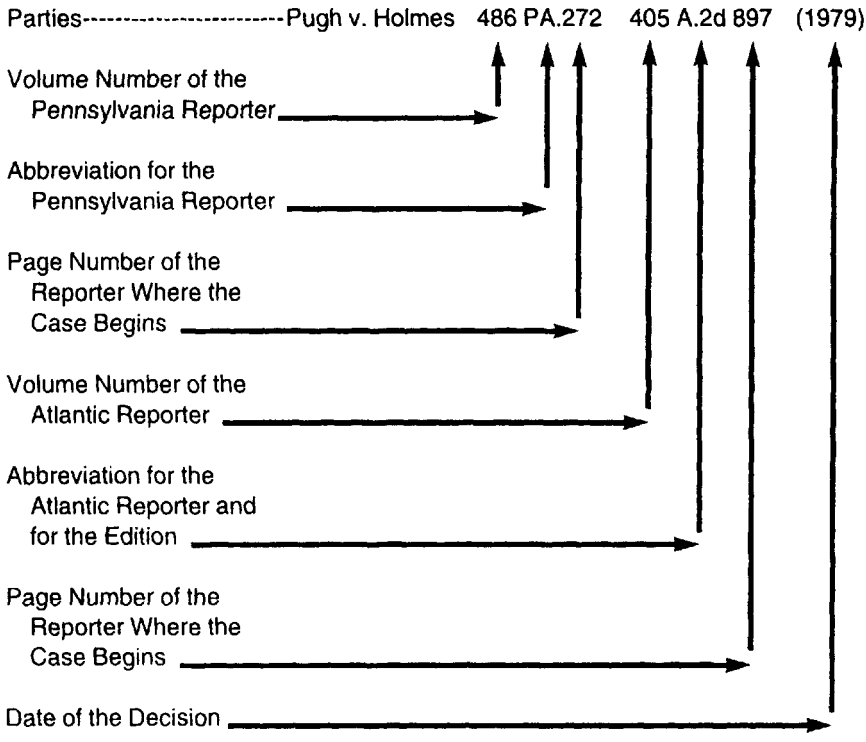


FIGURE 9.1

Step Two: Preliminary Review of the Subject

This step enables in-depth self-education about a topic, and is especially helpful when exploring unfamiliar territory. The *Index to Legal Periodicals* is relevant here, because it can yield a selection of relevant articles and reviews of the law and analyses of controversial cases. The legal encyclopedia, such as *Corpus Juris Secundum,* is also a good introductory source. General texts on the topic, sometimes referred to as hornbooks, can also offer a sound introduction to an area of law.

Step Three: Search for Statutes and Regulations

Both federal and state laws are likely to exist on most topics. Here, the *U.S.C.A.* and the annotation of the state code will be most informative, supplemented by something like the *U.S.C.C.A.N.*, which

contains legislative history information. Other relevant sources include *CCH Congressional Index, Congressional Information Service (CIS), Digest of Public General Bills and Resolutions, Congressional Record Index, Senate and House Journals,* and *Congressional Quarterly.* For state legislation, refer to the *State Statutes Annotated* or *State Compiled Laws Annotated* or their supplements.

There is no uniform practice regarding state legislative history. To locate the state legislative history of a statute or amendment, use the *Journals* of each house for the year of the act. Reference tables at the end of each *Journal* (or in some separate index) will convert the Public Act number into the bill number. Once the bill number has been identified, check the reference table for that bill in both *Journals,* which typically include a record of formal action and comments or remarks from the floor. A review of the Bill and Joint Resolution of each *Journal* for any bills on the topic considered at the same session will be useful. Most states do not retain records of floor debates, committee hearings, or committee reports. The Governor's messages to the legislature are printed in the *Journals* but only rarely will these be concerned with a particular bill.

The *Code of Federal Regulations,* the *Federal Register,* or their state counterparts contain the regulations that structure the implementation of legislation.

Step Four: Search for Judicial Opinions

The cases cited in the above annotations should be consulted first. Additional cases may be located by using the *West Key Number System.* The *Index to Legal Periodicals* or a legal encyclopedia may also yield relevant case law.

Step Five: Completing the Search

Make certain the most recent editions and supplements have been consulted, as well as any advance sheets.

Step Six: Verifying the Search

Use the *Shepard's Citator* to check for the most current law. This source can also be useful in locating other relevant judicial opinions.

ELECTRONIC LEGAL RESEARCH RESOURCES

The availability of subscription services, such as LEXIS and WESTLAW, are perhaps the most straightforward options for electronic research. However, "the development of the Internet," according to Geisi (1997), "is likely to mark a turning point in the computerization of legal education." The Internet greatly expands the resources available for research, all of which are easily accessible. The amount of content located on the Internet is too vast to capture here. But one need only resort to any of the so-called "search engines" (e.g., "Yahoo" at http://www.yahoo.com) to obtain numerous sites suitable for conducting electronic legal research. Such an investigation is likely to unearth resources, such as Findlaw (http://www.findlaw.com), Cornell Legal Information Institute (http://www.cornell.law.edu), THOMAS, a site for Congressional legislative information (http://thomas.loc.gov), Kansas Elder Law Network (http://www.ink.org/public/keln/), or sites associated with practically any federal agency (e.g., DHHS at http://www.dhhs.gov or the GPO at http://www.access.gpo.gov). Advocacy organizations also monitor legal developments and publish their findings at their web sites, such as the Center for Law and Social Policy (http://www.clasp.org), Low Income Housing Coalition (http://www.nlihc.org), or HandsNet (http://www.handsnet.org). Suffice it to say that there is no shortage of resources, and all are available with minor effort.

A CONCLUDING NOTE

Although the above information is foreign, it is worth emphasizing that legal research competency can be acquired, and honed with practice. The major benefit of legal research, however, is the prospect of witnessing and monitoring legal development and the opportunity to discover that legal rules are not as static as they appear. This insight is particularly compelling for social services, because shifts in the allocation of scarce resources and societal attitudes toward helping those in need are manifest in the law's processes for problem-solving and change. These shifts occur without warning, and the tracking begins with finding the rules.

10

Court Testimony and Evidence

Social workers assist the court in its truth-finding process by presenting information as a witness or as an expert witness. Typically, the task is accomplished by organizing case records to be placed in evidence in court or by offering expert judgment on matters such as the impact of child sexual abuse, battered spouse syndrome, or proper standards of care in nursing homes. The settings vary—juvenile court, civil trial in context of malpractice lawsuit, criminal court, or administrative hearings—but the role has certain common features and is based on concepts that will be explored in this chapter.

EVIDENCE CONCEPTS AND PRINCIPLES

The complaining parties in a legal dispute obtain a favorable judgment only if they can prove their claims. The proof consists of evidence presented at trial. Evidence is presented through witnesses, records, documents, or concrete objects and may be defined as:

> that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue. . . . [It] is the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain. . . . Although the term "evidence" is sometimes used synonymously with "facts," the terms are not really synonymous, for "evidence" is limited to that which may properly be considered by the court or submitted to the jury for its consideration. . . . "Competent evidence" means evidence that tends to establish the fact in issue and does not rest on mere surmise or guess. (31 C. J. S. Evidence Sec. 2)

Evidence law consists of rules and standards that regulate the introduction of proof at trial, and these constitute the framework within which the material facts are proved. They specify how any proof (whether testimony, writings, physical objects, photographs, etc.) will be admitted or excluded at trial. The law of evidence is enormous, and no attempt will be made here to cover it all. Rather, this section will examine some of the fundamental and evidence concepts most relevant to social work. They are all "terms of art," that is, ideas that are best understood within a particular context.

Standards of Proof for Evidence

The "standard of proof" concept refers to the standard to be used to assess whether the evidence presented will allow the court to conclude that it actually proves the truthfulness of the assertions made by the complaining party and thus entitles them to their requested legal remedy. In short, it is how convincing the evidence must be to support a contention. The standard of proof will vary, depending on whether the suit is civil or criminal.

Criminal proceedings, which are instigated by the state on the people's behalf to prove that someone has violated the penal code, require evidence that allows the court to conclude *beyond a reasonable doubt* that the defendant is guilty as charged. The state has to show that, based on the evidence it presents, there will be no reasonable doubt in the court's mind that the defendant has done what he or she is accused of. It will be ". . . entirely convinced; satisfied to a moral certainty . . . [and that] the facts proven must, by virtue of their probative force, establish guilt" (Black, 1968). This apparently stringent standard bespeaks society's desire for certainty when a person's liberty is at stake.

Civil proceedings, which settle noncriminal disputes, use a relatively less demanding standard of proof, including the following:

- *Proof by clear and convincing evidence:* Generally this phrase and its numerous variations mean proof beyond a well-founded doubt. Some cases give it a less rigorous, but somewhat uncertain meaning, *viz.*, more than a preponderance but less than is required in a criminal case. . . . The degree of proof which will produce in the mind of the court a firm belief or conviction; proof sufficient to convince ordinarily prudent-minded people

(Black, 1968). The phrase expresses "a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty . . ." (31 C.J.S. Evidence Sec. 1023).

- *Proof by a preponderance of the evidence:* Greater weight of evidence, or evidence which is more credible and convincing to the mind. . . .that which best accords with reason and probability. . . . The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus,* unless it overbears, in some degree, the weight upon the other side. . . . It rests with that evidence which, when fairly considered, produces the stronger impression, and . . . is more convincing as to its truth when weighed against the evidence in opposition thereto (Black, 1968). In other words, it is ". . . evidence which is of a greater weight or more convincing than that which is offered in opposition." (32 C.J.S. Evidence Sec. 1018)

Best Evidence

"Best evidence" or "primary evidence" is that which is the most natural and satisfactory proof of the fact under investigation. . . . While in some circumstances "best evidence" may mean that evidence which is more specific and definite as opposed to that which is merely general and indefinite or descriptive, "best evidence" is variously defined as that . . . proof, which is indicated by the nature of the fact under investigation, as the most natural and satisfactory . . . (32A C.J.S. Evidence Sec. 776)

Material Evidence

Evidence is *material* when it relates to a substantive legal issue in the dispute. The complaint or the petition specifies the legal issues on which the parties disagree, and these are the matters for which competent evidence must be presented. Evidence introduced to prove a point other than these can be excluded as immaterial.

Relevant Evidence

Evidence is relevant when it tends to show that the material facts (as defined above) are more true than untrue. The concept speaks to whether the evidence is proof of an issue and whether there is a nexus to materiality. Assuming the evidence proves a material issue, the next question is whether it proves that *specific* material issue. For example, evidence that shows that a parent neglected his or her child on a prior occasion is material (as defined above) because it addresses the present question of neglect. However, that fact alone does not prove the parent's negligence on this particular occasion. Thus, such evidence, albeit material, would be excluded because it is not relevant.

Evidence Classifications

Evidence can be direct or circumstantial.

Direct evidence is evidence presented by a witness who has actual knowledge of the fact it is offered to prove. A conclusion can be drawn directly from the witness's statement. For example, on the question of physical abuse, the testimony of a neighbor that he or she saw the parent repeatedly strike the child would be direct evidence.

Circumstantial evidence is evidence presented by a witness that allows certain inferences about the truthfulness of the facts it is offered to show. For example, on the question of physical abuse, the testimony of a neighbor that he or she saw a crying child emerge from the house with (apparent) welts on the arm would be circumstantial evidence.

Hearsay evidence

Hearsay Rule

A witness's testimony can be excluded as hearsay when the witness offers a statement uttered out-of-court by some other party as proof that what he or she is saying is true. Hearsay evidence is generally excluded.

> Evidence is hearsay when its probative force depends on the competence of *some person other than the witness.* A clear example of hearsay

> evidence appears where a witness [A] testifies to the declaration [statement] of another person [B] for the purpose of proving the facts asserted by the witness [A]. . . . the general rule is that, subject to certain exceptions, hearsay evidence is inadmissible, or incompetent [as defined above]; the courts will not receive the testimony of a witness as to what some other person said, or told him, as evidence of the existence of the facts asserted [by the witness]. (31A C.J.S. Evidence Sec. 193)

The rule against the use of hearsay evidence is derived from a legal tradition that requires evidence to be direct, accurate, and verifiable. Out-of-court statements offered by a witness cannot meet these criteria, because there is no "opportunity to test by cross-examination the veracity and accuracy of the statement offered" (31A C.J.S. Evidence Sec. 193). A hearsay "statement" can be (1) an oral statement (he/she said ". . ."); (2) a written document; or (3) so-called "assertive conduct," that is, conduct that communicates an idea (e.g., the witness testifies that "the child pointed to the alleged assailant").

Given the court's truth-finding function, the hearsay rule has some intuitive appeal:

> . . . an unsworn statement of a person not called as a witness . . . is not recognized as having a sufficient probative effect to [allow us to believe] that the fact is as stated; and the rule is particularly applicable when such [out-of-court persons] can be summoned and sworn as a witness. The right of a party to test by cross-examination the veracity and accuracy of the person making the statement offered in evidence has been said to be the principal reason for the hearsay rule . . . (31A C.J.S. Evidence Sec. 193)

Exceptions to the Hearsay Rule

"Such exceptions [to the hearsay rule] are based on necessity, public policy, practical common sense, and the trustworthiness which experience has taught, or the circumstances indicate. . . ." (31A C.J.S. Evidence Sec. 193). Some examples include:

- Prior recollection recorded: reference to notes made at some earlier time which can be admitted into evidence, provided the witness can testify that, although he or she cannot now

remember, he or she initially had firsthand knowledge of the event and took accurate notes at the time.
- Admissions made directly to the witness by a party to the action.
- Admission by silence.
- "Excited utterance": a spontaneous remark which, because uttered under certain circumstances or the stress of the moment, is presumed to be accurate and truthful.
- Official or public records, which are presumed to be reliable (e.g., birth and death records, payroll data, case records, etc.).

WITNESSES

Generally, witnesses fall into two categories: lay and expert. The two are distinguished by the type of testimony they offer at trial. Witnesses typically testify to their knowledge of firsthand observations, to what they actually saw or heard. The expert witness, however, is an exception to this general rule.

Lay Witnesses

Actual concrete observations are the province of lay witnesses. They are limited to the facts they observe, so they can only testify about what they saw, heard, or otherwise experienced firsthand. Their role is a conveyer of facts. Consequently, they must refrain from drawing any conclusions from the facts they observe. Such inferences, no matter how obvious, will be disallowed by the court. (Exception: even a lay witness can draw a conclusion about a subject known by the average person, such as the indicators of drunkenness or the approximate speed of cars traveling down a street.) Their limited role reflects the division of labor of the trial system. Under this scheme, the jury or judge draws inferences from the facts presented by witnesses.

Lay witnesses, unlike experts, possess no special knowledge or skill; they need none to offer "mere" firsthand experiences. This characteristic should not suggest they occupy a second-class status in relation to experts. Rather, the point is that their contribution to the process is more *limited* than the expert's, who can testify about both firsthand experiences and about the consequences that follow from these observations.

Expert Witness

The court's truth-finding process often requires it to incorporate information beyond its expertise. Lay witnesses may accurately represent relevant facts but these alone may not be enough, and the court may require informed opinions about the conclusions that may be drawn from the facts presented to it. Enter the expert witness, whose opinions, which are based on relatively superior knowledge, experience or skill, may help the court discover the truth.

Who is an expert? The meaning is narrower than generally understood. Experts need not be the best in their fields. The judge determines whether someone will be allowed to testify as an expert. The decision is based on the court's finding that the subject for testimony is beyond the average lay person's knowledge. The judge then evaluates the expert's credentials to determine whether he or she has the requisite specialized knowledge, education, or experience. These qualifying requirements must be met before anyone—whether called by one of the parties or appointed by the court—is designated an expert. Once qualified, experts must testify that their opinion is based on a "reasonable degree of certainty."

Essentially, anyone who meets the court's expert-witness requirements can qualify as an expert witness. (Indeed, one person can be an expert witness in one situation; a lay witness in another.) The court will first decide whether expert opinion is needed, and if so, whether the required information is within the expert's area of expertise. In some instances, even if the expert has been qualified, the judge may disallow the opinion testimony if the judge decides that the state of knowledge within a field is so unreliable or new that an opinion with a "reasonable degree of certainty" cannot be offered even by an expert.

COURT TRANSCRIPT FOR *IN RE CUSTODY OF J.S.S.* 298 PA.SUPER. CT. 428 (1982)

Review the following transcript, which describes the examination and cross-examination of a social worker in a child custody dispute, and then evaluate the testimony in the light of the above guidelines. Then read the excerpt from the judicial opinion of the case on which the transcripts were based.

THE COURT: Just to put on the record, this is in re: Custody of Jeremy S., a minor. The parties are stipulating and agreeing that the report prepared by Pinebrook Services for Children and Youth for the Court in assisting the Court in deciding this matter shall be and become a part of the court record. Okay? All right. Anything else?

MR. FONZONE: No.

THE COURT: If you want to, you're the moving party.

MR. FONZONE: Just cross-examine.

Miss R., having been duly sworn, was examined and testified as follows:

THE COURT: It's Mrs., isn't it?

THE WITNESS: Miss.

THE COURT: Miss R., on behalf of this Court and through your employer, Pinebrook Services, you prepared an investigation and submitted a report to this Court relative to the minor child involved in these proceedings?

THE WITNESS: Yes, I did.

THE COURT: Now, in respect to that report, I believe copies have been sent to respective counsel, Attorney Fonzone and Attorney Keller; and in light of the posture of the case, they're allowed to question you in respect to your report. All right? So Attorney Fonzone was the moving party in this case, so we'll allow Attorney Fonzone to begin the questioning. All right, Mr. Fonzone. And the other attorney is Attorney Keller.

CROSS-EXAMINATION

BY MR. FONZONE:

Q: Ma'am, for the purposes of the record, could you state your name?

A: Miss R.

Q: And your age, ma'am?

A: Twenty-eight.

Q: And your formal education?

A: I have a B.A. in social science and a minor in psychology. I also received my social work certification from the Independent Colleges of the Lehigh Valley Consortium.

Q: With respect to the degree, when did you receive that?

A: 1975.

Q: And what have you been doing since '75?

A: I was employed at the Lutheran Home in Topton for five years as a diagnostic case worker, and also since September I've been working with Pinebrook Services.

Q: And the other degree you mentioned, the social worker degree, what is that, ma'am? How do you achieve that?
A: You're required to take courses beyond my social science degree and my psychology degree, specifically in the social welfare field.
Q: And how many courses have you taken beyond your degrees?
A: I have approximately thirty credits towards my M.S.W.
Q: That would be a master of social work?
A: Right.
Q: What did you do at the Topton Home, ma'am?
A: Basically I started out as a child care worker for a few months, and then I moved on to case worker. At that point I did therapy with the children in the institution. I also did home studies and then I became the diagnostic caseworker, which is a specialization in doing home study psychosocials for children who are referred to us for the report.
Q: When you say home studies, what does that mean?
A: Okay. A child is referred to us because of something they've done or family problems. It is my job to go out to the home, study the home, analyze the dynamics of the family, get extensive family background on them and determine whether that home is suitable for that child to return to.
Q: And how many occasions were you called to do that, ma'am?
A: I averaged six every month.
Q: For what period?
A: For five years.
Q: Seventy-two a year then for five years?
A: Well, my math is not that good, but—
Q: Approximately. Ma'am, prior to being called on to do the home study in this case, did you know any of the parties?
A: No, I did not.
Q: Any of the attorneys?
A: No, I did not.
Q: Never dealt with anyone before?
A: No.
Q: Do you have your report with you?
A: Yes, I do.
Q: Could I refer you to the—it's an unnumbered page, but the first page at the bottom, the paragraph beginning with "While showing."
A: Under what topic are you—
Q: The first page of your report. It's not numbered, but it's the first page. The next page is Page 2.
THE COURT: Do you have your typed copy?
THE WITNESS: No, I don't.

BY MR. FONZONE:

Q: Could I see what you have? You must have notes. Could I see your notes?

A: Yes.

Q: This is all written by you. The first page of the report you have in front of you now, ma'am, begins with "While."

A: Yes.

Q: Are you saying that Alverta made a statement to you about what you have in that paragraph?

A: Yes, I am.

Q: And did you make a note of what she said at that time?

A: Yes, I did. When we were going through the home and looking at the rooms, she indicated to me that Jean had a single bed and was sleeping in the same room as two of her children, and indicated that she was no longer interested in men.

Q: And that's how you translate that into what you've typewritten?

A: And also that Barbara had a boy friend and she was the only female in the home that had a room to herself and a double bed.

Q: And did she tell you all of this at one time?

A: In the course of the conversation while touring the house, yes.

Q: And how long was that conversation?

A: While touring the house. I would say it took us approximately fifteen minutes to tour the house.

Q: And do you recall specifically when she told you those two separate facts?

A: We went to the two bedrooms, one right after the other, so it would have been in that period of time.

Q: And she told you basically what?

A: That Jean had a single bed and was sleeping in the room with two of her children because she was no longer interested in men, and indicated that Barbara had a double bed and she was seeing someone.

Q: And did she tell you that's why she had a double bed?

A: I can't say that she actually said that's why she had a double bed, no.

Q: But you agree that your typewritten statement would indicate that?

A: She alluded to the fact, yes, and that's what's in my report.

Q: Well, there's no allusion at all in your typewritten statement. You say, "Barbara, for example, has private room and double bed because she is presently dating someone."

A: Yes.

Q: And is your recollection clear then that it was that matter of factly said to you, or is that a conclusion you arrived at?

A: She did present the two facts one right after the other.

Q: And your fertile imagination put them together?
MR. KELLER: Objection.
THE COURT: The objection is overruled.
BY MR. FONZONE:
Q: You may answer.
A: Well, since she stated the two facts one right after the other, yes, I put them together.
Q: Now, with respect to the financial set up in the home, Alverta told you that all the working people contribute to the home?
A: Yes.
Q: Have you done anything to check the veracity of any statements made in your report? For example, if someone told you they ran away for a particular reason, did you ever attempt to find out why they ran away or do any work at all in that respect?
A: I'm not sure I understand your question.
Q: Well, you gained information that one person was placed in the Wiley House.
A: Yes.
Q: Did you ever check with the Wiley House as to why that person was placed there?
A: No, I did not.
Q: And I see in the early part of your report you have fifteen people residing at Alverta's house.
A: Yes.
Q: Would your conclusion change any if you knew there were less people residing there today?
A: I would have to know how many, what the arrangements, the sleeping arrangements, were at this point.
Q: With respect to Harold, what is your impression as to how often he's at that home?
A: From what was indicated to me, it's sporadic.
Q: Judy S., Tammy S. and Joanne and Danny S. no longer reside at that home, so four people have left.
MR. KELLER: Objection, Your Honor. There's nothing on the record about that. Is that a question?
BY MR. FONZONE:
Q: Well, take that as a fact, hypothetical if you like.
MR. KELLER: Well, I object.
THE COURT: It's not on the record, but we have to have a little latitude here. The objection will be overruled, assuming that were a fact.
BY MR. FONZONE:

Q: Do you have those names?
A: Yes.
Q: Now, would the fact that they've left influence the opinion you've rendered in your report?
A: Certainly there would be less people living in the home, but I still feel that the home is overcrowded.
Q: And is that the objection you have to the home, that it's overcrowded?
A: Because of the amount of adults and the way the home is set up with no one being specifically responsible for the discipline of each child, that everyone takes turn, this certainly is going to affect the identity, any child's identity growing up in such a home.
Q: And is that a second objection that you have?
A: Yes.
Q: Do you have any other objections to the home?
A: There was some question about the sexual practices, which you have, you know, discussed previously. But there are many—there are very many relationship problems with all of Mrs. S's children, many of her daughters had illegitimate children, her sons have had difficulty in their marriages. As far as the dynamics of the family go, there seem to be relationship problems.
Q: That would be true of Sandra also?
A: She's also a product of that environment, yes.
Q: And she's had two illegitimate children?
A: Yes.
Q: She's living with a man she's not married to?
A: Yes.
Q: Now, with respect to Mr. M., are you aware that he had a stepbrother?
A: No, I'm not.
Q: And were you aware that he hasn't worked for—I forget the precise facts, but twelve or fifteen years?
A: Yes, he did tell me he had been unemployed.
Q: Although you make the observation that although he's presently unemployed, he does odd jobs and has applied for several jobs?
A: Yes.
Q: What do you gather out of that? Is that a positive influence or why is it important that he's applied for other jobs?
A: That he is making an attempt at this point to find employment.
Q: Well, then you didn't do any investigative work as to the actual length of time he had not been employed?
A: Yes, I did. And although I can't find it right here in my notes, he did indicate to me that he had been a private chauffeur, which was his last permanent employment.

Q: Did he tell you when he did that?
A: That's what I'm looking for now. He told me four years ago he was self-employed as a private chauffeur.
Q: Did he tell you how long he did that?
A: No, he did not.
Q: And I suspect you had no reason or no opportunity to check on whether he actually was a private chauffeur?
A: Right.
Q: Now, on your last page, Page 4 of the Sandra home study, you say her affect was consistently appropriate. What does that mean?
A: The affect meaning a person's facial expressions, their mannerisms during questioning, composure.
Q: And what does that mean then, consistently appropriate?
A: It means when discussing a difficult area, a topic that may have been painful for her, she became upset as one would expect, but yet she was able to smile during more casual moments.
Q: Is that in opposition to something you found with Alverta?
A: Mrs. S. was much more guarded during the interview and was not as open with me as Sandra was.
Q: Did you have the opportunity to interview Sandra's son?
A: No, I did not.
Q: Don't you think that would be crucial, as he'll be a member of that household?
A: We did discuss that and—
Q: You discussed that with Sandra?
A: Exactly. And we had a lot of difficulty arranging times when I could meet with him.
Q: Why was that? This is a seventeen-year-old boy in high school.
A: With his working schedule, school schedule and my schedule.
Q: Well, don't you think it's relevant to your study?
A: Yes and no. He is, as you say, seventeen, and may not be in the household much longer. Mrs.—
Q: Why would you say that, Miss R? Why would you say he may not be in the household much longer?
A: The fact that he's seventeen, and usually people when they're eighteen leave the household. And Miss Shook indicated to me that she did not feel he would be there much past that.
Q: What do you base the fact that when people turn eighteen they leave the household on?
A: They're of legal age, they're out of school, they go out on their own.
Q: Is there a study that says that?
A: I can't quote studies to you, no.

Q: So it's an assumption you made based on a feeling you have?
A: And from what Miss S. indicated to me.
Q: Well, what did she indicate to you? Did she tell you he was living with her or he wasn't?
A: Oh, he's living there now, or at the time of my study.
Q: Are you certain of that?
A: I saw his room, his belongings.
Q: But you didn't see him, you didn't talk to him?
A: No.
Q: And the only reason you don't think it's so crucial to talk to him is because you think he may be leaving?
A: Well, whether he is or he isn't, he wouldn't have the child or responsibility, Miss S. will.
Q: Well, she's not going to have that during the day, is she?
A: She has plans for a day care center for him.
Q: But she's not going to have that during the day, the day care center is going to.
A: Exactly.
Q: When the child comes home, who's to say who's going to be at home, the boy or the mother?
A: Well, certainly she is the person who will be the legal guardian for him.
Q: Yes.
A: So she will I assume have the responsibility of child-rearing. She did not indicate otherwise to me.
Q: Well, did you ask?
A: Certainly.
Q: Did you ask her if she intends to have her son sit with the child?
A: Did I ask that specific question?
Q: Yes.
A: No.
Q: How many rooms did Sandra have in her apartment?
A: Five rooms and a bath.
Q: And how many rooms were in Alverta's home?
A: Nine and a bath.
Q: Did the nine include the attic?
A: Yes.
Q: And did it include the basement?
A: No.
Q: There is a full basement, though, isn't there?
A: Yes.
Q: And how much area do they have around the home?
A: Which home?

Q: Let's start with Alverta.
A: She has a large yard.
Q: And how about Sandra?
A: A small yard.
Q: Had you ever in your 360 home studies dealt with a home that was like Alverta's home?
A: Certainly every home is unique.
Q: What was unique about her home?
A: In comparison to my others?
Q: Yes.
A: The family dynamics, the size of the household, the way it was set up.
Q: I take it there's nothing directly wrong with having a large group of people?
A: No.
Q: When you talk about dynamics, what do you mean?
A: The interactions between the people. Certainly this is a very matriarchal household.
Q: Some societies are that way.
A: Certainly. I'm not passing judgment on that. I'm just stating a fact. I've never been in a household where everyone turned in their pay check to the head of the household and then it was divided up from there.
Q: Did anyone within that household tell you they didn't like the way it was being run?
A: The residents there at the time? No, no one voiced an objection.
Q: And there are certainly children who are no longer there in addition to Sandra. Did you have an opportunity to talk to any of them?
A: None of them were present.
Q: You're not aware of any of them?
A: Aware of them?
Q: Yes.
A: Mrs. S. did indicate to me that she had children out of the household, yes.
Q: And you had their names and addresses?
A: No, I do not.
Q: Could you have gotten those?
A: I'm sure Mrs. S. would have provided them for me.
Q: Would you like to have them to talk to those people to get their impressions?
THE COURT: This is of which people?
MR. FONZONE: These are the other children not living within the home. In addition to Sandra there are others. And I believe some of them have testified before you, Judge. At least two daughters did.

THE WITNESS: The study as I was required to do it was of the two households, not of anyone else's household.

BY MR. FONZONE:

Q: I think you've indicated that none of the people within the household of Alverta expressed any discomfort or any objections to the way things were being run.

A: The only person who voiced objection was Sandra.

Q: Who was not in the household. And the three other daughters not within the household, you didn't speak to any of them?

A: Right.

Q: Would it be important to speak to them?

A: I feel that I got a good understanding of what was going on with just the people I spoke to.

Q: So it's not important to you then to speak to these other three?

A: No.

Q: Were you able to eliminate the animosity between Sandra and Alverta in arriving at your conclusions?

A: Certainly it was there. As I indicated in the report, Mrs. S. preferred to tell unflattering stories about Sandra rather than present her own story.

Q: But you wouldn't say that Sandra told you unflattering stories about Alverta?

A: Certainly she did.

Q: As a matter of fact, you put some of them in here, about legal papers and funeral?

A: Yes.

Q: Do you know who paid for the funeral?

A: To my knowledge, it was an insurance company.

Q: If it were not for the insurance company, do you know who paid that?

A: It was pending when I spoke with Sandra.

Q: So you didn't ask Alverta who paid for the—

A: I did call Attorney Keller and asked him if he had a copy of the bill.

Q: And what did he tell you?

A: And it was his impression also, or from what I recall what he told me, was that the insurance company had paid and the rest was—the balance was due.

Q: You didn't want to see the receipted bill saying Alverta paid for it, the balance? Would that make any difference?

A: Certainly it verifies her story.

THE COURT: Is this the funeral of the daughter?

MR. FONZONE: The granddaughter of Alverta.

THE COURT: Sandra's daughter. What was her name: Debra?

THE WITNESS: Debra.

MR. FONZONE: Yes, Your Honor.

BY MR. FONZONE:

Q: Did you have the impression that this whole thing is about money?

A: That's what Mrs. S. indicated to me, that she felt Sandra was looking for the money.

Q: What is your impression? I didn't ask for what Alverta told you.

A: I don't feel that money is the motive here.

Q: And I take it from what you told us there's very little that would change your impression that you put in your report?

A: That's correct.

Q: Did you have an opportunity to speak to Jeremy?

A: Jeremy's an infant.

Q: Right. Did you spend any time—

A: Well, while I was there he was sleeping.

Q: Now, based on your experience, and the Court is going to be faced with a decision, if custody were changed, how should that be accomplished? Overnight, gradually?

A: I would prefer to see it gradually.

Q: And what do you mean by that?

A: Starting out with visits. I don't know at this point how often Sandra had contact with Jeremy. Certainly it would be a very difficult thing for any child to be changed from one household to another if they're not familiar with that person.

Q: And would you continue visitation with the grandmother once custody were completely changed?

A: I would have no objections.

MR. FONZONE: I have no other questions.
Your Honor, the bill itself I haven't marked. I'd like to hold onto it.

THE COURT: Yes. The Court has had an opportunity to see it I think.

CROSS-EXAMINATION

BY MR. KELLER:

Q: Miss R, you described your job classification as diagnostic home study. Do you also do family counseling?

A: Yes, I do.

Q: And would that involve dealing with families that are having domestic or other problems?

A: Yes.

Q: How long have you done that?

A: I received my training from Philadelphia Child Guidance Clinic last summer, the summer of 1980.

Q: Had you done counseling over the years prior to that"
A: As far as the children in our care involving the parents so that they would be able to have the child return home, yes.
Q: And have you had occasion to make evaluations for court regarding minor children?
A: Yes, I do.
Q: In what respect?
A: As I mentioned before, as a diagnostic case-worker, I do a complete study of the family and go into court and make recommendations whether that family is suitable to have the children return home.
Q: In what context would that be in? Would that cover a wide variety of situations?
A: Yes. Oftentimes the child has committed a delinquent act, is having school problems or there's something going on in the family that's in question.
Q: Now, can you tell me what day you went to Alverta's house?
A: December 1st, 1980.
Q: I think in response to Mr. Fonzone's questioning, you agreed that Sandra was a product of that same environment that exists at Alverta's house at this point, that she was a product of that environment. Is that correct?
A: Yes.
Q: Do you see any difference, however, in the present lifestyle between the two households?
A: Well, I think what Attorney Fonzone was pointing out was that Miss S. also had two illegitimate children, which is true; but that happened while she was under her mother's roof. She has not had any children since she's moved out.
Q: In discussing that issue with Sandra, were you able to gather any facts or impressions regarding her attitude and her present feelings about her upbringing and the environment that she came from?
A: Certainly she had a lot of negative feelings about it which prompted her to move out. I see that she has made a life for herself and has been successful in supporting herself and her children since she moved out.
Q: Based on what you've observed and your discussions with the parties, could you characterize Sandra's attempt to be on her own as a positive motivation on her part?
A: She felt that her children were being affected by the lifestyle that she was living while with her mother, and feeling that that was negative moved out and faced some hard times, certainly, to start a new life and become the dominant and significant person in their lives as opposed to having the child-rearing shared by several adults.

Q: And on Page 4 of your home study regarding Alverta, the heading is "Impressions, continued." Do you see that?
A: Yes.
Q: In that paragraph, you state that "A child growing up in this environment might well experience problems in establishing a secure sense of identity." Could you elaborate and give us some specific examples of what types of problems a child could face growing up in this specific environment?
A: Okay. First off and the most obvious, if everyone is sharing the responsibility of discipline and child rearing, there may be a loss of identity as far as who the true parents are, who is that significant person in the child's life. As can be expected, many adults are going to have different viewpoints on how to raise a child and there's going to be—it can be expected that there's going to be a lot of inconsistency in that. And oftentimes when a child is faced with so many inconsistencies, you're talking about some character disorders that may develop from that, maybe a lack of a sense of a true right and wrong, because what may be right and wrong in one adult's eyes may not be the same in another's.
Q: And would these problems also be affected by the other factors which you list in that same paragraph, which are the situation of open sexuality, little privacy and crowded conditions?
A: Certainly.
Q: On page 3 of your home study regarding Alverta, the paragraph entitled "Future plans," it would be fair to say, I take it, from what you say—You're saying there that Alverta informed you that she has no plans to alter her present living situation.
A: Correct.
Q: Now, did you observe a living quarters in the cellar of this household?
A: Yes, I did.
Q: And what is the nature of the cellar? Is it finished or unfinished?
A: Unfinished.
Q: What are the walls? What is the—
A: It's a cellar.
Q: Would these be cement walls?
A: Yes, and she did—
Q: So there's nothing on the walls except cement?
A: Exactly.
Q: And what is the floor?
A: The floor was cement, but they had made an attempt to make it more livable by placing the rugs down under the living area.
Q: What did the ceiling look like? Were there exposed pipes?
A: I did not go completely into the basement. I was at the cellar stairs. I could not see whether there were exposed pipes or not.

Q: Did you notice where the boiler was, where the—
A: No, I did not see the boiler.
Q: So you don't know where it is in relation to the sleeping quarters?
A: In relation to the sleeping, no.
Q: And were you informed who sleeps in the basement?
A: Yes, I was. Judy and her two daughters, Tammy and Joanne.
Q: And how old would Tammy and Joanne be?
A: Tammy is seven and Joanne is six.
Q: And are there any facilities whatsoever in that cellar that you know of, any facilities other than a bed?
MR. FONZONE: I'm going to object, Your Honor. She didn't see the cellar, it's pretty clear.
THE COURT: Were you down in the cellar or just—
THE WITNESS: We had toured the house. I went to the cellar stairs, looked down and saw the beds and the rug and the floor and walls. But I cannot address myself to what the rest of the cellar looked like, just where their living quarters were.
THE COURT: I see. Well, if you can answer the question, the objection will be overruled.

BY MR. KELLER:

Q: Did you note whether there were any bathroom facilities in the cellar?
A: The only bathroom that Mrs. S. indicated to me was on the second floor.
Q: The only bathroom in the household is on the second floor?
A: Yes.
Q: So we have one bathroom for all of these people?
A: Correct.
Q: And did you observe a cot in the hallway somewhere where somebody was sleeping?
A: On the landing before going up to the attic stairs, yes.
Q: Was that a child sleeping on that?
A: Yes, it was.
Q: Who was that?
A: Dean, age eleven.
MR. KELLER: Thank you.

RECROSS-EXAMINATION

BY MR. FONZONE:

Q: You learned that the lady that was in the basement had no place to go and Alverta let her go there?
A: Yes.

Q: And you since heard from me that she's not there any longer?
A: Correct.
MR. KELLER: I object.
THE COURT: Well, the objection will be sustained.
BY MR. FONZONE:
Q: I doubt that that has anything to do with your opinion, as to whether she is or is not down in the basement?
A: No, the rest of the house in my opinion was overcrowded.
Q: Jeremy himself had a room of his own?
A: Yes, he did.
Q: And he's the individual that you're concerned with?
A: Right.
Q: And as far as the number of rooms in the home, there's nine plus the basement? That's what you told us before.
A: Okay.
Q: And the home that she's in has five; is that right?
A: Yes.
Q: And your opinion with respect to what is a suitable home is not influenced by the greatest area of living space?
A: Certainly that's taken into consideration, but of course, all factors must be.
Q: What is the most important factor?
A: The environment that the child's going to be growing up in.
Q: So if they had a home that was twice as large, you would still find it objectionable?
A: Yes, I would.
MR. FONZONE: I have no other questions.
THE COURT: All right. You may step down. Thank you, Miss R. The Court thanks you very much. Gentlemen, anything you want to state on the record at this time?
MR. KELLER: I have nothing.
MR. FONZONE: No, Judge.
THE COURT: All right. We'll have a decision coming down as soon as possible.
(Proceedings concluded.)

In Re Custody of J.S.S., 298 Pa. Superior Ct. 428 (1982), was an appeal from an order of the Court of Common Pleas awarding custody of Jeremy S. to Sandra S., who is his grandmother. The appellant, Alverta S., is the great-grandmother of the child. The child's mother was killed in a car crash in May 1980 when the child was less than 1 year old. Consider the judge's evaluation of the testimony in

relation to his determination of the best interests of the child, paying special attention to the judges's reasons.

IN RE CUSTODY OF J.S.S., 298 PA. SUPER. CT. (1982) PENNSYLVANIA SUPERIOR COURT

Opinion by: Johnson

This is an appeal from an order of the Court of Common Pleas awarding custody of Jeremy S. to Sandra S. who is his grandmother. The appellant, Alverta S., is the great-grandmother of the child. The child's mother was killed in a car crash in May 1980 when the child was less than one year old.

The facts of this case are as follows. The child's mother, Debra, conceived the child in 1978 when she was sixteen years old, still in high school and living with her mother, Sandra. There was testimony that Sandra urged Debra to abort the pregnancy. Debra did not wish to do so, and moved to her grandmother Alverta's house where she lived until her accidental death in 1980. Her baby, Jeremy, the child whose custody is at issue in this case, has therefore lived with Alverta, his great-grandmother, since his birth in May 1979.

At the time of the hearing in October 1980, Sandra was 36 years old. She was living with her 17-year-old son and 49-year-old paramour in a second floor apartment. She is the eldest daughter of Alverta. She has worked in house-keeping at nursing homes since leaving her mother's home. Her two children, Debra and Willard, were born of a liaison with a married man, since deceased. She has lived with her paramour, Roger, for four and one half years, and been involved with him for about nine years. . . .

Alverta is 55 years old. She owns a large house with a large yard. She was raised by maternal grandparents, married at 18 and gave birth to nine children before her husband died. She has never worked outside the home. Currently the adults in her household give her their paychecks, with which she manages the household. The household consists of about a dozen people of different generations and includes two of Alverta's daughters, a daughter-in-law, and their respective children of grade school age. The only men are Harold Whelan, the 38-year-old son of Alverta's former paramour, and a nephew of Harold who is 22. Harold appears himself to have had a sexual relationship with Alverta in the past. Harold works as a garage mechanic and also helps to maintain the house of which he is a part owner together with Alverta and two of her daughters. Harold testified, as did other members or former members of the household, that Jeremy is loved and well taken care of in Alverta's household.

The judge awarded custody to Sandra essentially (1) because he was "concerned with the large number of people residing with Alverta," (2) because he was "concerned with exposing the child to the open sexuality

of the Alverta S. household" and (3) because of the lack of "any type of steady relationship among men and women" in Alverta's household as compared to Sandra's. See slip op. at 5-6, Nos. 80-C-1955 & 80-C-2027 (C.P. Lehigh County, June 18, 1981).

In custody cases the scope of our review is very broad. *Commonwealth ex rel. Spriggs v. Carson,* 470 Pa. 290, 368 A.2d 635 (1977); *Commonwealth ex rel. Oxenreider v. Oxenreider,* 290 Pa.Super. 63, 434 A.2d 130 (1981). We do not usurp the fact-finding function of the trial court, but we are not bound by the deductions or inferences made by the trial judge from the facts he has found. We need not accept a finding which has no competent evidence to support it, but are instead required to make an independent judgment based on the evidence and testimony, and make such order on the merits of the case as to do right and justice. See *Garrity v. Garrity,* 268 Pa.Super. 217, 407 A.2d 1323 (1979), and cases cited therein. So as to facilitate this broad review, we consistently emphasize that the hearing court must provide us with a complete record and a comprehensive opinion which contains a thorough analysis of the record and specific reasons for the court's ultimate decision. *Garrity v. Garrity, supra; Guelich v. Guelich,* 282 Pa.Super. 621, 425 A.2d 848 (1980). When the hearing judge fully complies with these requirements, his decision is not reversed unless he has abused his discretion. *Commonwealth ex rel. Bendrick v. White,* 403 Pa. 55, 169 A.2d 69 (1961); *Commonwealth ex rel. E. H. T. v. R. E. T.,* 285 Pa.Super. 444, 427 A.2d 1370 (1981).

In custody cases the best interests of the child are the most important consideration. All other considerations are deemed subordinate to the child's physical, intellectual, emotional, moral and spiritual well-being. See *Commonwealth ex rel. Holschuh v. Holland-Moritz,* 448 Pa. 437, 444, 292 A.2d 380, 383 (1972); *In re Snellgrose,* 432 Pa. 158, 163, 165, 247 A.2d 596, 599, 601 (1968); *Jon M. W. v. Brenda K.,* 279 Pa.Super. 50, 54, 420 A.2d 738, 740 (1980); *Commonwealth ex rel. Williams v. Williams,* 229 Pa.Super. 327, 330, 324 A.2d 540, 542 (1974); *Commonwealth v. Kraus,* 185 Pa.Super. 167, 170, 138 A.2d 225, 227 (1958). To affirm the order of the lower court, therefore, we must be persuaded that its decision comports with the best interests of the child. Additionally, each party has the burden of proving that the best interests of the child will be served by the placement of the child with her. *Beichner v. Beichner,* 294 Pa.Super. 36, 439 A.2d 737 (1982).

For the reasons given below, we find that Sandra did not meet this burden, that the record is inadequate, that the lower court's opinion did not sufficiently consider and analyze all the testimony, and that the lower court drew conclusions that are either not based on, or are controverted by, the testimony.

These defects are all intertwined. We shall therefore discuss them in terms firstly of the insufficient information in the record, which bears on the judge's having reached conclusions which had no facts to support

them, and secondly in terms of what is in the record which the judge did not treat in his opinion or seemed to disregard in making his decision.

In *Hugo v. Hugo,* 288 Pa.Super. 1, 430 A.2d 1183 (1981), we remanded the case for more detailed findings of fact and a more comprehensive opinion. One of the deficiencies which we noted in Hugo was that the husband of the person to whom custody was awarded by the trial court was not present when the social worker visited the home, nor did he testify at the custody hearing. We decided that without more information about the relationship between the child and the man in question, the lower court had an insufficient basis for its conclusion that the home was suitable. *Id.,* 288 Pa.Superior Ct. at 7, 430 A.2d at 1186.

The same defect exists here. We know from the record that at the time of the hearing Sandra had lived with Roger for about four years, and that he had not worked for eight years. Sandra testified that on the day of the hearing he was visiting his mother who was sick, and yet that he did want Sandra to have Jeremy. Similarly, Sandra's son Willard, though not in school on the day of the hearing, did not attend the hearing. Nor was Willard ever interviewed by the case worker. We cannot affirm an award of custody to a family unit where two-thirds of that unit are not seen or examined before the court, or where there is no adequate competent testimony about them presented to the court, so that the court may make a well-founded decision.

Additionally, in Hugo this court noted that the social worker visited the home of the mother and "was able to comment on the child's surroundings and interaction with his mother." *Id.* This element was absent in the case before us now. The case worker did not, on her single visit to Sandra's home, observe any interaction between Sandra and Jeremy. We find this to be a substantial defect.

In *Beichner v. Beichner,* 294 Pa.Super. 36, 439 A.2d 737 (1982), in *Jones v. Floyd,* 276 Pa.Super. 76, 419 A.2d 102 (1980), and in *Gunter v. Gunter,* 240 Pa.Super. 382, 361 A.2d 307 (1976), we reversed and remanded when the record lacked, *inter alia,* disinterested testimony from a social worker, pastor or psychologist about the parties. In this case the only witnesses for Sandra at the first hearing were her landlady, who testified that Sandra's apartment was always clean, and the owner of a day care center who testified about the program at the center where Sandra said she would place Jeremy during the day. The latter person testified that she did not know Sandra and did not know how Sandra would discipline Jeremy. The witnesses for Alverta consisted of family members and a neighbor. These testified to Jeremy's being loved and well cared for. The trial court, after the hearing, ordered an investigation to be made by the Lehigh County Department of Children and Youth Services, with costs to be shared by Alverta and Sandra. A caseworker from Pinebrook Services for Children

and Youth in Allentown did the court-ordered study of Alverta's and Sandra's households on behalf of the Lehigh County agency. (See Brief for Appellant at 5.) She testified at the second hearing. The facts supplied in both her testimony and her report chiefly concerned the living arrangements of each household and the family history of the parties.

Although the case worker's report arguably satisfies the letter of the Beichner and Floyd requirement, it does not satisfy the spirit. It lacks any basic information about the atmosphere of Sandra's household and how Jeremy would adapt to it, and it lacks any information about the relationship between Sandra and Jeremy. Instead it contains conclusions which were shown on cross-examination not to be based on fact. * * *

The record shows that the lower court's opinion and order were dated June 18, 1981. Notice of appeal was filed on July 9, 1981. On June 25, Alverta's counsel submitted a petition to the trial judge for reconsideration of the order because of previously unavailable evidence in the form of the opinion of Jeremy's physician that placing Jeremy with Sandra would be against Jeremy's best interests. This petition was denied on July 6, 1981. On June 29, the physician in question wrote a long and detailed letter to the judge expressing, with reasons, his dismay at the custody order. (This letter was filed on July 31 and is part of the record.) Although we fail to see why counsel did not inform himself as to the possibility of the availability of this testimony before the hearing, we do not condone the trial judge's summary denial of the petition, particularly in view of the information, observations and opinions presented to him by the physician and of his responsibility to assure himself that his decision be in Jeremy's best interest. On remand, this error should be corrected.

Thus, although in this case there was ostensibly some evidence from a disinterested witness, this evidence was inadequate. On remand more information should be made available to the court in the form of testimony, expert or otherwise, with regard to the relationship between Jeremy and the people in the Alverta's household and between Jeremy and those in Sandra's household. See *Commonwealth ex rel. Michael R. v. Robert R. R.*, 293 Pa.Super. 18, 437 A.2d 969 (1981), where we noted, *inter alia,* the absence of any analysis of the effect of the mother's relationship with her new paramour on the children; *Gunter v. Gunter, supra,* where we remarked on the absence of testimony about the mother's relationship with her paramour. * * *

The trial court in placing Jeremy with Sandra [* * * 16] gave no consideration whatsoever in its opinion to the fact that it was uprooting this young child from the home he had lived in since birth. This was error, and should be corrected on remand. See e.g., *Ray v. Ray,* 293 Pa.Super. 216, 438 A.2d 614 (1981), where one of the factors to be included in a hearing after remand was the effect on the children of a change in custody.

In addition to a complete record we also need a comprehensive opinion which shows a searching and thorough analysis of all the testimony, and conscientious and independent reasoning. See, e.g., *Ray v. Ray,* 293 Pa.Super. 216, 438 A.2d 614 (1981) (remanded for additional evidence, including the current living conditions of each party and the effect on the children of a change in custody, and for a comprehensive and analytical opinion addressing the fitness of the parties, the credibility of the witnesses, the home surroundings of the parties and the care and condition of the children). See also *Commonwealth ex rel Michael R. v. Robert R.,* 293 Pa.Super. 18, 437 A.2d 969 (1981); *Hugo v. Hugo,* 288 Pa.Super. 1, 430 A.2d 1183 (1981); *In re Custody of White,* 270 Pa.Super. 165, 411 A.2d 231 (1979); [* * * 17] *Gunter v. Gunter,* 240 Pa.Super. 382, 361 A.2d 307 (1976). * * *

From the trial court's opinion, relying heavily on the caseworker's report and testimony and ignoring almost entirely the rest of the testimony at trial, we are not convinced that the trial court overcame the hurdle of his disapproval of Alverta's household in order to consider where Jeremy would be happier and more loved and better cared for. The judge's view that privacy for those who have boyfriends is a "reward for promiscuity" is not the only inference to be drawn, nor is it based on anything but the caseworker's opinion. See pp. 1254-1255, *supra*. . . .

The judge also concluded that Jeremy's sense of security would be harmed by the number of adults supervising and disciplining him. "For a young child to be secure, he must have only a limited number of authority figures and one distinct set of guidelines for him to master. With so many authorities [as there are in Alverta's household], the child may never be quite sure what is expected of him and his sense of self will be harmed." This conclusion again was inspired by the caseworker's report, and assumes that the various adults in Alverta's household all have different rules and expectations, and that those in Sandra's have the same. The record does not provide a basis for these assumptions. . . .

The order awarding custody of Jeremy S. to Sandra S. is reversed. The case is remanded for further proceedings consistent with this opinion.

LIVING WITH UNCERTAINTY

Finally, there is the issue of confidential records, which are frequently kept as documentation of communications between workers and clients. These documents, under certain circumstances, can be subpoenaed. The increase in reporting requirements has imposed an additional burden on social workers to maintain appropriate records. Dickson (1998) provides a very comprehensive discussion of the topic and supplies extensive references to readings dealing with all aspects of confidentiality and record-keeping.

11

Privileged Communications and Worker-Client Relations

Testimony offered as a lay or expert witness is a significant part of judicial fact finding and is presented within a legal structure designed to accomplish one goal: to search for the truth. No person can refuse to testify when called to do so. A court can subpoena (officially command) reluctant parties and compel them to testify and even require that they bring subpoenaed documents and records. Subpoenaed parties who fail to appear or to testify can be cited for contempt (a willful disobeying of a judge's command or official court order).

There are some situations where facts may be kept out of the truth-finding process, such as when the requested information is privileged or when the law finds that a party has a duty to divulge certain confidential communications.

CREATING THE COMMUNICATIONS PRIVILEGE

Privileged communications may be kept out of legal proceedings. The law requires that they be kept beyond the truth-finding process until public policy requires they be set aside:

> Where persons occupy toward each other certain confidential relations, the law, on the ground of public policy, will not compel, or even allow one of them to violate the confidence reposed in him by the other, by testifying, without the consent of the other, as to communications made to him by such other in the confidence which the

> relation has inspired. . . . This rule of privileged communication is not a rule of substantive law, but a mere rule of evidence, which does not affect the general competency of any witness, but merely renders him incompetent to testify to certain particular matters. . . . [S]tatutory privileges are absolute in the sense that, even in matters involving public justice, a court may not compel disclosure of confidential communications thus privileged. Privilege has been held to be a matter of statute and the general rule is that there is no privilege in the absence of statute. (97 C.J.S. Witnesses Sec. 252).

Privileges are created by the legislature, presumably because they seek to protect communications between parties that share a special relationship (VandeCreek, Knapp, and Herzog, 1988; Lutkis & Curtis, 1985; Sloan and Hall, 1984). For example, husband-wife communications are protected from disclosure. Similarly, communications between doctors and patients, priests and penitents, and lawyers and clients are protected.

Not all relationships are privileged. Legislatures vary among the 50 states, so a protected relationship in one state may not exist in another. For example, communications between news reporters and their sources are protected in Pennsylvania (42 Pa. Cons. Stat. Ann. Sec. 5942), but not necessarily in all states. The social worker-client relationship is another illustration of varied state practices (Dickson, 1998; Savrin, 1985; Starobin, 1984), although some form of protection exists in almost all states.

As a general rule, then, only communications that meet the following four requirements can expect to be protected from disclosure.

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation (Wigmore, 1961).

Legislatures also enact legislation designed to deal with confidentiality in specific settings. For example, 42 U.S.C. § 290 specifies

confidentiality boundaries in federally funded substance abuse treatment programs:

> Records of the identity, diagnosis, prognosis or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted . . . by any department or agency of the United States shall . . . be confidential and be disclosed only for the purpose and circumstances expressly authorized. . . .

Similarly, records in other arenas of practice are governed by setting-specific confidentiality requirements. Among these are mental health agencies, juvenile courts, adoption agencies, schools, child protective service agencies, area agencies on aging, and settings that work with persons with AIDS. Both legislative and case law should be reviewed in each area to gain familiarity with the relevant legal rules.

ASSERTING THE PRIVILEGE

A confidential communication privilege can be thought of as something that is "owned" or "held" by the party asserting that certain information be kept out of court. In social worker-client relationships, the client, as the "holder" of the privilege, makes the assertion. As Woody (1984) notes

> . . . the recipient of services has the privilege, and it can be either waived [more on this in the next section] or invoked. . . . There may be "two types of holders" of a privilege, which is intended to encourage accurate communication of potentially self-damaging information. The primary holder is the one whose immediate interests are harmed if disclosure occurs. (S)he is the communicator. It is (s)he whom the laws seek to encourage. His/her assertion or express waiver of the privilege should thus always prevail over anyone else's wishes, including those of a secondary holder. A secondary holder is one who is allowed to assert the privilege in certain instances where the primary holder is unable to assert the privilege for himself. Stated differently, the human services professional is not at liberty to invoke the privileged communication—that must be done by the client.

The social worker—in the context of a client-worker relationship—merely indicates to the court that he or she is prohibited from divulging certain confidential communications because the client has not given permission for them to be made public. A court may accept this claim, but it nonetheless evaluates each claim to determine whether an exception to the general rule is warranted.

The notion of a "holder" of a privilege implies a one-to-one relationship between client and worker. The privilege can remain intact, provided the communications remain with these two. But, as a general rule, once the communications go beyond them, that is, they are somehow communicated to a third party, the privilege ceases to exist.

A client may certainly waive the privilege, or engage in conduct (behavior, in writing, etc.) that suggests he or she has, in effect, waived it, or be situated in a circumstance where he or she may not have a reasonable expectation that the communications be treated as confidential (e.g., in a group setting, a statement made in presence of parent or agent of the professional in the situation). The following judicial opinion, *Bower v. Weisman* (1987), illustrates the analytical framework for dealing with this type of situation. The facts pertain to attorney-client relationships, but the general principals are applicable to other settings. It is offered primarily to introduce the nature and impact of the so-called "eavesdropper rule."

Following *Bower,* the case of *State v. Andring* (1984) illustrates how the court considers the difference between one-on-one versus group therapy sessions in relation to the claim of medical privilege. *Andring* deals with a defendant who, while out on bond for alleged sexual abuse of his stepdaughter and niece, entered a treatment program built around group therapy sessions. During one session he discussed his sexual conduct, after which the state tried to obtain the records. The defendant argued that the disclosures, albeit in a group setting, were protected nonetheless by the Federal Comprehensive Alcohol Abuse ad Alcoholism Prevention, Treatment, and Rehabilitation Act of 1974. The court was confronted with the dilemma of reconciling this federal Act and a state law, the Minnesota Maltreatment of Minors Reporting Act. The court concluded that the Congress would not have intended to preempt state law under these circumstances, arguing that only a limited abrogation of the medical privilege would be allowed.

BOWER v. WEISMAN, 669 F. SUPP. 602 (1987) UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Sweet, D. J.

Plaintiff Sachiko Bower ("Bower") has moved to compel answers to certain questions and the production of certain documents which have been withheld by defendant Frederick Weisman ("Weisman") on the grounds of attorney client privilege. For the reasons set forth below, the motion is granted in part and denied in part.

Information Withheld

The information withheld by Weisman falls into five distinct categories:

1. Production of testamentary trust instruments and a videotaped codicil of Weisman's will.
2. Communications with Weisman's attorneys Richard Gilbert and Robert Littenberg (now deceased) relating to the subject matter of proposed property agreements between Bower and Weisman drafted by those attorneys in the years 1982 through 1984.
3. Communications with Weisman's attorney Coleman Bean about the proposed property agreements drafted by Gilbert and Littenberg.
4. Communications in 1985 in which Weisman may have directed his business and financial advisor Mitchell Reinschreiber to tell Gilbert's firm that Weisman was under emotional and mental duress from Bower.
5. Communications in 1980 in which Weisman may have told Littenberg to find a way to make $1 million available to Bower without gift tax liability.

