Buffalo Law Review

Volume 18 | Number 3 Article 14

4-1-1969

Welfare Law—Alabama's "Substitute Father" Regulation Held Invalid

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WELFARE LAW—ALABAMA'S "SUBSTITUTE FATHER" REGULATION RULED INVALID

Mrs. Sylvester Smith and other public welfare recipients were removed from Alabama's federally-funded Aid and Services to Needy Families with Children program (herein referred to as AFC)[1] between June, 1964 and January, 1967. Mrs. Smith had allegedly cohabited with a Mr. Williams, himself married and a father of nine children, in violation of a regulation of the Alabama Department of Pensions and Security, the so-called "substitute father" regulation,[2] and therefore was precluded from receiving aid under the AFC program for herself and her four minor children beginning on October 1, 1966. The family would have been eligible for such aid under the program if not for the Alabama regulation. On November 8, 1967, Mrs. Smith and other petitioners similarly situated brought a class action against Ruben King, Commissioner of the Alabama Department of Pensions and Security, and other administrators, in the United States District Court for the Middle District of Alabama seeking a declaratory judgment and injunctive relief enjoining the enforcement of the regulation. A three-judge court[3] decided for the plaintiffs on the grounds that the regulation violated both the Social Security Act and the Equal Protection Clause of the fourteenth amendment.[4] On direct appeal to the Supreme Court,[5] *held*, non-suitability of a child's home is not a proper criterion for denying all welfare aid to a needy child. Further, the Alabama definition of "parent" conflicts with § 406a of the Social Security Act, 42 U.S.C.§ 606(a), and is invalid.[6] The equal protection argument was not reached. *King v. Smith*, 392 U.S. 309 (1968).

Subchapter IV of the Social Security Act,[7] Aid and Services to Needy Families with Children, was first presented to the Congress on January 17, 1935, after six months of study and planning by the Committee on Economic Security. The Subchapter replaced the financially inadequate Mother's Pension Laws, passed by 46 states during the years 1909-1911, which provided financial security for the benefit of fatherless children. In 1934, the total annual expenditure of these Mother's Pension programs was approximately 33 million dollars, ranging from $9,312 in Louisiana to 12 million dollars in New York. However, even the latter figure represented only 93¢ per capita in the union's largest state.[8] The Congressional documents at the time of the adoption of the AFC program were

1. Subchapter IV of the Social Security Act, §§ 401-410, *as amended*, 42 U.S.C. §§ 601-610 (1964). The program was originally known as "Aid to Dependent Children," 49 Stat. 627 (1935). In the 1962 amendments to the Act, however, the name was changed to "Aid and Services to Needy Families with Children," 76 Stat. 185 (1962).
2. Alabama Manual for Administration of Public Assistance, Pt. I, c. II, Section VI.
3. 28 U.S.C. § 2281 (1959).
4. 277 F. Supp. 31 (Ala. 1967).
5. 28 U.S.C. § 1253 (1959).
6. 392 U.S. 309 (1968).
7. 42 U.S.C. §§ 601-610 (1964).
8. H.R. Rep. No. 615, 74th Cong., 1st Sess. Table VI, 11 (1935).

replete with evidence that the AFC was initiated in order to shelter the unprotected children who were regarded as the "most tragic victims of the depression."[9] For example, the majority report to the Senate concluded that "the heart of any program for social security must be the child."[10] The House report declared that,

> One clearly distinguishable group of children, now cared for through emergency relief, for whom better provision should be made, are those children in families lacking a father's support. Nearly 10% of all families on relief are without a potential breadwinner other than a mother whose time might be best devoted to the care of her young children.[11]

Significantly, the federal government decided to contribute one-third (now more than three-fourths, depending on the number of aid recipients in the family) of the funds needed for the program in each state that decided to participate in the AFC project,[12] as long as the state prepared an aid distribution plan which conformed with the purposes of AFC, was administered properly, encompassed the entire state, and was satisfactory to the Secretary of Health, Education and Welfare.[13] Congress gave the states the right to administer AFC according to local standards of need[14] and to establish a residency requirement as a prerequisite for the receipt of aid, for a period not to exceed one year.[15]

In the absence of a statutory duty, and despite the Secretary's wide discretion to withhold federal funds if the state plan did not furnish aid "with reasonable promptness to all eligible individuals," the states based the eligibility of a family to obtain aid on the "moral character" of the parent.[16] The latitude given to the states in formulating the above policy led to abuse. Alabama used this "suitable home" or "moral fitness" eligibility determination as a basis for denying welfare benefits to petitioners herein.

