DEVELOPMENTS IN WELFARE LAW: AFDC SHELTER REDUCTIONS

THOMAS M. WALSH*

Public assistance programs have long stimulated controversy. Virtually every year courts have been faced with challenges to state legislation that attempts to terminate or reduce public assistance benefits.[1] One relatively new and extremely volatile area of litigation is shared housing. In dealing with this issue in the past, the courts have consistently refused to allow states to shorten their welfare rolls or reduce their budgets by conclusively presuming that recipients who share housing have either reduced need or more available income.[2]

In 1974 the courts heard challenges in two of the nation's largest welfare states, New York and California,[3] to legislation that attempted to reduce assistance to recipients of Aid to Families with Dependent Children (AFDC)[4] who were sharing housing. In *Van Lare v. Hurley*[5] and *Cooper v. Swoap*[6] the courts invalidated such reductions and cast what may have been the final blow to legislation attempting to reduce AFDC benefits based on shared housing in the absence of a legal obligation to support. After a short review of the law as to shared housing, this Note will focus on the impact of *Van Lare* and *Cooper* and discuss the remaining alternatives by which reductions may still be effected.

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* B.A., Wabash College, 1973; J.D. (expected), Washington University, 1976.

1. This increase in the amount of welfare litigation is due in large part to the recognition of the recipient's right to challenge state welfare procedures and the establishment of the OEO Legal Services Program. *Developments in Welfare Law —1973*, 59 CORNELL L. REV. 859, 861-62 (1974).

2. *See* King v. Smith, 392 U.S. 309 (1968); cases cited notes 42-44 *infra.*

3. New York, California and Pennsylvania had the largest caseloads in 1971. Lurie, *Estimates of Tax Rates in the AFDC Program*, 27 NAT'L TAX J. 93, 99 (1974).

4. 42 U.S.C. §§ 601-10 (1970), *as amended*, (Supp. IV, 1974).

5. 421 U.S. 338 (1975).

6. 11 Cal. 3d 856, 524 P.2d 97, 115 Cal. Rptr. 1 (1974).

I. The AFDC Statute and Prior Decisions

The AFDC program was begun in 1935 to provide assistance to children deprived of parental support.[7] It is but one of four categorical public assistance programs rendering help to the needy.[8] By design it is a program of "cooperative federalism,"[9] whereby financing is furnished by the state and federal governments on a matching fund basis.[10] The administration of the program, however, is left almost exclusively to the states.

While participation in the program is voluntary, every state has chosen to take part in the program, and forty-nine states provide a separate shelter allowance within the scheme.[11] The participating

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7. Social Security Act of 1935, 42 U.S.C. §§ 601-44 (1970), *as amended*, (Supp. IV, 1974). *E.g.*, King v. Smith, 392 U.S. 309, 325 (1968) (protection of child paramount goal); Holloway v. Parham, 340 F. Supp. 336, 342 (N.D. Ga. 1972) (paramount goal to protect needy and dependent children); Woods v. Miller, 318 F. Supp. 510, 513-14 (W.D. Pa. 1970) (primary object of AFDC to encourage care of dependent child in his home or in another home); Norton v. Lavine, 74 Misc. 2d 590, 344 N.Y.S.2d 81, 91 (Sup. Ct. 1973) (protection of child paramount goal). For a comprehensive study of the history of the AFDC program see W. Bell, Aid to Dependent Children (1965).

8. There are three other aid programs under the Social Security Act: Old Age Assistance, Social Security Act §§ 101-06, 42 U.S.C. §§ 301-06 (1970) (OAS); Aid to the Blind, *id.* §§ 1001-06, 42 U.S.C. §§ 1201-06 (AB); Aid to the Permanently and Totally Disabled, *id.* §§ 1151-55, 42 U.S.C. §§ 1351-55 (ATD).

9. King v. Smith, 392 U.S. 309, 316 (1968).

10. The federal government pays the majority of each states' total regular expenditures for AFDC. Social Security Act § 403(a)(1)(A), 42 U.S.C. § 603(a)(1)(A) (1970). The state's share, although a small portion, may still be quite substantial in light of the recent rise in total expenditures. *See* note 21 *infra*.

11. King v. Smith, 392 U.S. 309, 311, 316-17 (1968); Boucher v. Minter, 349 F. Supp. 1240, 1242 n.2 (D. Mass. 1972); Social Security Act §§ 401-02, 42 U.S.C. §§ 601-02 (1970); 20 Mercer L. Rev. 325, 326-27 n.12 (1969).

States employ either the flat grant or allowance system to compute the level of their AFDC payments. Under a flat grant system, the schedule of payments is based on family size. Throughout the state, every family of the same size will receive an equal grant, less any other income the particular family is receiving. There is no consideration of the individual needs of each family. For additional explanation of the validity and mechanics of the flat grant system see Rosado v. Wyman, 397 U.S. 397 (1970), and Houston Welfare Rights Organization, Inc. v. Vowell, 391 F. Supp. 223 (S.D. Tex. 1975).

Under an allowance system, the state department of welfare determines the amount each family is to receive, which is the sum of that family's actual expenditures for budgeted items. Indiana's statute is typical:

> The amount of assistance which shall be granted for any dependent child shall be determined by the county department with due regard to the re-

states must submit a plan[12] to the Secretary of Health, Education and Welfare (HEW) for approval.[13] The Act requires HEW to approve the state plan, as long as it does not contravene any of the federal criteria.[14] Central to a determination of the state plan's adherence to federal criteria is the requirement that states furnish aid with "reasonable promptness to all eligible individuals."[15]

The AFDC program is designed particularly to benefit those children who have "been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of the parent."[16] Aid is furnished as long as the child resides with a relative and is under the age of eighteen, or until age twenty-one if the child is attending school.[17] Benefits in either situation are granted only if a parent is absent from the home.[18]

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sources and necessary expenditures of the family and the conditions existing in each case . . . and shall be sufficient . . . to provide the child with a reasonable subsistence compatible with decency and health, taking into consideration all needs essential to the well-being of the child.

IND. ANN. STAT. § 12-1-7-3 (Burns Supp. 1974). In determining the amount of the grant, the department looks to various factors such as the age and sex of each member of the family. Under the allowance system the legislature usually sets a ceiling on the amount payable to the recipient each month.

12. 45 C.F.R. § 201.3 (1972), *as amended*, 45 C.F.R. § 233. 90(a) (1974).

13. Social Security Act § 402(b), 42 U.S.C. § 602(b) (1970). The New York plan had been approved. Taylor v. Lavine, 497 F.2d 1208, 1210 (2d Cir. 1974), *rev'd sub nom.* Van Lare v. Hurley, 421 U.S. 338 (1975).

14. Social Security Act § 402(b), 42 U.S.C. § 602(b) (1970). Among the criteria enumerated in § 602(a) are: (1) a mandatory plan in effect in all of the political subdivisions of the state; (2) financial participation by the state; (3) a single state agency either administering or supervising the plan; (4) provision for a fair hearing for those whose claims are delayed or denied; (5) proper administrative methods (*e.g.*, hiring of employees); (6) submission of reports requested by the Secretary of HEW; and (7) consideration of income available to the child in determining aid. *Id.* § 402(a), 42 U.S.C. 602(a) (Supp. III, 1973). For a discussion of Condition X, a criterion added by HEW, under which state plans were rejected if they imposed stricter eligibility requirements than the Secretary considered rational in light of the purposes of public assistance, see Note, *Welfare's "Condition X,"* 76 YALE L.J. 1222 (1967).

15. Social Security Act § 402(a)(10), 42 U.S.C. § 602(a)(10) (1970); *see* Note, *AFDC Eligibility Conditions Unrelated to Need: The Impact of Dublino*, 49 IND. L.J. 334, 335 (1974).

16. Social Security Act § 406(a)(10), 42 U.S.C. § 606(a)(10) (1970).

17. *Id.* § 406(a)(2), 42 U.S.C. § 606(a)(2) (1970); *see* Dandridge v. Williams, 397 U.S. 471, 479 (1970) (Congress intended to help children through the family structure).