Applicable Law

Under Fed.R.Evid. 501, in a civil action where state law determines the rule of decision, the privilege of a witness is determined by state rather than federal law. See *Drimmer v. Appleton*, 628 F. Supp. 1249, 1250 (S.D.N.Y. 1986). The courts of New York, the forum in this action, would apply the privilege law of the place where the evidence will be introduced at trial or the location of the discovery proceeding itself. *Id.* at 1250. The discovery in this case is being taken with respect to both the New York and the related California action. Bower and Weisman have both briefed both New York and California law on the issues, and Weisman has represented that the law in the two fora is identical on these questions, which Bower has not disputed.

Under New York law, "communications encompassed by [the attorney-client privilege] are absolutely privileged unless the privilege is waived by

the client." *Reisch v. J & L Holding Corp.*, 111 Misc.2d 72, 443 N.Y.S.2d at 638, 640 (Sup.Ct. 1981). The privilege, however, "should be narrowly construed in accordance with the Court of Appeals' direction to allow liberal discovery to sharpen issues and avoid undue delay." *Id.*

Waiver of the privilege can be either express or by conduct, including partial disclosure. See 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961). That is, "A client's disclosure to a third party of a communication made during a confidential consultation with his attorney 'eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege.'" *United States v. Aronoff*, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) (quoting *In re Horowitz*, 482 F.2d 72, 81 (2d Cir.), cert. denied, 414 U.S. 867, 38 L. Ed. 2d 86, 94 S. Ct. 64 (1973)). In addition:

> [A] disclosure of, or even merely an assertion about, the communication may effect a waiver of privilege not only as to that communication, but also as to other communications made during the same consultation and communications made at other times about the same subject. *Id.* (emphasis added).

A. The Trust Documents and the Codicil.

Bower has argued that she is entitled to the trust documents because the existence of a trust would tend to establish the pattern of conduct between Bower and Weisman during their relationship. She has demanded any will codicils on the grounds that they may be relevant in describing the nature of her relationship with Weisman.

Weisman has refused to produce them on the grounds that they are covered by the attorney-client privilege. In general, such documents are subject to the privilege: "There are few communications that are more confidential than those relating to the preparation, contents and execution of a will when made within the scope of the attorney-client relationship, not in the presence of a stranger and not made to the attorney with the intention that he communicate its contents to someone else." *Will of Johnson*, 127 Misc.2d 1048, 488 N.Y.S.2d 355, 357 (Sur. Ct. 1985).

Here, however, Weisman has waived the attorney-client privilege with respect to his testamentary instruments by producing copies of attorney Gilbert's handwritten notes which reflect attorney-client communications about Weisman's will: "On FW's death he will will to her [Bower] balance . . . by forgiving note (so she can retire indebtedness). " There is a star in the margin at this point in the notes, next to which is written "Can we keep note out of FW's gross estate[?]" . . .

By producing these privileged communications about the will and the trust agreement, Weisman has waived his privilege with respect to the entire subject matter, and the trust agreements and codicils will be produced.

B. Oral Examination of Weisman on the subject matter of Attorney-Client Documents which have been Produced.

In addition to the Gilbert notes, Weisman has also already produced a series of documents that relate to understandings and draft property settlement agreements between Weisman and Bower being discussed and negotiated in August 1984. The papers include not only drafts, but letters from Weisman's counsel to Mitchell L. Reinschreiber, Weisman's business and financial consultant, outlining the purpose of the agreements and the reasons for various changes. One of the letters observes, for instance, that the documents represent "an attempt to take the first step toward protecting Fred's interest from any claim by Sachiko after his death."

The production of these documents and letters is sufficient waiver of the attorney-client privilege to find that Weisman has waived his privilege with respect to them. He may be orally examined about his communications with Gilbert and Littenberg on the subject of the already produced documents. * * *

According to the evidence adduced by Weisman, Bower came into possession of the letter in the following manner. Weisman and Bower were travelling together and sharing a hotel suite. At the time, the two were still close enough that they were, according to Bower's testimony, "sleeping . . . together." Weisman left for a business meeting, and directed Bower to wait for him in their suite. According to Bower, in the living room of the suite, "his [Weisman's] paper was all over, spread on the table. And then I was trying to cleaning [sic] up in the room and organize, and I saw a paper lying there with my name on it from an attorney to him." Bower made a copy of the letter, upon which she sought to examine Weisman at his deposition.

The issue is whether, under these circumstances, the letter is properly a "confidential" communication. In a change from the common law rule, both the California and the New York code direct that the interception of a confidential communication by an eavesdropper, for instance, does not destroy the privilege. Calif. Evid. Code § 954 comment; N.Y. C.P.L.R. § 4503. According to Judge Weinstein, "This change accords with the realities of modern life. While it may perhaps have been tolerable in Wigmore's day to penalize a client for failing to achieve secrecy, such a position is outmoded in an era of sophisticated eavesdropping devices against which no easily available protection exists." J. Weinstein & M. Berger, 2 Weinstein's Evidence para. 503(b)[02] (footnotes omitted). However, the eavesdropper rule "does not . . . in any way reduce the client's need to take all possible precautions to ensure confidentiality." *Id.* As the commentary to the California Code observes: "The making of the communication under circumstances where others could easily overhear it is evidence that the client did not intend the communication to be confidential." Calif. Evid. Code §

954 comment. Weinstein illustrates this notion thus: "If . . . the communication takes place in a crowded elevator the client should expect that there will be persons listening and he will be taken not to have intended the statements to be in confidence." 2 Weinstein's Evidence para. 503(a)(4)[01], at 503-31.

Under the facts here, by leaving a letter spread out on a table in a room in a suite in which Bower was directed to wait fails to reach the level of taking "all possible precautions to ensure confidentiality." *Id.* at para. 503(b)[02]. While not quite as careless as communicating in an elevator, leaving a document out on a table (as opposed to putting it in a briefcase or in a drawer) in a public room in a suite in which another person is staying is insufficient to demonstrate Weisman's objective interest in its confidentiality. Consequently, Weisman may not assert attorney-client privilege with respect to the letter in question.

D. Discovery of Documents from the File of Richard Gilbert, Esq.

Bower has also asserted, in essence, that the production of the Gilbert and Littenberg draft documents was so great a waiver, that Weisman has waived his right to claim any privilege as to any of his communications with them, and has demanded the production of all of the remaining documents which are a part of Gilbert's file. In addition, she seeks to examine Weisman on a communication with Littenberg in 1980 about a way to make a $1 million gift to her without gift tax liability. Although the disclosure of documents is substantial, and what has been disclosed is explicit that the documents are "an attempt to take the first step toward protecting Fred's interest from any claim by Sachiko after his death," there has not been a waiver as to all the communications. Weisman will, however, disclose any documents from Gilbert's file that bear on the issue of protecting Weisman's interest from claims by Bower after his death. It is so ordered.

STATE v. ANDRING, 342 N.W.2D 128
SUPREME COURT OF MINNESOTA

Opinion by: Wahl

Defendant David Gerald Andring is charged with three counts of criminal sexual conduct in the second degree in violation of Minn. Stat. § 609.343 (1982). The two complaints setting out these counts allege that defendant had sexual contact with his 10-year-old stepdaughter and his 11-year-old niece. A hearing was held to consider a probable cause challenge to the complaints. Probable cause was found. Defendant was released on bond, pending trial, on condition that he have no contact with the alleged victims.

Defendant voluntarily entered the Crisis Intervention Unit at Bethesda Lutheran Medical Center (crisis unit) after the probable cause hearing but before trial. A social history of defendant was taken by a registered nurse; the admitting diagnosis was acute alcoholism and depression. During his stay, defendant received one-on-one counseling with staff physicians and other medical personnel. He also participated in a daily 2-hour group therapy session with other patients in the crisis unit, sessions which were supervised by physicians and registered nurses. Those present at the group therapy sessions were informed that such sessions were confidential and that only the staff would have access to information disclosed in the sessions. Defendant related his experience of sexual conduct with young girls (1) during one-on-one counseling sessions with registered nurses and a medical student, (2) during the taking of his social history with a registered nurse, and (3) during group therapy sessions.

The state, in the course of its investigation of the case, learned of inculpatory disclosures made by defendant at the crisis unit. The state then moved for discovery and disclosure of defendant's medical records and statements made to crisis unit personnel. No request for disclosure from non-staff participants in the group therapy sessions was made. The trial court, after an extensive inquiry into the ramifications of the state's motion, denied the state's motion for discovery of statements made by defendant during the taking of his social history and during one-on-one therapy but granted the motion for discovery of defendant's disclosures made during group therapy sessions.

Considering the issue of confidentiality of group therapy disclosures as both important and doubtful, the trial court certified the following question to this court:

Whether the scope of the physician-patient and/or registered nurse-patient privilege is to be extended to prevent disclosures of communications concerning Defendant's sexual conduct with minor children during group therapy sessions, a crime for which he has already been charged, where such group therapy sessions are an integral and necessary part of Defendant's diagnosis and treatment and consist of physicians and/or registered nurses and other patients, who participate in said group therapy sessions and are an aid to Defendant's diagnosis and treatment as well as their own, i.e., are such patients to be considered as agents of the physicians and/or registered nurses and/or do such patients come within the meaning of "being reasonably necessary for the accomplishment of the purpose of such a communication" so as to render the relationship confidential?

In an order directing additional briefing on the certified question, we specifically asked for further analysis of the effect of federal statutes and regulations and the effect of Minn. Stat. § 626.556 (1982) (reporting of

maltreatment of minors) on this certified question. At our invitation, *amicus curiae* briefs were filed by the Minnesota Hospital Association, the Minnesota Nurses Association, the Minnesota Medical Association, the Minnesota Psychiatric Association, the Minnesota Psychological Association and Minnesota psychologists in private practice.

Defendant argues initially that the disclosures requested by the state, including those made during group therapy sessions, are protected by the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act Amendments of 1974, § 122(a), 42 U.S.C. § 4582 (1976) (alcohol treatment act) and the regulations promulgated thereunder, 42 C.F.R. § 2.1-.67 (1982) (alcohol treatment regulations). The crisis unit, which offers short-term care for alcohol abusers, is covered by the act because it receives federal funding. The act and regulations provide for confidentiality of the records of patient identity, diagnosis, prognosis or treatment in such treatment centers. 42 U.S.C. § 4582(a) (1976); 42 C.F.R. § 2.11(o) (1982); 42 C.F.R. § 211(e) (1982).

The regulations purport to preempt any state law which may authorize or compel disclosure prohibited by the act and regulations. 42 C.F.R. § 2.23 (1982). The Minnesota Maltreatment of Minors Reporting Act (state child abuse act), Minn. Stat. § 626.556, subds. 3 and 8, requires health care personnel to report suspected child abuse and prohibits the use of the physician-patient privilege to exclude evidence regarding the child's injuries in cases involving child abuse. Do the federal alcohol treatment act and regulations preempt the state child abuse act? Concluding that this result could not have been the intent of Congress, we hold that they do not.

Section 626.556 was enacted in 1975 in response to the requirements of the Federal Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101-07 (1976) (federal child abuse act) and the regulations promulgated thereunder, 45 C.F.R. § 1340 (1982) (child abuse regulations). These regulations require that a state, in order to qualify for federal funds for child abuse programs, must enact a statute providing for rather specific methods of reporting child abuse. This statute must be approved by the Secretary of Health and Human Services. 45 C.F.R. § 1340.3-3 and .3-4 (1982). Minnesota enacted the required statute, section 626.556, and receives federal funds for child abuse programs.

The federal child abuse act and the federal alcohol treatment act were enacted in 1974 by the same Congress. Both the child abuse regulations and the alcohol treatment regulations were promulgated by the Secretary of Health and Human Services (then Secretary of Health, Education and Welfare). Section 2.23 of the alcohol treatment regulations prohibits states from enacting statutes to compel disclosure of patients' records made during treatment. Section 1340.3-3 of the child abuse regulations requires

states to enact comprehensive child abuse reporting and investigation statutes as a prerequisite to receiving funds. Neither Congress nor the Secretary could have intended that the confidentiality provisions of the alcohol treatment regulations make the child abuse reporting requirements ineffective.

Congress recognized the strong local interest in preventing child abuse and consequently enacted legislation which, while mandating a minimally acceptable child abuse reporting and investigation system, left as much flexibility on the state level as possible. 45 C.F.R. § 1340.1-1 (1982). Whenever Congress acts in areas traditionally reserved to the states (as are both alcohol treatment and child abuse prevention), it is more difficult to find broad preemption. Tribe, American Constitutional Law, § 6.25, p. 385 (1978). Not only was Congress aware that it was acting within areas traditionally left to the states, it also recognized that the states were the best level at which to deal with child abuse prevention. Given its awareness of the situation, Congress could not have intended to preempt the very state statutes that it had itself mandated. We hold that the confidentiality of patient records provision of the alcohol treatment act does not preclude the use of patient records in child abuse proceedings to the extent required by Minn. Stat. § 626.556.

What then does the state child abuse reporting act require? Does it totally abrogate the medical privilege, as the state argued to the trial court, or does it only permit evidentiary use of the objective information which the act requires to be reported, as defendant contended?

A minor maltreatment report, in order to be sufficient under the act, must "identify the child, the parent, guardian, or other person responsible for his care, the nature and extent of the child's injuries and the name and address of the reporter." Minn. Stat. § 626.556, subd. 7 (1982). The statute also provides that, despite a physician-patient or husband-wife privilege, "no evidence regarding the child's injuries shall be excluded in any proceeding arising out of the alleged neglect or physical or sexual abuse." Minn. Stat. § 626.556, subd. 8 (emphasis added). Certainly, subdivision 8 was meant to allow evidentiary use of the information reported to authorities under the mandate of the reporting act. We do not, however, construe the reporting act so broadly as to require that defendant's record from the crisis unit, which includes confidential statements made to professionals in one-on-one sessions and within group therapy sessions, be handed over, in its entirety, to prosecution authorities.

The legislature may well have decided that the need to discover incidents of child abuse and neglect outweighs the policies behind the medical privilege. Once abuse is discovered, however, the statute should not be construed, nor can the legislature have intended it to be construed, to permit total elimination of this important privilege. The central purpose of the

child abuse reporting statutes is the protection of children, not the punishment of those who mistreat them. Our legislature expressly recognized this fact in stating the policy behind the reporting act: "to protect children whose health and welfare may be jeopardized through physical abuse, neglect or sexual abuse; to strengthen the family and make the home safe for children through improvement of parental and guardian capacity for responsible child care." Minn. Stat. § 626.556, subd. 1. This policy, which recognizes that the child may return to the same home environment in which the maltreatment occurred, is best effectuated by continued encouragement for child abusers to seek rehabilitative treatment.

A narrow construction of section 626.556, subd. 8, which would achieve the purposes of the reporting act without destroying the benefits that result when those who maltreat children seek confidential therapy programs, should be, and hereby is, adopted. We hold that the medical privilege is abrogated only to the extent that it would permit evidentiary use of the information required to be contained in the maltreatment report—the identity of the child, the identity of the parent, guardian, or other person responsible for the child's care, the nature and extent of the child's injuries, and the name and address of the reporter. * * *

We then reach the question certified to this court pursuant to Minn. R. Crim. P. 29.02, subd. 4 as to whether confidential group therapy sessions which are an integral and necessary part of a patient's diagnosis and treatment are to be included within the scope of the medical privilege. The troublesome aspect of this question lies in the fact that third parties, other patients and participants in the therapy, are present at the time the information is disclosed. Does their presence destroy the privilege?

McCormick, in discussing the issue of whether the presence of third parties renders a statement to a physician nonprivileged, argues that the court should analyze the problem in terms of whether the third persons are necessary and customary participants in the consultation or treatment and whether the communications were confidential for the purpose of aiding in diagnosis and treatment. McCormick's Handbook of the Law of Evidence, § 101 (E. Cleary 2d ed. 1972). Under this approach, we conclude that the medical privilege must be construed to encompass statements made in group psychotherapy. The participants in group psychotherapy sessions are not casual third persons who are strangers to the psychiatrist/psychologist/nurse-patient relationship. Rather, every participant has such a relationship with the attending professional, and, in the group therapy setting, the participants actually become part of the diagnostic and therapeutic process for co-participants.

This point is more fully developed in Cross, Privileged Communications Between Participants in Group Psychotherapy, 1970 L. & Soc. Order 191, 196-98, 200-01 (1970): * * *

An interpretation which excluded group therapy from the scope of the psychotherapist-patient privilege would seriously limit the effectiveness of group psychotherapy as a therapeutic device. This would be particularly unfortunate because group therapy is a cost-effective method of psychotherapy in that it allows the therapist to treat a number of patients at the same time. It is also more effective with some patients, who, upon hearing other people reveal their innermost thoughts, are less reluctant to reveal their own. Many commentators agree that the psychotherapist-patient privilege should be extended to include group therapy. See e.g., Smith, Constitutional Privacy in Psychotherapy, 49 Geo. Wash. L. Rev. 1, 51-52 (1980); Comment, The Psychotherapist-Patient Privilege in Texas, 18 Hous. L. Rev. 137, 161-62 (1980); 2 D. Louisell & C. Mueller, Federal Evidence § 216 (1978); Cross, Privileged Communications Between Participants in Group Psychotherapy, 1970 L. & Soc. Order 191. Because the confidentiality of communications made during group therapy is essential in maintaining its effectiveness as a therapeutic tool, we answer the certified question in the affirmative. We hold that the scope of the physician-patient/medical privilege extends to include confidential group psychotherapy sessions where such sessions are an integral and necessary part of a patient's diagnosis and treatment. We reverse the order of the trial court allowing disclosure of defendant's statements made during group therapy.

Certified question answered in the affirmative. Reversed.

EXCEPTIONS TO THE PRIVILEGE

The court determines whether the requirements for privilege communications have been met. If not, the parties must testify. In a few (rare) instances, however, even a valid privilege may be set aside for what the court often refers to as "public policy considerations." The important point here is that the court has the discretion to accept or reject an argument of privilege, even if the claim is statutorily based. The exceptions cited below are best understood as illustrating instances that might lead to setting aside a privilege. No guarantees are to be assumed. Moreover, there may be reasons other than those identified below that might give rise to an exception. (Dickson, 1998)

Wilson (1978), in her classic treatise on the topic, provides below a comprehensive list of exceptions to the worker-client communications privilege. The following summary, paraphrased from

her (classic) text *Confidentiality in Social Work,* is not exhaustive, but it addresses relevant social work issues. An investigation of relevant state law will reveal how these operate and whether there are additional ones.

The client waives privilege. The client is the "holder" of the privilege, so he or she can waive it, and the court will generally make the worker comply.

Client introduces privileged material into litigation. If the client offers the privileged information, he or she effectively waives any claim that such information be treated as privileged.

The social worker is called to testify in a criminal case. This situation would arise where a statute requires a professional to testify if the issue involves a criminal offense.

A client sues his or her counselor.

A client threatens a criminal act. This exception approximates the conditions in the celebrated *Tarasoff* opinion, that is, the client threatens to harm a third party.

A patient threatens suicide. This exception raises many of the same concerns as the above and is equally difficult to predict.

A client threatens to harm his therapist. Again, this exposes many of the same concerns expressed above.

Child abuse or neglect is suspected. The reporting requirements in many abuse or neglect statutes mandate the reporting of suspected violations and provide penalties for failure to report.

A treating professional needs to collect fees for services rendered.

Information is shared in the presence of a third party. Where the third party is *not* a member of the group, as described above in *Minnesota v. Andring.*

Emergency action is needed to save a client's life. This raises issues similar to the suicidal-client exception.

Legal action is needed for protection of a minor.

A presentence investigation report is prepared.

The treating professional is employed in an agency/institution. Typically, professionals in an agency setting will share information to expedite service delivery. Not all of them, however, can invoke the confidential communications privilege, and this can pose problems.

THE DUTY TO WARN: THE LEGACY OF *TARASOFF*

Perhaps the most celebrated exception to the privilege communication rule is the "duty to warn" when the client threatens a criminal act or to harm a third party. On these occasions, the safety of others supersedes confidentiality requirements. A 1976 case, *Tarasoff v. Regents of the University of California,* 17 Cal.3d 425 (1976), is the hallmark case on the topic. In *Tarasoff,* the court held that the welfare of the community overrides worker-client confidentiality. A worker who acts otherwise is likely to be found liable for any injury caused by his or her failure to warn a third party.

In *Tarasoff,* the plaintiffs alleged that the defendants had a duty to warn them that Mr. Prosenjit Poddar had confided to them his intention to kill their daughter, Tatiana Tarasoff. No warning was provided by the defendants. Subsequently, Mr. Poddar realized his intentions and killed Ms. Tarasoff. The plaintiffs argued that they should have been warned of the danger so they could alert their daughter. The court agreed with the plaintiffs and concluded that they had a valid cause of action. In so concluding, it noted that:

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus, it may call for him to warn the intended victim or others likely to appraise the victim of the danger, to notify the policy, or to take whatever other steps are reasonably necessary under the circumstances.

Post-*Tarasoff* developments are even more complicated, and the question becomes: what is the scope of *Tarasoff*? What are the consequences for the parties? These questions do not yield easy answers, especially given the myriad situations that implicate a rule such as the one announced in *Tarasoff.* Notwithstanding, Dickson (1998) in an effective and comprehensive survey of the law pertaining to confidentiality, offers useful guidance:

> In many states that have adopted the *Tarasoff* formulation, the victim must be readily identifiable before the therapist is required to breach

confidentiality. However, some decisions have extended the range of potential victims and correspondingly the duty to protect. The cases appear to fall into three categories.

1. Decisions that essentially follow *Tarasoff,* requiring that the victim be identified or readily identifiable—finding that liability could be imposed in situations where the readily identifiable victim is not warned or protected, and refusing to impose liability where there is no readily identifiable victim;
2. Decisions that extend *Tarasoff* to include victims who, although not specifically identified, could have been identified by the therapist from observations or past records—holding that a therapist should have concluded that the individuals were in danger, and finding liability if confidentiality was not breached and these individuals were not warned or protected; and
3. Decisions that extend *Tarasoff* even further—holding that potential victims include anyone who could be harmed by the acts of the dangerous person, and finding liability could be imposed if there was not a general protection from these acts (pp. 154–155).

The practical implications are apparent: one must know the law in a particular state to discover the existence of (1) a *Tarasoff*-like decision and how that rule is evolving and (2) the legislation that addresses the topic. Both types of rules will have consequences for professional conduct and decision making.

12

Social Work Privilege in Federal Courts: Deconstructing *Jaffe v. Redmond* (1996)

The 1996 United States Supreme Court decision, *Jaffe v. Redmond,* redefined longstanding expectations about confidential communications between professional social workers and their clients. In a 7 to 2 opinion, the Court established a confidential communications privilege in federal court for licensed social workers. The underlying reasoning of this paradigm shift is as significant as the decision itself. To illuminate the meaning and scope of the Court's ruling, the following discussion compares the transcript of the oral argument before the United States Supreme Court and the resulting final decision (majority and dissenting opinions) and articulates several themes that expose what *Jaffe* stands for. In the process, we also witness the machinations of the Supreme Court decision-making process.

The hoopla surrounding its announcement notwithstanding,[1] the fundamental assumption underlying *Jaffe v. Redmond* (1996) is startlingly evident: social workers should keep the confidences of their clients. The assertion is reasonable, perhaps even banal; arguably merely good manners. The several layers of ethical imperatives that inhere in this declaration, however, pose the real conundrum.[2]

To explore the phenomenon that is *Jaffe v. Redmond,* I will work critically with several key themes that surfaced in the oral argument for the case,[3] in search of clues for the ultimate judicial decision (majority and dissenting). The juxtaposition of oral-argument transcript and the language of the Supreme Court's judicial decision

can be instructive, because it provides an occasion to lay bare their assumptions and to evaluate how, if at all, these proclivities find their way into the final pronouncement.

THE FACTS OF *JAFFE v. REDMOND*

Social work professionals often discuss the *Jaffe* decision in general terms, with some awareness of its impact on professional practice, but without any appreciation of the actual facts upon which it rests. The facts are important because they offer insight into the scope of the Court's ruling, and this will have consequences for the value of *Jaffe* as a precedent. Following, then, are the facts the United States Supreme Court deemed relevant, as well as the appellate route by which the case reached the high court:

> After a traumatic incident in which she shot and killed a man, a police officer received extensive counseling from a licensed clinical social worker. The question we address is whether the statements the officer made to her therapist during the counseling sessions are protected from compelled disclosure in a federal civil action brought by the family of the deceased. Stated otherwise, the question is whether it is appropriate for federal courts to recognize a "psychiatric privilege" under Rule 501 of the Federal Rules of Evidence.
>
> Petitioner is the administrator of the estate of Ricky Allen. Respondents are Mary Lu Redmond, a former police officer, and the Village of Hoffman Estates, Illinois, her employer during the time that she served on the police force [footnote omitted]. Petitioner commenced this action against respondents after Richmond shot and killed Allen while on patrol duty.
>
> On June 27, 1991, Redmond was the first officer to respond to a "fight in progress" call at an apartment complex. As she arrived at the scene, two of Allen's sisters ran toward her squad car, waving their arms and shouting that there had been a stabbing in one of the apartments. Redmond testified at trial that she relayed this information to her dispatcher and requested an ambulance. She then exited her car and walked toward the apartment building. Before Redmond reached the building, several men ran out, one waving a pipe. When the men ignored her order to get on the ground, Redmond drew her service revolver. Two other men then burst out of the building, one, Ricky Allen, chasing the other. According to Redmond, Allen was

brandishing a butcher knife and disregarded her repeated commands to drop the weapon. Redmond shot Allen when she believed he was about to stab the man he was chasing. Allen died at the scene. Redmond testified that before other officers arrived to provide support, people came pouring out of the buildings, and threatening confrontation between her and the crowd ensued.

Petitioner filed suit in Federal District Court alleging that Redmond had violated Allen's constitutional rights by using excessive force during the encounter at the apartment complex. The complaint sought damages under Rev. Stat. 1979, 42 U.S.C. 1983 and the Illinois wrongful death statute, Ill. Comp. Stat., ch. 740, 180/1 *et seq.* (1994). At trial, petitioner presented testimony from members of Allen's family that conflicted with Redmond's version of the incident in several important respects. They testified, for example, that Redmond drew her gun before exiting her squad car and that Allen was unarmed when he emerged from the apartment building.

During pretrial discovery petitioner learned that after the shooting Redmond had participated in about 50 counseling sessions with Karen Beyer, a clinical social worker licensed by the State of Illinois and employed at that time by the Village of Hoffman Estates. Petitioner sought access to Beyer's notes concerning the sessions for use in cross-examining Redmond. Respondents vigorously resisted the discovery. They asserted that the contents of the conversations between Beyer and Redmond were protected against involuntary disclosure by a psychotherapist-patient privilege. The district judge rejected this argument. Neither Beyer nor Redmond, however, complied with his order to disclose the contents of Beyer's notes. At depositions and on the witness stand both either refused to answer certain questions or professed an inability to recall details of their conversations.

In his instructions at the end of the trial, the judge advised the jury that the refusal to turn over Beyer's notes had no "legal justification" and that the jury could therefore presume that the contents of the notes would have been unfavorable to respondents [footnote omitted]. The jury awarded petitioner $45,000 on the federal claim and $500,000 on her state-law claim.

The Court of Appeals for the Seventh Circuit reversed and remanded for a new trial. Addressing the issue for the first time, the court concluded that "reason and experience," the touchstones for acceptance of a privilege under Rule 501 of the Federal Rules of Evidence, compelled recognition of a psychotherapist-patient privilege.[4]

[Following this line of reasoning, as well as an assessment of the Court of Appeals' rationale for its decision,] the court concluded

that the trial court has erred by refusing to afford protection to the confidential communications between Redmond and Beyer.

The United States courts of appeals do not uniformly agree that the federal courts should recognize a psychotherapist privilege under Rule 501. [Citations omitted.] Because of the conflict among the courts of appeals and the importance of the question, we granted certiorari. (*Jaffe v. Redmond*, 518 US 1, 3-8)

RECONCILING THE ORAL ARGUMENT IN *JAFFE v. REDMOND* WITH THE COURT'S FINAL DECISION

Making sense of the *Jaffe* decision requires close examination of both the transcript of the oral argument of the case, which illuminates the way the Justices approached a set of facts that did not yield a transparent solution, and the associated judicial decision. The oral argument occurs in front of the Justices, who variously pose questions to the attorneys representing the Petitioner and Respondent, and the attorneys respond, making certain to cast their reply in terms favorable to their argument. One can think of the question and answer session in the oral argument as an exercise in problem-solving. The Justices, through their give-and-take with the attorneys, articulate the limits of the controlling law and search for a way to fashion a rule on which to rest their final decision. The results of this exercise are on display in the text of the judicial decision.

Following the brief note below, we will turn our attention to the four themes in the transcript that form the basis for the comparison of the court's reasoning in the judicial decision.

A Brief Note About the Players and the Supreme Court Oral Argument Process

Jaffe, the Special Administrator for the deceased Allen, is the Petitioner, and is represented in the oral argument by Mr. Kenneth Flaxman. Redmond, the police officer, is the Respondent, and is represented by Mr. Gregory Rogus. Mr. James Feldman, Assistant to the Solicitor General, Department of Justice, appears on behalf of the United States, as *amicus curiae*, supporting the Respondents.

The attorneys for the Petitioner and for the Respondent are each allotted a specified period of time to present their case to the Justices. The court may, as in this case, also allot time for argument from *amicus curiae.* The Justices do not assign themselves any particular amount of time for questioning; each may raise a question if he or she chooses, although not every Justice participates in the actual questioning. Unfortunately, the transcript does not reveal the identity of any of the Justices, although one can sometimes discern the source for a particular question. The process occasionally lapses into a virtual game of "cat and mouse," with the Justices providing hypothetical examples or assuming a "devil's advocate" position with the lawyers, all with the goal of prodding both sides to lay out the breadth and scope of their position.

Key Themes Within the Transcript Vis á Vis the Court's Final Decision

I will address four topics that surface in the oral argument and are consequently discussed in the final decision. To be sure, this list is not exhaustive. Notwithstanding, these areas expose what the court really cares about in the light of the facts before it and the interplay between oral argument debate and the issues the Court deems worthy of attention in the final decision. The topics are as follows:

1. The Court's predisposition toward expansion of the privilege, what the Court perceives as its doctrinal boundaries;
2. The Court's understanding of what Redmond wants, what the Court perceives as the scope of the matter before it and, consequently, what it thinks it can properly offer Redmond;
3. The Court's balancing of apparently competing interests, how the Court defines the relevant countervailing values and the implications for judicial decision making; and
4. The Court's assumptions about the competencies of social workers, what the Court perceives as the implicit justification for its final decision and the implications for the extension and scope of the privilege that Redmond requests.

In the discussion below, I will signal reference to the oral argument transcript text by using *ITALICS;* text from the judicial decision will be set apart through the use of **BOLD TEXT.**

The Court's Predisposition Toward Expansion of the Privilege

The Court has a longstanding aversion to expansion of evidentiary privileges. Attorney Flaxman begins his argument by reminding the court of the scope of Rule 501, a move designed to suggest a presumption of nonexpansion absent the requisite "reason and experience." Flaxman has laid down the challenge, but the court is having none of it. A Justice's question about the Federal Rules of Evidence adoption date has the potential to stop Flaxman in his tracks. The inference is none too subtle: Twenty-three years have passed since the adoption of the Rules, and this reality is significant. While not explicitly stating that the passage of time might supply an opportunity to bring the rule into line with contemporary needs, the Court does seem to open the door to this consideration.

Oral Argument Transcript Text:

MR. FLAXMAN: Even before Rule 501, when this court had full common law power to recognize privileges, the Court was very parsimonious in the privileges that it would recognize. The Court recognized a common law privilege for trade secrets, a common law privilege for informants, a common law privilege for military secrets. The Court rejected a news gatherer's privilege, and an accountant's privilege. Following the adoption of the Federal Rules of Evidence, the Court has continued to be very reluctant to establish new privileges. The Court rejected an editorialist privilege, a State legislator's privilege, an accountant's work product privilege, and an academic peer review privilege.

QUESTION: When were the Federal Rules of Evidence adopted, Mr. Flaxman?

MR. FLAXMAN: 1973, I believe.

QUESTION: Thank you. (Transcript, p. 2)

The Court's line of inquiry focuses on making sense of Rule 501, with the aim of laying out its scope and, more important, any latitude contained therein. Clearly, the Justices can move cautiously in creating a privilege, but equally apparent is the fact that the Court can, if it so chooses, create the privilege provided it protects important interests. The issue surfaces not only in the questioning of Mr. Flaxman above, but in questions put to Mr. Rogus and Mr. Feldman, as illustrated in the transcript text below.

Oral Argument Transcript Text:

MR. ROGUS: *Mr. Chief Justice, and may it please the Court:*
In enacting Rule 501, Congress declared that the Federal courts are to look to reason and experience in determining evidentiary privileges. The intent behind the rule as evidenced both in the legislative history and as acknowledged by this Court in the Trammel decision was not to freeze the law of privilege as it existed but to allow the courts flexibility to develop rules of privilege, [illegible word] again in line with reason and experience. Now, it is true, as Mr. Flaxman has mentioned, that decisions of this Court have counseled caution in terms of the recognition of privilege. However, this Court has also stated that when a privilege promotes sufficiently important interests to outweigh the need for probative evidence, recognition and implementation of a privilege is proper. Now, in this case the Seventh Circuit acted consistent with its authority under Rule 501 and consistent with this Court's directive in Trammel, and determined that reason and experience justified a recognition—(Transcript, p. 25)

MR. ROGUS: *As the Court indicated in Trammel, we certainly, in terms of formulating the Federal rule, can look to State law for guidance, but inasmuch as there was a Federal question involved in this case, and under the language of 501, we can look to State law for guidance, but [illegible words] as State law would not control question.*

QUESTION: *All right. Well, what does 501 tell us? It tells us that the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.* (Transcript, p. 38)

MR. FELDMAN: *Mr. Chief Justice, and may it please the Court. Rule 501 provides that the privilege of a witness shall be governed by the principles—not the specific privileges, but the principles of the common law as interpreted by the courts of the United States in the light of reason and experience. In our view, the most significant feature to look to in determining what reason and experience tells us here is the fact that all 50 States have recognized the privilege in one form or—*

QUESTION: *Well, they recognize something. I mean, your brother was just saying that, I think, that what we should recognize is a presumption of confidentiality subject to exception by weighing. If we go no further than to do that, is it even worth the trouble?*

MR. FELDMAN: *I—*

QUESTION: *Why bother?*

MR. FELDMAN: *Well, I—actually, we—it's not our position that that's what the Court ought to do.*

QUESTION: *Well, what's your position—*

MR. FELDMAN: *Our—*

QUESTION: *—on the value of a—of the kind of presumption that he was arguing for? Is that worth the trouble?*

MR. FELDMAN: *I think it would have some value in, some incremental value in increasing the confidence of patients that their communications would be confidential, but I don't think it would have the kind of value that the States generally have recognized when they've adopted—*

QUESTION: *If that's all we did, should we do it at all?*

MR. FELDMAN: *Yes. I think that that would be something useful to do. It's not our position that that's what the courts ought to do. I think under Rule 501, the Federal courts ought to take a cautious view towards the recognition of privileges. It ought to be sure to recognize the general policy of the Federal rules in favor of the admissibility of evidence, but where a privilege is justified, and especially where the 50 States have so—have at least uniformly recognized the important interests that are at stake in a case like this, I think the Federal courts should do likewise. The fact that all 50 States have recognized it I think shows that they recognize the importance of psychotherapy in the relief of mental and psychological distress for people. I think they've recognized the need for confidentiality, the very strong need for confidentiality.*

MR. FELDMAN: *I wanted to get to the second point, which was that in our brief we suggest that the key question is whether a confidential relationship is formed, and that question, since States are the primary level of government that governs the relationships of psychotherapists and patients, as with most other professions, the question of whether a confidential relationship, a highly confidential, an extraordinarily confidential relationship is formed, I think it's reasonable to look to State law for that.*

QUESTION: *So you look to licensing, plus the extent of privilege, State by State?*

MR. FELDMAN: *I think you'd look to the question of whether the privilege extends to this kind of a relationship. As far as the specific narrow exceptions to the State—*

QUESTION: *Under the rubric of whether or not there's a reasonable justification to believe that the communication is confidential?*

MR. FELDMAN: *Under the rubric of, if there's—the Federal privilege—a necessity for the application of any privilege is that a confidential relationship is formed. In attorney-client privilege, if you're not a member of the bar in a given State—the State gets to determine who's a member of the bar. If you're not a member of the bar, there's no question that you don't have a privilege in Federal court, and similarly with the*

marital privilege and other kinds of privilege. In the same way, it's up to the State to determine whether a confidential relationship has been formed, and that's a prerequisite for the application of the Federal privilege. Once you have that, I think the exceptions in the States follow enough of a pattern that—

QUESTION: *Mr. Feldman, in this case would Illinois have recognized a privilege for what's at issue here?*

MR. FELDMAN: *Yes. The Seventh Circuit so held, in fact.*

QUESTION: *I was unclear on your answer a moment ago. Are you still arguing for a uniform Federal rule on privilege?*

MR. FELDMAN: *Yes.* (Transcript, pp. 41–42, 47–48)

As the decision text below indicates, the Court presents a broad sweep of history regarding the recognition of testimonial privileges. It is evidently searching for an important interest to bolster the contention that a psychotherapist-patient privilege ought to exist. Their language suggests that the Justices want to embrace the idea that psychotherapy relationships turn on trust, and this prerequisite cannot be met without some assurance that a patient's frank disclosure of facts and emotions will be protected. The need for such protection, then, within the context of the psychotherapist-patient relationship is the important private interest to be served. Equally revealing is the Court's willingness to find a vital public interest. The psychotherapist privilege serves the public interest, the Court concludes, "by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."

After indicating that Rule 501 implies the extension of confidentiality privileges on a case-by-case basis, the Court confidently states:

Decision Text:

The common-law principles underlying the recognition of testimonial privileges can be stated simply. For more than three centuries, it has now been recognized as a fundamental maxim that 'the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.' [citations omitted] Exemptions from the

general rule disfavoring testimonial privileges may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.' Guided by these principles, the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence.' Both 'reason and experience' persuade us that it does. (*Jaffe v. Redmond*, 518 US 1, 9)

Having found the requisite "reason and experience" justified by a "public good," the Court reinforces its position by placing the argument for extending the privilege under Rule 501 within the context of achieving the statutory goals of important state legislation.

Decision Text:

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege. [footnote omitted] We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. [citations omitted] Because state legislatures are fully aware of the need to protect the integrity of the fact-finding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. [footnote omitted] Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications. (*Jaffe v. Redmond*, 518 US 1, 12-13)

Justice Scalia respectfully dissents from the majority's views on the matter. He is convinced that the Court has ignored its precedents, which state "a judicial preference for the truth," and instead created a privilege that is "new, vast, and ill-defined." Scalia addresses the Rule 501 controversy by laying out how the majority avoided explicitly dealing with the rule's parameters. By framing the issue before it as one revolving around whether it is appropriate for federal courts to recognize a psychotherapist privilege, Scalia claims that the

majority sidestepped dealing with the nuances of Rule 501. The Court, in his view, did not confront the truth:

Decision Text:

Relegating the question actually posed by this case to an afterthought makes the impossible possible in a number of wonderful ways. For example, it enables the Court to treat the Proposed Federal Rules of Evidence developed in 1972 by the Judicial Conference Advisory Committee as strong support for its holding, whereas they in fact counsel clearly and directly against it. The Committee did indeed recommend a "psychotherapist privilege" of sorts; but more precisely, and more relevantly, it recommended a privilege for psychotherapy conducted by "a person authorized to practice medicine" or "a person licensed or certified as a psychologist," . . . which is to say that it recommended against the privilege at issue here. [italics in original underlined] (*Jaffe v. Redmond,* 518 US 1, 18)

What the Respondent (Redmond) Wants from the Court

Essentially, the Respondent wants to shield her communications with her social worker (a Ms. Karen Byers) from the court; in short, she wants a privilege to withhold information from the court's truth-finding process. The attorney for the Petitioner, Mr. Flaxman, paints a picture of an arguably unreasonable Respondent, someone who would expand the concept of privilege beyond all recognition. Counsel for Respondent, Mr. Rogus, on the other hand, wants nothing unreasonable. The Court even seems willing to draw the line at extending the privilege only to licensed clinical social workers.

Oral Argument Transcript Text:

MR. FLAXMAN: And the Court limited spousal privileges. The respondents in this case ask the Court to fashion a new, broad privilege that would apply to any mental health professional engaged in psychotherapy or counseling. The number of persons engaged in these professions is countless, and the number of conversations that would be protected by this new privilege are countless.

QUESTION: Well, it's not countless if they're licensed and we confine the privilege to those who are licensed. I assume you could go to every State and count how many licenses there are.

MR. FLAXMAN: Well, except the States are each day creating new counselor status positions. I think California, there's now somebody who, after 2 years of an associate's degree, becomes a certified alcoholic counselor.

QUESTION: *But are they licensed, or they have some State certification, or is there some document?*

MR. FLAXMAN: *Yes. They receive a State license, and they're—*

QUESTION: *Well then, I assume they could be counted.*

MR. FLAXMAN: *They can be counted, but it would be—it would be a very large number.*

QUESTION: *I take it, in line with Justice Souter's questioning, that most States license clinical social workers and they pass some sort of an examination.*

MR. ROGUS: *It is our understanding that of the 50 States that recognize privileges, 44 of them do, in fact, extend that privilege to clinical social workers.*

QUESTION: *And do those persons who hold that privilege have a duty of confidentiality under their own professional ethical standards?*

QUESTION: *Okay, so we can draw the line simply by saying the line's got to be drawn somewhere, and we're going to draw it at the point at which the person receiving the communication is licensed by the State. But in principle, apart from that line-drawing methodology, there's no reason to draw it there, is there? I have had law clerks tell me things in confidence, and I presume they felt better after telling me.*

(Laughter.)

QUESTION: *I assume there was some value to it, but you would not recognize the privilege in that case, but there's no reason in principle why you shouldn't, is there?* (Transcript, pp. 3, 32–33)

The decision text below does not explicitly address the issue of licensure. Instead, the matter is handled within the context of the unanimous recognition of the privilege among the 50 states. Moreover, the Court emphasizes that it is of no consequence that the privilege should emerge first from the state legislatures rather than the court. It will gladly take its cue from legislative initiatives, without real concern about limiting the scope of the protection; that is, since all the state legislatures believed the privilege critical, there may be room for diversity of practice with respect to the scope of the protection afforded.

Decision text:

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege. [footnote omitted] . . .

It is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision. . . . That the privilege may have developed faster legislatively than it would have in the courts demonstrates only that the States rapidly recognized the wisdom of the rule as the field of psychotherapy developed. [footnote omitted] Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth, we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. (*Jaffe v. Redmond,* 518 US 1, 12–13)

The dissenting opinion takes a different view of this matter. Justice Scalia, joined in part by the Chief Justice, is skeptical that licensed social workers possess the requisite education and training merely because they have graduated from a Master of Social Work program. He sees the majority decision as opening the floodgates to potential injustice by failing to distinguish between "licensed clinical social workers," whom he believes are the real focus of the majority decision, and "licensed social workers," the group to which the majority wants to extend the privilege. Scalia's fear of the slippery slope is evident:

Decision text:

But the rule announced today . . . is not limited to licensed clinical social workers, but includes all—licensed social workers." . . . And the training for a 'licensed social worker' consists of either (a) 'a degree from a graduate program in social work,' approved by the State, or (b) 'a degree from an undergraduate program' approved by the State, plus '3 years of supervised professional experience.' With due respect, it does not seem to me that any of this training is comparable to the training of the other experts (lawyers) to whom this Court has accorded a privilege, or even of the experts (psychiatrists and psychologists) to whom the Advisory Committee and this Court proposed extension of a privilege in 1972. It seems to me quite irresponsible to extend the so-called 'psychotherapist privilege' to all licensed social workers, nationwide, without exploring these issues. (*Jaffe v. Redmond,* 518 US 1, 29–30)

Moreover, Scalia is worried about the danger of extending the privilege to social workers, in general. The majority Justices, in his view, have granted blanket protection to a profession in a manner

not anticipated by the individual states that created a privilege for social work professionals. Congress, not the Court, is the proper forum for the matter, according to Scalia:

Decision text:

Thus, although the Court is technically correct that the vast majority of States explicitly extend a testimonial privilege to licensed social workers, that uniformity exists only at the most superficial level. No State has adopted the privilege without restriction; the nature of the restrictions varies enormously from jurisdiction to jurisdiction; and 10 State, I reiterate, effectively reject the privilege entirely. It is fair to say that there is scant national consensus even as to the propriety of a social-worker psychotherapist privilege, and none whatever as to its appropriate scope. In other words, the state laws to which the Court appeals for support demonstrate most convincingly that adoption of a social-worker psychotherapist privilege is a job for Congress. (*Jaffe v. Redmond*, 518 US 1, 35)

The "Balancing" of Apparently Competing Interests

Although all states recognize some form of privilege, the real issue in *Jaffe* is the existence of a privilege in federal courts. The transcript text below suggests that the court explored the idea of a balancing test, but subsequently determined that such a test would be inappropriate because the crux of the matter is the presence of a privilege and the consequences thereof. And a balancing test would not amount to much of a privilege at all.

Oral Argument Transcript Text:

QUESTION: *And yet all 50 States recognize some form of privilege in this area.*

MR. FLAXMAN: *Well, some of the—they recognize some form of privilege. Some of those privileges amount to nothing more than the balancing test, the district judge's, the trial judge's discretion that we're seeking in this case, and the States have made different exceptions, and many States—*

QUESTION: *Now, the court below didn't adopt a clear rule of, there is a privilege and that's that. It went on to balance the need for the evidence?*

MR. FLAXMAN: *Well, the court below adopted a very unconventional definition of cumulative. It said, I think, that because there were four witnesses who were family members of the deceased, and one police officer on the other side in the civil rights case, our learning what the police officer told the social worker, our learning that the police officer had had memory problems, would be cumulative.*

QUESTION: *In the area of privileged communications, do the Federal courts typically engage in a balancing in determining whether to apply the privilege or not?*

MR. FLAXMAN: *The one circuit that has recog—the Second Circuit has expressly adopted a balancing test, and describes the privilege that it was adopting as nothing more than a requirement that the district judge balance the privacy interest with the opponent's need to know.*

QUESTION: *Well, that's really not much of a privilege, is it, because if everything is going to be balanced at the time the evidence is sought to be admitted—the time the privilege is supposed to work is when the person either feels free or does not feel free to confide to the professional therapist.* (Transcript, pp. 8–9)

The Justices want to determine if there are equally compelling interests that must somehow "balance out" for justice to be served. The exchange between a Justice and attorney Rogus clearly illustrates the dilemma:

Oral Argument Transcript Text:

QUESTION: *Mr. Rogus, did the court also balance the need for the evidence with its notion of the privilege?*

MR. ROGUS: *The court did engage in balancing.*

QUESTION: *Is that the way that Federal courts normally approach the exercise of a privilege?*

MR. ROGUS: *That is a technique and approach that is used, was mentioned by the Second Circuit in the Doe case. In actuality, what's at work here—*

QUESTION: *Do you defend that as an appropriate approach?*

MR. ROGUS: *The need for balancing is appropriate particularly with respect to determining when an exception to a privilege should come into play.*

QUESTION: *Well, would that be the approach in the case of an attorney-client privilege, for example? You balance the need?*

MR. ROGUS: *Well, I think that has been done in the sense of the recognition of the privilege, for example, in the crime fraud exception. While the attorney-client privilege is recognized, and there are no exceptions that come to mind immediately, the crime fraud exception—*

QUESTION: *But that's not balancing. That's a boundary to the privilege. It prevents the abuse of the privilege. It has nothing to do with the requirements or the exigencies of, and the necessities of producing the information in a particular case, and I'm quite surprised that you support the balancing idea. I should have thought you would say the privilege either should be granted or it shouldn't.*

MR. ROGUS: *Well, the privilege, the underlying privilege should be granted. The balancing that we refer to is the balancing of the important interests that are served by recognition of the privilege against the need for probative—*

QUESTION: *Is that a case-by-case balancing?*

MR. ROGUS: *No, not a case-by-case balancing. It's a balancing at the policy level weighing the interests, the important interests against [*27] the need for probative evidence.*

QUESTION: *Well, is it possible—*

QUESTION: *You mean, it wouldn't matter if it's the only source of this evidence available in this particular case? That wouldn't be taken—I had thought that some of the State courts that do balancing would consider that thing, that this thing couldn't be obtained from any other source, it's crucial to the defense or the plaintiff's—*

MR. ROGUS: *If it were the only evidence available on a material element of the cause of action, that would certainly affect the balancing.*

QUESTION: *Well, I'd consider that case-by-case, myself.*

QUESTION: *If you subscribe to what Justice Scalia just said, the purpose of the privilege is to enable the attorney or the doctor, whoever, to tell a person, I suppose, that what you say here is confidential, and if instead he has to say, what you say here may be confidential, depending on how some future court may balance the need for your testimony, that's much less disposed to get people to confide.*

MR. ROGUS: *Well, in this instance, psychotherapists do need to tell their patients—patients do need to know that their communications are confidential.*

QUESTION: *So you're in effect starting with a presumption of confidentiality subject to case-by-case balancing on the issue of exception?*

MR. ROGUS: *A presumption of confidentiality, yes.*

QUESTION: *Okay.* (Transcript, pp. 26–27)

The Court went out of its way to expressly address the "balancing test" issue in its final decision. The majority's concern is apparent: a privilege diminished by "balancing" affords no worthwhile protection. The blunt language is unmistakable:

Decision text:

We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. [footnote omitted] Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need

for disclosure would eviscerate the effectiveness of the privilege. As we observed in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.' [citation omitted] (*Jaffe v. Redmond*, 518 US 1, 17–18)

The Court's Assumptions About the Competencies of Social Workers, and the Consequences for the Scope of the Privilege

The Court wants to avoid distinguishing between the therapeutic functions of psychiatrists, clinical psychologists, and social workers. The Justices imply that the focus should be the client's expectation of confidentiality, which would shift attention to the presence of the therapeutic mileau and its attendant expectations. This approach is broader than that advanced by the petitioner and argued by Mr. Flaxman, who suggests to the court that different types of professionals employ diverse therapies, and these differences should determine the application of the privilege. However, the Court's broad conceptualization of psychiatric social work is derived from the American Psychiatric Association's conception of the field. Moreover, such a view of social workers reinforces the Court's decision to eschew distinctions between psychiatric or psychoanalytic sessions and clinical counseling, as the court states, "in the more ordinary sense."

Oral Argument Transcript Text:

QUESTION:	*Well, is it different in kind from the kind of evidence that would be privileged under the clinical—under a privilege for clinical psychologists? Does the social worker here learn something different in sort of standard counseling—*
MR. FLAXMAN:	*Well—*
QUESTION:	*—from what a clinical psychologist learns and hears?*
MR. FLAXMAN:	*Well, we don't know, on this record, what kind of therapy was actually being administered. As a general rule, I think a legislature could make a rational distinction between social workers and clinical psychologists and psychiatrists.*
QUESTION:	*Because?*
MR. FLAXMAN:	*Because they'd be different kinds of therapy.*
QUESTION:	*Well, what is the difference?*
MR. FLAXMAN:	*Well, I think as a rational distinction a legislature could say that a*

psychiatrist and a clinical psychologist are going to be more concerned with psychic reality, and a social worker would be more concerned with helping somebody deal with their the problems that they're facing. We—in the record—

QUESTION: *I mean, that sounds very sensible just based on the language we're using. As a matter of positive knowledge, is that correct?*

MR. FLAXMAN: *It's—*

QUESTION: *It sounds like a reasonable answer, but is it true, I guess is what I'm saying.*

(Laughter.)

MR. FLAXMAN: *That's—unlike the number of people who are licensed, that's an answer—that's a question that can't really be ascertained. It can be debated by scholars. It can be debated by interest groups.*

QUESTION: *Well—*

QUESTION: *Well—*

QUESTION: *—can we say that there simply are no clear, standard cases on which we can answer that question? In other words, psychiatric social workers do all sorts of things. Who knows what they're doing, is that sort of what you're saying?*

MR. FLAXMAN: *That's correct. Our approach.*

QUESTION: *Well, Mr. Flaxman—*

QUESTION: *The brief of the American Psychiatric Association I take it, correct me if I'm wrong, supports the Respondent here, and they don't ask that we draw the line that you're suggesting in this colloquy with Justice Souter.*

MR. FLAXMAN: *That brief—*

QUESTION: *Or am I incorrect?*

MR. FLAXMAN: *No, I think you're absolutely correct, but I think they're incorrect in reading the record in this case. The record in this case doesn't support the claim that there was psychoanalytic counseling going on with the social worker and respondent Redmond. The record in this case doesn't reflect anything about the type of therapy—*

QUESTION: *Well, but I infer from their position that formal psychiatric or psychoanalytic sessions are not necessarily different in their objectives than clinical counseling in the more ordinary sense, assuming there's an aura of confidentiality about it, where the confidentiality is expected on both sides.* (Transcript, pp. 4–6)

Ultimately, the Court's reasons for extending the federal privilege to social workers reveals their assumptions about both the functions and clientele of social workers. The court is concerned about providing access to counseling services to those who might otherwise

be left out, due to their inability to afford a psychiatrist or psychologist. They even go out on a limb to some degree, speculating that such access is the reason the majority of states explicitly extended testimonial privileges to social workers.

Decision text:

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. [footnote omitted] Today, social workers provide a significant amount of mental health treatment. [citations omitted] Their clients often include poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals. [footnote omitted] Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers. [footnote, citing states, omitted] (*Jaffe v. Redmond,* 518 US 1, 15–17)

Justice Scalia castigates the majority for its soft-headed analysis of professional social worker functions and competencies. He emphatically disagrees with the majority's contention that the psychotherapist privilege should be extended to social workers, who, after all, do not enjoy such a privilege in five states. The fact that these five legislatures decided against *any form* (italics in original) of privilege, Scalia argues, is revealing and—ought to give one pause." He especially dislikes the majority's indolence, which results in their unwillingness or inability to intelligently lay out satisfactory reasons. Scalia does not disguise his disapproval:

Decision text:

Of course this brief analysis—like the earlier, more extensive, discussion of the general psychotherapist privilege—contains no explanation of why the psychotherapy provided by social workers is a public good of such transcendent importance as to be purchased at the price of occasional injustice. Moreover, it considers *only the respects in which social workers providing therapeutic services are similar* (italics in original) to licensed psychiatrists and psychologists; not a word about the respects in which they are different. (*Jaffe v. Redmond,* 518 US 1, 28)

Scalia continues his rant, attacking what he views as the narrow scope of social work competency, characterizing it as inferior to the knowledge base of licensed psychiatrists or psychologist. Interestingly, he commits the same error that he accuses the majority of making: he offers no reasons, empirical evidence, or references to any relevant literature that would substantiate his viewpoint. Indeed, one might safely conclude that he considers social workers no more professionally trained than one's "rabbi, minister, family or friends." One wonders where he picked up the notion that social work professionals possess only soft or intangible skills:

Decision text:

A licensed psychiatrist or psychologist is an expert in psychotherapy—and that may suffice (though I think it not so clear that this Court should make the judgment) to justify the use of extraordinary means to encourage counseling with him, as opposed to counseling with one's rabbi, minister, family or friends. One must presume that a social worker does not [italics in original] bring this greatly heightened degree of skill to bear, which is alone a reason for not encouraging that consultation as generously. Does a social worker bring to bear at least a significantly heightened degree of skill—more than a minister or rabbi, for example? I have no idea[!!], and neither does the court. . . . It is not clear that the degree in social work requires any [italics in original] training in psychotherapy. The 'clinical professional experience' apparently will impart some such training, but only of the vaguest sort, judging from the Illinois Code's definition of 'clinical social work practice,' . . . (*Jaffe v. Redmond,* 518 US 1, 28)

Scalia saves his most powerful denunciation for the Court's blind spot regarding what to him are blatant distinctions between social worker versus psychologist/psychiatrist functions, in terms of the extent to which either profession performs psychotherapy exclusively. The distinction carries great weight for Scalia, inasmuch as these functions have implications for the scope of any privilege that is granted. The fact that social workers can be psychotherapists and yet carry out related functions such as program administration, poses problems for Scalia. He seems worried that the privilege be extended only in those instances where a social worker can be shown to exclusively perform only psychotherapy. Again, one wonders where he acquired such a narrow conception of the social work role, given that generalist proclivities have been

a perennial—and necessary—mainstay of the profession. These objections are contradictory to contemporary perceptions of the social work functions and roles. Simply put, Scalia seems entirely off the mark. His objections, thus, seem without merit, at best; ignorant, at worst:

Decision text:

Another critical distinction between psychiatrists and psychologists, on the one hand, and social workers, on the other, is that the former professionals, in their consultations with patients, do nothing but psychotherapy. [italics in original] Social workers, on the other hand, interview people for a multitude of reasons. . . . Thus, in applying the 'social worker' variant of the 'psychotherapist' privilege, it will be necessary to determine whether the information provided to the social worker was provided to him in his capacity as a psychotherapist, [italics in original] or in his capacity as an administrator of social welfare, a community organizer, etc. Worse still, if the privilege is to have its desired effect (and is not to mislead the client), it will presumably be necessary for the social caseworker to advise, as the conversation with his welfare client proceeds, which portions are privileged and which are not. (*Jaffe v. Redmond*, 518 US 1, 30)

CONCLUSION

Justice Stevens, and the six justices that joined him in the 7-2 decision, seems to have been informed by the various amici briefs submitted to the court, which, among other things, observed that social workers currently provide a significant amount of mental health treatment and often to a population that is unable to afford the more costly services of psychiatrist or psychologist. That this phenomenon represents a trend that has been unfolding over the past 20 years was also observed by the court, thanks in large part to the amicus brief supplied by the National Association of Social Workers (NASW).