In addition to need determination standards, residency laws, and the "suitable home" criteria, the states have invented numerous methods, either by legislation or by administrative regulation, that exclude undesirable families from the AFC program, irrespective of actual need. A home could be declared "unfit" if the parent did not foster religion.[17] As a prerequisite for obtaining public assistance, social workers forced mothers to sign statements promising not to meet men at any time.[18] In many jurisdictions, the welfare department carried

9. *Id.* at 9.
10. S. Rep. No. 661, 74th Cong., 1st Sess. 16 (1935).
11. H.R. Rep. No. 615, *supra* note 8, at 10.
12. 42 U.S.C. § 603 (1964).
13. 42 U.S.C. § 602(b) (1964).
14. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Pt. IV, § 3120. (herein referred to as HANDBOOK).
15. 42 U.S.C. § 602(b) (1964).
16. H.R. Rep. No. 615, *supra* note 8, at 24; S. Rep. No. 628, 74th Cong., 1st Sess.. 36 (1935).
17. W. BELL, AID TO DEPENDENT CHILDREN, 33 (1965) [hereinafter cited as AID TO DEPENDENT CHILDREN].
18. *Id.* at 48.

on "midnight searches" of welfare recipients' homes to locate a "phantom husband" after receiving a tip from a neighbor or passerby.[19] Some jurisdictions did not allow aid-recipient mothers to house male boarders as a source of extra money.[20] Other restrictions included forcing the mother, even if she had a one year old child, to seek employment if available anywhere in the community (thus leaving the child without adequate supervision),[21] summarily denying aid if a family had any delinquent children,[22] stopping assistance to families in which children over ten years would not work in the harvest during a recess,[23] refusing assistance if a parent was "tubercular,"[24] and conditioning welfare benefits on a quota system based on race.[25] Some legislatures entertained the idea of sterilization as a condition for receiving funds.[26] The press also heightened public criticism of the welfare situation by exaggerating welfare frauds and depicting the system as one of wholesale fraud and gross immorality.[27] The states' virtual control of the federally-financed program was further strengthened by a governmental policy of acquiescence in state *de facto* control because of the administrative fear of aid cutbacks by Congress if the program, already severely criticized, stirred up greater controversy. The people who had the most to gain by publicizing their unfair treatment and desperate plight had the highest rate of illiteracy and no money with which to appeal administrative decisions, or even serve a complaint alleging unfair treatment.[28] This further increased the free reign allowed to the states when administering welfare policy. Finally, the most recent weapon in the states' arsenal to restrict benefits to needy families, *i.e.*, the "substitute father" or "man-in-the-house" regulation, was introduced.

Alabama, relying on its amorphous ability to allocate aid, first contended that denying benefits because of the "unsuitability" of the home would discourage illicit sexual relations and illegitimate children. Echoing the Mother's Pen-

19. *Id.* at 87. These abusive searches have been used to their fullest extent in Washington, D.C. Although initial attempts to have these warrantless searches declared unconstitutional failed, *Smith v. Board of Commissioners of District of Columbia*, 380 F.2d 632, the regulation authorizing these searches was declared invalid in Stewart v. Washington, 14 Wel. L. Bull. 7 (1968), for failure to obtain the district commissioner's approval. However, the California Supreme Court had termed these harassing welfare searches in violation of the fourth amendment, unless the county could show compliance with the standards governing searches for evidence of crime. Parrish v. Civil Service Commission of Alameda County, 35 U.S.L.W. 2583. Recent United States Supreme Court restrictions as to administrative searches (necessitating a warrant) lend further weight to the conclusion that the "midnight searches" will soon be declared unconstitutional. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523. *See* HANDBOOK, *supra* note 14, §§ 2220, 2230. *See generally*, Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

20. AID TO DEPENDENT CHILDREN, *supra* note 17, at 118.

21. *Id.* at 82. *See generally*, Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 88 (1967).

