

INVISIBLE WOMAN?

ROLE-PERCEPTION IN WELFARE LITIGATION

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... the composition of the poor is changing so that the poor more and more are those who gain least from economic growth: the aged, the disabled, female-headed families, and those whose limited skills seem unlikely to be demanded by an increasingly complex industrial system.

Poverty Amid Plenty, The Report of the President's Commission on Income Maintenance Programs 37 (1969).

THE COMPOSITION of the poor is not only changing, but its numbers are increasing, if those appearing on the welfare rolls are any indication. Over 14 million persons are recipients of public assistance money payments this year.¹ They include the aged, the disabled, the blind, and most of all, families with dependent children.² Most receive assistance through a combination of Federal, state and local programs under which the Federal government assumes about 55 percent of the cost.³ The largest single category of assisted programs is known as Aid to Families with Dependent Children, or, in welfare jargon, AFDC. The overwhelming majority of publicly assisted families under this program are female headed families.⁴ They are the specific concern of this article.

Whether receiving AFDC assistance or some other form of aid, people who receive welfare have asserted in recent years the proposition that they ought not be required to pay for it in the frequently exacted currency of their constitutional rights.⁵ In increasing numbers, they have resorted to the courts for vindication, to such an extent that the Supreme Court has commented upon the "widening litigation in this area."⁶ And they have often been successful, despite the commonly

held belief that "welfare is a 'gratuity' furnished by the state, and thus may be subject to whatever conditions the state sees fit to impose."⁷

1. 10 Welfare in Review 77 (May-June 1972).

2. There are two major forms of public assistance: general assistance, financed entirely by state and local units; and categorical assistance. Categorical assistance programs are defined by the Social Security Act and involved federal financial assistance to the state plans meeting federal standards. There are four major types of categorical assistance: Old Age Assistance (OAA); Aid to the Blind (AB); Aid to the Permanently and Totally Disabled (APTD); and Aid to Families with Dependent Children (AFDC). See 42 U.S.C. §§301-06; 601-09; 1201-06; 1351-55 (1965). The AFDC provisions were extensively amended in 1968. See 42 U.S.C. §§601-44 (Supp. V, 1970).

AFDC, which is the particular concern of this article, is by far the largest of the four programs. In 1969, there were more recipients of AFDC than of aid under all other categorical programs combined. See Public Assistance Statistics, 8 Welfare in Review 30, 31 (Mar.-Apr. 1970). In the first quarter of 1972, almost 11 million persons were receiving AFDC payments, 10 Welfare in Review 77 (May-June 1972).

3. N.Y. Times, Aug. 16, 1971, at 36, col. 1.

4. In the 1960's, fathers were absent from the home in more than 75% of the families in the AFDC caseload. D. Eppley, *The AFDC Family in the 1960's*, 8 Welfare in Review 8, 11 (Sept.-Oct. 1970).

5. *Wyman v. James*, 400 U.S. 309, 344 (1971) (dissenting opinion of Mr. Justice Marshall); C. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 Yale L.J. 1347, 1349-50 (1963); Note, *Rehabilitation, Investigation and the Welfare Home Visit*, 79 Yale L.J. 746, 758 (1970).

6. See *Graham v. Richardson*, 403 U.S. 365 (1971).

7. See C. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965). The Supreme Court, however, seems to be conflicted on this issue. Compare *Wyman v. James*, 400 U.S. 309, 321-22 (1971) in which the Court observed that "what Mrs. James appears to want from the agency which provides her and her infant son with the necessities of life is the right to receive those necessities upon her own informational terms," with *Graham v. Richardson*, 403 U.S. 365, 374 (1971) where it was observed that "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege,'" citing, inter alia, *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Goldberg v. Kelly*, 397 U.S. 254 (1970), both welfare cases.

The list of victories is impressive, but not unbroken. The Supreme Court has held that termination of welfare benefits before a fair hearing violates the due process clause of the Fourteenth Amendment;⁸ that residency requirements are invalid because they obstruct the constitutional rights to travel from state to state;⁹ and more recently, that refusal of welfare benefits to aliens violates the equal protection clause of the Fourteenth Amendment.¹⁰

Other Supreme Court decisions were based on the Social Security Act,¹¹ although constitutional issues were argued and passed upon below.¹² Thus, denial of payments to the children of a mother who "cohabits" in or outside her home with any "able-bodied man" violates the Social Security Act.¹³ And states may not, for the same reason, impute to a needy child income not actually received from a "man assuming the role of spouse" (a MARS, somewhat inappropriately, in welfare usage).¹⁴

Still, many recipients are subjected to procedures and controls not imposed on other citizens.¹⁵ One group in particular seems to have fared less well than others, particularly when pressing rights of a personal and private nature. It is comprised of AFDC mothers.¹⁶

The welfare mother's home has been subject to continuing review by state officials.¹⁷ Her home may be visited without her consent;¹⁸ she may be subject to unannounced midnight or predawn raids — a practice as yet unreviewed by the Supreme Court;¹⁹ she may be required to maintain a "suitable home" as defined by a state agency;²⁰ should she be so careless as to bear a child, until recently, she may have been forced to bring a paternity action in order to obtain benefits for her baby.²¹ Sometimes she is threatened with "neglect" proceedings leading to the loss of the baby or her other children.²² Should she permit her family to become too large, she and her children are "penalized" by the maximum grant regulations in effect in many states.²³ The Supreme Court has not rendered opinions

on most of these issues, but where it has, it has acted unfavorably to the mother, and the consequence has been a loss of benefits for her children.²⁴ This contrasts

8. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wheeler v. Montgomery*, 397 U.S. 280 (1970).
9. *Shapiro v. Thompson*, 394 U.S. 618 (1969).
10. *Graham v. Richardson*, 403 U.S. 365 (1971).
11. Statutes and regulations are generally first examined to see if constitutional questions can be avoided. *Ashwander v. T.V.A.*, 297 U.S. 288, 346-48 (1936). See also the dissenting opinion of Mr. Justice Marshall in *Wyman v. James*, 400 U.S. 309, 338 (1971). *Townsend v. Swank*, 404 U.S. 282 (1971) held that an Illinois statute and regulation including needy and dependent 18 to 20 year olds attending high school or vocational school in AFDC benefits, while excluding those attending a college or university, were in conflict with the Social Security Act and for that reason were invalid under the Supremacy Clause. The equal protection issue was therefore not reached, although the Court expressed doubt whether the Illinois classification could withstand the strictures of the Equal Protection Clause.
12. In *King v. Smith*, 392 U.S. 309 (1967), the three-judge district court had expressly held that Alabama's "substitute father" regulation violated the Equal Protection Clause of the fourteenth amendment. *Smith v. King*, 277 F. Supp. 31 (M.D. Ala. 1967).
13. *King v. Smith*, *supra* note 12.
14. *Lewis v. Martin*, 397 U.S. 552 (1970). The three-judge district court in this case had upheld California's income contribution regulation on both statutory and constitutional grounds. *Lewis v. Stark*, 312 F. Supp. 197 (N.D. Cal. 1968). The question of the obligation under state law of non-adopting stepfathers remains open. *Lewis v. Martin*, *supra*, at 560.
15. C. Reich, *supra* note 7.
16. AFDC fathers would be subject to the same intrusions as mothers, theoretically. As a practical matter, however, AFDC father are so scarce that the rules and regulations apply almost exclusively to women. See text accompanying fn. 4, *supra*.
17. See, e.g., J. Handler & M. Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 Law & Contemp. Prob. 377 (1966); M. Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 Calif. L. Rev. 511, 552-56 (1966).
18. See *Wyman v. James*, *supra* note 5.
19. *Id.*, at 326; C. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 Yale L.J. 1347 (1963).
20. J. Handler & M. Rosenheim, *supra* note 17, at 388, point out that the "suitable-home" policy runs primarily to mothers whose sexual conduct elicits community disapproval. See also CCH Poverty Law Reports 1230 (1968). The Social Security Act requires that a state plan for aid and services to needy families with children must provide that "where the state agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring the condition to the attention of the appropriate law enforcement agencies." 42 U.S.C. § 602 (Supp. V. 1970).
21. The Social Security Act requires that the state shall provide:
 - (A) For the development and implementation of a program under which the state agency will undertake
 - (i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and
 - (ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support.
22. 42 U.S.C. § 602 (a) (16) (Supp. V. 1970). This is known as the NOLEO (Notice to Law Enforcement Officers) provision. Some states had made the mother's cooperation a condition of eligibility. See 1 CCH Poverty Law Reports 1310 (1968). Such state provisions were challenged in the federal courts where they were found to conflict with the Social Security Act. See e.g., *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969); *Meyers v. Juas*, 327 F. Supp. 759 (D. Ore., 1971). *Aff'd mem.* 404 U.S. 803 (1971); *Saiz v. Goodwin*, 325 F. Supp. 23 (N. Mex. 1971) *vacated and remanded*, 450 F. 2d 788 (1971) See also Comment, *AFDC Eligibility and the Mandatory Paternity Suit*, 10 J. Fam. L. 174 (1970).
23. C. Reich, *supra* note 7, at 1247.
24. *Dandridge v. Williams*, 397 U.S. 471 (1970).
25. See *Wyman v. James*, *supra* note 5. Refusal to consent to the home visitation resulted in cessation of aid. *Id.* at 318.

strikingly with the Court's holdings and attitudes in cases where the children assert rights of their own²⁵ and in cases in which the claimed right is not of a personal or private nature. The mother seems almost invisible — a non-person with no proper interests of her own, subject at almost every turn to the judgment of state officials on even the most intimate details of her life. The constitutional "penumbra of privacy" discovered in *Griswold v. Connecticut*²⁶ fades at her door.

It is the purpose of this article to examine the plight of the mother of the AFDC family and to ask how she, as an individual, fares in the struggle for welfare rights.

The Invisible Woman: Who is She?