What does the *Jaffe* decision stand for? Ultimately, according to the United States Supreme Court, the case represents the proposition that communications between licensed social workers and their clients are privileged in federal courts. No small task, indeed; and, at some level, the decision is a watershed for a maligned profession.

While it is clear that the privilege exists in federal courts, its application at the state level can vary according to the dictates of state leg-

islatures. This is not a fatal problem, per se—a social worker need only look to his or her specific state requirements on the matter—but it does suggest that the social work profession must advocate universality and uniformity of state laws dealing with confidentiality and privilege. Indeed, as of 1996, according to NASW General Counsel the issue of social worker privilege is addressed unevenly throughout the country.[5]

Ultimately, there are two interrelated notions that lie beneath the Supreme Court's decision in *Jaffe.* Both are seamlessly intertwined, though neither, at first blush, seems to have anything to do with privilege communications. The first, and perhaps most obvious, is the court's assumption about social workers as members of the so-called "helping profession." Both the majority and the dissenting opinions share certain perceptions of the strengths and functions of social work professionals. The source of their insight can be traced, at one level, to the amici briefs, but the leap from these briefs to the court's conclusions draws on some unknown, vague, and inarticulate assumptions about social workers and their role in society. The second notion, more subtle than the first, is the idea that the Supreme Court can hand down a decision that effectively reframes social relationships. That is, the decision arguably betrays the social functions of law, the way law is used for ill or good, in society; and, in the process, the often inexplicit role of the Supreme Court is brought into focus. The result is a view of the Court that gives one pause, inasmuch as a decision such as *Jaffe* allows us to celebrate the use of law to promote important social change and invites us to think hard about the scope of judicial decision making. And, in this context, that we approve of the judicial outcome is the least important issue.

JAFFE v. REDMOND, 518 U.S. 1 (1996)
UNITED STATES SUPREME COURT

Justice Stevens delivered the opinion of the Court.

After a traumatic incident in which she shot and killed a man, a police officer received extensive counseling from a licensed clinical social worker. The question we address is whether statements the officer made to her therapist during the counseling sessions are protected from compelled disclosure in a federal civil action brought by the family of the deceased. Stated otherwise, the question is whether it is appropriate for federal

courts to recognize a "psychotherapist privilege" under Rule 501 of the Federal Rules of Evidence.

[The facts of the case are laid out at the beginning of the chapter and are not repeated here.]

During pretrial discovery petitioner learned that after the shooting Redmond had participated in about 50 counseling sessions with Karen Beyer, a clinical social worker licensed by the State of Illinois and employed at that time by the Village of Hoffman Estates. Petitioner sought access to Beyer's notes concerning the sessions for use in cross-examining Redmond. Respondents vigorously resisted the discovery. They asserted that the contents of the conversations between Beyer and Redmond were protected against involuntary disclosure by a psychotherapist-patient privilege. The district judge rejected this argument. Neither Beyer nor Redmond, however, complied with his order to disclose the contents of Beyer's notes. At depositions and on the witness stand both either refused to answer certain questions or professed an inability to recall details of their conversations.

In his instructions at the end of the trial, the judge advised the jury that the refusal to turn over Beyer's notes had no "legal justification" and that the jury could therefore presume that the contents of the notes would have been unfavorable to respondents. The jury awarded petitioner $45,000 on the federal claim and $500,000 on her state-law claim.

The Court of Appeals for the Seventh Circuit reversed and remanded for a new trial. Addressing the issue for the first time, the court concluded that "reason and experience," the touchstones for acceptance of a privilege under Rule 501 of the Federal Rules of Evidence, compelled recognition of a psychotherapist-patient privilege. 51 F.3d 1346, 1355 (1995). "Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment." *Id.*, at 1355-1356. As to experience, the court observed that all 50 States have adopted some form of the psychotherapist-patient privilege. *Id.*, at 1356. The court attached particular significance to the fact that Illinois law expressly extends such a privilege to social workers like Karen Beyer. *Id.*, at 1357. The court also noted that, with one exception, the federal decisions rejecting the privilege were more than five years old and that the "need and demand for counseling services has skyrocketed during the past several years." *Id.*, at 1355-1356.

The Court of Appeals qualified its recognition of the privilege by stating that it would not apply if "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." *Id.*, at 1357. Balancing those conflicting interests, the court observed, on the one hand, that the evidentiary

need for the contents of the confidential conversations was diminished in this case because there were numerous eyewitnesses to the shooting, and, on the other hand, that Officer Redmond's privacy interests were substantial. *Id.*, at 1358. Based on this assessment, the court concluded that the trial court had erred by refusing to afford protection to the confidential communications between Redmond and Beyer.

The United States courts of appeals do not uniformly agree that the federal courts should recognize a psychotherapist privilege under Rule 501. Compare *In re Doe,* 964 F.2d 1325 (CA2 1992) (recognizing privilege); *In re Zuniga,* 714 F.2d 632 (CA6), cert. denied, 464 U.S. 983, 78 L. Ed. 2d 361, 104 S. Ct. 426 (1983) (same), with *United States v. Burtrum,* 17 F.3d 1299 (CA10), cert. denied, 513 U.S. (1994) (declining to recognize privilege); *In re Grand Jury Proceedings,* 867 F.2d 562 (CA9), cert. denied sub nom. *Doe v. United States,* 493 U.S. 906, 107 L. Ed. 2d 214, 110 S. Ct. 265 (1989) (same); *United States v. Corona,* 849 F.2d 562 (CA11 1988), cert. denied, 489 U.S. 1084, 103 L. Ed. 2d 846, 109 S. Ct. 1542 (1989) (same); *United States v. Meagher,* 531 F.2d 752 (CA5), cert. denied, 429 U.S. 853, 50 L. Ed. 2d 128, 97 S. Ct. 146 (1976) (same). Because of the conflict among the courts of appeals and the importance of the question, we granted certiorari. 516 U.S. (1995). We affirm.

Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience." The authors of the Rule borrowed this phrase from our opinion in *Wolfle v. United States,* 291 U.S. 7, 12, 78 L. Ed. 617, 54 S. Ct. 279 (1934), which in turn referred to the oft-repeated observation that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States,* 290 U.S. 371, 383, 78 L. Ed. 369, 54 S. Ct. 212 (1933). See also *Hawkins v. United States,* 358 U.S. 74, 79, 3 L. Ed. 2d 125, 79 S. Ct. 136 (1958) (changes in privileges may be "dictated by 'reason and experience'"). The Senate Report accompanying the 1975 adoption of the Rules indicates that Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis." S. Rep. No. 93- 1277, p. 13 (1974). The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges." *Trammel v. United States,* 445 U.S. 40, 47, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980); see also *University of Pennsylvania v. EEOC,* 493 U.S. 182, 189, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990).

Guided by these principles, the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh

the need for probative evidence. . . ." 445 U.S. at 51. Both "reason and experience" persuade us that it does.

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." *Trammel,* 445 U.S. at 51. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients

> "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment." Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).

By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests.

Our cases make clear that an asserted privilege must also "serve public ends." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981). Thus, the purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Ibid. And the spousal privilege, as modified in Trammel, is justified because it "furthers the important public interest in marital harmony," 445 U.S. at 53. See also *United States v. Nixon,* 418 U.S. at 705; *Wolfle v. United States,* 291 U.S. at 14. The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional

problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

> In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. See *Trammel,* 445 U.S. at 48-50; *United States v. Gillock,* 445 U.S. 360, 368, n. 8, 63 L. Ed. 2d 454, 100 S. Ct. 1185 (1980). Because state legislatures are fully aware of the need to protect the integrity of the fact-finding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

It is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision. Although common-law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case. In *Funk v. United States,* 290 U.S. 371, 78 L. Ed. 369, 54 S. Ct. 212 (1933), we recognized that it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both "reason" and "experience." *Id.,* at 376–381. That rule is properly respectful of the States and at the same time reflects the fact that once a state legislature has enacted a privilege there is no longer an opportunity for common-law creation of the protection. The history of the psychotherapist privilege illustrates the latter point. In 1972 the members of the Judicial Conference Advisory

Committee noted that the common law "had indicated a disposition to recognize a psychotherapist-patient privilege when legislatures began moving into the field." Proposed Rules, 56 F.R.D. at 242 (citation omitted). The present unanimous acceptance of the privilege shows that the state lawmakers moved quickly. That the privilege may have developed faster legislatively than it would have in the courts demonstrates only that the States rapidly recognized the wisdom of the rule as the field of psychotherapy developed.

The uniform judgment of the States is reinforced by the fact that a psychotherapist privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules. In *United States v. Gillock*, 445 U.S. 360, 367-368, 63 L. Ed. 2d 454, 100 S. Ct. 1185 (1980), our holding that Rule 501 did not include a state legislative privilege relied, in part, on the fact that no such privilege was included in the Advisory Committee's draft. The reasoning in Gillock thus supports the opposite conclusion in this case. In rejecting the proposed draft that had specifically identified each privilege rule and substituting the present more open-ended Rule 501, the Senate Judiciary Committee explicitly stated that its action "should not be understood as disapproving any recognition of a psychiatrist-patient . . . privilege contained in the [proposed] rules." S. Rep. No. 93-1277, at 13. Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth," *Trammel*, 445 U.S. at 50, we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. See, e.g., U.S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994 pp. 85–87, 107–114; Brief for National Association of Social Workers et al. as Amici Curiae 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *Id.*, at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. Perhaps in recognition

of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers. We therefore agree with the Court of Appeals that "drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." 51 F.3d at 1358, n. 19.

We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in Upjohn, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U.S. at 393.

These considerations are all that is necessary for decision of this case. A rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would "govern all conceivable future questions in this area." *Id.*, at 386.

The conversations between Officer Redmond and Karen Beyer and the notes taken during their counseling sessions are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. The judgment of the Court of Appeals is affirmed.

It is so ordered.

[The dissenting opinion is omitted, although portions of it are supplied above.]

This page intentionally left blank

PART III

Socio-Legal Issues in Social Work Practice

This page intentionally left blank

13

Social Worker-Lawyer Partnerships: Historical and Contemporary Perspectives

The rich possibilities of social worker-lawyer partnerships, though long extolled, are best achieved when both groups recognize their interdependent roles. Both practice and the literature depict successful social worker-lawyer collaboration in a variety of settings, and as this chapter argues, there are numerous opportunities and strategies for future cooperation.

HISTORICAL ANTECEDENTS

The progressive-era reforms initiated in response to the nascent industrial revolution offered the first opportunities for social worker-lawyer dialogue. Each profession appreciated the ensuing inhumanity, and each looked to the law to address industrialization's consequences (Davis, 1975). Both exhibited sympathy for social victims, although the discrepancy between the caring and the callous within the legal community was more pronounced (Auerbach, 1976). There were, however, still sufficient reform-minded attorneys to constitute (along with their colleagues in the embryonic social work profession) an effective movement for social change.

Progressive reformers, including such prominent partnerships as the one that existed between Jane Addams and Florence Kelley, sought to arrest the destructive forces that followed industrialization's

wake. They challenged institutional inadequacy in areas such as juvenile delinquency, worker safety, unemployment, and child labor. The feat was accomplished through "protective legislation": enactments that specify broad remedial schemes for the purpose of eradicating similarly far-reaching social evils. Their overall achievements were impressive, and they forced significant inroads into an array of early 20th century public problems (Zimring, 1983).

These early reformers resorted to the legislature (versus the court) because they considered it the best means to accomplish their aims. Legislation's major advantage was its ability to produce a solution applicable to a wide range of people. That is, the remedy would go beyond the two disputing parties that bring their case to a judge; instead, it would encompass a group of people, all of whom are affected by the "evil" the legislation is designed to exorcise. The legislative route also was relatively quicker and did not require the time investment demanded by the deliberative, case-by-case judicial process. Perhaps obviously, this strategy implies a lot about the comparative competency of legal institutions, of their ability to best solve a particular public issue. Essentially, one is not inherently better than another, however, this is not really the issue. Rather, the main point is that the forum selection (court versus legislature) reflects expectations about what it can do best, as perceived by those who would use it to advance their view of social justice.

These early reformers also preferred legislation to judicial action because they saw the court as a mechanism for the enemies of reform to be used by the unscrupulous to thwart social progress. They thus used the court only if they felt compelled to "fight fire with fire," so to speak. Although this attitude would change later, especially against the background of the 1960s, the prevailing wisdom trusted the "benevolence of the state [i.e., legislation] against the procedures of lawyers" (Rothman, 1982).

This reform plan was informed by the collection of large amounts of so-called "social data," which was then used to make a "social diagnosis." Social ills were to be cured by dosages of progressive legislation. "The settlement house experience," according to Rothman (1982), "provided the occasion for collecting an abundance of data. . . . [I]n all, [they] assembled an array of information about the depths of social problems affecting American society that make legislative intervention compelling."

Social workers, happily, were very visible during this reformist period. The most prominent assumed diverse roles and achieved noteworthy results. As one observer notes:

> More than anyone else, Florence Kelly devised the new technology of social reform. [Her] National Consumers League battled against child labor, and against night work and excessive hours for women. The League's investigations turned facts to stir public conscience. Then the League's lawyers drafted bills, and the League's lobbyists sought to push them through legislatures. The League thus initiated the fight for minimum-wage laws and worked out a model statute, soon enacted in thirteen states and D.C. (Schlesinger, 1957, p. 24)

It soon became evident, however, that legislation could not be the sole reform strategy. The early social reformers remained skeptical about courts, yet also realized that legislation could be challenged, and these attacks had to be confronted head-on.

For example, when Florence Kelly's protective legislation for women workers was challenged in the case of *Muller v. State of Oregon* (1908), she enlisted Louis D. Brandeis to argue its constitutionality before the U.S. Supreme Court. Brandeis, a prominent Progressive and distinguished attorney, shared Kelly's belief that the law could be responsive to social needs. His advocacy before the nation's highest court was enormously successful, and ultimately signaled the legality of similar state statutes. Indeed, in his personal reform initiatives, he attempted to bridge the gap between social needs and legal rules, suggesting that the latter had to bend to accommodate the former. This was a relatively singular vision of social justice and legal responsiveness—one that found expression ultimately in the famous "Brandeis brief," an innovation in legal appellate advocacy and the first of several social-data based research tomes he compiled with the very able assistance of Josephine Goldmark of the National Consumers League. The brief, which essentially argued that the facts as well as the law were relevant to any determination of community welfare, and both comprised the social environment within which legal rules were shaped, embodied his belief in what he termed the "living law" (Urofsky, 1981).

But, overall, legislation did predominate, and the initiatives begun during the early part of the 20th century also formed the basis for similar efforts that culminated in the New Deal. The period's reformist

ethos grew steadily and paved the way for subsequent attempts to influence public policy in the 1930s when "through Belle Moskavitz the social work ethos infected Alfred E. Smith; through Frances Perkins and others, Robert F. Wagner; through Eleanor Roosevelt, active in the Women's Trade Union and a friend of Florence Kelly's . . ., Franklin D. Roosevelt" (Schlesinger, 1957, p. 25).

The New Deal prompted different responses from the social workers and lawyers. The social work community welcomed its emphasis on a governmental role in assisting the poor. The legal sector's reaction, however, was mixed. More traditional factions eschewed Roosevelt's program because it threatened their view of the legal order and of the administration of justice. Reform-minded elements, on the other hand, embraced New Deal goals and turned their energies to the poor, particularly to trying to meet this group's legal needs (Auerbach, 1976).

Both professions, however, recognized the emergence of an enlarged governmental role, which seemed to expand steadily through the 1940s and culminated in the political economy of the New Frontier and the Great Society. This latter period coincided with the requisite social climate needed to inaugurate the Office of Economic Opportunity's legal services program (Auerbach, 1977). Its structure departed from the traditional scheme for legal services delivery, according to (Carlin, et al, 1966), in several significant ways.

> [By] the importance placed upon the establishment of neighborhood law offices to increase the accessibility of legal services to the poor; (1) the requirement that the poor be represented on the governing body of the legal services agency; (2) the adoption of a more aggressive stance in promoting the collective as well as individual interests of the poor; and (3) concern for insuring the independence of the legal services organization from those vested interests that might be threatened by more vigorous representation of the poor. (Carlin et al., 1966)

The existence of legal services thus provided myriad opportunities for social workers and lawyers to join together during this period to ameliorate social conditions repugnant to both fields. They collectively attacked the regulatory inconsistencies that obstructed poor people's efforts to obtain or retain welfare benefits, as well as legislative rules that institutionalized the subordinate legal status of

the poor (landlord-tenant law, for example). They also mounted successful judicial challenges, using the "class action" device, on an array of problems affecting the socially disadvantaged (Morales, 1981).

In sum, the initial dialogue between social workers and lawyers emerged in response to industrialization and matured over several decades in conjunction with the government's assumption of an obligation for the poor. Interdisciplinary cooperation, based on legal challenges, which dramatically altered the relation between the poor and the state, institutionalized this obligation. Social services, consequently have become increasingly cast in legal terms, thus blurring the distinction between legal rights and service delivery. The trend is likely to continue and will compel both disciplines to work through their mutual apprehensions about each other. They will have to recognize, as Bradway predicted over 70 years ago, that

> social workers [sh]ould look to the law and government as the form towards which must of their work is constantly drifting . . . [and] lawyers might be expected to anticipate, from social work and others, new additions to the law as soon as social and economic factors warrant. (Bradway, 1929, p. 19)

LEGAL CONTENT IN SOCIAL WORK EDUCATION: PREPARING STUDENTS FOR INTERPROFESSIONAL PRACTICE

By Robert Madden

As social work enters its second century and the world enters a new millennium, many scholars are looking to the future and setting an agenda in response to evolving demands and opportunities. One of the areas of growing importance to social work is the law. If the social work profession is to be in control of its future, it must become committed to the role of exerting influence on the legal system through education, advocacy and proactive legal policy development. For a profession that historically has been a strong voice in hostile environments, we have neglected the opportunities to influence the legal system in order to improve its decisions for clients and practitioners.

The law has been a concern of social work throughout the history of the profession. In 1917 Mary Richmond, writing in *Social Diagnosis,*

acknowledged that the legitimacy of social work was not accepted by the courts. Richmond described a family with three children, all under the age of six who were all unable to walk as a result of severely bowed legs from an unidentified disability or illness. A social worker had worked with the family to encourage them to seek medical care and evaluations but after several months, no progress was made and no medical care was secured. When a referral was made to the courts for neglect, Richmond explained that the judge would need a medical doctor to testify about the neglect because the social worker's report would be insufficient to supply *proof* for the courts (p. 41). There was a clear distinction between the type of *social evidence* a social worker could provide, as opposed to the *scientific evidence* of the medical doctor. The former was considered by the courts to be a lay opinion, the latter, a professional proof of the issue.

In Richmond's era, the reticence on the part of the courts to respecting the knowledge and expertise of social work was not surprising given the infancy of the profession. In recent years, social workers have been involved increasingly in legal actions and social workers are routinely called as expert witnesses in a variety of cases. The price that the profession is paying for increased acceptance in society is the concomitant increase in oversight and regulation of social work practice. Slowly, the legal system has reflected the society's need for better defined standards, regulations and expectations for professional social work practice and has acted to set these standards. This trend is obvious from an examination of the increases in malpractice actions against social workers (Reamer, 1994) and the proliferation of state regulations. But the profession must not be a passive player in the relationship with the legal system. The education and scholarship needed by social workers to influence this developing relationship has lagged behind practice.

> The most willing judge, unaided by other agencies, can do but little more than interpret the law. If social workers and the law had planned and worked in unison twenty years ago, we would have been spared many injustices. Let us resolve here and now to create a closer union between social service and the law. What in effect I am pleading for is a partnership of judge, social worker, religious leader and psychiatrist in striving for justice and human aid (Goldstein, 1933).

Although a great deal was written in the 1920s concerning the relationship between law and social work (Bersoff et al, 1997; Schottland, 1968) Judge Goldstein's comments during the National Conference of Social Work in 1933 make it clear that the struggle to integrate the two professions experienced little progress in the formative years of the

social work profession. In more recent times, many authors have written texts on social work and law (e.g., Albert, 1986; Brieland & Lemmon, 1985; Reamer, 1994; Saltzman & Proch, 1990); and there have been several articles discussing ways to increase the legal content within the social work curriculum (Jankovic & Green, 1981; Kopels & Gustavsson, 1996; Lemmon, 1983; Lynch & Brawley, 1994). All of these authors have, in varying degrees, called for similar actions to Judge Goldstein.

Despite more than 70 years of periodic attention, the reality is that most social workers possess insufficient knowledge and skills to be effective participants in the legal systems that are part of the practice environment in every social work setting. The continuing deficiency may be due to the failure of schools to provide most students with essential legal content for practice (Kopels & Gustavsson, 1996) or the discomfort social workers have with the aggressive style, authority, and obtuse terminology and procedures used by the legal system (Madden, 1998). Regardless of its genesis, the problem can only be solved by a profession-wide commitment to influence the legal system, similar to the movement to influence legislative and political systems in recent years (Haynes & Mickelson, 1991).

Current deficiencies in the legal knowledge and skills of social workers are particularly troubling in light of the recent trend toward increased interdisciplinary work among the professions (Meares, 1998). Several cultural and social factors have supported the emphasis on interprofessional collaboration. Postmodernism has raised important questions concerning the legitimacy and truths of individual disciplines and thus, indirectly has encouraged interdisciplinary discourse (Leonard, 1996). Another impetus for this trend comes from the social/political efforts to increase partnerships between professions as evidenced by the recent policy of private and public grant programs to favor proposals in which interdisciplinary collaboration is featured. Moving beyond traditional boundaries, policy makers now seem to value coordinated problem-solving by different professions, each with unique knowledge, skills, perspectives and personal attributes (Andrews, 1990). Building bridges between professions enables individuals from different disciplines to reinforce and support each other in meeting client needs.*

LEGAL SCHOLARSHIP

One of the ways the social work profession can increase its influence on the legal system is by making a broader commitment to undertake

scholarship in the law. Historically, the response of social workers to the law can be characterized as more reactive than proactive. When a court decision is rendered that purports to set a standard for practice, the profession scrambles to determine how it can comply. Instead we must examine each decision with regard to its impact on clients and the practice of social work. We must become more skilled in using the appeals process to fight decisions that are not therapeutic (Wexler, 1990) or that place social workers in untenable situations. We must continue to develop practice standards that detail the expected behavior of clinicians and the standard of care for working various populations or diagnoses so that the courts will be less able to create a standard out of a particular case. And when a rogue lawsuit survives the legal challenges establishing an unacceptable standard for social work, we must turn to the legislature to develop a proper statutory standard.

Social work education can play an important role in preparing the profession for a more active role in the legal system. First, there is a need for all students to be knowledgeable of legal issues that confront clients. Understanding such processes as divorce/custody, civil commitment, adoption, and the like enables a social worker to be effective in educating clients and advocating for their rights (Lynch & Brawley, 1994). Since involvement in these situations is inevitable for most practitioners, early comfort with the legal processes and a clear understanding of the various roles and functions of legal professionals can increase the confidence and competence of social workers. Additionally, students must be knowledgeable concerning the various laws that regulate practice such as licensure (Biggerstaff, 1995), privileged communication (Kagle, 1990), and mandatory abuse-reporting statutes.

Knowledge of the law is also important to further the social justice goals of the social work profession. Clients who are poor or oppressed may not wield the power or resources to sustain a change in social policy. However, in the legal system, an individual case can result in a fundamental change in social policy (Smith, 1991). Courts can only make policy based on cases brought before them. Low-income and dependent populations may need help accessing legal representation and constructing evidence to support legal policy changes (Moore, 1995). Similarly, social workers need to advocate for victim services programs for those who have been affected by a crime such as domestic violence, rape, and homicides. Finally, knowledge of the legal system enables social workers to work for changes in law, criminal procedures, and related issues such as gun control and

capital punishment; and to engage in prevention strategies such as improving security and working on community education initiatives (Masters, 1991).

But mere understanding of the law is not sufficient. Social workers need to recognize inadequacies and injustices within the legal system and work to change them. For example, in many states, there is a family court to hear divorce/custody cases and a juvenile court to hear abuse/neglect cases. Often there is little communication or cooperation between the systems. An allegation of abuse that arises in the context of a family court action for custody may never be fully investigated as a child abuse case. In this situation, the needs of the child are often subjugated to the rights of the parents. Social workers, on the front lines of these cases, are in a unique position to advocate for legal policy changes and to collaborate with legal professionals to improve the system.

When courts rule on cases directly involving social work practice, the cases most often involve a malpractice complaint or an administrative hearing against a practitioner. Judges and juries may be swayed by sympathetic plaintiffs who are suffering. Social workers need to be knowledgeable concerning the expectations of professional conduct and the standards of care that have been developed. Courts determine the standard of care by evaluating how the average practitioner of the profession would have acted under similar circumstances (Simon, 1997). The professional social work organizations and leadership must assume responsibility for educating legal systems concerning the standards for social work practice.

Most of the basic expectations of social workers are common sense, ordinary professional behavior: Among the basic expectations, social workers should maintain client confidentiality; keep adequate records; conduct thorough assessments; obtain informed consent; refrain from dual relationships with clients, specifically including any sexual relationships with current or former clients; remain honest in all matters related to the business of practice; recognize when unqualified to treat a client and refer the case to a specialist; and receive clinical supervision/consultation and professional development on a regular basis (Madden, 1998). The essential obligation of all social workers is to act so as not to cause harm, and the most effective way to mitigate the risk is for social workers to participate in ongoing education and consultation (Kurzman, 1995).

A more specific standard of care applies to practice in specialized areas. NASW and other professional organizations have developed practice standards for working with psychiatric problems such as

schizophrenia and depression and clinical situations such as suicide assessment, assessment of dangerousness, and recovered memory work (See, e.g., NASW Practice update: Evaluation and treatment of adults with the possibility of recovered memories of childhood sexual abuse, 1996). Students and practitioners should understand these standards and assume responsibility for practicing within these parameters to protect clients from harm. Research needs to continue to develop these standards, and expert witnesses should be held to the highest ethical standards as they articulate the positions of the profession.

LEGAL CONTENT IN SOCIAL WORK EDUCATION

There are some schools that offer specific courses on social work and law, most of which are offered as electives (Kopels & Gustavsson, 1996). In many schools, the inclusion of legal content occurs at the interest of individual faculty who use legal material in their syllabi for practice or policy courses. Kopels and Gustavsson (1996) stress the need for an infusion approach to provide students with legal content in Masters of Social Work (MSW) programs. They focus on six legal precepts that form the basis of legal knowledge necessary for well-informed practitioners: The definition and regulation of practice; client issues; privacy; advocacy; conflict/liability; and precedents (p.119). Instead of relying on students to take an elective or to expect that programs will be able to add a requirement of a course on law, the authors argue for an infusion approach that integrates material across the MSW curriculum so all students will enter the workforce with a basic competency in legal issues. It has been argued that in some areas of the social work curriculum, infusion may result in a lack of depth and a tendency to descriptive rather than analytical materials (Reisch, 1998). Integrating content on the law across the curriculum may yield an "infusion illusion": Leaving students with a little knowledge, but without true competencies.

In the existing literature on the law and social work, there is an underlying assumption that social workers make better advocates when they have a greater knowledge of the law (Braye & Preston-Shoot, 1994). As a result, social workers should be educated to respond to the demands of the legal system. There is a missed opportunity in the modesty of this goal, however. Law must be viewed by the social work profession as an institution that is part of the democratic process of governing. It is a system that can be manipulated to meet the needs of clients. The goals of social work must include a

role as an active participant in legal practice related to the interests of clients and the profession. To do this, social work educators need to prepare students with the knowledge and skills needed to practice effectively and to realize the opportunities to exert influence over the development and application of the law. The outline below illustrates some key competencies for social work practitioners.

KNOWLEDGE OF THE LAW

Sociology of the law

Understanding the role of law in society as an institution that structures relationships and enforces expectations

Understanding basic legal reasoning

Regulation of the profession

Knowledge of Standards and Criteria for who can practice; licensing/certification systems

Constraints and mandates for practice: reporting laws, fraud, etc.

How legal systems operate

Knowledge of Constitution, contract, tort, and criminal law enables social workers to play a meaningful role for clients in the legal process

Practice-specific legal information such as: commitment proceedings, child welfare, divorce/custody, immigration, etc.

Using legal advocacy to advance civil rights and social justice

Understanding the processes for helping individuals, groups and communities

Understanding the various standards of care that are developed by the courts

Awareness of guidelines for practitioners in one's field of practice

Understanding the role and orientation of judges, lawyers, and juries in particular legal proceedings

Knowledge of the process for filing amicus briefs and supporting appellate review of decisions that are not consistent with the interests of clients or clinicians

Keeping abreast of the developing practice standards using research and professionally developed protocols

SKILLS IN LEGAL PRACTICE

The areas of legal content listed above describe the knowledge needed by social workers to interact effectively with the legal system. The knowledge must be accentuated by the attainment of skills that will enable social workers to engage in productive partnerships and to be more effective in their advocacy and legal policy development. These skills include:

Assessing legal rights and accessing resources to provide clients with legal remedies to injustice

Researching the law including effective locating and analysis of legal materials

Influencing social policy through involvement in litigation and administrative law

Lobbying: Developing and supporting legislation to amend legal rights or to advance statutory protections for clients and clinicians

Testifying as both a witness and as an expert including skills in conducting court-ordered evaluations, writing court reports

Educating lawyers and judges concerning such issues as family dynamics, child development, and mental health

Forming partnerships with lawyers and legal advocacy organizations to advance the goals of social work and underrepresented populations

Compiling social science and anecdotal case evidence to support legal policy changes

Drawing from Lemmon's integrative framework for legal content in social work education that recommends moving from the general to specific (1983), and Kopel and Gustavsson's list of legal precepts necessary for social workers (1996), and the specific knowledge and skill competencies listed above, Table 13.1 lists the content areas in law and social work and suggests points at which information could be integrated into the curriculum.

It is essential that social work educators find ways to teach legal information to students at all levels of the educational continuum. At the undergraduate level, most Bachelor of Social Work (BSW) programs face intense pressures to limit required courses as a consequence of CSWE (Council on Social Work Education) requirements, liberal arts requirements, and the needs of transfer students. Most schools could use the infusion approach by requiring students to read cases, locate statutes, and analyze ethical issues such as confidentiality and self-determination in civil commitment. The use of legal cases and materials is not only valuable in exploring the content areas in policy and practice and familiarizing students with legal reasoning, it has a useful place in an undergraduate program because it contributes to a liberal education by addressing ethical principles, personal values, interdisciplinary aspects, and in general promotes critical thinking (Bersoff et al., 1997).

Kopels and Gustavsson's survey (1996) highlighted the pressures on the graduate social work curriculum and the difficulty with adding new requirements. Despite this reality, MSW programs should develop a combination of an elective/required stand-alone course in the law and an infusion approach to teaching legal content across the curriculum. This approach allows all students to receive a general treatment of the material but still provides for a more in-depth treatment of legal studies that can only occur in a dedicated course. It is essential that the profession graduate master's level clinicians who have a basic competency in the law. In clinical practice courses, legal cases can be used to help students assess practice standards and learn basic standards of care. In macro-practice courses, students can examine the courts as a locus for change efforts and learn skills in supporting legal processes. In policy courses, students can analyze class action lawsuits to assess various policy options and their implications.

Table 13.2 lists some leading cases and some less well-known cases that are particularly illustrative of legal reasoning. These cases may be used by social work educators as part of an assignment or classroom experience. This is only an illustrative list that could be expanded to meet the needs of a particular curriculum. Legal/social work scholars must continue to develop resources such as a source book of model statutes, regulations, and cases that can be used across the social work curriculum. For example, Pollack's (1997) recent text summarizes significant cases and provides explanation as to the legal reasoning used to reach each decision. While useful as an introductory text, social workers must learn to read the actual language of cases to appreciate the full complexity of legal reasoning. It is advised that the

TABLE 13.1 Content Areas Relevant to Educational Level

Content in law and social work	Generalist: BSW MSW first year	Specialist level: MSW second year	Continuing ed./ professional devl.
Sociology of the law	* Law as an institution * Role of law in society * Structural inequality & discrimination	* Specific legal knowledge * Constitutional principles * Criminal law * Civil law	
Definition & regulation of the profession	* Licensing * Mandatory reporting laws * Sanctions	* Analysis of ethical conflicts * Violations of licensing laws	* Participation in NASW committees on inquiry
Operation of legal systems	* Responding to subpoenas * Understanding various courts & functions * Basic research skills for finding legal materials	* Inclusion of population-specific information for family, juvenile and probate court * Administrative law process	* Testifying as a witness or expert * Educating legal professionals * Mediation & arbitration training * Strategies for interdisciplinary collaboration
Civil rights & social justice	* Knowledge of how courts can be instrument of social policy change * Precedent-setting cases * Class action lawsuits	* Skills to assess, refer cases in support of individual rights or justice for oppressed groups	* Develop research, testimony, funding, and resources to support advocacy court actions
Standards of care for practice	* Confidentiality and its limits * Record keeping * Boundary violations/sexual impropriety * Informed consent	* Malpractice: incorrect diagnosis/ treatments * Privilege * Accepted treatment approaches * Assessment of dangerousness	* Clinical research * Analysis of legal decisions * Advanced treatment approaches for various disorders

TABLE 13.2 Example Cases for Integrating Legal Content

Practice situation	Issue	Case/citation
Confidentiality	Legal elements of . . . Limits of . . .	*Macdonald v. Clinger,* 446 N.Y.S. 2d 801 (Sup. Ct. 1982)
Privileged communications	Legal recognition	*Jaffe v. Redmond,* 116 S. Ct. 1923 (1996)
Child welfare	Worker liability	*Deshaney v Winnebago Cty. Dept. Social Services* 489 U.S. 189 (1989)
Homicidal client	Duty to warn Duty to protect	*Tarasoff v. Regents of University of California,* 17 Cal.3d 425 (1976)
Suicidal client	Prevention of harm Standard of care	*Bellah v. Greenson,* 146 Cal. Rptr. 535 (Cal. App. 1978)
Group/family therapy	Confidentiality in . . .	*State v. Andring,* 342 N.W. 2d 128 (Minn. 1984)
Clinical assessment	Professional judgment rule	*Lorenzo v. Fuerst,* 1997 Ohio App. LEXIS 12 (1997)
Managed care	Liability for denial of coverage	*Wickline v. California,* 183 Cal. App. 1175 (1986)
Civil commitment	Competency and informed consent	*Zinermon v. Burch,* 494 U.S. 113 (1990)

cases be reviewed by faculty and edited to eliminate excessive citations and the technical or nonsubstantive procedural sections of each case.

Social work programs on both the baccalaureate and master's level should actively recruit field practice sites that expose students to the law. Affiliation with a law school legal clinic or children's law center can provide opportunities to pair lawyers and social workers

on cases. Placements in a court system, with the public defender's office, or in a legal aid society can also be excellent opportunities for students with an interest in the law. An added benefit from these placements is to generate discussion and awareness on the part of other students as field practice experiences are discussed in seminars and classes.

With more states moving toward a mandatory professional development program as a requirement for maintaining licensure or certification (currently 36 states have a continuing education (CEU) requirement (American Association of State Social Work Boards, 1996)), social work educators and state chapters of the National Association of Social Workers have an expanding opportunity to offer continuing education that addresses legal issues for practice. This training can be more specific to handling case situations, reducing malpractice risks, drafting and supporting legislation, and direct involvement in legal proceedings. Another area for professional development is the training and nurturing of a group of experts on various subjects related to social work. Referrals to these experts, including clinicians, academicians, and researchers, could be made when a social work program or professional organization is contacted by a lawyer or the legislature. Further, this group of experts could participate in the drafting of amicus briefs in legal cases under appeal that are of interest to the social work profession or to a client group.

CONCLUSION

The field of social work has been hesitant to become actively involved in the workings of the legal system. As a result, the legal system has exerted enormous influence on the practice of social work. If social workers are to make the relationship with the law more reciprocal, they must be as vigilant about exerting influence on the law and the legal systems, as they have been in addressing legislative initiatives. When social workers understand the purpose of a proceeding, the roles of the attorneys and other legal professionals and prepare themselves for the specific roles they are assigned, there are opportunities to educate and thus influence the legal system (Madden, 1998).

The first step in legal involvement is for each member of the profession to have an adequate level of knowledge and skill to support competent involvement in the legal system. It is the responsibility of social work education to prepare students for practice in this regard. It will take a commitment on the part of each school to see to it that the legal knowledge and skills of graduates prepare students to engage in a developing, reciprocal relationship with the law.

14

Second Parent Adoption and Same-Sex Relationships

Lani Golay and Raymond Albert

Imagine that a lesbian couple living together in a long-term, committed relationship decides to have a child. One of the women conceives a child through artificial insemination. The other woman participates in the birthing process, is present at the birth, and is equally involved in supporting and raising the child. Under this law, the nonbiological coparent is essentially a "legal stranger" to her own child (*Adoption of Tammy*, 1993). The child may not be eligible for the coparent's disability, health, or life insurance benefits. If the biological mother dies or becomes incapacitated, the child would not automatically remain with the coparent. If the mothers were to split up, nothing guarantees that the coparent, without an adoptive or biological link to the child, could obtain custody, visitation rights, or have child support obligations (Peltz, 1995).

For these reasons lesbian parents have sought second-parent adoptions in which the nonbiological coparent adopts the child without severing the biological parent's own parental rights and responsibilities (Zuckerman, 1986). Second-parent adoption is the only legal step that guarantees protection of the relationship between nonlegal parents and their children. Without this protection, only the partner who is a biological parent or who legally adopts the child is considered to be the legal parent (Women's Law Project, 1995). The discussion below depicts the legal context for addressing this phenomenon through a survey of the associated case law.

THE PROBLEM

Legal recognition for nonlegal parents is important for several reasons: It is the only way to guarantee that a nonlegal parent's parental rights would be protected in a custody dispute; it has implications for inheritance laws, health, disability and social security benefits; and finally, legal recognition of both parents is important for the child, who benefits from having two parents to provide moral and financial support. It is also important for the child to have two parents who have the power to make those decisions that require a parental consent (Women's Law Project, p. 23).

Petitions for second-parent adoption have posed unique challenges for state courts. Adoption is governed solely by statute, and no state statute explicitly permits second-parent adoption. On the other hand, courts face a tough issue because the child is already with the lesbian couple. To deny the adoption petition would only harm the interests of the child, which is contrary to the general purpose and express provisions of most adoption statutes (Ill. Ann. Stat., Ch. 40, para. 1525). The only way a same-sex couple can obtain a second-parent adoption, therefore, is to convince a court to construe the existing adoption statute liberally to serve the best interests of the child. Since 1993, courts have employed these justifications for liberal statutory interpretation to permit second parent adoptions in two general ways: "pseudo-stepparent adoption" and joint adoption.

THE CONTOURS OF THE CASE LAW

In the case of the *Adoption of Tammy* (1993), two unmarried women, Helen and Susan, filed a joint petition to adopt Tammy. Helen and Susan had lived together in a committed relationship for more than 10 years. For several years prior to the birth of Tammy, Helen and Susan planned to have a child, biologically related to both of them, whom they would jointly parent. Susan successfully conceived a child through artificial insemination by Helen's biological cousin. Since her birth, Tammy has lived with and been raised and supported by Helen and Susan. Both women jointly and equally participate in parenting Tammy, and both have a strong financial commitment

to her. Over a dozen witnesses testified to the fact that Helen and Susan participate equally in raising Tammy and that she relates to both women as her parents. The Department of Social Services conducted a home study in connection with the adoption petition that recommended the adoption, and an attorney appointed to represent Tammy's interests also strongly recommended that the joint petition be granted.

In *Adoption of Tammy,* the Supreme Judicial Court of Massachusetts held that the "adoption statute did not preclude same-sex cohabitants from jointly adopting child, and adoption was in the best interests of child." This finding overcame the two statutory constraints that were posed in the case. The statutory scheme provided only that married couples can jointly adopt and that "a person" may adopt (Mass. Ann. Laws, ch. 210, 1994). The court reasoned that according to a "legislatively mandated rule of statutory construction . . . words importing the singular number may extend and be applied to several persons as long as such a construction is consistent with legislative intent." Thus, where the purpose of the statute was to promote the best interests of the child, the court would permit a plural construction of "person," *Adoption of Tammy,* at 318–319.

The second barrier in this case was the mandatory termination requirement (Mass. Ann. Laws, ch. 210, 1994). The Massachusetts court reasoned that the legislature "obviously did not intend that a natural parent's legal relationship to its child be terminated when the natural parent is party to the adoption petition." Likewise, in the case *M.M.D & B.H.M.* (1995), the court stated that to apply the termination provision in the context of joint adoptions would yield "absurd results" and impose "obvious injustice," at odds with the purpose of the statute.

In a similar case, *Adoptions of B.L.V.B and E.L.V.S.* (1993), the Vermont Supreme Court ruled that its adoption statutes permit coparent adoptions without the biological parent relinquishing her parental rights. The court ruled that although the legislature did not draft the law with same sex adoptions in mind, the intent of the adoption statutes as a whole was to "clarify and protect the legal rights of the adopted person at the time the adoption is complete, not to proscribe adoptions by certain combinations of individuals." (Crockin, 1994). Agreeing with the findings in the *Adoption of Tammy,* the court also concluded that the law could not have meant

to terminate the parental rights of the biological parent who intended to continue to raise her child. It appears that Vermont and Massachusetts are currently the only two state high courts to have ruled on coparent adoptions while several lower courts in other jurisdictions have reached similar results.

A New York Surrogate's Court found that requiring the natural parent to terminate her parental rights would have the "absurd outcome" of negating the women's efforts to create a legal family. The "only rational result," the court concluded, "was to continue the natural parent's rights" (Crockin, p.5). Similarly, the District of Columbia Superior Court, Family Division, noted that terminating a natural parent's rights after an adoption was merely directory, rather than mandatory, and that a termination in the case at hand would not be in the best interest of the two children (*In re Petition of J.W.C. for Adoption of Minor,* 1994).

In some cases, courts have gone slightly further, reasoning that second-parent adoptions were analogous to stepparent adoptions. This allows the coparent to adopt without triggering the termination provision that would sever the natural parent's rights.

The courts either have held that the termination provision is directory rather than mandatory (*Adoption of Caitlin and Emily,* 1994), or have declined to apply the provision altogether (*Adoption of Evan,* 1992). Courts have reasoned that when legislatures enacted the termination provisions, they had not imagined that an unmarried, let alone same-sex, partner of the natural parent would petition for adoption (*In re Jacob,* 1992).

In *Adoption of Evan* (1992), the court explained, "the petitioners are a committed, time-tested life partnership. For Evan, they are a marital relationship at its nurturing supportive best and they seek second parent adoption for the same reasons of stability and recognition as any couple might (*Adoption of Evan,* 1992)." Similarly, in a case in New Jersey, the judge asserted, "I am convinced that in this adoption, J.M.G. should be treated as a stepparent as a matter of common sense, and in order to protect the child's interests in maintaining her relationship with her biological mother (*Adoption of a Child,* 1993)." In both of these cases, the courts essentially ruled that for the purposes of the statute, the lesbian parents were married.

The court, in *Adoption of B.L.V.B. and E.L.V.B.* (1993), expanded the stepparent exception to include the petitioning partner to

"further the purposes of the statute as was originally intended by allowing the children of . . . [non-marital] unions the benefits and security of a legal relationship with their de facto second parents" and granted the petition without terminating the biological mother's rights (*B.L.V.B.*, at 1276). Various forms of the stepparent exception were granted in courts in Connecticut, New York, New Jersey, and Illinois (*In re Baby Z,* 1996; *In re Adoption of a Child* by J. M. G., 1995; *In re Petition of K.M. and O.M.,* 1995).

While there have been several cases in support of second-parent adoptions there have also been cases in opposition to second-parent adoptions. The Montgomery County Orphans' Court rejected an adoption application by a mother's lesbian partner in *In re Adoption of B.L.P.* (1995). The court determined that the Adoption Act only permits a second parent to be added instead of substituted when the current parent and the proposed adoptive parent are legally married. This proves to be quite an obstacle to gay and lesbian couples considering they are not allowed to get married. The court also determined that this case failed to meet a statutory requirement—parental consent to relinquish all parental rights to the child. The court did not explicitly state the reason it was using strict construction of the statute but cited two earlier cases holding that the Adoption Act should be strictly construed as a statute enacted in derogation of the common law (*Hufford Adoption Case,* 1966; *Gunther Adoption Case,* 1965).

Another case that seems to get significant attention by the Courts is *In re Adoption of E.M.A.* (1979). E.M.A.'s natural parents were never married and terminated their brief liaison prior to her birth. The natural father placed E.M.A. in the physical custody of Petitioner. Petitioner and the natural father entered into an agreement relating to custody and maintenance and support of the child. Petitioner is a single woman who does not intend to marry the father of E.M.A. She wished to adopt the child to legalize the mother-daughter relationship that already existed in fact (*In re Adoption of E. M. A.,* 1979). The Court denied the appellant's petition for adoption holding that the consent given by the natural father did not meet the statutory requirements for adoption by a nonspouse (*In re Adoption of E.M.A.* at 10).

Unlike the situation in *B.L.P.,* which involved a lesbian couple who had been in a committed relationship for 14 years and intended to

continue living together as a family, the parents of E.M.A. did not have the functional equivalent of a spousal relationship. The case involved two unmarried persons who lived separately. They were heterosexual and were therefore not barred from marrying like the couple in *B.L.P.* While the facts in the case of *B.L.P.* seem clearly distinguishable from *E.M.A.* the court still relied on the 1979 Pennsylvania Superior Court holding in *In re Adoption of E.M.A.* This case did not deal with second parent adoptions. Its reasoning, in fact, supports the granting of second-parent adoptions (Glennon, 1998).

Courts in Colorado and Wisconsin have, like the Montgomery County Orphans' Court, rejected second-parent adoptions by same-sex partners (*In re Adoption of T. K. J.*, 1966; *In re Angel Lee M.*, 1994). As in *B.L.P.*, these courts ignored the purposes of the statutory provisions when determining their meaning and whether the refusal to permit the adoptions was in the child's best interests. In these cases, the courts interpreted statutory language that stated that children were available for adoption only when parental rights had been terminated. The courts further held that, under their statutory language, second-parent adoptions were permitted only when the parent is married to the prospective adoptive parent (*In re Angel Lee M.*, 1994).

In *In re Adoption Petition of Bruce M.* (1994), a D.C. Superior Court flatly rejected a joint-adoption petition filed by same-sex partners where the child was previously adopted by one of the partners. The court said it could find no legislative intent to permit more than one unmarried person to adopt a child and rejected the view that the stepparent exception could be extended on the facts presented (Crockin, p.5).

CONCLUSION

It is clear from the cases presented that second-parent adoption is a tenuous right. Courts from different states are divided on this issue, as are courts from the same state. Petitioners of second-parent adoption face the difficult task of convincing the court to rule on the best interests of the child while applying a liberal approach to the statutory constraints contained in the Adoption Act. Second-parent adoption is the only legal step that guarantees protection of the relationship between nonlegal parents and their children.

ADOPTION OF TAMMY, 416 MASS. 205 SUPREME JUDICIAL COURT OF MASSACHUSETTS

Greaney, J.

In this case, two unmarried women, Susan and Helen, filed a joint petition in the Probate and Family Court Department under G. L. c. 210, § 1 (1992 ed.) to adopt as their child Tammy, a minor, who is Susan's biological daughter. Following an evidentiary hearing, a judge of the Probate and Family Court entered a memorandum of decision containing findings of fact and conclusions of law. Based on her finding that Helen and Susan "are each functioning, separately and together, as the custodial and psychological parents of [Tammy]," and that "it is the best interest of said [Tammy] that she be adopted by both," the judge entered a decree allowing the adoption. Simultaneously, the judge reserved and reported to the Appeals Court the evidence and all questions of law, in an effort to "secure [the] decree from any attack in the future on jurisdictional grounds." See G. L. c. 215, § 13 (1992 ed.). See also *Adoption of Thomas*, 408 Mass. 446 (1990). We transferred the case to this court on our own motion. We conclude that the adoption was properly allowed under G. L. c. 210.

We summarize the relevant facts as found by the judge. Helen and Susan have lived together in a committed relationship, which they consider to be permanent, for more than ten years. In June, 1983, they jointly purchased a house in Cambridge. Both women are physicians specializing in surgery. At the time the petition was filed, Helen maintained a private practice in general surgery at Mount Auburn Hospital and Susan, a nationally recognized expert in the field of breast cancer, was director of the Faulkner Breast Center and a surgical oncologist at the Dana Farber Cancer Institute. Both women also held positions on the faculty of Harvard Medical School.

For several years prior to the birth of Tammy, Helen and Susan planned to have a child, biologically related to both of them, whom they would jointly parent. Helen first attempted to conceive a child through artificial insemination by Susan's brother. When those efforts failed, Susan successfully conceived a child through artificial insemination by Helen's biological cousin, Francis. The women attended childbirth classes together and Helen was present when Susan gave birth to Tammy on April 30, 1988. Although Tammy's birth certificate reflects Francis as her biological father, she was given a hyphenated surname using Susan and Helen's last names.

Since her birth, Tammy has lived with, and been raised and supported by, Helen and Susan. Tammy views both women as her parents, calling Helen "mama" and Susan "mommy." Tammy has strong emotional and

psychological bonds with both Helen and Susan. Together, Helen and Susan have provided Tammy with a comfortable home, and have created a warm and stable environment which is supportive of Tammy's growth and over-all well being. Both women jointly and equally participate in parenting Tammy, and both have a strong financial commitment to her. During the work week, Helen usually has lunch at home with Tammy, and on weekends both women spend time together with Tammy at special events or running errands. When Helen and Susan are working, Tammy is cared for by a nanny. The three vacation together at least ten days every three to four months, frequently spending time with Helen's and Susan's respective extended families in California and Mexico. Francis does not participate in parenting Tammy and does not support her. His intention was to assist Helen and Susan in having a child, and he does not intend to be involved with Tammy, except as a distant relative. Francis signed an adoption surrender and supports the joint adoption by both women.

Helen and Susan, recognizing that the laws of the Commonwealth do not permit them to enter into a legally cognizable marriage, believe that the best interests of Tammy require legal recognition of her identical emotional relationship to both women. Susan expressed her understanding that it may not be in her own long-term interest to permit Helen to adopt Tammy because, in the event that Helen and Susan separate, Helen would have equal rights to primary custody. Susan indicated, however, that she has no reservation about allowing Helen to adopt. Apart from the emotional security and current practical ramifications which legal recognition of the reality of her parental relationships will provide Tammy, Susan indicated that the adoption is important for Tammy in terms of potential inheritance from Helen. Helen and her living issue are the beneficiaries of three irrevocable family trusts. Unless Tammy is adopted, Helen's share of the trusts may pass to others. Although Susan and Helen have established a substantial trust fund for Tammy, it is comparatively small in relation to Tammy's potential inheritance under Helen's family trusts.

Over a dozen witnesses, including mental health professionals, teachers, colleagues, neighbors, blood relatives and a priest and nun, testified to the fact that Helen and Susan participate equally in raising Tammy, that Tammy relates to both women as her parents, and that the three form a healthy, happy, and stable family unit. Educators familiar with Tammy testified that she is an extremely well-adjusted, bright, creative, cheerful child who interacts well with other children and adults. A priest and nun from the parties' church testified that Helen and Susan are active parishioners, that they routinely take Tammy to church and church-related activities, and that they attend to the spiritual and moral development of Tammy in an exemplary fashion. Teachers from Tammy's school testified that Helen

and Susan both actively participate as volunteers in the school community and communicate frequently with school officials. Neighbors testified that they would have no hesitation in leaving their own children in the care of Helen or Susan. Susan's father, brother, and maternal aunt, and Helen's cousin testified in favor of the joint adoption. Members of both women's extended families attested to the fact that they consider Helen and Susan to be equal parents of Tammy. Both families unreservedly endorsed the adoption petition.

The Department of Social Services (department) conducted a home study in connection with the adoption petition which recommended the adoption, concluding that "the petitioners and their home are suitable for the proper rearing of this child." Tammy's pediatrician reported to the department that Tammy receives regular pediatric care and that she "could not have more excellent parents than Helen and Susan." A court-appointed guardian ad litem, Dr. Steven Nickman, assistant clinical professor of psychiatry at Harvard Medical School, conducted a clinical assessment of Tammy and her family with a view toward determining whether or not it would be in Tammy's best interests to be adopted by Helen and Susan. Dr. Nickman considered the ramifications of the fact that Tammy will be brought up in a "non-standard" family. As part of his report, he reviewed and referenced literature on child psychiatry and child psychology which supports the conclusion that children raised by lesbian parents develop normally. In sum, he stated that "the fact that this parent-child constellation came into being as a result of thoughtful planning and a strong desire on the part of these women to be parents to a child and to give that child the love, the wisdom and the knowledge that they possess . . . [needs to be taken into account]. . . . The maturity of these women, their status in the community, and their seriousness of purpose stands in contrast to the caretaking environments of a vast number of children who are born to heterosexual parents but who are variously abused, neglected and otherwise deprived of security and happiness." Dr. Nickman concluded that "there is every reason for [Helen] to become a legal parent to Tammy just as [Susan] is," and he recommended that the court so order. An attorney appointed to represent Tammy's interests also strongly recommended that the joint petition be granted.

Despite the overwhelming support for the joint adoption and the judge's conclusion that joint adoption is clearly in Tammy's best interests, the question remains whether there is anything in the law of the Commonwealth that would prevent this adoption. The law of adoption is purely statutory, *Davis v. McGraw,* 206 Mass. 294, 297(1910), and the governing statute, G. L. c. 210 (1992 ed.), is to be strictly followed in all its essential particulars. *Purinton v. Jamrock,* 195 Mass. 187, 197 (1907). To the extent

that any ambiguity or vagueness exists in the statute, judicial construction should enhance, rather than defeat, its purpose. *Hayon v. Coca Cola Bottling Co. of New England,* 375 Mass. 644, 648-649 (1978). *Vallin v. Bondesson,* 346 Mass. 748, 753 (1964). The primary purpose of the adoption statute, particularly with regard to children under the age of fourteen, is undoubtedly the advancement of the best interests of the subject child. See G. L. c. 210, §§ 3, 4A, 5A, 5B, 6. See also *Adoption of a Minor,* 343 Mass. 292, 294-296 (1961); *Krakow v. Department of Pub. Welfare,* 326 Mass. 452, 455-456 (1950); *Erickson v. Raspperry,* 320 Mass. 333, 335 (1946); *Merrill v. Berlin,* 316 Mass. 87, 89 (1944); *Bottoms v. Carlz,* 310 Mass. 29 (1941); *Purinton v. Jamrock, supra* at 199 ("It is the right of the children that is protected by this statute. . . . The first and paramount duty is to consult the welfare of the child"). With these considerations in mind, we examine the statute to determine whether adoption in the circumstances of this case is permitted.

1. The initial question is whether the Probate Court judge had jurisdiction under G. L. c. 210 to enter a judgment on a joint petition for adoption brought by two unmarried cohabitants in the petitioners' circumstances. We answer this question in the affirmative.

There is nothing on the face of the statute which precludes the joint adoption of a child by two unmarried cohabitants such as the petitioners. Chapter 210, § 1, provides that "[a] person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself, unless such other person is his or her wife or husband, or brother, sister, uncle or aunt, of the whole or half blood." Other than requiring that a spouse join in the petition, if the petitioner is married and the spouse is competent to join therein, the statute does not expressly prohibit or require joinder by any person. Although the singular "a person" is used, it is a legislatively mandated rule of statutory construction that "words importing the singular number may extend and be applied to several persons" unless the resulting construction is "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute." G. L. c. 4, § 6 (1992 ed.). In the context of adoption, where the legislative intent to promote the best interests of the child is evidenced throughout the governing statute, and the adoption of a child by two unmarried individuals accomplishes that goal, construing the term "person" as "persons" clearly enhances, rather than defeats, the purpose of the statute. Furthermore, it is apparent from the first sentence of G. L. c. 210, § 1, that the Legislature considered and defined those combinations of persons which would lead to adoptions in violation of public policy. Clearly absent is any prohibition of adoption by two unmarried individuals like the petitioners. * * *

While the Legislature may not have envisioned adoption by same-sex partners, there is no indication that it attempted to define all possible categories of persons leading to adoptions in the best interests of children. Rather than limit the potential categories of persons entitled to adopt (other than those described in the first sentence of § 1), the Legislature used general language to define who may adopt and who may be adopted. The Probate Court has thus been granted jurisdiction to consider a variety of adoption petitions. See *Adoption of Thomas,* 408 Mass. 446, 449-451 (1990). The limitations on adoption that do exist derive from the written consent requirements contained in § 2, from specific conditions set forth in § 2A, which must be satisfied prior to the adoption of a child under the age of fourteen, and from several statutory and judicial directives which essentially restrict adoptions to those which have been found by a judge to be in the best interests of the subject child. See *Merrill v. Berlin,* supra at 89 (in dismissing elderly grandparents' petition to adopt following death of children's parents, and retaining custody with three female testamentary guardians, the court stated "the only question [to be considered] is whether the best interests of the children would be served by their adoption").

