PRORATING AFDC SHELTER ALLOWANCES: PRESUMPTION OF CONTRIBUTION BY NONRECIPIENT HOUSEHOLD MEMBERS

Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974)

Plaintiff, who received Aid to Families with Dependent Children[1] (AFDC) for her child, shared a residence with her incapacitated sister. During a two-and-one-half month period when plaintiff's sister received no assistance benefits,[2] plaintiff's AFDC shelter allowance was prorated and correspondingly reduced,[3] as required by a New York public welfare regulation.[4] After an adverse ruling in a hearing[5] before the state welfare agency, plaintiff initiated a class action in federal district court, arguing that the regulation violated the implementing regulations of the Social Security Act by effecting a conclusive presumption of income.[6] The court found for the plaintiff.[7] Upon appeal by the

1. 42 U.S.C. §§ 601-44 (1970).

2. Prior to January 1, 1973, plaintiff's sister received benefits under the New York Home Relief program, N.Y. SOC. SERV. LAW §§ 157-65 (McKinney 1966), a state-funded and state-administered general assistance program. In mid-March 1973, she began receiving assistance under the Aid to the Disabled Program, 42 U.S.C. §§ 1351-55 (1970).

3. Plaintiff's rent was $180, toward which her sister made no contribution. Before January 1, 1973, plaintiff's shelter allowance portion of her AFDC grant was $155 a month, the maximum permitted to a household of three persons. This amount was reduced to $110 a month, *i.e.* two-thirds of $155, while plaintiff's sister received no assistance; it was increased to $155 when the sister became eligible for Aid to the Disabled. Taylor v. Lavine, 497 F.2d 1208, 1213 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3330 (U.S. Dec. 9, 1974) (No. 5054).

4. 18 N.Y.C.R.R. § 352.30(d) (1974):

> A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

5. An AFDC applicant or recipient may request and receive a hearing before the state welfare agency regarding questions of fact involved in agency actions affecting his assistance claim, including its reduction or termination. 45 C.F.R. § 205.10 (1973), *implementing* Goldberg v. Kelly, 397 U.S. 254 (1970). New York's fair hearing regulation is found at 18 N.Y.C.R.R. §§ 358.1-.27 (1974).

6. Plaintiff's statutory argument was based upon 45 C.F.R. § 233.90(a) (1973):

> A State plan under title IV-A of the Social Security Act must provide that the determination whether a child 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, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [*sic*] that natural or adoptive parents are required to support their children. Under this requirement, 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 one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

In addition to her statutory argument, plaintiff challenged the constitutionality of 18 N.Y.C.R.R. § 352.30(d) (1974) on three grounds: (1) that the regulation created a conclusive presumption offensive to due process; (2) that it denied her equal protection of the laws; and (3) that it impinged on her rights to free association and privacy. Brief for Appellees at 3-4, Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974).

7. Taylor v. Lavine, No. 73-C-699 (E.D.N.Y., Oct. 23, 1973). The district court in *Taylor* adopted the reasoning of the court in Hurley v. Van Lare, 365 F. Supp. 186 (S.D.N.Y. 1973), on the presumption issue. *Hurley* involved 18 N.Y.C.R.R. § 352.31 (a)(3) (1973), *quoted in* Hurley v. Van Lare, 365 F. Supp. 186, 188 n.1 (S.D.N.Y. 1973), *and* 43 FORDHAM L. REV. 150, 150-51 n.2 (1974):

> When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:
>
> . . . .
>
> (iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c).

The *Hurley* court noted that the cross-reference in the regulation should be to § 352.30 (d). 365 F. Supp. at 188 n.1. During the four months in 1970 and 1971 that plaintiff Hurley lived with an unrelated male friend, the shelter allowance she received for herself and her three children was reduced from $150 to $115. After a fair hearing, it was set at $120, *i.e.* four-fifths of $150. Ms. Hurley appealed to federal district court, where her due process claim (similar to that of plaintiff Taylor, note 6 *supra*) was found to have sufficient merit to give the court jurisdiction under 28 U.S.C. § 1343(3) (1970), thus permitting it to hear the statutory claim under the theory of pendent jurisdiction. The court held that the New York regulations were inconsistent with 45 C.F.R. § 233.90 (a) (1973), *quoted in* note 6 *supra*, inasmuch as they impermissibly assumed that the lodger would pay his portion of the shelter costs. 365 F. Supp. at 195.

The *Taylor* case had a second plaintiff, Ms. Otey, who received AFDC for herself and her son. They had received a maximum shelter allowance for two persons of $145. When an older, ineligible, and unemployed son entered the household, the allowance was reduced to $96.65, two-thirds of $145.00. No explanation was given in the *Taylor* opinion for the difference in budgeting procedure between the Otey and Taylor households, both of which contained three members. *See* note 3 *supra*.

defendant New York Commissioner of Social Services,[8] the Second Circuit Court of Appeals reversed and *held*: The setting of AFDC benefit levels by prorating the shelter expenses on the basis of an ineligible person's presence in the recipient's household does not constitute a conclusive presumption of contribution by that person.[9]

The public welfare provisions of the Social Security Act of 1935[10] were designed as a "scheme of cooperative federalism"[11] to meet the needs of victims of the Depression who would not benefit from other relief programs[12] or the eventual economic recovery of the nation.[13] AFDC is one of four categorical public welfare programs[14] created un-