Families "headed" by women (women are regarded as heading families only in the absence of a man²⁷) comprised, in 1968, 81 percent of all "single parent" families.²⁸ Female-headed families included 90 percent of all single parent families with children under 18.²⁹ Although only a little more than a quarter of female-headed families receive public assistance, most of the 1.4 million families receiving public assistance are headed by women.³⁰

Families headed by women, tend, especially if they are Black, to be concentrated in the central cities of the largest urban areas.³¹ And the Black families tend to be larger and the mothers younger.³² But the vast majority of families of both races included children under 18 when the mother was 44 or younger, and substantial numbers had children under 18 even when the mother was 64 or younger.³³

About a quarter of the family heads are married, but the husband was not living at home because of separation, military service, institutionalization, or employment elsewhere. About a fifth of the women were divorced. A tenth had never married. The rest were widowed.³⁴

According to her age and race, her educational level varies, as might be ex-

pected. And the median family income is predictably low: 51 percent of the median for all husband-wife families, or, for the female-headed family, about \$4,300. Over a third have incomes under \$3,000.³⁵

The above profile is of all families headed by women. The picture of the AFDC family has also been drawn.³⁶ The category designated for AFDC assistance is the "dependent child," who is an age-qualified needy child who "has been deprived of parental support of care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent," and who is living with any one of several listed relatives (who are also entitled to aid).³⁷ Thus, the absence of a mother may qualify the child for such assistance. But at the end of the 1960's, it was the father who was absent in over three-fourths of the families.

About half the AFDC families³⁸ were, at the end of the last decade, Black and other races; half were white. More AFDC families came from the South than anywhere else, but fewer than half had lived

25. *Dandridge v. Williams*, *supra* note 23, may be seen as an exception, since the "surplus" children in a "too-large" family were asserting a right to have their needs met to the same extent as children in smaller families. It is nevertheless the case that the purpose of the maximum grant limitation included control of reproduction. See *infra*, notes 98-128 and accompanying text. 26. 381 U.S. 479, 483 (1965).

27. In this connection, the reflections of Angela Davis on the Moynihan report are very interesting. See A. Davis *Reflections of the Black Woman's Role in a Community of Slaves*, *The Black Scholar* (Dec., 1971).

28. J. Cowhig, *Characteristics of Families Headed by Women, March 1968* 8 *Welfare in Review* 16 (Jan.-Feb. 1970).

29. *Id.*

30. *Id.*, and see *supra* note 4.

31. *Id.*

32. *Id.*, at 16-17.

33. *Id.*, at 17.

34. *Id.* Widows historically have been the favored group in public assistance plans. See M. Rosenheim, *supra* note 17, at 553-54.

35. J. Cowhig, *supra* note 28, at 17-19, noting a possible correlation between low income and family status:

The comparatively low income received by families headed by women and comparatively lower educational attainment of these women may be both a cause and an effect of their family status. That is, low income and low levels of education may contribute to marital instability; once separation, divorce, or desertion has occurred, the chance of improved socio-economic position are diminished.

Id., at 19.

36. D. Eppley, *supra* note 4, from which the following description has been summarized.

37. 42 U.S.C. § 601 (Supp. V, 1970).

38. The number of children in the "typical" AFDC Family has by a statistical quirk, been overstated. U.S. Department of Health, Education and Welfare statistics indicate a median of 2.8, due to statistical conventions. But, it has been suggested, "The typical welfare family of a mother and three children is a statistical artifact — she has but two." L. Platky, *Measures of AFDC Family Size*, 10 *Welfare in Review* 61, 65 (May-June 1972).

in more than one state. The mother's median age was 33; the median number of years of education was 10.1. Her level of occupational skills tended to be low.

The Welfare Mother and Employment

Much of the popular resentment of welfare stems from the suspicion that the virtuous and working citizens are supporting the non-working and probably unvirtuous. The welfare mother is almost assumed to be morally suspect and hence "unworthy."³⁹ Indeed, this attitude seems to be reflected even in the Supreme Court. In *Wyman v. James*,⁴⁰ the majority offered reflections on the plaintiff's motives and character which seem gratuitous in view of the issue before the Court (constitutionality of home visits), suggesting that the plaintiff "appears to want from the agency which provides her and her infant son with the necessities for life . . . the right to receive those necessities upon her own informational terms . . ."⁴¹ The tone of the language is hardly impartial.

The poor, it has been observed, provide an irresistible opportunity for moralizing.⁴² Particularly this is true when their poverty is alleviated somewhat by public assistance — which is always to be carefully distinguished from social insurance:

While social insurance is geared to the average needs of large numbers of people, public assistance is directed to the peculiar needs of individuals whose financial dependence is supposedly caused by personal inadequacies rather than by general social or economic flaws.⁴³

Social insurance programs, because they involve fixed contributions to an insurance scheme, shield their beneficiaries from criticism because these persons can be said to have "earned" the benefits.⁴⁴ Public assistance, by contrast, is thought of as a handout to people who ought to be working.

Because work is thought to engender self-esteem and is known to supply at least a measure of independence, various

work incentive and training programs have been created or proposed to aid needy adults who will in turn set a good example for their children.⁴⁵ When the target of such programs is the welfare mother with young children, however, the programs are of dubious efficacy unless adequate day-care facilities can be made available. Assuming that they will be, can or will the welfare mother participate in the work and training programs?⁴⁶

At the end of the 1960's over 13 percent of welfare mothers were gainfully employed in regular or part-time jobs. Seven percent were either enrolled in work or training programs, or waiting to be enrolled in the Work Incentive Program (WIN). Over 35 percent did not work because they were needed at home; 36 percent did not work because they

39. M. Rosenheim, *supra* note 17, at 554. One in seven AFDC mothers is employed full or part time. H. Oberhev, *AFDC Mothers: Employed and not Employed*, 10 *Welfare in Review* 58 (May-June 1972).

40. 400 U.S. 309 (1971).

41. *Id.* at 321-322.

42. C. Reich, *supra* note 7, at 1245-46.

43. Note, *Rehabilitation, Investigation and the Welfare Home Visit*, *supra* note 5, at 757.

44. *Id.*, at 746. The AFDC program with its adult population drawn from an age group presumptively employable is especially vulnerable to criticism. See J. Handler & M. Rosenheim, *supra* note 17, at 387. Since most of the family heads are women, however, a severe conflict arises between the goals of the program and public perceptions and criticism. The state purpose of AFDC is to encourage "the care of dependent children in their own homes . . . to help maintain and strengthen family life . . ." 42 U.S.C. § 601 (Supp. V, 1970). Traditionally, the mother's role is seen as in the home with her children. However, AFDC is also to encourage "maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection." *Id.* to further this goal, the WIN (work incentive) program was instituted. Under the WIN program, welfare recipients are referred for work or training. Each member of an AFDC family aged 16 or over who is not in school full time is eligible except (1) recipients who are ill, incapacitated, or of advanced age; (2) recipients whose remoteness from a project precludes effective participation; and (c) recipients whose presence in the home is required because of the illness or incapacity of another family member. Recipients may request referrals, and if they do, they must be referred "unless the State agency determines that participation . . . would be inimical to the welfare of such person or family." 42 U.S.C. § 602 (a) (19) (A) (iv-vii) (Supp. V, 1970). See Comment, *Public Welfare WIN Program: Arm-Twisting Incentives*, 117 U. Pa. L. Rev. 1062 (1969).

HEW regulations add to the list of those who cannot be referred persons "whose presence in the home is required because adequate child care services cannot be furnished." 34 Fed. Reg. 1357 (1969).

45. Note 44, *supra*. See also J. Handler & M. Rosenheim, *supra* note 17 at 387; J. Handler & E. Hollingsworth, *Work, Welfare, and the Nixon Reform Proposals*, 22 *Stan. L. Rev.* 907 (1970).

46. See J. Handler & E. Hollingsworth, *supra* note 45; I. Cox, *The Employment of Mothers as a Means of Family Support*, 8 *Welfare in Review* 9 (Nov.-Dec. 1970); P. Levinson, *How Employable Are AFDC Women?* 8 *Welfare in Review* 12 (July-Aug. 1970); E. Prescott, W. Tash & W. Usdane, *Training and Employability: The Effects of MDTA on AFDC Recipients*, 8 *Welfare in Review* 1 (Jan.-Feb., 1971).

lacked skills, were incapacitated, or could not find jobs.⁴⁷

Studies reveal what common sense would indicate: the lack of child care is the first obstacle to the employment of women.⁴⁸ Some 60 percent of AFDC mothers have children under six years of age in their care,⁴⁹ and their median educational level and occupational skills are lower than for the general population.⁵⁰ However, the personal characteristics of the AFDC family heads differ little from those of other poor people⁵¹ and understandably the welfare mother may be reluctant to leave her small children.⁵² If she does and finds a job, she would probably like to feel she has thereby improved her family's situation. But there is often a "tax" on working, which makes it virtually impossible to rise above the welfare level of existence.⁵³ If these two impediments were removed—the lack of child care facilities and the tax imposed upon her earnings in the form of welfare deductions — many more welfare mothers would probably wish to work and be trained for work.⁵⁴

Occupational training expectably increases employability and income.⁵⁵ Once in the work force, however, welfare mothers are subject to the same adverse conditions confronting the general population of working women: low wages and low level occupations.⁵⁶ Those same conditions are probably responsible for so many women being "on welfare" to begin with. Even full-time, year-round women employees achieved a median annual salary of only \$4,500 in 1967, while the median salary of fully employed men was \$7,182.⁵⁷ Add to this gross disparity in earnings between full-time working men and full-time working women the presence of children, and the problem of financial independence for women is intensified. Only seven percent of employed mothers with children under the age of six worked full-time the year round in 1967.⁵⁸ Even if they worked full-time year round, many mothers with small children would be unable to lift themselves out of poverty. Not even half of

all fully employed women earned, in 1967, enough to support a family of four at slightly above that year's poverty level of \$3,500.⁵⁹ Expectably, if the mother is Black her situation is even worse. More non-white mothers of young children work, but they earn even less.⁶⁰

Still, more than a third of AFDC families leave the rolls each year. And the average length of time of welfare is just a little more than two years. Somehow or other, these families must have become self-supporting. The reason may be the return of the father, a re-marriage, the growth of the children, or the attainment of employment.⁶¹

That the welfare mother manages to remove her family from the AFDC rolls in two years, by whatever means, is a

47. D. Eppley, *supra* note 4, at 14. H. Oberheu, *supra* note 36, indicates that employed AFDC mothers are "more likely to be Negro than White or any other race, even though the unemployment rate is higher for Negro women in the general population." *Id.* at 61.