18. 42 U.S.C. § 606(a) (1970). Since 1961 aid has been available under the unemployed parent program to children, both of whose parents are present in the

A determination of eligibility depends primarily on the standard of need set by the state. Since the program's inception, the states' autonomy in setting their own standards of need and levels of benefits has been recognized.[19] The clash between federal criteria and state plans occurs when a state attempts "either to adopt more limited definitions of the target category or to impose collateral conditions on eligibility."[20]

Because of the phenomenal rise in AFDC expenditures,[21] states have sought various means to limit their expenses. An early method, sub-

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home only if the child suffers deprivation because of the unemployment of his father. Social Security Act § 407, 42 U.S.C. § 607 (1970). *See* Note, *Social Welfare Law After the "Man-in-the-House," What?—Is* King v. Smith *the Answer?* 15 How. L.J. 265, 271 (1969).

19. H.R. REP. No. 615, 74th Cong., 1st Sess. 12, 24 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 4, 36 (1935); Note, *Social Welfare After the "Man-in-the-House," supra* note 18, at 269-70. States are granted wide latitude in determining a family's standard of need. One author has summarized the states approach as including:

> (1) a standard amount for food, clothing, and other basic needs except shelter, which varies according to the size of the family and, in some states, the age and sex of the members;
> (2) the actual amount paid for rent up to a maximum or, in some states, a fixed amount regardless of actual rent; and
> (3) an amount for special needs that arise for families in unusual circumstances, such as special diets and transportation to a doctor.

Lurie, *supra* note 3, at 94. States thus determine the amount of benefits to be paid by either paying the entire difference between the standard of need and countable income, a certain percentage of the difference, the difference between a percentage of the standard of need and countable income, or a flat grant regardless of actual need. *Id.* at 95-96. *See* Jefferson v. Hackney, 406 U.S. 535 (1972); note 11 *supra.*

20. Note, *AFDC Eligibility Conditions Unrelated to Need, supra* note 15, at 335-36.

21. In fiscal 1975 welfare expenditures increased 20%, with AFDC rolls, the largest family assistance program, reaching a record high. An average of 3.3 million families (11,078,000 individuals) received benefits monthly in fiscal 1975, a 5.6% increase over fiscal 1974. Similarly, benefits per recipient averaged $64.30 in fiscal 1975, an increase of $7.05 over fiscal 1974. St. Louis Post-Dispatch, Oct. 17, 1975, at 2B, col. 5.

This phenomenal rise in welfare expenditures comes on the heels of a 25 year period in which expenditures had remained fairly stable. The dramatic rise began during the Democratic administrations of the 1960's and has been attributed to the political developments (*e.g.*, civil rights, civil disorder, and expanded legal, medical and community action programs) of that era. Steiner, *Reform Follows Reality: The Growth of Welfare*, 34 PUB. INTEREST 47, 64-65 (1974). The problem of increasing welfare costs is particularly acute in states that have statutory or constitutional ceilings on the total amount that the state can spend on public welfare. Note, *What Remains of Federal AFDC Standards After Jefferson v. Hackney?*, 48 IND. L.J. 281, 281 n.7 (1972). For a discussion of the recent federal response to

sequently rejected by Congress, was the use of waiting lists, whereby new applications were held pending a decrease in present recipients or an increase in available funds.[22] Another method was the "suitable home" requirement that stood for twenty-five years until Congress acted to remove this requirement in 1961 and 1962.[23] More recently, states have attempted to curtail AFDC costs by reducing the amount of assistance given to each eligible family as well as by reducing the total number of eligible recipients.[24] The courts, however, have consistently rejected states' attempts to eliminate or reduce the amount of assistance to recipients through the technique of conclusively presuming that "benefits" result from shared housing.

The first major challenge to such conclusive presumptions heard by the Supreme Court was *King v. Smith*.[25] AFDC recipients challenged Alabama's "substitute father" regulation that declared an AFDC family ineligible for benefits if the mother cohabited with an able-bodied man.[26] Under the state's rationale a "substitute parent" was a non-absent parent within the meaning of the Social Security Act; since aid is furnished only when a parent is continually absent from the home, no aid need be furnished to families with which a man cohabits.[27]

Neither of Alabama's asserted state interests were found sufficient to uphold the regulation. First, although the Court recognized the validity

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spiraling AFDC costs see Note, *Relative Responsibility in AFDC: Problems Raised by the NOLEO Approach—"If at First You Don't Succeed . . . ."*, 9 URBAN L. ANN. 203 (1975).

22. *See* Social Security Act § 402(a)(10), 42 U.S.C. § 602(a)(10) (1970); H.R. REP. No. 1300, 81st Cong., 1st Sess. 48 (1949). *See also* Dandridge v. Williams, 397 U.S. 471, 490 (1970) (Douglas J, dissenting).

23. The suitable home requirement required the caseworker's personal evaluation of the quality of the welfare home, often including a judgment of the mother's moral conduct. If the home was deemed unsuitable for the child, aid would not be granted. Congressional amendments in 1961 and 1962 prohibited the termination of benefits based on the suitability of the home, but allowed removal of the child to a more suitable environment. Note, *What Remains of Federal AFDC Standards After Jefferson v. Hackney?*, *supra* note 21, at 283.

24. *Id.* at 281. *See* cases cited notes 42-44 *infra.*

25. 392 U.S. 309 (1968). For discussions of *King* see 18 AM. U.L. REV. 603 (1969); 18 BUFFALO L. REV. 623 (1969); 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 167 (1968); 15 LOYOLA L. REV. 371 (1969); 47 N.C.L. REV. 228 (1968); 47 TEX. L. REV. 349 (1969).

26. Under the Alabama scheme sexual relations between the parties as infrequently as once every six months may have been sufficient to establish cohabitation. 392 U.S. at 314.

27. *Id.* at 313. *See* note 16 and accompanying text *supra.*

of Alabama's interest in regulating the morality of its citizens, it found the regulation invalid as a flat denial of aid to needy children.[28] Secondly, Alabama's asserted interest in placing informal marriages on par with formalized marriages was also held invalid. The Court found the two types of living arrangements totally unequatable in the context of the AFDC program, since only the married father has a duty to support the children.[29] From this conclusion the Court reasoned that the term "parent" in the Act[30] includes only those bearing a legal support obligation.[31]

Although *King* invalidated the use of the man-in-the-house rules in determining eligibility, twelve states continued to include the man-in-the-house's income in the budget of the AFDC family, thereby reducing their benefits.[32] In response to this situation, HEW promulgated a regulation defining "parent" pursuant to *King*, both for establishing eligibility and for determining the amount of assistance.[33] The regulation mandates that in the absence of a legal support obligation the states consider only income that is actually and currently available to support the child when determining the income and resources of the recipient family.

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28. 392 U.S. at 320; *see* 18 AM. U.L. REV. 603, 604-05 (1969).

29. 392 U.S. at 327.

30. Social Security Act § 406(a)(1), 42 U.S.C. § 606(a)(1) (1970); *see* text at note 16 *supra.*

31. 392 U.S. at 329. The Court found repeated references in the Act's legislative history to "breadwinner," "wage-earner," and "father" to describe the kind of "parent" covered by the Act. Accordingly, the Court deduced that Congress had intended to define "parent" as one legally obligated to support the child. *Id.* at 328. For the legislative history see H.R. REP. No. 615, *supra* note 19, at 10; S. REP. No. 628, *supra* note 19, at 17-18.

32. Pollack, *Man-in-the-House Rules After* King v. Smith: *New HEW Regulations*, 14 WELFARE L. BULL. 19, 21 (1968); Note, *AFDC Income Attribution: The Man-in-the-House and Welfare Grant Reductions*, 83 HARV. L. REV. 1370, 1377 (1969) [hereinafter cited as Note, *AFDC Income Attribution*].

33. 45 C.F.R. § 203.1 (1969), *as amended*, 45 C.F.R. § 233.90(a) (1974). The regulation provides in part:

> In establishing the financial eligibility and the amount of 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 [person legally obligated to support the child under state law] will be considered available for children in the household in the absence of proof of actual contributions.

Id.

Several states thought the new HEW regulation conflicted with section 402(a)(7) of the Social Security Act, which requires states to include the income of any individual whom the state determines should be included.[34] The states argued that the HEW regulation requires the inclusion of the income of any person residing in the home.[35] The Supreme Court, however, felt a careful reading of the regulation showed that it was intended to include only "essential persons"—those whose presence the state deemed beneficial to the AFDC family's stability and were thus included in the recipient family's budget.[36]

Despite this seemingly definitive stance taken by the Court, the states continued to use regulations based on shared housing to terminate or reduce AFDC payments. The courts have relied heavily on *King* and *Lewis v. Martin*[37] to invalidate subsequent state regulations that employ shared housing restrictions, applying the reasoning in those two cases to reduction as well as termination of benefits.[38] Under

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34. The statute requires that in determining need the state must consider "any other income and resources of any other individual . . . living in the same home . . . whose needs the State determines should be considered in determining the needs of the child or relative claiming . . . aid." Social Security Act § 402(a)(7), 42 U.S.C. § 602(a)(7) (1970).

