JUDICIAL RESPONSIBILITY IN WELFARE CASES

Two experimental work projects were approved by the Secretary of Health, Education and Welfare (HEW) for implementation in certain selected areas of New York State.[1] These projects required employable members of families receiving public assistance under the Aid to Families with Dependent Children (AFDC) program[2] in those areas to register for employment training and placement.[3] The formulation of the experimental work projects was a response to growing public and legislative hostility that threatened to result in a massive decrease in state AFDC funds.[4]

In *Aguayo v. Richardson*[5] appellants sought to enjoin New York State from implementing these state work projects on the grounds that the limited geographic basis[6] for their implementation violated equal protection requirements and that the federal approval of the programs was invalid. Following a lengthy discussion of preliminary issues, including the validity of the Secretary's approval of the projects,[7] the

1. 42 U.S.C. § 1315 (1970) is the demonstration project provision of the Social Security Act authorizing the approval of experimental programs. This section allows the Secretary to waive compliance with requirements of 42 U.S.C. § 602 (Supp. II, 1972) "to the extent and for the period he finds necessary to enable [a state] to carry out such [an experimental] project," if in his judgment the experimental project "is likely to assist in promoting the objectives" of the Social Security Act. This includes waiver of the requirement that a state plan for AFDC "shall be in effect in all political subdivisions of the State . . . ." 42 U.S.C. § 602(a)(1) (Supp. II, 1972).

2. 42 U.S.C. §§ 601-08 (1970). For a discussion of the background and scope of the AFDC program see King v. Smith, 392 U.S. 309 (1968).

3. N.Y. Soc. Serv. Law § 131 (McKinney Supp. 1972).

4. Aguayo v. Richardson, 473 F.2d 1090, 1103 (2d Cir. 1973), *cert. denied,* Aguayo v. Weinberger, 414 U.S. 1146 (1974).

5. 473 F.2d 1090 (2d Cir. 1973).

6. The State of New York sought to implement the projects in 14 welfare districts in New York City, two counties in the New York City metropolitan area, three upstate urban areas, and six counties throughout the State. *Id.* at 1094. The project areas apparently were chosen to provide a mixture of urban, suburban and rural welfare areas for assessing the impact and feasibility of the experimental projects.

7. Appellants claimed that the Secretary of HEW had exceeded his authority under 42 U.S.C. § 1315 (1970) in approving the experimental programs because: (1) the projects were not likely to assist in promoting the objectives of the Social Security Act; (2) 42 U.S.C. § 1315 (1970) does not permit the Secretary

Second Circuit Court of Appeals modified[8] and affirmed a prior district court denial of injunctive relief.[9]

The work relief projects, Public Services Work Opportunities Program (PSWOP) and Incentives for Independence (IFI), were developed by the State and approved by HEW on a one-year trial basis.[10] PSWOP, comprised of a number of urban, suburban and rural welfare

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to waive any requirements that might lessen or deny statutory rights or entitlements; (3) the Secretary granted his approval on the basis of inadequate information; (4) the projects cannot succeed; and (5) the approval did not expressly waive compliance with the federal Work Incentive Program (WIN), 42 U.S.C. § 630 *et seq.* (Supp. II, 1972). 473 F.2d at 1103-05, 1107-08. The court of appeals found that the Secretary had not exceeded his authority in approving the projects, noting, *inter alia,* that the Secretary was required only to exercise his "judgment" that the projects would further the objectives of the AFDC program and that the purposes of the New York projects were clearly within the purview of the purposes of the Social Security Act. *Id.* at 1105. The court also noted that the projects were not useless merely because the projects might not succeed; in fact, "[a]scertainment by actual demonstration [that the program could not work] would itself be a legitimate objective." *Id.* at 1106. The court also determined that the Secretary could "take into account the growing antagonism to the welfare system [and the need to satisfy the public] that every reasonable effort [was] being made to induce employable recipients of assistance to work . . . ." *Id.* at 1103.

