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Introduction to the Welfare Law Issue

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INTRODUCTION TO THE WELFARE LAW ISSUE

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This is the third consecutive year that Issue Five of the *Cornell Law Review* has contained a series of Articles and Notes in the area of welfare law.[1] As in the past two issues, one Note tracks recent developments in the Aid to Families with Dependent Children (AFDC) Program. Another Note discusses extended unemployment benefits. The remaining Articles and Note analyze the development and constitutionality of the Legal Services Corporation Act (LSCA). The juxtaposition of these analyses is fitting. Many legal services clients are dependent upon AFDC, and legal services attorneys have litigated with great success in AFDC cases.[2]

As a legal aid attorney, one witnesses the conditions in which our poor live, and feels, albeit vicariously, the stigma and injustice suffered. Stepping back from the daily problems of the welfare recipient to synthesize a broader perspective on developments in welfare law, however, provides no relief from this discouragement, at least not for one who favors a humane public assistance program.

The development of the AFDC Program, as described in previous issues of the *Cornell Law Review*,[3] has been characterized by restrictive federal and state legislation, and by administrative action

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[1] For a discussion of the scope of the welfare law area see Martin, *Welfare Law: The Problem of Terminology*, 60 CORNELL L. REV. 792 (1975).

[2] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients held entitled to hearing before benefits discontinued); Shapiro v. Thompson, 394 U.S. 618 (1969) (abolished residency requirement as test of welfare eligibility); King v. Smith, 392 U.S. 309 (1968) (abolished state "substitute father" rule that denied benefits to eligible children whose mother lived with employable man).

[3] Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825 (1974); Note, *1974 Developments in Welfare Law—Aid to Families with Dependent Children*, 60 CORNELL L. REV. 857 (1975); Note, *Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 861-80 (1974).

designed to reduce AFDC expenditures. One is struck by the sheer number of recent changes that have sought to limit the class of eligible recipients and create presumptions against eligibility. The basic purposes of the AFDC Program are to encourage "the care of dependent children in their own homes or in the homes of relatives[,] . . . to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for . . . self-support and personal independence . . . ."[4] Nevertheless, federal and state governments have attempted to accomplish a myriad of other purposes and policies through this program.[5] Such attempts have contributed to the continuous modification and increasing complexity of the AFDC Program. As a result, predictability and clarity—especially desirable qualities in a program assisting persons with generally low levels of education—are sorely lacking.[6]

In studying and litigating in the welfare law area, one perceives a cyclical pattern to its development. Although the cycle is not unique to welfare law, it is often more pronounced than in other areas of the law. Typically, a state adopts a restrictive administrative practice or regulation. Litigation is subsequently initiated against the new restriction, often proceeding on the theory that it fails to comply with federal legislation and regulations.[7] Successful litigation is then met with changes in the federal law that originally provided a basis for the challenge. Finally, a new round of litigation is brought, challenging the federal change and state responses, and the entire cycle may be repeated.

This cycle is clearly apparent in the litigation and regulatory changes concerning the status of tax refunds in determining eligibility and need for AFDC assistance.[8] A federal regulation formerly provided that only income actually available for current use *on a regular basis* could be considered in making those determinations.[9] Many states treated tax refunds as countable income, thereby reducing or denying benefits. Hawaii followed this practice, which was

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[4] 42 U.S.C. § 601 (1970).

[5] *See* F. PIVEN & R. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971). Piven and Cloward argue that expansive welfare policies are implemented to stem civil disorder and restrictive ones are used to enforce work norms.

[6] For a general discussion of the importance of these principles in the law see L. FULLER, THE MORALITY OF LAW 63-65, 79-81 (rev. ed. 1969).

[7] *See, e.g.*, Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971); King v. Smith, 392 U.S. 309 (1968).

[8] For a more extensive discussion of developments in tax refund treatment in determining AFDC eligibility, see Note, *1975 Developments in Welfare Law—Aid to Families with Dependent Children*, 61 CORNELL L. REV. 777, 790-94 (1976).