In this case all requirements in §§ 2 and 2A are met, and there is no question that the judge's findings demonstrate that the directives set forth in §§ 5B and 6, and in case law, have been satisfied. Adoption will not result in any tangible change in Tammy's daily life; it will, however, serve to provide her with a significant legal relationship which may be important in her future. At the most practical level, adoption will entitle Tammy to inherit from Helen's family trusts and from Helen and her family under the law of intestate succession (G. L. c. 210, § 6), to receive support from Helen, who will be legally obligated to provide such support (G. L. c. 209C, § 9; G. L. c. 273, § 1 [1992 ed.]), to be eligible for coverage under Helen's health insurance policies, and to be eligible for social security benefits in the event of Helen's disability or death (42 U.S.C. § 402 [d] [1988]).

Of equal, if not greater significance, adoption will enable Tammy to preserve her unique filial ties to Helen in the event that Helen and Susan separate, or Susan predeceases Helen. As the case law and commentary on the subject illustrate, when the functional parents of children born in circumstances similar to Tammy separate or one dies, the children often remain in legal limbo for years while their future is disputed in the courts. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. J.L. 459, 508-522 (1990); Comment, Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother, 19 U.C. Davis L. Rev. 729, 741-745 (1986). In some cases, children

have been denied the affection of a functional parent who has been with them since birth, even when it is apparent that this outcome is contrary to the children's best interests. Adoption serves to establish legal rights and responsibilities so that, in the event that problems arise in the future, issues of custody and visitation may be promptly resolved by reference to the best interests of the child within the recognized framework of the law. See G. L. c. 209C, § 10. See also Adoption of B.L.V.B. (Vt. Sup. Ct. 92-321). There is no jurisdictional bar in the statute to the judge's consideration of this joint petition. The conclusion that the adoption is in the best interests of Tammy is also well warranted.

2. The judge also posed the question whether, pursuant to G. L. c. 210, § 6 (1992 ed.), Susan's legal relationship to Tammy must be terminated if Tammy is adopted. Section 6 provides that, on entry of an adoption decree, "all rights, duties and other legal consequences of the natural relation of child and parent shall . . . except as regards marriage, incest or cohabitation, terminate between the child so adopted and his natural parents and kindred." Although G. L. c. 210, § 2, clearly permits a child's natural parent to be an adoptive parent, § 6 does not contain any express exceptions to its termination provision. The Legislature obviously did not intend that a natural parent's legal relationship to its child be terminated when the natural parent is a party to the adoption petition.

Section 6 clearly is directed to the more usual circumstances of adoption, where the child is adopted by persons who are not the child's natural parents (either because the natural parents have elected to relinquish the child for adoption or their parental rights have been involuntarily terminated). The purpose of the termination provision is to protect the security of the child's newly created family unit by eliminating involvement with the child's natural parents. Although it is not uncommon for a natural parent to join in the adoption petition of a spouse who is not the child's natural parent, see, e.g., *Adoption of a Minor (No. 1)*, 367 Mass. 907 (1975); *Erickson v. Raspperry*, 320 Mass. 333 (1946), the statute has never been construed to require the termination of the natural parent's legal relationship to the child in these circumstances. Nor has § 6 been construed to apply when the natural mother petitions alone to adopt her child born out of wedlock. See Curran, petitioner, 314 Mass. 91 (1943). Reading the adoption statute as a whole, we conclude that the termination provision contained in § 6 was intended to apply only when the natural parents (or parent) are not parties to the adoption petition.

3. We conclude that the Probate Court has jurisdiction to enter a decree on a joint adoption petition brought by the two petitioners when the judge has found that joint adoption is in the subject child's best interests. We further conclude that, when a natural parent is a party to a joint adoption

petition, that parent's legal relationship to the child does not terminate on entry of the adoption decree.

4. So much of the decree as allows the adoption of Tammy by both petitioners is affirmed. So much of the decree as provides in the alternative for the adoption of Tammy by Helen and the retention of rights of custody and visitation by Susan is vacated. So ordered.

15

The Civil Rights Remedy of the Violence Against Women Act of 1994

Cynthia Bangs and Raymond Albert

As a nation, America has only recently recognized violence against women as a social problem. Although violence against women is grossly underreported, studies indicate that only 34 percent of rapes by a stranger and only 13 percent of rapes by acquaintances are reported. In addition, someone with whom they had a relationship commits more than half of all murders of women (statement of Rep. Schroeder, 139 Cong. Rec. H10359, 1993). It is statistics like these that led to the call for a legislative response, and in 1994 Congress enacted the Violence Against Women Act (hereinafter VAWA).

Since enactment VAWA has faced some constitutional challenges in the courts. The discussion below addresses the Civil Rights Remedy of the VAWA and the commerce clause challenges it has encountered. Following an overview of the Violence Against Women Act of 1994, we will examine the Civil Rights Remedy of the Act and the surrounding commerce clause controversy, along with two associated landmark judicial decisions.

AN OVERVIEW OF THE VIOLENCE AGAINST WOMEN ACT OF 1994

In 1994, Congress and the President responded to the epidemic of violence against women in America. On September 13, 1994 President

Clinton signed into law the Violent Crime Control & Law Enforcement Act of 1994. As a whole, the VAWA, Title IV of the Violent Crime Control & Law Enforcement Act, received widespread support in Congress despite being overshadowed by more controversial sections of the crime bill. VAWA was actually the least controversial part of the crime bill, which barely passed because of partisan congressional battles and intense Democratic Party infighting.

Senator Joseph Biden, a Delaware Democrat, introduced the VAWA because he thought it would raise the nation's awareness of violence against women and make the issue a national priority (*Women and Violence,* 1990). The Senator expressed VAWA's three goals by saying, "the first goal is to try to make the streets a little bit safer for women; the second goal is to make their homes a little bit safer; and, the third goal is to protect their civil rights" (*Women and Violence,* 1990). The Act became the first comprehensive federal law to address domestic violence, sexual assault, and other crimes against women.

MAJOR PROVISIONS OF VAWA

The following is a description of VAWA's major provisions (with the exception of the Civil Rights Provision, which is in the following section):

- **New Federal Crimes**—If a domestic abuser crosses state lines to abuse or harass a victim, or forces her to cross state lines, and does abuse her according to the Act, this is considered a federal crime (The Violent Crime Control and Law Enforcement Act, 1994, 18 U.S.C. 2261). If an abuser crosses state lines to abuse in violation of a protection order and then violates it or if an abuser causes the victim to flee across state lines as a result of a violation of a protection order the act makes this a federal crime (The Violent Crime Control and Law Enforcement Act, 1994, 18 U.S.C. 2262).
- **National Domestic Violence Hotline**—VAWA provided a grant to a private, nonprofit agency for "the operation of a national toll-free hotline" for no more than 5 years (The Violent Crime Control and Law Enforcement Act, 1994, 42 U.S.C. 10241).

- **Battered Immigrant Women Provisions**—Due to VAWA the battered immigrant spouse or child of a United States citizen may file a petition on his or her own without the abuser's assistance. A battered spouse or a child of a citizen may also request to suspend deportation under VAWA (The Violent Crime Control and Law Enforcement Act, 1994, 8 U.S.C. 1154).
- **Sexual Assaults**—As a result of VAWA's enactment a rape victim can demand an alleged assailant be tested for HIV. Under VAWA the victim and assailant would receive the results (The Violent Crime Control and Law Enforcement Act, 1994, 42 U.S.C. 14011). VAWA also amends the existing Federal Rules of Evidence for Sexual Assault cases, whereby the victim's past sexual conduct in not admissible in court. Certain exceptions are noted in the Act (The Violent Crime Control and Law Enforcement Act, 1994, 25 U.S.C. 2074). Additionally, VAWA provides for mandatory restitution for sex crimes (The Violent Crime Control and Law Enforcement Act, 1994, 18 U.S.C. 2248).

THE CIVIL RIGHTS REMEDY OF VAWA

According to VAWA's Civil Rights Remedy for Gender-Motivated Violence, victims of violent crimes based on their gender can sue for damages or court-ordered injunctions. The crime must be a felony and the victim must be able to demonstrate that the crime was motivated by gender. The victim could then bring a claim in federal or state courts (The Violent Crime Control and Law Enforcement Act, 1994, 42 U.S.C. 13701). This provision has been VAWA's main criticism from the beginning.

Prior to VAWA there was a law for civil rights remedies for crimes motivated by gender in the workplace, but not for crimes of violence motivated by gender that took place in public or in one's home (H.R. Rep. No. 103-711, 1994). Members of the House who advocated for this provision felt that a violent crime against women because she is woman is a form of discrimination based on gender, and the civil rights remedy is an attempt to address this problem.

The challenge to this section lies in the controversy over the application of the Constitution's Commerce Clause. Congress

believes the civil rights provision is grounded in the fifth section of the Fourteenth Amendment and in section eight of Article I of the Constitution. The Commerce Clause connection is plainly stated by Congress in its purpose, which is "to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender" (The Violent Crime Control and Law Enforcement Act, 1994, 42 U.S.C. 40302). Congress' intent regarding the connection between interstate commerce and gender-motivated violence against women is unambiguous.

The Commerce Clause gives the Federal government the power to "regulate commerce with foreign nations, and among the several states, and with Indian Tribes." This power to regulate interstate commerce supersedes the power of the states (Renshaw, 1998). In a 1994 House Report, Congress made the connection to the Commerce Clause by stating that crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products (H.R. Rep. No. 103-711, 1994).

Despite Congress' intentions, opponents of the Civil Rights Remedy spoke out even before it was enacted. The Judicial Conference of the United States felt that the Federal Courts would be overwhelmed with "domestic disputes" that should be handled by the states. They also worried that women could vengefully misuse it in divorce cases (Reske, 1991). Other critics were convinced that it threatened Constitutional principles of state and federal balance of power and that it would increase the number of cases in the federal courts (Carty, 1997).

Consequently, the controversy over the Civil Rights Remedy was laid in the groundwork of the Act, and this reality set the stage for Constitutional challenges in the courts: *Doe v. Doe* (1996) and *Brzonkala v. Virginia Polytechnic Institute & State University* (1997).

Doe v. Doe (1996)

The first challenge to VAWA came with *Doe v. Doe* (1996). The plaintiff, a Connecticut woman, used the civil rights remedy to sue her exhusband for gender-motivated violence. She claimed her husband physically and mentally abused her for 17 years (Renshaw, 1998). Her exhusband's attorneys argued that the civil rights remedy of VAWA is unconstitutional because there is no "rational basis" for the act under the Commerce Clause.

The District Court disagreed and found the civil rights provision constitutional. The court used a "rational basis" test to conclude that gender motivated violence was rationally related to interstate commerce and cited as evidence many of Congress' findings on the relationship between the two. The court further agreed that a woman's fear of gender-motivated violence is a result of limited participation in both the work and marketplace; such violence significantly impacts interstate commerce enough to fall under the commerce clause. In response to the defendant's claim that the Act attempts to "federalize" domestic violence cases, the court recognized the states as having primary authority in domestic violence cases, but held that VAWA is "complementary" to the states and does not infringe on states rights (Renshaw, 1998).

Although *Doe* upheld the constitutionality of VAWA's civil remedy, critics disagree with the ruling because, they argue, the activity regulated is noneconomic in nature and the judge should have gone beyond a "rational basis" test. Their dissatisfaction may be not only with the outcome but with the analytical framework used by the court. Despite this victory for the Act, the next challenge, *Brzonkala v. Virginia Polytechnic* (1997), almost ended in a much different result.

Brzonkala v. Virginia Polytechnic (1997)

In *Brzonkala v. Virginia Polytechnic Institute & State University,* a female student who had allegedly been gang raped used VAWA's civil remedy by suing the university and three male students. The victim alleged that she was raped by two of the school's football players and that the school had knowledge of and permitted a sexually hostile environment.

The district judge followed an earlier Supreme Court decision as a guide in deciding against the plaintiff's claim. The judge relied heavily on the Supreme Court's ruling in *U.S. v. Lopez* (1995), which struck down the Gun Free School Zone Act of 1990 because possession of a firearm in a school zone is a noneconomic activity with no connection to interstate commerce. The Court in *Lopez* felt that it was a noneconomic activity and therefore could not be controlled by the commerce clause.

One month after the *Doe* decision the District Court that heard *Brzonkala,* using a *Lopez* analysis, found the civil rights remedy provision in VAWA unconstitutional. The District Court found that the provision did not have the authority of either the commerce clause or the enforcement clause (Schick, 1997). In fact, the District Court *Brzonkala* ruling was in complete opposition to the *Doe* decision. The *Brzonkala* court found that there was no rational basis to support the connection between interstate commerce and gender-motivated violence against women. The attorneys for Christy Brzonkala appealed the District Court's decision, and the case proceeded to the Federal Court of Appeals.

The Court of Appeals reversed the District Court's ruling. It held that VAWA, specifically the civil rights remedy for gender-motivated violence, was constitutional. The Court of Appeals felt that the issue at hand was whether there was a rational basis for Congress to enact VAWA under the commerce clause. It did not address the argument of economic versus noneconomic activity. The appeals court expressed that the actual point of the *Lopez* decision was missed by the district court. The *Lopez* court did not strike down the Gun Free School Zone Act because it was noneconomic in nature. The appeals court said the act was struck down because there was no congressional findings proving that possessing a firearm in a school zone affected interstate commerce.

Another difference between VAWA and the Gun Free School Zone Act is that Congress limited VAWA so that it would not enter the arena of state law in cases of child custody and divorce. The Act states,

> Neither section 1367 of title 28, United States Code, nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States

jurisdiction over any State law claim seeking the establishment of divorce, alimony, equitable distribution of marital property, or child custody decree ((The Violent Crime Control and Law Enforcement Act, 1994, 42 U.S.C. 40302). Congress made clear the relationship between gender-motivated violence and interstate commerce as well as made clear that VAWA would not infringe in traditional state arenas.

CONCLUSION

In sum, the Violence Against Women Act of 1994 was the first comprehensive federal law to address crimes against women. Congress made clear attempts to establish the relationship between interstate commerce and gender-motivated violence against women. Despite these deliberate attempts the civil remedy for gender-motivated violence against women remains in controversy. In *Doe,* a Connecticut district court held it constitutional. In *Brzonkala,* the Court of Appeals, by reversing the Virginia District Court's ruling, reached a similar result. Based on the current case law, the future of the Act appears to be favorable. However, until such cases make their way to the Supreme Court the constitutionality of the Act may continue to be an ongoing question (Liuzzo, 1997).

CHRISTY BRZONKALA v. VIRGINIA POLYTECHNIC INSTITUTE, 132 F.3D 949 (1997) UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

Diana Gribbon Motz, Circuit Judge:

This case arises from the gang rape of a freshman at the Virginia Polytechnic Institute by two members of the college football team, and the school's decision to impose only a nominal punishment on the rapists. The victim alleges that these rapes were motivated by her assailants' discriminatory animus toward women and sues them pursuant to the Violence Against Women Act of 1994. She asserts that the university knew of the brutal attacks she received and yet failed to take any meaningful action to punish her offenders or protect her, but instead permitted a sexually hostile environment to flourish; she sues the university under Title IX of the Education Amendments of 1972. The district court dismissed the case in its entirety. The court held that the complaint failed to state a claim under Title IX and that Congress lacked constitutional authority to enact the

Violence Against Women Act. Because we believe that the complaint states a claim under Title IX and that the Commerce Clause provides Congress with authority to enact the Violence Against Women Act, we reverse and remand for further proceedings.

Christy Brzonkala entered Virginia Polytechnic Institute ("Virginia Tech") as a freshman in the fall of 1994. On the evening of September 21, 1994, Brzonkala and another female student met two men who Brzonkala knew only by their first names and their status as members of the Virginia Tech football team. Within thirty minutes of first meeting Brzonkala, these two men, later identified as Antonio Morrison and James Crawford, raped her.

Brzonkala and her friend met Morrison and Crawford on the third floor of the dormitory where Brzonkala lived. All four students talked for approximately fifteen minutes in a student dormitory room. Brzonkala's friend and Crawford then left the room.

Morrison immediately asked Brzonkala if she would have sexual intercourse with him. She twice told Morrison "no," but Morrison was not deterred. As Brzonkala got up to leave the room Morrison grabbed her, and threw her, face-up, on a bed. He pushed her down by the shoulders and disrobed her. Morrison turned off the lights, used his arms to pin down her elbows and pressed his knees against her legs. Brzonkala struggled and attempted to push Morrison off, but to no avail. Without using a condom, Morrison forcibly raped her.

Before Brzonkala could recover, Crawford came into the room and exchanged places with Morrison. Crawford also raped Brzonkala by holding down her arms and using his knees to pin her legs open. He, too, used no condom. When Crawford was finished, Morrison raped her for a third time, again holding her down and again without a condom.

When Morrison had finished with Brzonkala, he warned her "You better not have any fucking diseases." In the months following the rape, Morrison announced publicly in the dormitory's dining room that he "liked to get girls drunk and fuck the shit out of them."

Following the assault Brzonkala's behavior changed radically. She became depressed and avoided contact with her classmates and residents of her dormitory. She changed her appearance and cut off her long hair. She ceased attending classes and eventually attempted suicide. She sought assistance from a Virginia Tech psychiatrist, who treated her and prescribed antidepressant medication. Neither the psychiatrist nor any other Virginia Tech employee or official made more than a cursory inquiry into the cause of Brzonkala's distress. She later sought and received a retroactive withdrawal from Virginia Tech for the 1994-95 academic year because of the trauma.

Approximately a month after Morrison and Crawford assaulted Brzonkala, she confided in her roommate that she had been raped, but could not bring

herself to discuss the details. It was not until February 1995, however, that Brzonkala was able to identify Morrison and Crawford as the two men who had raped her. Two months later, she filed a complaint against them under Virginia Tech's Sexual Assault Policy, which was published in the Virginia Tech "University Policies for Student Life 1994-1995." These policies had been formally released for dissemination to students on July 1, 1994, but had not been widely distributed to students. After Brzonkala filed her complaint under the Sexual Assault Policy she learned that another male student athlete was overheard advising Crawford that he should have "killed the bitch."

Brzonkala did not pursue criminal charges against Morrison or Crawford, believing that criminal prosecution was impossible because she had not preserved any physical evidence of the rape. Virginia Tech did not report the rapes to the police, and did not urge Brzonkala to reconsider her decision not to do so. Rape of a female student by a male student is the only violent felony that Virginia Tech authorities do not automatically report to the university or town police.

Virginia Tech held a hearing in May 1995 on Brzonkala's complaint against Morrison and Crawford. At the beginning of the hearing, which was taped and lasted three hours, the presiding college official announced that the charges were being brought under the school's Abusive Conduct Policy, which included sexual assault. A number of persons, including Brzonkala, Morrison, and Crawford testified. Morrison admitted that, despite the fact that Brzonkala had twice told him "no," he had sexual intercourse with her in the dormitory on September 21. Crawford, who denied that he had sexual contact with Brzonkala (a denial corroborated by his suitemate, Cornell Brown), confirmed that Morrison had engaged in sexual intercourse with Brzonkala.

The Virginia Tech judicial committee found insufficient evidence to take action against Crawford, but found Morrison guilty of sexual assault. The university immediately suspended Morrison for two semesters (one school year), and informed Brzonkala of the sanction. Morrison appealed this sanction to Cathryn T. Goree, Virginia Tech's Dean of Students. Morrison claimed that the college denied him his due process rights and imposed an unduly harsh and arbitrary sanction. Dean Goree reviewed Morrison's appeal letter, the file, and tapes of the three-hour hearing. She rejected Morrison's appeal and upheld the sanction of full suspension for the Fall 1995 and Spring 1996 semesters. Dean Goree informed Brzonkala of this decision in a letter dated May 22, 1995. According to Virginia Tech's published rules, the decision of Dean Goree as the appeals officer on this matter was final. * * * [Levels of review sponsored by the school and related developments have been omitted.]

On December 27, 1995, Brzonkala initially filed suit against Morrison, Crawford, and Virginia Tech; on March 1, 1996, she amended her complaint. She alleged inter alia that Virginia Tech, in its handling of her rape claims and failure to punish the rapists in any meaningful manner, violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994). She also alleged that Morrison and Crawford brutally gang raped her because of gender animus in violation of Title III of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994) ("VAWA"). The United States intervened to defend the constitutionality of VAWA.

On May 7, 1996 the district court dismissed the Title IX claims against Virginia Tech for failure to state a claim upon which relief could be granted. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 772 (W.D. Va. 1996) (" Brzonkala I"). On July 26, 1996 the court dismissed Brzonkala's VAWA claims against Morrison and Crawford, holding that although she had stated a cause of action under VAWA, enactment of the statute exceeded Congressional authority and was thus unconstitutional. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996) ("Brzonkala II"). [Portions of the opinion dealing with Title IX and with challenges based on the establishment of a hostile environment have been omitted.] * * *

We now turn to the question of whether the district court erred in dismissing Brzonkala's claim that Morrison and Crawford violated Title III of the Violence Against Women Act of 1994 ("VAWA"). See 42 U.S.C. § 13981 (1994). The district court held that Brzonkala alleged a valid VAWA claim, but that VAWA was beyond congressional authority, and thus unconstitutional. See Brzonkala II, 935 F. Supp. at 801. We agree with the district court that Brzonkala stated a claim under VAWA. We conclude, however, that Congress acted within its authority in enacting VAWA and hold that the district court erred in ruling the statute unconstitutional.

In September 1994, after four years of hearings, Congress enacted VAWA, a comprehensive federal statute designed to address "the escalating problem of violent crime against women." S. Rep. No. 10-138, at 37 (1993). Title III, the portion of the statute at issue in this case, establishes the right upon which a civil claim can be brought:

> All persons within the United States shall have the right to be free from crimes of violence motivated by gender. . . . 42 U.S.C. § 13981(b).

The statute goes on to set forth the elements necessary to plead and prove such a claim:

> (c) Cause of action
> A person (including a person who acts under color of any statute, ordinance,

> regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
> (d) Definitions
> For purposes of this section—
> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
> (2) the term "crime of violence" means—
>
> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
>
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981. Thus, to state a claim under § 13981(c) a plaintiff victim must allege "a crime of violence motivated by gender." 42 U.S.C. § 13981(c).

Morrison and Crawford do not argue that Brzonkala's allegation of gang rape fails to satisfy § 13981(d)(2)'s definition of a "crime of violence." However, they do briefly assert that Brzonkala has failed to allege a "crime of violence motivated by gender." 42 U.S.C. § 13981(c) (emphasis added).

A "crime of violence motivated by gender" is defined as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). Congress has indicated that "proof of 'gender motivation' under Title III" of VAWA is to "proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws. Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event." S. Rep. No. 103-138, at 52; see also S. Rep. No. 102-197, at 50 (1991).

The statute does not outlaw "random acts of violence unrelated to gender." 42 U.S.C. § 13981(e)(1). However, bias "can be proven by circumstantial as well as indirect evidence." S. Rep. No. 103-138, at 52. "Generally accepted guidelines for identifying hate crimes may also be useful" in determining whether a crime is gender-motivated, such as: "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any

other apparent motive (battery without robbery, for example); common sense." *Id.* at 52 n.61.

With these standards in mind, we examine Brzonkala's complaint. Brzonkala alleges that two virtual strangers, Morrison and Crawford, brutally raped her three times within minutes after first meeting her. Although Brzonkala does not allege mutilation or other severe injury, the brutal and unprotected gang rape itself constitutes an attack of significant "severity." Id. Moreover, Brzonkala alleges that the rapes were completely without "provocation." Id. One of her assailants conceded during the college disciplinary hearing that Brzonkala twice told him, "No" before he initially raped her. Further, there is an absence of any "apparent motive" for the rapes other than gender bias. Id. For example, no robbery or other theft accompanied the rapes.

Finally, Brzonkala alleges that when Morrison had finished raping her for the second time he told her, "You better not have any fucking diseases." She also alleges that Morrison later announced to the college dining room, "I like to get girls drunk and fuck the shit out of them." Verbal expression of bias by an attacker is certainly not mandatory to prove gender bias, *Brzonkala II,* 935 F. Supp. at 785 ("The purpose of the statute would be eviscerated if, to state a claim, a plaintiff had to allege, for example, that the defendant raped her and stated, 'I hate women.'"), but it is "helpful." See S. Rep. No. 103-138, at 51. As the district court noted, Morrison's "statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent" and that "this statement indicates disrespect for women in general and connects this gender disrespect to sexual intercourse." *Brzonkala II,* 935 F. Supp. at 785. In addition, since Brzonkala alleged that Morrison and Crawford engaged in a conspiracy to rape her, Morrison's comments are also relevant in assessing Crawford's liability. See *Loughman v. Consol-Pennsylvania Coal Co.,* 6 F.3d 88, 103 (3rd Cir. 1993) (concluding that in a civil conspiracy "every conspirator is jointly and severally liable for all acts of co-conspirators taken in furtherance of the conspiracy"); *United States v. Carpenter,* 961 F.2d 824, 828 n.3 (9th Cir. 1992) (holding that "acts and statements in furtherance of the conspiracy may be attributed to" a co-conspirator and citing *Pinkerton v. United States,* 328 U.S. 640, 646-47, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946)); *United States v. Chorman,* 910 F.2d 102, 111 (4th Cir. 1990) (same).

In sum, Brzonkala has clearly alleged violations of VAWA. Virtually all of the earmarks of "hate crimes" are asserted here: an unprovoked, severe attack, triggered by no other motive, and accompanied by language clearly stating bias. The district court correctly concluded that Brzonkala alleged a VAWA claim.

The remaining issue before us is whether the district court correctly held that Congress exceeded its constitutional authority in enacting VAWA. Congress itself directly addressed this question. On the basis of numerous specific findings and a mountain of evidence, Congress stated that it was invoking its authority "pursuant to . . . section 8 of Article I of the Constitution" to enact a new civil rights law to protect "victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce. . . ." 42 U.S.C. § 13981(a) (emphasis added). Article I, Section 8, Clause 3 of the Constitution empowers Congress to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

In assessing whether Congress exceeded its authority under the Commerce Clause, we note that every act of Congress is entitled to a "strong presumption of validity and constitutionality," *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984), and will be invalidated only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). The Supreme Court has directed that "given the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court is "not lightly to second-guess such legislative judgments." *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 251, 110 L. Ed. 2d, 191, 110 S. Ct. 2356 (1990) (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985)). This is "particularly" true when, as here, the legislative "judgments are based in part on empirical determinations." *Id.* Deference to such judgments by the legislature constitutes the "paradigm of judicial restraint." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993).

Moreover, "the task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); see also *United States v. Lopez*, 514 U.S. 549, 568, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) (Kennedy, J., concurring) ("The history of the judicial struggle to interpret the Commerce Clause . . . counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power."). Thus, a reviewing court need only determine "whether a rational basis existed for concluding that a regulated activity" substantially affects interstate commerce. *Lopez*, 514 U.S. at 557.

With these directives in mind, we consider whether Congress exceeded its authority under the Commerce Clause in passing VAWA. The Supreme Court has long held, and recently reiterated in Lopez, that there are "three

broad categories of activity that Congress may regulate" under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-559 (citations omitted); *United States v. Bailey*, 112 F.3d 758, 765-66 (4th Cir. 1997), cert. denied, 139 L. Ed. 2d 170, 118 S. Ct. 240 (1997) (rejecting a *Lopez* challenge to Title II of VAWA and stating *Lopez's* three-part test).

Here, as in *Lopez*, "the first two categories of authority may be quickly disposed of:" VAWA "is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [VAWA] be justified as a regulation [protecting] an instrumentality of interstate commerce or a thing in interstate commerce." *Lopez*, 514 U.S. at 557. "Thus, if [**49] [VAWA] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce." *Id.*

The Lopez Court applied the substantial effects test to the Gun Free School Zones Act, which made it a federal crime to knowingly possess a firearm in a school zone. 18 U.S.C. § 922(q) (1988 ed. Supp. V) (amended 1994, 1996). In passing § 922(q), Congress attempted to supplant state criminal laws with a federal statute that criminalized an activity that on its face had "nothing to do with" commerce, without making any findings demonstrating the activity affected interstate commerce or including a jurisdictional element ensuring a case by case connection with interstate commerce. *Lopez*, 514 U.S. at 561 and n.3. In these circumstances, the Supreme Court "would have [had] to pile inference upon inference" to find a rational basis for concluding the statute "substantially affected any sort of interstate commerce." *Id.* at 567. This the Court declined to do, and so declared § 922(q) unconstitutional. *Id.*

In contrast to the congressional silence in Lopez, Congress made voluminous findings when it enacted VAWA. Accordingly, we can begin where the Lopez Court could not, by "evaluating the legislative judgment that the activity in question substantially affected interstate commerce." *Lopez*, 514 U.S. at 563; see also *City of Boerne v. Flores*, 138 L. Ed. 2d 624, 117 S. Ct. 2157, 2169-2170 (1997) (recognizing the importance of Congressional findings in determining the "appropriateness of [Congress's] remedial

measures"). In doing so, we recognize that discerning a rational basis "is ultimately a judicial rather than a legislative question," *Lopez,* 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 273, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964) (Black, J., concurring)), and "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (quoting *Hodel,* 452 U.S. at 311 (Rehnquist, J., concurring)). But a "court must defer" to congressional findings when there is "a rational basis for such a finding." *Hodel,* 452 U.S. at 276. Indeed, "the Supreme Court has without fail given effect to such congressional findings." Laurence H. Tribe, American 29 Constitutional Law, 310-11 (2d ed. 1988). Accordingly, we first examine the congressional findings made in connection with VAWA. See *United States v. Leshuk,* 65 F.3d 1105, 1111-12 (4th Cir. 1995) (rejecting a *Lopez* challenge to the "Comprehensive Drug Abuse Prevention and Control Act" and beginning and ending our analysis by relying totally upon Congress's "detailed findings" on the interstate commerce effects).

1. The Congressional findings and testimony that support the passage of VAWA pursuant to the Commerce Clause are detailed and extensive. Congress carefully documented the enormity of the problem caused by violence against women. For example, Congress found that:

- "Violence is the leading cause of injury to women ages 15–44. . . ." S. Rep. No. 103-138, at 38 (1993).
- "For the past 4 years [prior to 1993], the U.S. Surgeons General have warned that family violence—not heart attacks or cancer or strokes—poses the single largest threat of injury to adult women in this country." *Id.* at 41-42 (footnote omitted).
- "An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence [**52] victims are women." H.R. Rep. No. 103-395, at 26 (1993) (footnotes omitted).
- "Three out of four American women will be victims of violent crimes sometime during their life." *Id.* at 25 (footnote omitted).
- "Since 1988, the rate of incidence of rape has risen four and a half times as fast as the total crime rate. There were 109,062 reported rapes in the United States in 1992—one every five minutes. The actual number of rapes committed is approximately double that figure. . . ." *Id.* (footnotes omitted).

The committee reports similarly found that "the cost to society" resulting from violence against women "is staggering." S. Rep. No. 101-545, at 33

(1990). Domestic violence alone is estimated to cost employers "at least $3 billion—not million, but billion—dollars a year" due to absenteeism in the workplace. *Id.* Furthermore, "estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103-138, at 41. Moreover, "it is not a simple matter of adding up the medical costs, or law enforcement costs, but of adding up all of those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems." S. Rep. No. 101-545, at 33.

These monetary figures were accompanied by other evidence establishing that violence against women has a substantial impact on interstate commerce: Over 1 million women in the United States seek medical assistance each year for injuries sustained by their husbands or other partners. As many as 20 percent of hospital emergency room cases are related to wife battering.

But the costs do not end there: woman abuse "has a devastating social and economic effect on the family and the community." . . . It takes its toll in homelessness: one study reports that as many as 50 percent of homeless women and children are fleeing domestic violence. It takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence. S. Rep. No. 101-545, at 37. Fear of violence "takes a substantial toll on the lives of all women, in lost work, social, and even leisure opportunities." S. Rep. No. 102-197, at 38 (1991).

Thus, based upon an exhaustive and meticulous investigation of the problem, Congress found that:

> crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. H.R. Conf. Rep. No. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1853.

In concluding that "there is no doubt that Congress has the power to create the Title III remedy under" the Commerce Clause, Congress noted that:

> gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full participation in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from

> taking jobs in certain areas or at certain hours that pose a significant risk of such violence. . . . For example, women often refuse higher paying night jobs in service/retail industries because of the fear of attack. Those fears are justified: the No. 1 reason why women die on the job is homicide and the highest concentration of those women is in service/retail industries. . . . 42 percent of deaths on the job of women are homicides; only 12 percent of the deaths of men on the job are homicides. S. Rep. No. 103-138, at 54 & n.70 (footnotes omitted).

Our task is simply to discern whether Congress had "a rational basis" for concluding that the regulated activity—here violence against women—substantially "affected interstate commerce." *Lopez, 514* U.S. at 558-559. After four years of hearings and consideration of voluminous testimonial, statistical, and documentary evidence, Congress made an unequivocal and persuasive finding that violence against women substantially affects interstate commerce. Even the district court recognized that "[a] reasonable inference from the congressional findings is that violence against women has a major effect on the national economy." *Brzonkala II,* 935 F. Supp. at 792. Accordingly, whatever one's doubts as to whether Title III of VAWA represents a good policy decision, *Seaton v. Seaton,* 971 F. Supp. 1188 (E.D. Tenn. 1997), we can only conclude that Congress' findings are grounded in a rational basis. We note that every court to consider the question except the court below, has so held. See *Crisonino v. New York City Housing Auth.*, 985 F. Supp. 385, 1997 U.S. Dist. LEXIS 18268 (S.D.N.Y. 1997); *Anisimov v. Lake,* 982 F. Supp. 531, 1997 WL 538718 (M.D. Ill., 1997); *Seaton,* 971 F. Supp. at 1194; *Doe v. Hartz,* 970 F. Supp. 1375 (N.D. Iowa 1997); *Doe v. Doe,* 929 F. Supp. 608 (D. Conn. 1996).

In fact, in *United States v. Leshuk,* 65 F.3d 1105 (4th Cir. 1995), we recently relied exclusively on less extensive Congressional findings to uphold Section 401(a)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1) (1994). *Id.* at 1111, 1112. In Leshuk the defendant was convicted of possessing and cultivating marijuana in violation of § 841(a)(1), and raised a *Lopez* challenge to the statute. *Id.* at 1107-08. We held that *Lopez* did not require the invalidation of § 841(a)(1) because the "intrastate drug activities" that it regulated "are clearly tied to interstate commerce." 65 F.3d at 1112. We based our conclusion wholly on Congress's "detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, have a substantial and direct effect upon interstate drug trafficking and that effective control of the interstate problems requires the regulation of both intrastate and interstate activities." *Id.* (internal quotation marks omitted). Without further ado we "relied upon these findings" to hold the Commerce Clause authorized Congress to enact this statute. *Id.*

Similarly, earlier this year, in *Hoffman v. Hunt* we reviewed "the congressional reports" to uphold the Freedom of Access to Clinics Act (FACE), determining that those reports made "clear" that "several aspects of interstate commerce are directly and substantially affected by the regulated conduct." 126 F.3d 575, 1997 WL 578787 at 11 (4th Cir. 1997). Because Congress had made these persuasive findings we concluded that we did not need to "'pile inference upon inference' to find a substantial effect on interstate commerce." Id. (quoting *Lopez*, 514 U.S. at 567). The congressional findings setting forth VAWA's substantial effect on interstate commerce are far more detailed and complete than those we found sufficient to establish a rational basis for the statutes challenged in Leshuk and Hoffman, and we thus have no hesitation similarly upholding VAWA. When a court finds "that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, [its] investigation is at an end." *United States v. Beuckelaere*, 91 F.3d 781, 785 (6th Cir. 1996) (quoting *Katzenbach v. McClung*, 379 U.S. 294, 303, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)).

2. Contrary to the district court's holding, and the arguments of Morrison and Crawford, nothing in Lopez requires a different result.

Although the Court refused to make an "additional expansion" to Congress's Commerce power to uphold § 922(q), and clarified that a regulated activity must "substantially affect interstate commerce," it did not overrule a single Commerce Clause precedent, signal a decrease in congressional power under the Commerce Clause, or abandon the "rational basis" test. 115 S. Ct. at 1629-34; see also *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997) ("Lopez did not alter our approach to determining whether a particular statute falls within the scope of Congress's Commerce Clause authority."); *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) (The Lopez Court "reaffirmed rather than [**63] overturned the previous half century of Commerce Clause precedent"), cert. denied, 117 S. Ct. 46-47 (1996).

In fact, in describing the history of the Court's Commerce Clause jurisprudence, Lopez forthrightly affirmed the modern expansive view of Congress's power under the Commerce Clause, and eschewed the more restrictive view of "commerce" based on formalistic distinctions between "direct" and "indirect" effects on interstate commerce. 514 U.S. at 555. The Court noted that "modern-era precedents . . . confirm that this power is subject to outer limits," i.e., it cannot "be extended so as to embrace effects upon interstate commerce so indirect and remote" as to "obliterate the distinction between what is national and what is local and create a completely centralized government." 115 S. Ct. at 1628-29. But the Court

expressly followed decades of "modern-era precedents" recognizing that a court's only role in considering a Commerce Clause challenge is "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." 514 U.S. at 557 (citing *Hodel,* 452 U.S. at 276-80; *Perez v. United States,* 402 U.S. 146, 155-56, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)); *Katzenbach v. McClung,* 379 U.S. 294, 299-301, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964); and *Heart of Atlanta Motel,* 379 U.S. at 252-253); see also *Lopez,* 514 U.S. at 374 (Kennedy, J., concurring) (Lopez does not "call in question" prior commerce clause "principles").

Morrison and Crawford's reliance on *Lopez* falters not only because they ignore the limited nature of the *Lopez* holding but also because VAWA differs from § 922(q) in several important respects. In order to uphold VAWA, we need not "pile inference upon inference" as the Government asked the Court to do in *Lopez. Lopez,* 514 U.S. at 567. Because Congress made no findings to support § 922(q) the Government was forced to argue that guns in schools affected commerce based upon several tenuous, multilayered theories. See *id.* at 564; *Terry,* 101 F.3d at 1418 (quoting *Lopez,* 514 U.S. at 564) (For example, "gun possession near schools threatens the educational environment, which hampers the educational process, which creates a 'less productive citizenry' which adversely affects 'the Nation's economic well-being' and which in the end adversely [**65] affects interstate commerce."). VAWA, by contrast, regulates behavior—gender-based violent crime against women—which Congress has found substantially and gravely affects interstate commerce on the basis of abundant evidence. Cf. *Perez,* 402 U.S. at 154 (rejecting Commerce Clause challenge because "credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce"). To connect VAWA with interstate commerce, a court need not make any inferences—Congress itself has clearly established and documented that gender-based violence against women substantially affects interstate commerce.

Additionally, unlike § 922(q), VAWA does not invade areas of traditional state control. The *Lopez* Court noted that "under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez,* 514 U.S. at 561 (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 635, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), and *United States v. Enmons,* 410 U.S. 396, 411-12, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973)). Title III of VAWA is not a criminal statute and it displaces no state criminal law. Cf. *id.* (noting that statute in Lopez "displaces state policy choices" and "overrides legitimate state . . . laws"). Nothing in Title III prevents a victim of gender-based violence from bringing state criminal

charges or pursuing state tort remedies, or affects how the state treats those claims.

In fact, far from displacing state law, Congress carefully designed VAWA to harmonize with state law and protect areas of state concern. Thus, VAWA references state criminal laws in defining a "crime of violence." See 42 U.S.C. § 13981(d)(2) (defining "crime of violence" as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18. . . .") (emphasis added). Moreover, Congress expressly limited the reach of VAWA in further deference to traditional areas of state expertise such as divorce or child custody proceedings. See 42 U.S.C. § 13981(e)(4) (VAWA does not confer "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.") In sum, VAWA acts to supplement, rather than supplant, state criminal, civil, and family law controlling gender violence. The States are still free to "experiment[ ] to devise various solutions" to the problems of gender-based violence against women. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

In addition, unlike the statute invalidated in *Lopez*, VAWA does not occupy a legal territory where "States lay claim by right of history and expertise." 115 S. Ct. at 1641 (Kennedy, J., concurring). Instead, VAWA legislates in an area—civil rights—that has been a federal responsibility since shortly after the Civil War. Furthermore, federal action is particularly appropriate when, as here, there is persuasive evidence that the States have not successfully protected the rights of a class of citizens. In passing VAWA Congress made extensive and convincing findings that state law had failed to successfully address gender motivated violence against women. Congress concluded that:

> Other State remedies have proven inadequate to protect women against violent crimes motivated by gender animus. Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination. Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. Collectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims. S. Rep. No. 103-138, at 49 (footnotes omitted).

In VAWA, Congress has passed a civil rights law, a quintessential area of federal expertise, in response to "existing bias and discrimination in the

criminal justice system." H.R. Conf. Rep. No. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1853.

Nonetheless, Morrison and Crawford argue that Lopez requires a different result. They note that § 922(q) had "nothing to do with 'commerce'" and was not "an essential part of a larger regulation of economic activity," *Lopez*, 514 U.S. at 561, and assert that VAWA similarly regulates a non-economic activity and is therefore beyond Congress's Commerce Clause authority. This argument, however, misreads both Lopez and VAWA. * * *

Finally, our holding that Congress had a rational basis to conclude that violence against women has a substantial effect on interstate commerce does not mean, as Morrison and Crawford contend, that acting pursuant to the Commerce Clause Congress can reach any activity, including divorces, child-support, and "diet and exercise habits." This argument ignores the years of hearings on the need for VAWA and the reams of congressional findings made in support of VAWA. It belittles the seriousness of the national problem that discriminatory violence against women presents. It overlooks VAWA's explicit deference to State expertise: the statute's express restriction to gender-motivated violent crimes is defined in part in reference to state law, and it prohibits jurisdiction over divorce, alimony, and child custody matters. See 42 U.S.C. § 13981(e)(4).

Most importantly, this argument disregards the ineludible fact that our role is simply to determine if Congress had a rational basis for concluding that a regulated activity "substantially affects interstate commerce." *Lopez*, 514 U.S. at 560. After four years of hearings and extensive legislative findings, Congress has adjudged that violence against women substantially affects interstate commerce. It is "abundantly clear that our job in this case is not to second-guess the legislative judgment of Congress that" violence against women "substantially affects interstate commerce, but rather to ensure that Congress had a rational basis for that conclusion." *Bishop*, 66 at 577. In light of Congress' findings, well supported by testimony and data, we hold that Congress had such a rational basis in enacting VAWA.

We note that it is apparent that Congress took great care to detail its findings and support its conclusion that VAWA was within its commerce authority. The breadth of the record itself manifests that Congress understood its duty to act only within its enumerated powers in this case, and took that duty seriously. As the Supreme Court explained in *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650, 88 L. Ed. 1509, 64 S. Ct. 1196 (1944):

> [Whether] the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation

> and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised. . . .

To summarize, we hold that Brzonkala's complaint states a claim under Title IX against Virginia Tech, and under the Violence Against Women Act against Morrison and Crawford. Further, we hold that the Commerce Clause provides Congress with authority to enact the Violence Against Women Act. Accordingly, the judgments of the district court dismissing both the Title IX and Violence Against Women Act claims are reversed and the case is remanded for further proceedings.

No. 96-1814—Reversed and remanded, No. 96-2316—Reversed and remanded.

16

Informed Consent for Medical Treatment

Robert Long and Raymond Albert

The giving and receiving of consent is a significant legal idea in the American culture. A mechanic requires the written consent of the owner before work can be done on an automobile. A child invited on a school outing requires written consent from parents to participate. A new house being built in an open field requires consent of the local government in the form of a building permit. The relationship between an attorney and a client begins with the exchange of some form of consent and serves as an agreement that one will act on behalf of the other. A living will gives power to another to act in a deliberate and decisive way on behalf of one who is seriously and terminally ill.

These examples and the definitions of consent indicate that relationships brought together over the giving or receiving of consent may not be one of equals. The facts or information exchanged in the giving of consent may not always be complete or exhaustive or even true. The agreement, even if it is in writing, may be reviewed or changed to meet changing needs or circumstances.

While many forms of consent grant privilege of a particular type, consenting to medical care takes on a special importance for individuals. Consenting to medical care is not merely agreeing on principle but is agreement based on an understanding of facts and associated risks and benefits. Consent, and in particular informed consent for medical care between a physician and a patient, is a core doctrine of American jurisprudence.

The doctrine of Informed Consent is critical to the proper functioning of the American medical system. It is more than a regulation, it is a moral value described and worked out in the relationship between a physician and a patient. The case law surrounding the doctrine has been instrumental in shaping the contours of that relationship and has lead to practical precautions, such as the formation of standardized consent forms for medical procedures and in the development of standardized consent forms for medical experimentation. It is clear from continuing legal issues regarding informed consent that not every physician fully understands or practices the idea of informed consent. But as the following survey of case law describes, their ignorance may have perilous consequences.

SCHLOENDORFF v. SOCIETY OF NEW YORK HOSPITAL (1914)

In January 1908, the plaintiff, Mrs. Schloendorff, entered New York Hospital suffering from some disorder of the stomach. New York Hospital was considered a charity hospital, providing free care but also admitting those who could afford to pay. The decision about whom to admit was made by the Hospitals Board of Trustees. The fee for those who could pay for services was $7 week, and this was the fee charged the plaintiff.

After several weeks of care the house physician detected a fibroid tumor in the plaintiff's abdomen. The physician recommended an ether examination. The plaintiff consented to the examination but notified the physician that there must be *no* operation. While the plaintiff was unconscious during the examination a tumor was removed. After the operation the plaintiff developed gangrene in her left arm and some fingers were amputated. The plaintiff would testify at the trial that the operation was done without her knowledge and consent. She also contended that the gangrene was the result of the operation. The plaintiff sued, alleging negligence.

Schloendorff v. Society of New York Hospital (1914) is important case law in several distinct ways. The first was a decision about the liability of charity hospitals. From *Schloendorff* came the determination that charity hospitals were not liable for the negligence of their physicians and nurses in the treatment of patients. *Hordern v. Salvation*

Army (1910) and other cases that followed *Schloendorff* upheld the idea that a patient, by accepting benefit from a charity hospital, could not hold the hospital liable for negligence. New York Hospital remained exempt even though the patient was charged $7 week. *Collins v. N.Y. Post-Graduate Medical School & Hospital* (1901). In the case of charity hospitals the payment is regarded as merely a contribution to maintain the charity and in fact does not cover the actual cost of care.

Schloendorff is not only about negligence, however; it is also about trespass. Justice Cardoza, in his opinion on *Schloendorff,* stated that "every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

The court ruled that because the patient did not consent to the operation she did not give up her rights to recover damages. But the court also ruled that the hospital was not liable because the relationship between the hospital and the physician was not one of master-servant. The hospital supplied the surgeon and the nurses believing them capable of exercising the skills for which they had been trained. The responsibility of the hospital was to exercise control only over where its medical personnel practiced and not over their actual duties (e.g., *Poutre v. Saunders,* 1943). The court opinion in *Schloendorff* continued by stating that the "wrong was not of the hospital; it was of the physicians...[if] they violated her [Schloendorff] commands, the responsibility is not the defendant's but theirs."

This case is also significant in its discussion of consent. A nurse was assigned by the surgeon to prepare the plaintiff for the ether examination. This preparation was done during the night. The plaintiff recalled at trial that she asked the nurse several times during the preparation "Do you understand that I am not to be operated on?" The nurse is reported to have responded that yes she understood and that the preparation for the exam and the operation were the same. The nurse did not report, nor did the court hold that it was her duty to report, to the Superintendent of the Hospital the questions and confusion about whether the plaintiff was to have an exam or an operation. The nurse assured the plaintiff that an ether examination was all that was intended. The nurse did not know if or when an operation was scheduled and had no reason to suspect that

the operation would be against the specific orders of the patient. Cardoza states in the court opinion "There may be cases where a patient ought not to be advised of a contemplated operation until shortly before the appointed hour." Cardoza further states that a hospital that opens itself to all who seek assistance does not subject itself to liability even though the ministers of healing whom it has selected have proved unfaithful in their trust.

SCHLOENDORFF AND ITS PROGENY

Schloendorff has influenced two specific doctrines of law, immunity from liability for charitable hospitals and the doctrine of informed consent. Prior to *Schloendorff* there was little case law on the issue of immunity. One example is *McDonald v. Massachusetts General Hospital* (1890). Here, a charity patient in a charity hospital could not hold the hospital liable for the negligent care received from a student doctor. The Massachusetts court held as its only authority an English case, *Holiday v. St. Leonard's*. Following this case other courts in New England and finally in New York followed the lead of Massachusetts in exempting charitable hospitals from liability.

From 1909 to the 1950s *Schloendorff* was followed by the courts but with some inconsistency and almost always based on the issue of liability. The court in *Phillips v. Buffalo General Hospital* (1924) abandoned the use of *Schloendorff* to waive the right of a patient to collect for negligent injury.

The use of *Schloendorff* as legal precedent ended with *Bing v. Thuing* (1957). Justice Fuld writing in the court opinion states "it is not too much to expect that those who serve and minister to members of the public should do so . . . subject to that principle and within the obligation not to injure through carelessness." Although Justice Fuld made it clear that he was not pronouncing "the ultimate" fate of the *Schloendorff* rule, he stated that he had long been dissatisfied with it.

Although *Schloendorff* no longer governs in cases of liability, the words of Justice Cardoza have come to be a permanent part of the doctrine of informed consent. *Schloendorff* marked a clear departure from the 19th century idea that physicians held the key to medical knowledge and wisdom and were to be considered the only authority

in making decisions about medical practice and procedures. A new partnership was emerging, one that would greatly strengthen the role of the patient in guiding medical procedures (Darvall, 1993).

SCHLOENDORFF'S LEGACY: DOCTRINE OF INFORMED CONSENT

The doctrine of informed consent matured slowly through the first half of the 20th century. The first model of informed consent was one of beneficence. In this model the physician had a primary obligation to provide medical assistance but not always the detailed information to describe the assistance. The physician provided information that he or she presumed the patient needed to know. Information that was provided, and the depth of that information, was often governed by the norms and traditions within the medical community where the physician practiced. This model of the physician as benefactor also permitted the physician to withhold medical information if the physician determined that it would cause distress, anxiety, or fear within the patient (Faden & Beauchamp, 1986).

The model of the beneficent physician also raised the issue of whether the physician was required to inform the patient of the risks of the proposed treatments. The result of this decision on the part of the physician would mean that patients would consent to treatment without a clear understanding. The risk for the physician is that they would lose authority over best medical practice. (See American Law Reports (A.L.R.) 2d 1028)

The case law in the early 20th century seemed to be an attempt to balance this idea of good medical practice and the need for the patient to know and understand what was going to happen during the treatment. In 1913, *Rishworth v. Moss* (1913) affirmed that there must be consent in every case "except in an emergency where to delay to obtain consent would endanger the life or health of the patient." In emergency conditions the Court has always allowed the detailed explanations by the physician to be set aside in favor of treating the patient. (See *Mitchell v. Robinson* (1960)). Also in 1913 an Oklahoma court affirmed that a contract made between a physician and a patient was a valid contract and that the "patient has the right to insist upon the strict performance of it." *Rolanter v. Strain* (1913).

The Court held that it is not necessary to show that the surgeon intended to injure the patient. It is sufficient if it appears that the act was wrong and unlawful.

The rights of the patient are further strengthened by *Perry v. Hodgson* (1927). This case established that the issue was not about whether the surgery was good surgery but about whether the operation that was performed was actually the operation that was contracted between the physician and the patient.

The Restatement of Torts (1934) highlighted this issue in a number of places. The restatement said that to constitute consent, the "assent must be to an invasion substantially the same as that which is inflicted" § 54. In practical terms this means that if a patient gives consent for surgery on their right hand, that is where the surgery must take place. The Restatement also looks at what constitutes consent. Here consent can be given in a variety of ways—verbally, written, through general conversation, asking questions and indicating that the answers to the questions are understood. "An apparent assent is given by words or conduct which while not intended to express a willingness to submit to an invasion, would be understood by a reasonable man, to be so intended" §50(2).

By the 1950s litigation began in earnest over the requirement of informed consent for medical treatment. The principle issue was a growing awareness of personal autonomy. Based on classical theories of ethics, the idea of personal autonomy was becoming a powerful idea in American society and through the Doctrine of Informed Consent it found its way into American jurisprudence. Personal choice became defined as perhaps the most sacred trust of the American people; it was grounded in democratic principles of voting and free speech and became a fundamental part of the participation of individuals in medical procedures. This is the very core of informed consent and throughout the early to midtwentieth century case law began to represent this ideal.

For example *Davis v. Rodman* (1921) establishes that even the risk of exposure to a contagious disease does not give the state the authority to inoculate or vaccinate without the consent of the individual. The court also began to recognize the right of the individual to know the dangers that exist with a medical treatment. If the patient is not told about the dangers and does not fully understand the risks of the procedures, the consent does not represent a free

choice. *Bowers v. Talmadge* (1964). Finally the court held in *Alden v. Younger* (1976) that the patient must be the one to give consent, the court cannot use a responsible relative for consent because it violates the patient's rights to privacy. (But see *Lester v. Aetna Casualty and Surety Co.*, 1957)

If patients possess rights as autonomous persons it seems reasonable that they will become equal participants in treatment decisions. This represents a significant departure from the earlier model with the physician as holding the key to medical treatment and acting as the benefactor. The court has also explored this partnership. In *Hunt v. Bradshaw* (1955) it found that if the information provided to the patient was fraudulent, deceptive, or misleading then the disclosure invalidated the consent obtained from the patient. The idea of best judgment is cited in *Hunt* as an example that what the physician discloses must be factual and that the failure of the physician to explain both the benefit and the risk of any procedure may expose the physician to considerable liability. *Hunt* is also significant because it lists the desirable skills and knowledge a physician or surgeon must possess: (1) skills and abilities that others with similar education and in similar positions must possess; (2) the ability to exercise reasonable care and diligence in application of the skills and knowledge; and (3) the ability to use best judgment in treatment and care of the patient.

In 1955 the Doctrine of Informed Consent became more clearly focused in *Salgo v. Leland Stanford Jr. University Board of Trustees* (1955). Here the Court determined that the full disclosure by the physician of the benefits, risks, and dangers of any medical procedure should be consistent with the exercise of professional discretion.

Salgo represents a new direction in case law. Prior to *Salgo* physicians only needed to inform a patient of the risks and danger in a way that conformed with the prevailing medical practices in their local community. In *Scott v. Bradford* (1956), which followed *Salgo,* the Court required the physician to provide a reasonable disclosure of the nature and probable consequences of the treatment or procedure. The disclosure would review the probable successes and, based on the physician's knowledge and experience and best judgement, the dangers of the procedures. What needs to be emphasized in any disclosure is the possibility of bad results (Applebaum, 1987).

In 1972 the Supreme Court provided an extensive review of the doctrine of Informed Consent in the opinion of *Canterbury v. Spence* (1972). The opinion provides an extensive examination of prior case law and establishes that there must be respect for the individual rights of patients in determining for themselves what direction they will choose with particular therapies. The opinion also stresses that the standards that govern the information that physicians must provide may be standards set by law and not simply those that physicians might choose or impose on themselves.

Canterbury involved a young man with back pain who consented for an operation without receiving information as to the risk of paralysis from the procedure. On the day after the operation the plaintiff fell from his hospital bed. Following the fall the plaintiff became paralyzed in the lower half of his body. The patient was never able to regain the full mobility and suffered with continuing medical problems associated with the paralysis. The court examined a number of issues in this case including the charges of negligence on the part of the physician in how the surgery was performed and on the part of the hospital in failing to prevent the plaintiff from falling out of the hospital bed. More importantly the court looked at whether the physician had sufficiently warned the plaintiff of the dangers of the proposed procedure. The Court resurrected the language of *Schloendorff* and observed that an unauthorized operation constitutes battery (e.g., *McCold,* 1957) and that a consent can become void if the patient is given fraudulent or misleading information (see *Hunt* (1955). The Plaintiff [Canterbury] contended that the physician [Dr. Spence] did not disclose the risk of the operation, even though that risk constituted only a 1 percent chance of paralysis. In other testimony the plaintiff's mother reported that Dr. Spence said that the proposed operation was not more serious than any other operation. Dr. Spence, and other collaborating surgeons, testified at the trial that the operation did have a risk factor; about 1 percent of all such procedures resulted in some paralysis.

Dr. Spence further expressed his opinion that to disclose more information about the risk, based on this 1 percent factor, would have been unwise. The Court deemed the disclosure necessary, even if the disclosure might have caused the plaintiff emotional stress, or even if the disclosure might have caused the plaintiff to change his mind completely about continuing with the procedure.

Canterbury stands as a landmark case in the Doctrine of Informed Consent. It follows in the direction first described by *Schloendorff* that "every human being of adult years and sound mind has a right to determine what shall be done with his own body." More importantly it gives substance to the idea that the patient has the right to be informed so that the decision the patient makes is more than simply relying on the judgment of the physician.

Canterbury moves informed consent in a second direction, and this was highlighted in the testimony of Dr. Spence. The information provided by the physician must meet certain standards, and these standards cannot just be those that exist in a certain community but must always be standards that are in the best interest of the patient.

CONCLUSION

The Doctrine of Informed Consent is a legal doctrine that is integrally entwined with issues of liability and with policy issues on how to structure relationships between professionals (physicians, hospitals, etc.) and the public. Perhaps the critical question is whether informed consent can ever be legislated or whether it can be dependent on the respect of one human for another (Applebaum, 1987). Until there is a definitive answer to that question, the aforementioned case law is the only strategy to ensure that physicians live up to their oath to "do no harm" to the public that trusts them.

CANTERBURY v. SPENCE, 150 U.S. APP. D.C. 263 (1972) UNITED STATES COURT OF APPEALS, D.C. CIRCUIT

Spotswood W. Robinson, III, Circuit Judge:

This appeal is from a judgment entered in the District Court on verdicts directed for the two appellees at the conclusion of plaintiff-appellant Canterbury's case in chief. His action sought damages for personal injuries allegedly sustained as a result of an operation negligently performed by appellee Spence, a negligent failure by Dr. Spence to disclose a risk of serious disability inherent in the operation, and negligent post-operative care by appellee Washington Hospital Center. On close examination of the record, we find evidence which required submission of these issues to

the jury. We accordingly reverse the judgment as to each appellee and remand the case to the District Court for a new trial.