Appellants' last objection was based on Dublino v. New York State Dep't of Social Serv., 348 F. Supp. 290 (W.D.N.Y. 1972), which held that the so-called New York Work Rules were pre-empted by the federal WIN program. The Supreme Court recently reversed this holding as to the pre-emption issue, while remanding the case to the district court on questions of conflict between certain state provisions and federal WIN requirements. New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405 (1973). For a discussion of the WIN program and its purposes see Graham, *Public Assistance: Congress and the Employable Mother,* 3 U. RICHMOND L. REV. 223 (1969); Comment, *Public Welfare "WIN" Program: Armtwisting Incentives,* 117 U. PA. L. REV. 1062 (1969).

8. The modification pertained to the 30-day suspension of benefits for refusal to participate in the experimental programs. Concerned with possible due process problems and cognizant of the serious impact of such a suspension requirement, the court of appeals temporarily enjoined the requirement. The court required a more thorough and deliberate investigation of the questions going to the merits of the suspension requirement. 473 F.2d at 1112.

9. Aguayo v. Richardson, 352 F. Supp. 462 (S.D.N.Y. 1972).

10. IFI was developed pursuant to N.Y. SOC. SERV. LAW § 29-a (McKinney Supp. 1972). The statutory authorization of PSWOP is unclear. The program does not fit within the requirements of § 29-a, but the State seemed to rely on N.Y. SOC. SERV. LAW § 350-k (McKinney Supp. 1972). The court interpreted § 350-k as providing for a statewide program, but since PSWOP's statutory authorization was not questioned, the court declined to raise the issue itself and joined the parties in assuming that the program was properly authorized under state law. 473 F.2d at 1094 n.2. For authorization of HEW's approval see notes 1, 7 *supra.*

districts,[11] provided employment for "employable"[12] AFDC recipients for whom regular private- and public-sector jobs and training were unavailable and could not be developed. Employment under PSWOP could include work for any state or local agency located in the recipient's county. PSWOP workers could not displace persons who were or otherwise might have been employed by the state. They could, however, perform work "which, because of budgetary problems or otherwise, would not be undertaken except for PSWOP."[13] Additionally, PSWOP required provision for child care arrangements,[14] reimbursements for certain work-related expenses,[15] and limitations on earnings[16] and wage rates.[17] The contemplated sanction for nonparticipation by eligible recipients was a 30-day suspension of benefits.[18]

The IFI project[19] was substantially identical to PSWOP in its work

11. For the geographical makeup of PSWOP see note 6 *supra*. Approximately 25% of the State's AFDC recipients resided in the areas included in the PSWOP program.

12. For "employability" definitions see N.Y. Soc. Serv. Law § 131 (McKinney Supp. 1972). Two additional exemptions from PSWOP participation included mothers or relatives caring for children under six years of age, and mothers or female caretakers of children if the father or other male relative in the home was registered for PSWOP. 473 F.2d at 1094 n.3.

13. 473 F.2d at 1094.

14. No eligible AFDC recipient could participate unless satisfactory child-care arrangements were made. *Id.* at 1095.

15. *See* N.Y. Soc. Serv. Law §§ 131-f, 350-k(6)(a), (b) (McKinney Supp. 1972). It is unclear what expenses actually would be reimbursed. Appellants charged that participation in PSWOP would result in a net reduction in income because the State would not reimburse for such items as cold-weather clothing, shoes or personal grooming items. 473 F.2d at 1095 n.4. 18 N.Y.C.R.R. § 385.10(e)(5) (1972) provided for reimbursement for transportation and lunches only "when essential to enable a recipient to participate in the work relief program;" such allowances were not to exceed $40 per month nor one dollar per day for lunch.

16. PSWOP earnings could not exceed the amount of a recipient's regular AFDC benefits. 473 F.2d at 1095. This requirement suggests that there was no actual work "incentive" under this program. Rather it was negative inducement; work or risk a loss of AFDC benefits. *See* notes 63, 65 *infra*.