8. The *Taylor* appeal was consolidated with that from Hurley v. Van Lare, 365 F. Supp. 186 (S.D.N.Y. 1973).

9. Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3330 (U.S. Dec. 9, 1974) (No. 5054). The court specifically avoided the issue of the possible mootness of plaintiff Taylor's claim since her benefits had been restored. *Id.* at 1213 n.3. The court also remanded the case for the convening of a three-judge court to consider the constitutional issues raised by appellees. *See* note 6 *supra*. The remand was heard by a panel consisting of District Judges Bauman and Weinstein, who decided the *Hurley* and *Taylor* cases respectively, and Circuit Judge Hays, who wrote the majority opinion in the instant case. In a 2-1 decision, the majority found that the New York regulations established an irrebuttable presumption of support by the lodger, which was offensive to due process. The three-judge court also said that it did not have to decide whether the claims were moot since the case was a class action involving a regulation that affected many AFDC families. Hurley v. Van Lare, 380 F. Supp. 167 (S. & E.D.N.Y. 1974).

Plaintiffs have been granted certiorari to the United States Supreme Court on the statutory issues. Taylor v. Lavine, 43 U.S.L.W. 3330 (U.S. Dec. 9, 1974) (No. 5054).

10. 42 U.S.C. § 301 *et seq.* (1970, Supp. III, 1973).

11. King v. Smith, 392 U.S. 309, 316 (1968). The Court was speaking only of AFDC, but the phrase could be used to describe all the original public welfare provisions of the Act. *See* note 14 *infra*. In simplified terms, the federal government provides the major portion of the funding on a matching basis to the states, which administer the programs. States are not required to participate, but if they choose to do so, they must submit plans to the Department of Health, Education, and Welfare for the Secretary's approval.

12. *E.g.*, the Work Projects Administration (WPA), the Civilian Conservation Corps (CCC), and the Public Works Administration (PWA). *See generally* King v. Smith, 392 U.S. 309, 328 (1968); W. BELL, AID TO DEPENDENT CHILDREN (1965); F. PIVEN & R. CLOWARD, REGULATING THE POOR (1971).

13. The public welfare programs, and particularly AFDC, were a federal response to the failure of rudimentary state welfare programs under the pressures of the Depression. Mothers' pension programs existed in forty-six states, but by the early 1930's were unable to meet the massive needs of dependent children. Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825, 826-27 (1974).

14. The four categorical programs were (1) AFDC, 42 U.S.C. §§ 601-44 (1970, Supp. III, 1973); (2) Old Age Assistance (OAA), *id.* §§ 301-04, 306; (3) Aid to the Blind (AB), *id.* §§ 1201-04, 1206; and (4) Aid to the Totally and Permanently Disabled

der the Act and is intended to meet the financial needs of dependent children.[15] An applicant for AFDC must satisfy two basic eligibility requirements:[16] (1) dependency, defined by the Federal Act to mean

(ATPD), *id.* §§ 1351-55. ATPD was not added to the Act until 1950. OAA, AB, and ATPD were repealed, effective January 1, 1974, and replaced by Supplemental Security Income (SSI), 42 U.S.C. §§ 1381-85 (Supp. III, 1973), a uniform, guaranteed annual income program for the disabled, blind, and elderly.

15. 42 U.S.C. § 601 (1970). "Dependent child" is defined in 42 U.S.C. § 606(a) (1970) as follows:

> [A] needy child (1) 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 his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place or residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment . . . .

The Court in King v. Smith, 392 U.S. 309 (1968), devoted a significant portion of its opinion to the legislative history of the AFDC program. It found that the "paramount goal" of AFDC was the protection of the child deprived of the support of a "breadwinner." Intact families could be expected to benefit from other public programs and private employment. *Id.* at 325-29.

16. This is an often repeated statement, *see, e.g.*, Doe v. Shapiro, 302 F. Supp. 761, 764 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970), but is no longer entirely accurate. The Supreme Court's decision in Wyman v. James, 400 U.S. 309 (1971), in effect sustained New York's practice of conditioning initial and continuing eligibility on home visits by the recipient's caseworker. Similarly, in New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973), the Court held that the state could condition eligibility on participation in a state work-training program.

These two cases appear to be contrary to a line of analysis developed by the Court for evaluating state-imposed eligibility conditions unrelated to need. That line began with King v. Smith, 392 U.S. 309 (1968), which invalidated Alabama's "substitute parent" condition, and continued through Townsend v. Swank, 404 U.S. 282 (1971) (Illinois provided assistance to children aged 18 to 21 in vocational school, but not to those in college). In *Swank* the Court said "a state eligibility standard that excludes persons eligible for assistance under the federal AFDC standards violates the Social Security Act . . . ." *Id.* at 286. In Carleson v. Remillard, 406 U.S. 598 (1972), in which California had attempted to say that parents away from home on active military service were not absent from the home, the Court clearly stated that eligibility "must be measured by federal standards." *Id.* at 600.

The Court also eliminated durational residence requirements for eligibility in Shapiro v. Thompson, 394 U.S. 618 (1969), on constitutional rather than statutory grounds.