22. AID TO DEPENDENT CHILDREN, *supra* note 17, at 13.

23. *Conditioning of Welfare on Child Labor Attacked*, 12 WEL. L. BULL. 1 (Sept. 1968).

24. AID TO DEPENDENT CHILDREN, *supra* note 17, at 7.

25. *Id.* at 35.

26. *Id.* at 71; Note, *Aid to Families with Dependent Children—A Study of Welfare Assistance*, 44 DENVER L.J. 102, 117 (1967).

27. AID TO DEPENDENT CHILDREN, *supra* note 17, at 61.

28. *Id.* at 83.

sion philosophy, and strongly enforcing the "moral character" requirements, only the "fit" or "worthy" poor were allowed to receive welfare. A child was eligible for funds only when he lived in a "suitable home," *i.e.*, conforming to the caseworker's or the general community's subjective opinion of "suitable home." Whether a mother was divorced, deserted, separated, or unmarried were all qualities determinative of her "moral fitness." In most jurisdictions, social workers strongly felt that to financially support a parent's desertion of a child or to support illegitimate chlidren would have the effect of placing a premium upon these social evils. As one social worker stated, "Perpetuating homes which produce such results (crime, illegitimacy, and desertion) would be both uncharitable and unwise."[29] Therefore, the children of widows, the incurably insane, and prisoners serving long-term sentences were in the best position to receive aid. The social workers were less interested in protecting the innocent children in "unsuitable" homes, in recognizing that environment created unstable marital patterns and resultant illegitimacy, and in employing the financial resources at their disposal to ameliorate the ills incident to poverty, than they were in eliminating these families from the welfare rolls by applying middle class standards to lower-income class situations. Winifred Bell also points out that,

> Although few details emerge from the unstatistical past, it is apparently true that most "fit and deserving" widows were white.[30]

Probably because of the subjectivity and arbitrariness of classifying a home as "unsuitable," the above statement was especially true in the South, where the proportion of Negroes in the caseload was considerably smaller than in the child population. One field supervisor in the South reported,

> [t]he number of Negro cases is few due to the unanimous feeling on the part of the staff and board that there are more work opportunities for Negro women and to their intense desire not to interfere with local labor conditions. The attitude that they have always gotten along, and that "all they'll do is have more children" is definite.[31]

The practice of AFC, namely, ". . . [to] encourage the care of dependent children,"[32] thus became distorted since the neediest children, in many cases, were denied aid. In 1941, thirty-one of the forty-five states participating in AFC had some type of "suitable home" requirement,[33] but enforcement depended upon local attitudes toward illegitimacy and the causes of poverty. A step toward eradicating eligibility criteria not based on need occurred in 1940 when the Social Security Bureau issued its first official statement on "suitable home" requirements, recommending that

29. *Id.* at 7.
30. *Id.* at 9.
31. *Id.* at 34.
32. 42 U.S.C. § 601 (1964).
33. AID TO DEPENDENT CHILDREN, *supra* note 17, at 30.

> [a]ssistance . . . be given . . . where standards are, or with the aid of the state department, can become such as to protect the interests and welfare of the child.[34]

However, after World War II, the existence of widespread unemployment, the increased racial tension, the emigration of the rural poor to the cities, the growing and prosperous middle class, the greater attention on family breakdown, and a rising community awareness of welfare, exposed the children's aid program to attack for allegedly encouraging illegitimacy and shiftlessness among the poor by providing monies for immorality. Winifred Bell explains,

> Americans still believed that they lived in Utopia where worldly rewards awaited all individuals who made sufficient and appropriate effort.[35]

By 1960, twenty-three states had some "suitable home" requirement for welfare eligibility. This criterion for allocating benefits, however, was never tested as broadly or as severely as Louisiana did in 1960. In July, 1960, Louisiana reduced its welfare rolls by 22,501 children (95% Negro) after local AFC administrators enforced new legislation declaring that a home in which an illegitimate child has been born subsequent to the receipt of public assistance would henceforth be considered "unsuitable," and therefore, ineligible for aid.[36] This crisis precipitated the Fleming ruling which put a restriction on the states' latitude in erecting "suitable home" requirements, or in the formulation of similar regulations based on the "moral character" of the parents, as a basis of denial of aid to the innocent child.[37] That ruling declared that the use of the "suitable home" criteria as a basis for denial of all benefits, in any jurisdiction, was inconsistent with the purpose of AFC unless the child was removed from the improper environment.