35. Note, *AFDC Income Attribution*, *supra* note 32, at 1377-78.

36. Shapiro v. Solman, 396 U.S. 5 (1969), *aff'g* 300 F. Supp. 409 (D. Conn. 1969); *see* Note, *AFDC Income Attribution*, *supra* note 32, at 1378. In *Solman* the Court invalidated a regulation that operated to terminate or reduce benefits. *See* 45 C.F.R. § 233.20(a)(2)(vi) (1974).

37. 397 U.S. 552 (1970). *Lewis* followed *King*, holding that in determining the resources available to the child California could not consider the income of a non-adopting stepfather or man-adopting-the-role-of-spouse, since he had no legal obligation to support the child. At the core of these decisions is the concept that the federal objective of aiding the needy dependent child is paramount. This mandates the finding that a reduction is as violative of federal policy as a termination, for the dependent child is just as likely to suffer in either case.

38. Shortly after *King*, the United States Supreme Court affirmed the invalidation of a Connecticut regulation that presumed the income of a stepfather available to the AFDC family. Shapiro v. Solman, 396 U.S. 5 (per curiam), *aff'g* 300 F. Supp. 409 (D. Conn. 1969). The Connecticut regulation, unlike those at issue in *King* and *Lewis*, did not mandate only a termination because of the stepfather's presence, but effectuated either a termination or a reduction of benefits based on the stepfather's income level. The Court relied on *King*, in its per curiam affirmance of the district court decision, thus making it clear that the *King* rationale extends to reductions as well as terminations. Since then federal and state courts have treated reductions and terminations alike, recognizing their similar impact on the dependent child. Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 314 A.2d 362 (1974), serves as a recent example. The New Jersey regulation at issue in *Hausman* provided for a payment of $107.00

this rationale courts have consistently invalidated regulations attempting to utilize a conclusive presumption that a person lodging in an AFDC household contributes to the support of the family. The courts have adamantly refused to recognize the states' "economies of scale"[39] argument, finding that absent an actual contribution by the lodger, the recipient's expenditures remain unchanged.[40] If a reduction in benefits were effected absent a showing of actual contribution, the real object of the program—the needy child—would suffer.[41] State regulations that employ conclusive presumptions have thus been invalidated, whether they pertain to a non-legally responsible stepfather,[42] a non-legally responsible relative,[43] or a non-legally responsible unrelated person.[44] The cases all seem to stand for the principle that only *actual income*

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monthly per person for a household of two, but reduced the per capita payment to $94.00 where the household was enlarged to three persons by the presence of a non-eligible person. *Id.* at 205-06, 314 A.2d at 364. Relying on *King* and *Lewis*, the court rejected the state's argument that its schedule simply reflected the economies of scale, shelter costs remaining constant while the number of persons living there increased. The court found the state's "economies of scale" theory to be an impermissible irrebutable presumption that the lodger was paying his share of the expenses. *Id.* at 207-08, 314 A.2d at 365-66. *See, e.g.*, cases cited notes 42-44 *infra*.

39. "[U]nder the economies of scale theory, five persons living in a household of six and contributing their share of total costs can live more cheaply than five persons living in a household of five." Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298, 302 (N.D. Ind. 1973).

40. *See, e.g.*, Jenkins v. Georges, 312 F. Supp. 289, 291-92 (W.D. Pa. 1969); Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 208, 314 A.2d 362, 365-66 (1974).

41. Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 208, 314 A.2d 362, 366 (1974); *see* note 37 *supra*.

42. Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972); Boucher v. Minter, 349 F. Supp. 1240 (D. Mass. 1972); Gaither v. Sterret, 346 F. Supp. 1095 (N.D. Ind.), *aff'd*, 409 U.S. 1070 (1972); X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 1970), *aff'd sub nom.* Engleman v. Amos, 404 U.S. 23 (1971); Ojeda v. Hackney, 319 F. Supp. 149 (N.D. Tex. 1970); Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), *aff'd*, 396 U.S. 5 (1969).

43. Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972); Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971); Jenkins v. Georges, 312 F. Supp. 289 (W.D. Pa. 1969); People v. Gilbert, 1 Cal. 3d 475, 462 P.2d 580, 82 Cal. Rptr. 724 (1969); *cf.* Rodriguez v. Vowell, 472 F.2d 622 (5th Cir. 1973); Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972).

44. Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298 (N.D. Ind. 1973); Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 314 A.2d 362 (1974).

may be considered when determining the amount of aid an AFDC family is to receive.[45]

II. Shared Housing with Non-Recipients

A. *Van Lare v. Hurley*

In light of the consistent and seemingly definitive stance taken by the courts in the area of welfare grant reductions based on the "benefits" of shared housing, one might expect that any reductions based on such a conclusive presumption would be unacceptable. The Second Circuit, however, recently accepted a novel justification for such a reduction.[46] Although later reversed by the Supreme Court in *Van Lare v. Hurley*,[47] the decision merits discussion as it raises interesting questions involving both statutory interpretation and constitutional issues. At issue in *Van Lare* was the validity of New York regulations reducing the shelter allowance of AFDC families when non-recipients who are not legally

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45. As an exception to this line of cases, the court in Tartaglio v. Department of Institutions & Agencies, 102 N.J. Super. 592, 246 A.2d 483 (App. Div. 1968), *cert. denied*, 394 U.S. 1000 (1969), allowed a state to consider a stepfather's income available to the children to whom he owed no duty to support because he had listed the children as dependents on his tax returns. A subsequent case, X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 1970), suggested that *Tartaglio* was inconsistent with the Supreme Court's later decision in Lewis v. Martin, 397 U.S. 552 (1970).

46. Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974), *rev'd sub nom.* Van Lare v. Hurley, 421 U.S. 338 (1975). AFDC recipients originally challenged the regulations in two federal district courts. Hurley v. Van Lare, 365 F. Supp. 186 (S.D.N.Y. 1973); Taylor v. Lavine, Slip. Op. No. 73-C-699 (E.D.N.Y. 1973). From an adverse judgment in each case, the government appealed to the Court of Appeals for the Second Circuit. The Second Circuit consolidated the appeals and reversed the district courts on the statutory issues, remanding the case for a hearing by a three judge district court on the constitutional issues. Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974). On remand a combined district court for the eastern and southern districts of New York found that the regulations violated due process. Hurley v. Van Lare, 380 F. Supp. 167 (E. & S.D.N.Y. 1974). The Supreme Court noted probable jurisdiction on the appeal from the three judge district court, Van Lare v. Hurley, 419 U.S. 1046 (1975), and granted certiorari on the Second Circuit's decision on the statutory issue, Taylor v. Lavine, 419 U.S. 1046 (1975). The Supreme Court reversed the decision of the Second Circuit and the judgment of the three judge district court was vacated and remanded with instructions to dismiss as moot. Van Lare v. Hurley, 421 U.S. 338, 342-44 (1975).

47. 421 U.S. 338 (1975), *rev'g sub nom.* Taylor v. Lavine, 497 F.2d 1208 (1974).

obligated to support the dependent children reside in the household.[48] The regulations were challenged on constitutional grounds,[49] and on the grounds of conflict with the Social Security Act and its implementing regulations.[50] The Second Circuit, reversing the district court, found the state regulations consistent with the federal Act and regulations and remanded for a determination of the constitutional issues.[51]

Prior to *Van Lare,* regulations terminating or reducing benefits because of the presence of a non-recipient in the home had been stricken as conclusive presumptions of income.[52] The Second Circuit, however,

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48. The challenged regulations provide in pertinent part:

> A non-legally responsible adult or unrelated person in the household, who is not applying for nor receiving assistance shall not be included in the budget and shall be deemed a lodger. . . . In the event a lodger does not contribute at least $15.00 per month, the family shelter allowance, including fuel for heating, shall be a pro-rata share of the regular shelter allowance.