Following the *King-Townsend-Remillard* line, lower courts have struck down a common eligibility condition that an applicant or recipient mother provide the state with the name of the putative father of her child and/or cooperate in legal action to obtain his payment of child support. *See, e.g.*, Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973), *cert. denied*, 417 U.S. 947 (1974); Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), *prob. juris. noted sub nom.* Roe v. Norton, 415 U.S. 912 (1974); Story v. Roberts, 352

the physical deprivation of parental support;[17] and (2) economic need, as determined by the states in their standards of need.[18]

The amount of a recipient's allowance is calculated by measuring his income[19] and resources[20] against his need.[21] Often, when other facts

F. Supp. 473 (M.D. Fla. 1972); Doe v. Swank, 332 F. Supp. 61 (N.D. Ill.), *aff'd mem. sub nom.* Weaver v. Doe, 404 U.S. 987 (1971); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970). *But see* 38 Fed. Reg. 10940 (1973) (adoption of HEW regulation permitting states to deny mother's portion of AFDC grant, while continuing payments to her for the child, when she fails to cooperate in seeking support from putative father).

Finally, it can be argued that the Court's decision in Jefferson v. Hackney, 406 U.S. 535 (1972), has the effect of permitting the states to manipulate eligibility by altering their standards of need. *See* Note, *What Remains of Federal AFDC Standards After Jefferson v. Hackney?*, 48 IND. L.J. 281 (1973).

17. *See* notes 15 & 16 *supra.*

18. Prior to 1947, recipients' needs were determined by caseworkers on a case-by-case measuring of expenditures. Since 1947, states have had to develop standards which specify by household size the income required to pay for basic subsistence needs. Shelter needs and special needs (*e.g.*, special diet for diabetics) are usually calculated separately and added to the recipient's basic needs as established by the standard. Lurie, *supra* note 13, at 840. Shelter needs can be the amounts actually paid, a set maximum regardless of household size, or varying maximums depending on family size—the case in New York. HEW regulations require that the standard be uniformly applied throughout the state, 45 C.F.R. § 233.20(a)(2)(iii) (1973), and that certain items of need be included in the standard, *id.* § 233.20(a)(2)(iv). *See* BUREAU OF FAMILY SERVICES, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SIMPLIFIED METHODS FOR DETERMINING NEEDS (1964), *reprinted in* 2 CENTER ON SOCIAL WELFARE POLICY AND LAW, MATERIALS ON WELFARE LAW at VI-8.

In King v. Smith, 392 U.S. 309, 318-19 (1968), the Court, citing U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, HANDBOOK OF PUBLIC WELFARE ADMINISTRATION pt. IV, § 3120 (1957), stated that "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." Every major Supreme Court public welfare case since *King* has reaffirmed that statement. *E.g.*, Shea v. Vialpando, 416 U.S. 251, 253 (1974); Jefferson v. Hackney, 406 U.S. 535, 541 (1972).

In 1968 Congress amended the Act to add § 402(a)(23), which required the states to bring their standards into line with the increased cost of living. Act of Jan. 2, 1968, Pub. L. No. 90-248, § 213(b), 81 Stat. 898 (codified at 42 U.S.C. § 602(a)(23) (1970)). When the Supreme Court first confronted this requirement and its ambiguous legislative history in Rosado v. Wyman, 397 U.S. 397 (1970), it found that, while the amendment required the states to increase their standards, they did not have to increase the *level of benefits* paid to recipients. Then, in Jefferson v. Hackney, 406 U.S. 535 (1972), the Court found permissible a Texas practice of making a percentage reduction in the updated standard of need when calculating the amount of a recipient's award. For a full explanation of this process see Note, *supra* note 16. The net effect of *Rosado* and *Jefferson* is that the states have virtually unlimited latitude in setting their level of benefits and standards of need as applied to the determination of the recipients' grants.

19. Income is described by 45 C.F.R. § 233.20(a)(3)(ii)(*c*) (1973) and 45 C.F.R. § 233.90(a) (1973) as "such net income as is actually available for current use

are present, states have presumed, without later verification, that an applicant has available resources or income.[22] Beginning with *King v. Smith*[23] and *Lewis v. Martin*,[24] court decisions[25] and Department of

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on a regular basis . . . ." Newer proposed regulations, 38 Fed. Reg. 18254 (1973), specify only "net income available for current use." The earlier version, however, was applicable in *Taylor*.

20. Resources are described in 45 C.F.R. § 233.20(a)(3)(i) (1973):

> In addition to the home, personal effects, automobile and income producing property allowed by the agency, the amount of real and personal property, including liquid assets, that can be reserved for each individual recipient shall not be in excess of two thousand dollars.

A more recent proposed regulation states that the value of the resources an AFDC recipient family may reserve, other than its home, heirlooms, wedding and engagement rings, and materials used in employment,

> shall not be in excess of a market value of $2250, of which not more than $1200 shall consist of motor vehicles; the real and personal property shall be valued at their gross market value including encumbrances.

38 Fed. Reg. 18254 (1973).

Another interpretation of "resource" was suggested by the court in Randall v. Goldmark, 495 F.2d 356, 361 (1st Cir. 1974), which said in dictum:

> [W]e believe that to qualify as a currently available resource . . . it need only be shown that [it] . . . directly benefit[s] an AFDC recipient in such a manner that [it is] actually used to defray expenses which such recipient would otherwise incur.

21. If there is a budgetary deficit between needs and income, the state may elect to fill all or part of it. Some states impose a maximum for a family of a given size regardless of the magnitude of its deficit. This procedure was sustained by the Supreme Court in Dandridge v. Williams, 397 U.S. 471 (1970), against statutory and constitutional attacks. Other states pay a fixed percentage of the budgetary deficit. Still others follow Texas, *see* note 18 *supra*, in applying a percentage reduction to the standard of need to decrease benefit levels. Lurie, *supra* note 13, at 838-39.