The second reason for discontinuing welfare funds to petitioners was due to the broad construction of the word "parent" by the Alabama Department of Pensions and Security. The basis for aid under the AFC subchapter is the "dependent child" who is a needy child,

> who has been deprived of parental support or care by reason of the death or continued absence from the home . . . of a parent, and who is living with his father, mother, or [any one of other specified relatives].[38]

Aid can only be granted if a parent of the needy child is continuously absent from the home. Alabama, by invoking the "substitute father" theory, created

34. *Id.* at 36.
35. *Id.* at 58.
36. *Id.* at 139.
37. State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare.
38. 42 U.S.C. § 606(a) (1964); furthermore, 42 U.S.C. § 608 includes as a "dependent child" one who has been removed from the home of a relative to either a private home, a foster home, or a public child-care agency.

a parent and thereby denied public assistance to an otherwise eligible family because there was no longer a dead or absent parent. The Alabama regulation stated:

> An able-bodied man, married or single, is considered a substitute father of all the children of the applicant . . . mother . . . [if] . . . he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation . . . [or if] . . . he visits [the home] frequently for the purpose of cohabiting with the child's natural or adoptive mother . . . [or if] . . . he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere.[39]

It was irrelevant whether the "substitute father" was already married, was the child's natural father, or whether he had voluntarily agreed or was legally obligated to support the family. This regulation clearly did not conform to Alabama statutory and common-law rules concerning legal obligation to support or capacity to enter into marriage.[40] Furthermore, the regulation implied that it was irrelevant whether the "man-in-the-house" actually contributed financially for the support of the family. Alabama, in defense of this lack of inquiry into actual support, argued, logically and correctly if we accept the "substitute father"-parent equality which Alabama presupposes, that eligibility for aid under section 606a is dependent upon the number of parents in the home, not whether they support the child. Therefore, such an investigation into parental support was rendered unnecessary and placed families with an informal marital arrangement in which there were two parents (albeit one a substitute parent) on an equal basis with those having the ordinary marital relationship with two parents at home. By flatly denying benefits when there was any other parent or quasi-parent of the dependent child, Alabama had gone further than any other jurisdiction which had "substitute father" statutes or regulations, except South Carolina, Georgia, and the District of Columbia. All other jurisdictions which had "man-in-the-house" provisions within the welfare laws permitted the "substitute father's" contribution (if any) to the family to be one factor in determining family need and, by so doing, kept within the Act.[41] By 1967,

39. *Supra* note 2.

40. Under Alabama statutes, a legal duty of support is imposed only upon a "parent," who is defined as (1) a "natural legal parent," (2) one who has "legally acquired the custody of" the child, and (3) 'the father of such child. . . though born out of lawful wedlock." However, under the Alabama regulation in question, substitute parenthood is not based upon whether the man-in-the-house is the natural father of the child or whether he had voluntarily agreed or was legally obligated to support the child. ALA. CODE tit. 34, §§ 89, 90 (1961); ALA. CODE tit. 27, 12(1), 12(4) (1958). Law v. State, 238 Ala. 428, 191 So. 803 (1939). Similarly, Alabama cannot contend, as a further defense of its regulation, that the duty of child support descends upon any man who "cohabits" with a woman because marriage is presumed from the relationship. Alabama law, while recognizing common law marriage under Ala. Code tit. 34, § 9 (1961), holds that marriage may be contracted in that state only by parties "competent to so contract . . . by mutual and actual agreement." Rogers v. McLeskey, 255 Ala. 148, 142 So. 526, 527 (1932). Thus, a man already married is not competent to contract, while even "cohabitation" with an unmarried man cannot be presumed to substantiate a marriage unless there has been actual agreement to marry.