18 N.Y.C.R.R. § 352.30(d), *quoted in* 497 F.2d at 1211.

> When a female applicant or recipient is living with a male to whom she is not married . . . his available income and resources shall be applied in accordance with the following:
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> . . . .
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> (iv) When the male is unwilling to assume the 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 § 352.30(d).

18 N.Y.C.R.R. § 352.31(a)(3), *quoted in* 497 F.2d at 1210-11.

49. Plaintiffs alleged the regulations were unconstitutional under the due process and equal protection clauses and that they violated the rights of privacy and association. 497 F.2d at 1212.

50. Hurley v. Van Lare, 365 F. Supp. 186 (S.D.N.Y. 1973); Taylor v. Lavine, Slip. Op. No. 73-C-699 (E.D.N.Y. 1973). *Hurley* sustained the plaintiff's argument that the New York regulations violated the federal Act and regulations by creating a conclusive presumption of income. The district court in *Taylor* found the reasoning in *Hurley* convincing and adopted it, holding the state regulations invalid.

51. *See* note 46 *supra*; notes 71-88 and accompanying text *infra.*

52. The basis of all prior decisions, regardless of the various arguments forwarded by the states, was that the only realistic way to view such regulations was as a conclusive presumption of support. *See* cases cited notes 42-44 *supra.* Courts have for some time frowned on conclusive presumptions. Vlandis v. Kline, 412 U.S. 441 (1973) (irrebuttable presumption of non-residency when enrolled at a state university if the legal address was outside the state during the year of admission held invalid); Stanley v. Illinois, 405 U.S. 645 (1972) (irrebuttable presumption that unwed father unfit for custody of natural child held invalid); Heiner v. Donnan, 285 U.S. 312 (1935) (irrebuttable presumption that gift made within two years of death was made in contemplation of death not permissible since there were other plausible explanations). Regulations creating a rebuttable presumption of income have been held invalid if applied by state officials as though they were conclusive. Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F.

in adopting a new approach, reasoned that the presence of a lodger in the home created a "fair inference" that the AFDC recipients were not occupying all the space for which they paid rent.[53] The court stated that the objective of the New York regulations was to "insure that all the beneficiaries of an AFDC grant are entitled to enjoy it." Since benefits were reduced and not terminated, the regulations merely prevented non-eligible persons from receiving free living space,[54] insuring that only recipients receive the benefit of the grant. Drawing an analogy to the situation in which an eligible family lodges in a non-eligible person's home, the court pointed out that the state in either situation should pay only the eligible family's pro-rata share of the rent.[55]

To make the critical distinction between termination and reduction the court distinguished *King* and *Lewis* by finding that New York's objective was more limited than that of Alabama or California.[56] The court found New York's objective in providing aid only to eligible individuals to be "coextensive with the federal interest in allocating AFDC appropriations only to eligible persons."[57] Thus, the majority found a clear distinction between regulations that completely cut off benefits to eligible individuals and those such as New York's which disabused non-eligibles' from receiving free living space and thereby assured that benefits be paid only to eligible individuals.[58]

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 (1974).

53. 497 F.2d at 1215. *See* notes 62-63 and accompanying text *infra*.

54. 497 F.2d at 1216. This interest was found "coextensive" with the federal interest in allocating AFDC appropriations only to eligible persons. *Id.*

55. *Id.* at 1215. This analogy disregarded the recent decision in Battle v. Lavine, 44 App. Div. 2d 307, 354 N.Y.S.2d 680 (1974). The regulation in *Battle* reduced the eligible person's stipend if he resided in the home of a non-legally responsible relative or friend. The *Battle* court found that though the purpose of the regulation was to keep ineligibles from indirectly receiving aid the inevitable result was "to reduce, perhaps drastically, the stipend for those who are eligible," forcing them to use portions of their food and clothing allotments for rent. *Id.* at 310, 354 N.Y.S.2d at 683.

56. 497 F.2d at 1216. The court felt the New York regulations were more limited than those at issue in *King* (Alabama) or *Lewis* (California), because they did not terminate aid but merely reduced it so that non-recipients could not receive indirect benefits. *See* Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1968); note 37 *supra*.

57. 497 F.2d at 1216.

58. *Id. See* note 37 *supra*; note 65 *infra*.

This interpretation of *King* and *Lewis* seems contorted. The essence of these decisions is the definitive requirement that the dependent child—the primary object of the program—is not to suffer. In *King*, the Court found that the regulation reducing benefits because of the consort's mere presence left the child unprotected since the paramour was under no legal obligation to support him. The Court held that such a presumption was unwarranted in light of the congressional intent to provide meaningful economic security for the child.[59]

The majority justified the reduction on an economies of scale argument, that "per individual housing costs decrease as the number of individuals living together increases."[60] Thus, it reasoned that the housing costs of the recipient family are reduced when a non-recipient resides in the household.[61] This is admittedly true when the lodger makes an actual contribution of support. The mere presence of a lodger, however, does not conclusively show that the AFDC family's expenses have been diminished, for "economies of scale" do not reduce total cost. Absent an actual contribution, the recipient family's expenses remain the same. Thus, if there is a reduction in the shelter allowance without a corresponding contribution from the lodger, the dependent child is very likely to suffer.[62]

The Second Circuit sidestepped this argument by finding a "fair inference" of a reduced standard of need, rather than a conclusive presumption of income. It was reasoned that the presence of the lodger "evidences the recipient family's diminished need for housing space."[63] Supposedly, the housing needs of the AFDC family and the lodger are separable, thus allowing the state to reduce shelter payments to reflect only that part of the rental unit occupied by the recipient family. But the "fair inference" is in actuality nothing more than a conclusive presumption of income, since the only pertinent consideration is the presence of a lodger—the size or use of the space within the rental unit is irrelevant.[64]

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59. King v. Smith, 392 U.S. 309, 329-30 (1968).

60. 497 F.2d at 1215. *But see* note 38 *supra.*

61. 497 F.2d at 1215-16.

62. The dissent notes that "if the state reduces the rent allowance, the difference will either be made up out of the food budget—literally out of the child's mouth—or it will not be made up, resulting in eviction." *Id.* at 1222 (Oakes, J., dissenting).

63. *Id.* at 1215.

64. "Labeling the New York regulation a 'fair inference' does not change its conclusive nature where a showing contrary to the inference will not affect the

The Second Circuit obviously did not feel itself bound by the reasoning adopted in prior cases.[65] This approach can only be viewed as an attempt to meet the welfare problems head on. Public opposition has been aroused by the rising costs of public assistance programs, led by AFDC,[66] and the initial reaction has been to search out possible ineligibles on the welfare rolls.[67] The judiciary is no less aware of problems in the poverty programs than are the legislative and executive branches of government, and it may be credited with many of the advancements.[68] The Second Circuit's majority apparently viewed the New York regulation as a fair method of preventing indirect benefits from accruing to ineligible persons, while avoiding the pitfalls of a case-by-case factual determination. The court, however, seems to have characterized the question as one of excess space rather than income attribution. This characterization overlooks certain problems that the regulation shares with the income attribution theory. Specifically, the characterization fails to come to grips with the

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shelter allowance reduction; here the only fact considered by the state in the fair hearing is the presence or absence of a lodger, not the amount of space in the apartment." *Id.* at 1219 (Oakes, J. dissenting). Thus the inference may not reflect the actual living arrangement. *See* note 74 and accompanying text *infra*. *See also* 88 HARV. L. REV. 654, 658 (1975).

65. *See* notes 37-38, 42-44 *supra*. Although not cited in the majority opinion of the Second Circuit, the court's position is supported by language in Dullea v. Ott, 316 F. Supp. 1273 (D. Mass. 1970), suggesting that welfare benefits can be reduced because of the mere presence of a non-recipient in the household. Since *Dullea* was decided on other grounds, this language is dictum.

66. *See* note 21 *supra*.

67. Davidson, *Government Role in the Economy: Implications for the Relief of Poverty*, 48 J. URBAN L. 1, 61-62 (1970); Krause, *Child Welfare, Parental Responsibility and the State*, 6 FAMILY L. Q. 377 (1972).

68. "It is the participation of the courts that has brought the rule-making process to life. . . . Instead of the legislative and executive branches providing the initiative for the creative development of new rules, with the courts imposing a restraining hand when necessary, it has been the courts that have supplied the initiative and in some measure, the creativity." Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1, 23.