[9] 45 C.F.R. § 233.20(a)(3)(ii)(C) (1974) (repealed).

attacked in *Kaisa v. Chang*.[10] Attorneys from the Legal Aid Society of Hawaii argued that tax refunds were not available on a regular basis and could not be treated as countable income. If not treated as income, the refunds would be a resource and potentially exempt under the recipient's resource reserve.[11] The court in *Kaisa* upheld the Legal Aid Society's argument and ruled that tax refunds could only be treated as a resource.

The decision, however, provided little cause for rejoicing—for while the case was pending, the federal regulation was amended. At present, it merely requires that income be available for current use in order to be countable.[12] Thus, when victory seemed near, the rules of the game were changed.

Also illustrative of this welfare law cycle, are developments in the requirement that a recipient cooperate in establishing paternity and pursuing support payments.[13] In the past, many states denied public assistance where a parent refused to assist in establishing a support obligation. These state eligibility rules were attacked as being unconstitutional and incompatible with the Social Security Act[14]—that Act formerly contained no such eligibility condition; therefore, these state rules were asserted to be impermissible under the supremacy clause.[15]

A notable case in this area is *Shirley v. Lavine*,[16] which reached the United States Supreme Court on two occasions. After a three-judge district court had invalidated a New York regulation conditioning AFDC eligibility upon cooperation in obtaining support from absent parents,[17] the New York legislature amended the state Social Services Law to include a provision similar to the invalidated regulation.[18] The legislative intent was presumably to save the regulation or else to reduce AFDC expenditures by protracting the appeals process. On appeal, the Supreme Court vacated the judg-

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[10] 396 F. Supp. 375 (D. Hawaii 1975).

[11] *See* 45 C.F.R. § 233.20(a)(3)(i) (1975).

[12] *Id.* § 233.20(a)(3)(ii)(D) (1975).

[13] For a more thorough examination of these developments see Note, *supra* note 8, at 797-802.

[14] 42 U.S.C. §§ 301-1396g (1970 & Supp. IV, 1974). The AFDC eligibility conditions are contained in *id.* § 602(a). Prior to 1975, there was no federal requirement of parental cooperation. *See* note 19 and accompanying text *infra*.

[15] *See* Doe v. Swank, 332 F. Supp. 61 (N.D. Ill.), *aff'd mem. sub nom.* Weaver v. Doe, 404 U.S. 987 (1971); Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal.), *aff'd mem. sub nom.* Carleson v. Taylor, 404 U.S. 980 (1971).

[16] 2 CCH Pov. L. Rep. ¶ 16,203 (N.D.N.Y.), *vacated*, 409 U.S. 1052 (1972), *on remand*, 365 F. Supp. 818 (N.D.N.Y. 1973), *aff'd per curiam sub nom.* Lascaris v. Shirley, 420 U.S. 730 (1975).

[17] 18 N.Y.C.R.R. § 369.2(f)(3)(ii)(e) (Aug. 31, 1971).

[18] N.Y. Soc. Serv. Law § 101-a(2) to (3) (McKinney 1976).

ment of the district court and remanded the case for further consideration in light of the New York amendment. Whereupon, the district court again invalidated the New York eligibility condition as being incompatible with the Social Security Act, despite an intervening amendment to federal regulations that brought them largely in line with the New York practice. The Supreme Court affirmed this judgment of the district court, but, by that time, the Social Security Act provision at issue had been changed.[19] Consequently, the protracted litigation bore no fruit for welfare recipients.

Adding to the frustrations of this cycle is the length of time that states require to implement court decisions. Developments in the legal effect of a stepfather's income upon his stepchild's AFDC eligibility illustrate this time lag. The 1968 Supreme Court decision in *King v. Smith*[20] and the HEW regulation implementing that decision appeared to clarify the law in this area. The HEW regulation states, in part, that absent a law of general applicability requiring stepparents to support as natural parents, states may not presume that stepparent income is available for the support of minor stepchildren.[21] The validity of the HEW regulation was subsequently upheld in *Lewis v. Martin*.[22] Nevertheless, states having no such law of general applicability continued to include stepparent income in determining AFDC eligibility, even where the income was not in fact available.[23]

In New York, for example, although no law requires stepparents to support as natural parents, stepparent income was automatically included in determining welfare budgets.[24] This practice was invalidated by the state supreme court in *Uhrovick v. Lavine*,[25] and the decision was unanimously affirmed on appeal.[26] In view of the weakness of the state's claim[27] and the inevitability of a final decision

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[19] *See* 42 U.S.C. § 602(a)(26)(B) (Supp. IV, 1974).