48. E. Prescott, W. Tash & W. Usdane, *supra* note 45, at 1.

49. I. Cox, *supra* note 46, at 9, 15.

50. *Id.*, at 9.

51. E. Prescott, W. Tash & W. Usdane, *supra* note 46, at 1.

52. *But see* J. Handler & E. Hollingsworth, *supra* note 45, at 919. Their Wisconsin study indicates that mothers with pre-school children seemed to want to have a job even more than mothers whose children were in school.

53. *See* I. Cox, *supra* note 46, at 15:
In most states in 1967, the amount of the AFDC payment to the family was reduced by the recipients' net earnings, with some allowance for work expenses. Therefore, a woman did not improve the economic situation of the family unless she could earn more than the amount of the assistance payment. However, 20 States limited the amount of the AFDC payment by setting a maximum on the amount that could be paid but allowed other family income to supplement the AFDC payment up to the total amount of the family's need as determined by the state's standards. These states, therefore, offered money incentives for employment, and higher proportions of AFDC mothers were employed in them. The median proportion employed in states in which earnings increased family income was 28.3 percent, as compared with a median of 10.5 percent of mothers employed in states with a 100 percent tax rate of earnings.

See also J. Handler & E. Hollingsworth, *supra* note 45, at 927-28. Their Wisconsin study showed that to make working worthwhile, the full time wage would have to be more than the welfare grant plus expenses, since everything over expenses in that state was to be taxed at 100 percent. Only 5 percent of those interviewed were capable of earning wages even at the breakeven level.

54. Over half the respondents in the Wisconsin study were positive about working if good child care service was available. J. Handler & E. Hollingsworth, *supra* note 45, at 918. *See also* I. Cox, *supra* note 46, at 15.

55. E. Prescott, W. Tash & W. Usdane, *supra* note 46, at 5.

56. I. Cox, *supra* note 46, at 10.

57. *Id.*, at 11. After MDTA training, men averaged more than \$90 an hour more than women. E. Prescott, W. Tash, & W. Usdane, *supra* note 46, at 4. Despite these gross disparities in earnings, the high percentage of female enrollment in federal work and training programs has been questioned as indicative of a failing to recognize the importance of the male as "primary breadwinner." M. Rosenheim, *supra* note 17, at 537-39 & n. 95.

58. I. Cox, *supra* note 46, at 11.

59. *Id.*

60. *Id.*, H. Obeshev, *supra* note 47, indicates that more Black than other AFDC mothers work.

61. *Id.*, at 14-16.

rather remarkable achievement. How remarkable can be illustrated by measuring the profile of her as sketched above against that of a woman who is in the best position adequately to support her family. She should be:

middle-aged; have no children under 6; have a high school or, preferably, a college education; work full time in a professional, technical, or upper level clerical occupation; and be white.⁶²

If public assistance is directed to the peculiar needs of individuals whose financial dependence is supposedly caused by personal inadequacies, and such inadequacies provide the justification for social overseeing on the part of the state through its welfare system, then it may be questioned whether the welfare mother is the appropriate target for such overseeing. As the writer of the "prescription for success in family support" observed of the ingredients, "[f]ew . . . are subject to choice and none guarantees 100 per cent success, including the last."⁶³

The reason why so many "female-headed" families receive AFDC assistance must be, to a large extent, built into the structure of society. Scarcely half of all fully employed women, whatever their personal qualifications, can earn enough to support four people. And that does not take into account the problems of child care faced by so many welfare mothers with pre-school children. The sex-bias of the job market need hardly be documented here. The results of that bias are clear.

In addition to being the "wrong" sex, however, the welfare mother tends to have low skills, or no skills that are saleable.⁶⁴ Again, this is as much a structural fault as it is a personal fault of the mother. Women have historically been discouraged from all but a very few "acceptable" or "feminine" kinds of occupational or intellectual training, and encouraged instead to marry and have children.⁶⁵ Welfare mothers have done these things, only to find themselves, when they have lost their husbands, the objects of social disapproval.⁶⁶

Nevertheless, it is generally assumed that the single parent family, and particularly the AFDC family, suffers problems regarded as special, rather than general, whether or not due to personal inadequacies.⁶⁷ The personal characteristics of the AFDC families are not markedly different from those of the poor at large, however.⁶⁸ It is the receipt of public assistance that sets them apart, and is thought to justify the benevolent intrusions made by the state into their lives. These intrusions are variously explained. Professor Reich cites the theory that "since all forms of welfare represent the expenditure of public funds, the public may properly interest itself in these funds even after they have reached the hands of the beneficiaries."⁶⁹ Another is that the intrusions are necessary to provide the various services built into the AFDC program, services aimed at "fostering self-care, self-support and strengthening of family life."⁷⁰

The services which necessitate the benevolent intrusions and indeed the entire AFDC program have been created and are implemented with the well-being of the children particularly in mind. The children are the primary beneficiaries of the system. Such a priority is self-evident, and where the issue is the Social Security Act, the position of the Supreme Court has been generally favorable to the children when their rights under that Act were asserted.⁷¹ Children are helpless through most of their formative years. How those years are passed, and the treatment children receive then, are of inestimable importance to their futures.

62. *Id.*, at 13.

63. *Id.*, at 13-14.

64. See generally P. Levinson, *supra* note 46.

65. See, e.g., Hearings on S.J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2nd Sess., at 674-75 (1970).

66. M. Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 Calif. L. Rev. 511, 555-56 (1966).

67. J. Colwig, *supra* note 28, at 16.

68. E. Prescott, W. Tash, & W. Usdane, *supra* note 46, at 1.

69. C. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965).

70. Note, *Rehabilitation, Investigation and the Welfare Home Visit*, 79 Yale L.J. 746, 748-49 (1970).

71. See text accompanying notes 13 and 14, *supra*.

The state has every reason to be concerned with their welfare, whether or not their parents are receiving public assistance and whether or not both parents are at home.⁷² Whether this right and proper concern is being used or abused when the welfare mother seeks to assert constitutional rights of her own is the subject of the rest of this article.

Welfare Children in the Supreme Court: Statutory Victories

Often the conduct of the welfare mother is controlled through withholding benefits from her children. So, for that matter, is the conduct of the father. If a state has not enacted the unemployed parent provision,⁷³ a father may be virtually forced to leave home so that his family may receive aid.⁷⁴ This is so because the child would not otherwise meet the AFDC requirements which include the absence of a parent from the home.⁷⁵ If the father does leave, for whatever reason, and another moves in, he was, until a few years ago regarded as a "substitute father" by many states, resulting in the ineligibility of the children. The avowed purpose of such treatment was to discourage the immorality of the adults and possibly consequent illegitimacy of children. Further justification was asserted to be the state's interest in "not undertaking the payment of . . . funds to families who because of their living arrangements would be in the same position as if the parents were married, except for the marriage."⁷⁶ The practice was challenged under the Social Security Act and under the equal protection clause of the Fourteenth Amendment in *King v. Smith*.⁷⁷

The constitutional issue was not reached in the Supreme Court because the Alabama regulation involved was declared invalid as inconsistent with the Social Security Act. The Court held that Congress had determined that "immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children

is the paramount goal of AFDC."⁷⁸ To Alabama's second argument, the Court answered that Alabama failed to take account of the fact that the situations of married and informal families were not in fact similar, because the substitute father was under no legal obligation to support the children.⁷⁹

Mr. Justice Douglas, in concurring would have reached the constitutional issue, as had the three-judge district court.⁸⁰ The district court, per curiam, had held:

This Court is clear to the conclusion that Alabama's "substitute father" regulation creates precisely the type of classification prohibited by the Equal Protection Clause. The Alabama regulation directs that Aid to Dependent Children financial assistance not be given to a class of children who meet the eligibility requirements and that this financial assistance be denied for an arbitrary reason — the alleged sexual behavior of the mother; such a reason is wholly unrelated to any purpose of the Aid to Dependent Children Statutes.⁸¹

Mr. Justice Douglas seemed to find this the decisive point, analogizing the *King v. Smith* situation to that of *Levy v. Louisiana*⁸² in which the Court held that Louisiana violated the Fourteenth Amendment by denying recovery to an illegitimate child for the death of his mother under the state's wrongful death act.⁸³

However, the concurring justice also observed that "the Alabama regulation is aimed at punishing mothers who have

72. On equalization of systems of family law for the poor and for the rest of society, see J. tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status* (pts. 1, 2), 16 *Stan. L. Rev.* 257, 900 (1964); (pt. 3), 17 *Stan. L. Rev.* 614 (1965); T. Lewis & R. Levy, *Family Law and Welfare Policies: The Case for "Dual Systems."* 54 *Calif. L. Rev.* 748 (1966).

73. 42 U.S.C. § 607 (Supp. V, 1970).

74. See 1 CCH Poverty Law Reports 1320 (1969).

75. 42 U.S.C. § 606 (Supp. V, 1970).

76. *King v. Smith*, 392 U.S. 309, 327 (1968).

77. 392 U.S. 309 (1968).

78. *Id.*, at 325.

79. *Id.*, at 329.

80. *Smith v. King*, 277 F. Supp. 31 (M.D. Ala 1967).

81. *Id.*, at 39-40.

82. *Levy v. Louisiana*, 391 U.S. 68 (1968).

83. For an analysis of the case and its progeny, see H. Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana — First Decisions on equal Protection and Paternity*, 36 *U. Chi. L. Rev.* 338 (1970).

non-marital sexual relations."⁸⁴ The district court had intimated that this might be proper:

The expressed interest of the State of Alabama in not desiring to underwrite financially or approve situations which are generally considered immoral is a laudable one; the State's argument that this regulation is a "genuine attempt to place the responsibility for taking care of children on persons who bring them into being," is, however, wholly without any realistic or rational basis insofar as this "substitute father" regulation is concerned. The punishment under the regulation is against needy children, not against the participants in the conduct condemned by the regulation.⁸⁵

Thus, in the view of the district court and perhaps also of the concurring justice, while it may be constitutionally proper to distinguish between mothers who behave immorally and mothers who do not, this has no rational connection to the needs of the children and it is their rights which are violated by penalizing them for the conduct of their mother.