22. This practice would seem to be supported by 42 U.S.C. § 602(a)(7) (1970):

> A state plan for aid and services to needy families with children must . . . in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income . . . .

The court in Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), *aff'd mem.*, 396 U.S. 5 (1969), construed the term "other individual," which was added by amendment in 1968, to include only persons classified as "Essential Persons," a category long-recognized by HEW as incorporating only persons essential to the well-being of the child. Moreover, 45 C.F.R. § 233.20(a)(2)(vi)(*b*) (1973) states that the choice of who is an "Essential Person" rests with the recipient, not the state. Since *Solman*, no state has successfully argued that § 602(a)(7) permits a presumption of income. For examples of the presumptions states have used, see note 25 *infra*.

23. 392 U.S. 309 (1968). *King* involved an Alabama regulation that classified an unrelated male living with an AFDC recipient as a "substitute parent," and thereby disqualified the recipient from receiving AFDC since the children were deemed not to be deprived of parental support. The case turned on the definition of parent. After re-

Health, Education, and Welfare (HEW) regulations[26] have prohibited

viewing the legislative history, *see* note 15 *supra*, the Court said that parent meant "only those persons with a legal duty of support." 392 U.S. at 327. In a footnote, the court stated that the predecessor regulations of today's 45 C.F.R. § 233.20(a)(3)(ii) (1973), limiting income to that "actually available for current use on a regular basis," "clearly comported" with § 602(a)(7). 392 U.S. at 319 n.16. Taken with the Court's definition of parent, this footnote plainly suggested that no presumption of support or contribution of income could be made in the absence of a legal obligation that it be provided.

24. 397 U.S. 552 (1970). After King v. Smith, 392 U.S. 309 (1968), HEW promulgated 45 C.F.R. § 203.1 (1969), which was the predecessor of today's 45 C.F.R. § 233.90(a) (1973), *quoted in* note 6 *supra*, prohibiting the presumption of contribution by persons other than natural or adoptive parents, or stepparents obliged to support their stepchildren under a state law of "general applicability." At issue in *Lewis* was a California statute, CAL. WELF. & INST'NS CODE §§ 11351-11351.5 (West 1969), requiring a "man assuming the role of a spouse" (MARS) to contribute toward the household's needs and assuming that a stepfather made such a contribution. The Court found that 45 C.F.R. § 203.1 (1969) comported with the federal statute, since HEW could "reasonably conclude that an obligation to support under state law must be of 'general applicability' to make that obligation in reality a solid assumption on which estimates of funds actually available to children on a regular basis may be calculated." 397 U.S. at 558-59.

25. The presumptions of income or support that have been held impermissible fall into three general categories. First, a number of courts have struck down presumptions that apply a stepfather's income to the recipient's needs. *See, e.g.*, Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972); Gaither v. Sterrett, 346 F. Supp. 1095 (N.D. Ind.), *aff'd mem.*, 409 U.S. 1070 (1972); X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 1970), *aff'd sub nom.* Engelman v. Amos, 404 U.S. 23 (1971); Grubb v. Sterrett, 315 F. Supp. 990 (N.D. Ind.), *aff'd mem.*, 400 U.S. 922 (1970); Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), *aff'd mem.*, 396 U.S. 5 (1969); Uhrovick v. Lavine, 43 App. Div. 2d 481, 352 N.Y.S.2d 529 (1974); *In re* Slochowsky, 73 Misc. 2d 563, 342 N.Y.S.2d 525 (Sup. Ct. 1973); *In re* Fowler, 130 Vt. 176, 288 A.2d 463 (1972); Borkman v. Commissioner of Social Welfare, 128 Vt. 561, 268 A.2d 790 (1970). *But see* Sugarman v. Burns, 76 Misc. 2d 813, 350 N.Y.S.2d 99 (Fam. Ct. 1973). For an example of a valid state support law of general applicability, see Kelley v. Iowa Dep't of Social Servs., — Iowa —, 197 N.W.2d 192, *appeal dismissed*, 409 U.S. 813 (1972).

The second kind of presumption that has been held invalid is attribution to the family's needs of the income of a child or other legally nonobligated relative. *See, e.g.*, Rodriguez v. Vowell, 472 F.2d 622 (5th Cir.), *cert. denied*, 412 U.S. 944 (1973); Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972); Howard v. Madigan, 363 F. Supp. 351 (D.S.D. 1973); Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807 (1972); Bourque v. Commissioner of Welfare, 6 Conn. C.C.R. 685, 308 A.2d 543 (1972); Howard v. Department of Pub. Welfare, 272 A.2d 676 (D.C. Ct. App. 1971); Montgomery v. Iowa Dep't of Social Servs., — Iowa —, 209 N.W.2d 30 (1972); HEW State Letter No. 1088 (Sept. 25, 1970), *reprinted in* 2 CENTER ON SOCIAL WELFARE POLICY AND LAW, MATERIALS ON WELFARE LAW at VI-135.

Finally, courts have held impermissible the presumption that the income of an unrelated person in the recipient's household is available for the recipient's needs. *See, e.g.*, Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1968); Roselli v. Affleck, 373 F. Supp. 36 (D.R.I. 1974); Jenkins v. Georges, 312 F. Supp. 289 (W.D. Pa. 1969); cases cited note 30 *infra* (prorating shelter allowance).