The record we review tells a depressing tale. A youth troubled only by back pain submitted to an operation without being informed of a risk of paralysis incidental thereto. A day after the operation he fell from his hospital bed after having been left without assistance while voiding. A few hours after the fall, the lower half of his body was paralyzed, and he had to be operated on again. Despite extensive medical care, he has never been what he was before. Instead of the back pain, even years later, he hobbled about on crutches, a victim of paralysis of the bowels and urinary incontinence. In a very real sense this lawsuit is an understandable search for reasons.

At the time of the events which gave rise to this litigation, appellant was nineteen years of age, a clerk-typist employed by the Federal Bureau of Investigation. In December, 1958, he began to experience severe pain between his shoulder blades. He consulted two general practitioners, but the medications they prescribed failed to eliminate the pain. Thereafter, appellant secured an appointment with Dr. Spence, who is a neurosurgeon.

Dr. Spence examined appellant in his office at some length but found nothing amiss. On Dr. Spence's advice appellant was x-rayed, but the films did not identify any abormality. Dr. Spence then recommended that appellant undergo a myelogram—a procedure in which dye is injected into the spinal column and traced to find evidence of disease or other disorder—at the Washington Hospital Center.

Appellant entered the hospital on February 4, 1959. The myelogram revealed a "filling defect" in the region of the fourth thoracic vertebra. Since a myelogram often does no more than pinpoint the location of an aberration, surgery may be necessary to discover the cause. Dr. Spence told appellant that he would have to undergo a laminectomy—the excision of the posterior arch of the vertebra—to correct what he suspected was a ruptured disc. Appellant did not raise any objection to the proposed operation nor did he probe into its exact nature.

Appellant explained to Dr. Spence that his mother was a widow of slender financial means living in Cyclone, West Virginia, and that she could be reached through a neighbor's telephone. Appellant called his mother the day after the myelogram was performed and, failing to contact her, left Dr. Spence's telephone number with the neighbor. When Mrs. Canterbury returned the call, Dr. Spence told her that the surgery was occasioned by a suspected ruptured disc. Mrs. Canterbury then asked if the recommended operation was serious and Dr. Spence replied "not anymore than any other operation." He added that he knew Mrs. Canterbury was not well off and that her presence in Washington would not be necessary. The testimony is contradictory as to whether during the course of the conversation Mrs.

Canterbury expressed her consent to the operation. Appellant himself apparently did not converse again with Dr. Spence prior to the operation.

Dr. Spence performed the laminectomy on February 11 at the Washington Hospital Center. Mrs. Canterbury traveled to Washington, arriving on that date but after the operation was over, and signed a consent form at the hospital. The laminectomy revealed several anomalies: a spinal cord that was swollen and unable to pulsate, an accumulation of large tortuous and dilated veins, and a complete absence of epidural fat which normally surrounds the spine. A thin hypodermic needle was inserted into the spinal cord to aspirate any cysts which might have been present, but no fluid emerged. In suturing the wound, Dr. Spence attempted to relieve the pressure on the spinal cord by enlarging the dura—the outer protective wall of the spinal cord—at the area of swelling.

For approximately the first day after the operation appellant recuperated normally, but then suffered a fall and an almost immediate setback. Since there is some conflict as to precisely when or why appellant fell, we reconstruct the events from the evidence most favorable to him. Dr. Spence left orders that appellant was to remain in bed during the process of voiding. These orders were changed to direct that voiding be done out of bed, and the jury could find that the change was made by hospital personnel. Just prior to the fall, appellant summoned a nurse and was given a receptacle for use in voiding, but was then left unattended. Appellant testified that during the course of the endeavor he slipped off the side of the bed, and that there was no one to assist him, or side rail to prevent the fall.

Several hours later, appellant began to complain that he could not move his legs and that he was having trouble breathing; paralysis seems to have been virtually total from the waist down. Dr. Spence was notified on the night of February 12, and he rushed to the hospital. Mrs. Canterbury signed another consent form and appellant was again taken into the operating room. The surgical wound was reopened and Dr. Spense created a gusset to allow the spinal cord greater room in which to pulsate.

Appellant's control over his muscles improved somewhat after the second operation but he was unable to void properly. As a result of this condition, he came under the care of a urologist while still in the hospital. In April, following a cystoscopic examination, appellant was operated on for removal of bladder stones, and in May was released from the hospital. He reentered the hospital the following August for a 10-day period, apparently because of his urologic problems. For several years after his discharge he was under the care of several specialists, and at all times was under the care of a urologist. At the time of the trial in April, 1968, appellant required crutches to walk, still suffered from urinal incontinence and paralysis of the bowels, and wore a penile clamp.

In November, 1959 on Dr. Spence's recommendation, appellant was transferred by the F.B.I. to Miami where he could get more swimming and exercise. Appellant worked three years for the F.B.I. in Miami, Los Angeles and Houston, resigning finally in June, 1962. From then until the time of the trial, he held a number of jobs, but had constant trouble finding work because he needed to remain seated and close to a bathroom. The damages appellant claims include extensive pain and suffering, medical expenses, and loss of earnings.

Appellant filed suit in the District Court on March 7, 1963, four years after the laminectomy and approximately two years after he attained his majority. The complaint stated several causes of action against each defendant. Against Dr. Spence it alleged, among other things, negligence in the performance of the laminectomy and failure to inform him beforehand of the risk involved. Against the hospital the complaint charged negligent post-operative care in permitting appellant to remain unattended after the laminectomy, in failing to provide a nurse or orderly to assist him at the time of his fall, and in failing to maintain a side rail on his bed. The answers denied the allegations of negligence and defended on the ground that the suit was barred by the statute of limitations.

Pretrial discovery—including depositions by appellant, his mother and Dr. Spence—continuances and other delays consumed five years. At trial, disposition of the threshold question whether the statute of limitations had run was held in abeyance until the relevant facts developed. Appellant introduced no evidence to show medical and hospital practices, if any, customarily pursued in regard to the critical aspects of the case, and only Dr. Spence, called as an adverse witness, testified on the issue of causality. Dr. Spence described the surgical procedures he utilized in the two operations and expressed his opinion that appellant's disabilities stemmed from his pre-operative condition as symptomatized by the swollen, non-pulsating spinal cord. He stated, however, that neither he nor any of the other physicians with whom he consulted was certain as to what that condition was, and he admitted that trauma can be a cause of paralysis. Dr. Spence further testified that even without trauma paralysis can be anticipated "somewhere in the nature of one percent" of the laminectomies performed, a risk he termed "a very slight possibility." He felt that communication of that risk to the patient is not good medical practice because it might deter patients from undergoing needed surgery and might produce adverse psychological reactions which could preclude the success of the operation.

At the close of appellant's case in chief, each defendant moved for a directed verdict and the trial judge granted both motions. The basis of the ruling, he explained, was that appellant had failed to produce any

medical evidence indicating negligence on Dr. Spence's part in diagnosing appellant's malady or in performing the laminectomy; that there was no proof that Dr. Spence's treatment was responsible for appellant's disabilities; and that notwithstanding some evidence to show negligent post-operative care, an absence of medical testimony to show causality precluded submission of the case against the hospital to the jury. The judge did not allude specifically to the alleged breach of duty by Dr. Spence to divulge the possible consequences of the laminectomy.

We reverse. The testimony of appellant and his mother that Dr. Spence did not reveal the risk of paralysis from the laminectomy made out a prima facie case of violation of the physician's duty to disclose which Dr. Spence's explanation did not negate as a matter of law. There was also testimony from which the jury could have found that the laminectomy was negligently performed by Dr. Spence, and that appellant's fall was the consequence of negligence on the part of the hospital. The record, moreover, contains evidence of sufficient quantity and quality to tender jury issues as to whether and to what extent any such negligence was causally related to appellant's post-laminectomy condition. These considerations entitled appellant to a new trial. * * *

Suits charging failure by a physician adequately to disclose the risks and alternatives of proposed treatment are not innovations in American law. . . .

The root premise is the concept, fundamental in American jurisprudence, that "every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.

A physician is under a duty to treat his patient skillfully but proficiency in diagnosis and therapy is not the full measure of his responsibility. The cases demonstrate that the physician is under an obligation to communicate specific information to the patient when the exigencies of reasonable care call for it. Due care may require a physician perceiving symptoms of bodily abnormality to alert the patient to the condition. It may call upon the physician confronting an ailment which does not respond to his ministrations to inform the patient thereof. It may command the physician to instruct the patient as to any limitations to be presently observed for his own welfare, and as to any precautionary therapy he should seek in the

future. It may oblige the physician to advise the patient of the need for or desirability of any alternative treatment promising greater benefit than that being pursued. Just as plainly, due care normally demands that the physician warn the patient of any risks to his well-being which contemplated therapy may involve.

The context in which the duty of risk-disclosure arises is invariably the occasion for decision as to whether a particular treatment procedure is to be undertaken. To the physician, whose training enables a self-satisfying evaluation, the answer may seem clear, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie. To enable the patient to chart his course understandably, some familiarity with the therapeutic alternatives and their hazards becomes essential.

A reasonable revelation in these respects is not only a necessity but, as we see it, is as much a matter of the physician's duty. It is a duty to warn of the dangers lurking in the proposed treatment, and that is surely a facet of due care. It is, too, a duty to impart information which the patient has every right to expect. The patient's reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with arms length transactions. His dependence upon the physician for information affecting his well-being, in terms of contemplated treatment, is well-nigh abject. As earlier noted, long before the instant litigation arose, courts had recognized that the physician had the responsibility of satisfying the vital informational needs of the patient. More recently, we ourselves have found "in the fiducial qualities of [the physician-patient] relationship the physician's duty to reveal to the patient that which in his best interests it is important that he should know." We now find, as a part of the physician's overall obligation to the patient, a similar duty of reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved. * * *

Duty to disclose has gained recognition in a large number of American jurisdictions, but more largely on a different rationale. The majority of courts dealing with the problem have made the duty depend on whether it was the custom of physicians practicing in the community to make the particular disclosure to the patient. If so, the physician may be held liable for an unreasonable and injurious failure to divulge, but there can be no recovery unless the omission forsakes a practice prevalent in the profession. We agree that the physician's noncompliance with a professional custom to reveal, like any other departure from prevailing medical practice, may give rise to liability to the patient. We do not agree that the patient's cause of action is dependent upon the existence and nonperformance of a relevant professional tradition. * * *

Thus we distinguished, for purposes of duty to disclose, the special and general-standard aspects of the physician-patient relationship. When medical judgment enters the picture and for that reason the special standard controls, prevailing medical practice must be given its just due. In all other instances, however, the general standard exacting ordinary care applies, and that standard is set by law. In sum, the physician's duty to disclose is governed by the same legal principles applicable to others in comparable situations, with modifications only to the extent that medical judgment enters the picture. We hold that the standard measuring performance of that duty by physicians, as by others, is conduct which is reasonable under the circumstances.

Once the circumstances give rise to a duty on the physician's part to inform his patient, the next inquiry is the scope of the disclosure the physician is legally obliged to make. The courts have frequently confronted this problem but no uniform standard defining the adequacy of the divulgence emerges from the decisions. Some have said "full" disclosure, a norm we are unwilling to adopt literally. It seems obviously prohibitive and unrealistic to expect physicians to discuss with their patients every risk of proposed treatment—no matter how small or remote—and generally unnecessary from the patient's viewpoint as well. Indeed, the cases speaking in terms of "full" disclosure appear to envision something less than total disclosure, leaving unanswered the question of just how much.

The larger number of courts, as might be expected, have applied tests framed with reference to prevailing fashion within the medical profession. Some have measured the disclosure by "good medical practice," others by what a reasonable practitioner would have bared under the circumstances, and still others by what medical custom in the community would demand. We have explored this rather considerable body of law but are unprepared to follow it. The duty to disclose, we have reasoned, arises from phenomena apart from medical custom and practice. The latter, we think, should no more establish the scope of the duty than its existence. Any definition of scope in terms purely of a professional standard is at odds with the patient's prerogative to decide on projected therapy himself. That prerogative, we have said, is at the very foundation of the duty to disclose, and both the patient's right to know and the physician's correlative obligation to tell him are diluted to the extent that its compass is dictated by the medical profession.

In our view, the patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be

divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked. And to safeguard the patient's interest in achieving his own determination on treatment, the law must itself set the standard for adequate disclosure. * * *

The topics importantly demanding a communication of information are the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated. The factors contributing significance to the dangerousness of a medical technique are, of course, the incidence of injury and the degree of the harm threatened. A very small chance of death or serious disablement may well be significant; a potential disability which dramatically outweighs the potential benefit of the therapy or the detriments of the existing malady may summons discussion with the patient. * * *

Two exceptions to the general rule of disclosure have been noted by the courts. Each is in the nature of a physician's privilege not to disclose, and the reasoning underlying them is appealing. Each, indeed, is but a recognition that, as important as is the patient's right to know, it is greatly outweighed by the magnitudinous circumstances giving rise to the privilege. The first comes into play when the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment. When a genuine emergency of that sort arises, it is settled that the impracticality of conferring with the patient dispenses with need for it. Even in situations of that character the physician should, as current law requires, attempt to secure a relative's consent if possible. But if time is too short to accommodate discussion, obviously the physician should proceed with the treatment.

The second exception obtains when risk-disclosure poses such a threat of detriment to the patient as to become unfeasible or contraindicated from a medical point of view. It is recognized that patients occasionally become so ill or emotionally distraught on disclosure as to foreclose a rational decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient. Where that is so, the cases have generally held that the physician is armed with a privilege to keep the information from the patient, and we think it clear that portents of that type may justify the physician in action he deems medically warranted. The critical inquiry is whether the physician responded to a sound medical judgment that communication of the risk information would present a threat to the patient's well-being.

The physician's privilege to withhold information for therapeutic reasons must be carefully circumscribed, however, for otherwise it might devour the disclosure rule itself. The privilege does not accept the paternalistic notion that the physician may remain silent simply because divulgence

might prompt the patient to forego therapy the physician feels the patient really needs. That attitude presumes instability or perversity for even the normal patient, and runs counter to the foundation principle that the patient should and ordinarily can make the choice for himself. Nor does the privilege contemplate operation save where the patient's reaction to risk information, as reasonable foreseen by the physician, is menacing. And even in a situation of that kind, disclosure to a close relative with a view to securing consent to the proposed treatment may be the only alternative open to the physician. * * *

Reversed and remanded for a new trial.

CRUZAN v. DIRECTOR, MISSOURI DEP'T. OF HEALTH, 497 U.S. 261 (1990)
SUPREME COURT OF THE UNITED STATES

Chief Justice Rehnquist delivered the opinion of the Court.

Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Copetitioners Lester and Joyce Cruzan, Nancy's parents and coguardians, sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy's desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. We granted certiorari, 492 U.S. 917 (1989), and now affirm.

On the night of January 11, 1983, Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The vehicle overturned, and Cruzan was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed her as having sustained probable cerebral contusions compounded by significant anoxia (lack of oxygen). The Missouri trial court in this case found that permanent brain damage generally results after 6 minutes in an anoxic state; it was estimated that Cruzan was deprived of oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the recovery, surgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the consent of her then husband. Subsequent rehabilitative efforts

proved unavailing. She now lies in a Missouri state hospital in what is commonly referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. The State of Missouri is bearing the cost of her care.

After it had become apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked hospital employees to terminate the artificial nutrition and hydration procedures. All agree that such a removal would cause her death. The employees refused to honor the request without court approval. The parents then sought and received authorization from the state trial court for termination. The court found that a person in Nancy's condition had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures." App. to Pet. for Cert. A99. The court also found that Nancy's "expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration." *Id.*, at A97-A98.

The Supreme Court of Missouri reversed by a divided vote. The court recognized a right to refuse treatment embodied in the common-law doctrine of informed consent, but expressed skepticism about the application of that doctrine in the circumstances of this case. *Cruzan v. Harmon*, 760 S.W.2d 408, 416-417 (1988) (en banc). The court also declined to read a broad right of privacy into the State Constitution which would "support the right of a person to refuse medical treatment in every circumstance," and expressed doubt as to whether such a right existed under the United States Constitution. *Id.*, at 417-418. It then decided that the Missouri Living Will statute, Mo Rev. Stat. § 459.010 et seq. (1986), embodied a state policy strongly favoring the preservation of life. 760 S.W.2d at 419-420. The court found that Cruzan's statements to her roommate regarding her desire to live or die under certain conditions were "unreliable for the purpose of determining her intent," *id.*, at 424, "and thus insufficient to support the coguardians[']claim to exercise substituted judgment on Nancy's behalf." *Id.*, at 426. It rejected the argument that Cruzan's parents were entitled to order the termination of her medical treatment, concluding that "no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here." *Id.*, at 425. The court also expressed its view that "broad policy questions bearing on life and death are more properly addressed by representative assemblies" than judicial bodies. *Id.*, at 426.

We granted certiorari to consider the question whether Cruzan has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances.

At common law, even the touching of one person by another without consent and without legal justification was a battery. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39–42 (5th ed. 1984). Before the turn of the century, this Court observed that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hospital,* 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914). The informed consent doctrine has become firmly entrenched in American tort law. See Keeton, Dobbs, Keeton, & Owen, supra, § 32, pp. 189-192; F. Rozovsky, Consent to Treatment, A Practical Guide 1-98 (2d ed. 1990).

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. [emphasis added] Until about 15 years ago and the seminal decision in *In re Quinlan,* 70 N.J. 10, 355 A.2d 647, cert. denied sub nom. *Garger v. New Jersey,* 429 U.S. 922, 50 L. Ed. 2d 289, 97 S. Ct. 319 (1976), the number of right-to-refuse-treatment decisions was relatively few. Most of the earlier cases involved patients who refused medical treatment forbidden by their religious beliefs, thus implicating First Amendment rights as well as common-law rights of self-determination. More recently, however, with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned. See 760 S.W.2d at 412, n.4 (collecting 54 reported decisions from 1976 through 1988).

In the Quinlan case, young Karen Quinlan suffered severe brain damage as the result of anoxia and entered a persistent vegetative state. Karen's father sought judicial approval to disconnect his daughter's respirator. The New Jersey Supreme Court granted the relief, holding that Karen had a right of privacy grounded in the Federal Constitution to terminate treatment.

In re Quinlan, 70 N.J. at 38-42, 355 A.2d at 662-664. Recognizing that this right was not absolute, however, the court balanced it against asserted state interests. Noting that the State's interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims," the court concluded that the state interests had to give way in that case. *Id.,* at [*271] 41, 355 A.2d at 664. The court also concluded that the "only practical way" to prevent the loss of Karen's privacy right due to her incompetence was to allow her guardian and family to decide "whether she would exercise it in these circumstances." *Ibid.*

After Quinlan, however, most courts have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right. See L. Tribe, American Constitutional Law § 15-11, p. 1365 (2d ed. 1988). In *Superintendent of Belchertown State School v. Saikewicz,* 373 Mass. 728, 370 N.E.2d 417 (1977), the Supreme Judicial Court of Massachusetts relied on both the right of privacy and the right of informed consent to permit the withholding of chemotherapy from a profoundly retarded 67-year-old man suffering from leukemia. *Id.,* at 737-738, 370 N.E.2d at 424. Reasoning that an incompetent person retains the same rights as a competent individual "because the value of human dignity extends to both," the court adopted a "substituted judgment" standard whereby courts were to determine what an incompetent individual's decision would have been under the circumstances. *Id.,* at 745, 752-753, 757-758, 370 N.E.2d at 427, 431, 434. Distilling certain state interests from prior case law—the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession—the court recognized the first interest as paramount and noted it was greatest when an affliction was curable, "as opposed to the State interest where, as here, the issue is not whether, but when, for how long, and at what cost to the individual [a] life may be briefly extended." *Id.,* at 742, 370 N.E.2d at 426. * * *

Many of the later cases build on the principles established in *Quinlan, Saikewicz,* and *Storar/Eichner.* . . . Reasoning that the right of self-determination should not be lost merely because an individual is unable to sense a violation of it, the court held that incompetent individuals retain a right to refuse treatment. It also held that such a right could be exercised by a surrogate decisionmaker using a "subjective" standard when there was clear evidence that the incompetent person would have exercised it. Where such evidence was lacking, the court held that an individual's right could still be invoked in certain circumstances under objective "best interest" standards. *Id.,* at 361-368, 486 A.2d at 1229-1233. Thus, if some trustworthy evidence existed that the individual would have wanted to terminate treatment, but

not enough to clearly establish a person's wishes for purposes of the subjective standard, and the burden of a prolonged life from the experience of pain and suffering markedly outweighed its satisfactions, treatment could be terminated under a "limited-objective" standard. Where no trustworthy evidence existed, and a person's suffering would make the administration of life-sustaining treatment inhumane, a "pure-objective" standard could be used to terminate treatment. If none of these conditions obtained, the court held it was best to err in favor of preserving life. *Id.*, at 364-368, 486 A.2d at 1231-1233.

The court also rejected certain categorical distinctions that had been drawn in prior refusal-of-treatment cases as lacking substance for decision purposes: the distinction between actively hastening death by terminating treatment and passively allowing a person to die of a disease; between treating individuals as an initial matter versus withdrawing treatment afterwards; between ordinary versus extraordinary treatment; and between treatment by artificial feeding versus other forms of life-sustaining medical procedures. *Id.*, at 369-374, 486 A.2d at 1233-1237. As to the last item, the court acknowledged the "emotional significance" of food, but noted that feeding by implanted tubes is a "medical procedure with inherent risks and possible side effects, instituted by skilled health-care providers to compensate for impaired physical functioning" which analytically was equivalent to artificial breathing using a respirator. *Id.*, at 373, 486 A.2d at 1236. * * *

Other courts have found state statutory law relevant to the resolution of these issues. In *Conservatorship of Drabick,* 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, cert. denied, 488 U.S. 958 (1988), the California Court of Appeal authorized the removal of a nasogastric feeding tube from a 44-year-old man who was in a persistent vegetative state as a result of an auto accident. Noting that the right to refuse treatment was grounded in both the common law and a constitutional right of privacy, the court held that a state probate statute authorized the patient's conservator to order the withdrawal of life-sustaining treatment when such a decision was made in good faith based on medical advice and the conservatee's best interests. While acknowledging that "to claim that [a patient's] 'right to choose' survives incompetence is a legal fiction at best," the court reasoned that the respect society accords to persons as individuals is not lost upon incompetence and is best preserved by allowing others "to make a decision that reflects [a patient's] interests more closely than would a purely technological decision to do whatever is possible." [*276] *Id.*, at 208, 245 Cal. Rptr. at 854-855. See also *In re Conservatorship of Torres,* 357 N.W.2d 332 (Minn. 1984) (Minnesota court had constitutional and statutory authority to authorize a conservator to order the removal of an incompetent individual's respirator since in patient's best interests).

In *In re Estate of Longeway,* 133 Ill. 2d 33, 549 N.E.2d 292, 139 Ill. Dec. 780 (1989), the Supreme Court of Illinois considered whether a 76-year-old woman rendered incompetent from a series of strokes had a right to the discontinuance of artificial nutrition and hydration. Noting that the boundaries of a federal right of privacy were uncertain, the court found a right to refuse treatment in the doctrine of informed consent. *Id.,* at 43-45, 549 N.E.2d at 296-297. The court further held that the State Probate Act impliedly authorized a guardian to exercise a ward's right to refuse artificial sustenance in the event that the ward was terminally ill and irreversibly comatose. *Id.,* at 45-47, 549 N.E.2d at 298. Declining to adopt a best interests standard for deciding when it would be appropriate to exercise a ward's right because it "lets another make a determination of a patient's quality of life," the court opted instead for a substituted judgment standard. *Id.,* at 49, 549 N.E.2d at 299. Finding the "expressed intent" standard utilized in *O'Connor, supra,* too rigid, the court noted that other clear and convincing evidence of the patient's intent could be considered. 133 Ill. 2d at 50-51, 549 N.E.2d at 300. The court also adopted the "consensus opinion [that] treats artificial nutrition and hydration as medical treatment." *Id.,* at 42, 549 N.E.2d at 296. Cf. *McConnell v. Beverly Enterprises-Connecticut, Inc.,* 209 Conn. 692, 705, [*277] 553 A.2d 596, 603 (1989) (right to withdraw artificial nutrition and hydration found in the Connecticut Removal of Life Support Systems Act, which "provid[es] functional guidelines for the exercise of the common law and constitutional rights of self-determination"; attending physician authorized to remove treatment after finding that patient is in a terminal condition, obtaining consent of family, and considering expressed wishes of patient).

As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond that, these cases demonstrate both similarity and diversity in their approaches to decision of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources—state constitutions, statutes, and common law—which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did. This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a "right to die." We follow the judicious counsel of our decision in *Twin City Bank v. Nebeker,* 167 U.S. 196, 202, 42 L. Ed. 134, 17 S. Ct. 766 (1897), where we said that in deciding "a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible

phase of the subject." The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In *Jacobson v. Massachusetts, 197* U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358 (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. Decisions prior to the incorporation of the Fourth Amendment into the Fourteenth Amendment analyzed searches and seizures involving the body under the Due Process Clause and were thought to implicate substantial liberty interests. See, e.g., *Breithaupt v. Abram,* 352 U.S. 432, 439, 1 L. Ed. 2d 448, 77 S. Ct. 408 (1957) ("As against the right of an individual that his person be held inviolable . . . must be set the interests of society . . .").

Just this Term, in the course of holding that a State's procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Washington v. Harper,* 494 U.S. 210, 221-222, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); see also *id.,* at 229 ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). Still other cases support the recognition of a general liberty interest in refusing medical treatment. *Vitek v. Jones,* 445 U.S. 480, 494, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); *Parham v. J. R.,* 442 U.S. 584, 600, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment"). But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Youngberg v. Romeo,* 457 U.S. 307, 321, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). See also *Mills v. Rogers,* 457 U.S. 291, 299, 73 L. Ed. 2d 16, 102 S. Ct. 2442 (1982).

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible.

But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Petitioners go on to assert that an incompetent person should possess the same right in this respect as is possessed by a competent person. They rely primarily on our decisions in *Parham v. J. R., supra,* and *Youngberg v. Romeo, supra.* In Parham, we held that a mentally disturbed minor child had a liberty interest in "not being confined unnecessarily for medical treatment," 442 U.S. at 600, but we certainly did not intimate that such a minor child, after commitment, would have a liberty interest in refusing treatment. In Youngberg, we held that a seriously retarded adult had a liberty interest in safety and freedom from bodily restraint, 457 U.S. at 320. Youngberg, however, did not deal with decisions to administer or withhold medical treatment. The difficulty with petitioners' claim is that in a sense it begs the question: An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a "right" must be exercised for her, if at all, by some sort of surrogate. Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition

of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "there will, of course, be some unfortunate situations in which family members will not act to protect a patient." *In re Jobes,* 108 N.J. 394, 419, 529 A.2d 434, 447 (1987). A State is entitled to guard against potential abuses in such situations. Similarly, a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it. See *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 515-516. Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.

In our view, Missouri has permissibly sought to advance these interests through the adoption of a "clear and convincing" standard of proof to govern such proceedings. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas,* 441 U.S. 418, 423, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979) (quoting *In re Winship,* 397 U.S. 358, 370, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (Harlan, J., concurring)). "This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer,* 455 U.S. 745, 756, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (quoting *Addington, supra,* at 424). Thus, such a standard has been required in deportation proceedings, *Woodby v. INS,* 385 U.S. 276, 17 L. Ed. 2d 362, 87 S. Ct. 483 (1966), in denaturalization proceedings, *Schneiderman v. United States,* 320 U.S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1943), in civil commitment proceedings, *Addington, supra,* and in proceedings for the termination of parental rights, *Santosky, supra.* Further, this level of proof, "or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as . . . lost wills, oral contracts to make bequests, and the like." *Woodby, supra,* at 285, n.18.

We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute. But not only does the

standard of proof reflect the importance of a particular adjudication, it also serves as "a societal judgment about how the risk of error should be distributed between the litigants." *Santosky, supra,* at 755; *Addington, supra,* at 423. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction. In Santosky, one of the factors which led the Court to require proof by clear and convincing evidence in a proceeding to terminate parental rights was that a decision in such a case was final and irrevocable. *Santosky, supra,* at 759. The same must surely be said of the decision to discontinue hydration and nutrition of a patient such as Nancy Cruzan, which all agree will result in her death. * * *

In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. We note that many courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to the prior expressed wishes of the incompetent individual, or whether they allow more general proof of what the individual's decision would have been, require a clear and convincing standard of proof for such evidence. See, e. g., *Longeway,* 133 Ill. 2d at 50-51, 549 N.E.2d at 300; *McConnell,* 209 Conn. at 707-710, 553 A.2d at 604-605; *O'Connor,* 72 N.Y. 2d at 529-530, 531 N.E.2d at 613; *In re Gardner,* 534 A.2d 947, 952-953 (Me. 1987); *In re Jobes,* 108 N.J. at 412-413, 529 A. 2d, at 443; *Leach v. Akron General Medical Center,* 68 Ohio Misc. 1, 11, 426 N.E.2d 809, 815 (1980). The Supreme Court of Missouri held that in this case the testimony adduced at trial did not amount to clear and convincing proof of the patient's desire to have hydration and nutrition withdrawn. In so doing, it reversed a decision of the Missouri trial court which had found that the evidence "suggested" Nancy Cruzan would not have desired to continue such measures, App. to Pet. for Cert. A98, but which had not adopted the standard of "clear and convincing evidence" enunciated by the Supreme Court. The testimony adduced at trial consisted primarily of Nancy Cruzan's statements made to a housemate about a year before her accident that she

would not want to live should she face life as a "vegetable," and other observations to the same effect. The observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. We cannot say that the Supreme Court of Missouri committed constitutional error in reaching the conclusion that it did.

Petitioners alternatively contend that Missouri must accept the "substituted judgment" of close family members even in the absence of substantial proof that their views reflect the views of the patient. They rely primarily upon our decisions in *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989), and *Parham v. J. R.*, 442 U.S. 584, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979). But we do not think these cases support their claim. In Michael H., we upheld the constitutionality of California's favored treatment of traditional family relationships; such a holding may not be turned around into a constitutional requirement that a State must recognize the primacy of those relationships in a situation like this. And in Parham, where the patient was a minor, we also upheld the constitutionality of a state scheme in which parents made certain decisions for mentally ill minors. Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way. No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents.

If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. All of the reasons previously discussed for allowing Missouri to require clear and convincing evidence of the patient's wishes lead us to conclude that the State may choose to defer only to those wishes, rather than confide the decision to close family members.

The judgment of the Supreme Court of Missouri is. . . . Affirmed.

17

Liability for Neglect in Nursing Homes

Ilene Warner and Raymond Albert

As the population of the United States continues its rapid growth in the segment over the age of 65 years, society will be faced with issues involving the care, housing, and medical treatments of elderly persons with increasing intensity. It is estimated that 2.3 million Americans will reside in any one of the 19,000 nursing homes in this country at during any one given year (Lidz, 1992, p. 22). Future predictions place one person in four in a nursing home at some point in their lives. Despite the public focus of hospitals as the center of health care delivery, nursing homes provide double the number of beds as acute care hospitals, and there are three times as many nursing homes in the United States as there are hospitals (Ouslander, 1991, p. 3).

The above profile suggests heightened demand for long-term care, and this trend portends the potential for increased exposure for legal liability. The following discussion examines the regulatory context for defining institutional neglect and discusses the associated case law, with special attention to those cases that suggest the possibility of holding institutions criminally liable for their negligent conduct.

FEDERAL AND PENNSYLVANIA STATE NURSING HOME REGULATIONS

The nursing home industry is one of the most regulated businesses in the United States (Spiter-Resnick & Krajcinovic, 1995). In theory,

these controls were designed to protect vulnerable patients from mistreatment in the facilities, a necessary step given degree of control exercised by institutions over the lives of the residents (Thomas, 1982). Because of these concerns, there has been a succession of regulations governing the industry since the passage of Medicare in 1965. The first set of Pennsylvania Department of Health Rules and Regulations pertaining to nursing home standards was promulgated in 1966 following the passage of the Amendments to the Social Security Act. These regulations were divided into separate mandates for skilled-privately owned facilities, skilled-nonprofit facilities, and intermediate facilities.

Twenty-two years later, the Pennsylvania Department of Health issued revised regulations addressing specific areas that affect not only quality of life issues concerns but mistreatment of residents as well. Specific state regulations pertaining to adequate physical care include:

- The facility shall provide nursing services to meet the needs of patients (28 Penn. Statutes, Section 211.12(a)).
- General supervision, guidance and assistance for a patient in implementing the patient's personal health program to assure that preventive measures, treatments, medications, diet, and other health services prescribed are properly carried out and recorded (28 Penn. Statutes, Section 212.12(e)(9)).
- Nursing personnel shall be aware of the nutritional needs and food and fluid intake of the patients and assist promptly where necessary in the feeding of patients. Food and fluid intake of patients shall be observed and deviations from normal shall be recorded and reported to the charge nurse and physician (28 Penn. Statutes, Section 211.12(r)).
- The facility shall have an active program of restorative care for patients who need the service. The service shall be an integral part of nursing service and shall be directed toward assisting a patient to achieve and maintain an optimal level of self-care and independence (28 Penn. Statutes, Section 211.12(s)).

The above regulations provide a mandate for facilities to provide adequate staff to maintain the health and safety of the residents to whom it provides services. The goal of care is to maximize each

resident's self-care and health status through the provision of services as well as observing for changes from the baseline to delay deterioration.

In 1987, Congress passed the Omnibus Budget and Reconciliation Act (hereinafter OBRA), which provided significant reforms for the nursing home industry (Edelman, 1990). Through the use of comprehensive assessments, facilities are mandated to prevent the development of a particular problem such as pressure ulcers or incontinence if it was not an issue upon admission. The facility is also directed to correct the problem if it occurs and to prevent recurrence if the problem is at all avoidable. OBRA altered the inspection process by focusing on outcomes of patient care, including the decreased usage of chemical (tranquilizers) and physical restraints, identification and treatment of incontinence, improved care planning, and the achievement of the resident's highest functional capacities. The following federal regulations, promulgated pursuant to OBRA, pertain to issues involving neglect in long-term care facilities.

The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect and abuse of residents, and misappropriation of resident property. "Neglect" means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness. It may include but not be limited to being left to sit or lie in urine or feces . . . or failing to answer call bells to provide needed assistance (42 C.F.R. Section 483.13(c)).

- A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life (42 C.F.R. Section 483.15).
- Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practical physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care (42 C.F.R. Section 483.25).
- Based upon the comprehensive assessment of a resident, the facility must ensure that (1) a resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were

unavoidable; and (2) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection, and prevent new sores from forming (42 C.F.R. Section 483.25(c)).

- Based on a resident's comprehensive assessment, the facility must ensure that a resident (1) maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and (2) receives a therapeutic diet when there is a nutritional problem (42 C.F.R. Section 483.25(i)).
- The facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practical physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care (42 C.F.R. Section 483.30).

The federal regulations specify the facility's responsibility to maintain the resident's highest level of functioning through the use of interdisciplinary assessments. The intention was to review each resident at least quarterly to provide early interventions for problems. Federal mandates, looking at quality of care/life issues, focused on the impact of inadequate staffing and inattention to residents' needs as well as the general nursing and nutritional needs of the residents in stating the definitions of neglect in long-term care.

Enforcement of state and federal regulations is performed by departments of health within certain jurisdictions. The subjectivity of the survey process and the fragmentation of the agencies involved in the survey process provides less than desirable results (Butler, 1979). A particular facility's inability to provide adequate staff, interventions, or care for its residents may not be discovered by the survey process until a significant trend over time has been observed.

APPLICATION OF CRIMINAL STATUTES TO ACTS OF CORPORATE NEGLIGENCE

Despite the preponderance of state and federal nursing home regulations, the inspection and certification process that occurs at least

annually, and the structure of Ombudsman and Adult Protective Services as mediation and investigatory agencies, negligence occurs in the nursing home industry. In two recent cases in Philadelphia, Pennsylvania Administrators and Directors of Nursing were indicted on charges of involuntary manslaughter and reckless endangerment in connection with the deaths of two residents, one at each of their two facilities. The indictments were notable in that the government attempted to hold employees of a corporation criminally negligent for the eventual demise of these residents. (The deaths were due to inadequately treated pressure ulcers—bedsores. These ulcers generally develop over areas of bony prominences, such as hips, sacrum, heels, scapulae, and the head. If a patient sustains pressure over these areas, circulation to the site becomes impaired and tissue death occurs. As the progression of events occurs, the damage to underlying tissues becomes increasingly more extensive, with the result that the tissue deterioration can spread infection to the bone or to the entire system. In the worst cases, the infection can be fatal.)

It was argued that the negligent conduct represented a level of criminality, as understood within the context of the existing Pennsylvania law regarding involuntary manslaughter:

- General rule—A person is guilty of involuntary manslaughter if, as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, causes the death of another person (18 Penn. Statutes Section 2504(a)).
- State of mind or *mens rea* which characterizes involuntary manslaughter is reckless or gross negligence; great departure from standard of ordinary care evidencing disregard for human life or indifference to possible consequences of the actor's conduct (18 Penn. Statutes Section 2504(6)).
- In an involuntary manslaughter case, facts must be such that fatal consequences of negligent act could reasonably have been foreseen; it must appear that the death was not the result of a misadventure, but the natural and probable result of a reckless or culpably negligent act (18 Penn. Statutes Section 2504(7)).
- Recklessness or criminal negligence required to sustain an involuntary manslaughter conviction may be found if accused consciously disregarded or, in gross departure from the standard of reasonable care, failed to perceive substantial and

unjustifiable risk that his actions might cause death or serious body harm (18 Penn. Statutes Section 2504(8)).
- Negligence as an element of involuntary manslaughter denotes the absence of due care (18 Penn. Statutes Section 2504(9)).

In addition, the current liability of organizations in Pennsylvania with regard to corporate culpability are found in:

- A corporation may be convicted of the commission of an offense if the offense consists of an omission to discharge a specific duty of affirmative performance imposed of corporations by law (18 Penn. Statutes Section 307(a)(2)).
- An individual is held legally accountable for any conduct he performs or causes to be performed in the name of a corporation or an incorporated association or in its behalf to the same extent as if it were performed in his own name or behalf (18 Penn. Statutes Section 307(e)(1)).
- Whenever a duty to act is imposed by law upon a corporation having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directed upon himself (18 Penn. Statutes Section 307(2)).

In an address to the National College of District Attorneys on the topic of corporate criminal liability, then Assistant Attorney General of Texas, David T. Marks, delineated the conditions under which corporations should be held criminally liable. He identified four factors which could be applied to determine criminal negligence (Marks, 1986):

1. **The Egregious Harm Test**—Examines the extent of the harm suffered by the victim, its duration, evidence of multiple victims, a history of harm by the corporation, the helplessness of the victim (captive consumer), and the extent to which the harm can be linked to an evil state of mind due to greed in the face of foreseeable harm and with no attempt of the part of the corporation to avert the risk of harm.
2. **Individual Responsibility Obscured Through Collective Action**—Since most corporations act as a collective of the thoughts and actions of many people, it is difficult to identify the individuals

most at fault for an error. If the offense is the result of a habit of the corporation, a pattern previously exposed, the criminal liability of the organization as a whole is considered.

3. **Collective Harm**—A corporate organization with harm caused in a fragmented fashion may be held liable given the collective impact of the organization's actions.
4. **The Ends of Justice**—In many cases, a corporate underling is commanded to act in a negligent manner. In order to dissuade corporations from such a practice, the application of criminal liability may be imposed in order to cause the corporation to adopt more sound policies and procedures, institute monitoring and quality assurance controls, establish standard operating procedures and to avoid the social stigma which results in criminal prosecutions.

Marks also suggested that, under the doctrine of *respondeat superior,* corporations be held liable for negligent criminal conduct of their servants. The doctrine of *respondeat superior* holds that a master is liable for certain acts committed by its servant and surfaced in the hospital setting in *Darling v. Charleston Community Memorial Hospital* (1987). In *Darling,* it was shown that a when a hospital fails to provide appropriate care to a patient and that breach of duty results in a harm, the hospital itself is held corporately negligent. Therefore, certain duties of the hospital staff were directly attributable to the hospital corporation itself. It is a small step, arguably, to apply the holding in *Darling* to the nursing home environment.

Pennsylvania was one of the most recent states to adopt laws defining corporate negligence (Nathanson, 1993). In *Thompson v. Nason Hospital* (1991), the court defined the four duties that hospitals owe to their patients:

1. A duty to use reasonable care in the maintenance of safe and adequate facilities and equipment.
2. A duty to select and retain only competent physicians.
3. A duty to oversee all persons who practice medicine within its walls as to patient care.
4. A duty to formulate, adopt, and enforce adequate rules and policies to ensure quality of care for the patients.

In taking this stand, the Court held that in today's environment, patients look to hospitals for treatment, a departure from the

physician as the source for treatment. Since this shift has occurred, hospitals have a greater duty to the patient to provide adequate standards of care. Again, no significant conceptual leap is required to apply these standards to the nursing home milieu.

To defend against allegations of corporate criminal liability, Marks (1986) notes that corporations may plead lack of knowledge about the activities, that the actions were performed within the scope of employment, or that the actions performed by employees were part of accepted business practices. But this defense can be overcome, according to Nathanson (1993, p. 581) by demonstrating that the facility had actual or constructive knowledge that its devices, physicians or policies created harm and that the facility did not rectify the problem. Hospitals may be found guilty of corporate negligence based on failure to prevent harm—a failure to meet the standard of care. In its most serious form, this negligence may result in the revocation of Medicare and Medicaid reimbursement or loss of Joint Commission Accreditation, as well as the withdrawal of private insurers and HMO referrals to the facility (Rasmussen, 1992). Similarly, nursing homes that fail to meet the standard of care may lose state and federal licensure and certification, a costly outcome since the combined Medicare and Medicaid funds constitute 71% of the total dollars spent on nursing home payments (Ouslander, 1991).

CASE LAW ANALYSIS

Although as a general concept it is accepted that a nursing home is not the insurer of the safety of its residents, a facility must show that it exercises the requisite standard of care in relation to its patients. The duty, as a practical matter, means that a facility must provide the degree of skill and diligence demonstrated by the same or similar facilities, particularly those located within the same community. This principle was articulated in *Nichols v. Green Acres Rest Home* (1971). In this case, a resident eloped from a Louisiana nursing home and was found face down in a puddle of water a number of yards away from an adjacent river. The Court affirmed the lower court judgment in favor of the nursing home, stating that the facility provided a reasonable level of care but could not prevent this type of injury.

The judgment in *Nichols* notwithstanding, civil actions against nursing facilities based on issues of negligence can be found throughout the country and with increasing frequency. In *Montgomery Health Care v. Ballard* (1990), the estate of a nursing home resident who died as a result of multiple, infected pressure ulcers sued the nursing home and its parent company. The State Circuit Court entered a judgment against the nursing home, but the facility appealed, claiming that the admission of the State Department of Health inspection reports should have been inadmissible. These reports documented widespread citations for neglect and dangerous conditions throughout the facility. The nursing home also claimed that its parent company was not liable for the tort actions of the subsidiary facility. The Supreme Court of Alabama upheld the admissibility of the inspection reports and held that parent corporations of the nursing home could be held liable for the nursing home's negligence resulting in the resident's death where the parent controlled or retained the right of the day-to-day activities within the facility.

In another civil action against the operator and corporate owners of a nursing home, the plaintiffs argued that the physical abuse of a resident, and his resulting death weeks later, was a violation of OBRA regulations and an infringement of residents rights. In *Stiffelman v. Abrams* (1983), the executors of the deceased sought damages under OBRA rather than for wrongful death, as there was no claim made for the loss of support due to Stiffleman's death. The Court held that OBRA provided a private remedy if patients were deprived of their rights to be free from abuse.

In *Mitchell v. State of Florida* (1986), the owner of a nursing facility was convicted of aggravated abuse and exploitation of the aged with culpable negligence. Evidence presented to the Circuit Court showed that residents within the facility had multiple, extensive pressure ulcers that were linked to the charges of abuse. Mitchell's defense was that he was unaware of the conditions within the Florida facility. Evidence was introduced during the appeal process that Mitchell was the owner and operator of a facility in Iowa that was closed based on complaints similar to those found in the Florida facility. The Court affirmed Mitchell's conviction.

In that same year, the State of Louisiana brought action against six nursing home staff members alleging cruelty to the infirm. In

State v. Brenner (1986), the state applied Louisiana statute, which specified that "cruelty to the infirm is the intentional or criminally negligent mistreatment or neglect whereby unjustifiable pain or suffering is caused a person who is a resident of a nursing home" (LSA-RS 14:93.3). The state argued that the administrator of the nursing facility neglected or mistreated residents by failing to assure that the nursing home was maintained in a sanitary manner, performed necessary health services, trained the staff properly, supplied adequate supplies and staff, maintained records properly, fed residents adequately, and provided water and care. The defendants argued that the Louisianan statute concerning neglect was vague. They also contended that they were denied due process because they were unaware of both the wrongdoing and the consequences of the act. The State Supreme Court upheld the judgment against the defendants, noting that the terms "intentional or criminally negligent mistreatment or neglect" and "unjustifiable pain and suffering" were of sufficiently clear meaning to afford an ordinary person a fair notice that the conduct was prohibited (Pozgar, 1990).

In 1983, in *People v. Gurell,* partners of a nursing home corporation were charged with multiple violations of the Nursing Home Reform Act of 1979. The owners were found guilty of repeatedly breaching the assorted state regulations. Despite previous citations for the same offenses, the operators continued to operate in same manner. The State Supreme Court ultimately affirmed lower court findings that interpreted the federal Act and Illinois Statutes as providing for criminal penalties if the failure to correct deficiencies is done intentionally.

The first case in the country in which a nursing home administrator was charged with reckless endangerment stemming from the death of a resident in a nursing home involved a Wisconsin facility (Pray, 1986). In *State v. Serebin* (1984), an elderly resident, Bruno Dreyer, wandered from the Glendale Convalescent Center and died as a result of exposure. The home's administrator and owners were charged with 1 count of homicide by reckless conduct and 58 counts of abuse of inmates. Serebin appealed the Circuit Court's conviction on the grounds that the state did not establish a causal nexus between the lack of adequate staffing, pressure ulcers, weight loss, and the actions of the defendant in the neglect of residents. Serebin

also sought to establish that there was no evidence that having more staff in the facility would have prevented the resident from eloping.

The Court of Appeals of Wisconsin rejected the lower court's decision on the grounds of insufficient evidence, noting that there were no expert witnesses presented to connect the indicators of neglect (weight loss, pressure ulcers) to the specific statute of neglect. The state had indicted Serebin based on the theory that the purposeful reductions in staffing could be seen as foreseeable in the death of Dreyer and the poor condition of the other residents.

The state then appealed to the Wisconsin Supreme Court to establish grounds for causation in this type of case. During this stage, the state introduced evidence that the Department of Health inspection that occurred just prior to Dreyer's death reported understaffing that endangered the "health, safety and welfare" of the residents and ordered the deficiencies corrected. Based on this information, the Court held that Serebin had created a foreseeable risk to the residents through staff reductions, although it could not find that the staff reductions were directly linked to Dreyer's elopement.

The Supreme Court did, however, find sufficient evidence to uphold Serebin's conviction of resident neglect based on documentation of weight loss of residents. It was also shown that the pressure ulcers were a direct result of the combined effects of lack of staff for repositioning and inadequate nutritional intake. Serebin's conviction for resident neglect was upheld and he was sentenced to 18 months in jail.

The *Serebin* decision illustrates the steps necessary to prove criminal neglect. The first procedure involves determining whether reckless behavior occurred. In this case, Serebin had received previous warnings about his staffing inadequacies from the Department of Health and was obliged to correct the problem. Secondly, a determination of causation between the conditions under which the facility operated and the death/harm to the residents must be established. Lastly, the state must provide sufficient evidence to prove causation. This requirement may be difficult to prove in long-term care facilities where a number of staff members take care of residents over a prolonged period of time (Pray, 1986, p. 353).

In *People v. Casa Blanca Convalescent Homes* (1984), the defendant was the corporate entity doing business as a chain of nursing homes

in California. The charges included multiple acts ranging from failure to provide adequate nursing care, pressure ulcers, and inadequate diets to rodent/fly infestations. Both the trial court and the Court of Appeal affirmed the judgment against the defendant corporation. Casa Blanca attempted to have inspection survey reports, which noted similar deficiencies, blocked from evidence, but the Court held the Department of Health inspection reports were properly admitted and noted they constituted admissions of wrongdoing on the part of the facility.

The action against Casa Blanca Convalescent Homes actually began in 1976 when a resident in one of their nine facilities, Leola Dobbs, was admitted to Hilltop Convalescent Center in July. Within 3 months, she was readmitted to the referring hospital with multiple, large pressure ulcers on her hips, dehydration, and malnutrition and in a semicomatose state. Other residents had pressure ulcers, contradictory or missing documentation of care or conditions, the absence of vital sign measurements, and missing intake and output records (of fluid and urine). One resident was burned by a hot water bottle on three occasions and later died as a direct result of her injuries. There were problems with maggots, cockroaches, inadequate linen, moldy food, inadequate nursing staff, and the unauthorized use of restraints.

At the trial, Casa Blanca defended its facilities' poor care by claiming it was impossible to be totally in compliance with all of California's codes under Title 22. They introduced the argument that their homes averaged 25 to 50 deficiencies per facility, a number below the average deficiencies in the facilities of their competitors. They argued that this was significant proof that they were essentially in compliance with regulations. The Court dismissed this level of reasoning and noted that it was not only the number of deficiencies but the seriousness of those problems that indicates the need for intervention. Moreover, the trial court found that Casa Blanca engaged in a pattern of conduct consisting of repeated violations of the regulations governing care in nursing facilities. No evidence had been introduced by Casa Blanca that its competitors practiced the same business practices as claimed by the defendant corporation. As a result, the facility was fined $2500 for each of 67 violations, the maximum allowable assessment.

FUTURE DIRECTIONS

A 1997 *TIME* magazine investigative report reported widespread neglect of nursing home residents. The report revealed residents dying for lack of food, water, or the most basic hygiene (Thompson, 1997, p. 35). It cited, among other things, the investigation of David Hoffman, Assistant U.S. Attorney, Eastern District of Pennsylvania, who sued a nursing home for failure to provide adequate care—as evidenced by the presence of festering bedsores on several residents. Hoffman (1997), in an unprecedented move, successfully used the federal False Claims Act (1997) to enforce quality care standards. He describes three 1994 episodes in which the federal Nursing Home Reform Act was violated, resulting in a lawsuit against a Pennsylvania long-term care facility for inadequate care.

One of the government's three cases, for example, unfolded as follows: A nursing home patient was constantly restrained in her wheelchair, a situation that, according to the wound care expert retained by the government, may have caused the patients wounds and, more important, prevented them from healing.

> Beginning in 1993, she developed multiple pressure ulcers. By late 1993, she had numerous stage II and III ulcers, as well as multiple hospital admissions for dehydration and urinary tract infections. By January 1994, she was confined to bed with 16 pressure ulcers, including two stage IV ulcers. Her serum albumin was 2.2 grams/dL at the time of percutaneous endoscopic gastrostomy (PEG) tube placement in February 1994. Tube feedings providing 1500 kcal (29 kcal/kg) and 63 grams of protein (1.2 grams/kg) per day were inadequate—she needed 2060 kcal (40 kcal/kg) and 103 grams of protein (2 grams/kg) daily. She died several months later. The LTC [long-term care] facility's notes indicated excellent intakes, which clearly did not match with her clinical deterioration. Poor nursing care—the constant restraint in a wheelchair and poor, inconsistent documentation—and inadequate nutrition were both present in this case (Hoffman, 1997, p. 27).

"The implications of this case," Hoffman argues, "are dramatic from a quality of care perspective: Providing inadequate care now translates into a false claim to the government for payment [under Medicare or Medicaid]. The False Claims Act provides for treble

damages and penalties of $5000 to $10000 per claim submitted for payment—enormous potential cost to any company that provides inadequate care (p. 29).

Perhaps the most critical issue in the nursing home industry involves the financing of care and the supply/demand for nursing home beds and services. The Delaware Valley Hospital Council (Pennsylvania, Delaware, New Jersey) estimates that there is a shortage of nearly 8000 nursing home beds in Philadelphia County alone. The cause for this shortage is directly attributable to the moratorium on the costs of new bed construction in Pennsylvania for Medical Assistance recipients. A challenge to the moratorium, which alleges discrimination against the poor and the medically needy and asks for remedies to improve the supply and access of Medical Assistance nursing home beds, has yet to be resolved.

As nursing homes vie for subacute services using the hospital model for the provision of services, the facilities must become more cognizant of the standards of care that govern their policies and actions. When a hospital (or nursing home) fails to perform its expected duties and harm occurs, the hospital can be held corporately negligent.

PEOPLE v. CASA BLANCA CONVALESCENT HOMES, 159 CAL. APP. 3D 509 (1984) COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Opinion by: Staniforth

The People by this action sought civil penalties and injunctive relief (Bus. & Prof. Code, §§ 17200, 17536) against defendant Casa Blanca Convalescent Homes, Inc. (Casa Blanca). The People charged Casa Blanca with multiple unlawful and unfair acts, ranging from failure to provide adequate nursing care so as to prevent decubitus ulcers (bedsores) to failure to serve adequate diets and keep the nursing facilities free from flies and pests, etc. After a court trial the judge imposed judgment upon Casa Blanca for $167,500 in penalties and appropriate injunctive relief.

In its memorandum of intended ruling, the trial court described each type of act found to be a violation and listed exactly how many of each type of act or condition it found in Casa Blanca's facilities.

Facts

Casa Blanca Convalescent Homes, Inc., is a State of California licensed operator of nine nursing homes in San Diego County. Each of these facilities has been licensed and is responsible under the law for compliance with provisions of long term care under the Health, Safety, and Security Act of 1973 (Health & Saf. Code, § 1417 et seq.) and the regulations contained in titles 17 and 22 of the California Administrative Code.

Since 1974 Casa Blanca in its nine nursing facilities has on numerous occasions (by its actual admissions) allowed or caused incidents to occur and conditions to exist which violated nursing home regulations established by the State of California. * * * [Material omitted here describes several patients' stories, which clearly evidences a lack of care.]

Creation of Records After the Fact

Hilltop at one time employed an individual whose job it was to fill in blank spaces on a patient's medical record without regard for accuracy. One of her duties entailed altering her style of writing so the medical record would appear as if different individuals had recorded treatment as it was administered to a particular patient. Another of her duties entailed taking patients' charts to a doctor's office so he could complete them without having to see the patients.

Such violations were not confined to Casa Blanca's Hilltop facility. A review of the record of Helen Nednien, a patient at Casa Blanca's Hillcrest facility (Hillcrest), reveals while her turnsheet was indeed filled out, there were 47 instances when she was listed as being on her right side at 5:30 a.m. and "being turned onto her very same side at 7:30 a.m." On one occasion, a Department of Health Services (DOHS) inspector examined the record and found no record had been kept of the turning of Nednien at 7:30 a.m. and 9:30 a.m. The inspector left the record for a while only to return later and find someone had filled it in during her absence.

Filth

Shortly before she left Casa Blanca's employ in March 1976, Patricia Ellis, a licensed vocational nurse, examined one of the patients and found there were maggots present in her vagina and anus. Ellis reported this fact to her superiors. Despite this report, there was no evidence anything was done to correct the situation or prevent its recurrence.

Several months later, at the same facility, cockroaches were found in patients' beds and on one patient's colostomy bag. Other facilities were found to have cockroaches at the nurse's station and in the patients' beds.

Many of Casa Blanca's patients were incontinent and required frequent linen changes. Failure to provide clean linen for these patients was a common occurrence.

Inadequate Nursing Staff

Casa Blanca admitted to at least five instances of inadequate nursing staff. In addition, there were instances when Casa Blanca (again by its own admission) did not have sufficient numbers of people working on its nursing staff to provide the required bowel and bladder training program for incontinent patients.

Instead of adding additional personnel to its staff, Casa Blanca determined those patients whose needs in this regard could not be attended to were found unsuitable for bowel and bladder retraining. There were instances when the number of nurse's aids maintained could handle the needs of only four or five incontinent patients when as many as thirty such patients had been admitted to its facility.

Unauthorized Use of Restraints

On several occasions Casa Blanca was using body restraints without the necessary physician's order. One graphic example is the case of patient Jose Andrade. His leg was tied to the rail on his bed. As a result, Andrade's leg was broken. He was then transferred from the Casa Blanca facility to an acute care hospital. In addition, there was at least one occasion when Casa Blanca's staff locked DOHS inspectors out of its facility in an attempt to conceal its use of restraints without proper medical authorization.

The Burning of Karen Gentles

Before the burning of Karen Gentles, Casa Blanca had been warned its hot water was too hot on three separate occasions. Despite these warnings, this young psychiatric patient was scalded while bathing and received severe burns at Casa Blanca's Genesee East facility. The water temperature at Genesee East was found to be too hot after the complaint was filed in this action.

Moldy Food

Casa Blanca employed a dietary consultant rather than a full-time dietician. The number of hours the consultant would donate to the dietary needs of each facility was found inadequate. The evidence at trial established if Casa Blanca needed to add trained personnel anywhere other than the nursing department, it was in the kitchen. On two occasions, Casa Blanca representatives directed old food be kept; liver, which had turned green with mold, was kept so it could be pureed and later served to patients instead of being thrown out. Maggot-infested carrots were saved and fed to the patients. Casa Blanca issued a memorandum, "Let's Eliminate Waste," to its facility administrators encouraging them to cut down on food costs and encouraging improvisations to save money.