Having done away with the "substitute father" rule, which would deny financial assistance altogether to the children, the Court went on to invalidate, two years later, a state regulation which would diminish payments by imputing to a needy child income from a man residing in the home whether or not he actually contributed to the child's support. A state statute mandated the support contributions, which the state assumed to have been made in all cases.⁸⁶ Again, the Supreme Court declined to reach the constitutional issue, although the district court had done so in sustaining the validity of the California regulation in question. The three-judge district court had held that a man assuming the role of spouse (the MARS) was properly obligated under California law to contribute to the support of the mother's children with whom he was living.⁸⁷ An HEW regulation, which requires that the amount by which welfare assistance could be reduced is limited by the amount of proved contributions from the MARS,

was held invalid as conflicting with the Social Security Act,⁸⁸ its policy, and the "cooperative federalism" upon which the AFDC program rests. The states have sole power to determine need, and the HEW regulation was thought to intrude upon this power.⁸⁹

To the plaintiffs' arguments of equal protection, due process and the right to privacy, the district court responded negatively in each instance. The equal protection argument focused on the children, but the rights of the MARS (but not the mother) were added. As the district court summarized the plaintiffs' objections:

The thrust of plaintiffs' objection is that the classifications drawn by the legislature are not reasonably related to the purposes of the statute, and that it is unconstitutional to impose on the children and the income-earning MARS in a family receiving AFDC payments a burden that is not imposed on AFDC children without an income-earning MARS or on a MARS living with a non-AFDC family.⁹⁰

In denying the children's argument, the district court distinguished *King v. Smith* on the ground that it was not the conduct of the mother that distinguished the children from other AFDC children, but the presence of a breadwinner who was obligated to support them.⁹¹ The state had a "rational purpose"⁹² for its regulation in spreading out its welfare funds to as many needy people as possible. No invidious discrimination was found. As for the rights of the MARS, any claimed discrimination between him and a similarly

84. 392 U.S. at 336.

85. 277 F. Supp. at 9-40.

86. *Lewis v. Martin*, 397 U.S. 552 (1970), *rev'ing* *Lewis v. Stark*, 312 F. Supp. 197 (N.D. Cal., 1968).

87. *Lewis v. Stark*, 312 F. Supp. 197 (N.D. Cal., 1968).

88. *Id.*, at 201-02.

89. *Id.*, at 202.

90. *Id.*, at 203.

91. *Id.*, at 204.

92. *Id.* The equal protection clause, as applied to legislation classified as "social" or "economic" requires some "rational state purpose" to sustain a classification. *Id.*, at 203. See *Morey v. Doud*, 354 U.S. 457 (1957); Note, *Developments in the Law — Equal Protection*, 82 Harv. L. Rev. 1065, 1082 (1969): "Once a purpose has been attributed to a statutory classification, equal protection analysis still demands a decision on whether all and only those persons similarly situated with respect to the purpose of the law are included in it."

situated man in a non-AFDC family was irrelevant.⁹³

The due process argument (against California's assumption of actual contributions) was treated summarily, but the court concluded that the state could operate on the assumption that the law has been complied with, and referred the plaintiffs to the legislature.

The MARS' last claim was that his right to privacy was violated by the regulation. No similar claim was made by the welfare mothers involved. Distinguishing *Griswold v. Connecticut*,⁹⁴ the district court held that the intrusion here was not unconstitutional since it was not so intimate as that involved in an attempt to prove the use of contraceptives.⁹⁵

Here again, no claim was made for the mother on any of the constitutional issues involved. Nor was she mentioned in the Supreme Court's opinion⁹⁶ that the HEW regulation requiring actual contribution was consistent with the Social Security Act. *King v. Smith*, said the Court, did not hold that a "legal obligation to support" was sufficient to qualify a man as a "parent" under the Social Security Act, and that California's statutory imposition of such a duty was not determinative.⁹⁷

The Children in the Supreme Court: Constitutional Defeats

Both *Lewis v. Martin* and *King v. Smith* upheld the right of the children to welfare payments on statutory grounds alone. *Dandridge v. Williams*,⁹⁸ however, held that denial or limitation of payments to certain needy and dependent children constitutionally proper on grounds that also worsen the constitutional position of their mothers. For upholding Maryland's maximum grant provisions,⁹⁹ the decision has been characterized as a "retrenchment."¹⁰⁰ For its attempted removal of meaningful equal protection shelter from the welfare area, it could be characterized as a disaster.

The maximum grant operates in effect to penalize existing children for each additional child over a certain number born

into an AFDC family. The district court had held that the maximum grant regulation violated the equal protection clause by creating two classes of children: those in large families who will not have their needs met, and those in small, who will.¹⁰¹ The district court could find no rational state purpose "other than to fit the total needs of the State's standards of their subsistence requirement, into an inadequate state appropriation."¹⁰² But to administer the inadequate state appropriation, it is not permissible, under the equal protection clause, to distinguish among needy children according to whether they are the fourth or the eighth to arrive in a family unit.¹⁰³

In a supplemental opinion,¹⁰⁴ the district court responded to an additional argument of the state in favor of the maximum grant. Its purpose, said Maryland, was to further the principle of "less benefit,"¹⁰⁵ which aims to equalize individuals receiving public assistance and those who are working by gearing the maximum grant to the minimum wage. The idea is to remove any incentive to abandon or decline employment for the purpose of obtaining public assistance.

93. 312 F. Supp. at 204-05, *Id.*, 205-05.

94. 381 U.S. 479 (1965).

95. *Lewis v. Stark*, 312 F. Supp. at 206.

96. *Lewis v. Martin*, 397 U.S. 552 (1970).

97. "In the absence of proof of actual contribution, California may not consider the child's 'resources' to include either the income of a nonadopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS — whatever the nature of his obligation to support." *Id.* at 559-60.

The case was remanded. California was foreclosed from arguing that its assumption-of-income provisions are consistent with the Social Security Act as applied to MARS, but could demonstrate that the provisions as applied to nonadopting stepfathers are consistent with the Act. *Id.* at 560.

98. 397 U.S. 471 (1970).

99. The maximum grant in Maryland was an administrative regulation imposing a ceiling of \$250 per month for AFDC families. Maryland Manual of the Dep't of Social Services, Pt. II, Rule 200, § VII, 1. Until the *Dandridge* decision, the lower courts had unanimously held such ceilings were invalid. *Dandridge v. Williams*, 397 U.S. 471, 517 (1970) (dissenting opinion of Mr. Justice Marshall).

100. C. Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 Calif. L. Rev. 555 (1970).

101. *William v. Dandridge*, 297 F. Supp. 450 (Md. 1968).

102. *Id.*, at 458.

103. *Id.*, at 458-59.

104. 297 F. Supp. at 459-70. The district court modified its original opinion on the issue of whether the maximum grant is consistent with the Social Security Act. It declined to decide the question, but reaffirmed the constitutional basis of the prior opinion. *Id.*, at 469.

105. *Id.*, at 467.

Another effect, thought to be desirable, is the encouragement of family limitation.

Assuming the claimed state purposes were the actual purposes, the district court, nevertheless, found the maximum grant invalid because it affected children who were not rationally related to the alleged state purposes; in other words, the regulation failed for overreaching.¹⁰⁶ AFDC is not limited to abandoned children, so the regulation would affect children qualified for assistance by reason of a parent's incapacity which would in no way further the claimed state purpose of encouraging employment. At the same time, the purpose of the Social Security Act to preserve family life is subverted by the regulation because the "surplus" children would be sent to live with relatives in order to qualify them for assistance. The family planning purpose was found to be unpersuasive, and in any case the regulation still invalidly overreached because it is not limited to children born after AFDC eligibility is established.¹⁰⁷

All other lower courts passing on the maximum grant had likewise found it to be invalid, either on statutory or constitutional grounds, or both.¹⁰⁸ The Supreme Court, however, sustained the state on all counts. It first held that the maximum grant was not contrary to the Social Security Act.¹⁰⁹ On the equal protection issue, which the Court reached because it had sustained the state on the statutory issue, Maryland's arguments of legitimate state interests prevailed. The Supreme Court held that the district court had erred in applying the doctrine of overreaching to a case which did not involve freedoms guaranteed by the Bill of Rights.¹¹⁰ Social and economic interests, it said, may be the subject of discriminatory but not "suspect" classification provided only that there be some "reasonable basis for the classification."¹¹¹ If some reasonable basis exists, the Court will not inquire whether all who are similarly situated with respect to the basis are affected, or if some who are not related to the basis are affected.

Although Mr. Justice Marshall wrote in his dissent that the decision was wholly without precedent,¹¹² the majority cited in support of its constitutional standard of review *Goesaert v. Cleary*.¹¹³ *Goesaert* involved a challenge to a state statute denying bartending licenses to all women except the wives or daughters of male bar owners. The Court refused to inquire into a discriminatory purpose of monopolizing the occupation for men, but attributed to the state the possible purpose of avoiding "social and moral problems."¹¹⁴ Yet while declining to inquire

106. Equal protection permits statutory classification for constitutionally permissible purposes if the classification relates reasonably to the purpose. Note, *Developments in the Law — Equal Protection*, 82 Harv. L. Rev. 1065, 1077-84 (1969). Overreaching, or overinclusion, occurs when a classification includes not only those who are reasonably situated with respect to the purpose, but others who are not so situated as well. *Id.*, at 1086. It was apparently thought, until *Dandridge*, that overinclusion invalidated even legislation in the economic area where no suspect classifications or fundamental interests were involved. *Id.*, at 1082.

107. 297 F. Supp. at 467-69.