69. On remand the district court discussed the work of Professor Herbert Gans of Columbia University, who noted the prevalence of the "doubling-up" phenomenon, in which the poor take in other poor people as lodgers. These lodgers "help out in the family in various ways in lieu of paying rent, helping to raise the children, taking care of the house, doing a variety of things." Professor Gans explained that its prevalence is due to the insecure and chaotic sector of society in

lifestyle of the poor,[69] and does not acknowledge that the specific information necessary for individual determinations is already on file.[70]

On remand for consideration of the constitutional issues, the three-judge district court[71] accepted the Second Circuit's characterization of the problem as one of excess space.[72] The three judge court rejected the notion that there was a fair inference of reduced need in the regulation, however, finding that in reality it created alternative irrebuttable presumptions. First, the regulation presumed that a recipient family housing a noncontributing lodger actually needs less space and, consequently, needs less money to pay for it. Alternatively, the regulation presumed that, even if the recipient family cannot subsist in less space, it somehow needs less money to pay its share of the rent.[73]

In considering the first presumption, the three judge court found that an AFDC family housing a noncontributing lodger may not need less space for its own use. "The lodger may be an older child sharing a single or bunk bed with a younger sibling, or a disabled relative sleeping on the couch. If the lodger is the mother's adult male companion, he may be sharing the mother's own bed."[74] Moreover, the court argued that even if the family needed less space it is not likely that they could find a smaller habitable apartment.[75] The second argument, however, carries little weight in light of the operation of the regulation. There is no need for the recipient family to move into smaller housing once its shelter allowance is reduced because if the lodger either moves out or is evicted by the recipient family, the full allowance will be restored.[76] The court could have better attacked the first presumption

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which the poor live. Hurley v. Van Lare, 380 F. Supp. 167, 171-73 (E. & S.D.N.Y. 1974).

70. The dissenting opinion at the Second Circuit points out that an initial determination of actual need and resources is already required by other New York welfare regulations and that this information is continually updated. Thus, "it is absurd to create an administrative presumption concerning resources of income or space, when the actual information is on file and subject to immediate verification." 497 F.2d at 1220 n.11 (Oakes, J., dissenting).

71. Hurley v. Van Lare, 380 F. Supp. 167 (E. & S.D.N.Y. 1974). Plaintiffs alleged the regulations were unconstitutional under the due process and equal protection clauses and that they violated the rights of privacy and association. *Id.* at 169.

72. *Id.* at 169.

73. *Id.* at 173-76.

74. *Id.* at 173.

75. *Id.*

76. Taylor v. Lavine, 497 F.2d 1208, 1219 n.8 (2d Cir. 1974), *rev'd, sub nom.* Van Lare v. Hurley, 421 U.S. 338 (1975).

on the basis of the anomalous operation of the regulation. It makes little sense to restore the full shelter allowance if there has been a showing that the family is occupying excess space.

The court found the alternative presumption equally objectionable. To assume that the presence of the lodger evidences a need for less money (since the family must pay only its pro-rata share of the rent), one must also assume that the lodger is actually paying *his* share of the expenses. The three judge court summarily found this presumption violative of federal law, citing the Second Circuit's opinion.[77] The district court majority simply carried the Second Circuit's reasoning one step further and managed to turn the table on it.[78]

Finding the two irrebuttable presumptions without basis in fact, the court had little difficulty finding them violative of procedural due process.[79] Quoting recent Supreme Court decisions the district court stated the rule that irrebutable presumptions have long been disfavored and are unconstitutional when not universally true and when there is a reasonable means of making the crucial determination.[80] Since existing New York regulations already provided for a "fair hearing," the court held that a reasonable means of making the individual

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77. 380 F. Supp. at 175, *citing* Taylor v. Lavine, 497 F.2d 1208, 1215 (2d Cir. 1974).

78. Judge Hays, who wrote the majority opinion for the Second Circuit, sat by designation with the district court on remand. He dissented on remand, implying rather pointedly that the Second Circuit might not find the "fair inference" unconstitutional. Apparently there is a high level of tension between the two courts as to the propriety of these regulations.

79. 380 F. Supp. at 173-77. The court found the sex discrimination challenge without merit. Although the term "male" was present in the regulation the court found the language superfluous in light of early language holding "persons" responsible. *Id.* at 176. The court then ruled that the state has a legitimate interest in determining whether a lodger's presence in fact reduces the recipient's shelter needs, and dismissed the free association and privacy claims. *Id.* Finally, the court found that the equal protection claim overlapped the due process claim, and that a separate decision on the equal protection ground was therefore unnecessary. *Id.* at 176-77.

Very few opinions dealing with presumptions of income have turned on a constitutional determination. *See* Boucher v. Minter, 349 F. Supp. 1240 (D. Mass. 1972). *But see* Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972). The issue has never been decided by the Supreme Court, although in *King* Justice Douglas concurred on constitutional grounds. King v. Smith, 392 U.S. 309, 334 (1968) (Douglas, J., concurring).

80. 380 F. Supp. at 173, *quoting* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644 (1974), *and* Vlandis v. Kline, 412 U.S. 441, 452 (1973). *See also* notes 38-45 and accompanying text *supra.*

determinations was available.[81] Additionally, the court found a "property" right in the recipient's statutory entitlement to an allowance commensurate with actual need.[82] Thus, to deny the individual "the essential procedural right to challenge the purported factual basis of a determination adversely affecting his own liberty or property" was held to be a denial of due process.[83]

Judge Hays, in dissent, found the Second Circuit's opinion on statutory grounds to control the constitutional issues.[84] He argued that either the lodger has the means to pay his own way or he does not. Assuming the former, Judge Hays saw no due process violation in abating the recipient's shelter allowance to reflect payment of the lodger's pro-rata share.[85] This does not mean, however, that the lodger is in fact paying his share of the expenses.[86] If, on the other hand, the lodger is unable to pay his share, Judge Hays saw no constitutional problem in forcing him to move out or go on welfare himself, causing the recipient family's shelter allowance to be increased.[87] Whether this suggestion would run afoul of the constitutionally recognized rights of privacy and free association has not been settled.[88]

The Supreme Court's rejection of the Second Circuit's novel reasoning provided no surprises. Relying on *King, Lewis* and *Townsend v.*

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81. 380 F. Supp. at 175. The New York regulation is 18 N.Y.C.R.R. §§ 358.1-.27, *cited in* 380 F. Supp. at 175. *See also* Stanley v. Illinois, 405 U.S. 645, 656 (1972).

82. 380 F. Supp. at 175. *See* Note, *Social Welfare—An Emerging Doctrine of Statutory Entitlement,* 44 NOTRE DAME LAW. 603, 629 (1969).

83. 380 F. Supp. at 175.

84. This is not surprising since Judge Hays wrote the majority opinion for the Second Circuit. *See* note 78 *supra.*

85. 380 F. Supp. at 178 (Hays, J., dissenting).

86. This is exactly the situation the majority found in the second presumption created by the statute. *See* notes 77-78 and accompanying text *supra.*

87. 380 F. Supp. at 178 n.2 (Hays, J., dissenting).

88. *Id.* at 176. A federal district court found a violation of the right of privacy in the analogous situation presented in Moreno v. United States Dep't of Agriculture, 345 F. Supp. 310, 314 (D.D.C. 1972), *aff'd,* 413 U.S. 528 (1973). In *Moreno* a statute denying food stamps to a household which included a person not related to the recipient was held invalid. *See* Brief for Appellee at 28-29, Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974). Similarly, it can be argued that the regulation threatens the right of free association by penalizing a recipient for residing with a non-recipient. *Id.* at 29. *But cf.* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); note 79 *supra.*

Swank,[89] the Supreme Court, in a short opinion, reversed the Second Circuit's decision, finding that the New York regulations did in fact create a conclusive presumption.[90] The Court found invalid the state's argument that the presence of a lodger evidenced excess space, since if the lodger moved out the full allowance was restored.[91] Additionally, the Court rejected the state's argument that the reduction prevented non-recipients from indirectly receiving benefits. While this is undeniably a meritorious goal, the state is not allowed to achieve it at the expense of the needy child.[92]

B. *What Alternatives Remain After Van Lare?*

The Supreme Court's decision in *Van Lare* seemingly forecloses the use of any regulation establishing a conclusive presumption in the absence of a legal obligation to support the AFDC family. This is true whether the regulation is interpreted as presuming either less need on the part of the family or a contribution from the lodger. It is doubtful, however, that we have seen the end of legislative attempts to reduce benefits when a lodger is present in the welfare home. Successful legislation would be of great practical importance in reducing welfare rolls since there are many AFDC households in which a non-recipient is present.[93]

States remain free, of course, to reduce benefits by implementing similar regulations based on rebuttable presumptions.[94] Rebuttable presumptions would merely shift the burdens of proof and of coming

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89. 404 U.S. 282 (1971) (state provision adding an eligibility requirement conflicting with the federal statute violates the supremacy clause).