The Inspector's Reports—"Statement of Deficiencies"

Inspectors from the DOHS visited Casa Blanca's facilities on numerous occasions. Following its inspections, it presented Casa Blanca with its findings in a "Statement of Deficiencies." A representative of Casa Blanca

then reviewed the deficiencies and provided the DOHS with a "Plan of Correction." In those instances where Casa Blanca's representatives disagreed with the statement of deficiencies, they would express their disagreement in writing on the document or simply refuse to sign it. Many of the inspection reports contained admissions of the allegations in the statement of deficiencies and plan of correction. These were admitted into evidence.

Financial Ability of Casa Blanca to Respond to Civil Penalties

After paying all of its expenses in 1980, Casa Blanca realized a net profit of $1,376,205. Counsel for Casa Blanca agreed Casa Blanca could easily respond to civil penalties of $250,000.

Defense Evidence

Casa Blanca presented evidence disputing the violations, together with evidence from the DOHS personnel, it was impossible to make continuous total compliance with each of the title 22 (Cal. Admin. Code) regulations. There was testimony that none of the DOHS inspectors ever inspected a skilled nursing facility in any part of the State of California that was not at varying levels of violation of the regulatory framework. The violations averaged between 25 to 50 per inspection. The average number of violations in San Diego County was between 25 to 40 per inspection. Casa Blanca's violations were numerically significantly below that average.

It was further contended it was not possible to be free from violating the regulations because of the subjective nature of the regulations themselves and the manner in which they are interpreted by the DOHS inspectors.

Finally, it was urged there was an error rate in the charting or administration of medications in skilled nursing facilities ranging from a 10 to 25 percent variance; it was beyond the control of any facility to obtain a higher or more perfect standard of compliance with such regulations.

Statement of Decision

After hearing the evidence, the trial court issued its memorandum of intended ruling, finding Casa Blanca had "repeatedly failed" to file or have on file an adequate surety bond (covering patient deposits) required by title 17 of the California Administrative Code section 253.1 and title 22 of the California Administrative Code section 72241. The evidence showed there were 364 days when various Casa Blanca facilities had patient deposits in excess of the bond posted. The trial court aggregated the violations by each facility and found five acts for which a fine was imposed. For example, Madison had 190 days (69 percent of the time) over bond but was treated as one violation; Hilltop committed 17 violations which were aggregated into one act for which a $2,500 fine was imposed.

The court found 19 "acts" of repeated failure to maintain proper health records. These 19 "acts" were the result of aggregating over 1,000 record keeping violations within one year. Each patient's medical records entered

in evidence contained numerous violations. Each record was counted as one act in violation of the California Administrative Code for which a $2,500 fine was levied. In similar fashion, in response to its 10 specific findings of ultimate fact for repeated violations of various described specific "acts" or conditions, the court found a total of 67 "acts" and assessed a $2,500 fine for each act for a total penalty of $167,500. The court then declared defendants "will be enjoined from allowing any of the following acts or conditions to exist in any of [its institutions]." The court then specified in detail the "acts" and conditions to be enjoined.

At the request of Casa Blanca, the court issued its statement of decision, adopting in exact detail its memorandum of intended ruling. Casa Blanca filed lengthy objections to this statement of decision. The court thereafter entered judgment imposing a fine of $167,500, plus costs and an injunction conformable to the statement of decision. Casa Blanca appeals.

Discussion

Casa Blanca contends the trial court failed to provide a sufficient statement of decision, explaining the factual and legal basis for its determination on the principle issues as required by Code of Civil Procedure section 632. * * *

The trial court in its statement of decision declared Casa Blanca had committed 67 specified "acts" in violation of nursing home regulations constituting unlawful and unfair business practices. The court specifically described 10 different categories of "acts" which occurred in Casa Blanca facilities on "repeated" occasions. * * * Casa Blanca would require more. Casa Blanca would compel the trial court to make findings with regard to detailed evidentiary facts, to make minute findings as to individual items of evidence. Such a detailed evidentiary analysis is not required by law. * * *

Casa Blanca's request of the trial court to answer these questions constituted an inappropriate challenge to the findings or the statement of decision. The court's statement of decision specifically found 67 violations of 10 different nursing home regulations. The trial court did not find each separate violation to constitute an "act." More than a thousand record keeping violations were determined to be 17 "acts"—based upon 17 separate sets of patient records. The evidence detailed 12 different occurrences when Casa Blanca personnel administered medicine or treatment without first obtaining a doctor's order. The evidence showed two broad classes of violations: (1) failure to render treatment, or (2) giving treatment without order. The court described the violations and aggregated these violations into two "acts." The court was not required to give the evidentiary detail supporting its ultimate finding of fact. The trial court performed its statutory duty. There is no error here.

Casa Blanca demanded the court define in its statement of decision what was meant by a "business practice." In so doing, it called upon the

trial court to answer questions already settled as a matter of law. * * * We conclude there is both a factual and legal basis for finding not only were there violations of the administrative regulations in question, but its activities constituted a pattern of behavior pursued by Casa Blanca as a "business practice."

Casa Blanca next complains of the trial court's failure to make specific findings regarding its fifth affirmative defense, its contention of unconstitutionality of Business and Professions Code section 17200 by reason of "impossibility of compliance" with the statute. The decision of the court impliedly rejected this constitutional argument. * * * The regulation of the health care industry is not an unreasonable use of police power. These regulations are specifically designed to insure those individuals confined to Casa Blanca facilities receive adequate care and treatment. The failure of Casa Blanca to adhere to minimum standards of health care poses a real danger to the public health and safety of this community. (See *People v. Balmer* (1961) 196 Cal. App. 2d Supp. 874, 877 [17 Cal. Rptr. 612].) The California Supreme Court in *People v. McKale* (1979) 25 Cal.3d 626 [159 Cal. Rptr. 811, 602 P.2d 731], held administrative regulations promulgated under the provisions of Business and Professions Code section 17200 are both lawful and enforceable. We find no grounds here to declare the code section or the regulations unconstitutional.

Casa Blanca next contends titles 17 and 22 of the California Administrative Code are unconstitutionally vague and ambiguous, subject to varying interpretations. . . . These terms are not too vague to be understood by a jury, a trial court and these parties. Where the facility was so filthy and pest ridden that maggots were observed in patients' body cavities, can there be any doubt as to the meaning of the regulation or its breach? Casa Blanca also asserts 19 violations of the medical records regulations (Cal. Admin. Code, tit. 22, § 72547) resulted from its inability to understand them, due to their complexity and length. The violations of record requirements did not involve some vague, technical matters. There is no vagueness in a requirement to keep records of fluid intake, blood pressure, body temperature, number, time and nature of turning the body of a bedridden patient. There was a pattern of unlawful neglect in record-keeping. Numerous patients' records in various facilities were not only not maintained, but were also fabricated, forged in an effort to conceal evidence of poor nursing care.

Casa Blanca also challenges the regulation requiring adequate staffing. . . . The regulation plainly requires such numbers of skilled nursing personnel to "provide the necessary nursing services" for whatever number of patients are in house. . . . The evidence before the trial court clearly establishes multiple failures to provide an adequate number of nurses and training of nursing personnel to meet patient needs. * * *

Casa Blanca next argues substantial compliance with titles 17 and 22 of the California Administrative Code regulations as a defense to the charges made. Nothing in the rules or statutes before this court indicate substantial compliance is a defense against a civil action or a criminal prosecution under Health and Safety Code section 1290. The term "substantial compliance" has no application in such legal proceedings. The operator of a skilled nursing facility is required to comply with all provisions of the code absent an exemption granted by the DOHS. * * *

Casa Blanca contends equitable estoppel should have been raised by the trial court to preclude enforcement of the regulations in issue here. . . . The doctrine of equitable estoppel if properly raised applies to a situation where the party seeking to invoke the doctrine was led to believe in the truth of a particular set of facts, in fact believed them to be true and had a right based upon past conduct to believe in them. (*Killian, supra,* 77 Cal. App.3d at p. 13.) There is no evidence here the DOHS led or misled Casa Blanca to believe it was acquiescent in Casa Blanca's conduct. The evidence is of deficiency notices sent regularly to the Casa Blanca facilities. Time and again Casa Blanca promised to embark upon a plan of correction only to have the same deficiency appear in another facility or in the same facility on a later occasion. * * *

Finally, the collateral estoppel doctrine should not be applied here as a matter of public policy and sound reason. If applied it would authorize Casa Blanca to continue to violate provisions of the California Administrative Code with the knowledge or belief its previous unlawful/unfair conduct would protect it from a lawsuit for further unlawful or unfair practices. Applying such a rule would protect Casa Blanca from any sanctions on the theory that some tolerance of its conduct immunizes it in all respects. The doctrine should not be applied in this setting. * * *

Casa Blanca next contends the trial court erroneously admitted the DOHS inspection reports into evidence. This contention is unsound. Those reports constituted an admission by a party. They were admissible pursuant to Evidence Code sections 1220 through 1222. The trial court made such a finding and admitted the documents into evidence. The documents were prepared by, and contained entries by, both representatives of the DOHS and Casa Blanca. They were made after the inspection of one or more of the facilities. * * *

Finally, judgment in this case does not depend for validity upon the use in evidence of the inspection reports. Such reports were cumulative in nature. Casa Blanca's defects are shown by a plethora of substantial evidence admitted on trial. This appeal court must view evidence in the light most favorable to respondent and in doing so, must look at the totality of evidence. (*Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 355 [282

[*534] P.2d 23, 51 A.L.R. 2d 107].) If we strike inadmissible documents, the trial court's judgment still has overwhelming support. * * *

Severe sanctions were justified here because of Casa Blanca's repeated violations of patient care regulation. These were not isolated instances; multiple violations were not limited to a single one of Casa Blanca's nine houses but appeared in a number of the facilities. There were forgeries and malpractice coverups; violations with respect to the physical plant were proven to cost the life of at least one patient (Karen Gentles died as a result of scalding water). Financial gain appears to be Casa Blanca's motive. . . .

Finally, substantial evidence justified issuance of the injunction. The evidence showed breaches of the law, the regulations and flagrant misconduct which was continued and repeated. (See *Volpicelli v. Jared Sydney Torrance Memorial Hosp.* (1980) 109 Cal. App.3d 242 [167 Cal. Rptr. 610].) The relief in such cases may be as wide and diversified as the means employed in perpetration of the wrongdoing. (*Wickersham v. Crittenden* (1892) 93 Cal. 17, 32 [28 P. 788].) There is more than substantial evidence to support the issuance of the injunction in this case. . . . The judgment in all respects in affirmed.

18

Imposing the Death Penalty on Juveniles

Angelo Adson and Raymond Albert

The death penalty, when administered to juveniles, raises considerable legal questions as demonstrated in the examination of pertinent case law. The debate illustrates the ambivalence toward the practice; viewpoints fluctuate between those who accept this ultimate penalty, on the one hand, and those who view it as cruel and unjust, on the other. Proponents of the death penalty view it as a justification for the restitution of certain offenses as outlined in the penal code. These proponents use the strict wording of the penal code to support their arguments. Equally compelling are the arguments proposed by the opponents of the juvenile death penalty. They cite the Eighth and Fourteenth Amendments as adequate justification for its abolition. The following discussion surveys pertinent case law in an effort to analyze the nature of the ambivalence that may be at the root of this fluctuation.

HISTORICAL ANTECEDENTS

The execution of juveniles in America dates back to the 17th century when, in 1642, a child was executed for the crime of bestiality. This event illustrates the existent conventional wisdom that children were nothing other than adults in small bodies. Moreover, the law incorporated prevailing morality, and bromides such as "an eye for an eye and a tooth for a tooth" clearly informed attitudes about the law and its social functions.

United States law permitting the executions of juveniles is based on English Common law, and one finds numerous cases in which children are condemned to death. In 1708 two children were hanged in the town of Lynn for a felony. One child was 7 and the other but 11 years of age. This practice, which soon spread to America, portrayed the lack of empirical and biological data needed to reach such a harsh conclusion. Yet, these same practices are evident today as individuals of suspect classes are deprived of adequate legal representation.

Blackstone, through his Commentaries, discusses some of the first known opinions on the practice of condemning youth to death. His most famous opinion stated: "If it appears to the court and jury that he is *doli capax,* and could not discern between good and evil, he may be convicted and suffer death." In this particular opinion Blackstone went on to cite cases of boys 9 and 10 years of age who had killed companions and were hanged because their behaviors indicated a sense of guilt.

Similarly, in the United States, these trends began to cause considerable controversy. In the case of *State v. Aaron* (1818), an 11-year-old slave was accused of murdering a younger child. The Supreme Court of New Jersey overturned the conviction and death sentence on the basis that the conviction was obtained by means of a pressured confession. The court also recognized that the presumption of innocence had not been refuted by strong and irresistible evidence. In this case, the state's responsibility was to remain fair and impartial in gathering evidence against the accused. In pressuring the child into a confession, the state exercised its powers unfairly, thereby undermining the premise of fairness, and the authority of the state supplied a considerable advantage in prosecuting the case.

In *Godfrey v. State* (1858), the outcome was quite different. In this case, an 11-year-old slave hacked a 4-year-old to death. Then, covered with blood, he blamed the act on "imaginary Indians." The child was sentenced to death and executed despite clear evidence of infantile reasoning. What many saw as an outrage, however, was the court's ability to disregard *State v. Aaron* as vital to ruling in the present case. The state's unwillingness to rely on persuasive authority of a sister jurisdiction exposed the court's seemingly subjective and arguably arbitrary delineation of the criteria on which to distinguish the good and evil of an individual's intent.

EVOLUTION OF PRECEDENT AND THE ROLE OF THE SOCIO-POLITICAL ENVIRONMENT

The question again surfaces as to the permissibility of the state to impose on the accused certain qualities that question intent. In *Ridge v. State* (1924), the court declined to impose the death penalty on a person who had committed murder at the age of 14. The state's rationale was buried in its interpretation of state legislation, which urged that the death penalty could not be imposed on an individual under the age of 14 convicted of murder, unless the offender was a person with a sense of responsibility, intelligence, and understanding equal to that of an ordinary person of the age of 16 years. Under this legislation, a juvenile 16 years of age could be given the death penalty without, in effect, having to be certified as an adult.

In *Haley v. Ohio* (1948), the courts began to recognize that some degree of leniency was necessary in punishing juveniles who committed capital offenses. It further recognized that the "ultimate punitive sanction of death is just too harsh." As the courts began to further analyze the cognitive differences between adults and children, considerable questions were raised regarding whether this difference in age warranted a concomitant distinction in moral judgment.

In *Robinson v. California* (1962), the court addressed adolescent development as having some weight in the determination of the individual's functioning. It further alluded to offending "contemporary standards of decency" in putting to death individuals who, because of their lack of maturity, exist in the law as persons who are incapable of making legally binding decisions in certain matters and who are often accorded disparate treatment for acts that would be regarded as criminal if they were adults. The distinction between responsibility and immaturity would bring into question a juvenile's ability to discern right from wrong.

Under *Furman v. Georgia* (1974), the Supreme Court proclaimed that "in consideration of existing law, the imposition of the death penalty . . . constitutes cruel and unusual punishment thus violating the Eighth and Fourteenth Amendments." The Court found that the application of the death penalty was harsh, freakish, and arbitrary. As a result, the Court reversed an extensive number of death sentences because they deemed such penalties constitutionally unacceptable.

The political climate of the *Robinson* and *Furman* decision is especially revealing, having been handed down during a decade that witnesses significant gains in civil rights. Arguably, the court's decisions, which clearly represent a more humane approach, were informed by these developments. Indeed, the *Robinson* and *Furman* cases appear to have been influential in recognizing the importance of rehabilitating juveniles as opposed to punishing them. The idea of rehabilitation had not been considered previously, thus its implementation was even scarcer.

The process of sentencing juveniles started to meet other forms of opposition. The purpose was to reclassify juveniles to meet adult standards of sentencing. This practice proved to be the leverage proponents needed to justify the certification of juveniles. The discretion of its imposition again rested in the subjective voice of the Court. In *Furman v. Georgia* (1974), Justice White's opinion alluded to the reality that the transfer system did not ask any questions necessary for rationally distinguishing those cases in which the imposition of the death penalty was appropriate from those cases in which it was not.

There were several cases during the 1970s that directly challenged the constitutionality of the imposition of the death penalty for juveniles. These claims not only questioned the moral issue of sentencing juveniles, but also illuminated the various other factors deemed necessary for reaching such conclusions. As the impact of *Furman* began to fade, the courts resumed the imposition of the death penalty stating that within the new federal guidelines and standards, the punishment of death does not invariably violate the constitution.

Woodson v. North Carolina (1976) and *Roberts v. Louisiana* (1976) both held that no particular circumstances of a capital offender's crime should automatically require the death penalty. Rather, the sentencer must be free to consider a myriad of factors to determine whether death is appropriate.

Estelle v. Gamble (1976) established that the imposition of the death penalty to juveniles is "offensive to contemporary standards." This case again brought into question the abnormal development of the juvenile offender and his ability to adequately function as an adult.

Coker v. Georgia (1979) initiated a reexamination of the Eighth Amendment rights. "A form of punishment is disproportionate,

hence excessive, under the Eighth Amendment, if it is greater than the offender deserves." Ultimately, the court, in the course of its deliberations, must consider whether, in this context, adolescents should be equated with adults. Since adolescents are not expected to conform to adult standards, it is inappropriate to inflict upon them the death penalty. *Coker v. Georgia* (1979) suggested that "State sanctioned executions of children are cruel, inhumane, and contrary to the rehabilitative and protective attitudes which the law otherwise manifests towards them." The *Coker* case made several direct references to the idea of rehabilitation of the juvenile offender, a strategy that eventually helped put a human face on the violent juvenile offender.

One of the most important precedent-setting cases involved challenges directed at the heart of the death penalty legislation. In *Gregg v. Georgia* (1976), the court recognized that "the death penalty served two principal social purposes: retribution and deterrence of capital crimes by perspective offenders." It further recognized that the impulsiveness of the youthful offender, coupled with the youth's general lack of the appreciation of the finality of death, undermines whatever deterrent effect the death penalty may have on him. It finally recognized that because an adolescent is not as responsible as an adult for his behavior, retribution is objectionable. Since neither the goal of deterrence nor retribution can be achieved by inflicting the death penalty on youthful offenders, its application to them is excessive.

The court's biased or uninformed assumptions about juveniles continued to have adverse implications for individuals who could not afford adequate representation. Most damaging was the sentencer's ability to determine the characteristics of the defendant and measure the appropriateness of the death penalty by those characteristics. *Woodson v. North Carolina* (1976) and *Lockett v. Ohio* (1978) challenged this concept and held that an attribute of the defendant's character may be more important than the circumstances of the offense in determining the cruel and unusual nature of the death penalty. These cases further suggested that the youth of a defendant should always be considered in light of the Court's heightened awareness of the status of children and adolescents in society. In contrast, *Gregg v. Georgia* (1976) established the constitutionality of the death penalty when imposed on adults.

On October 5, 1977 President Carter signed the International Covenant on Civil and Political Rights. Part III; Article 6, Clause 5 of the Covenant abolishes the death penalty for persons under the age of 18. The United States Congress has not yet acted on this Covenant. Despite these efforts, the post-*Furman* environment witnessed the reinstatement of the death penalty in 38 jurisdictions in 1977.

RETREAT FROM PROGRESS

By the end of the 1970s, a two-tiered system had emerged, one that treated juvenile offenders differently than adults. Paradoxically, however, also during this period courts generally failed to rule on the constitutionality of capital punishment as applied to juveniles under the Eighth and Fourteenth Amendments. Despite several cases directly related to the topic, courts had abandoned early efforts to eliminate the death penalty for juvenile offenders.

The death penalty opponents received a fatal blow under *Lockett v. Ohio* (1978) in which the Court failed to consider the psychological impairment of a juvenile as mitigating evidence. As a result, the juvenile was sentenced to death despite his extensive mental impairment. Although this was a major setback for the pursuit of appropriate sanctions for youthful offenders, it did not deter efforts to get courts to halt a barbaric practice.

Constitutional questions surfaced again in *Eddings v. Oklahoma* (1982). The state conceded that the Eighth Amendment would not allow the imposition of the death penalty for a 10-year-old. This was in light of specific Oklahoma legislation that permitted sentences of death for children of any age. Okla. Stat. Ann. tit. 21 701.9(A), 701.10-701.12 (West 1983). Although the Court reversed the defendant's sentence, it failed to rule on whether the infliction of the death penalty on minors was in violation of the Eighth Amendment rights. In his dissenting opinion, Justice Burger criticized his colleagues for not ruling on the specific issue for which they had granted certiorari and further suggested that the execution of juveniles was indeed constitutional.

In the years immediately following the *Eddings* case, the Supreme Court refused to hear similar cases involving the application of the

death penalty to minors: *Trimble v. Maryland* (1984); *Roach v. Martin* (1985); *Roach v. Alken* (1986). Meanwhile, some progress was achieved in cases dealing with the culpability of minors. In *Edmund v. Florida* (1982), the Court ruled that the critical facet of the individualized determination of culpability required in capital cases is the defendant's mental state when he or she commits the crime. Put simply, do minors reason as adults? Their inability to fully appreciate the moral implications of their behavior was at issue, thus implicating their ability to be responsible for their actions.

State v. Wilkins (Mo. banc 1987) recognized that the death penalty has been, in effect, a means of covering up the failures of existing social and penal programs. This blunt reality repeatedly called into question the court's willful disregard of the issue of rehabilitation. In *Thompson v. Oklahoma* (1988), the Court reiterated that although it had determined that the death penalty was not inherently cruel, it had recognized the extraordinary nature of the punishment.

Twenty-nine states have adopted the *Eddings'* holding through legislation. In every trial where 16- or 17-year-olds are eligible for the death penalty, their youth must be considered in assessing the punishment. As the *Eddings* rule was applied to various cases, the Court continued the practice of using its own discretion to decide what characteristics were considered culpable.

Stanford v. Kentucky (1989) involved the two cases of Stanford and Wilkins. In both cases the juveniles committed murder at the age of 16 and 17, respectively, and consequently received the death penalty for their convictions. In the proceedings, the parties cited the age of the petitioners as pertinent to a cruel and unusual Eighth Amendment challenge to the death penalty. Expert testimony acknowledged the impact of an individual's environment on his behavior. However, in writing for the court, Justice Scalia rejected the sociosci-entific evidence introduced by petitioners. Also evident in his writing was his low regard for the concept of socioeconomic factors and its impact on an individual's well-being.

Using the holdings of *Stanford* and *Thompson,* the Supreme Court established that it is cruel and unusual punishment if the criminal sentenced to death was under the age of 16 at the time of the capital offense. Many states have followed this rule set by the Supreme Court. As a result, the number of individuals on death row awaiting punishment for crimes committed under the age of 18 is steadily

increasing. The Supreme Court of South Carolina, like those of many other states, held that sentencing a 16-year-old juvenile offender to death did not violate the Eighth Amendment.

FUTURE TRENDS

Various trends emerged that began to assert the Eighth Amendment rights of juveniles condemned to death. *State of Washington v. Furman* (Wash. 1993) relied on *Thompson* in holding that Washington's death penalty statue could not be construed to authorize the imposition of the death penalty for a crime committed by a juvenile because it specified no minimal age at which the death penalty could be applied. In contrast, *Wright v. Commonwealth* (Va. 1993) concluded that imposing the death penalty on a 17-year-old defendant did not constitute cruel and unusual punishment because it did not violate society's evolving standards of decency.

While *Allen v. State* (Fla. 1994) overturned the death penalty sentence of a 15-year-old on the grounds of cruel and unusual punishment, *State v. Richardson* (Mo. 1996) held that sentencing a 16-year-old to death did not constitute cruel and unusual punishment. *State v. Jackson* (Ariz. 1996) confirmed that sentencing a 16-year-old was not cruel and unusual punishment even though Arizona's execution laws did not specify a minimum age for execution. These various rulings were indicative of the unevenness of the case law and portend its future direction. Ultimately, although it may prove impossible to identify an individual's maturity and moral culpability, the state must make the effort nonetheless. It has the power to exercise the requisite discretion to fashion a rule that recognizes that imposing the death penalty on juveniles is an essentially barbaric act.

THE STATE OF WASHINGTON v. FURMAN, 122 WASH. 2D 440 (1993) SUPREME COURT OF WASHINGTON

Opinion by: Andersen

Michael Furman appeals his aggravated first degree murder conviction and death sentence. We affirm the conviction, vacate the death sentence, and remand for resentencing.

Facts of Case

Eighty-five-year-old Ann Presler was brutally murdered in her home on April 27, 1989. A friend found her body the next morning. Detectives spoke with Mrs. Presler's neighbors, several of whom said they had seen Michael Furman walking door to door looking for work the day of the murder. Appellant initially denied visiting Mrs. Presler's house, but eventually admitted that he raped, robbed and murdered her. * * *

After taking appellant's confession, the officers obtained a search warrant for his home. During the search, the officers found the clothing appellant said he had been wearing on the day of the murder. They also found a marijuana pipe. The officers photographed and seized the pipe, which was then placed in the police evidence room. The pipe was later inadvertently lost.

Appellant was arrested on April 30, 1989, 2 months before his 18th birthday. Because of his age, he was initially charged with the murder in juvenile court. Following a declination hearing, the case was transferred to superior court for appellant's prosecution as an adult. The State then filed a notice of intent to seek the death penalty.

After the charges were filed, appellant contacted the investigating detective several times and made additional incriminating statements. He subsequently moved to suppress those statements as well as the statements he made before the charges were filed. He also moved to dismiss the premeditation element of the aggravated first degree murder charge on the ground that the State's loss of the marijuana pipe denied appellant the opportunity to have it tested. The trial court denied both motions.

Trial began in January of 1990. The only disputed issue at trial was whether appellant premeditated the murder. He testified that he smoked one or two bowls of marijuana and two bowls of marijuana sprinkled with methamphetamine 30 to 45 minutes before going to Mrs. Presler's house. The drugs made him "high," which he described as a condition in which he knows what is going on, but feels different and acts without thinking.

To support claims of diminished capacity and intoxication, defense counsel called two expert witnesses: Dr. Lloyd Cripe, a neuropsychologist, and Dr. Lawrence Halpern, a neuropharmacologist. Defense counsel had also arranged for appellant to be examined by a clinical psychologist, Dr. Bruce Olson. Dr. Olson did not testify before the jury, but did prepare a report which was then provided to Drs. Halpern and Cripe. That report contains the detailed description which appellant provided of his sexual history. Dr. Cripe testified that appellant has a severe personality disorder. In Dr. Cripe's opinion, because of this disorder and appellant's drug use, it is very improbable that the murder was a deliberate, reflected action.

Dr. Halpern testified regarding the effect of methamphetamine on the mind and expressed the opinion that appellant's use of methamphetamine made him unable to reflect or deliberate about the mechanics or consequences of his actions. Dr. Halpern also said appellant probably suffers from Cluver-Busi syndrome, which can cause a person to attempt sex with almost any person or even inanimate objects. According to Dr. Halpern, use of methamphetamine would tend to increase sexuality and decrease impulse control. Over defense counsel's objection, the State asked Dr. Halpern about the sexual history material contained in Dr. Olson's report.

The trial court instructed the jury on diminished capacity, but declined to give appellant's proposed instruction on voluntary intoxication. The jury found appellant guilty of aggravated first degree murder, unanimously agreeing that all five alleged aggravating factors had been proved. Following the penalty phase, the jury found the State had proved there were insufficient mitigating circumstances to merit leniency. Appellant was therefore sentenced to death.

Issues

Issue One. Did the juvenile court err in declining jurisdiction?

Issue Two. Did loss of the marijuana pipe violate appellant's due process rights?

Issue Three. Did the trial court err in ruling on challenges for cause based on the jurors' views regarding the death penalty?

Issue Four. Did the trial court err in admitting appellant's statements to the police?

Issue Five. Did the trial court err in admitting an "in life" photo of the victim?

Issue Six. Did the trial court err in allowing the prosecutor to cross-examine appellant's expert about appellant's sexual history?

Issue Seven. Did the trial court err in failing to give appellant's proposed instruction on [***12] voluntary intoxication?

Issue Eight. Did prosecutorial misconduct deny appellant a fair trial?

Issue Nine. May appellant be executed for a crime he committed while a juvenile?

Decision

Issue One.

Conclusion. The juvenile court did not err in declining jurisdiction.

A case filed in juvenile court may be transferred for adult criminal prosecution upon a finding that the declination of juvenile court jurisdiction would be in the best interest of the juvenile or the public. RCW 13.40.110(2). In making this determination, the juvenile court is to consider: (1) the seriousness of the alleged offense and whether the protection of the community requires declination; (2) whether the offense was committed

in an aggressive, violent, premeditated or willful manner; (3) whether the offense was against persons or only property; (4) the prosecutive merit of the complaint; (5) the desirability of trial and disposition of the entire case in one court, where the defendant's alleged accomplices are adults; (6) the sophistication and maturity of the juvenile; (7) the juvenile's criminal history; and (8) the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system. All eight of these factors need not be proven; their purpose is to focus and guide the juvenile court's discretion. The court's decision will be reversed only if there has been an abuse of that discretion.

We find no such abuse. The juvenile court expressly considered each of the eight Kent (*Kent v. United States,* 383 U.S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045 (1966)) factors and quite reasonably concluded that trying appellant as an adult would be in the best interests of the public. Appellant was charged with aggravated murder, the most serious offense which can be committed in this state. In view of appellant's confession, the charge had obvious prosecutorial merit. Perhaps most importantly, the crime occurred less than 2 months before appellant's 18th birthday. If he had been tried as a juvenile, he could have been confined only for the 3 years remaining until his 21st birthday. He could not, therefore, have served even the juvenile standard range penalty for the offense. The services available during that time are clearly inadequate to protect the public.

Issue Two.

Conclusion. Loss of the marijuana pipe did not violate appellant's due process rights.

Appellant contends that loss of the pipe precluded him from having it tested, which might have shown he used methamphetamine as well as marijuana. He claims the loss of evidence to support his diminished capacity/intoxication defense violated his due process rights under the analysis in *State v. Wright,* 87 Wash. 2d 783, 557 P.2d 1 (1976) and *State v. Vaster,* 99 Wash. 2d 44, 659 P.2d 528 (1983). As we explained in *State v. Straka,* 116 Wn.2d 859, 883, 810 P.2d 888 (1991), the federal constitutional analysis in those cases is no longer valid in light of the Supreme Court's decisions in *California v. Trombetta,* 467 U.S. 479, 488-89, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984) and *Arizona v. Youngblood,* 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988). We have not yet decided if the state constitution requires adherence to the analysis in *Vaster* and *Wright.* We will consider whether to apply our state constitutional provisions more strictly than parallel federal provisions only when we are asked to do so, "and even then only if the argument includes proper analysis of the six 'interpretive principles' outlined in *State v. Gunwall,* 106 Wash. 2d 54, 720 P.2d 808 (1986)." Appellant offers no such argument. We therefore confine our analysis to the federal constitution.

"Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." "To meet this standard of constitutional materiality, evidence must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (Citation omitted.) The pipe possessed no apparent exculpatory value when it was lost. Although appellant had mentioned using the pipe to smoke marijuana, he did not claim to have been impaired by that use, nor did he mention methamphetamine use at all. Moreover, his detailed descriptions of the murder indicated no mental impairment.

If evidence did not possess an apparent exculpatory value when it was lost or destroyed, but was nevertheless "potentially useful", failure to preserve that evidence constitutes a violation of due process if "a criminal defendant can show bad faith on the part of the police." Appellant conceded at trial that there is no evidence of bad faith.

Issue Three.

Conclusion. Our vacation of appellant's death sentence moots his argument regarding the trial court's rulings on the challenges for cause.

Issue Four.

Conclusion. The trial court did not err in admitting appellant's statements to the police.

In determining the voluntariness of a juvenile's confession, the court must consider the totality of the circumstances, including the juvenile's age, experience, and capacity to understand the warnings given him. According to the trial court's unchallenged findings, appellant was free to leave when he made his first statement. It was not, therefore, necessary to inform him of his constitutional rights at that time. Appellant was informed of his constitutional rights, as required by Miranda, following his initial statement and before he made any additional incriminating statements. Appellant at no point asserted his Fifth Amendment right to counsel. Nor did he assert his right to remain silent. Some of appellant's statements were made after the information was filed, and thus after his right to counsel attached under the Sixth Amendment and Const. art. 1, § 22 (amend. 10). The detectives repeatedly advised appellant of that right, however, as did his attorney. Against the advice of counsel, appellant repeatedly contacted the detectives and made additional incriminating statements. This evidence clearly supports the trial court's finding that the statements were voluntary. * * *

Issue Five.

Conclusion. The trial court did not err in admitting an "in life" picture of the victim.

"In life" pictures are not inherently prejudicial, particularly where as here the jury has seen "after death" pictures of the victim's body. The trial court's ruling admitting such a photograph will not be reversed absent a showing of a manifest abuse of discretion. We find no such abuse here. . . .

Issue Six.

Conclusion. The trial court did not commit reversible error in allowing the prosecutor to cross-examine Dr. Halpern about appellant's sexual history. * * *

[W]e are vacating appellant's death sentence on other grounds, and any possible error in the admission of the sexual history evidence was harmless as to the conviction itself. . . . Particularly in view of this confession, which describes a clearly premeditated murder, committed by a person fully aware of the consequences of his actions, there is no reasonable probability that admission of the sexual history evidence affected the guilt phase verdict.

Issue Seven.

Conclusion. The trial court did not err in failing to give appellant's proposed instruction on voluntary intoxication.

Appellant offered two substantially overlapping defenses—diminished capacity and voluntary intoxication. Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged. Voluntary intoxication is not a defense, as such, but a factor the jury may consider in determining if the defendant acted with the specific mental state necessary to commit the crime charged. If there is substantial evidence to support either of these theories, the jury should be given instructions which allow the defendant to argue the defense. If the claim of diminished capacity is premised wholly or partly on the defendant's voluntary consumption of drugs or alcohol, however, one instruction can be adequate to permit the defendant to argue defendant's theory of the case. *State v. Hansen,* 46 Wash. App. 292, 730 P.2d 706, 737 P.2d 670 (1987). In *Hansen,* the Court of Appeals held that an instruction on voluntary intoxication was adequate to allow the defendant to argue the claim of diminished capacity based on drug intoxication. In much the same manner, the diminished capacity instruction which appellant's jury received was adequate to permit him to argue that drug use and other factors made him unable to premeditate the murder. The trial court's failure to give a separate instruction on voluntary intoxication did not impair appellant's ability to argue his theory of the case.

Issue Eight.

Conclusion. None of the claimed guilt phase prosecutorial misconduct prejudiced appellant's right to a fair trial, and appellant's challenge to the

prosecutor's penalty phase conduct is mooted by our vacation of the death sentence. * * *

Issue Nine.

Conclusion. Neither the declination statute nor the death penalty statute authorizes imposition of the death penalty for crimes committed by juveniles.

The United States Supreme Court has upheld imposition of the death penalty against defendants who were 16 or 17 when their crimes occurred. *Stanford v. Kentucky,* 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989). The issue in *Stanford* was not whether a state statute authorized that penalty, however. Kentucky and Missouri state courts had applied their state statutes in that manner and had upheld the defendants' death sentences. The issue before the Supreme Court was whether application of those statutes in that manner violated the Eighth Amendment. Before any constitutional issue is raised here, we must first conclude that Washington statutes authorize imposition of appellant's death sentence.

The "trial court's sentencing authority is limited to that expressly found in the statutes." Our criminal laws apply to children as young as 8 years old. RCW 9A.04.050; *State v. Q.D.,* 102 Wash. 2d 19, 685 P.2d 557 (1984). The juvenile court may decline jurisdiction and transfer any case for prosecution to adult court, if the appropriate legal criteria are satisfied, regardless of the age of the juvenile. *RCW* 13.40.110(2). The penalty for aggravated murder, in cases prosecuted in adult court, is either death or life imprisonment without the possibility of release or parole. *RCW* 10.95.080. Thus, if these statutes authorize imposition of all adult penalties against juveniles transferred to adult court, a child as young as 8 could theoretically be tried as an adult and sentenced to death or life without parole for aggravated murder. One youth has in fact been convicted of that offense and sentenced to life in prison without parole for a crime he committed at age 13. If the State there had sought the death penalty, *RCW* 10.95.070(7) would have allowed the jury to consider the defendant's youth as a mitigating factor, but the death penalty statute does not require the jury to treat any mitigating factor alone as sufficient to merit leniency.

Admittedly, it is unlikely the State would seek, or the jury would return, a death sentence against an extremely young defendant. The significant factor, however, is that such verdicts would be possible if our statutes were interpreted to authorize imposition of the death penalty for crimes committed by juveniles. The 4-justice plurality in *Thompson v. Oklahoma,* 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988) concluded that the death penalty cannot be imposed against defendants who were 15 or younger when the crime occurred because the death penalty serves no valid retributive or deterrent purpose in such cases. In her concurrence,

Justice O'Connor concluded, more narrowly, that defendants under 16 when their crimes were committed "may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." Under either view, our statutes would clearly be unconstitutional as applied to defendants 15 or younger if interpreted to authorize imposition of the death penalty following decline of jurisdiction in juvenile court. *RCW* 13.40.110 authorizes juveniles to be tried as adults, but does not mention the death penalty. *RCW* 10.95 authorizes imposition of the death penalty, but does not refer to crimes committed by juveniles. Most critically, neither statute sets any minimum age for imposition of the death penalty.

"'Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality.'" We cannot rewrite the juvenile court statute or the death penalty statute to expressly preclude imposition of the death penalty for crimes committed by persons who are under age 16 and thus exempt from the death penalty under Thompson. Nor is there any provision in either statute that could be severed in order to achieve that result. The statutes therefore cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles. Absent such authorization, appellant's death sentence cannot stand.

Appellant's aggravated first degree murder conviction is affirmed. The death sentence is vacated, and the case is remanded for imposition of a sentence of life in prison without the possibility of release or parole.

19

Charitable Organizations and Lobbying

Margo Campbell and Raymond Albert

The Supreme Court case law regarding charitable organizations and lobbying is diverse. The existing case law can be organized into three categories: (1) cases that regulate lobbying, (2) cases dealing with freedom of speech and the political activity of groups, and (3) cases that address the issue of government sanctions against certain nonprofit activities. The following discussion will provide a nonexhaustive survey of the case law in each of these areas.

CASE LAW ADDRESSING FEDERAL LOBBYING STATUTES

Two federal laws control the topic under discussion—the Foreign Agents Registration Act of 1938 and the Federal Regulation of Lobbying Act of 1946. The U. S. Supreme Court has had an opportunity to construe each, and the resulting case law is described below.

In *Viereck v. United States* (1943) the Court addressed the possible violation of the Foreign Agents Registration Act of 1938 by the petitioner. The question before the court was whether the statement that the petitioner failed to make was in fact required by the Act. It was asserted that he had failed to report to the Secretary of State his activities in which he "systematically attempted to influence the political thought of this country on behalf of Germany." The Court found that the Act asked for a reporting of only activities that were

conducted to serve the agency's needs, as opposed to his own. His actions were found to be for his own benefit; thus he was found to not be in violation of the Act.

This case's significance lies in its implications that personal lobbying is not regulated by this law; and is essentially a right. The Court found this Act an attempt "to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of nature of their employment" (*Viereck v. United States,* 1943). This Act was not meant to limit the personal political activity of an individual (Layton, 1997).

The idea of a right to lobby was reinforced in *United States v. Rumely* (1953). The organization with which the respondent was associated had engaged in many activities, including the sale of political books; the Select Committee on Lobbying Activities wanted the names of the individuals who had purchased these books. The essential task of the Court was to "recognize the penetrating and persuasive scope of the investigative power of Congress" (*United States v. Rumley,* 1953). The Court found "to construe the resolution as authorizing the Committee to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, would raise doubts of constitutionality in view of the prohibition of the First Amendment" (*United States v. Rumley,* 1953). This case underscores the idea that the individual has the right to lobby, and also clarifies the degree to which the government can attempt to infringe on the right to freedom of speech and press.

In 1953, the Court was again faced with the question of the validity of the government's involvement in the regulation of lobbying. *United States v. Harris* (1954) dealt with the Federal Regulation of Lobbying Act. The Act's language in §§ 305, 307 and 308, which was cited as vague, was thought to impede the due process of the individual and group. The Court found that these sections were not too vague, and that Congress has the right to require the disclosure of lobbying activities. The Court saw that:

> [F]ull realization of the American ideal of government depends to no small extent on [the Congress'] ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be

> drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent (*United States v. Harris,* 1954).

Thus, the Court found it to be a legitimate act of government to investigate the actions and contributors to groups that lobby, and this may lend the way to further involvement of the government in the actions of groups attempting to advocate politically.

The case law regarding the regulation of lobbying underscores the reality that the government is able to control the political advocacy efforts of individuals and groups in a variety of ways. While some of the cases question the legitimacy of these activities, the trend seems to be moving in the direction of further "indirect" limitation on activities. Whether the government can constitutionally limit these types of activities is addressed in the section below.

THE UNCONSTITUTIONAL CONDITIONS CASE LAW

When the government grants a benefit on the condition that the recipient will relinquish a constitutional right; it is based on an attempt to do indirectly what it may not do directly. This conflict is embodied in case law that lays out the parameters of the dispute between rights and privileges. In this context, the government cannot restrict "rights" but can restrict "privileges." To justify the restriction of a right, such as freedom of speech, the government must demonstrate that the restriction is designed to serve "compelling interests" (*Sable Communications of California, Inc. v. Federal Communications Commission,* 1989). The government must also show the provision is narrowly tailored, that is, encompassing only those activities necessary to actually protect the state's interest (Moody, 1996).

The evolution of the unconstitutional conditions doctrine demonstrates the development of the view that the government does not have the privilege to infringe on the rights of its citizens. In *Frost & Frost Trucking Co. v. Railroad Commission of California* (1926) (addressing the requirement of a permit for use of public roads) the Court found:

> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege all together, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights (*Frost and Frost Trucking Co. v. Railroad Commission of California,* 1926).

It wasn't until 1958 until this doctrine was used again. It is this resurrection, with a new political slant, that applies to charitable organizations and lobbying.

In *Speiser v. Randall* (1958), the Court was asked to address the validity of an oath taken by war veterans to receive a property-tax exemption. The oath states that they do not and will not advocate the overthrow of the federal or state government by force, violence, or other unlawful means or advocate the support of a foreign government against the United States in the events of hostilities. The Court concluded that the oath-taking constituted a limitation on free speech by denying a tax exemption for engaging in speech. It held that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech" (*Speiser v. Randall,* 1958). Thus, the denial of the tax exemption was seen as equivalent to a penalty. In essence, the government cannot deny First Amendment rights directly through a statute, nor may it do so through restrictions on tax-collecting authority.

In *Sherbert v. Verner* (1963), the Court was faced with a state's denial of unemployment benefits to a woman who lost her job because she refused to work Saturdays for religious reasons. The state in question, South Carolina, argued a compelling interest in conditioning the unemployment benefits in instances where "suitable work" was not attainable. The state held that the woman in fact had "suitable work" and was thus not eligible for unemployment benefits.

The Court determined that the state's denial of these benefits were in violation of Sherbert's First Amendment rights. It stated that "conditioning the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties" (*Sherbert v. Verner,* 1963). In essence, the condition placed on her unemployment

benefits is equal to a fine; to deny her benefits for her religious practice is the same as fining her for her religious practice, an act which the government is not allowed to do.

In 1972, the Court followed this doctrine in a landmark decision in both the rights/privilege debate as well as the unconditional conditions doctrine. In *Perry v. Sinderman* (1972), the respondent, a junior college professor in the state college system, alleged that the college's decision not to rehire him stemmed from the respondent's public criticism of the university; and this decision violated his First Amendment right to speech and his procedural due process rights. The Court found that if the respondent's contract was not renewed because of his speech against the school, then this would constitute a violation of his First Amendment rights. Again, it was held by the Supreme Court that the government cannot condition the receipt of federal benefits on relinquishing constitutional rights. If the college did not renew the respondent's contract on the basis of his public criticism of the school, it was in essence stating that public criticism of the school (freedom of speech) is prohibited (relinquishment of constitutional right) if a person wants to maintain the position in the state school (conditioning of benefit).

The Court also determined that there was no longer a distinction between rights and privileges. It stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech (*Perry v. Sinderman,* 1972).

Thus, even though this benefit is not a right, the benefit cannot be conditioned in a manner that denies a constitutional right.

In *Federal Communications Commission v. League of Women Voters of California et al.* (1984), nonprofit corporations questioned Section 399 of the Public Broadcasting Act of 1967, which forbids any "noncommercial educational broadcasting station which receives a grant from the Corporation" to "engage in editorializing." The government's stated interest in this case was to protect the stations from being coerced—through the promise of an approval or denial of

federal funding—into becoming "vehicles for Government Propagandizing or the objects of governmental influence" and also to keep partisan groups from using the stations to express their own points of view. The Court found that the constrained activity (editorializing) deserved special First Amendment protection. It stated that:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period (*Federal Communications Commission v. League of Women Voters of California,* (1984).

In weighing the governmental interests against the provisions of the statute, the Court found that the real governmental interest was an intent to prevent the spending of taxpayers' money in activities taxpayers may not support. Finally, the Court found that the statute was not narrowly tailored; it encompassed many types of speech that did not address only the government interest asserted. Consequently, the Court held the statute unconstitutional.

Federal Communications Commission v. League of Women Voters of California et al. is significant in two ways. First, it upheld the idea that the government may not regulate through its spending power what it may not constitutionally regulate outside such power. It was also the first significant case that addressed charitable organizations and lobbying. The findings in this case could be extended to instances where the same limitations may be imposed on charitable organizations and their receipt of federal funds. (A prototype of this sort of limitation can be found in the Istook Amendment, provisions introduced, but not enacted, in the two most recent Congressional sessions. The intent of the amendment is, in effect, to limit the ability of nonprofit organizations to engage in lobbying-type activities.)

Four other cases exist that address the freedom of speech provisions in a variety of ways. *First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts* (1978) looks at the constitutionality of a Massachusetts criminal statue that prohibited business corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to

the voters, other than one materially affecting any of the property, business or assets of the corporation." The Court found the statute violated the First Amendment, stating "even if it were permissible to silence one segment of society upon sufficient showing of imminent danger, there has been no showing that the imminent voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts" (*First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts,* (1978). Thus, corporations have a right to political advocacy as well.

In *Village of Schaumburg v. Citizens for a Better Environment et al.* (1980), an ordinance that prohibited door-to-door or on-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes" was challenged. In finding that the ordinance violated the First and Fourteenth Amendments, the court stated that:

> [W]hile soliciting financial support is subject to reasonable regulations, such regulation must give due regard to the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and to the reality that without solicitation the flow of such information and advocacy would likely cease (*Village of Schaumburg v. Citizens for a Better Environment et al.*, 1980).

This conclusion reinforces both the importance and constitutional protection of charitable soliciting, as well as value of advocating, communicating, and disseminating views and ideas.

The decision of *First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts* was upheld in the 1980 case *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York* (1980). It extends the right of corporations' freedom of speech to the area of bill inserts. It also addresses content-based regulation, a type of regulation based on the subject matter—as opposed to the time, place, or manner—of speech. The restriction was found to be unconstitutional. Other cases, such as *Riley, District Attorney of the Tenth Prosecutorial District of North Carolina, et al v. National Federation of the Blind of North Carolina* (1980), extended this prohibition into other realms of political advocacy, that is, prohibiting content-based limits on charitable organizations and their solicitation of contributions.

THE "NONSUBSIDIZING" CASE LAW

Early case law shows the Court's opinions on subsidizing of benefits. In *Trist v. Child* (1874), the Court refused to enforce a contract that dealt with a contingent fee for lobbying. The Court found that it was against public policy for a lobbyist to sell his or her personal influence over members of the legislature. This position was reemphasized in *Hazelton v. Sheckells* (1906), when it found that a contingent fee contract, again based on the passage of a legislative act, was void. The court concluded that "it was contrary to sound morality and tended to induce improper solicitation of an important branch of government" (*Hazelton v. Sheckells,* 1906). In *Textile Mills Securities Corp. v. Commissioner of Internal Revenue* (1941), the Court found the lobbying and propaganda expenses not to be deductible as "ordinary and necessary expenses" of the agent who was attempting to secure legislation in Congress. Thus, the early case law set the stage for decisions that served to limit government subsidies.

In *Cammarano et al. v. United States* (1959), a taxpayer deducted the amount paid to a trade association for grassroots lobbying, and the court ruled these deductions in violation to Treasury Regulation 111§29.23 (o)-1 (Internal Revenue Code of 1939), which states that no deduction should be allowed to "sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda. . . ." In justifying its decision, the court argued that, in denying the deduction, the taxpayer was not denied the right to engage in constitutionally protected activities. The decision, in effect, amounted to a refusal to subsidize lobbying activities, which is not the same as an impermissible penalty of protected speech.

Cammarano was followed by *Regan v. Taxation with Representation* (1983). In this case, probably one of the most notable about charitable organizations and lobbying, a nonprofit organization challenged the "substantial lobbying" prohibition (a vaguely worded limitation, at best) under the §501(c)(3) regulations in the Internal Revenue Code. The organization was instead granted §501(c)(4) status, which allows an organization to conduct extensive lobbying activities; the organization is also responsible for payment of federal unemployment taxes, and any gifts received are not considered tax deductible. Taxation with Representation is a nonprofit organization organized

to promote its view of the "public interest" in the area of federal taxation. When it was denied the § 501 (c)(3) status, it brought suit, claiming that § 501(c)(3)'s prohibition against substantial lobbying is unconstitutional under the First Amendment because it imposes an "unconstitutional burden" on the receipt of tax-deductible contributions. It further claimed that the denial was unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause because the Code allows tax-deductible gifts to veterans' organizations that qualify under § 501(c)(9).

The Court held that the prohibition of "substantial lobbying" did not violate the First Amendment because Congress had chosen not to subsidize lobbying activities by excluding organizations that engaged in such activity from § 501(c)(3) status. Thus, the Court once again applied the "nonsubsidy" theme to its decision. A key point in this holding is that Congress had not precluded lobbying activities all together. The availability of the § 501(c)(4) status, which allows lobbying without restriction, allowed for the distinction between such groups. The Court specifically mentioned this dual structure as an option. Using a rational basis analysis, the Court argued that Congress imposed no restriction on nonlobbying activities, nor a restriction on only certain lobbying topics, but rather an overall restriction on lobbying activities alone.

The implications of *Regan v. Taxation with Representation* are vast. Here, the Court strongly endorsed the dual structure's ability to ensure that the constitutional rights are protected. Moreover, in applying the rational basis rather than the heightened level of review—as it has previously done in recognizing lobbying as protected speech—the Court opened the door to further erosion of an important right.

One case, *Rust v. Sullivan* (1991), joined the theme of nonsubsidy with the unconstitutional conditions doctrine. The road leading up to *Rust* was actually paved by three related cases dealing with federal subsidizing of abortions. In *Maher, Commissioner of Social Services of Connecticut v. Roe et al.* (1977), *Harris, Secretary of Health and Human Services v. McRae et al.* (1980), and *Williams v. Zbaraz et al.* (1980), the Court upheld statutes prohibiting government funding of some abortions. The Court found that the government had simply chosen not to subsidize abortions, except in special circumstances, such as the health of the mother being in danger. Then, in *Rust v. Sullivan,* in a suit brought as a class action, the Court confronted administrative

regulations that limit the use of Title X funds (as appropriated through the Public Health Service). These regulations did not allow federal funds to be used for counseling, referrals, or advocating on abortion.

The Court held that the government was not violating a constitutional right in denying the subsidy, but rather was limiting the use of federal funds for their intended purposes, that is, for preventive family planning services and research. The Court found that the government can "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way". An important point in the Court's finding is that the regulations governed only the scope of the activities for which the funds were granted. It was found:

> The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds (42 U.S.C. Section 300-300a-6, 1988).

In this case, the Court contrasted its holding that the government may not place conditions on the funds that is disperses. The Court distinguished this opinion by pointing out that in unconstitutional conditions cases, the government has restricted the recipient as opposed to the activity. Title X funds fall outside this fact pattern, the Court claims, because they are intended for only a program, not the conduct outside the activity. Thus, the restrictions do not infringe on First Amendment rights. Unfortunately, when one ponders the implications of *Rust*, it may be to safe to argue that there is not a significant leap from *Rust's* prohibitions to circumstances that justify limits on the use of other federal funds.

CONCLUSION

Ultimately, to understand this field of law is to appreciate the extent to which charitable organizations have historically used their position

to advocate for unpopular policies and populations, such as poor persons, elderly persons, or children. The case law affecting charitable organizations and their ability to lobby is framed by requirements embedded in the U. S. Tax Code. This law has significant consequences for organizations dependent on federal dollars. Given the trend in case law, then, legislation such as that suggested by Representative Istook, albeit unsuccessful in the most recent sessions of Congress, will have a greater chance of survival.

RUST v. SULLIVAN, 500 U.S. 173 (1991) SUPREME COURT OF THE UNITED STATES

Chief Justice Rehnquist delivered the opinion of the Court.

These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit the ability of Title X fund recipients to engage in abortion-related activities. The United States Court of Appeals for the Second Circuit upheld the regulations, finding them to be a permissible construction of the statute as well as consistent with the First and Fifth Amendments to the Constitution. We granted certiorari to resolve a split among the Courts of Appeals. We affirm.

In 1970, Congress enacted Title X of the Public Health Service Act (Act), 84 Stat. 1506, as amended, 42 U. S. C. §§ 300 to 300a-6, which provides federal funding for family-planning services. The Act authorizes the Secretary to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." § 300(a). Grants and contracts under Title X must "be made in accordance with such regulations as the Secretary may promulgate." § 300a-4(a). Section 1008 of the Act, however, provides that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 [**1765] U. S. C. § 300a-6. That restriction was intended to ensure that Title X funds would "be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." H. R. Conf. Rep. No. 91-1667, p. 8 (1970).

In 1988, the Secretary promulgated new regulations designed to provide "'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2923-2924 (1988). The regulations clarify, through the definition of the term "family planning," that Congress

intended Title X funds *"to be used only to support preventive family planning services."* H. R. Conf. Rep. No. 91-1667, p. 8 (emphasis added). Accordingly, Title X services are limited to "preconceptional counseling, education, and general reproductive health care," and expressly exclude "pregnancy care (including obstetric or prenatal care)." 42 CFR § 59.2 (1989). The regulations "focus the emphasis of the Title X program on its traditional mission: The provision of preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children, while clarifying that pregnant women must be referred to appropriate prenatal care services." 53 Fed. Reg. 2925 (1988).

The regulations attach three principal conditions on the grant of federal funds for Title X projects. First, the regulations specify that a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 CFR § 59.8(a)(1) (1989). Because Title X is limited to preconceptional services, the program does not furnish services related to childbirth. Only in the context of a referral out of the Title X program is a pregnant woman given transitional information. § 59.8(a)(2). Title X projects must refer every pregnant client "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." *Ibid.* The list may not be used indirectly to encourage or promote abortion, "such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by 'steering' clients to providers who offer abortion as a method of family planning." § 59.8(a)(3). The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request. One permissible response to such an inquiry is that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." § 59.8(b)(5).

Second, the regulations broadly prohibit a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." § 59.10(a). Forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities. *Ibid.*

Third, the regulations require that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. § 59.9. To be deemed physically and financially separate, "a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient." *Ibid.* The regulations provide a list of nonexclusive factors for the Secretary to consider in conducting a case-by-case determination of objective integrity and independence, such as the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities. *Ibid.*

Petitioners are Title X grantees and doctors who supervise Title X funds suing on behalf of themselves and their patients. Respondent is the Secretary of HHH. After the regulations had been promulgated, but before they had been applied, petitioners filed two separate actions, later consolidated, challenging the facial validity of the regulations and seeking declaratory and injunctive relief to prevent implementation of the regulations. Petitioners challenged the regulations on the grounds that they were not authorized by Title X and that they violate the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers. After initially granting petitioners a preliminary injunction, the District Court rejected petitioners' statutory and constitutional challenges to the regulations and granted summary judgment in favor of the Secretary. *New York v. Bowen,* 690 F. Supp. 1261 (SDNY 1988).

A panel of the Court of Appeals for the Second Circuit affirmed. 889 F.2d 401 (1989). Applying this Court's decision in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), the Court of Appeals determined that the regulations were a permissible construction of the statute that legitimately effectuated congressional intent. The court rejected as "highly strained," petitioners' contention that the plain language of § 1008 forbids Title X projects only from performing abortions. The court reasoned that "it would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a 'method of family planning.'" 889 F.2d at 407. "The natural construction of . . . the term 'method of family planning' includes counseling concerning abortion." *Ibid.* The court found this construction consistent with the legislative history and observed that "appellants' contrary view of the legislative history is based entirely on highly generalized statements about the expansive scope of the family planning services" that "do not specifically mention counseling concerning abortion as an intended service of Title X projects" and that "surely cannot be read to trump a section of the statute that specifically excludes it." *Id.*, at 407-408. * * *

The court likewise found that the "Secretary's implementation of Congress's decision not to fund abortion counseling, referral or advocacy also does not, under applicable Supreme Court precedent, constitute a facial violation of the First Amendment rights of health care providers or of women." 889 F.2d at 412. The court explained that under *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983), the Government has no obligation to subsidize even the exercise of fundamental rights, including "speech rights." The court also held that the regulations do not violate the First Amendment by "conditioning receipt of a benefit on the relinquishment of constitutional rights" because Title X grantees and their employees "remain free to say whatever they wish about abortion outside the Title X project." 889 F.2d at 412. Finally, the court rejected petitioners' contention that the regulations "facially discriminate on the basis of the viewpoint of the speech involved." *Id.*, at 414.