[20] 392 U.S. 309 (1968).

[21] 45 C.F.R. § 233.90(a) (1975).

[22] 397 U.S. 552 (1970).

[23] *See, e.g.*, Guither v. Sterrett, 346 F. Supp. 1095 (N.D. Ind.), *aff'd mem.*, 409 U.S. 1070 (1972).

[24] 18 N.Y.C.R.R. § 352.31(a)(2) (as amended Dec. 12, 1974).

[25] 2 CCH Pov. L. Rep. ¶ 18,054 (N.Y. Sup. Ct. 1973).

[26] 43 App. Div. 2d 481, 352 N.Y.S.2d 529 (1974), *aff'd*, 35 N.Y.2d 892, 324 N.E.2d 360, 364 N.Y.S.2d 890 (1974).

[27] In Freda v. Lavine, No. 73-C-362 (E.D.N.Y. July 3, 1973), *vacated*, 494 F.2d 107 (2d Cir. 1974), the district court stated: "It appears quite clear to this court that New York does not have a 'state law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.' " *Id.* at 13, *quoting* 45 C.F.R. § 233.90(a) (1975). Although the court of appeals required the district court to abstain pending the state court's resolution of *Uhrovick* (*see* note 26 *supra*), this seemed

against it, New York's pursuit of appellate review can only be explained as an attempt to save AFDC expenditures during the period in which the state was entitled to an automatic stay of the lower court's determination.[28] Although the Supreme Court had decided *Lewis* in 1970, it was not until February 1975 that the New York State Department of Social Services recognized the validity of that decision.[29]

Most future litigation in the welfare area will be handled within the framework of the Legal Services Corporation. In this issue, the two major analyses of the Corporation document the compromises that were necessary to preserve legal representation for the nation's poor. Following an introduction by Dean Roger Cramton, Chairman of the Board of the Legal Services Corporation, an Article by Warren George explains the history of the LSCA, and a Note analyzes the constitutionality of restrictions it places upon legal services attorneys and clients.[30] One of the most interesting portions of the George Article is his discussion of the controversy and compromise surrounding backup centers—the offices that provide special litigation, training, and clearinghouse services.[31] Recent action by the Board of the Legal Services Corporation has added another chapter since that Article was written.

On March 5, 1976, the Board adopted a resolution[32] that deals with the funding of backup or support centers in light of section 2996e(a)(3) of the LSCA, commonly called the Green Amendment.[33] Under the terms of the resolution, contracts will be made with support centers to provide legal assistance to eligible clients; the "centers . . . will be limited to client counseling and representational

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to be an academic application of the abstention doctrine without any true inquiry into whether a meritorious question existed concerning the interpretation of state law.

[28] *See* N.Y. CIV. PRAC. LAW § 5519(a)(1) (McKinney Supp. 1975).

[29] *See* letter from Abe Lavine, Commissioner of N.Y. State Department of Social Services, to County Departments of Social Services, Transmittal No. 75 ADM-21 (Feb. 26, 1975).

[30] George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976); Note, *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734 (1976).

[31] *See* George, *supra* note 30, at 709-22.

[32] 41 Fed. Reg. 10,271 (1976).

[33] [T]he Corporation is authorized . . . to undertake directly and not by grant or contract, the following activities relating to the delivery of legal assistance—

(A) research,

(B) training and technical assistance, and

(C) to serve as a clearinghouse for information.