41. *See* Kern County v. Coley, 40 Cal. Rptr. 53 (1964); People v. Bailey, 55 Cal. 2d

a total of twenty-three jurisdictions had some type of "substitute father" provision. The popularity of these restrictions with welfare critics grew quickly after 1962.

> As states recognized that they ran an exceedingly high risk of losing federal funds if they explicitly excluded children on the basis of birth status (*suitable home requirement*), they turned their attention to alternative methods of defining eligibility so that much the same result could be achieved less obviously and within the legal framework of the Social Security Act.[42]

In the instant case, the Supreme Court affirmed the district court's verdict "without reaching the constitutional issue."[43] The Court's approach was to invalidate the Alabama regulation as being inconsistent with the requirement of the Act ". . . that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."[44] Alabama, as a first defense, argued that (the policy of) denying aid to families in which the mother is carrying on an illicit relationship discourages immorality and illegitimacy. The Court disposed of this defense by reciting the Congressional reaction in the manner of new legislation after the Fleming ruling of 1960. Congress enacted section 404(b) of the Act,[45] which permits states, without losing federal funds, to deny aid to children who live in "unsuitable homes," but only if these children are granted other care and assistance. The Court emphasized that

> the statutory approval of the Fleming Ruling, however, precludes the States from otherwise denying AFC assistance to dependent children on the basis of their mother's alleged immorality or to discourage illegitimate births. . . . 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 AFC.[46]

The Court also disposed of Alabama's second justification for its aid restrictions —namely, the "substitute father" doctrine. The analysis began by placing the AFC program in historical perspective. As previously stated, a "dependent child" is a needy child who had been deprived of dual parental support, and had only one parent or guardian to look to for support. The Court then examined the Congressional debate before passage of the Social Security Act to elicit the intent of the Act. The Court viewed, in particular, the economic hardships at

214, 360 P.2d 39, 11 Cal. Rptr. 543 (1961); People v. Rozell, 28 Cal. Rptr. 478 (1958); *see* 42 U.S.C. § 602(a)(7); *compare* New York State Department of Social Welfare Regulation § 353.3 in conjunction with New York City Welfare Department Informational Bull. 66-23 (July 6, 1966) *with* N.J. Categorical Assistance Budget Manual § 502 *and* Miss. State Dept. of Pub. Wel. Regs. Vol. 3, § D, p. 4512.

42. AID TO DEPENDENT CHILDREN, *supra* note 17, at 76.

43. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 346 (1945) (concurring opinion of Justice Brandeis).

44. 42 U.S.C. § 602(a)(9) (1964).

45. 42 U.S.C. § 604(b) (1964).

46. 392 U.S. 309, 322-23 (1968).

the time of the depression, and the statements in both the House and Senate Reports evidencing the fact that "parent" as used by Congress in 1935 was synonymous with "father" or "mother" in the legal sense. Therefore, only death, incapacity, or desertion of a "parent" could deprive the family of a parent. The Senate Report concluded,

> [m]any of the children included in relief families present no other problem than that of providing work for the breadwinner of the family. These children will be benefitted through the work relief program and . . . through private industry. But there are . . . children in relief families that will not be benefitted [by these work relief programs]. . . . These are the children in families which have been deprived of a father's support and in which there is no adult other than the one who is needed for the care of the family. These are principally families with female heads who are widowed, . . . or deserted.[47]

The Congressional attitude, as interpreted by the Court, was that if the breadwinner or parent was alive and capable of caring for his family, a child would be ineligible for aid because private industry would provide job opportunity for his father and the child would be adequately supported. But for families without a father or breadwinner, relief would be necessary to prevent the psychological and physical impairments caused by inadequate supplies of food and clothing. Thus, the Congressional intent to provide security for *all* children would be defeated if the Alabama regulation were able to deny aid to a family without a "parent" simply because the spouse had a paramour who owed no legal duty of support and protection to the child. The Court rejected the argument that Congress wanted to exclude such a class of children. Finally, the Chief Justice stated that the way in which "parent" is used throughout the Act corroborates the Court's interpretation that a "substitute parent" is not a "parent" within the scope of that term.[48] Therefore, the Alabama regulation and similar regulations or statutes of other jurisdictions which summarily deny aid if there is a cohabiting paramour are invalid because they define "parent" in a manner inconsistent with the plain meaning of section 406(a) of the Act.[49] Alabama had breached the duty imposed under this section and if it desired to continue participating in the AFC program, it must change its plan for public assistance to conform with the Social Security Act.[50] Those jurisdictions which put the ordinary marriage on an equal footing with the illicit relationship present in this case cannot receive federal funds until they adhere to this opinion[51] because the "substitute parent" has no legal duty to support the needy children, nor can the jurisdiction force upon him the obligation to support the children, unless he