26. *See* note 6 *supra*.

such presumptions, unless the income or resources are derived from a legal support obligation of general applicability, such as that imposed upon natural or adoptive parents.[27] All other income must be "actually available for current use on a regular basis"[28] before it can be applied to the recipient's budgeted need; similarly, resources must be "currently available."[29]

In *Taylor v. Lavine*, the court determined that presumptions of reduced need justified prorating the shelter allowance.[30] In reaching its

27. Presumptions based on state statutes that have attempted to place a support obligation upon only those stepfathers whose children receive AFDC have been held impermissible. The courts have reasoned that a stepfather support law that would permit a presumption of income under 45 C.F.R. § 230.90(a) (1973) would have to obligate *all* stepfathers in the state to support their stepchildren to the same extent as natural and adoptive children are supported. *See, e.g.*, Gaither v. Sterrett, 346 F. Supp. 1095 (N.D. Ind.), *aff'd mem.*, 409 U.S. 1070 (1972); Kelley v. Iowa Dep't of Social Servs., — Iowa —, 197 N.W.2d 192, *appeal dismissed*, 409 U.S. 813 (1972). A similar argument would apply to the case of the unrelated person in the household.

28. 45 C.F.R. § 233.20(a)(3)(ii)(c) (1973); *see* note 19 *supra*.

29. 45 C.F.R. § 233.20(a)(3)(i) (1973); *see* note 20 *supra*.

30. Several other recent cases have dealt with state regulations prorating the shelter allowance. In Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298 (N.D. Ind. 1973), an Indiana regulation, as applied, was found to create an irrebuttable presumption foreclosing an "objective and equitable" determination of need. The court said it did not have to decide whether the presumption set up an impermissible assumption of available income. *Id.* at 305. The court in Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972), held the prorating of the shelter item invalid as applied because the practice presumed contribution by ineligible persons without providing the recipient a chance for rebuttal. A Massachusetts regulation that conclusively presumed that a stepfather provided shelter for his recipient stepchildren was held to be contrary to 45 C.F.R. § 233.90(a) (1973) and offensive to due process. Boucher v. Minter, 349 F. Supp. 1240 (D. Mass. 1972). In Jenkins v. Georges, 312 F. Supp. 289 (W.D. Pa. 1969), Pennsylvania was found to have violated federal regulations by assuming that legally nonobligated adults paid a share of recipient children's shelter allowance.

The California Supreme Court invalidated a state regulation which assumed nonneedy relatives provided shelter as "gifts" to recipient children. Waits v. Swoap, 11 Cal. 3d 887, 524 P.2d 117, 115 Cal. Rptr. 21, *cert. denied*, 95 S. Ct. 499 (1974). The court ruled that the presumption did not comport with the state welfare statute and was contrary to the *King* and *Lewis* decisions. In Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 314 A.2d 362, *cert. denied*, 417 U.S. 955 (1974), the court held that the state could not prorate shelter and basic needs and thereby reduce the grant unless it verified the contribution of the ineligible household member. In Battle v. Lavine, — App. Div. 2d —, 354 N.Y.S.2d 680 (1974), the court found that the prorating of the shelter allowance where a recipient lived with a friend assumed the latter's support and thus violated 45 C.F.R. § 233.90(a) (1973).

Three cases have reached the same result as *Taylor*. In Dullea v. Ott, 316 F. Supp. 1273 (D. Mass. 1970), the court in dictum stated that the assumption that noneligible persons and recipients in the same household shared expenses was realistic and not a deprivation of due process. The court in Watson v. Department of Pub. Welfare, 6 Pa.

decision, the majority noted that the New York regulation[31] was the state's attempt to keep ineligible persons from receiving benefits indirectly in the form of free living space provided by a recipient.[32] The majority reasoned that the state may achieve this goal by making the level of benefits dependent upon the presence or absence of an ineligible person in the household, as long as that criterion accurately measures the recipient's needs.[33] The presence of an ineligible person in the household indicated, to the court, the recipient's reduced need for space.[34] In addition, the presence of an ineligible person evidenced the recipient's reduced need for rent expenditures as a result of the lowered per capita shelter costs and the benefits of economies of scale accruing to the enlarged household.[35] The court concluded, therefore,

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Cmwlth. 54, 293 A.2d 133 (1972), held that the prorating of shelter expenses did not presume any contribution by the nonrecipient; the court cited its own dictum in Cuffee v. Department of Pub. Welfare, 5 Pa. Cmwlth. 503, 291 A.2d 549 (1972), as the only precedent for its argument. In *Cuffee*, the court had said in dictum that prorating did not assume any contribution and that the practice protected the welfare department from paying the rent of nonrecipients. *See also* Padilla v. Wyman, 34 N.Y.2d 36, 312 N.E.2d 148, 356 N.Y.S.2d 3 (1974), *appeal filed*, 43 U.S.L.W. 3087 (U.S. Aug. 5, 1974) (No. 69) (prorating of basic needs reflected lowered per capita costs and involved no assumption of contribution or support).

31. *See* note 4 *supra*.

32. 497 F.2d at 1216.

33. *Id.* at 1215. The court said that King v. Smith, 392 U.S. 309 (1968), *see* note 23 *supra*, permits a regulation like New York's as long as it determines need accurately and does not attempt to "vindicate a moral interest unrelated to the need of the family . . . ." 497 F.2d at 1214-15.

34. The court stated that New York may infer "from the presence of the lodger in the household that the AFDC-recipient family actually needs less space for its own use than it is paying rent for." 497 F.2d at 1215.