42 U.S.C. § 2996e(a)(3) (Supp. IV, 1974). The restriction imposed by this section was first proposed in an amendment offered by Representative Edith Green. *See* 119 CONG. REC. 20,717 (1973).

activities, professional responsibility activities in accordance with the Code of Professional Responsibility of the American Bar Association, and such 'housekeeping' activities as are normally carried on by law offices."[34] Support centers are prohibited from using Corporation funds for research, training, technical assistance, and clearinghouse activities that are not part of providing legal assistance to eligible clients. In adopting this resolution, the Board has rejected interpretations that the Green Amendment totally abolishes the backup centers.[35]

Pursuant to the terms of the resolution, contracts will be negotiated with existing backup centers to allow continued specialized assistance to individual clients. These centers, however, will not be able to continue general research, training, and technical assistance, and their budgets will be reduced by the amount that is presently allocated to such activities. On the other hand, since the Corporation itself may perform such activities, centers engaged almost exclusively in this type of work will be brought within the Corporation. It is expected that the Legal Services Training Program and the National Legal Aid and Defender Association Technical Assistance Project will be transferred to the Corporation's Washington headquarters. The paralegal Institute will have its training activities transferred to the Corporation, and other programs may be transferred as well. The *Clearinghouse Review,* while remaining in Chicago, has already been transferred to the Corporation.[36]

Although the Board's action provides relief for these specialized offices, its action, constrained by the Green Amendment, is not without deleterious effect upon the backup centers. These changes in the Corporation may cause many backup center employees to leave the legal services program. Some may not wish to relocate; others, who have litigated, assisted in training programs, and performed general research, may not wish to continue in only one of these functions; still more may leave because their independence has been threatened by this bifurcation.

On December 16, 1975, H.R. 10799 was approved by the House Committee on the Judiciary.[37] This bill would amend the LSCA to

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[34] 41 Fed. Reg. 10,271 (1976).

[35] *See* George, *supra* note 30, at 716.

[36] Statements about restructuring the backup centers and their activities are based upon a Memorandum to the Board of Directors of the Legal Services Corporation from Thomas Ehrlich, undated (copy on file at the *Cornell Law Review*), and conversations with Roger C. Cramton, Chairman of the Board of Directors.

[37] H.R. 10799, 94th Cong., 2d Sess. (1976). *See* 121 CONG. REC. D1546 (daily ed. Dec. 16, 1975).

allow the Corporation to undertake research, training, technical assistance, and clearinghouse functions by grant or by contract. It would allow the Board the option of continuing the support centers as they were structured prior to the Board's resolution of March 5, 1976. The speedy passage of this legislation is necessary if the Corporation is to retain its experienced and skilled employees.

The cyclical development of welfare law, in which federal legislation and regulations are changed to accommodate previously invalidated state practices, is a source of frustration to welfare recipients. But one can hope that future actions of Congress and the Legal Services Corporation Board will provide these persons with effective advocates, aided by a network of well-staffed and independent backup centers.

PROMISE AND REALITY IN LEGAL SERVICES*

Roger C. Cramton†

Ten years ago a creative and energetic new federal initiative—the Legal Services Program of the Office of Economic Opportunity—began to give life to the legal profession's ancient commitment to the principle that each citizen, without regard to means, should have access to the institutions of justice. The enthusiasm and accomplishment of this creative period led to reaction, controversy, and challenge. Faced with threats to its continued existence, the Legal Services Program lost some of its innovative zeal and concentrated on the delivery of legal services to the poor in an economical and highly professional manner.

Today, much of the controversy over the Legal Services Program has abated; the gains of the past have been consolidated; the program has matured; and there is general acceptance of the principle that poor people are entitled to legal representation at public expense. With the establishment of the new national Legal Services Corporation, an historic opportunity exists for further evolution and development of the legal services idea.

The creation of an independent corporation was not repudiation of the past, but an extension based on the firm foundation already laid down. It constituted a shift of emphasis, a codification of developing restrictions designed to prevent abuses of the program, and a new beginning in which fresh approaches and energies could be applied to the further development of the Legal Services Program.

The evolution of the Legal Services Corporation Act[1] is ably sketched by Warren George in this issue of the *Cornell Law Review*.[2] The history is an exciting one of political compromise, and it leaves him with "cautious optimism" for the future. The constitutional problems posed by the Act's exclusion from legal services of abortion and desegregation cases, and by its restrictions on political activity of staff attorneys, are illuminated in a comprehensive Note

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* Portions of this article are adopted from a talk to the National Legal Aid and Defender Association annual meeting in Seattle on November 14, 1975.

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The views expressed herein are those of the author and not necessarily those of the Legal Services Corporation.

[1] 42 U.S.C. §§ 2996-96*l* (Supp. IV, 1974).

[2] George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976).