17. The hourly rate for PSWOP work was the state minimum wage or the wage paid to state employees for comparable work, whichever was higher. Also, there was a 40-hour work week maximum. 473 F.2d at 1095.

18. 18 N.Y.C.R.R. § 385.7 (1972). The suspension requirement was enjoined by the court. *See* note 8 *supra*.

19. IFI involved 2.5% of the state's AFDC and Home Relief recipients and was implemented in three rural, suburban and urban welfare districts within or coextensive with the PSWOP areas. 473 F.2d at 1095.

obligations and benefits. IFI provided, however, full-time employment, full wages, and all fringe benefits normally received by state employees. In addition, a certain portion of a participant's IFI earnings were disregarded in determining eligibility for supplementary AFDC grants.[20] The overall effect was a possible increase in net income. The sanction for nonparticipation in IFI was a straight $66 per month reduction in AFDC benefits.[21]

In recent years, welfare litigation aimed at state AFDC programs has centered around two major issues. First, state AFDC eligibility requirements have been attacked for excluding from state programs persons otherwise eligible under federal AFDC requirements.[22] Secondly, the programs and their requirements have been attacked on the constitutional ground of violating equal protection.[23]

In the exclusion cases the courts, under federal supremacy clause theories, are willing to strike down state eligibility requirements that do not conform to federal AFDC requirements.[24] The courts recognize

20. *Id.* at 1096.

21. *Id.*

22. *See, e.g.,* King v. Smith, 392 U.S. 309 (1968); Woolfolk v. Brown, 325 F. Supp. 1162 (E.D. Va. 1971), *aff'd,* 456 F.2d 652 (4th Cir. 1972). The Social Security Act provides that a child is eligible for and entitled to AFDC benefits if he is "needy" and "dependent." 42 U.S.C. § 601 *et seq.* (1970). 42 U.S.C. § 602(a)(10) (Supp. II, 1972) further provides that AFDC assistance "shall be furnished with reasonable promptness to *all* eligible individuals." (Emphasis added.) 42 U.S.C. § 606 (1970) furnishes definitions of terms used in the federal legislation.

23. *See, e.g.,* Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968); Hagans v. Wyman, 471 F.2d 347 (2d Cir. 1973); Jefferies v. Sugarman, 345 F. Supp. 172 (S.D.N.Y. 1972).

24. U.S. CONST. art. VI, § 2; *see, e.g.,* Carleson v. Remillard, 406 U.S. 598 (1972) (holding invalid California's restriction on the federal "continued absence" requirement); King v. Smith, 392 U.S. 309 (1968) (holding invalid Alabama's "substitute father" regulation); X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 1970) (holding invalid New Jersey regulations that did not provide for "income disregard" as required by federal regulations); Woolfolk v. Brown, 325 F. Supp. 1162 (E.D. Va. 1971), *aff'd,* 456 F.2d 652 (4th Cir. 1972) (holding Virginia's work rule invalid for inconsistency with the federal WIN program); *cf.* Rosado v. Wyman, 397 U.S. 397 (1970) (holding that a state cannot alter its standard of need computation in order to avoid a federal requirement). *See also* Comment, *AFDC Eligibility Requirements Unrelated to Need: The Impact of* King v. Smith, 118 U. PA. L. REV. 1219 (1970).

"The plain language, legislative history, and purposes of the Act make clear that so long as one is needy and qualifies . . . within the meaning of § 406, 42 U.S.C.A. § 606, no further restriction on eligibility for assistance is permissible." Lopez v. Vowell, 471 F.2d 690, 693 (5th Cir.), *cert. denied,* 411 U.S. 939 (1973).

that states "may to some extent vary their eligibility requirements from federal standards"[25] and that states have a valid interest in preserving the fiscal integrity of their programs that are supported by limited AFDC resources.[26] This state interest, however, may not be protected by violating federal eligibility standards.[27]

In the equal protection cases, however, the courts generally are unwilling to strike down state welfare programs.[28] These decisions consistently follow the rationale and standards set forth in *Dandridge v. Williams*.[29] While not entirely insensitive to the fact that "public welfare assistance . . . involves the most basic economic needs of impoverished human beings,"[30] the *Dandridge* Court found that the classification involved was rationally related to "the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor."[31] The Court stated:

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25. Townsend v. Swank, 404 U.S. 282, 286 (1971).