35. *Id.* at 1216. The economies of scale argument appears to have entered welfare cases in Dandridge v. Williams, 397 U.S. 471 (1970), where the Court suggested that Maryland's maximum grant scheme which set a $250 maximum on any family's award (meaning that families with over six members received less per capita than smaller families) could be justified by the "greater ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments." *Id.* at 479-80. Other courts have considered or used the same argument. *See, e.g.*, Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298, 303 (N.D. Ind. 1973); Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 207-08, 314 A.2d 362, 365, *cert. denied*, 417 U.S. 955 (1974).

Most states implicitly recognize the functioning of economies of scale in their standards of need. *Cf.* Montgomery v. Iowa Dep't of Social Servs., — Iowa —, —, 209 N.W. 2d 30, 31 (1973). For example, a hypothetical state might say that one person needs $150 a month; two persons, $275; three, $375; and four, $450. The issue raised by cases like *Taylor* is whether the needs of a family of three living with an ineligible person are $375.00 or ($450/4) $\times$ 3 = $337.50.

that a recipient's actual housing costs are accurately measured by prorating shelter expenses, that is, by distributing the real costs equally among household members and then deducting the ineligible person's share.[36] Moreover, the court asserted that prorating does not presume that the ineligible person is contributing his share of housing expenses, because his needs and those of the recipient are separable.[37]

In dissent, Judge Oakes argued that living space is a resource and must be measured in actuality.[38] He also contended that the majority's presumption of a reduced need for space[39] might, in some cases, be contrary to fact[40] and thereby violate an HEW regulation[41] requiring that the recipient's need be determined on an "objective and equitable basis."[42] In addition, economies of scale and actual cost reductions in shelter expenses could not occur in the absence of a contribution by the ineligible person. HEW regulations,[43] however, prohibit presumptions of such contribution.[44] Finally, Judge Oakes relied upon three similar cases[45] to suggest that a presumption of contribution or reduced

36. 497 F.2d at 1215-16.

37. *Id.* at 1215. The court did not explain how the needs of the ineligible persons could be separated from those of the recipient after they presumably have been considered together in order to take advantage of economies of scale.

38. *Id.* at 1219. Judge Oakes cited Shea v. Vialpando, 416 U.S. 251 (1974), Lewis v. Martin, 397 U.S. 552 (1970), King v. Smith, 392 U.S. 309 (1970), and 45 C.F.R. § 233.90(a) (1973), as support for the proposition that resources, "be they income or amount of living space," must be determined by factual verification rather than presumption. 497 F.2d at 1220.

39. 497 F.2d at 1219. Judge Oakes noted that the state never argued the reduced need hypothesis; he suggested that the majority simply invented it. *Id.*

40. *Id.* For example, the presence of a "lodger" may result in the crowding of living and sleeping quarters. *Id.*

41. 45 C.F.R. § 233.20(a)(1) (1973) requires that state plans for AFDC

> [p]rovide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except where otherwise specifically authorized by Federal statute.

42. 497 F.2d at 1220. Judge Oakes also pointed out that plaintiffs' shelter allowance would be increased to its maximum if the lodger moved out. This result does not follow logically if the presence of the lodger demonstrates a reduced need for space. *Id.* at 1219 n.8.

43. 45 C.F.R. § 233.90(a) (1973); *see* note 6 *supra.*

44. 497 F.2d at 1222.

45. Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298 (N.D. Ind. 1973); Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972); Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 314 A.2d 362, *cert. denied*, 417 U.S. 955 (1974); *see* note 30 *supra.* Judge Oakes also relied upon Shea v. Vialpando, 416 U.S. 251 (1974), for his proposition. In *Shea*, Colorado had set a maximum allowance for work expenses for AFDC recipients. The Court found the Colorado practice in-

need for space might be permissible, but only if the recipient were afforded an opportunity for rebuttal.[46]

The majority correctly acknowledged[47] that conclusive presumptions of contribution or income are not permitted by HEW regulations[48] and case law.[49] In effect, however, the *Taylor* court proceeded to permit

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valid under federal regulations and case law requiring that need be measured on an individual basis. In the interests of administrative efficiency, a state might apply a predetermined level of work expenses to all recipients' budgets, so long as the individuals whose expenses exceeded that set level were provided an opportunity to prove their position and receive individualized consideration. *Id.* at 265.

46. 497 F.2d at 1219.

47. *Id.* at 1215.

48. 45 C.F.R. § 233.90(a) (1973); *see* note 6 *supra.*

49. *See* cases cited notes 23-25 *supra.* For cases dealing with presumptions of contribution to shelter expenses, see note 30 *supra.* These cases all reflect the statutory arguments commonly used in welfare law cases.