We begin by pointing out the posture of the cases before us. Petitioners are challenging the facial validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987).

We turn first to petitioners' contention that the regulations exceed the Secretary's authority under Title X and are arbitrary and capricious. We begin with an examination of the regulations concerning abortion counseling, referral, and advocacy, which every Court of Appeals has found to be authorized by the statute, and then turn to the "program integrity requirement," with respect to which the courts below have adopted conflicting positions. We then address petitioners' claim that the regulations must be struck down because they raise a substantial constitutional question.

We need not dwell on the plain language of the statute because we agree with every court to have addressed the issue that the language is ambiguous. The language of § 1008—that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning"—does not speak directly to the issues of counseling, referral, advocacy, or program integrity. If a statute is "silent or

ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 842-843. The Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. Ibid. In determining whether a construction is permissible, "the court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.,* at 843, n.11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it. *Id.,* at 844.

The broad language of Title X plainly allows the Secretary's construction of the statute. By its own terms, § 1008 prohibits the use of Title X funds "in programs where abortion is a method of family planning." Title X does not define the term "method of family planning," nor does it enumerate what types of medical and counseling services are entitled to Title X funding. Based on the broad directives provided by Congress in Title X in general and § 1008 in particular, we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible.

The District Courts and Courts of Appeals that have examined the legislative history have all found, at least with regard to the Act's counseling, referral, and advocacy provisions, that the legislative history is ambiguous with respect to Congress' intent in enacting Title X and the prohibition of § 1008. *Massachusetts v. Secretary of Health and Human Services,* 899 F.2d 53, 62 (CA1 1990) ("Congress has not addressed specifically the question of the scope of the abortion prohibition. The language of the statute and the legislative history can support either of the litigants' positions"); *Planned Parenthood Federation of America v. Sullivan,* 913 F.2d 1492, 1497 (CA10 1990) ("The contemporaneous legislative history does not address whether clinics receiving Title X funds can engage in nondirective counseling including the abortion option and referrals"); 889 F.2d at 407 (case below) ("Nothing in the legislative history of Title X detracts" from the Secretary's construction of § 1008). We join these courts in holding that the legislative history is ambiguous and fails to shed light on relevant congressional intent. At no time did Congress directly address the issues of abortion counseling, referral, or advocacy. The parties' attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing.

When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations

deal, we customarily defer to the expertise of the agency. Petitioners argue, however, that the regulations are entitled to little or no deference because they "reverse a longstanding agency policy that permitted nondirective counseling and referral for abortion," Brief for Petitioners in No. 89-1392, p. 20, and thus represent a sharp break from the Secretary's prior construction of the statute. Petitioners argue that the agency's prior consistent interpretation of § 1008 to permit nondirective counseling and to encourage coordination with local and state family planning services is entitled to substantial weight. This Court has rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. *Chevron*, 467 U.S. at 862. . . . We find that the Secretary amply justified his change of interpretation with a "reasoned analysis." *Motor Vehicle Mfrs., supra*, at 42.

We turn next to the "program integrity" requirements embodied at § 59.9 of the regulations, mandating separate facilities, personnel, and records. These requirements are not inconsistent with the plain language of Title X. Petitioners contend, however, that they are based on an impermissible construction of the statute because they frustrate the clearly expressed intent of Congress that Title X programs be an integral part of a broader, comprehensive, health-care system. They argue that this integration is impermissibly burdened because the efficient use of non-Title X funds by Title X grantees will be adversely affected by the regulations.

The Secretary defends the separation requirements of § 59.9 on the grounds that they are necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities. The program integrity regulations were promulgated in direct response to the observations in the GAO and OIG reports that "because the distinction between the recipients' title X and other activities may not be easily recognized, the public can get the impression that Federal funds are being improperly used for abortion activities." App. 85. The Secretary concluded:

> Meeting the requirement of section 1008 mandates that Title X programs be organized so that they are physically and financially separate from other activities which are prohibited from inclusion in a Title X program. Having a program that is separate from such activities is a necessary predicate to any determination that abortion is not being included as a method of family planning in the Title X program. 53 Fed. Reg. 2940 (1988).

The Secretary further argues that the separation requirements do not represent a deviation from past policy because the agency has consistently taken the position that § 1008 requires some degree of physical and financial separation between Title X projects and abortion-related activities.

We agree that the program integrity requirements are based on a permissible construction of the statute and are not inconsistent with congressional intent. As noted, the legislative history is clear about very little, and program integrity is no exception. The statements relied upon by petitioners to infer such an intent are highly generalized and do not directly address the scope of § 1008.

Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit "all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." Brief for Petitioners in No. 89-1391, p. 11. They assert that the regulations violate the "free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients" by impermissibly imposing "viewpoint-discriminatory conditions on government subsidies" and thus "penalize speech funded with non-Title X monies." *Id.*, at 13, 14, 24. Because "Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint." Id., at 18. Relying on *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987), petitioners also assert that while the Government may place certain conditions on the receipt of federal subsidies, it may not "discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'" *Regan, supra,* at 548 (quoting *Cammarano v. United States,* 358 U.S. 498, 513, 3 L. Ed. 2d 462, 79 S. Ct. 524 (1959)). There is no question but that the statutory prohibition contained in § 1008 is constitutional. In *Maher v. Roe,* 432 U.S. 464, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977), we upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions. The Court rejected the claim that this unequal subsidization worked a violation of the Constitution. We held that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Id.*, at 474. Here the Government is exercising the authority it possesses under *Maher* and *Harris v. McRae,* 448 U.S. 297, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980), to subsidize family planning services which will lead to conception and childbirth, and declining to "promote or encourage abortion."

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public

interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan, supra,* at 549. See also *Buckley v. Valeo,* 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); *Cammarano v. United States, supra.* "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *McRae, supra,* at 317, n.19. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher, supra,* at 475. The challenged regulations implement the statutory prohibition by prohibiting counseling, referral, and the provision of information regarding abortion as a method of family planning. They are designed to ensure that the limits of the federal program are observed. The Title X program is designed not for prenatal care, but to encourage family planning. A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk; "no funds appropriated for the project may be used in programs where abortion is a method of family planning," and a doctor employed by the project may be prohibited in [the course of his project duties from counseling abortion or referring for abortion. This is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope.

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. . . . *Regan v. Taxation with Representation of Wash., supra; Maher v. Roe, supra; Harris v. McRae, supra.* Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program. * * *

Petitioners also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. Relying on *Perry v. Sindermann,* 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), and *FCC v. League of*

Women Voters of Cal., 468 U.S. 364, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984), petitioners argue that "even though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry, supra,* at 597. Petitioners' reliance on these cases is unavailing, however, because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X grantee and a Title X project. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. Brief for Petitioners in No. 89-1391, pp. 3, n.5, 13. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. 42 U. S. C. § 300(a). The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds. 42 CFR § 59.9 (1989). * * *

By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in League of Women Voters and Regan, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program. The same principles apply to petitioners' claim that the regulations abridge the free speech rights of the grantee's staff. Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.

We find this argument flawed for several reasons. First, Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy. See *Grove City College v. Bell*, 465 U.S. 555, 575, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984) (petitioner's First Amendment rights not violated because it "may terminate its participation in the [federal] program and thus avoid the requirements of [the federal program]"). By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds—subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project—or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice. Second, the Secretary's regulations apply only to Title X programs. A recipient is therefore able to "limit the use of its federal funds to [Title X] activities." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984). It is in no way "barred from using even wholly private funds to finance" its proabortion activities outside the Title X program. Ibid. The regulations are limited to Title X funds; the recipient remains free to use private, non-Title X funds to finance abortion-related activities.

This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has recognized that the existence of a Government "subsidy," in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity," *United States v. Kokinda*, 497 U.S. 720, 726, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990); *Hague v. CIO*, 307 U.S. 496, 515, 83 L. Ed. 1423, 59 S. Ct. 954 (1939) (opinion of Roberts, J.), or have been "expressly dedicated to speech activity." *Kokinda, supra*, at 726; *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). . . . It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice.

The program does not provide postconception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. In these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force. * * *

The Secretary's regulations are a permissible construction of Title X and do not violate either the First or Fifth Amendments to the Constitution. Accordingly, the judgment of the Court of Appeals is

Affirmed.

REGAN v. TAXATION WITH REPRESENTATION, 461 U.S. 540 (1983) SUPREME COURT OF THE UNITED STATES

Justice Rehnquist delivered the opinion of the Court.

Appellee Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the "public interest" in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary. This case began when TWR applied for tax-exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3). The Internal Revenue Service denied the application because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3). [Section § 501(c)(3) grants exemption to:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

TWR then brought this suit in District Court against the appellants, the Commissioner of Internal Revenue, the Secretary of the Treasury, and the United States, seeking a declaratory judgment that it qualifies for the exemption granted by § 501(c)(3). It claimed the prohibition against

substantial lobbying is unconstitutional under the First Amendment and the equal protection component of the Fifth Amendment's Due Process Clause. The District Court granted summary judgment for appellants. On appeal, the en banc Court of Appeals for the District of Columbia Circuit reversed, holding that § 501(c)(3) does not violate the First Amendment but does violate the Fifth Amendment. 219 U. S. App. D. C. 117, 676 F.2d 715 (1982). Appellants appealed pursuant to 28 U. S. C. § 1252, and TWR cross-appealed. We noted probable jurisdiction of the appeal, 459 U.S. 819 (1982). * * *

. . . TWR is attacking the prohibition against substantial lobbying in § 501(c)(3) because it wants to use tax-deductible contributions to support substantial lobbying activities. To evaluate TWR's claims, it is necessary to understand the effect of the tax-exemption system enacted by Congress.

Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

It appears that TWR could still qualify for a tax exemption under § 501(c)(4). It also appears that TWR can obtain tax-deductible contributions for its nonlobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying. TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize.

We also note that TWR did not bring this suit because it was unable to operate with the dual structure and seeks a less stringent set of bookkeeping requirements. Rather, TWR seeks to force Congress to subsidize its lobbying activity. See Tr. of Oral Arg. 37-39.

TWR contends that Congress' decision not to subsidize its lobbying violates the First Amendment. It claims, relying on *Speiser v. Randall,* 357 U.S. 513 (1958), that the prohibition against substantial lobbying by § 501(c)(3) organizations imposes an "unconstitutional condition" on the receipt of tax-deductible contributions. In Speiser, California established a rule requiring anyone who sought to take advantage of a property tax

exemption to sign a declaration stating that he did not advocate the forcible overthrow of the Government of the United States. This Court stated that "[to] deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.*, at 518.

TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). But TWR is just as certainly incorrect when it claims that this case fits the Speiser-Perry model. The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

This aspect of these cases is controlled by *Cammarano v. United States*, 358 U.S. 498 (1959), in which we upheld a Treasury Regulation that denied business expense deductions for lobbying activities. We held that Congress is not required by the First Amendment to subsidize lobbying. *Id.*, at 513. In these cases, as in Cammarano, Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying. We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Id.*, at 515 (Douglas, J., concurring).

TWR contends that Congress has overruled Cammarano by enacting § 162(e), which permits businesses to deduct certain lobbying expenses that are "ordinary and necessary [business] expenses." See Brief for Appellee 13. It is elementary that Congress' decision to permit deductions does not affect this Court's holding that refusing to permit them does not violate the Constitution. * * *

The issue in these cases is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby. For the reasons stated above, we hold that it is not. Accordingly, the judgment of the Court of Appeals is. . . . Reversed.

20

Lobbying Reform and Nonprofit Organizations: Policy Images and Constituent Policy*

Margaret Jane Wyszomirski

The relationship between politics and policy has been a perennial concern of political scientists. Interest in each of the two elements has varied over time, and perspectives on their relationship have multiplied. At one time, politics and policy were likely to be juxtaposed, like politics and administration. Currently, politics and policy are more likely to be seen as interrelated, although views differ as to the character of that relationship. For example, many analysts have seen policy as being the dependent variable of politics, while others have held the reverse proposition.

Writing in a 1968 report of the Social Science Research Council, Austin Ranney observed that "at least since 1945 most American political scientists have focused their professional attention mainly on the process by which public policies are made and have shown relatively little concern with their contents" (Ranney, 1968, p. 3). During that approximately 20-year period, the analytical focus on political processes tended to cast policy as a product of a process, as in David Easton's classic model (Easton, 1965). A later refinement of this perspective saw policy as the output of a system or subsystem,

* This article originally appeared in the *Policy Studies Journal*, Vol. 26, No. 3, 1998. Reprinted with permission.

while recognizing that each subsystem was focused on a particular policy area and involved a limited number of interested participants. Arguing that the subsystem concept was "disastrously incomplete," in 1978 Hugh Heclo proposed a larger, more fluid and idea-driven system, which he called an issue network (Heclo, 1978). Indeed, today so many variants of process subsystems and networks have been identified that some analysts have suggested that they might constitute a continuum ranging from "iron triangle" subgovernments, characterized by limited participation, resistance to external influences, and preoccupation with material interest: to issue networks, characterized by broad and fluid participation, issue experts, and unclearness about who is in control (Anderson, 1997, p. 83).

Even as this "politics produces policy" approach evolved, it was joined by the reverse perspective—that policies determine politics. As Theodore J. Lowi first suggested in a 1964 article, each type of policy "developed it own characteristic political structure, political process, elites, and group relations" (Lowi, 1964, pp. 689–690). In a 1972 elaboration of these ideas, he distinguished four functional categories of policy—distributive, regulatory, redistributive, and constituent. Each policy type was defined in terms of its impact or expected impact on society (Lowi, 1972).

Three of these policy types—distributive, regulatory, and redistributive—have become standard analytical constructs. Subsequently, other scholars have elaborated on these types of policy politics. For example, Ripley and Franklin (1991) have explored congressional and bureaucratic interactions, while Kenneth Meier (1993) has focused on patterns of bureaucratic structure and tools. Analysts also have suggested refinement or subcategories of regulatory policy. Robert Salisbury (1968) has proposed "self-regulatory policy," while Ripley and Franklin (1991) have divided regulatory policy into "competitive regulation" and "protective regulation."

The fourth policy type that Lowi originally identified—constituent policy—seems to have received comparatively little attention and remains conceptually murky. Indeed, even Lowi gave sparse attention to constituent policy, which he also referred to as "system maintenance policy." He defined constituent policies as those issues where the governmental exercise of coercion was both remote and likely to be imposed through the environment. Examples included reapportionment, setting up a new agency, or dealing with monopolies

by changing the rules protecting their limited liability rather than by regulating their conduct (Lowi, 1972, pp. 300, 309). Subsequently, Kenneth Meier (1993, p. 110) conceived of constituent policy as "those intended to benefit government in general or the nation as a whole." Substantively, he included both national security policy as well as government service policy such as personnel management, supplies and facilities management, and coining/printing money. In a slightly different interpretation, Spitzer (1995, p. 235) has characterized constituent policies as "the rules of the game . . . focus[ed] on the overhead function of government and therefore the nature of governmental authority." His examples include election laws, reappointment, and administrative/departmental reorganization. Meanwhile, Ripley and Franklin (1991, pp. 151–181), following a suggestion by Lowi, and contrary to Meier, do not treat national security as constituent policy, but rather divide it into three categories—structural, crisis, and strategic. Each of these is somewhat analogous to one of the three major policy types commonly used to discuss categories of domestic policy.

Clearly, some of the confusion derives from the term itself. The term "constituent" has at least three meanings—general, political, and policy-oriented. The general definition of constituent makes it a synonym for component, as in a "constituent part of the whole." Politically, a constituent is one who authorizes another to act for him/her, as in the case of a citizen who is a constituent of a state's governor. This political meaning easily elides into the broader sense of "constituencies," which includes in its meaning not only voters in a political district, but also interest groups or clientele groups directly affected by government actions or decisions. However, both the general and political meanings of the term are likely to mislead and misdirect the policy analyst. When used to define a category of policy, the meaning of "constituent" refers to what is characteristic or essential to making a political or governing system what it is. Both Lowi's reference to constituent policy as "system maintenance" and Spitzer's characterization of it as the "rules of the game" capture aspects of the essential and holistic meaning of "constituent."

According to the working definition just posed, constituent policy issues seem to be appearing on the political agenda with considerable—and perhaps increasing—frequency. Campaign finance reform, lobbying reform, term limits, the line item veto, balanced budget

amendments, reinventing government, and devolution all would seem to be examples of constituent policy issues that have arisen, been the subject of considerable and ongoing debate, and prompted at least piecemeal action. One such instance—the "Istook Amendment"—concerned efforts to change the permissible lobbying practices of nonprofit organizations (NPOs). Many of the proposals embodied in the various Istook Amendments were not new; rather, they revived proposals made in the early and mid-1980s, yet in the 104th Congress these proposals acquired considerable currency and generated repeated controversy. Many factors can be identified as contributing to this change in policy attention and processing. Although this analysis will survey briefly a number of explanatory elements, it will focus on how a shift in the tone and focus of the policy image of the NPOs themselves contributed to redefining the issue as one of constituent policy, raised its agenda placement, and changed the calculus of political feasibility concerning Istook-like reforms. First, however, a review of the substance of the Istook Amendments and of pertinent developments in the relations of the federal government and NPOs is in order.

ISTOOK AND EARLIER CONCERNS ABOUT NONPROFIT ORGANIZATIONS

From time to time, concerns about the political activities of NPOs have surfaced on the federal government agenda during the past 50 years. For example, in the 1930s, 1950s, and the early 1960s, questions arose in Congress about the political influence and operations of private foundations (Marlowe, 1994, p. 28). The Internal Revenue Service (IRS), as the tax-collecting agency, is the primary source of rules that defines what are permissible political activities for various types of tax-exempt organizations. As a matter of contract or grant compliance, the Office of Management and Budget (OMB) also issues regulations affecting the NPOs that obtain federal funds. The primary focus of concern in this discussion is charitable NPOs, which are defined in Section 501(c)(3) of the Internal Revenue Code. These organizations are both tax-exempt and tax-deductible. IRS rules concerning the lobbying activities of 501(c)(3) set financial limits for what can be spent on lobbying activities and define

what activities count against those limits. These rules recognize two types of lobbying—direct and grass roots (on which only a quarter of total allowable lobbying expenditures can be spent). In defining what does not count as lobbying activity, these rules exempt nonpartisan research, study, and analysis; self-defense activities; direct responses to legislative inquiries; and discussions of broad social, economic, or similar policy issues as long as there is no specific legislative matter involved. However, 501(c)(3) NPOs can establish and lobby through affiliated 501(c)(4) organizations, which do not have limitations on the extent of the lobbying activities that they conduct in behalf of their exempt purpose (however, while tax-exempt, they are not tax-deductible). With regard to political activities that constitute electioneering, 501(c)(3) NPOs cannot endorse, contribute to, work for, or otherwise support a candidate for public office, nor can they oppose candidates (Smucker, 1991).

During the past 30 years, the interaction of government and NPOs has grown markedly as the federal government increasingly has employed extragovernmental and quasigovernmental agents as part of policy implementation. This relationship has been given many names, such as third-party government, partnership, government by proxy, coproduction, privatization, or nonprofit federalism (Butler, 1985; Kettl, 1988; Salamon, 1981, 1995; Savas 1987). Concurrently, between 1960 and 1980, the number of NPOs involved in political advocacy in Washington, DC proliferated (Berry, 1984, p. 20; Walker, 1983); the scale and scope of advocacy activity involving NPOs increased noticeably; and a broader diversity of perspectives became mobilized, engendering more prevalent conflict (Baumgartner & Jones, 1993, pp. 175–192). Increasingly during these years, NPOs and their national associations participated in legislative deliberations regarding policy implementation and evaluation, as well as funding for related programs, and policy formulation on a range of social policy issues.

In the early 1980s, many NPOs felt themselves threatened by budget and regulatory policies of the Reagan Revolution, especially cuts in domestic and discretionary spending programs. Indeed, coming in the wake of decades of growth and increasing self-awareness, this threat helped forge a shared identity among NPOs, the establishment of a peak association (Independent Sector), and more cohesive political mobilization. In January 1983, OMB proposed revisions to the regulations contained in its Circular A-122 regarding permissible

lobbying activities for any organizations—whether nonprofit or for profit—receiving federal funds, stipulating that they "could not use those funds to pay for office space, personnel, or equipment that would be used in any way for 'political advocacy'" ("Opposition blocks rules on lobbying," 1983). Further, it would have banned recipients from "inducing" or "coercing" employees to become involved in political advocacy activities and would prohibit the use of federal money to pay dues to political organizations or to purchase subscriptions to their publications. OMB defined advocacy to include involvement in political campaigns, attempts to influence governmental decisions either by appeals to public opinion or by communication with elected and/or appointed officials, and attempts to communicate with the federal courts by submitting *amicus curiae* briefs.

A firestorm of opposition greeted these proposals, which were regarded as overly broad, excessively burdensome, and unenforceable, as well as partisan-motivated attempts to defund the Left. Indeed, OMB received more than 6,000 letters expressing opposition. Three different congressional subcommittees scheduled hearings on the proposal. One hundred and seventy-one members of Congress from both parties expressed opposition and urged OMB to rescind the proposal ("Opposition blocks rules on lobbying," 1983). The American Civil Liberties Union argued that the new regulations amounted to an unconstitutional attempt to censor the First Amendment-guaranteed right of free speech. In the event that OMB proceeded, Independent Sector threatened to file suit in Federal District Court seeking a temporary restraining injunction while pursuing a judicial challenge on constitutional grounds. There was some discussion of introducing legislation to overturn the regulation if OMB issued it. When OMB proposed to narrow the scope of the regulations to focus only on NPOs, it was suggested that they were attempting to "defund the Left" (Pear, 1983). Eventually, OMB bowed to the intense opposition, watered down the most controversial aspects, and narrowed its terms.

The issue was rejoined when the IRS finally formulated draft regulations to implement the Lobbying by Public Charities Act (Section 1307 of the Tax Reform Act of 1976). Originally intended to encourage nonprofit advocacy, the Act declared lobbying to be an acceptable exempt purpose expenditure, yet the 1986 proposed regulations sought to restrict severely lobbying efforts as well as other nonprofit

advocacy and public education activities by reviving some of the ideas abandoned by the earlier OMB effort. Additionally, it expanded the definition of lobbying to include nonpartisan analysis, public education, and grassroots lobbying (Union Institute, 1994, pp. 7–9). Furthermore, the IRS wanted to apply the regulations retroactively over the prior 10-year period. As with the OMB proposals, these were contested strongly by NPOs, resulting in both the modification and delay of final IRS regulations. When the IRS lobbing rules finally were issued in August 1990, they were seen as "greatly extend[ing] the lobbying rights of nonprofits" (Smucker, 1991, p. 65).

Beginning in the late 1970s, a line of Supreme Court decisions concerning the fundraising and/or lobbying activities of NPOs seemed to signal legal tolerance for regulatory approaches (Hopkins, 1984, pp. 84–85; Yamolinsky, 1980). In 1977, the *Abood v. Detroit Board of Education* decision had ruled that taxpayers were not required, directly or indirectly, to "contribute to the support of an ideological cause [they] may oppose" (Wittmann & Griffin, 1995, p. 6). While the *Schaumburg* (1980), the *Regan v. TWR* (1983), and the *Cornelius v. NAACP* (1985) cases showed that, substantively, civil rights guarantees continue to shield NPOs and their activities, they also indicated that the federal government could take a less positivist role in assisting NPOs to exercise those rights fully. Indeed, in the Court's unanimous opinion, Justice Rehnquist noted in *Regan v. TWR* that First Amendment protection did not require the government to subsidize lobbying, either directly or through tax expenditures. More recently, in the *Rust v. Sullivan* (500 U.S. 13 (1991)) decision, Justice Rehnquist, speaking for a 5-to-4 majority, found that

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way . . . There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy . . . [W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program. (pp. 193–194)

Although qualified, these views seem to suggest that nonprofit grantees of the federal government can be subject to reasonable

regulation, as are other forms of economic transaction (Hammer, 1992).

Conversely, *Regan v. TRW* (1983) also clarified the extent to which a charity could control the lobbying activities of a 501(c)(4) affiliate and the kinds of recordkeeping arrangements that would be required (Smucker, 1991, p. 89). Thus this case also can be seen as part of another line of decisions indicating that NPOs "are protected by the First Amendment's guarantee of freedom of assembly and could no more be regulated without a compelling reason than the press could" (Lenkowsky, 1997, p. 41). Clearly, many aspects of lobbying have been left unresolved by the Court. Perhaps the most fundamental is the definitional question as to whether, with regard to lobbying, NPOs are to be defined as subject to economic regulation or treated as constitutionally protected agents of civil liberties (Wyszomirski, 1987).

Both in 1986 White House Conference on Small Business and the House Ways and Means Committee heard complaints that some NPOs were engaged in unfair competition because of their tax-exempt status. For over a decade the Business Coalition for Fair Competition has been lobbying against the entrepreneurial trend among NPOs, and endorsed a tightening of Unrelated Business Income Tax (UBIT) rules (Thompson, 1995). The IRS has pending case investigations concerning NPOs and the marketing of affinity credit cards or of services and goods by universities. A 1995 General Accounting Office report found that all of the unrelated income activities of charitable and educational organizations were excluded from UBIT under one or more of 40 exclusions—lending fuel to the charges of the ineffectuality of UBIT rules to level the competitive market positions of NPOs and commercial organizations (Gandhi, 1995, p. 2, 7). The recurrent charges of unfair business practices by NPOs helped create an impression that at least some NPOs might be more concerned with their entrepreneurial self-interests than with their public interest missions. Therefore, this criticism could be seen as casting a "special interest" shadow over the advocacy activities of NPOs.

In 1995, many of the administrative reforms proposed in the 1980s resurfaced—and with apparently greater momentum. The venue of action also shifted from the administrative forums of OMB and the IRS to the legislative arena. In early June, Representative

John Mica (R-FL) held a House Civil Service Subcommittee hearing on a proposal to bar advocacy groups from inclusion in the federal government's annual charity, the Combined Federal Campaign (Barr, 1995a). A key vehicle in this debate was a series of legislative amendments offered by Representatives Ernest Istook (R-OK), David McIntosh (R-IN), and Robert Ehrlich (R-MD) that would limit or prohibit advocacy by NPOs that receive federal grant funds. (Collectively, hereafter these will be referred to as the "Istook Amendment.") Throughout both sessions of the 104th Congress, these proposals were attached to various bills. While the particulars varies, in broad dimensions, the Istook Amendment proposed to: (a) institute a new and lower cap on the amount of money that NPOs receiving federal grants could spend on advocacy (the cap would apply not only to federal grant funds, but to an organization's general revenues); (b) extend the current definition of lobbying to encompass any attempt—whether direct or indirect—to influence public policy at the federal, state, or local level in the legislative, executive, or judicial branches; and (c) expand the reporting requirements of NPOs concerning advocacy activities and make that information publicly available on the Internet as part of a national database on lobbying activities. Furthermore, enforcement procedures would include provisions to encourage private bounty hunters to function as whistleblowers (Lester, 1995).

Initially raised in hearing before the House Subcommittee on Economic Growth, Natural Resources, and Regulatory Affairs in June, it was proposed later as an amendment to the Labor/Health and Human Services-Education appropriations bill for fiscal year (FY) 1996. Later, House conferees tried to attach the amendment to another appropriations bill—for Treasury and Postal Services. In the Senate, it took the form of the Simpson-Craig Amendment to the Continuing Resolution to extend spending authority while a budget was being negotiated by the House, Senate, and White House. Indeed, the inclusion of policy riders (such as the Istook Amendment, which had the backing of house Majority Leader Richard Armey) on must-pass appropriations was part of the long budget standoff between the GOP-controlled Congress and the Clinton Administration (Koszczuk, 19996, p. 527). When these alternatives failed, then the proposal was raised briefly in the context of lobbying reform but was dropped in an effort to keep the

Lobby Disclosure Act on track to passage and signature by President Clinton in December 1995. In both cases, changes in regulations concerning NPOs and advocacy became not only issues in their own right but chess pieces in larger and higher-stakes political games.

In the second session of the 104th Congress, various incarnations of the Istook Amendment again came into play. Representative Istook offered a somewhat softened amendment to the FY 1996 Omnibus Appropriations bill (H.R.3019) that would have required NPOs receiving federal grants to report the total amount they spent on lobbying at the federal, state, and local levels according to an expansive definition of lobbying and advocacy. The Amendment was approved very narrowly and was singled out by the White House as objectionable and as a veto candidate (Hager, 1996, p. 604). Again, in June 1996, Representative Istook tried to attach a version of his amendment to the FY 1997 Treasury, Postal Service, and General Government Appropriation's bill. During a July hearing concerning the Environmental Protection Agency's grant management practices, House Subcommittee Chairman McIntosh took the opportunity to ask about the advocacy activities of NPO grant recipients, specifically about the National Council of Senior Citizens.

When the 105th Congress convened in January 1997, one of the House's first actions was to fulfill a platform pledge to adopt the "Truth in Testimony" rule. As a consequence, anyone from a nongovernmental group testifying before the House must disclose how much money (both in grants and contracts) the group has received from the federal government in the previous 3 years (Seelye, 1997). Two House subcommittee chairmen initially announced their intentions to hold hearings that would touch on the advocacy and political activities of NPOs. Nancy Johnson (R-CT), chair of the House Ways and Means subcommittee that oversees the IRS, was concerned with exploring whether charities and other NPOs become too involved in electioneering and political activities, adding that advocacy groups may "not need taxpayer subsidy." Meanwhile, McIntosh, as chair of the Government Reform and Oversight subcommittee, was interested in holding hearings to examine the activities of charities that receive federal grants, noting that "Congress is asking every federal grantee to make a choice—are you going to do charitable good deeds, or are you going to engage in political advocacy?" (Demko, Moore, & Williams, 1997,

pp. 31–32). As it turned out, campaign finance reform hearings chaired by Rep. Fred Thompson (R-TN) preoccupied the Government Reform and Oversight Committee and subsumed the NPO issue. These hearings encompassed the use of tax-exempt organizations by both Democratic and Republican parties and various candidates to raise "soft money" and to circumvent campaign finance law (Carr, 1997). Thus the focal point was campaign finance irregularities rather than NPOs.

Thus, in the past two decades, debates over the lobbying activities of NPOs have occurred in a number of governmental venues—administrative, judicial, and legislative. The scope of the issue seems to have broadened from lobbying per se to political advocacy and political activity, including lobbying. At least at the congressional level, the locus of debate has become diffuse, involving a variety of subcommittees, pieces of legislation, legislators, and legislative devices. These political dynamics are not typical of a regulatory issue. Instead, they suggest that this policy issue has been evolving from one type of policy to another. Thus, throughout the 1980s, the issue was essentially a regulatory matter in which OMB and/or the IRS took the lead and in which the Supreme Court occasionally played a role. Early in the 1980s, the issue acquired redistributive implications, as different kinds of NPOs saw federal funding decreases (Salamon, 1995, p. 197). In the mid-1990s, the issues seemed to have expanded, evolving into a constituent policy that could change the rules of political engagement and the dynamics of policy and budgetary decisionmaking.

SHIFTING POLICY IMAGE AND NEW POLITICAL MOMENTUM

A number of plausible explanations can be offered for the appearance and tenacity of the Istook Amendment. Clearly, political considerations played a part. With the shift of power to Republicans in both the House and Senate following the 1994 elections, conservative issues took on a new momentum in Congress. The shift in congressional control was propelled, in part, by a strong streak of conservatism among a large class of new members. Relative new members of the House, including freshmen like David McIntosh (R-IN) and

Robert Ehrlich (R-MD), as well as sophomore Ernest Istook (R-OK), saw "Istook proposals" as part of an effort to dislodge "business as usual" in a Washington overrun with special interests. Others saw this as a renewed effort to "defund the Left"—a strategy that was initiated by the early Reaganauts and has been an idea promoted by conservative think tanks for years. Still others argued that it was a tactical diversion designed to facilitate the achievement of Republican budget deduction goals by otherwise preoccupying the defenders of many social service programs targeted for reduction or elimination. Furthermore, in 1995, the issue of NPO lobbying reform was carried along on a tide of bigger issues such as budget balancing, downsizing government, lobbying and campaign finance reform, and devolution. While each of these explanations has an element of plausibility, even taken together they cannot account fully for the greater momentum and repeated persistence of efforts to enact new lobbying rules for NPOs. This article argues that an important intervening factor can be found in shifts in the tone and focus of the policy image of NPOs that has occurred during the past 15 years. The introduction of negative aspects into the policy image of NPOs, and to their political advocacy activities in particular, make them more vulnerable to reform efforts in the mid-1990s.

The term "policy image" simply means how a policy is understood and discussed (Baumgartner & Jones, 1993, pp. 25–26). Although levels of understanding vary, every public policy generally is understood in simplified and symbolic terms. These images are a mixture of empirical information and emotive appeals. Different people can hold different and even competing images of the same policy, and proponents of a policy often hold one set of images while opponents emphasize a different set if images. In other words, different policy images can prompt different political dynamics. In periods of significant social or political change, once-stable policy images are likely to be challenged and competing images offered for public acceptance. Such changes in image and affective tone can be associated with changes in patterns of political mobilization.

As a 1994 article in *Nonprofit World* observed, the "view can no longer be taken for granted . . ." that "because nonprofits are established to do good, they{can} view themselves as 'better' than for-profits, deserving special treatment by government" (Lauer, 1994, p. 28). The sources of the negative images include the following five points.

First, some large, highly visible nonprofit membership groups—such as the American Association of Retired Persons (AARP) (Hizenrath, 1995), the National Rifle Association (NRA), the National Association for the Advancement of Colored People NAACP), the American Civil Liberties Union (ACLU) (Bair, 1995)—experienced internal conflict and criticism over their policy stands and operating practices. Evidence of division and dissatisfaction within an organization's ranks can be indicative of fragmentation within a policy community, weakening its ability to contend with opposition, as well as providing the arguments of its opposition, with more credibility (Kingdon, 1984). Such dissension also can be damaging to the image of organizations that seek—as do nonprofits—to portray themselves as essential to effective democracy. Accusations that certain NPOs stray from practicing either democracy or accountability among their own membership can spill over onto NPOs more generally (Cox, 1991, p. 78).

Second, many of the constituencies that NPOs serve have seen their own policy images tarnished. NPOs concerned with the elderly have see the public perception of their constituency shift from being "poor, frail, dependent, and above all, deserving" to that of "prosperous, hedonistic, selfish, politically powerful greedy geezers" (Binstock, 1995, p. 69). Those in higher education have suffered from the "slings" of political correctness, the "arrows" of excessive overhead costs, burnout, and misconduct among college administrators, and public discontent stirred by years of sharply rising tuition. Organizations that provide social welfare services have been compromised by the concept that "welfare dependency" has been cultivated and that the system has been abused by "welfare queens." Indeed broad public and bipartisan discontent with welfare policy seems to have spilled over into a confusion between "charity" and "welfare"—as in seeing welfare programs as "tax-supported charity" (Raspberry, 1995). Cultural organizations—from the arts and humanities to public television—have seen their publicness questioned through accusations of immorality, bias, and elitism. Environmentalists have been accused of putting animals, plants, and the ecology above people, jobs, and community. Even religious organizations have had their scandals and excesses, and some have acquired a politicized coloration.

Subsequently, many of the policy arenas in which NPOs play a prominent role have seen the valence of their public image change

from predominantly positive to a mix of positives and negatives. The resulting composite policy image of the nonprofit sector and/or specific subsectors has become contested and ambiguous—a development that places the nonprofit sector and its members in a more vulnerable political position than previously. Indeed, as is typical of destabilized policy systems, opposing sides in the Istook Amendment debate seemed to see drastically different things when they looked at the same proposal. Proponents of the Istook Amendment saw it as a good government measure, a "declaration of independence from special interests," an end of welfare for lobbyists, or an attempt to maintain the impartial administration of government (Congressional press releases, 1995). Meanwhile, opponents of the Istook regulations saw them as "gag rules" or as efforts to "silence America" or "to defund the Left" (Arenson, 1995; Richardson & Joe, 1995).

Third, partisans of various stripes have identified the advocacy activities of specific NPOs as obstructionist or unfair. Democrats and the "Left" found the activities of the NRA regarding the Crime Bill of 1993 and the actions of the Bureau of Alcohol, Tobacco, and Firearms and Federal Bureau of Investigation in the Waco and Ruby Ridge incidents to be highly objectionable. Congressional officials of both parties considered the advocacy efforts of the AARP to have been misleading with regard to Medicare Catastrophic Health Care in 1987 (Cox, 1991, p. 78). Such perceptions of obstruction imply that these tax-exempt organizations (and perhaps others) not only are not furthering the public interest, but are impeding effective and responsive policymaking.

Other NPOs engaged in public education have come to be seen as unfair; that is, operating for the benefit of particular public figures. The establishment of tax-exempt organizations that are affiliated with current federal officials or aspirants to federal office have raised questions about their use as electioneering devices or for the political benefit of individual politicians. The ethics case against House Speaker Newt Gingrich revolved around his use of a number of nonprofit entities to advance partisan purposes (Babcock, 1997). Such practices, however, are neither new nor confined to Mr. Gingrich's activities. A 1987 report from the Center for Responsive Politics found a "significant increase in the 1980s in the number of 501(c)(3) public charities created or otherwise affiliated with federal

elected officials of federal aspirants," such as former Senator Gary Hart; Senators Jesse Helms, Edward Kennedy, and Robert Dole; Representatives Jack Kemp and Newt Gingrich, former Arizona Governor (later Interior Secretary Bruce Babbitt; and presidential aspirant Reverend Pat Robertson (Center for Responsive Politics, 1987, p. 3).

Fourth, the tenor and style of nonprofit advocacy in Washington shifted during the 1980s. Broad-agenda ideological groups such as the Moral Majority (and later the Christian Coalition) or People for the American Way appeared. The agendas of defined groups such as the National Organization for Women or the Children's Defense Fund broadened. The research capacity of ideological, cause-related, and special interest groups grew. Each of these developments helped propel policy issue networks, made them conflict-prone, and generated more advocacy information. In turn, these competitive, conflictual networks have confounded the public's sense of the facts, compromised the credibility of much research, and may have contributed to the growing perception of "special interests." It might even be suggested that the former distinction between economic special interests that predominated among the organized interests of the postwar period and the public interest groups that proliferated in the 1960s and 1970s has been blurred to the point where few groups are regarded as genuinely representing the public interest. As Senator Alan Simpson asserted with regard to the AARP, "An organization cannot simultaneously be a disinterested servant of the public good, and a self-declared special interest spending millions to lobby for its own benefit" (Simpson, 1995b, 3; see also Simpson, 1995a).

Fifth, instances of fraud, misuse of funds, and leadership misconduct in major NPOs have raised doubts about the trustworthiness and the positive image of NPOs more generally. The revelations about and conviction of Joseph Aramony of the United Way, or the collapse of the New Era Philanthropy (Walsh, 1995), among other incidents, seem to have encouraged a level of criticism both in Congress and in the press that would have been unimaginable a decade ago. For example, in 1995, two national weekly magazines (*The New Republic* and *U.S. News and World Report*) published major stories that were highly critical of private foundations (Samuels, 1995) or of NPOs of all kinds ("Tax exempt!," (1995)).

POLICY EVOLUTION AND POLITICAL LEARNING

Currently, although NPO lobbying seems to be an issue on the political agenda, there is relatively little agreement as to the policy problem involved or about the requisite dimensions of a policy solution. While critics of NPOs call for a separation of "true charities from lobbying groups that wish to masquerade as charities" (Yang, 1995), defenders see an unnecessary effort to "redefine what nonprofit work is" (Barr, 1995b; Melendez, 1995). Similarly, the definition of lobbying is in flux. Lobbying used to pertain to direct action to influence the decisions of legislators concerning a pending piece of legislation. Then the concept was extended to cover grass-roots lobbying. The means and methods of lobbying grew more varied and sophisticated, including public interest litigation, direct mail campaigns, advocacy research, fax alerts, and now the use of the Internet. Together these constitute a repertoire of political advocacy that gives everyone—including NPOs—more ways to influence government policies and activities. Thus, the methods of political advocacy have outgrown the relatively narrow definitional boundaries of political lobbying.

Even as the recognition of a nonprofit sector has grown, the policy image of NPOs has been shifting. Given the developments discussed above, it is little wonder that the policy image of NPOs has changed from a positive, albeit vague, valence to a mix of positives and negatives. Particularly as that policy image has shifted in the past few years, NPOs have become more susceptible to reform efforts like the Istook Amendments. However, despite these image shifts, the efforts of the 104th Congress to reform NPOs lobbying regulations failed. Early indications suggest that the members of the 105th Congress may have deducted some political lessons from the experience of their predecessors.

First, attempting to act quickly upon a significant expansion of the definition of lobbing to political advocacy may have been too big a change for the policy system to accept, particularly when introduced in the form of amendments and riders to other bills. In other words any redefinition that might result in policy changes would seem to require extensive issue clarification and more development through standard legislative and policy formulation procedures than was the case with the Istook Amendments.

Second, the experience may have revealed that Istook Amendment approaches were both blunt and poorly aimed policy instruments. Too blunt, in that the revised lobbying regulations would have applied indiscriminately to the range of NPOs from peak associations to individual operating organizations (which do relatively little lobbying and could find the changes administratively onerous and expensive). This left lobbying reform efforts open to challenge as unreasonable and excessive. Conversely, if lobbying and advocacy are a policy problem, then it is legitimate to ask whether the "problem" is confined to NPO activity or whether it also encompasses for-profit recipients of federal contracts. The omission of private commercial interests from advocacy reform gave nonprofit advocates a powerful argument against the fairness of the Istook Amendments. Furthermore, critics on the Left consider political activities other than advocacy as being problematic. These include Gingrich's organizations and the Christian Coalition, which are seen as engaged in partisanship and electioneering.

NPOs also learned from their experiences with the Istook Amendments. In particular, they learned the political value of broad, deep, and cohesive mobilization. In organizing to combat the Istook Amendments, a broad coalition of NPOs was assembled that included not only those NPOs that might be affected directly, but also others in the sector (such as orchestras and foundations) that had only indirect interests or that joined the effort as a matter of principle. A coalition of national membership organizations whose members were themselves NPOs brought considerable political contacts and resources to bear. Many of these national organizations not only were very effective in mobilizing their organizational members, but also energized the trustees of these organizations to political action. This tactic allowed the nonprofit sector to bring the issue home to legislators in their districts and to point out the impact such reforms might have on the operations and services of NPOs in communities across the nations.

The "old" policy system surrounding the nonprofit sector was alternately distributive or regulatory. Distributive policy politics was typical of nonprofit concerns acting as third-party agents in subsector policy arenas such as education, social welfare, and culture. Regulatory politics periodically characterized issues that concerned the entire sector, such as tax provisions, lobbying, and electioneering

restrictions, but the political dynamics surrounding lobbying reform for NPOs have changed and no longer resemble those typical of distributive or regulatory policy. The scope and locus of political debates is wide and diffuse—involving all branches of government, many congressional committees as well as extensive activity on the floor of Congress, and numerous bureaucratic actors. The tenor and volume of debates is intense, involving competing ideological camps and considerable attention to redefining the character of policy issues. Both the visibility and the conflict levels are high. Not only do the different "sides" in the debate appeal to different core values, but they see different policy problems and perceive virtually opposing potential impacts. The character of the politics prompts another look at the policy content, which seems to indicate that a constituent policy issue well may be involved. The debate over lobbying reforms and NPOs has focused on the policymaking and political consequences of how lobbying reforms will affect the way in which public decisions will be made—in other words, on the rules of the game. Thus, the case of Istook Amendments suggests that the constituent type of policy may be characterized by an intrinsically interwoven relationship of politics and policy, each affecting the other in mutually interactive manner.

21

Restrictions to Legal Services for the Poor

Catherine Ormerod and Raymond Albert

In the closing paragraph of his book that traced the development, politicking, and early years of the first federal program making attorneys available to the poor, Earl Johnson, Jr. posed two provocative questions:

> Are (the poor) to be entitled to equal justice only when their causes are minor or consonant with the philosophy of the ruling political party? Or will they be able to pursue any legal objective through any lawful means in keeping with the ideals of the legal profession? (Johnson 1978, p. 284)

Johnson was the second director of the Office of Economic Opportunity's (hereinafter OEO) Legal Services Program (hereinafter LSP). Today, after 32 years of providing funds for legal services and creating an infrastructure to deliver those services, Johnson's questions remain relevant. Because federal funding is renewed annually by the U.S. Congress, the process remains dependent on the political sentiments of the day. Each year, through the budget process, our politicians provide a different answer to Johnson's inquiry; yet, the question remains: what is the proper level of federal involvement in providing financial support that gives the poor access to the legal system?

The discussion below will briefly trace the history of the OEO's Legal Services program, its painful metamorphosis into the Legal

Services Corporation in 1974, and the subsequent attempts by Congress to restrict its funding and to limit the activities of LSC recipients. It will then examine case law that has emerged to challenge LSC and congressional restrictions. The scarcity of case law on this subject has surprised this author. In the light of the origins of legal services, its structure, and the political atmosphere and processes in which it must operate, it is a wonder that legal aid continues to be funded at all. Born of the politics of social change, the Legal Services Corporation remains controlled by the politics of the day. And political sentiments concerning the poor and society's obligations to them are far different at the end of the century than they were during the idealistic 1960s.

THE OFFICE OF ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM

Across the country in the 1870s, private legal aid societies began to spring up independently to provide poor people with access to attorneys and thus the nation's courts to solve some people's simple legal problems. By 1923 the American Bar Association established the National Association of Legal Aid Organizations, which functioned to connect local bar associations to the offices and thus to the problems of the poor in their communities (Kessler, 1987, p. 7). Characteristically, the legal aid offices took only individual cases, were generally located in the urban centers, and were severely underfunded.

The role of the legal aid societies remained fairly constant until the 1960s, which was, among other things, a time to reexamine poverty and individual and governmental responsibility in ameliorating it. In the private sphere, the Ford Foundation initiated several projects to decentralize social services and pursue social change through legal research. At the public level, President Lyndon Johnson announced that his administration would launch a "War on Poverty. Through the Economic Opportunity Act of 1964, Johnson created the Office of Economic Opportunity (OEO) as the federal agency to implement and coordinate the work of community-based agencies that were charged with attacking the root causes of poverty (Davis, 1993, p. 32). One year after the passage of the legislation,

the OEO made available grants for legal services. It was not until 1966 that the Legal Services Program (LSP) was formally mentioned in the statute through the Economic Opportunity Amendments of 1966. Unlike the legal aid societies it replaced, the Legal Services Program worked on two fronts: (1) it established new neighborhood offices (or subsumed old legal aid offices), making lawyers more accessible to their clients, and (2) it devoted time and energy to bringing about social reform through the legal system. The impact felt by the country was significant:

> In 1965, staff of all legal aid societies in the country made up the equivalent of 400 full-time lawyers. By June 1968 OEO had augmented this by 2,000 positions, and in 1972, only one of the largest 50 cities was still without a Legal Services Program. (Johnson, 1978, p. 188)

The goal of the neighborhood law offices was not simply to provide attorneys and access to the legal system; they would, through legal reform, work to reduce poverty (Johnson, 1978, p. 187). According to Johnson, legal aid societies had done no systemic work and had litigated only 6% of their clients' cases in 1959. In contrast, by 1971 Legal Services attorneys were taking 17% of their cases to court. No legal aid attorney ever took a case to the U.S. Supreme Court. Yet during a 5-year period from 1967 to 1972, the LSP brought 219 cases involving the rights of the poor to the country's highest court. One hundred thirty-six cases were decided on their merits, and 73 cases were won. The work of the LSP recipients in the arena of reform led to the establishment of poverty law (Johnson, 1978, p. 189). This work won praise from some corners and harsh criticism and staunch opposition from others. California Governor Ronald Reagan was among a handful of governors who became convinced that the government had no business funding "legal services radicals"(Kessler, 1987, p. 8).

CREATION OF THE LSC—A MOVE TO DEPOLITICIZE THE AGENCY

In 1970 President Richard Nixon appointed a representative to dismantle the OEO. By this time, the American Bar Association was a

strong supporter of the LSP and lobbied hard to save it by separating it from the OEO (Kessler, 1987, p. 7). After 3 years of intense and bitter fighting, the Legal Services Corporation Act was signed into law on July 25, 1974. The LSC Act was intended to cure two major deficiencies in the OEO program: it created a board of directors (Kessler, 1987, p. 8), and limited some of the most controversial aspects of the LSP:

> (5) The Corporation shall insure that (A) no employee of the Corporation or of any recipient . . . while carrying out legal assistance activities under this title, engage in, or encourage others to engage in, any public demonstration or picketing, boycott, or strike . . . P.L. 93-355, Section 106 (b)(5)(A) (1974); and
>
> The Corporation shall not itself—
>
> (1) participate in litigation on behalf of clients other than the Corporation; or
>
> (2) undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative bodies, except that personnel of the Corporation may testify or make other appropriate communication (A) when formally requested to do so by a legislative body, a committee or a member thereof, or (B) in connection with legislation or appropriations directly affecting the activities of the Corporation. P.L. 93-355, Section 106 (c) (1974)

The law goes on in Section 107 to spell out further restrictions on legal assistance attorneys from participating in political activity; from providing voters with transportation to the polls; from any voter registration activity; from accepting fee-generating cases or criminal cases; from participating in litigation concerning desegregation, abortion, and any litigation involved with the armed forces of the United States. P.L. 93-355, Section 107 (1974)

The fact that legal services survived the legislative process, albeit with restrictions, gratified advocates such as Earl Johnson. Johnson downplayed the effect of the restrictions the Act imposed on the LSC. He argued that the restrictions were actually rendered ineffectual by the provision that affirms that the

> LSC will not interfere with the any attorney carrying out his professional responsibilities to his clients as established in the Canons of

Ethics and the Code of Professional Responsibility of the ABA (Johnson, 1978).

As will be seen, as each year passed, and as times become more conservative, Congress added more restrictions while cutting funding. Advocates have tried with varying and limited success to use Johnson's argument that the Canons and Professional Code protect them from restrictions.

The LSC administers the funds allocated by Congress each year, passing the dollars on to the legal services recipients throughout the country. The LSC is governed by a Board of Directors composed of 11 voting members who have been appointed by the President. No more than 6 may be members of the President's political party, and a majority must be members of the bar of the highest court of any state. P.L. 93-355, Section 1004 (a) (1974). The LSC issues regulations governing local programs, which include the restrictions on activities, client eligibility, and the composition of local governing boards (Kessler, 1987, p. 34).

THE 1970S AND 1980S

By most accounts, the LSC enjoyed a relatively calm period in the mid to late 1970s. Some had thought that both the national and local opposition to the LSC had subsided. Funding grew from $90 million to $321 million; by 1981 staff grew to 6200 attorneys and 3000 paralegals serving more than one million clients annually (Kessler, 1987, p. 8).

In 1980 Ronald Reagan, an old foe of legal services, was elected President and legal services was again pulled into the limelight and put on the political hot seat. As part of his philosophy of transferring power from the federal government to the states, Reagan in 1982 called for LSC's budget to be zeroed out. LSC supporters prevented this from happening, but they were not able to protect LSC funding allocations. By 1984, LSC funding was down to $241 million from $321 million, and President Reagan was appointing LSC board members who did not support the agency's original vision or goals (Kessler, 1987, p. 10).

In the end, Reagan and his conservative supporters were unable to "zero-out" LSC funding, but they were able to insert new bans

into the legislation while influencing a new generation of politicians who embraced the philosophy that legal services was hopelessly liberal, a bad use of government dollars, and a program that should be returned to the private attorneys. Restrictions on LSC funding and activities continued during the 1980s and into the early 1990s, but nothing compared to the actions of the 104th Congress in 1996.

104TH CONGRESS CUTS LSC

In legal services' contentious history, 1996 stands out as a year that was both financially and organizationally devastating. The Omnibus Consolidated Rescissions and Appropriations Act of 1996 (hereafter called the Budget Act of 1996) cut LSC funding by 30% and imposed a host of new restrictions on the work that could be done by the recipients. LSC funding was slashed to $283 million from $415 million a year earlier. Nationally, the cuts caused about 13% of LSC program staff to leave and 13% of local legal services offices were forced to close (Houseman, 1997). The Budget Act of 1996 restricted LSC recipients from litigating class action suits, engaging in welfare reform work, participating in any litigation having to do with abortion as well as most forms of legislative and administrative advocacy and client outreach. LSC recipients are prohibited from collecting attorneys' fees and federal legal services back-up centers, which serve as clearinghouses, lost all federal funding (Community Legal Services, 1996).

The debates in Congress both for and against LSC were heated and passionate. Opponents' sentiments about the LSC are characterized by the following:

> We understand that in normal Congressional politics it is easier to reduce an agency's funding than to eliminate entirely both the funding and the agency. In this case, however, no other solution will do. The LSC is wholly bad, and if now, in the time of a Republican majority in both Houses of Congress, it is merely reduced, it will certainly spring back to life later with greater vigor. It must be killed, dead. *Legal Services Reform Act* (1996)

In the end, more moderate forces saved the LSC from being "killed, dead," but many people worry that the program has been hopelessly crippled, particularly in light of the ban on advocacy.

CASE LAW

Using the legislative and congressional budget battles as backdrop, the discussion will now examine the cases that have challenged the restrictive portions of the law. Again, the challenges have been few, and until 1996, far between. In fact, the majority of the restrictions have never been challenged (Roth, 1998, p. 108), including the bans on cases dealing with the most politically contentious issues of recent history: abortion and desegregation.

TASBY V. ESTES (1976)

The first three cases to challenge the restrictions in the 1974 LSC statute or subsequent amendments to it did little to alter the terms in which LSC recipients litigated on behalf of their clients. *Tasby v. Estes* (1976) was filed in U.S. District Court, Northern District of Texas in 1976. The case concerned the desegregation efforts of the Dallas Independent School District, which plaintiffs successfully argued had been inadequate. The court had ordered the school district to make amends. After a long and arduous process of litigation and implementation of ordered changes, it became time for the defendant, the Dallas School District, to pay the plaintiffs' attorneys. Legal Services attorneys had brought the case in 1970s. By the time the attorneys fees were awarded, it was 1976, and LSC recipients were barred from becoming involved in cases of desegregation. The school district refused to pay the fees and thus the suit was filed. The court ruled that the legal services attorneys were free to take on desegregation cases under the OEO's LSP program and were able also to collect fees. The Court reasoned that the LSC Act of 1974

> clearly contains a prohibition regarding cases relating to the desegregation of elementary and secondary school and any school system. However, that prohibition must be read in conjunctions with other statements contained in the Act regarding the need to protect the best interests of clients and to adhere to the Code of Professional Responsibility, the Cannons of Ethics, and the high standards of the legal profession (*Tasby v. Estes*, at 644, (1976)).

The Court decided that the legal services agency was eligible to collect the attorneys fees and that it could continue representing the plaintiffs through March 31, 1976.

SMITH V. EHRLICH (1976)

Later that same year in *Smith v. Ehrlich* (1976), staff attorneys for two different legal services agencies asked the court to declare unconstitutional regulations that prevented attorneys from seeking election to partisan or nonpartisan offices during the time they are employed by legal services. The staff attorneys argued that they were not employees of the federal government, nor did they receive directly compensation from Legal Services Corporation. Thus they should not be subject to the restrictions contained in LSC Act of 1974. The attorneys, one from South Carolina and one from California, both ran for nonpartisan offices and claimed that the Legal Services Act "contravened" their First Amendments rights to free expression and that the restrictions violated their right to equal protection of the law, as guaranteed by the Fifth Amendment.

The court disagreed with this argument, citing the Hatch Act which "makes . . . abundantly clear that Congress has power to regulate the partisan political activities of government employees." The court felt that both partisan and nonpartisan activities were included in this prohibition. The judges cited the congressional debate that occurred during discussion of the Legal Services Act:

> The program, originally funded pursuant to provisions of Economic Opportunity Act of 1964 . . . had become "controversial and embattled" . . . much to the detriment of the poor, whose mission it was to serve. Indeed, the "central objective of the legislation" was to "free the program from outside political influence" (119 Cong. Rec. 40476), and to that end great emphasis was placed upon the creation of a politically independent legal services corporation. . . . Senator Javits attributed the troubles of legal services to litigation initiated by staff attorneys which placed them in direct conflict with state and local governments . . . It is understandable, with this background in mind, why Congress would not want these lawyers to hold elected positions at the state and local levels (*Smith v. Ehrlich*, at 818 (1976)).

The Court asserted that Congress found little distinction between partisan and nonpartisan offices and in the end found nothing in the Constitution barring Congress from making these policy determinations.

In making the claim that the Act violated legal service attorneys rights to equal protection, the plaintiffs argued that legal services

attorneys were treated differently than all other government employees in that they were prevented from engaging in nonpartisan candidacies while attorneys from other governmental agencies were not. The judges argued that Congress acted appropriately when it distinguished legal services attorneys from all others. In dismissing the case, they argued:

> The legal services staff attorneys form a natural class of individuals who serve a program that in the judgment of Congress has been subjected to detrimental political pressure. Beyond this, there may be good reason to treat the staff attorney differently from a lawyer representing the government (or Corporation) itself. Legal services lawyers frequently come in direct conflict with state and local governments in the course of representing their clients (*Smith v. Ehrlich* (1976)).

Texas Rural Legal Aid v. LSC

The first case in which a legal aid recipient sued the Legal Services Corporation was *Texas Rural Legal Aid, Inc. v. Legal Services Corporation* (1990), which challenged the "Final Rule" contained in regulations issued by the Legal Services Corporation in 1989. The Final Rule prohibited legal services recipients from participating in redistricting cases even if the recipients' respective boards approved the activity.

> Redistricting is defined as: any effort, directly or indirectly, to participate in the revision or reapportionment of a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census. 45 CFR § 1632.2.