26. *Id.* at 291.

27. *Id.* The state's economic interest can be protected by its power to set the *level* of benefits and the standard of need. *See, e.g.*, King v. Smith, 392 U.S. 309, 334 (1968); Comment, *AFDC Eligibility Requirements Unrelated to Need, supra* note 24, at 1241-42.

28. *See* cases cited note 23 *supra*. This observation holds true despite the Supreme Court's earlier decisions in Goldberg v. Kelly, 397 U.S. 254 (1970), and Shapiro v. Thompson, 394 U.S. 618 (1969). Dicta in *Shapiro* and Justice Harlan's interpretation of the majority opinion in his dissent were read as suggesting that the "compelling state interest test" was applicable to welfare cases because state-created welfare classifications might deny persons the bare necessities of life. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 14 (1972). Goldberg v. Kelly, 397 U.S. 254 (1970), dealing with a due process issue, spoke of the "brutal need" of welfare recipients for the essentials of food, clothing, housing and medical care provided by AFDC. *Id.* at 261. The Court also viewed public assistance as more than charity, analogizing welfare entitlements to "property" rather than "gratuities." *Id.* at 262 n.8. The *Goldberg* Court essentially withdrew the right-privilege distinction, at least in the welfare area. *Id.* at 262.

29. 397 U.S. 471 (1970). *Dandridge* involved a suit against Maryland's maximum grant regulation of AFDC benefits as constituting an invidious discrimination against large families in violation of equal protection. For discussions of *Dandridge* and its impact see Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 60-71 (1970); Comment, *Legal Rights of AFDC Recipients After* Rosado v. Wyman *and* Dandridge v. Williams, 21 AM. U.L. REV. 207 (1971).

30. 397 U.S. at 485.

31. *Id.* at 486.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[32]

According to *Dandridge,* this "reasonable basis" test should be applied in the areas of economic and welfare regulation.[33]

The courts have followed the *Dandridge* standard of evaluating equal protection issues in welfare cases, further enunciating the states' legitimate interests in apportioning their finite resources[34] and rejecting any notion that a "fundamental right" is at stake.[35] Unless "the classification rests on grounds wholly irrelevant to the achievement of the State's objective,"[36] the courts will not set aside the statute nor will

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32. *Id.* at 485, *quoting* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

33. 397 U.S. at 484-85. Morey v. Doud, 354 U.S. 457, 465 (1957), modified somewhat the "traditional" equal protection test stated in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), by adding the requirement that "a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Dandridge,* however, appears to restrict the additional requirement of *Morey* to a lesser standard in welfare cases: whether any state of facts can reasonably be imagined to support the statute. *See* Dandridge v. Williams, 397 U.S. 471, 508 (Marshall, J., dissenting); 35 ALBANY L. REV. 416 (1971). *See also* McGowan v. Maryland, 366 U.S. 420 (1961).

There is, however, some suggestion that the Supreme Court may be revising its approach to equal protection to conform more closely to the *Morey* standard by adding the criterion of an "appropriate" governmental interest. *See, e.g.,* Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Gunther, *supra* note 28, at 17-24.

34. Hagans v. Wyman, 471 F.2d 347 (2d Cir. 1973); *accord,* King v. Smith, 392 U.S. 309 (1968). *Compare* Richardson v. Belcher, 404 U.S. 78 (1971), *with* X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 1970).