47. S. Rep. No. 661, *supra* note 10, at 17.
48. *See, e.g.*, 42 U.S.C. § 602(a)(10).
49. 42 U.S.C. § 606(a) (1964). *See* HANDBOOK, *supra* note 14, § 3414(4) which suggests that only those persons with a legal duty of support are termed "parents."
50. *See* Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. Civil Service Commission, 330 U.S. 127, 143 (1947).
51. *Supra* note 50.

voluntarily becomes their father, or is adjudged to be the natural father of the children.

There are three important considerations which should be noted in regard to the instant case. First, the Court did not wish to decide this case on constitutional grounds. The Supreme Court did not reach the question of equal protection, while the district court decided the case on that basis. The district court explained,

> Some children cannot be classified as eligible and others ineligible without a reasonable basis for distinguishing one class from the other; classifications may only be created which are rationally related to the purpose of the federal and Alabama Aid to Dependent Children statutes .... The Alabama regulation directs that aid ... not be given ... for an arbitrary reason—the alleged sexual behavior of the mother; such a reason is wholly unrelated to the purpose of the Aid to Dependent Children statutes. *The basic purpose of the program ... is to provide financial assistance to needy children who are deprived of the support and care of one of their parents.*[52]

The district court was undoubtedly correct in saying that Alabama was looking only to the conduct of the mother rather than to economic factors, and that a mother's behavior and the "substitute father" regulation were unrelated to a child's actual need. The district court was also correct in saying that such an unreasonable determination, based upon the unrelated actions of the mother, was a denial of the child's right to equal protection if the purpose of the Act was to provide such aid; however, the provision for such financial aid was not the purpose of AFC. Rather, Subchapter IV of the Act makes it clear that financial assistance to the home is only one of the means of enabling a state to achieve the purposes of the AFC program; Congress sought ". . . [to encourage] the care of dependent children . . . ,"[53] to foster good citizenship, and to enable children to begin their lives untainted by the physical and emotional problems afflicting the destitute. The latter two purposes are derived from Congressional sentiment as revealed in the House and Senate reports at the time of the Act's adoption. Therefore, an unconstitutional denial of equal protection can only exist if there is no rational basis in accord with legislative intent in denying aid to children with morally unfit mothers while granting aid to children with morally fit mothers.[54] If financial aid were the only type of assistance available, it could validly be said that there is a rational basis for such a determination. It is true that financially supporting some unsuitable homes, by directly aiding the head of the household, in light of the mother's possible use of the money, may not accomplish any of the purposes of the Act. If the above analysis merely restates the obvious, the district court could not properly say that equal protec-

52. 277 F. Supp. 31, 38-39 (1967) (emphasis added).
53. 42 U.S.C. § 601 (1964).
54. Skinner v. Oklahoma, 316 U.S. 535 (1942); Morey v. Doud, 354 U.S. 457, 465-66 (1957).

tion would be denied if monetary grants to the head of the household were the only form of aid available. However, because direct financial aid is not the only means to achieve the previously mentioned purposes of the Act, the equal protection argument still has much force. When other "adequate care and assistance" may be granted under section 404(b) of the Act,[55] and the child may be removed to a foster home pursuant to section 408,[56] in lieu of direct financial aid, there is no longer a rational basis classifying one child as eligible for aid because his mother's conduct is acceptable, while another child is ineligible for any aid because his mother is "unfit." Ideally, with alternative assistance programs, the child will no longer be menaced by the "unsuitable" conditions and the aid will become as helpful to him as it would to a child from a "suitable home." Therefore, the equal protection grounds could have been employed effectively here; however, the district court misinterpreted the purpose of the Act and failed to state the proposition correctly.