Although the *Taylor* court was not confronted with constitutional issues, *see* notes 6 & 9 *supra,* conclusive presumptions that impinge upon protected areas of property interests and individual freedom have been found violative of procedural due process. In an early case, Heiner v. Donnan, 285 U.S. 312 (1932), the Supreme Court held that the fifth amendment due process clause was violated by a conclusive presumption that a transfer of property within two years prior to death was in contemplation of death, and hence taxable. In recent years the Court has found due process problems with other conclusive presumptions. *E.g.,* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (school board cannot require all pregnant teachers to take maternity leave beginning in fifth month of term on basis of presumption of physical incapacity; physical condition must be determined on individual basis to satisfy due process requirements); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (denial of foodstamps to households in which member had been claimed as tax dependent in prior year by person not in household was not rational measure of need and was based upon irrebuttable presumption, often contrary to fact, that household member was being supported); Vlandis v. Kline, 412 U.S. 441, 452 (1973) (state could not use irrebuttable presumption of nonresidence to foreclose student's presentation of evidence that he was resident if presumption was not "necessarily or universally true in fact"); Stanley v. Illinois, 405 U.S. 645 (1972) (unmarried fathers cannot be conclusively presumed unfit to care for their children upon death of mother). In *Vlandis,* the Court suggested a test of irrebuttable presumptions: the presumption must fail as offensive to due process if (1) it is "not necessarily or universally true in fact," and (2) the state has "reasonable alternative means of making the crucial determination." 412 U.S. at 452. The first part of this test was reaffirmed in *LaFleur.* 414 U.S. at 646. *See generally* Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From* Rodriguez *to* LaFleur, 62 GEO. L.J. 1173 (1974).

No Supreme Court case has ruled on the constitutionality of irrebuttable presumptions in public welfare; the Court has always been able to use statutory analysis where income or resources are the subject of the presumptions. *See* cases cited notes 23 & 24 *supra.* Should the issue of the constitutionality of irrebuttable presumptions in public welfare cases come before the Court, the welfare agency would probably argue that recipients' need and welfare benefits are not individual or property interests protected by the due process clause of the fifth or fourteenth amendment. The decision in United States

conclusive presumptions of reduced need.[50]

Assuming *arguendo* that some presumption of reduced need is permissible,[51] an HEW regulation[52] requires that need be determined objectively and equitably. As the *Taylor* dissent suggested, the majority's presumption often may not reflect reality.[53] For example, there may not be a reduced need for space; rather, crowding may occur when an ineligible person enters the household. Hence, the presumption does not determine the recipient's need objectively.[54] Furthermore, since the presumption is conclusive and does not permit rebuttal by the recipient, it is arguably inequitable within the meaning of the regulation.

The majority's second presumption, derivative of the first, was that

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Dep't of Agriculture v. Murry, *supra*, would, however, substantially weaken such a contention.

50. One argument might be hypothesized in support of the court's presumption of need, although the court did not make it. The state could argue that its action involved merely its recognized freedom to set the level of need. *See* note 18 *supra*. While this argument has some merit, it implies that a state may have two standards of need, one for mixed households and another for households containing only recipients. 45 C.F.R. § 233.20(a)(2)(i) (1973) (emphasis added) speaks specifically of "*a* statewide standard [of need]," and 45 C.F.R. § 233.20(a)(2)(iii) (1973) (emphasis added) requires that "*the* standard . . . be *uniformly applied* throughout the State." In addition, 45 C.F.R. § 233.20(a)(1) (1973), *quoted in* note 41 *supra*, requires that individual need be determined on an objective and equitable basis. A separate standard for mixed households that did not look to the *fact* of contribution would be incapable of providing an objective and equitable determination of need. *Cf.* Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 208-09, 314 A.2d 362, 365, *cert. denied*, 417 U.S. 955 (1974).

51. *But cf.* note 62 *infra* and accompanying text.

52. 45 C.F.R. § 233.20(a)(1) (1973), *quoted in* note 41 *supra*.

53. 497 F.2d at 1219.

54. There has been very little judicial interpretation of the meaning of "objective and equitable" in 45 C.F.R. § 233.20(a)(1) (1973). The court in Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298 (N.D. Ind. 1973), said of the phrase: "[A]t least its minimum requirement is clear, namely, state programs must be consistent and compatible with the goals and priorities of the federal statute and regulations." *Id.* at 303. These goals, according to the court, are the protection of the needy, dependent child and the preservation of the family unit. *Id.* The *Stanton* court proceeded to find that an Indiana regulation, similar to the one in *Taylor*, though objective and equitable on its face, did not, when applied as an irrebuttable presumption, permit an objective and equitable determination of need. *Id.* at 304-05. The court did not reach the presumption-of-income issue.

In Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 314 A.2d 362, *cert. denied*, 417 U.S. 955 (1974), the court said that the state could not adjust its standard of need "by arbitrary means" amounting to a determination of need that was not objective or equitable as required by 45 C.F.R. § 233.20(a)(1) (1973). *Id.* at 208-09, 314 A.2d at 366. The regulation and facts in *Hausman* were quite similar to those in *Taylor*.

lowered per capita costs and economies of scale reduce the recipient's actual needs for shelter.[55] Considered purely as a conclusive presumption of need, it must fail for the reasons set forth in the preceding paragraph. While the majority emphasized the element of need, the second presumption nonetheless has the *effect* of a presumption of income. Real housing costs[56] would be reduced and economies of scale would function to the advantage of the recipient only when the ineligible person actually contributed his share. Since the "lodger" is not legally obligated to contribute, HEW regulations[57] prohibit any presumption, however indirect, that he does. Only his actual, available contributions toward his portion of the shelter need could be considered in computing and reducing the recipient's grant.[58]

The dissent was generally correct in its analysis of the nature and failings of the majority's presumptions of need. The dissent's suggestion, however, that space is a resource subject to the objective and equitable requirements of the HEW regulation[59] is not strongly supported by case law[60] or other regulations.[61] More importantly, the implication that a rebuttable presumption would be permissible is questionable insofar as it directly, or in effect, assumes a contribution by the ineligible person. As stated earlier, an HEW regulation prohibits any presumption where there is no generally applicable legal support obligation.[62]

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55. Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298 (N.D. Ind. 1973), Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972), and Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 314 A.2d 362, *cert. denied*, 417 U.S. 955 (1974), all suggest that the state may be able to assume from the presence of an ineligible person in the household that the recipient has reduced shelter costs. All three cases, however, say the presumption as applied must be rebuttable in order to be constitutional (*Owens*) or objective and equitable (*Stanton* and *Hausman*).