35. Dandridge v. Williams, 397 U.S. 471 (1970); *accord,* Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973). The *Feinerman* court was reluctant to recognize a right as "fundamental" unless it was set out in the Constitution. *Cf.* People v. Olague, 31 Cal. App. 3d 5, 106 Cal. Rptr. 612 (Super. Ct. 1973). *But cf.* Sawyer v. Sigler, 320 F. Supp. 690 (D. Neb. 1970) (intimating that the right to medical treatment is a constitutional right and holding that the state cannot require a person to choose between a statutory right and a constitutional right). *See generally* Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972); Comment, *Legal Rights of AFDC Recipients, supra* note 29, at 215-16.

36. McGowan v. Maryland, 366 U.S. 420, 425 (1961). *See generally* Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973).

they substitute their own judgments or economic and social philosophies for those of the state.[37]

The state has broad powers in the areas of economic and social welfare and a wide range of discretion in the allocation of public assistance funds.[38] Courts and legislatures therefore recognize that growing welfare rolls and dramatic increases in the costs of welfare imperil the very future of welfare programs.[39] Awareness of such realities has led the courts to uphold the right of the states to experiment with these programs.[40] The state is viewed as a "laboratory"[41] that has a right to tackle the problems of the poor "one step at a time"[42] without being subjected to a "constitutional straightjacket."[43]

The Second Circuit Court of Appeals' decision in *Aguayo* is consistent with the present trend of welfare law and equal protection adjudication. Following the *Dandridge* analysis, the court of appeals refused to invoke a "strict scrutiny" test of equal protection despite the fact that "the most basic economic needs of impoverished human beings"[44] were at stake. Relying heavily on *Dandridge* and its progeny, the court looked to several other developing equal protection standards,[45] but found that even under these stricter standards there was no

37. *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970); Rosado v. Wyman, 397 U.S. 397 (1970); Hagans v. Wyman, 471 F.2d 347 (2d Cir. 1973); Schwartz v. Talmo, 295 Minn. 356, 205 N.W.2d 318 (1973).

38. *See, e.g.,* Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); King v. Smith, 392 U.S. 309 (1968).

39. California Welfare Rights Organization v. Richardson, 348 F. Supp. 491 (N.D. Cal. 1972).

40. *See* California Welfare Rights Organization v. Richardson, 348 F. Supp. 491 (N.D. Cal. 1972); 42 U.S.C. § 1315 (1970). *Compare* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969), *with* Kaelin v. Warden, 334 F. Supp. 602 (E.D. Pa. 1971). *See generally* Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State,* 15 U.C.L.A.L. REV. 787 (1968).

41. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

42. McGowan v. Maryland, 366 U.S. 420, 426 n.3 (1961). *See generally* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935).

43. Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Aguayo v. Richardson, 473 F.2d 1090, 1109 (1973), *cert. denied,* Aguayo v. Weinberger, 414 U.S. 1146 (1974).

44. 473 F.2d at 1109.

45. *See* note 33 *supra.*

denial of equal protection in the implementation of PSWOP and IFI. The right of the state to experiment in the welfare area controlled.[46]

The state's right to experiment, however, was not challenged by appellants. Rather, they were concerned with the manner in which the state was experimenting. Claiming that certain AFDC recipients would be forced to participate in the programs solely on the basis of their residence, appellants objected to the state's geographic classification because residency was unrelated to the purposes of the AFDC program.[47]

Geographic classifications do not per se render a statute constitutionally invalid.[48] The state may create different classifications provided they bear a rational relation to the statutory purpose. Thus, courts have upheld statutes differentiating among citizens of different counties if there were differences among the counties that required or justified disparate treatment.[49]

The *Aguayo* court found that the program areas were selected in order to provide an adequate sampling of welfare recipients of various ethnic backgrounds as well as those from urban, suburban and rural areas.[50] Accordingly, the court determined that the classification was neither arbitrary nor unreasonable by justifying it on the basis of the purpose of the experiment rather than the purposes of the AFDC program.[51] Appellants contended, however, that the areas were not chosen

46. 473 F.2d at 1109-10.