The Court found, however, that the Legal Services Corporation had, by promulgating the Final Rule, exceeded its authority by restricting activities in which recipients could engage. Only Congress has that power, the judges decreed.

> There is no indication in the LSC Act or its legislative history that Congress intended to delegate its legislative power to LSC to prohibit categories of litigation beyond those Congress itself had banned. LSC makes no specific claim, although that is in effect what it has done. Rather LSC seeks to extend authority to accomplish this precise result from language that authorizes its limited administrative role,

> distorting the text of the LSC Act into a grant of almost unlimited policy control of the entire program. In doing so, LSC has exceeded its authority and usurped the powers of Congress (*Texas Rural Legal Services v. LSC,* at 888 (1990)).

Thus the Court declared the Final Rule invalid. In doing so, it took away LSC's ability to restrict local legal services' activities. More importantly, it affirmed the role of Congress as the rule maker. It would be another 20 years before a challenge was brought, questioning Congress' authority to restrict certain activity.

CHALLENGING THE 1996 RESTRICTIONS

The budget cuts and the litigation restrictions enacted by the 104th Congress were the harshest ever experienced by the LSC. This 30% reduction in funding led to massive restructuring of legal services offices, including staff lay-offs, office closings, and the splitting of offices into two separate entities, one receiving LSC funds and the other refusing the funds in order to be able to pursue restricted activities including class action suits and "legal advocacy" (Houseman, 1997). As Yoder suggests:

> Legal aid organizations that receive LSC funding have been divided over whether to challenge the regulations. On the one hand, some grantees believe that challenging the regulations will simply give Congress a reason to eliminate funding altogether. According to this reasoning, it is better to live with the restrictions because they affect so few cases than risk losing funding altogether. Others, however, believe the restrictions go too far and should be challenged if legal aid organizations are to retain any type of independence and integrity in serving clients (Yoder, 1998, p. 861).

To date, there have been three major challenges to the Budget Act of 1996, each of which will be discussed below.

VARSHAVSKY V. GELLER

At issue in the first case, *Varshavsky v. Geller* (1996), was the prohibition on LSC grantees from using either federal or private funds to

litigate class actions suits. Legal Services for the Elderly (LSE) attorney Valerie Bogart had been litigating a class action suit since 1991. When the 104th Congress passed the prohibition against class action suits in 1996, Bogart refused to step down as counsel to the group saying the Code of Professional Conduct prevented her from doing so (Rovella,1997). Legal Services of New York threatened to defund her agency if she did not step down. Bogart asked the court to decide.

Acting New York State Supreme Court Justice Beverly Cohen ruled the ban unconstitutional because its scope was too broad. Thus it violated the First Amendment's protection of freedom of association, freedom of speech, and freedom to petition the government for redress of grievances (Wise, 1997). Justice Cohen wrote:

> The legislative history of the restriction on class action litigation challenged here reveals that the actual state interest in passing the legislation was a blatant attempt to inhibit the First Amendment rights of LSC lawyers, their clients and anyone who agrees with them. The restrictions were designed to minimize, if not prevent, the political impact of the causes of the poor and their champions (*Varshavsky v. Geller* (1996)).

In part, Justice Cohen based her decision on *NAACP v. Button* (1963). This 1963 ruling held that an organization and its attorneys may assist people who use litigation as a form of political expression and as a means for achieving "the lawful objectives of equality of treatment by government agencies."

Legal Aid Society of Hawaii v. LSC

Legal Aid Society of Hawaii v. Legal Services Corp. (1997) also challenged the restrictions imposed by the 1996 Budget Act, but the result was not positive for legal services advocates. Legal Aid of Hawaii joined with four other LSC recipients to file suit in federal district court challenging the restrictions on the basis that they imposed unconstitutional conditions on the attorneys, and violated the equal protection and due process clauses of the U.S. Constitution. Initially, presiding Chief District Judge Alan Kaye granted an injunction against the enforcement of the some of the 1996 Budget Act's restrictions, saying that

> they were inconsistent with the First Amendment to the extent that they conditioned receipt of LSC funds on the grantees' relinquishment

of the right to work with other groups to pursue prohibited activities with non-LSC funds (*Legal Aid Society of Hawaii v. Legal Services Corp.* (1997)).

The LSC answered Judge Kay's critique by revising the regulations that controlled recipients' relationships with organizations pursuing prohibited activities. The new regulations were modeled on those upheld in *Rust v. Sullivan* (1991). According to the decision in Hawaii, the new regulations mandated that a recipient of LSC funds maintain physical and financial separation from unrestricted organizations. The court upheld the new regulations and the legal service recipients appealed that decision.

In the appeal, retired former U.S. Supreme Court Justice Byron White issued the summary judgment for the defendant, the Legal Services Corporation. Justice White's decision, once again, affirmed Congress' right to appropriate funds and limit the programs supported by those funds. He says that the appellants' claims that the regulations infringe on their First Amendment Rights are "indistinguishable" from the regulations that were at issue in the Supreme Court decision, *Rust v. Sullivan* (1991). *Rust* concerned regulations issued by the Secretary of Health and Human Services that prohibited the use of federal funds from use in any programs where abortion was performed. The regulations required separation between agencies that received federal money from Title X and programs that offered abortion. Upon challenge, the U.S. Supreme Court ruled that the "government may make a value judgment in favor of child birth over abortion and implement that judgment by the allocation of public funds (*Rust v. Sullivan* (1991)).

White, in the Hawaii decision says, "as in *Rust,* the LSC regulations do not force a recipient to give up prohibited activities; they merely require that the [recipient] keep such activities separate and distinct from [LSC] activities" (*Legal Aid Society of Hawaii v. Legal Services Corp.* (1997)).

Velazquez v. LSC

Finally, *Velazquez v. Legal Services Corporation* (1997) sought a preliminary injunction against the 1996 restrictions that limited the use of non-LSC funds as well as challenged the restrictions on the

use of federal funds. The court denied the injunction relying on the Hawaii decision and held that:

> in implementing the requirements, Congress had an interest in not only prohibiting the use of federal funds for certain activities, but also in preventing the appearance of government endorsement of the prohibited activities (*Velazquez v. Legal Services Corporation* (1997)).

CONCLUSION

The case law clearly and unequivocally asserts congressional power to select funding levels for the Legal Services Corporation and to establish the rules and regulations by which the agency and its funding recipients are obligated to abide. The Courts do not see a role for themselves in distinguishing Constitutional rights in funding decisions or in restricting governmental activity. Thus it is left to Congress to answer the question posed at the beginning of this discussion: to what extent should the government fund legal assistance to the poor? It seems to me that when thinking about legal services to the poor, there is a philosophical continuum at work. On one end there is the limited, pro bono/private legal aid society model. On the other end there is the robustly funded, two-tiered legal services model of the 1960s that combines bread and butter legal services with legal advocacy/systemic reform. Congress gets to pick a point on the continuum each year, and that choice depends on the political mood of the country.

This state of affairs pushes aside a central question posed by advocates—what good is a citizen's *right* to justice if he or she has limited or no access to the justice system? This is the question that will keep advocates awake at night dreaming of ways to get around congressional restrictions.

This page intentionally left blank

Notes

CHAPTER SIX

1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA), Pub. L. No. 104-193, 110 Stat. 125. Title I of the PRA replaces the Aid to Families with Dependent Children (AFDC) program with the Temporary Assistance for Needy Families (TANF) block grant.
2. Litigation developments and trends are reported in the Welfare Law Center's monthly *Welfare Bulletin* and its bimonthly newsletter, *Welfare News* (combined subscription is $40 a year ($60 for libraries)).
3. *Shapiro v. Thompson,* 394 U.S. 618 (1969). Under *Shapiro* and its progeny a state statute is subject to strict scrutiny when it "[1] actually deters travel . . .[,] [2] when impeding travel is its primary objective . . . [,] or [3] when it uses any classification which serves to penalize the exercise of that right." *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 903 (1986).
4. According to the National Governors' Association (NGA), the following jurisdictions have restricted benefits to new residents: District of Columbia, Florida, Georgia, Illinois, Maryland, Minnesota, New Hampshire, New York, North Dakota, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. *National Governors' Association Matrix and Summary of Selected Elements of State Plans for Temporary Assistance for Needy Families* (TANF) as of August 12, 1997 [hereinafter NGA TANF *Summary*] available on NGA's Web page <http://www.nga.org>. California, Connecticut, Indiana, Massachusetts, and New Jersey also have adopted restrictive policies regarding new residents, according to information gathered by the Welfare Law Center.
5. See Russell L. Hanson & John T. Hartman, Do Welfare Magnets Attract? (Feb. 1994) (Discussion Paper No. 1028-94, Inst. for Research on Poverty, Univ. of Wis.) http://ssc.wisc.edu/irp/dplist.htm>; William Frey et al., Interstate Migration of the U.S. Poverty Population: Immigration "Pushes" and Welfare Magnet "Pulls" (May 4, 1995) (paper presented at the Poverty Research Seminar Series, Washington, D.C.).

See generally Center on Social Welfare Policy & Law, *Welfare Myths: Fact Or Fiction* 25–26 (1996).

6. Such statutes allow the states to argue that they are not penalizing exercise of the right to travel because new residents are no worse off than they would have been in their former states. This argument is wrong in that it ignores the effect of cost-of-living differences and distorts the Supreme Court's right-to-travel penalty analysis, which focuses on whether new residents are treated less favorably than long-term residents, not on whether they are treated less favorably than they would have been in their former states. See *Zobel v. Williams,* 457 U.S. 55 (1982) (Alaska law that gave higher oil-revenue payments to long-term residents than to short-term residents unconstitutional even though the new residents would have received no such payments in their former states).
7. Rhode Island's statute is challenged in *Westenfelder v. Ferguson,* No. 97-478L (D.R.I..filed Aug. 21, 1997) (complaint). A preliminary injunction motion is pending.
8. As reported by advocates, Massachusetts and Wisconsin have adopted 60-day bars on aid to new residents. Minnesota has a 30-day bar.
9. As reported by advocates, Connecticut, Massachusetts, New York, and Washington all have residency statutes for immigrants.
10. See *Green v. Anderson,* 26 F.3d 95 (9th Cir. 1994), affirming 811 F. Supp. 516 (E.D. Cal. 1993), vacated on other grounds, 115 S. Ct. 1059 (1995) (Clearinghouse No. 48,733); *Maldonado v. Houston,* No. 97-4155 (E.D. Pa. Oct. 1997) (slip op.); *Roe v. Anderson,* 966 F. Supp. 977 (E.D. Cal. 1997); *Mitchell v. Steffen,* 487 N.W.2d 896 (Minn. 1992) (Clearinghouse No. 47,194); *Brown v. Wing,* 1997 WL392631 (N.Y. App. Div. July 3, 1997), affirming 649 N.Y.S.2d 988 (N.Y. Sup. Ct. 1996); *Aumick v. Bane,* 612 N.Y.S.2d 766 (N.Y. Sup. Ct. 1994) (Clearinghouse No. 48, 951). But see *V.C. v. Whitburn,* No. 94-C-1028 (E.D. Wis. Sept. 30, 1997). The *V.C.* court declined to issue a preliminary injunction in a two-page unreasoned order. The case involves a four-county AFDC demonstration project that was defunct by the time the court issued its order.
11. *Roe,* 966 F. Supp. at 977.
12. *Brown,* 1997 WL392631.
13. *Maldonado,* No. 97-4155 (E.D. Pa. October 1997) (slip op.).
14. *Id.,* slip op. at 51, citing *Shapiro,* 394 U.S. at 637-38.
15. New Jersey's multitier benefit system for new residents also has been challenged, but no decision yet has been issued in that case. *Sanchez v. Dep't of Human Servs.,* No. A-00466-97T5 (N.J. Super. Ct. App. Div. filed Sept. 15, 1997) (complaint).
16. *Jones v. Milwaukee County,* 485 N.W.2d 21 (Wis. 1992).

17. *Warrick v. Snider,* No. 94-1634 (W.D. Pa. July 5, 1995) (Clearinghouse No. 50,302). After extensive discovery, plaintiffs moved for summary judgment and are awaiting a decision.
18. *Shapiro,* 394 U.S. at 627.
19. See, e.g., *Graham v. Richardson,* 403 U.S. 365 (1971).
20. The term "workfare" does not appear in the federal statute, which instead refers to both "work experience" and "community service programs." 42 U.S.C. § 602(d). The term is used here to refer generically to any program which requires welfare recipients to perform unpaid work in order to remain eligible for their grants.
21. For background on New York City's workfare program see Timothy J. Casey, *A Workfare Primer,* WELFARE NEWS 7 (Welfare Law Ctr., Sept. 1997).
22. In Georgia a recipient who is the only caretaker of a severely disabled daughter who requires constant care including a gastrointestinal tube for feeding had to press her case in a fair hearing in order to receive an exemption. Even after doing so, she received only a 6-month exemption. Docket No. 97-11, 675-23-WLS (Ga. Office of Admin. Hearings July 18, 1997).
23. See Joe Sexton, Privacy and Pride Are Submerged at Busy Workfare Evaluation Site, *New York Times,* Oct. 13, 1997, at A1.
24. *Mitchell v. Barrios-Paoli,* No. 400896/97 (N.Y. Sup. Ct. N.Y. County filed Sept. 24, 1997) (class action complaint).
25. *Fridman v. City of New York,* No. 97 Civ. 6099 (S.D.N.Y. 1997).
26. *Davila v. Hammons,* No. 407163/96 (N.Y. Sup. Ct. N.Y. County April 21, 1997) (order) (Clearinghouse No. 51,713).
27. See *Bryan v. Hammons,* 662 N.Y.S.2d 691 (Sup. Ct. 1997); *Hesthag v. Hammons,* No. 403426/96 (N.Y. Sup. Ct. N.Y. County Nov. 14, 1997). But see *Ortiz v. Hammons,* No. 406095/96 (N.Y. Sup. Ct. N.Y. County Feb. 18, 1997) (Clearinghouse No. 51,677)
28. *U.S. Dep't of Labor (DOL), Department of Labor Guidance: How Workplace Laws Apply to Welfare Recipients,* Daily Lab. Rep. (BNA), No. 103, at E-3 (May 29, 1997) http://gatekeeper.dol.gov/dol/asp/public/w2w/welfare.htm> [hereinafter DOL GUIDE).
29. Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*
30. Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*
31. DOL GUIDE does not state an opinion about the status of workfare workers to organize under federal labor law (the National Labor Relations Act), or claim workers' compensation under state employment laws, or other legal protections that fall outside DOL or Equal Employment and Opportunity Commission jurisdiction.
32. DOL GUIDE, *supra* note 28, at E-3.

33. Another helpful resource is *National Employment Law Project (NELP), Employment Rights of Workfare Participants and Displaced Workers* (Apr. 1996). It is a detailed summary of the application of employment and labor laws to workfare programs. Contact NELP at 212.285.3025 for more information.
34. See discussion of litigation *infra.*
35. DOL GUIDE, *supra* note 28, points 6-7, at E-4. In order to count the recipient's food stamps, however, the state must operate an official food stamp workfare/wage supplementation program, or, as now authorized by the U.S. Department of Agriculture, it may apply in an expedited fashion to operate a "Simplified Food Stamp Program" created under the federal welfare law to coordinate TANF and food stamp requirements.
36. A workfare worker may be entitled to have hours calculated at the "prevailing" or "living" wage instead of the minimum wage. See *infra.*
37. DOL GUIDE, *supra* note 28, point 12, at E-5.
38. Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*
39. Rehabilitation Act, 29 U.S.C. § 794. See also Herbert Semmel & Cary LaCheen, *Temporary Assistance for Needy Families and the Americans with Disabilities Act,* in this issue.
40. Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* See also Semmel & LaCheen, *supra* note 39.
41. Title VI, 42 U.S.C. § 2000d. See also Sherry Leiwant & Yolanda Wu, *Civil Rights Protections and Employment Programs,* in this issue.
42. Memorandum 2 from Guy Molyneux & Jeffrey Garrin, Peter D. Hart Research Associates, Washington, D.C., to American Federation of Labor and Congress of Industrial Organizations (June 10, 1997) (regarding minimum-wage coverage for workfare recipients).
43. *Id.*
44. *Id.* at question w-2.
45. For a fuller discussion of potential legal challenges see *Center On Social Welfare Policy & Law & National Employment Law Project, Potential Litigation Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996* (Pub. L. No. 104-193) (Dec. 1996).
46. *Capers v. Giuliani,* No. 402894/97 (N.Y. Sup. Ct. N.Y. County filed July 14, 1997) (complaint) (Clearinghouse No. 51,717).
47. *N.Y. Lab. Law* § 27-a (McKinney 1992).
48. Occupational Safety and Health Act, *supra* note 30.
49. *N.Y. Soc. Serv. Law* § 330(5) (McKinney 1986).
50. *Stone & Tricoche v. Sweeney,* No. 402891/97 (N.Y. Sup. Ct. N.Y. County filed July 1997) (petition).
51. State ex rel. *Patterson v. Industrial Comm.,* 672 N.E.2d 1008 (Ohio 1996).

52. 42 U.S.C. § 607(c)(1)(A).
53. Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*
54. *Seminole Tribe of Florida v. Florida,* 517 U.S. 609 (1996).
55. See, e.g., *Wilson-Jones v. Caviness,* 107 F.3d 358 (6th Cir. 1997); *Rehberg v. Department of Pub. Safety,* 946 F. Supp. 741 (S.D. Iowa 1996).
56. *Johns v. Stewart,* 57 F.3d 1544 (10th Cir. 1995).
57. See discussion at pt. III. B.1, *supra.*
58. *Brukhman v. Giuliani,* 662 N.Y.S.2d 914 (Sup. Ct. 1997) (Clearinghouse No. 51,676).
59. *Church v. Wing,* 645 N.Y.S.2d 356 (App. Div. 1996).
60. *N.Y. Soc. Serv. Law* § 336-c(c)(2) (McKinney 1992).
61. N.Y. State Dep't of Soc. Servs., Fair Hearing No. 2560197J (Dec. 31, 1996).
62. 42 U.S.C. § 607(f)(2).
63. *Melish v. City of New York* (N.Y. Sup. Ct.. N.Y. county filed May 1997) (complaint).
64. See http://www.afscme.org/afscme/press/012797_1.htm.
65. U.S. Government Accounting Office, No. GAO/HEHS-97-74, *Welfare Reform-States' Early Experiences with Benefit Terminations* (May 1997) htm.
66. *Tormos v. Hammons,* 658 N.Y.S.2d 272 (App. Div. 1997).
67. *Kassler v. Wing,* 658 N.Y.S.2d 94 (App. Div. 1997).
68. *Hestag,* No. 403426/96 (N.Y. Sup. Ct.. Nov. 14, 1996); *Bryan,* 662 N.Y.S.2d at 691.
69. Docket No. 97-11, 675-23-WLS (Ga. Office of State Admin. Hearings July 18, 1997).
70. State of New Mexico ex rel. *Taylor v. Johnson,* No. 24547 (N.M. Sup. Ct. filed July 21, 1997) (petition for writ of mandate). At writing, plaintiffs' counsel reported outstanding compliance issues and the possible need for further relief. For pre-TANF welfare cases involving separation of powers claims see *Center on Social Welfare Policy & Law, Welfare Cutback Litigation, 1991–1994* (July 1994).
71. *Cressey v. Foster,* 694 So. 2d 1016 (La. Ct. App. 1997). The appellate decision noted that the lower court had found that actions to formulate program criteria were justified under emergency rule-making procedures. The appellate court did not address this issue on appeal since it found that the state had published only one emergency rule regarding the child support pass-through. The court upheld that emergency rule. Plaintiffs' counsel reported that the litigation did result in some favorable policy changes.
72. *Melgar v. California Dep't of Social Servs.,* No. 96AS05728 (Cal. Super. Ct. Sacramento County Oct. 31, 1996) (denial of food stamps to legal immigrant applicants done by All-County Letter; implementation

barred until state compliance with Administrative Procedure Act). *Gainer v. Miller,* No. 96-CI-0024 (Rowan Cir. Ct. Ky. Jan. 14, 1997) (settlement and order; rule making and other challenges to elimination of child support pass-through; temporary partial restoration resulted). But see *Cressey,* 694 So. 2d at 1016 (emergency rule ending child support pass-through upheld). *Success Against All Odds v. Department of Public Welfare of Pa.,* 700 A.2d 340 (Pa. Commw. Ct. 1997) (termination of child support pass-through; rule making requirement and substantive law not violated); for pre-TANF welfare cases involving Administrative Procedure Act claims see *Center on Social Welfare Policy & Law, supra* note 70.

73. As of August 12, 1997, according to the NGA TANF *Summary, supra* note 4.
74. Carolyn Tuturro et al., *Arkansas Welfare Waiver Demonstration Project, Final Report (June 15, 1997);* N.J. Dep't of Social Servs., *Family Development Program Evaluation Project Executive Summary of Project Deliverables* (Sept. 1997). In New Jersey the birthrate declined for both the experimental and control groups. Both reports question the use of random experimental design in this research.
75. Center on Social Welfare Policy & Law, *Welfare Myths: Fact or Fiction?* 19–20 (1996).
76. The Third Circuit previously upheld the U.S. Department of Health and Human Services' waiver for the New Jersey policy and rejected federal equal protection and due process challenges to the policy. *C.K. v. N.J. Dep't of Health & Human Servs.,* 92 F. 3d 171 (3d Cir. 1996) (Clearinghouse No. 49,451).
77. *N.B. v. Davis,* No. 49D139705 (Ind. Super. Ct. Marion County filed May 22, 1997) (complaint).
78. *Sojourner A. v. N.J. Dep't of Human Servs.,* No. ESX-L-10171-97 (N.J. Super. Ct. Essex County filed Sept. 1997) (complaint).
79. 42 U.S.C. § 654 (29).
80. *Doe v. Gallant,* No. 96-1307-D (Mass. Super. Ct., Aug. 9, 1996) (Clearinghouse No. 51,056).
81. *Smyth v. Carter,* 168 F.R.D. 28 (W.D. Va. 1996) (Clearinghouse No. 51,346).
82. *Blessing v. Freestone,* 117 S. Ct. 1353 (1997) (Clearinghouse No. 50,109).
83. *Success Against All Odds,* 700 A.2d at 340.
84. *Cressey,* 694 So. 2d at 1016.
85. *Gainer,* No. 96-CI-00241 (Rowan Cir. Ct. Ky. Jan. 14, 1997) (settlement and order).
86. 42 U.S.C. § 608 (a) (7).
87. The effects of state decisions in recent years to end or time-limit general assistance for employable individuals are instructive. Most recipients

faced serious personal and structural barriers to employment, a large majority did not find employment, and many suffered homelessness, hunger, poor health, and increased social isolation. Center on Social Welfare Policy & Law, *Jobless, Penniless, Often Homeless: State General Assistance Cuts Leaves "Employables" Struggling for Survival* (Feb. 1994).

88. Greg J. Duncan et al., *Time Limits and Welfare Reform: New Estimates of the Number and Characteristics of Affected Families* (April 22, 1997). <http://www.spc.uchicago.edu/PovertyCenter/limit121.html>.
89. For past litigation challenging state general assistance time limits, see *Welfare Law Ctr. Docket of Selected Recent Welfare and Related Cases* (Feb. 1997) (available to those representing or supporting welfare recipients in litigation).
90. *Bradford v. County of San Diego,* No. 97-CV-1024-JM (S.D. Cal., July 29, 1997) (Clearinghouse No. 51,727).
91. As of August 12, 1997, according to the NGA TANF *Summary, supra* note 4.
92. *Chandler v. Miller,* 117 S. Ct. 1295 (1997). For prior relevant cases see *Welfare News,* Dec. 1996, at 5–6.
93. *Hunsaker v. County of Contra Costa,* No. C-95-1082 MMC (N.D. Cal. July 31, 1997).
94. *Goldberg v. Kelly,* 397 U.S. 254 (1970).
95. See, e.g., Timothy J. Casey & Mary R. Mannix, Quality Control in Public Assistance: Victimizing the Poor Through One-sided Accountability, 22 *Clearinghouse Rev.* 1381 (Apr. 1989).
96. Preliminary data gathered and supplied by Center for Law and Social Policy.
97. *Gregory v. Kitchel,* No. 2:97-CV-135 (D. Vt. July 2, 1997).
98. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985). See generally Nancy Morawetz, A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era, 30 *Clearinghouse Rev.* 97 (June 1996).
99. *Washington Legal Clinic for the Homeless v. Barry,* 107 F. 3d 32 (D.C. Cir. 1997), reh'g denied (June 12, 1997) (Clearinghouse No. 51,731).
100. For detailed suggestions see Welfare Law Ctr., *Using a Plastic Card to Access Public Benefits: The Advocates' Guide to EBT* (1995) (available for $25 ($40 to libraries, government agencies, private contractors) plus $2 for shipping and handling).
101. *Richardson v. McKnight,* 117 S. Ct. 2100 (1997).
102. Open letter from Hubert H. Humphrey III, Attorney General, State of Minnesota, July 1, 1997, p. 1.
103. See, e.g., *Ortiz v. Eichler,* 794 F.2d 889 (3d Cir. 1986) (Clearinghouse No. 35,980).
104. *Malave v. Ferguson,* PC 97-3364 (R.I. Super. Ct. Jully 16, 1997).

105. *Shvartsman v. Callahan,* No. 97-C5229 (N.D. Ill. July 24, 1997) (complaint) (Clearinghouse No. 51,714).
106. For a full discussion of permitted activities see Alan Houseman & Linda Perle, *Clasp Guide to the Welfare Reform Regulation* pt. 1639 (Ctr. for Law & Social Policy Oct. 1997).
107. These cases are discussed *supra* in pts. III.A, III.B.2. For a description of the New York City workfare project see *Welfare News,* Feb. 1997, at 8.
108. *Westenfelder,* No. 97-478L (D.R.I. filed Aug. 21, 1997) (complaint); *Brown,* 1997 WL392631, *supra* note 10.
109. Contact Guy Lescault, Litigation Assistance Partnership Project Coordinator, at National Legal Aid and Defender Association, 202.452.0620, ext. 18.
110. For examples of contracts that appear to allow greater individual flexibility, order *Sample Personal Responsibility Agreements and Instructions from Five States* from the Welfare Law Center ($20 plus $2 for shipping and handling).

CHAPTER TWELVE

1. The NASW was quick to issue a press release on June 13, 1996 touting the importance of the Supreme Court's decision.
2. The NASW Code of Ethics delineates several aspects of privacy and confidentiality under the rubric of the "Social Worker's Ethical Responsibility to Clients." The specific language reads as follows:

    1. The social worker should share with others confidences revealed by clients, without their consent, only for compelling professional reasons.
    2. The social worker should inform clients fully about the limits of confidentiality in a given situation, the purposes for which information is obtained, and how it may be used.
    3. The social worker should afford clients reasonable access to any official social work records concerning them.
    4. When providing clients with access to records, the social worker should take due care to protect the confidences of others contained in those records.
    5. The social worker should obtain informed consent of clients before taping, recording, or permitting third party observation of their activities.

3. The oral argument before the Supreme Court precedes the final decision from the Court. The transcript merely details the questions put to counsel and their responses, but it reveals in the process the things the Justices deem important, things that may eventually find their way into the final decision.
4. Rule 501 provides as follows: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the Unites States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as two which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."
5. Carolyn Polowy, NASW General Counsel, issued a note on "Client Confidentiality and Privileged Communications" in November 1995, which included the following discussion of federal and state treatment of privilege:

In 22 states and the District of Columbia, statutes grant privilege to communications between clients and mental health professionals (Arizona, California, Colorado, D.C., Florida, Georgia, Iowa, Kentucky, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin). These "generic" privilege laws generally consider communications with psychiatrists, psychologists, social workers, and other listed counseling professionals as having equivalent importance and rights to privacy. In 21 states, privilege is granted to social workers as a profession, and separate statutes identify the privilege granted to other mental health professions (Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, New York, North Carolina, Oregon, South Dakota, Washington, and West Virginia). In three states, courts or legislatures have explicitly denied any privilege to communications with social workers (Alaska, North Dakota, and Oklahoma). In four states, it is unclear whether all such communications are privileged, because there is no general statutory provision or the courts have had no opportunity to adjudicate the issue (Alabama, Hawaii, Pennsylvania, and Wyoming).

Table of Cases

References

139 Cong. Rec., H10359 (daily ed. November, 20, 1993) (statement of Rep. Schroeder).

142 Cong. Rec. S8499 (daily ed. July 23, 1996).

28 Pennsylvania Code, Section 201.1, *et seq.*

Albert, R. (1986). *Law and social work practice.* New York: Springer.

American Association of State Social Work Boards. (1996). *Social work laws and board regulations: A state comparison study.* Culpeper, VA: Author.

Anderson, J. E. (1997). *Public policymaking* (3rd ed.). Boston: Houghton Mifflin.

Andrews, A. B. (1990). Interdisciplinary and interorganizational collaboration. In A. Manahan (Ed.), *Encyclopedia of social work* (18th ed., pp. 175–188). Washington, DC: NASW Press.

Applebaum, P.S., Lidz, C.W., & Meisel, A. (1987). *Informed consent: Legal theory and clinical practice.* New York: Oxford University Press.

Arenson, K.W. (1995, January 7). Large charities pay well, survey finds. *The New York Times,* p. A7.

Auerbach, J. S. (1976). *Unequal justice: Lawyers and social change in modern America.* New York: Oxford Press.

Babcock, C. R. (1997, January 7.). Use of tax-exempt groups integral to political strategy. *The Washington Post,* pp A1, A6.

Bair, J. (1995, October 29). ACLU under fire, off target, its critics say. *The Plain Dealer,* p. 16A.

Barr, S. (1995a, June 8). Advocacy groups in charity drive targeted by GOP. *The Washington Post,* p. A19.

Barr, S. (1995b, September 19). Nonprofits fight limits on lobbying. *The Washington Post,* pp. A1, A7.

Baum, D. (1996). *Smoke and mirrors: The war on drugs and the politics of failure.* Boston: Little, Brown.

Baum, L. (1980). The influence of legislatures and appellate courts over the policy implementation process. *Policy Studies Journal, 8,* 560–594.

Baumgartner, F. R., & Jones, B. D. (1993). *Agendas and political instability in American politics.* Chicago: University of Chicago Press.

Berry, J. M. (1984). *The interest group society.* Boston: Little, Brown.

Bersoff, D. N., Goodman-Delahunty, J., Grisso, J. T., Hans, V. P., Poythress, N. G., & Roesch, R. G. (1997). Training in law and psychology: Models from the Villanova Conference. *American Psychologist, 52,* 1301–1310.

Biggerstaff, M. A. (1995). Licensing, regulation and certification. In R. L. Edwards (Ed.), *Encyclopedia of social work* (19th ed., pp. 1616–1624). Washington, DC: NASW Press.

Binstock, R. H. (1995). A new era in the politics of aging: How will the old-age interest groups respond? *Generations, 19*(3), 68–74.

Black, D. (1972). The boundaries of legal sociology. *Yale Law Journal, 81,* 1086–1101.

Black's Law Dictionary. (1968). St. Paul, MN: West Publishing Co.

Bodenheimer, E. (1974). *Jurisprudence: The philosophy and method of the law.* Cambridge, MA: Harvard University Press.

Bodenheimer, E., Oakley, J. B., & Love, J. C. (1980). *An introduction to the American legal system.* St. Paul, MN: West Publishing Co.

Bohannan, P. (1967). *Law and warfare.* New York: Natural History Press.

Bradway, J. (1929). *Law and social work.* Chicago, IL: University of Chicago Press.

Braye, S., & Preston-Shoot, M. (1994). Partners in community care? Rethinking the relationship between the law and social work. *The Journal of Social Welfare and Family Law, 2,* 163–183.

Brieland, D., & Lemmon, J. A. (1985). *Social work and the law* (2nd ed.). St. Paul, MN: West.

Butler, P. A. (1979). Assuring the quality of care and life in nursing homes: The dilemma of enforcement. *North Carolina Law Review, 57,* 1329.

Butler, S. M. (1985). *Privatizing federal spending.* New York: Universe Books.

Butler, S. M. (1997). *Privatizing federal spending.* New York: Universe Books.

Carlin, J. E., Howard, J., & Messinger, S. L. (1966). Civil justice and the poor: Issues for sociological research. *Law and Society Review, 1,* 9–90.

Carr, C. (1997, February 22). Tax-exempt groups scrutinized as fundraising clout grows. *Congressional Quarterly Weekly Report, 55*(8), 471–475.

Carty, M.C. (1997). *Doe v. Doe* and the violence against women act: A post-*Lopez* commerce clause analysis. *St. John's Law Review, 71,* 465.

Center for Responsive Politics. (1987). *Public policy and foundations; The role of politicians in public charities.* Washington, DC: Author.

Chein, I., Gerard, D. L., Lee, R. S., & Rosenfeld, E. (1964). *The Road to H: Narcotics, delinquency, and social policy.* New York: Basic Books.

Community Legal Services. (1996). *The status of legal services in Philadelphia.* Philadelphia: Community Legal Services.

Cong. Rec., H697 (1994), (daily ed. February 1, 1994) (statement of Rep.

Bereuter); 140 Cong. Rec. H7218 (1994) (daily ed. March 26, 1994) (statement of Sen. Biden).

Congressional press releases. (1995). *Statements from Senator Larry Craig* (R-ID), 19 July; from *Representative Istook* (R-OK), *McIntosh* (R-IN), & *Ehrlich* (R-MD), 19 July; and *Senator Alan Simpson* (R-WY), 29 July. Washington, DC: Authors.

Corpus Juris Secundum

Council on Social Work Education. (1998). *Working paper on interprofessional education principles.* Alexandria, VA: Author.

Cowan, T. A. (1958). Group interests. *Virginia Law Review, 44*(2), 331–346.

Cox, H. (1991, January). Age before beauty. *Regardies,* 71–79.

Crockin, L. (1994). Beyond Tammy: co-parent adoptions in Massachusetts, 38 *OCT B.B.J.* 7.

Currie, E. (1985). *Confronting crime: An American challenge.* New York: Pantheon Books.

Currie, E. (1993). *Reckoning: Drugs, the cities, and the American future.* New York: Hill and Wang.

Darvall, L. (1993). *Medicine, law and social change: impact of bioethics, feminism and rights movements on medical decision making.* Aldershot, UK: Dartmouth.

Davis, K. C. (1975). *The social settlements and the progressive movements, 1890–1914.* Philadelphia: Temple University Press.

Davis, M. (1993). *Brutal need: Lawyers and the welfare rights movement.* New Haven, CT: Yale University Press.

Demko, P., Moore, J., & Williams, G. (1997, January 9). Charities face new scrutiny by Congress. *Chronicle of Philanthropy,* 1, 29, 35.

Dickson, D. T. (1998). *Confidentiality and privacy in social work: A guide to the law for practitioners and students* (pp. 51–69, 147–169). New York: Free Press.

Dole's Statement on Measure. (1996, Aug. 1). *The New York Times,* p. A24.

Dworkin, R. (1979). How to read the civil rights act. *New York Review of Books, 26,* 37–38.

Easton, D. (1965). *A systems analysis of political life.* New York: Wiley.

Edelman, T. S. (1990). The nursing home reform law: Issues for litigation. *Clearinghouse Review, October,* 545.

Ehrenreich, B. (1995). *The snarling citizen: Essays.* New York: Farrar, Straus & Giroux.

Ellwood, D. (1988). *Poor support: Poverty in the American family.* New York: Basic Books.

Evan, W. M. (1980). *The sociology of law.* New York: Free Press.

Faden, Ruth et al. (1986). *A history and theory of informed consent.* New York: Oxford University Press.

False Claims Act, 31 U.S.C. Sec. 3729 (1997).

Fitzpatrick, M. (1992). Rust erodes: The first amendment implications of *Rust v. Sullivan. Stanford Law Review, 45,* 185.

Freedman, J. O. (1978). *Crisis and legitimacy.* Philadelphia: University of Pennsylvania Press.

Gandi, N. M. (1995, July 13). *Testimony before the Subcommittee on Social Security and Family Policy, Finance Committee, U. S. Senate.* Washington, DC: United States Government Printing Office.

Geisi, M. A. (1997). Where can you go today? The computerization of legal education from workbooks to the web. *Harvard Journal of Law and Technology, 11,* 146.

Glennon, T. (1998). Binding the family ties: a child advocacy perspective on second-parent adoptions. *Temple Political & Civil Rights Law Review, 7*(2), 27–63.

Goldstein, J. J. (1933). The function of the courts in a community social welfare program. *Proceedings of the National Conference of Social Work, Detroit Michigan, June 11–17* (pp. 126–135). Chicago: University of Chicago Press.

Hager, G. (1996). GOP, Clinton edging toward fiscal precipice again. *Congressional Quarterly Weekly Report, 54*(10), 603–604.

Hammer, J. (1992). On the potential impact of *Rust v. Sullivan* as a model for content restrictions on federal arts and humanities funding. *Journal of Arts Management, Law and Society, 22,* 277–280.

Hanks, E., Herz, M. E., & Nemerson, S. S. (1994). *Elements of law.* Cincinnati, OH: Anderson Publishing Co.

Hart, H. L. A. (1968). *Punishment and responsibility: Essays in the responsibility of law.* New York: Longman.

Haynes, K. S., & Mickelson, J. S. (1991). *Affecting change: Social workers in the political arena.* New York: Longman.

Heclo, H. (1978). Issue networks in the executive establishment. In A. King (Ed.), *The new American political system* (pp. 87–124). Washington, DC: American Enterprise Institute.

Hetzel, O. J. (1980). *Legislative law and process.* Charlottesville, VA: The Michie Company.

Hizenrath, D. S. (1995, May 22). Tax status of AARP comes under scrutiny. *The Washington Post,* pp. A1, A8.

Hoebel, E. (1954). *The law of primitive man: A study in comparative legal dynamics.* Cambridge, MA: Harvard University Press.

Hoffman, D. (1997). The False Claims Act as a remedy to the inadequate provision of nutrition and wound care to nursing home residents. *Advances in Wound Care, 9,* 25–29.

Holmes, O. W. (1968). *The common law.* London: Macmillan.

Holtzoff, A. (1966). The vitality of the common law in our time. *Catholic University Law Review, 16,* 23–54.

Hopkins, B. R. (1984, September/October). Non-profits and free speech: Where are the boundaries? *Foundation News,* 84–85.

Houseman, A. 1997. *Can legal services achieve justice?* New York: Center for Law and Social Policy.

Hurst, J. (1982). Dealing with statutes. New York: Columbia University Press.

Jankovic, J., & Green, R. K. (1981). Teaching legal principles to social workers. *Journal of Education for Social Work, 17*(3), 28–35.

Johnson, E., Jr. (1978). *Justice and Reform: The Formative Years of the American Legal Services Program.* New Brunswick, NJ: Transaction Books.

Jones, C. O. (1977, 1980). *An introduction to the study of public policy.* Belmont, CA: Duxbury Press.

Jones, H., Kernochan, J., & Murphy, A. (1980). *Legal method: Cases and materials* (pp. 37–48). Mineola, NY: Foundation Press.

Kadish, S. H., Schulhofer, S. J., & Paulsen, M. G. (1983). *Criminal law and its processes.* Boston, MA: Little, Brown.

Kagle, J. D. (1990). Teaching social work students about privileged communication. *Journal of Teaching in Social Work, 4*(2), 49–65.

Kessler, J. (1987). *Legal services to the poor.* New York: Greenwood Press.

Kettl, D. F. (1998). *Government by proxy: (Mis)managing federal programs.* Washington, DC: Congressional Quarterly Press.

Keyes, W.N. (1995). *Life, death and the law: A source book on autonomy and responsibility in medical ethics* (Vols. 1 & 2). Springfield: Charles C. Thomas.

Kidder, R. (1983). *Connecting law and society.* Philadelphia, PA: Temple University Press.

Kingdon, J. W. (1984). *Agendas, alternatives and public policy.* Boston: Little, Brown.

Kopels, S., & Gustavsson, N. S. (1996). Infusing legal issues into the social work curriculum. *Journal of Social Work Education, 32*(1), 115–125.

Koszczuk, J. (1996, March 2). With humor and firm hand, Armey rules the House. *Congressional Quarterly Weekly Report, 54*(9), 523–528.

Kurzman, P. A. (1995). Professional liability and malpractice. In R. L. Edwards (Ed.), *Encyclopedia of social work* (19th ed., pp. 1921–1927). Washington, DC: NASW Press.

LaFond, J. Q., & Durham, M.L. (1992). *Back to the asylum: The future of mental health law and policy in the United States.* New York: Oxford University Press.

Lauer, L. D. (1994) When reality becomes image: Dealing with media dilemmas of the TV age. *Nonprofit World, 12,* 22–26.

Layton, T. C. (1997). Welfare for lobbyist or nonprofit gag rule: Can

Congress limit a federal grant recipient's use of private funds for political advocacy? *Syracuse Law Review, 47,* 1065.

Legal Services Reform Act of 1996; Hearings before senate committee on labor and human resources, 104th Cong., 2d Sess. 392 (1996).

Lemmon, J. A. (1983). Legal content in the social work curriculum. *Journal of Education for Social Work, 19*(2), 71–76.

Lenkowsky, L. (1997, January 23). Political advocacy by non-profit organizations could become the real casualty of the controversy. *Chronicle of Philanthropy,* 41–42.

Leonard, P. (1996). Three discourses on practice: A postmodern reappraisal. *Journal of Sociology and Social Welfare, 23*(2), 7–26.

Lester, P. (1995, November 4). House passes legislation silencing political opponents. *OMB Watch.* Available online: ombwatch@rtk.net.

Levi, E. (1949). *An introduction to legal reasoning.* Chicago: University of Chicago Press.

Lidz, C. W. (1992). *The erosion of autonomy in long term care.* Oxford: Oxford University Press.

Liuzzo, P. J. (1997). *Brzonkala v. Virginia Polytechnic and State University:* The constitutionality of the violence against women act—recognizing that violence targeted at women affects interstate commerce. *Brooklyn Law Review, 63,* 367.

Llewellyn, K. (1930). Case law. *Encyclopedia of the Social Sciences, 3,* 249.

Llewellyn, K. (1950). Canon's of construction. *Vanderbilt Law Review, 3,* 395–396.

Loury, G. (1998, June 29). Uneconomical. *The New Republic.* vol. 218, no. 26, p. 19.

Lowi, T. J. (1964). American business, public policy, case studies, and political theory. *World Politics, 16,* 677–715.

Lowi, T. J. (1972, July/August). Four systems of policy, politics, and choice. *Public Administration Review, 32,* 298–310.

Lutkus, A. M., & Curtis, P. A. (1985). Client confidentiality in police social work settings. *Social Work, 30,* 355–360.

Lynch, R. S., & Brawley, E. A. (1994). Social workers and the judicial system: Looking for a better fit. *Journal of Teaching in Social Work, 10*(1/2), 65–82.

Madden, R. G. (1998). *Legal issues in social work, counseling and mental health: Guidelines for clinical practice.* Thousand Oaks, CA: Sage.

Malinowski, B. (1926, 1961). *Crime and custom in savage society.* London: Routledge.

Marks, D. T. (1986). *Presentation on corporate criminal liability.* Unpublished manuscript.

Marlowe, H. (1994). How Congress views nonprofits—and what you can do about it. *Nonprofit World, 12*(5), 27–33.

Mahaffey, M., & Hanks, J. W. (Eds.). *Practical politics.* Silver Springs, MD: National Association of Social Workers.

Mass. Ann. Laws ch. 210 (1994).

Masters, R. C. (1991). Crime victims. In A. Gitterman (Ed.), *Handbook of social work practice with vulnerable populations* (pp. 414–445). New York: Columbia University Press.

McCold, A. (1957). Reappraisal of liability for unauthorized medical treatment. *Minnesota Law Review, 41,* 381–425.

Meares, P. A. (1998). The interdisciplinary movement. *Journal of Social Work Education, 34*(1), 2–5.

Meier, K. J. (1993). *Politics and the bureaucracy: Policymaking in the fourth branch of government.* Pacific Grove, CA: Brooks/Cole.

Melendez, S. E. (1995, July 31). Advocates for the social good. *The Washington Post,* p. A21.

Mermin, S. (1982). *Law and the legal system: An introduction.* Boston: Little, Brown.

Mishra, D. (1996). The road to concord: resolving the conflict of law over adoption by gays and lesbians. *Columbia Journal of Law and Social Problems, 30,* 91–136.

Montgomery Health Care v. Ballard, 565 So.2d 221 (1990).

Moody, A. E. (1996). Conditional federal grants: Can the government undercut lobbying by non-profits through conditions placed on federal grants? *Boston College Environmental Affairs Law Review, 24,* 113.

Moore, E. (1995). Legal issues: Low income and dependent people. In R. L. Edwards (Ed.), *The encyclopedia of social work* (19th ed., pp. 1584–1589). Washington, DC: NASW Press.

Morales, A. (1981). Social work with third-world people. *Social Work, 26,* 45–51.

Murphy, J. C. (1998). Legal images of motherhood: Conflicting definitions from welfare "reform," family and criminal law. *Cornell Law Review, 83,* 688.

National Association of Social Workers. (1996). *NASW practice update: Evaluation and treatment of adults with the possibility of recovered memories of childhood sexual abuse.* Silver Spring, MD: Robert G. Madden.

Nathanson, M. J. (1993). Hospital corporate negligence enforcing the hospital's role of administrator. *Tort and Insurance Law Journal, 28,* 577.

National Association of Social Workers. (1996). *NASW Practice update: Evaluation and treatment of adults with the possibility of recovered memories of childhood sexual abuse.* Silver Spring, MD: Author.

Nonet, P., & Selznik, P. (1978). *Law and society in transition.* New York: Harper and Row.

Nunez, R. (1972). The nature of legislative intent and the use of legislative documents as extension aids to statutory interpretation: A re-examination. *California Western Law Review, 9,* 128–133.

Office of Justice Programs, U.S. Dep't of Justice, State Court Sentencing of Convicted Felons, 1992. (1996).

Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 (1996).

Ouslander, J. G. (1991). *Medical care in the nursing home.* New York: McGraw Hill.

Parsons, T. (1962). Law and social control. In W. M. Evan (Ed.), *Law and Sociology* (pp. 60–68). New York: Free Press.

Patti, R. J., & Dear, R. (1981). Legislative advocacy: Seven effective tactics. In Mahoffey and John Henks (Eds.), *Practical politics* (pp. 99–117). Silver Springs, MD: National Association of Social Workers.

Pear, R. (1983, July 1). Administration drafts rules to limit lobbying by nonprofit groups. *The New York Times,* p. A7.

Peltz, M., (1995). Second-parent adoption: overcoming barriers to lesbian family rights. *Michigan Journal of Gender and Law, 3,* 175–190.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No.194-103.

Pollack, D. (1997). *Social work and the courts: A case book.* New York: Garland Publishing.

Pound, R. (1908). Common law and legislation. *Harvard Law Review, 21,* 383–386.

Pound, R. (1943). A survey of social interests. *Harvard Law Review, 57,* 1–39.

Pozgar, G. D. (1990). *Legal aspects of health care administration.* Gaithersburg: Aspen Press.

Pray, J. (1986). State v. Serebin: Causation and the criminal liability of nursing home administrators. *Wisconsin Law Review, 1986,* 339–366.

President Clinton's Announcement on Welfare Legislation. (1996). *The New York Times,* A24.

Rank, M. R. (1994). *Living on the edge: The realities of welfare in America.* New York: Columbia University Press.

Ranney, A. (1968). The study of policy content: A framework for choice. In A. Ranney (Ed.), *Political science and public policy* (pp. 3–21). Chicago: Markham.

Rasmussen, C. D. (1992). Hospital liability related to understaffing of nursing services: Walking the fine line between respondeat superior and corporate negligence. *West Virginia Law Review, 94,* 1101.

Raspberry, W. (1995, January 23). Charity closer to home. *The Washington Post,* p. A19.

Reamer, F. G. (1994). *Social work malpractice and liability: Strategies for prevention.* New York: Columbia University Press.

Reisch, M. (1998). *Challenges facing the curriculum in the new millennium.* Invitational presentation, Annual Program Meeting of the Council on Social Work Education, Orlando, FL.

Remnick, D. (1996, Apr. 29 & May 6). Dr. Wilson's Neighborhood. *The New Yorker,* 98–99.

Renshaw, M. M. (1998). Choosing between principles of federal power: The civil rights remedy of the violence against women act. *Emory Law Journal, 47,* 819.

Reske, H. J. (1991). Sparring over proposed remedy. *American Bar Association Journal, 77,* 35–36.

Richardson, E., & Joe, T. (1995, August 29). Reject that gag rule. *The Washington Post,* p. A19.

Richmond, M. E. (1917). *Social diagnosis.* New York: Russell Sage Foundation.

Ripley, R. B., & Franklin, G. A. (1991). *Congress, the bureaucracy, and public policy* (5th ed.). Pacific Grove, CA: Brooks/Cole.

Robinson, G. O., & Gellhorn, E. (1972). *The administrative process.* St. Paul, MN: West.

Roth, J. A. (1998). It is lawyers we are funding: A constitutional challenge to the 1996 restrictions on the legal services corporation. *Harvard Civil Rights-Civil Liberties Law Review, 33,* 107–158.

Rothman, D. J. (1982). Courts and social reform: A post-progressive outlook. In J. K. Weinberg (Ed.), Court ordered change in social institutions. *Law and Human Behavior, 6,* 113–120.

Rovella, D.E. (1997, Jan. 13). Will court win spur GOP backlash? *The National Law Journal,* A1.

Sabatier, P., & Mazmanian, D. (1980). The implementation of public policy: A conceptual framework of analysis. *Policy Studies Journal, 8,* 538–560.

Salisbury, R. H. (1968). The analysis of public police: A search for theories and roles. In A. Ranney (Ed.), *Political science and public policy* (pp. 151–175). Chicago, IL: Markham.

Salamon, L. M. (1981). Rethinking public management: Third-party government and the changing forms of government action. *Public Policy, 29*(3), 255–275.

Salamon, L. M. (1995). *Partners in public service.* Baltimore, MD: Johns Hopkins University Press.

Saltzman, A., & Proch, K. (1990). *Law in social work practice.* Chicago: Nelson-Hall.

Samuels, D. (1995, September 18 & 25). Philanthropic correctness. *The New Republic, 213,* 28–29, 32, 34–36.

Savas, E. S. (1987). *Privatization: The key to better government.* Chatham, NJ: Chatham House.

Savrin, P. W. (1985). The social worker-client privilege statutes: Underlying justification and practical operations. *Probate Law Journal, 6,* 243–276.

Schick, L. J. (1997). Breaking the 'rule of thumb' and opening the curtains—can the violence against women act survive constitutional scrutiny? *University of Toledo Law Review, 28,* 887.

Schlesinger, A. (1957). *Crisis of the old order: The age of Roosevelt.* Boston, MA: Houghton-Mifflin.

Schoen, L. M. (1997). Note: Working welfare recipients: A comparison of the family support act and the personal responsibility and work opportunity reconciliation act. *Fordham Urban Law Journal, 24,* 635.

Schottland, C. (1968). Social work and the law-some curriculum approaches. *Buffalo Law Review, 17,* 719–731.

Seelye, K. Q. (1997, January 16). House rule may rein in liberal advocacy groups. *The New York Times,* p. A12.

Selznick, P. (1961). Sociology and natural law. *Natural Law Forum, 6*(1), 84–108.

Simon, R. I. (1997). *Discharging sicker, potentially violent psychiatric inpatients in the managed care era: Standard of care and risk management.* In Proceedings, Liability prevention for mental health clinicians: Strategies and update, November 21, 1997, 1–25.

Simpson, A. K. (1995a, June 20). *Press release.* Washington, DC: United States Government Printing Office.

Simpson, A. K. (1995b, June 29). *Statement of Senator Alan K. Simpson to House Subcommittee on Regulatory Affairs.* Washington, DC: United States Government Printing Office.

Slawson, W. D. (1992). Legislative history and the need to bring statutory interpretation under the rule of law. *Stanford Law Review, 44,* 383–427.

Sloan, J. B., & Hall, B. (1984). Confidentiality of psychotherapeutic records. *Journal of Legal Medicine, 5,* 435–467.

Smiley, M. (1992). *Moral responsibility and the boundaries of community: Power and accountability from a pragmatic point of view.* Chicago, IL: University of Chicago Press.

Smith, C. E. (1991). *Courts and the Poor.* Chicago: Nelson-Hall.

Smucker, B. (1991). *The nonprofit lobbying guide.* San Francisco: Josey-Bass.

Solomon, L. M. (1995). *Partners in public service.* Baltimore, MD: Johns Hopkins University Press.

Spiter-Resnick, J., & Krajcinovic, M. (1995). Protecting the rights of nursing home residents: How tort liability interacts with statutory protections. *Nova Law Review, 19,* 630.

Spitzer, R. (1995). Promoting policy theory: Revising the arenas of power.

In D. C. McCool (Ed.), *Public policy theories, models and concepts: An anthology* (pp. 233–244). Englewood Cliffs, NJ: Prentice Hall.

Starobin, S. (1984). The social worker-client privilege—*Commonwealth v. Collett,* 439 N.E. 2d 1223 (Mass.). *Western New England Law Review, 6,* 1103–1129.

Statsky, W. (1975, 1984). *Legislative analysis and drafting.* St. Paul, MN: West Publishing Co.

Substance Abuse and Mental Health Services Administration (1996). *Preliminary Estimates from the 1995 National Household Survey on Drug Abuse.* Washington, DC: U.S. Dep't of Health and Human Services.

Tapp, J. L., & Levine, F. J. (1974). Legal socialization: Strategies for an ethical legality. *Stanford Law Review, 27,* 1–72.

Tax exempt! You pay Uncle Sam. How come thousands of American corporation do not? A special investigative report. (1995, October 2). *U.S. News & World Report,* 36–39, 42–44, 46, 51.

The Real War on Crime: The Report of the National Criminal Justice Commission (1996). Steven R. Donziger (Ed.). New York: Harper Perennial.

The Violent Crime Control & Law Enforcement Act of 1994, 18 U.S.C. § 2261 *et seq.* (West 1994).

Thomas, B. M. (1982). The rights of patients in nursing homes: When is there state action? *George Mason University Law Review, 5,* 315.

Thompson, M. (1997). Fatal Neglect. *TIME, 150,* 34–38.

Thompson, T. (1995, August 30). Businesses object to charities' lucrative new ventures. *The Washington Post,* 1, 14.

Turk, A. T. (1976, Feb.). Law as a weapon in social conflict. *Social Problems, 23,* 276–290.

Union Institute. (1994). *Nonprofit public interest advocacy.* Washington, DC: The Union Institute/Office of Social Responsibility.

Urofsky, M. I. (1981). *Louis D. Brandeis and the progressive tradition.* Boston, MA: Little, Brown & Co.

VandeCreek, L., Knapp, S., & Herzog C. (1988). Privileged communications for social workers. *Social Casework, 69,* 28.

Van Inwagen, P. (1986). *The incompatibility of responsibility and determinism, in moral responsibility.* New York: Oxford University Press.

Vanyo, J. P. (1971). Dynamics of the legal process and environmental law. *California Trial Lawyers Journal, 10,* 44–50.

Walker, J. L., Jr. (1983). The origins and maintenance of interest groups in America. *American Political Science Review, 77,* 390–406.

Walsh, S. (1995, May 20). New era foundation: Red flags, red faces. *The Washington Post,* pp. A1, A13.

Weber, M. (1954). *On law in economy and society.* New York: Simon & Schuster.

Weil, M., & Sanchez, E. (1983). Impact of the Tarasoff decision on clinical social work practice. *Social Service Review, 57,* 112–124.

Wexler, D., & Winick, B. (1991). *Essays in therapeutic jurisprudence.* Durham, North Carolina: Carolina Academic Press.

Wexler, D. B. (1990). *Therapeutic jurisprudence: The law as a therapeutic agent.* Durham, NC: Carolina Academic Press.

Widener, P. (1996, Oct.). Eddie Ellis at Large. *Prison Life,* 46–47.

Wigmore, J. (1961). *Evidence in trials at common law.* Boston, MA: Little, Brown.

Wilson, S. J. (1978). *Confidentiality in social work.* New York: Free Press.

Wilson, W. J. (1996). *When work disappears: The world of the new urban poor.* Chicago: University of Chicago.

Wise, D. (1997, Dec. 27). Class action ban for poor struck; Legal services rule held unconstitutional. *New York Law Journal,* 1.

Wittmann, M., & Griffin, C. P. (1995, July 12). *Restoring integrity to government: Ending taxpayer-subsidized lobbying activities.* Washington, DC: The Heritage Foundation.

Women and Violence: Hearing Before the Committee on the Judiciary, Senate, 103rd Cong., 2nd Sess. 3 (1990) (Statement of Sen. Biden, D-Del.).

Women's Law Project (1995). *Lesbian & gay parenting: a guide to legal rights in Pennsylvania* (2nd ed.). Authors.

Woody, R. H. (1984). Professional responsibilities and liabilities. In R. H. Woody & Associates (Eds.), *The law and the practice of human services.* San Francisco, CA: Jossey-Bass.

Wyszomirski, M. J. (1987). *The Constitution and nonprofit organization. Working Papers of the 1987 Spring Research Forum.* Washington, DC: Independent Sector.

Yamolinsky, A. (1980). The rights of charitable organizations and the First Amendment. *Grants Magazine, 3,* 83–87.

Yan, J. E. (1995, September 28). Dispute over nonprofits stalls spending bill. *The Washington Post,* p. A27.

Yoder, D. (1998). Note, justice or injustice for the poor? A look at the constitutionality of congressional restrictions on legal services. *William and Mary Bill of Rights Journal, 6,* 827–883.

Zuckerman, E. (1986). Comment: Second-parent adoption for lesbian-parented families: Legal recognition of the other mother. *U.C. Davis Law Review, 19,* 729.

Index