108. See note 99, *supra*; C. Dienes, *supra* note 100, at 561.

109. Section 402 (a) (10) of the Social Security Act, as amended 42 U.S.C. § 602 (a) (1) (Supp. V, 1970) requires a state plan that provides "that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." Appellees argued that the maximum grant is in violation of the Act since the younger children are just as dependent as their older siblings. It was also argued that the maximum grant undermines the purpose of the Act, which is to encourage the care of such children in their own homes, because parents of large families are forced to "farm out" their younger children to relatives in order to qualify them for aid. The Supreme Court held that it is the family grant that is affected, which is not incompatible with the Act. In support of this, it cited the several sections of the Act which stress or contain the word "family." Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family. We see nothing in the federal statute that forbids a state to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families — because of the inherent economies of scale — to accommodate their needs to diminished per capita payments." 397 U.S. 479-80. Although the Act requires that aid be furnished to "all eligible individuals," ascertainment of the level of benefits lies with each state. *Id.*, at 480. The majority also relied on the approval by the Secretary of Health, Education and Welfare of Maryland's welfare scheme, and a "specific congressional recognition of the state maximum grant provisions." *Id.*, at 481-82. Justices Douglas and Marshall challenged the majority's statutory findings. *Id.*, at 490-508, 508-17. See also C. Dienes, *supra* note 100, at 565-91.

110. 397 U.S. at 484. This holding is without precedent. See the dissenting opinion of Mr. Justice Marshall, 397 U.S. at 508-09; note 106 *supra*.

111. 397 U.S. at 485 & n. 17. If a right is characterized as "fundamental" or if a "suspect classification" is involved, a stricter standard of review is invoked.

112. *Supra*, note 110.

113. 335 U.S. 464 (1948).

114. See Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?* 84 Harv. L. Rev. 1499, 1503 (1971), observing that the Court in *Goesaert* felt no need to articulate the nature of the "moral and social" problems surrounding the employment of women in bars, nor the magnitude of the harms ensuing from them, and Note, *Developments in the Law — Equal Protection*, *supra* note 106, at 1079.

into the nature of those "social and moral problems" it did at least glance at the inclusiveness of the prohibition. The state could "deny to all women opportunities for bartending," but it could not "play favorites among women without rhyme or reason."¹¹⁵ Thus, while more than a little cavalier in its treatment of the question, the Court did pay some attention to the reasonableness of the line drawn between women in general and the wives and daughters of male owners. It did not say, "this legislation because it is 'social and economic' is not susceptible of inquiry into its possible underinclusion," as did the Court in *Dandridge*. *Goesaert* does, however, exemplify a permissive standard of review.¹¹⁶

The *Dandridge* majority seems to have gone much further in the "permissiveness" of equal protection review. All that is left in the social and economic area is some "rational state purpose."¹¹⁷ The scope of the classification, so long as the classification itself is related to the purpose, is not open to question.

Other cases cited in *Dandridge* in support of the "standard of review" it announces involved state regulation of business and industry.¹¹⁸ The majority did recognize the "dramatically real factual difference" between industries and the "most basic needs of impoverished human beings," but it could "find no basis for applying a different constitutional standard."¹¹⁹ Other bases were available, however, even if social welfare and public assistance laws are properly seen as if they related to businesses and industries: even in the economic area, classifications affecting "fundamental interests" and "suspect classifications" have been thought to call for a strict standard of review in which the presumption of constitutionality is removed and the state has the burden of justifying its differential treatment.¹²⁰

The majority, closing its opinion with a sort of disclaimer, said that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the

business of this Court."¹²¹ Certainly judges are not supposed to oversee the legislatures on the wisdom and desirability of laws, and their expertise on local conditions is probably in any event limited, causing them to rely on the judgment of local officials.¹²² But there is no reason why judges should not be expected to categorize questions fairly, knowing full well that how the question is asked determines its answer. Equating welfare legislation with industrial economic regulation will naturally result in their being treated alike despite the "dramatically real factual difference." Even if, in the economic area, the Court wishes now to require only some rational state purpose to sustain a law, the obvious objection is that the ranking of people is different from the ranking of industries.¹²³ There may well be sound social and economic justification for preferring one industry to another in a given area, while state preferences for people in small families to people in large are more difficult to justify.

Besides misclassifying the *Dandridge* issue, the Court implicitly declined to extend the concept of "fundamental interests,"¹²⁴ which would have at least necessitated a closer examination of the Mary-

115. 335 U.S. at 466.

116. Note, *Sex Discrimination and Equal Protection*, *supra* note 114, at 1504.

117. See notes 106 and 110, *supra*.

118. *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing laws); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61 (1913) (ordinance licensing places of amusement at graded license fees); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) (Statute to protect mineral springs restricted the pumping of gas). The court noted that the same standard of review had been employed in employment cases, citing *Goesaert v. Cleary*, *supra* notes 113, 114 and accompanying text; *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (river pilots appointed by state governor after serving an apprenticeship which in practice was generally restricted to relatives and friends of incumbent pilots).

119. 397 U.S. at 485.

120. See Note, *Developments in the Law—Equal Protection*, *supra* note 106, at 1077, 1120-23; *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556-57 (1947).

121. 397 U.S. at 487.

122. Note, *Developments in the Law—Equal Protection*, *supra* note 106, at 1078, 1080.

123. *Id.*, at 1081.

124. Interests thus far classified as "fundamental" and therefore deserving of special scrutiny under the equal protection clause include voting, procreation, rights with respect to criminal procedure and education. *Id.* at 1127-28. *Shapiro v. Thompson*, 394 U.S. 618 (1969) characterized the right to travel from one state to another as "fundamental," although not ascribable to a particular constitutional provision. 394 U.S. at 630.

land regulation and its effects. By mandating a permissive standard of review in an area now classified as social and economic, the Court was in effect saying that welfare interests are not "fundamental," even though food and shelter for children are involved.¹²⁵

The decision is frankly deplored here. To equate public assistance with industrial regulation is, it is submitted, a miscategorization, a misidentification of the problem. *Goesaert* is another example of miscategorization. Restrictive employment laws which directly limit individual human opportunity in a work oriented society ought not be treated the same way as industrial regulation (which might have some limiting effect on employment, but only indirectly). If, however, the complexities of industrial society and the public interest in the qualifications of employees necessitate that in most cases the states have considerable leeway in classification so that *Dandridge*-type permissive review is in most instances appropriate, then it would seem necessary to adjust the concepts of "fundamental interests and suspect classifications to accord with the realities of the situations at hand." Similarly, if the immensities of this welfare problem are such that the states ought to have considerable leeway, the doctrines of "fundamental interests" and "suspect classifications" ought to be re-examined so as to enable the courts to preserve, when necessary, the rights and dignity of the poor. The extension of "suspect classifications" to welfare children and to sex-based classifications,¹²⁶ and "fundamental interests" to the bare necessities of life would have softened the combined impact of *Goesaert* and *Dandridge*. As it is, after *Dandridge* the position of poor children, their mothers, and indeed, all women was perhaps worsened. For in addition to its "emasculatation of the Equal Protection Clause,"¹²⁷ the Court in citing *Goesaert* reinforced the constitutionality of the sex discrimination in employment which must contribute to the necessity for public assistance to begin with.¹²⁸

Any hope that *Dandridge* may have been an aberration was at least temporarily dampened by *Labine v. Vincent*¹²⁹ which carried permissive review almost to the extreme of no review at all. The case had serious implications for welfare mothers and their children.

Labine v. Vincent posed the question of whether an acknowledged illegitimate child has the right to take by intestate succession from her father. Louisiana is one of the few states which expressly denies the right,¹³⁰ and its law was challenged in the Supreme Court. It was expected that after the Court's earlier decision in *Levy v. Louisiana*¹³¹ the answer would be "yes" on the ground that children ought not be classified because of the acts of their parents, and that the question of inheritance from a putative father ought to depend upon proof of paternity, and not the child's status.¹³² The Supreme Court, in *Labine*, sought to distinguish *Levy* and its companion case, *Glon v. American Guarantee & Liability Insurance Co.*,¹³³ on the ground that they involved statutory actions, while rights of inheritance were of a different order.¹³⁴ This is, to say the least, an interesting distinction in view of the Court's earlier decision in *Irving Trust v. Day*,¹³⁵ where it said that "[r]ights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation and the dead hand rules succession only by sufferance."¹³⁶ If succession is no less

125. The majority's refusal to see that "fundamental personal interests" were involved was attacked from another point of view by C. Dienes, *supra* note 100, at 596. Professor Dienes' analysis focuses on the marital and familial relationship as fundamental, rather than on the interest of the dependent children in the necessities of life.

126. Classifications which are "suspect" (race, alienage, religion) trigger strict scrutiny under the equal protection clause. Sex, however, has never been held by the Supreme Court to be a "suspect classification." Note, Sex Discrimination and Equal Protection *supra* note 111, at 1503.

127. Dissenting opinion of Mr. Justice Marshall, 397 U.S. at 508.

128. See *supra* notes 56-62 and accompanying text.

129. 401 U.S. 532 (1971).

130. *Id.* at 556-57 (dissenting opinion of Mr. Justice Brennan).

131. 391 U.S. 68 (1968).

132. See generally H. Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana — First Decisions on Equal Protection and Paternity*, 36 U. Chi. L. Rev. 338, 344 (1969).

133. 391 U.S. 73 (1968).

134. 401 U.S. at 535.

135. 314 U.S. 556 (1942).

136. *Id.* at 562.

and no more a statutory right than the wrongful death action, the distinction sought to be drawn between the two demands greater explanation than was given.¹³⁷ The real reason seems to have been a re-dedication to the state's right to regulate private morality.¹³⁸ While declining even to consider whether there was a "rational basis" for the Louisiana law,¹³⁹ the majority stated that *if* the test were applicable, a rational basis existed in Louisiana's interest "in promoting family life."¹⁴⁰ Further, said the majority, "the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of poverty . . . is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State."¹⁴¹ "[T]here is nothing," said the majority, "in the vague generalities of the Equal Protection and Due Process Clauses which empowers this Court to nullify the deliberate choice of the elected representatives of the people of Louisiana."¹⁴²

Mr. Justice Brennan, in his lengthy dissent (joined by Justices Douglas, White and Marshall) accused the majority (which was not really a majority, for Mr. Justice Harlan filed a separate concurring opinion) of

simply excluding . . . illegitimate children from the protection of the [equal protection] Clause, in order to uphold the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimates' parents, but also the hapless, and innocent, children.¹⁴³

He further points out that the Court's holding that the state may regulate and uphold family life in any manner it chooses "would reverse 104 years of constitutional adjudication under the Equal Protection and Due Process Clauses. It is precisely state action which is subjected by the Fourteenth Amendment to its restraints."¹⁴⁴ Worst of all, the Court simply refused to analyze the discrimination in terms of the requirements of the Fourteenth Amendment.