47. Brief for Appellants at 33-34, Aguayo v. Richardson, 473 F.2d 1090 (1973); Reply Brief for Appellants at 2, *id.* In Damico v. California, [1968-1971 Transfer Binder] CCH POVERTY L. REP. ¶ 10,478 (N.D. Cal. 1969), the federal district court reasoned that the "paramount goal of the AFDC program was to fullfill the subsistence needs of dependent children." Rothstein, *Business as Usual?: The Judicial Expansion of Welfare Rights,* 50 J. URBAN L. 1, 12 (1972). 42 U.S.C. § 601 (1970) states that the purposes of the AFDC program are to

> encourag[e] 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 . . . parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

48. *See, e.g.,* Griffin v. County School Bd., 377 U.S. 218 (1964); McGowan v. Maryland, 366 U.S. 420 (1961); Salsburg v. Maryland, 346 U.S. 545 (1954).

49. *See, e.g.,* McGowan v. Maryland, 366 U.S. 420 (1961); Salsburg v. Maryland, 346 U.S. 545 (1954); Washington v. United States, 401 F.2d 915 (D.C. Cir. 1968); Kaelin v. Warden, 334 F. Supp. 602 (E.D. Pa. 1971); Horowitz & Neitring, *supra* note 40.

50. 473 F.2d at 1108-09.

51. According to the State, the purposes of the experimental programs were to "determine whether [PSWOP and IFI were] administratively feasible or efficient,

because of any unique characteristics or needs, but precisely because they were typical of the rest of the State in terms of welfare characteristics. Therefore, the classification was not rational because it was not reasonably related to "dependence, employability or potential for self-support."[52] The court disagreed, finding a random but rational basis to the selection.[53] "The Equal Protection clause does not place a state in a vise where its only choices in dealing with the problems of welfare are to do nothing or plunge into statewide action."[54]

In holding that the programs did not deny equal protection, the court relied on the limited duration and benevolent design of the experiment, the broad powers of the state in economic and social areas, and the hostile public attitude toward welfare.[55] The court's analysis implied that the state is to have the widest possible latitude in the area of welfare experimentation and that equal protection does not have the same meaning for welfare "guinea pigs" as it does for all other classes of citizens.[56]

Apparently, for the purposes of equal protection analysis, "welfare" has become a magic word. When welfare is involved, the courts tend to

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and whether [they] modifie[d] the attitude of the public toward welfare." 473 F.2d at 1105. The objectives of the particular projects, if they were successful, were to employ able-bodied adult recipients, decrease welfare costs, increase the initiative, self-respect and independence of recipients, and improve the public attitude toward welfare. *Id.*

The sampling methodology was related to experimentation. Although experimentation is not per se a purpose of AFDC, it is provided for in 42 U.S.C. § 1315 (1970). *See* notes 1, 7 *supra.*

52. Reply Brief for Appellants at 2, Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973). These three criteria are set out in the statement of purpose of the AFDC program. 42 U.S.C. § 601 (1970).

53. 473 F.2d at 1109.

54. *Id.* at 1109-10.

55. *Id.* at 1103, 1108-10.

56. In fact, federal appellees implied in their brief that the experimental programs might well constitute a denial of equal protection, but that the constitutional violation was justified because

> the two demonstration programs . . . [were] not designed to maintain such distinctions indefinitely. To the contrary, the programs [were] of limited duration and [were] intended only as pilot programs which as ultimately adopted, if at all, [would] discard all distinctions based on geographical location and [would] apply uniformly . . . to all AFDC recipients in the state.

Brief for Federal Appellees at 18, Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973).

apply only minimal scrutiny to the alleged discrimination.[57] Welfare matters are too complex and the interests involved are too great[58] for the courts to adopt automatically a "hands-off" approach in deferring to legislative judgment.[59] Although the *Aguayo* court took note of Justice Jackson's caveat in his concurring opinion in *Railway Express Agency, Inc. v. New York*[60] concerning the dangers of imposing laws only upon a minority for reasons of political expediency, the court found it inapplicable to PSWOP and IFI.[61] Yet, in light of the court's emphasis on the hostile public attitude toward New York's welfare system, it becomes apparent that the purpose of the experimental programs was to provide a panacea for the public's attitude rather than a viable and effective welfare program for the poor.