56. The majority's focus on per capita costs is misleading. Statistically, per capita costs would decline with the enlargement of the household. Such an arithmetic exercise, however, does not reflect the real costs, and hence the need, of the recipient, unless the ineligible person makes an actual contribution.

57. 45 C.F.R. § 233.90(a) (1973).

58. *Id.* § 233.20(a)(3)(ii)(*c*) (describing income); *id.* § 233.90(a); *see* cases cited note 25 *supra*.

59. 45 C.F.R. § 233.20(a)(1) (1973), *quoted in* note 41 *supra*.

60. No supporting precedent has been found for the assertion that space is a resource. The definition used by the court in Randall v. Goldmark, 495 F.2d 356 (1st Cir. 1974), *see* note 20 *supra*, suggested that a resource should have the capacity of being exchanged for goods and services. Such is not commonly the case with living space.

61. *See* note 20 *supra*.

62. This argument admittedly finds no precedent in case law. The issue of whether a rebuttable presumption would conflict with 45 C.F.R. § 233.90(a) (1973) apparently has not been litigated. The cases cited in note 55 *supra* do suggest that some courts

By focusing its arguments on need rather than income, the majority was able to avoid consideration of the weight of contrary precedent on the specific issue[63] and on presumptions of income in general.[64] As suggested above, however, the distinction between presumptions of need and presumptions of income is highly tenuous. Even if some distinction were possible, it is perhaps analytically more useful to classify both as budgetary presumptions,[65] because both impinge upon the budgetary process of determining the individual recipient's needs and resulting award. Such budgetary presumptions are, at the very least, limited by the objective and equitable requirement of the HEW regulation[66] and by due process constraints on conclusivity.[67] In most cases, however, any budgetary presumption should fail *qua* presumption where it directly or indirectly effects an assumption of contribution or income.[68] Conceivably a budgetary presumption might stand where it does not have such an effect and where it permits an objective and equitable determination of need.[69] The New York regulation[70] at issue in *Taylor*, however, fails to satisfy any of these constraints on budgetary presumptions.

The arguments and decision of the *Taylor* court do not exist in the world of legal abstraction alone; they have an immediate impact upon

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look favorably on rebuttable presumptions; the cases should not be read, however, as precedent on the specific point raised here. *See also* Doe v. Hursh, 337 F. Supp. 614, 617 (D. Minn. 1970) (dictum) (ninety-day waiting period to establish "continued absence" of parent as precondition to eligibility for AFDC would be permissible as "rebuttable evidentiary guide").

Clearly, a rebuttable presumption would not have the constitutional infirmities of an irrebuttable presumption. *See* note 49 *supra*. A rebuttable presumption is constitutionally sound when there exists a "rational connection between the fact proved and the ultimate fact presumed, and . . . the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910). In the *Taylor* situation, there may arguably be a rational connection between the presence of a "lodger" and lowered shelter costs for the recipient. Nonetheless, the strong language of the Court in Lewis v. Martin, 397 U.S. 552 (1970), *see* note 24 *supra*, suggests that a rebuttable presumption, though constitutional, would still conflict with the regulatory prohibition of assumption of income.

63. *See* note 30 *supra*.

64. *See* note 25 *supra*.

65. This term is suggested in Comment, *AFDC Eligibility Requirements Unrelated to Need: The Impact of* King v. Smith, 118 U. PA. L. REV. 1219 (1970).

66. 45 C.F.R. § 233.20(a)(1) (1973); *see* notes 41 & 54 *supra*.

67. *See* note 49 *supra*.

68. *See* notes 25 & 30 *supra*.

69. *Cf.* Shea v. Vialpando, 416 U.S. 251 (1974); notes 45 & 49 *supra*.

70. 18 N.Y.C.R.R. § 352.30(d) (1974).

the lives of thousands of recipients. At the simplest level, these families will be forced to choose between excluding a nonrecipient family member or suffering increased deprivation should they decide to keep the family intact.[71] This result is clearly contrary to the stated policy of the AFDC program to "strengthen family life,"[72] and it ignores existing judicial recognition of the "brutal need" of recipients.[73] More generally, the court's decision may open the way to other, more restrictive and manipulative[74] state and local regulatory actions contrary to the purposes of the program.[75] Sound legal and social policy analyses of the *Taylor* opinion by other courts, however, would help restrain such undesirable results.

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71. Perhaps the oldest and most telling criticism of the AFDC program has been that its eligibility requirements often force the splitting up of a family. An unemployed but able-bodied spouse can "desert" the family, knowing that they, at least, will receive some assistance. States now have the option of providing assistance to intact families with an unemployed spouse, 42 U.S.C. § 607 (1970), but not all states have implemented it.

72. 42 U.S.C. § 601 (1970).

73. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

74. F. PIVEN & R. CLOWARD, REGULATING THE POOR (1971) gives an account of governmental manipulation of the poor through the recurrent expansion and contraction of the public welfare programs.

75. Recipients' litigation against state policy is often time-consuming; barring an early injunction against implementation of a restrictive regulation, states may realize significant savings in expenditures during the years prior to a final judicial resolution of the issues.