The systematic dilution of the guarantees of the Equal Protection Clause when invoked by children darkens the horizon for their mothers. For if the state has uncontrolled power to legislate morality and to "foster" family life, it has uncontrolled power to control women, so long as they are identified primarily with family life. That a majority of the Court has historically and consistently acted on a belief in "woman's separate place" has already been demonstrated.¹⁴⁵ If a state may enact any law under the rubric — demonstrated or not — of protecting "family life," then it may arguably prohibit mothers from working outside the home,¹⁴⁶ from attending college,¹⁴⁷ from controlling their separate property,¹⁴⁸ or from asserting any other rights all too recently won. There is little on the face of *Reed v. Reed*,¹⁴⁹ which held unconstitutional a statute mandating a preference for men over women as estate administrators. To qualify this potential state power for family life was not a factor in that opinion. So the state may still impose

137. One explanation for the distinction could be that in intestate succession, the property being distributed is the decedent's own, while in *Levy and Glona*, forms of governmental largesse were being distributed. Thus, Louisiana's exclusion of illegitimate children in *Labine* could rest, as do many other intestacy provisions, on the presumed preferences of most property-owners. Nevertheless, it is the state which is making the classification, which of course brings it within the Equal Protection Clause.

138. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965).

139. 401 U.S. at 536 n. 6.

140. *Id.*

141. *Id.* at 538.

142. *Id.* at 539-40.

143. *Id.* at 541.

144. As recently as 1961, the Supreme Court noted that "Despite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a state, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service . . ." *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961). *Cf. Reed v. Reed*, 404 U.S. 71 (1971). See generally B. Brown, T. Emerson, G. Falk & A. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *Yale L. J.* 871, 875-82 (1971).

145. "The Supreme Court has never seriously re-examined its assumption of woman's separated place and the equal protection doctrines that flow from it." B. Brown, T. Emerson, G. Falk, & A. Freedman, *supra* note 145, at 878-79. This remains true even after *Reed v. Reed*, 404 U.S. 71 (1971), because that opinion did not mention either the home or family life, so the classification was not tested against the state interest in protecting either.

147. *Williams v. McNair*, 401 U.S. 951 (1971), *aff'g* 316 F. Supp. 134 (D.S.C. 1970) upheld, without opinion, sex restrictions in college admissions.

148. See hearings on S. J. Res. 61 Before Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., at 723 (1970).

149. 404 U.S. 71 (1971).

restrictions on any married woman in order to foster family life. And the effects would soon be felt by single women who would find employment opportunities even more restricted than they now are because women might marry and give up their jobs.¹⁵⁰ If little children may be disadvantaged and discriminated against by the state in order to "promote family life," certainly adult women (who can vote) may be classified for the same purpose.¹⁵¹

Although not an indication that "retrenchment" in the welfare area is ended, *Weber v. Aetna Casualty and Surety Co.*¹⁵² is at least a harbinger of renewed concern for the plight of illegitimate children. The question was the right of illegitimate children to recover under Louisiana workmen's compensation laws benefits for the death of their natural father, who had not and could not have acknowledged them. Writing for the majority, Mr. Justice Powell held that *Levy* and not *Labine* was the controlling precedent, quoting with approval *Levy's* observation that "legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the parent."¹⁵³ *Labine* was distinguished because of the traditional latitude given state discretion in the area of inheritance, but the majority also cited the state court's finding of a substantial state interest in providing for "the stability of . . . land titles and the prompt and definitive determination of the valid ownership of property left by decedents."¹⁵⁴ Finally, the *Weber* majority distinguished *Labine* because there the natural father could have legitimated his child, while in *Weber* this was impossible under state law.¹⁵⁵

So *Labine* is limited. More importantly, the *Weber* majority reaffirmed the reasoning of *Levy*, and placed it in a more structured conceptual framework, one which may also affect *Dandridge* (a possibility that Mr. Justice Rehnquist, dissenting, clearly recognized).¹⁵⁶ Said the majority:

Though the latitude given state economic and social regulation is necessarily

broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?¹⁵⁷

In this case, as in the others, the state interest in protecting and fostering legitimate family relationships was urged and, as in the others, accepted. "We do not," said the Court, "question the importance of that interest; what we do question is how the challenged statute will promote it."¹⁵⁸ Finally, and most hopefully for an eventual reexamination of the reasoning of the *Dandridge* majority, the *Weber* majority said: ". . . imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth. . . ."¹⁵⁹

In his dissent, Mr. Justice Rehnquist observed:

Levy and today's decision are not only inconsistent with the long line of earlier cases construing the Equal Protection Clause to forbid only irrational classifications; they are quite inconsistent with *Dandridge v. Williams*, . . . decided the year after *Levy*. If state welfare legislation involving "the most basic economic needs of impoverished human beings" is to be judged by the traditional "reasonable basis" standard, I am at a loss to see why that standard should not likewise govern

150. *Cf. B. Brown, T. Emerson, G. Falk, & A. Freedman, supra* note 145, at 894-96.

151. It has been suggested that the reason for the Court's permissive view of sex discrimination may be based as much on institutional calculations as on historical considerations. The tremendous ramifications of an institutionalized recognition of a change in the position of women, the many emotional over- and undertones, and the fact that women are a political majority and can thus utilize their voting power to bring about change, may all have influenced the Court. See Note, *Sex Discrimination and Equal Protection, supra* note 111, at 1505.

152. 406 U.S. 164 (1972).

153. *Id.* at 168.

154. *Id.* at 170.

155. *Id.* at 170-71.

156. *Id.* at 180, 184.

157. *Id.* at 172-73.

158. *Id.* at 173.

159. *Id.* at 175.

legislation determining eligibility for state workmen's compensation benefits.¹⁶⁰

Fundamental Rights and Suspect Classifications in Welfare Litigation

Where the right is fundamental — a concept that can better be illustrated than defined¹⁶¹ — welfare litigants have fared somewhat better when asserting constitutional issues. *Dandridge* declined to expand the interests covered by the concept, but rights previously identified as fundamental have not been limited. Interstate travel is one such right.

The right to travel is not sanctified by any express constitutional guarantee, of course, yet impairment of it through state welfare residency requirements was held to violate the Fourteenth Amendment's equal protection clause in *Shapiro v. Thompson*.¹⁶² The classification of welfare applicants according to how long they had resided in the state, while made for legitimate state purposes, was nevertheless unconstitutional: "If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional."¹⁶³ The right to travel is not explicitly mentioned in the Constitution nor is it more personal than a child's interest in not being hungry, or a woman's interest in her family, or in employment. But it had been previously identified as important enough to warrant careful scrutiny of state-imposed impediments to its enjoyment. *Dandridge*, given the opportunity to do so, declined to expand the fundamental interest concept.

Fundamental interests, however, are not alone in triggering strict review. If a classification is a "suspect" one, it will be strictly reviewed even though no fundamental interest is at stake. But this door to relief has also been shut on welfare mothers. *Graham v. Richardson*,¹⁶⁴ which struck down disqualification of aliens for welfare benefits, distinguished (and reenforced) *Dandridge* as follows:

Appellants' attempted reliance on *Dandridge v. Williams* . . . is misplaced, since

the classification involved in that case (family size) neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion.¹⁶⁵

Again, the impact of *Weber* must be measured. The test formulated there was "what fundamental personal rights might the classification endanger?"¹⁶⁶

On suspect classifications, the *Graham* decision said:

Under equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. * * * This is so in "the area of economics and social welfare." *Dandridge v. Williams*, 397 U.S. 471,485 (1970). But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate.¹⁶⁷

One might substitute young children in large impoverished families for aliens in the last sentence of the above paragraph, of course, and still have a "discrete and insular" minority worthy of judicial solicitude. Nor would substitution of "illegitimate children" distort the sense of the sentence. One might even substitute "poor mothers of small children" as deserving of special concern. They are a minority; they are discrete and insular; they lack access to jobs and to political power; they are the subject of public disapprobation; and they are in fact discriminated against both because of their sex and their status, however they can vote. But they are particularly vulnerable to intrusions upon their constitutional rights because the penalty of asserting those rights may be loss of support for their children — perhaps the cruelest of punishments, and a most effective one for it sure must deter many from seeking redress.

160. *Id.* at 184-85.

161. See note 121, *supra*.

162. 394 U.S. 618 (1969).

163. *Id.* at 631, citing *United States v. Jackson*, 390 U.S. 570, 581 (1968).

164. 403 U.S. 365 (1971).

165. *Id.*, at 376.

166. 405 U.S. 914 (1972) *emphasis added*.

167. 403 U.S., at 371-72.

In most of the cases thus far considered, the issues were generally posed in terms of the children's rights. In one, a MARS urged that his rights were infringed upon by welfare regulations but the Supreme Court never reached the issue, holding for the children on statutory grounds.¹⁶⁸ In *Shapiro v. Thompson*, however, AFDC mothers joined other categorical assistance recipients in urging their right of interstate travel. This is the only instance in which the Supreme Court has upheld welfare mothers claiming a personal constitutional right on constitutional grounds. And even here, it was seen as a right being exercised in furtherance of the children's welfare:

... we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.¹⁶⁹

Thus the Court found no conflict between the mothers' exercise of the right and their role as mothers. That a perception of such a conflict may influence the outcome is demonstrated by a later case.

Due Process in Welfare Litigation

In *Goldberg v. Kelly*,¹⁷⁰ the question was whether the state could terminate assistance to welfare recipients without a prior hearing. Some of the plaintiffs were AFDC recipients, others received general assistance funded and administered by the state alone. The state had provided a post-termination hearing, which the federal district court held did not satisfy due process standards because "... to cut off a welfare recipient in the face of ... 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it."¹⁷¹ Protection of tax revenues did not overwhelm the individual's overpowering need.