Further, it may be questioned whether improving public attitudes toward welfare is a legitimate state purpose that can justify the imposition of additional burdens upon the receipt of public assistance.[62]

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57. *See* Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 80-81 (1971). In both of these cases, the Supreme Court refused to subject welfare benefit allocations to strict scrutiny. *See generally* Schilb v. Kuebel, 404 U.S. 357 (1971); Gunther, *supra* note 28. The Supreme Court's decision in *Schilb*, although not a welfare case, indicates that the Court will apply "minimal scrutiny to legislation in areas ordinarily evoking sensitive review, where the legislation is reformist in nature." *Id.* at 13 n.56.

58. The extent to which protection should be given to the "right" to welfare benefits "depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest . . . ." Goldberg v. Kelly, 397 U.S. 254, 263 (1970). The recipient's interest often is to obtain the bare necessities of life. Shapiro v. Thompson, 394 U.S. 618 (1969).

59. *See generally* O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 CALIF. L. REV. 443 (1966); Note, *Legislative Purpose, Rationality, and Equal Protection,* 82 YALE L.J. 123 (1972). It also could be argued that this and other welfare decisions reflect an abdication of judicial responsibility.

60. 336 U.S. 106, 111 (1949). "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* at 112. Justice Jackson noted that the best way to invite such arbitrary action was to "allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Id.* at 112-13; *cf.* California Welfare Rights Organization v. Richardson, 348 F. Supp. 491, 495-96 (N.D. Cal. 1972).

61. 473 F.2d at 1109.

62. Justice Marshall, dissenting in Dandridge v. Williams, 397 U.S. 471, 508 (1970), argued that such a purpose was not consistent with nor within the purposes of the Social Security Act.

This question assumes even greater importance under a scrutiny of "work for relief" programs[63] and their effectiveness. The real tragedy of these two experimental programs is that they were modeled after the federal WIN program that, by most standards, has been a failure.[64] Generally, compulsory work programs have been expensive and unsuccessful.[65]

The principal objections to these "work for relief" projects include the inappropriateness of work provided, the programs' high cost relative to direct relief, and the lack of incentive from the money they generate for participants.[66] Yet New York's experimental projects embodied all of these defects. It is highly unlikely that New York could implement these programs on a statewide basis and still realize its objective of decreasing the cost of welfare. Statewide implementation would require an increase in both the supervisory and administrative manpower and the supportive services, such as child-care facilities. It is doubtful whether New York could create enough jobs to make statewide implementation feasible. Even though the programs were unsound and unworkable, the court determined that additional and substantial burdens upon welfare recipients were justified by the state's right to experiment.

Taking into consideration the present state of the welfare system and the states' legitimate interest in protecting the fiscal integrity of their welfare programs, the states *should* be allowed to experiment. The courts, however, in deciding whether a particular experiment is constitutionally permissible, must look beyond the state's own interests. Past failures and experiences coupled with the needs and interests of welfare recipients also must be considered, rather than allowing the courts to abdicate their responsibilities toward *all* the people.

Gayle L. Crose

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63. *See generally* O'Neil, *supra* note 59. For a distinction between work relief and work for relief programs see Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 CALIF. L. REV. 511, 534 n.77 (1966). PSWOP and IFI clearly fall into the latter category.

64. *See* 119 U. PA. L. REV. 485 (1971).

65. *See* 4 COLUM. J.L. & SOC. PROB. 197 (1968). *See generally* Wedemeyer & Moore, *The American Welfare System*, 54 CALIF. L. REV. 326 (1966).

66. *See* Rosenheim, *supra* note 63.