90. Van Lare v. Hurley, 421 U.S. 338 (1975). This holding rendered a decision on the constitutional issues moot. The lone dissenter, Justice Rhenquist, felt the regulation did not conflict with the federal statutes, basing his opinion on the majority opinion in *Taylor*. Reaching the constitutional issues, he found the regulations permissible relying on the dissenting opinion in Hurley v. Van Lare, 380 F. Supp. 167, 177 (E. & S.D.N.Y. 1974). In both instances he is relying on the opinions written by Judge Hays. *See* note 78 *supra*.

91. 421 U.S. at 347. *See* note 64 *supra*.

92. 421 U.S. at 347-48.

93. New Jersey recently estimated that nearly one-third of its AFDC homes were composed of recipient and non-recipient residents. Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 209-10, 314 A.2d 362, 366 (1974).

94. *See* Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298 (N.D. Ind. 1974); 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 (1974).

forward with evidence to the recipient.[95] They are compatible with the federal purposes of the AFDC program, and have been held to be objective and equitable:

> The state avoids paying funds not necessary under its definition of need; administrative efficiency is furthered; the welfare budget is protected for other needy recipients; and assistance groups living with nonrecipients not in fact sharing household expenses are protected by their rights to rebut the assumed sharing of expenses.[96]

As a method of lowering welfare expenditures and assuring that only eligible persons receive benefits, the rebuttable presumption is at best an unattractive compromise for the states. Since the rebuttable presumption places no obligation on the lodger to pay his pro-rata share of the expenses, no net saving of state funds can be effected.[97] If anything, the rebuttable presumption would encourage the lodger to refrain from making monetary contributions to the AFDC family, since, absent such contributions, the family's benefits remain undiminished. Thus, the lodger can keep all of his earnings while receiving free living accommodations, and cause no reduction of the recipient family's shelter allowance. Under these circumstances it is difficult to imagine that many lodgers would choose to make monetary contributions for their share of the rent.

The answer to the dilemma lies in establishing an independent statutory duty on behalf of the (non-recipient) lodger to contribute at least his pro-rata share of the shelter expenses. A California statute exemplifies this approach:

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95. Hausman v. Department of Institutions & Agencies, 64 N.J. 202, 209-10, 314 A.2d 362, 366 (1974), found this burden reasonable: "The obligation of an original applicant for assistance or of a recipient, when the addition of a non-eligible to the household occurs and a reduction in assistance is proposed, to come forward with the facts is not an undue one."

96. Mothers & Childrens Rights Organization, Inc. v. Stanton, 371 F. Supp. 298, 305 (N.D. Ind. 1974).

97. When the life style of the poor is considered, it becomes apparent that few lodgers will actually contribute to the expenses:

> So, quite frequently you do get a pattern among poor people, if they can't work or they can't find work either temporarily or permanently, of moving in with a relative, either temporarily or permanently, because there simply isn't any money to establish or continue to maintain one's own household. And typically, then, the people then become lodgers, help out in the family in various ways in lieu of paying rent, helping to raise the children, taking care of the house, doing a variety of things. I think that's one major explanation.

Hurley v. Van Lare, 380 F. Supp. 167, 171 (E. & S.D.N.Y. 1974), *quoting* Professor Herbert Gans, sociology professor at Columbia University.

> Whenever an unrelated adult male resides with a family applying for or receiving aid under this chapter, he shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement.[98]

If the lodger continues to reside with the AFDC family and is financially unable to make the necessary contribution, the California regulations subject him to prosecution under a statute making it a misdemeanor for those other than needy children knowingly to receive or use AFDC funds.[99]

This statute withstood constitutional attack on equal protection and due process grounds in *Russell v. Carleson*.[100] The plaintiffs in *Russell*[101] claimed that the statute imposed a " 'special obligation on the unrelated man [UAM] to affirmatively support the welfare family.' "[102] Specifically, they alleged the statute was sexually discriminatory[103] and that the contribution was fictionally calculated.[104] The court found no

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98. CALIF. WELF. & INST. CODE § 11351.5 (Deering 1969). The statute exempts bona fide paying lodgers, roomers or boarders. In determining the minimum financial contribution, the statute considers the adult male's income and expenses. The statute further requires that the child's mother and the unrelated adult male sign, under penalty of perjury, a statement of the conditions connected with the sharing of expenses. If either party willfully fails to cooperate, aid to the family may be discontinued. Since the termination provision seems to provide an added eligibility requirement it might be invalid under the *King* rationale. *See* Townsend v. Swank, 404 U.S. 282, 286 (1971).

99. Cal. SDSW Manual EAS §§ 20-101.21 to .22, 43-114.3, *cited in* Russell v. Carleson, 36 Cal. 3d 334, 339-40, 111 Cal. Rptr. 497, 500 (Ct. App. 1973). The statute provides: "Any person other than a needy child, who willfully and knowingly receives or uses any part of an aid grant paid [under the AFDC program] for a purpose other than the support of the needy child and the caretaker [*e.g.*, mother] involved, is guilty of a misdemeanor." CALIF. WELF. & INST. CODE § 11480 (Deering 1969).

100. 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (Ct. App. 1973).

101. Plaintiffs were both recipient mothers of dependent children living with unrelated adult males. The regulations defined an unrelated adult male as a male 21 years of age or older and unrelated by blood or marriage to any member of the AFDC family. *Id.* at 338 n.2, 111 Cal. Rptr. at 499 n.2.

102. *Id.* at 342, 111 Cal. Rptr. at 501.

103. "In particular the plaintiffs assert that the statute and regulations unconstitutionally discriminate against UAMs living with AFDC mothers while requiring no like contribution from adult relatives living with AFDC families or from unrelated adult females living with male heads of AFDC households, or from UAMs living with non-AFDC mothers." *Id.* at 342, 111 Cal. Rptr. at 501-02.

104. The court viewed this argument as the fulcrum of the constitutional attack —"namely, why is the uniform standard calculated on the fiction that plaintiffs are living apart when in fact they are in a sharing arrangement?" *Id.* at 341-42, 111 Cal. Rptr. at 506.

merit in the discrimination claim, reasoning that the regulation was at the very least a reasonably appropriate method of protecting the AFDC grant,[105] and that the legislature could justifiably have found that this classification posed the greatest threat to diversion of the grant.[106] The court found no merit in the challenge to the "fictional computation," reasoning that if the lodger contributed merely his pro-rata share *"he would in effect be using the AFDC grant because the grant is what made the sharing arrangement possible in the first place."*[107] Relying on *Dandridge v. Williams,*[108] the court properly found the standard of contribution created by the statute to be "a reasonable reconciliation of the realities and federal requirements."[109]

The distinction in the California Act between related and unrelated persons may have some rational basis and therefore be supportable against an equal protection challenge. A state might well determine that the presence of an adult related to the AFDC recipients provides some stabilizing influence in the home. A state may also find some rational basis in assuming this person would better serve as a "substitute parent" to the child than an unrelated adult, thereby making his presence in the home more socially justifiable.[110]

The distinction between male and female lodgers, however, is more tenuous. It is obvious that this statute provides "dissimilar treatment for men and women who are thus similarly situated."[111] Since the classification is based on sex alone, the legislature's attempt to deal with the problems "one at a time" may be insufficient to satisfy recent and more stringent constitutional tests. In *Frontiero v. Richardson,*[112] a Supreme Court decision handed down prior to *Russell,* the plurality

105. The court found the statute met the due process test announced in People v. Aguiar, 257 Cal. App. 2d 597, 602, 65 Cal. Rptr. 171, 174 (Ct. App. 1968) ("reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose"). 36 Cal. App. 3d at 343, 111 Cal. Rptr. at 502.

106. To justify this position the court relied on Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972):

> A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others." . . . So long as the judgements are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional strait jacket.

107. 36 Cal. App. 3d at 345, 111 Cal. Rptr. at 504.