An analysis of the equal protection argument's usefulness in this area is not exhausted. Once it is established that a state has the obligation to assist a child either in his own home, by other "adequate care and assistance," or by removal to a foster home, the question must be answered with respect to the appropriate standards with which to determine which form of aid should be given. The federal courts did not have such a question before them in the present controversy. The bases for removing a child from his home were not discussed. It was decided only that all aid could not be denied a needy child if a home was found "unsuitable." Certainly, if a jurisdiction enacts a regulation declaring a home "unsuitable,"[57] which in itself is grounds for removal of a child to a public or private institution, potential welfare clients will withdraw from the AFC program, or will fail to apply for benefits through fear that their children will be taken away from them. In Florida, during the late 1950's and early 1960's, when mothers who received aid were adjudged to have "unsuitable" homes which could subject them to neglect proceedings in which their children could be taken away, statistics demonstrate a large number of withdrawals from the AFC program and a decrease in new applications for such aid—even prior to the caseworker's inspection of the applicant's home and his declaration that it was "unsuitable."[58] The stigma of "unsuitable" and the possible loss of children through court intervention was directly responsible for the decline in the number of aid recipients.[59] If other states enacted legislation similar to Florida's, it would

55. 42 U.S.C. § 604(b) (1964).
56. 42 U.S.C. § 608 (1964).
57. "Unsuitable home" has been interpreted as including a mother who meets men in or out of her home, has a delinquent child, has no education, neglects her child, improperly teaches the child manners, keeps alcohol in the house, has an illegitimate child after receiving welfare, or performs any other "immoral" or "unworthy" act. *But see* In re Cager, 248 A.2d 384 (1968).
58. AID TO DEPENDENT CHILDREN, *supra* note 17, at 130.
59. Florida Dep't. of Pub. Wel., Suitable Home Law 25-26 (1962), as quoted in AID TO DEPENDENT CHILDREN, *supra* note 17, at 132.

result in increasing numbers of needy children being unable to acquire assistance to which they are entitled. The states would also be actively breaching their statutory duty "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."[60] In actuality, however, the threat of child-loss is not part of a scheme of overall reduction of welfare rolls (as already explained, AFC is not compulsory, but elective, upon the states, and so they could entirely eliminate the program if that were its intention), but rather the threat of child-loss is only aimed at reducing the number of aid recipients for certain classes of people, ostensibly Negroes. Implementation of the Florida legislation provides ". . . much reason to believe that the new law was aimed primarily at Negroes."[61] Thus, Alabama or any other jurisdiction may seek to dissuade Negroes from applying for aid through fear of child-loss by broadly construing the federal statutes permitting dependent children either to be removed to a foster home or to receive other "adequate care and assistance," if their homes are "unsuitable." Alabama may be able to accomplish by a strict construction of the Social Security Act, and regulations, what it could not achieve by using the "substitute-father" doctrine.[62] Nevertheless, not only would such a plan be open to objection for failure to provide assistance to all eligible individuals,[63] but also may be opposed on equal protection grounds. Welfare petitioners whose children are taken away may assert that classifications based on small divergences from absolute morality or "suitability" for parenthood, so as to deprive a parent of his child, are not rationally related to the purpose of the Act nor are classifications based on small deviations from absolute standards of morality "reasonable." Indeed, "[w]hen a legislative classification bears on a vital personal right of anyone . . . that classification is scrupulously examined for reasonableness."[64] Perhaps only gross immorality or neglect should deprive a parent of his child.[65] Finally, equal protection may be lacking if a number of Negro families are affected disproportionately by the strict imposition of child-loss standards resulting in the elimination of a racial class from the welfare rolls.[66] Such denial, whether occasioned by legislative act or administrative

60. 42 U.S.C. § 602(a)(9) (1964).

61. AID TO DEPENDENT CHILDREN, *supra* note 17, at 130. By 1962, of the 17,999 homes which had been questioned for "unsuitability," 16,242 were nonwhite, although 39% of the caseload was white.

62. *See* 42 U.S.C. §§ 601-610 (1964) and the Fleming ruling.

63. 42 U.S.C. § 602(a)(9) (1964).