In affirming, the Supreme Court agreed with the district court's weighing the welfare recipients' need more heavily than the state's interest in either conservation of revenues or summary adjudication.¹⁷² True, the majority conceded, some unqualified persons may be on the welfare rolls, but the danger is that an eligible recipient may suffer.¹⁷³

In the course of his opinion, Mr. Justice Brennan, writing for the majority, offered the following observations about the role of public assistance in the American system. Because they offer a stunning contrast to the views held by the majority in *Wyman v. James*,¹⁷⁴ decided less than a year later, they are quoted here at length:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."¹⁷⁵

The AFDC Mother and the Supreme Court: A Non-Person?

The welfare mother, who already been briefly sketched,¹⁷⁷ shares with other welfare recipients the right to travel from

168. *Lewis v. Stark*, 312 F. Supp. 197 (N.D. Cal. 1968), *rev'd and remanded sub nom. Lewis v. Martin*, 397 U.S. 552 (1970).

169. 394 U.S. 613, 632 (1969).

170. 397 U.S. 254 (1970).

171. *Kelly v. Wyman*, 294 F. Supp. 893, 899-900 (S.D.N.Y., 1968).

172. 37 U.S. at 263.

173. *Id.*, at 266.

174. 400 U.S. 309 (1971).

175. 397 U.S. at 264-65. For a recent development in due process, see *Stanley v. Illinois*, 405 U.S. 645 (1972).

176. See notes 27-38, *supra*, and accompanying text.

177. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

state to state,¹⁷⁸ the right to receive assistance for herself and her children even if she is not a citizen,¹⁷⁹ and the right to a fair hearing prior to termination of her family's benefits.¹⁸⁰ All of these are constitutionally guaranteed. She can, without causing her children to suffer loss of assistance, cohabit with a man not her husband because her children's statutory rights are protected, and not because she has asserted any right to such behavior.¹⁸¹ However, her children are not now protected, under either the Constitution or the Social Security Act from diminished assistance after the birth of another child in maximum grant states.¹⁸² The right to procreation, although a "fundamental interest" (at least when asserted by a male criminal),¹⁸³ has not been measured (or even recognized) in this context.

When, however, a mother asserts her own constitutional right, such as the freedom from unreasonable search, she is less likely to succeed, as a recent case amply warns her. *Wyman v. James*¹⁸⁴ challenged the constitutionality, under the Fourth and Fourteenth amendments, of enforced warrantless home visitations. Refusal of consent means withdrawal of aid to mother and child. Said Mr. Justice Blackmun, writing for the majority:

The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in a scale of comparative values, to a position secondary to what the mother *claims* as her rights.¹⁸⁵

Mrs. James was "claiming" a right not to be subject to an unreasonable search of her home. Quite apart from the question of whether the home visit is either a search or unreasonable, the Court seemed to feel that it was unseemly for Mrs. James to suggest that she, personally, had such a right. Because of her role as mother (or perhaps more accurately, poor mother without a husband) her interests are subordinate. Of course, there is no such hierarchy in the Constitution, which simply fails to mention women at all.

On the character of the home visit itself, the Court held that it was neither a "search" nor "unreasonable". The home

visit has been described as "the practice that most clearly embodies the unique rehabilitative cast of public assistance programs".¹⁸⁶ Although not specifically required by federal regulations or legislation,¹⁸⁷ it is a particularly important part of AFDC programs. Its goals are benevolent,¹⁸⁸ despite the fact that if consent to the visit is withheld, "no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search."¹⁸⁹ The Supreme Court conceded that the home visit is investigative as well as rehabilitative, but the investigative aspect, said the Court, "is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context".¹⁹⁰

The majority did not deny, as indeed it could not, that the home visit is at least in part investigative. It may be said that a fire inspector's visit to a commercial warehouse is at least in part intended to be helpful. This does not obscure the fact that both the welfare worker and the fire inspector may discover violations of the regulations which they are charged with enforcing.¹⁹¹ Nor does it obscure the fact that violations in either case may, if discovered, lead ultimately to criminal penalties. An expensive item in the welfare recipient's home may lead to a termination of benefits or a charge of fraud.¹⁹² The presence of a man may lead

178. *Graham v. Richardson*, 403 U.S. 365 (1971).

179. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

180. *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968).

181. *Dandridge v. Williams*, 397 U.S. 471 (1970).

182. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

183. 400 U.S. 309 (1971).

184. *Id.*, at 318 (emphasis added).

185. Note, *Rehabilitation, Investigation and the Welfare Home Visit*, 79 Yale L. J. 746 (1970).

186. *Id.*, at 747.

187. *James v. Goldberg*, 303 F. Supp., 935, 942 (S.D.N.Y., 1969).

188. U.S. at 317-18.

189. *Id.*

190. *See v. Seattle*, 387 U.S. 541 (1967). *See also Camara v. Municipal Court*, 387 U.S. 523 (1967).

191. Note, *Rehabilitation, Investigation and the Welfare Home Visit*, *supra*, note 185, at 752-53. The district court in *James v. Goldberg*, *supra* note 187, had no trouble at all characterizing the home visit as a search within the meaning of the Fourth Amendment without even considering these possibilities.

192. *See supra*, note 20. A determination that a home is "unsuitable" results in removal of the child from the home, not termination of aid to the child. See 42 U.S.C. §§ 602 (a) (16), 606 (a), 607, 608 (Supp. V, 1970). *See also King v. Smith*, 392 U.S. 309, 322-27 (1968).

to a charge of adultery or fornication, or a finding that the home is an "unsuitable" one in which to raise a child.¹⁹³ The benevolence of the intrusion makes it no less an intrusion.

Further, there is some indication that the benevolent or supportive aspect of the home visit falls far short of the ideal. One study concluded that "Our overall finding was that very little social service activity goes on."¹⁹⁴ Clients indicated that caseworkers tended to stay away from troublesome issues and that with the exception of medical services offered little concrete assistance.¹⁹⁵ If this is the case generally, the prop on which the Court rested its conclusion that the visit is not a search because it is rehabilitative as well as investigative falls away. There was, however, another prop: the reasonableness of the search.

Having concluded that the home visit is not a search, the Court went on to say that even if it is a search, it is not an unreasonable one. It offered several reasons in support of its conclusion.

The first is the public's interest in the welfare of the child. The child's needs are paramount and compared to them the mother's claimed right is assigned a secondary position.¹⁹⁶ This somehow assumes that a child in an impoverished family is in far greater jeopardy from his parents than children in other families.¹⁹⁷ Child abuse is a grave and heinous thing, but it is not confined to the poor, or those on the welfare rolls.¹⁹⁸ Ineligible families are protected from summary denials of aid because some entitled families may suffer from the same summary denials.¹⁹⁹ Welfare families in which the children are lovingly cared for should not be subject to a benevolent intrusion because in some welfare families — as in some more affluent families — children are physically and psychologically abused.

If the welfare authorities were without other means to ferret out child abuse, the home visit might be justifiably categorized as a warrantless search which is nevertheless reasonable.²⁰⁰ But it ought to be possible to require the recipient to

bring her children to the social worker's office at the time of the interview.²⁰¹ It is the loss of privacy in the home that is thought to be particularly stigmatizing. Stigma is closely related to privacy.²⁰²

Disclosing assets and resources, revealing the names of one's friends and associates, submitting to investigations and questioning, accounting for expenditures and social behavior — these are the price of receiving welfare. Loss of privacy is loss of dignity and is part of the shame of being a welfare recipient.²⁰³

The shame, the stigma, visited upon the parents may have deleterious and lasting effects upon the children who share it. Stigma inflicted by loss of privacy is unlikely to mitigate a sense of "unjustified frustration and insecurity."²⁰⁴ Nor is it likely to aid the children who see their homes periodically "checked" by outsiders. Such children are scarcely likely to be

193. J. Handler & E. Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 Stan. L. Rev. 1, 10 (1969). The amicus brief submitted on behalf of the Social Services Employees Union in *Wyman v. James* bears this out, noting that in many instances New York caseworkers are either badly trained or untrained, and generally lack experience. 400 U.S. 309, 322-21, n. 11 (1971). The majority's comment on this "astounding description" misses the point by a wide margin.

194. J. Handler & E. Hollingsworth, *supra* note 193.

195. 400 U.S. at 318.

196. One study has in fact indicated that child abuse tends to occur more often in large families of low socio-economic status and educational achievement, but it was pointed out that children in more prosperous homes are more likely to be treated by private physicians, or to go unreported. N.Y. Times, Aug. 16, 1971, at 16, col. 4.

197. *Wyman v. James*, 400 U.S. at 341-42 (dissenting opinion of Mr. Justice Marshall).

198. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

199. "... except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1966).

200. The district court observed of Mrs. James' claim that: less drastic means may be suggested for achieving the same basic purposes for which the City and State urged home visits are designed. Proof of actual residence may be ascertained, for example, by the submission of a duly-executed lease upon the premises in question. Family composition may be verified by the submission, in this instance, of birth certificates. The physical well-being of the child could be safeguarded by making available facilities for periodic medical examinations rather than by requiring routine home visits by case-workers. This is especially true since there is no assurance that the child will even be present when the home visit is made. *James v. Goldberg*, 303 F. Supp. 935 (S.D. N.Y., 1969).

The Supreme Court majority, however, denigrated the usefulness of the interview away from home, and such sources as a lease and birth certificates on the issue of eligibility. "Although these secondary sources might be helpful, they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits, or of impending medical needs. And, of course, little children, such as Maurice James, are not yet registered in school." 400 U.S. at 322.

201. J. Handler & E. Hollingsworth, *supra* note 193, at 2, 202. *Id.*

203. See text accompanying note 160, *supra*.

204. 400 U.S. at 319.

secure unless it is true that poor parents are bad parents, and the child knows this and will feel reassured by the caseworker's visit.

The Court's first reason why the home visit is not unreasonable seems suspect. If it is granted that the child's welfare is paramount, the question still remaining is whether the child is well-served by the unconsented home visit.