108. 397 U.S. 471, 487 (1970).

109. 36 Cal. App. 3d at 345, 111 Cal. Rptr. at 504.

110. *See* note 36 and accompanying text *supra*; notes 69, 97 *supra.*

111. Reed v. Reed, 404 U.S. 71, 77 (1971).

112. 411 U.S. 677 (1973).

opinion suggests that sex may be a suspect classification[113] subject to the rigors of strict scrutiny.[114] Applying the rationale of *Frontiero*, which had been ignored by the *Russell* court, it is doubtful that the state could find a sufficient interest to justify sexual discrimination in the statute.[115]

The obvious and simple solution to the discrimination problem would be the substitution of the word "person" for the word "male." A state could also effect a more widespread application of the statute, resulting in more numerous reductions in welfare benefits, by deleting the word "unrelated." This would require all adult persons residing in an AFDC household to contribute an amount equal to what they would spend if living alone, and would result in a tremendous savings to the state. The state would thus be able to accomplish what the regulation in *Van Lare* failed to achieve.[116]

This type of statute would solve the courts' problems with conclusive presumptions, which were rejected because of the absence of a legal support obligation.[117] By placing a legal duty on the lodger to contribute at least his share of the expenses, the state may well be free to

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113. *Id.* at 687. In a recent district court opinion, United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975), sex was held to be a suspect classification. *Id.* at 1063-65. Whether a majority of the Supreme Court would find sex to be a suspect classification today is questionable. *See* Kahn v. Shevin, 416 U.S. 351, 355 (1974). For the views of one commentator who believes sex should be a suspect classification and subject to strict scrutiny see Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481 (1971).

114. Justice Brennan, speaking for the plurality, detailed the rigors of the strict scrutiny test: "And when we enter the realm of 'strict judicial scrutiny' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality." 411 U.S. at 690.

115. An additional blow to the statute would be ratification of the Equal Rights Amendment, 86 Stat. 1523.

116. In an allowance system, this type of regulation could cause a reduction in the shelter allowance commensurate to the contribution made by the lodger. In a flat grant system, however, it might generate income only to the extent it exceeds the lodger's pro-rata share of the expenses because individual determinations of need are not permissible in the flat grant approach. If, therefore, the benefits of shared housing are considered when the recipient's standard grant is calculated, there could be no reduction for the contribution of the lodger's pro-rata expenses. Any reduction based on this amount would be an impermissible individual determination of need. Any contribution in excess of the pro-rata share could be considered income and properly deducted. *See* notes 123-26 and accompanying text *infra*.

117. *See, e.g.*, Van Lare v. Hurley, 421 U.S. 338 (1975); Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1968).

"presume" that the recipients receive this amount from the lodger. A regulation presuming additional income to the recipient family in this amount might still be subject to attack since federal regulations allow a reduction only when there is *actual* income.[118] But considering the courts' preoccupation in these cases with the absence of a legal obligation to contribute to the support of the family, the inference is clear that the imposition of a legal duty to contribute may be sufficient to establish the presumption that payments are being made.[119]

California has used still another approach in attempting to generate resources in the AFDC family—recognition of a wife's community property interest in her husband's earnings.[120] By granting the wife management and control of her share of the community property, the state presumes that this property is available for support of the dependent children.[121] When this regulation was attacked, however, the court found the presumption that the stepfather's income was available to support the stepchildren impermissible.[122] Nevertheless the court held that the wife's actual access to joint savings and checking accounts was sufficient to make those accounts available for the child's support.[123]

III. AFDC Recipients Residing with Recipients of Other Aid Programs — The California Experience

California enacted an extensive welfare reform bill in 1971[124] which provides a good example for a case study. A major provision of this controversial legislation substituted a flat grant system of payments for

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118. While the regulations provide that only income actually available on a regular basis may be considered in determining the need of the recipient, it is arguable that the requirement of actual income should be considered only in the absence of a legal obligation to support. *See* note 33 *supra.*

119. *See* note 117 and accompanying text *supra.*

120. Cal. Civ. Code § 5127.5 (Deering 1971).

121. Under this statute, the wife's interest extends only to the remainder of her husband's income after the subtraction of prior support payments and a $300.00 gross monthly exemption. Zumbrun, Momboisse & Findley, *Welfare Reform: California Meets the Challenge,* 4 Pacific L.J. 739, 778 (1973).

122. Camp v. Carleson, No. 216154 (Super. Ct., Sacramento County, Calif., Feb. 15, 1972).

123. *Id.*

124. Welfare Reform Act of 1971, ch. 578 [1971] Cal. Stats. 1136. For a discussion of the viewpoints of the proponents and opponents of the legislation in the California statehouse see Beilenson & Agran, *The Welfare Reform Act of 1971,* 3 Pacific L.J. 475 (1972); Zumbrun, Momboisse & Findley, *supra* note 121.

the administratively burdensome allowance system.[125] To implement this new system, the California Department of Social Welfare promulgated Eligibility and Assistance Standard (EAS) 44-115.9. This regulation established monetary allowances for housing and utility needs based on the number of recipients in the household.[126] If, due to a shared housing arrangement with an Adult Aid recipient, the pro-rata share of the AFDC recipient's expenses fell below the allowance created by EAS 44-115.9, EAS 44-115.8 required the difference to be treated as "in-kind" income and subtracted from the AFDC grant.[127]

The California Supreme Court, in *Cooper v. Swoap*,[128] found both the specific regulation[129] and the welfare department's general "non-cash economic benefit" theory in direct conflict with the governing statutes.[130] The majority viewed EAS 44-115.8 as a re-evaluation of the individual recipient's housing and utility needs. Underlying its opinion is the premise that the California legislature, in the Welfare Reform Act of 1971, rejected the system of individual determinations[131]

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125. The legislature now determines a uniform standard of need and a uniform payment. CALIF. WELF. & INST. CODE §§ 11450, 11452 (Deering Supp. 1973). *See* note 11 *supra.*

126. Since we are now dealing with reductions caused by shared housing with recipients of other aid programs it is important to note that the payment schedule for Adult Aid recipients operates in a different manner in California. *See* note 8 *supra.* In ATD housing needs are paid up to a maximum of $63.00 per month. In AB and OAS a minimum housing allowance is granted plus a supplemental allowance up to a maximum of $63.00 in order to reflect actual expenditures. The maximum for Adult Aid recipients who share housing, however, is $45.00. Adult Aid recipients never receive more for housing than they actually expend and up to a certain maximum their housing costs are paid in full. Brief for Appellant at 5, Cooper v. Carleson, 107 Cal. Rptr. 502 (Ct. App. 1973).

127. Plaintiff Cooper, an ATD recipient, resided with her five children who were all AFDC recipients. The family paid $88.00 monthly for housing and utilities. Applying the pro-rata calculation required by EAS § 44-115.8, the children's share was $70.00 (5/6 of $84.00). EAS § 44-115.9 provides an allowance of $101.00 for five recipients, resulting in a $31.00 difference between the pro-rata cost and the allowance. This difference was treated as "in-kind" income and subtracted from the grant. Cooper v. Swoap, 11 Cal. 3d 856, 861 n.3, 524 P.2d 97, 99 n.3, 115 Cal. Rptr. 1, 3 n.3 (1974).

128. *Id.* at 856, 524 P.2d 97, 115 Cal. Rptr. 1.

129. ELIGIBILITY AND ASSISTANCE STANDARD § 44-115.8, *cited in* 11 Cal. 3d at 860 n.2, 524 P.2d at 99 n.2, 115 Cal. Rptr. at 3 n.2.

130. 11 Cal. 3d at 863-64, 524 P.2d at 101, 115 Cal. Rptr. at 5.