64. Kirp, *The Poor, the Schools, and Equal Protection*, 4 HARV. EDUC. REV. 635, 637 (Fall 1968); *see* Skinner v. Oklahoma, 316 U.S. 35 (1942) (sterilization); *see generally*, Harvey, *The Challenge of the Rule of Law*, 59 MICH. L. REV. 608-9 (1961) in which the author demonstrates how the equal protection clause can be used to protect certain "ultimate values" considered fundamental in our society.

65. AID TO DEPENDENT CHILDREN, *supra* note 17, at 133-134 for a discussion for such a Tennessee regulation.

66. *See* Hoyt v. Florida, 368 U.S. 57 (1961); Hernandez v. Texas, 347 U.S. 475 (1954); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

policy, could be discovered by examination of the record in each case where alleged.[67]

The Supreme Court affirmed the district court's decision by construing the statute rather than reaching the constitutional questions. The Court decided that the term "parent" was not to be as broadly construed as Alabama had done and therefore overruled the "substitute parent" regulation. Second, the Court stated that 42 U.S.C. § 604(b), the Congressional reaffirmation of the Fleming ruling, precluded a state from absolutely denying assistance to a needy child unless other "adequate care and assistance" were granted with respect to such child. No money allotments would be disbursed to any state until its AFC plan conformed with this condition imposed by Congress.

The second significant aspect of this case bears on those issues which were overlooked by the Court. This decision is treated as significant because it overruled the "substitute father" regulation which flatly denied aid to a child when a parent was living with a paramour who had no legal duty to support the former's children. However, the case is equally prominent because the right of states to completely deny assistance to a family when a home is adjudged "unsuitable" was also overruled. "Moral character" of the parent may still be taken into account, apparently, because of the narrowness of the opinion, but no child can be absolutely ineligible for assistance due to his parent's conduct. Nevertheless, even a token decrease in the amount of assistance to a child because of his parent's conduct could be properly challenged on equal protection grounds.

The third important consequence of the instant case is that it signals the emergence of a new body of welfare law. Before this case, the few welfare claims actually litigated were either in state courts or lower federal courts. The Supreme Court has recently decided a case concerning the imposition of residency requirements as a requirement for welfare eligibility.[68] Finally, it appears highly probable that with the increased awareness of welfare problems,[69] increased legal services available to the recipients of public assistance,[70] and the increase

67. *See* Griffin v. Maryland, 378 U.S. 130 (1964); Maxwell v. Stephens, 348 F.2d 325 (8th cir. 1964).

68. Shapiro v. Thompson, — U.S. —, 89 S. Ct. 1322 (1969).

69. *For example*, (1) the determination of what a "parent' is, is still not settled; *see generally* 15 WEL. L. BULL. 1,5 (1968); (2) maximum limits on welfare are being challenged; *see generally* 10 WEL. L. BULL. 4 (1967), 12 WEL. L. BULL. 4 (1968), 14 WEL. L. BULL. 4 (1968), 15 WEL. L. BULL. 7 (1968); (3) there is alleged discrimination in public housing for aid recipients; *see generally* 8 WEL. L. BULL. 3 (1967), 9 WEL. L. BULL. 7 (1967), 11 WEL. L. BULL. 7 (1968), 13 WEL. L. BULL. 16 (1968); (4) benefits are stopped without adequate notice of prior hearing as required by 42 U.S.C. § 602(a)(4); *see generally* 9 WEL. L. BULL. 12 (1967), 12 WEL. L. BULL. 6 (1968), 13 WEL. L. BULL. 7,10 (1968), Note *Withdrawal of Public Welfare: The Rights to a Prior Hearing*, 76 YALE L. J. 1234 (1967); and (5) there is concern over the confidentiality of welfare records as provided in 42 U.S.C. § 602(a)(8) (1964); *see generally* 12 WEL. L. BULL. 5 (1968).

70. Among the many groups which provide legal services are various legal aid societies, the National Association for the Advancement of Colored Peoples, Mobilization for Youth, and the American Civil Liberties Union.

in the recipients' ability to be heard concerning the administration of a program set up for their own benefit, we are witnessing only the beginning of litigation in a previously overlooked area of law that affects millions of Americans daily.

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