131. "In establishing a flat grant system, the Legislature consciously abandoned the previous practice under which welfare grants were set on the basis of an administrative determination of need; instead, the Legislature took it upon itself to set fixed grant levels to be paid to *all* recipients without regard to indi-

in general, and in particular decisively rejected a section designed to reduce AFDC benefits when the recipient shared housing with an Aid to the Permanently and Totally Disabled recipient.[132] In light of such unambiguous legislative action the court held the state welfare department had overstepped its bounds in taking upon itself authority to reject express legislative determinations, and in addition, found that by labeling benefits derived from shared housing as "in-kind" income, the department had camouflaged the true nature of its calculations.[133]

Even if the regulation were not a smokescreen to re-evaluate need, the court found that it impermissibly recognized such benefits as income. Analysis of other statutes, legislative history, and prior regulations convinced the court that California had never considered the benefits of shared housing to represent income.[134] Finally, the court rejected the income theory on the basis that federal law allows only

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vidual need." *Id.* at 859, 524 P.2d at 98, 115 Cal. Rptr. at 2. The court also rejected the department's argument that the payment schedule had been calculated only on the basis of independent living arrangements: "[I]t is clear that in devising section 11450's flat grant figures, the Legislature relied upon the department's past payment schedule which did not distinguish between independently housed units and AFDC units that shared housing with others." *Id.* at 865 n.13, 524 P.2d at 102 n.13, 115 Cal. Rptr. at 6 n.13.

132. A bill requiring that a portion of the benefits of an ATD recipient who resided with an AFDC family be considered available to the AFDC family, thereby causing a reduction in the AFDC grant, was decisively defeated both on the Senate floor and in committee. *Id.* at 864, 524 P.2d at 101, 115 Cal. Rptr. at 5. *But see* Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 57-58, 69 Cal. Rptr. 480, 492 (Cal. App. 1968) (unpassed bills offer little evidence of legislative intent).

133. "The department's desire to cut welfare expenses at any cost has led it to disregard the clear guidelines of its legislative mandate and to construct a contrived and tortured concept of 'income' in an attempt to camouflage an impermissible reevaluation of AFDC recipient's needs." 11 Cal. 3d at 872, 524 P.2d at 107, 115 Cal. Rptr. at 11. The department admitted that EAS § 44-115.8 was designed to calculate actual housing needs of AFDC recipients: "It is only logical that the recipient should receive housing and utility allowances solely for actual needs." Brief for Respondents at 6, Cooper v. Swoap, 11 Cal. 3d 856, 524 P.2d 97, 115 Cal. Rptr. 1 (1974).

134. Former EAS 44-115.61 expressly rejected the idea that partially free or shared living costs represented income. Also, the court felt that had the legislature recognized any benefit from such arrangements it would have been represented in the legislative analyst's report on the financial consequences of the Welfare Reform Act of 1971. Finally, the court considered CALIF. WELF. & INST. CODE § 11006, which prohibits the inclusion of an Adult Aid recipient's benefits in anyone else's income. 11 Cal. 3d at 861-63, 524 P.2d at 103-05, 115 Cal. Rptr. at 3-5.

actual available income to be deducted from the welfare grant.[135] By the operation of the California regulation only an *average* rather than an *actual* figure is determined and deducted.[136]

The majority's logic seems unimpeachable, if, in fact, the legislative determination of the standard payment included figures reflecting payments to those recipients who were sharing housing. The majority's assertion that the maximum grant schedules were prepared with shared housing arrangements in mind may, however, be disputed.[137] If only independent living arrangements were considered, the state would be making double payments to the household.[138] This result is anomalous in light of the overall purpose of the Reform Act.[139]

Cooper leaves untouched the question of the validity of a regulation reducing benefits in a state which uses the allowance system. The court dealt with the problem exclusively within California's flat grant system.[140] It is quite probable, however, that the result would differ in a

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135. *See* note 33 *supra.*

136. 11 Cal. 3d at 870-71, 524 P.2d at 105-06, 115 Cal. Rptr. at 9-10.

137. *Id.* at 875, 524 P.2d at 109, 115 Cal. Rptr. at 13 (Burke, J., dissenting).

138. The economies of scale argument would retain at least partial validity here, for although the Adult Aid recipient receives only his pro-rata share of the shelter expenses, the AFDC family would be receiving its full grant.

139. In enacting the legislation the lawmakers were seeking to devise a new welfare system in which no one could get more than his fair share. The legislators were motivated by reports of persons making as much as $800.00 per month while drawing welfare. Beilenson & Agran, *supra* note 124, at 475-81. Further, since a regulation designed to prevent duplicate welfare payments would promote a legitimate state interest, it could withstand an equal protection attack:

> It would be curious, indeed, if two "pockets" of the same government would be required to make duplicating payments for welfare.
>
> The administrative procedures to give effect to this process may be cumbersome, but the right of the State to avoid overlapping benefits for support should be clearly understood.

Carleson v. Ramillard, 406 U.S. 598, 604 (1972) (Burger, C.J., concurring). Under the "double payment" rationale, the key to effecting reductions is simply to calculate the standard grant on the basis of individualized housing. It is not apparent, however, whether this would result in any significant savings to the state. If the benefits of shared housing are not calculated in the averaging process, the standard payment will certainly be higher. Whether the state could recapture more than this increase in payments is not clear. *Id.*

140. The majority chose not to reach the federal claims, although it touched briefly on the question of whether the regulation measured the *actual* value of the recipient's benefits. Relying on *King* and *Lewis*, the majority believed the California regulation was invalid as an inaccurate measurement of income under the federal statute. 11 Cal. 3d at 870-71, 524 P.2d at 105-06, 115 Cal. Rptr. at

state using an actual standard of need. The problem in cases involving non-recipients is the conclusive presumption of contribution created by the regulation.[141] The state has no control over the resources of the lodger and, absent a legal duty to contribute, cannot assure that an actual contribution will be made. When the lodger is a recipient of another aid program, however, the state usually has some power over the recipient's expenditures.[142] States generally retain the right to appoint a trustee to receive the recipient's grant. The trustee, in turn, pays the recipient's expenses.[143] Thus, even though a conclusive presumption might be created, the state has a means of insuring that the conclusive presumption is based upon fact.

CONCLUSION

From a review of recent challenges to AFDC shelter reductions based on shared housing two things are clear. First, because of the large amounts of money involved,[144] and the pressure on states and cities to become more fiscally responsible, states will continue to seek means to trim their welfare expenditures. Secondly, it is apparent after *Van Lare* and *Cooper* that courts will reject any method of reduction whereby payments are lowered based on a conclusive presumption that either "income" or other "benefits" result from shared housing with either recipients or non-recipients in the absence of a duty to support. The alternative of using a rebuttable presumption would be unacceptable to the states as it is very doubtful that meaningful savings could

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9-10. Apparently this was dictum, however, for in the companion case to *Cooper*, Justice Tobriner, who wrote both majority opinions, limited the *Cooper* holding to the state claims. Waits v. Swoap, 11 Cal. 3d 887, 889, 524 P.2d 117, 115 Cal. Rptr. 21 (1974).

141. *See* notes 37-45 and accompanying text *supra.*

142. This control is not inconsistent with the "money payment" principle incorporated in Social Security Act § 406(b), 42 U.S.C. § 606(b) (1970). Under that theory a recipient's grant is not identified with any particular requirement nor designated for any specific purpose. The purpose of this scheme is to encourage responsible budgeting by the recipient. When recipients of different aid programs reside together, however, the state has a legitimate interest in making sure each recipient pays his share of the shelter expenses in order to avoid double payments. *See* Carlson v. Remillard, 406 U.S. 598, 604 (1972) (Burger, C.J., concurring).

143. *See, e.g.,* IND. ANN. STAT. § 12-1-7.1-12 (Burns 1973); 62 PA. STAT. ANN. § 512 (1967).

144. *See* note 21 *supra.*

be effected through its use.[145] On its face, then, it would appear that only a statutorily imposed duty to contribute to the living expenses as used in California might solve the problem. This solution, however, has its drawbacks. The courts, while emphasizing the lack of a legal obligation to support, have also spoken of a need for *actual* contributions to the recipient family.[146] Whether they would be willing to accept the legal obligation to contribute a ratable portion of the household expenses as a sufficient basis for a reduction is yet to be determined. It is clear that if courts were to accept a reduction based solely on a legal obligation to contribute, an enforcement procedure would have to exist to insure "meaningful protection."[147] Alternatively, the state could restructure welfare policies whereby the "human" side of the welfare problem is stressed,[148] rather than viewing the welfare recipient as merely a financial burden on the state. This view would recognize the social benefits of shared housing as outweighing any financial savings. But whatever solution is adopted it is assured that the controversy will continue.

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145. *See* notes 94-97 and accompanying text *supra.*

146. *See* notes 38-45 and accompanying text *supra.*

147. *See* Note, *AFDC Income Attribution, supra* note 32, at 1384-85.

148. *See* notes 69, 97 *supra.*

COMMENTS