The second reason for the reasonableness of the search is the state's interest in "having at its command a gentle means, of limited extent and of practical and considerate application"²⁰⁵ of achieving assurance that public monies are being properly used by the recipients. This interest did not, however, outweigh the necessity for a prior hearing in termination cases.²⁰⁶ Nor did the public's interest in fire regulation compliance outweigh the necessity for a warrant to inspect a public warehouse.²⁰⁷ As Judge Skelly Wright has observed, such policing, gentle or otherwise, is not required where subsidies such as grants to farmers and airlines, and various tax exemptions are involved.²⁰⁸

The third reason is a variation on the second: the public, said the Court, like the private charitable provider, expects to know how the funds are utilized. Assuming this to be both true and justifiable, the information can be obtained somewhere else than in the recipient's home.²⁰⁹

In considering the reasonableness of the search, the Court focused again on the rehabilitative aspects of the home visit, and the protection of the child from exploitation, presumably through his or her serving as a "dependent child" for welfare purposes to more than one woman.²¹⁰

Wyman v. James involved New York's welfare administration, and the Court stressed that state's laws' respect for the welfare recipient. The visit in New York is never unannounced; privacy is emphasized; outside sources are checked only with the client's consent; forcible or fraudulent entry or visitation outside of

working hours is forbidden. Certainly the announced visit is less objectionable than the unannounced,²¹¹ but advance notice was not mentioned as an exception to the holding in *See v. City of Seattle* and *Camara v. Municipal Court*.²¹²

Scattered among the reasons why the home visit is a reasonable search if it is a search at all are comments and criticisms of the plaintiff. Mrs. James, according to the majority, wished to receive the necessities for herself and her son "upon her own information terms" and to "utilize the Fourth Amendment as a wedge for imposing those terms and to avoid questions of any kind."²¹³ The plaintiff's willingness to supply any information anywhere but her home was skeptically received, especially since children as young as the plaintiff's son were not yet enrolled in school where, presumably, the teachers could examine him for signs of abuse.²¹⁴

The reasonableness of the search was not affected, in the Court's opinion, by the possibility that the home visit may uncover evidence of criminal activity as a "byproduct." This is a risk "no greater than that which necessarily ensues upon any other discovery by a citizen of crimi-

205. *Goldberg v. Kelly*, 397 U.S. 254, 261-64 (1970).

206. *See v. City of Seattle*, 387 U.S. 541 (1967).

207. S. Wright, *Poverty, Minorities, and Respect for Law*, 1970 Duke L.J. 425, 427-28.

208. 400 U.S. at 319. As Mr. Justice Marshall observed in his dissenting opinion to *Wyman v. James*, "A true analogy [to the *Wyman v. James* situation] would be an Internal Revenue Service requirement that in order to claim a dependency exemption, a taxpayer must allow a specially trained IRS agent to invade the home for the purpose of questioning the occupants and looking for evidence that the exemption is being properly utilized for the benefit of the dependent. If such a system were even proposed, the cries of constitutional outrage would be unanimous". *Id.*, at 343.

209. *Id.*, at 319-20.

210. The findings of J. Handler & E. Hollingsworth, *supra* note 193, indicate that welfare clients' attitudes toward the unannounced home visit vary according to the clients' own experience. A majority of clients who had experienced unannounced visits (60%) felt that they were "all right", while those who had not experienced unannounced visits disapproved of them. *Id.*, at 11. The authors themselves thought that it was "extremely unfortunate that caseworkers do not have the courtesy to telephone in advance and that such a practice is accepted by welfare recipients". *Id.*, at 19. The Handler and Hollingsworth study took place in Wisconsin.

211. *See v. City of Seattle*, 387 U.S. 541 (1967) involved a fire inspection of a commercial warehouse. The initial warrantless visitation was described only as "routine" and "periodic". *Id.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967) also involved a routine inspection. *Id.*, at 526. After plaintiff's initial refusal to permit the housing inspector to enter, the inspector returned again, after two days. The plaintiff received still another visitation, and again refused entry, before a complaint was filed against him. *Id.*, 526-27.

212. 400 U.S. at 321-22.

213. *See supra*, note 200.

214. 400 U.S. at 322-23.

nal conduct".²¹⁵ Other citizens, of course, do not have the sanction and force of the state behind them in securing entrance to the homes of others, as does the caseworker.

Finally, the Court discussed the warrant procedure "which the plaintiffs appear to claim to be so precious to them. . . ." ²¹⁶ This procedure, said the Court, is objectionable in the welfare context because it could be applied for *ex parte*, its execution would require no notice, and it would justify entry by force and without limitation as to time.²¹⁷ The caseworker, moreover, would not have to show very much in the way of probable cause: merely her or his need to see the child in the home and have the assurance that the child is there, and is receiving aid. It would seem, however, that the caseworker can receive assurance elsewhere than in the home unless he or she has probable cause to believe the child is not in the home, or is not receiving aid.²¹⁸

A more pertinent reason for characterizing the home visit as either not a search or as a reasonable search is that the necessity for a warrant would introduce an element of hostility into a program designed to be beneficial and supportive.²¹⁹ If the home visit is beneficial and supportive, however, the recipient would have little reason to refuse consent. If she consents, a warrant is not necessary, and no element of hostility will ever be introduced. If she does not consent, the element of hostility is already there and can hardly be caused by the warrant if it should then be issued. As matters now stand, the visit is coercive in that refusal of consent leads to termination of benefits. Since it is now coercive, its rehabilitative purpose may already have been undermined; the mother may not feel in need of any services that are offered and may well feel herself competent to ask for them should the need arise.

It would seem that the majority in *Wyman v. James* believed that the poor must be guarded against, are not to be trusted, must be continually watched, particularly if they are mothers because their

poverty is proof of inadequacy, from which their children must be carefully guarded. But poverty for a woman is more likely than for men to be induced and maintained by structural biases — the same structural biases that dictate less compensation in employment, and that limit employment opportunities.²²⁰ Despite this, as the majority of the Court has made clear, the Supreme Court's attitude toward the welfare mother, like its attitude toward women generally,²²¹ is colored by these structural and perhaps cultural biases. It appears, for example, to share with the public at large the notion that:

. . . the AFDC mother is * * * in short, a minor criminal — a vagrant, an adulteress, a fornicator — in a nation where criminal laws condemning this kind of conduct have died either through disuse or repeal. The sanctions differ — she suffers *no* assistance or more restricted assistance instead of imprisonment — yet she is penalized for conduct which in the rest of us is widely regarded to be none of the public's business.²²²

215. *Id.*, at 323.

216. *Id.*, at 323-24. It has been pointed out that to require a warrant for the unconsented home visit would "recast the caseworker's relationship to the recipient in an adversary mold, like that of any government inspector to an inspectee". Note, *Rehabilitation, Investigation and the Welfare Home Visit*, 79 *Yale L.J.* 746-751 (1970).

217. No matter where are how the caseworker seeks to obtain information regarded as necessary, however, constitutional problems may arise. An interview away from the home may, it has been suggested, run afoul of *Katz v. United States*, 389 U.S. 347 (1967), "where the attachment of a listening device to a telephone booth was held to constitute a search because the defendant 'justifiably relied' on his words remaining private and not being used subsequently as evidence against him in a criminal prosecution". *Id.*, at 754. To the extent that the caseworker performs services, he or she elicits information which, under the circumstances, the client may reasonably believe to be confidential. *Id.*

218. *Supra*, note 216.

219. Because she is the recipient of a non-contributory system, and has therefore not "earned" the benefits (as, for example, have the beneficiaries of social insurance) the AFDC mother is seen as less worthy than other mothers, whatever her personal competence may actually be. J. Handler and M. Rosenheim have contrasted the public assistance and insurance beneficiary: "But most important of all, perhaps, the privacy of the insurance beneficiary in this regard is protected significantly by the feeling that he belongs to a worthier class than the assistance recipient and should not be subjected to intensive personal scrutiny". *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 *Law and Contemp. Prob.* 377, 387 (1966).

220. See notes 56-60 *supra*, and accompanying text.

221. See B. Brown, T. Emerson, G. Falk, & A. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *Yale L. J.* 871, 875-82 (1971). But this attitude may be changing. See *Reed v. Reed*, 404 U.S. 71 (1971), and the concurring opinion of Mr. Justice Douglas in *Alexander v. Louisiana*, 405 U.S. 625, 634 (1972), on the discrimination against women in the selection of jurors.

222. M. Rosenheim, *Vagrancy Concept in Welfare Law*, 54 *Cal. L. Rev.* 511, 555-56 (1966).

Due process, the right of interstate travel, protection of aliens — all of these are in a sense neutral: that is to say, they have equal relevance to everyone, regardless of race, class or sex. Is freedom from search, or the penumbral right of privacy, somehow different? Warehouses, farmers, business establishments, taxpayers — all are protected from unreasonable searches.²²³ But poor women are not; the home visit, for them, is neither a search nor an unreasonable search, but “help”. And because the mother’s rights are, according to the Supreme Court, subordinate (even when guaranteed by the Constitution to others) to her child’s, she is somehow suspect for even raising them. Perhaps this is but a function of the general failure to afford women any privacy at all. There is the rankling recognition among women that, while being denied access to the public life, they have had not even their private life respected. This disregard is magnified in the case of the poor, who traditionally lack privacy. In the case of Mrs. James, freedom from search was denied in order to protect her son along with the public purse. The protection of children is a worthy concern, demanding of the law’s meticulous attention. But the Court’s opinion, written by Mr. Justice Blackmun, betrays itself. The child is not only to be protected, but preferred over his or her mother who is denied what was freely granted to commercial warehouses: security from warrantless search. A fire inspector must have a warrant, even though a fire, should it break out, could kill scores of people. The unsuspecting public is no less vulnerable than the small child, and the child may be gravely damaged by the “visit”, or search, through a realization of the stigmatizing lack of privacy.

The question must be asked, if only in order to identify a problem, why women asserting individual rights fare so badly in the welfare context when those rights are perceived as role-related. “Role” in this connection is that which is apparently understood by a majority of the totally male Supreme Court of the United States.

“The Supreme Court’s approach to women’s rights has been characterized, since the 1870’s, by two prominent features: a vague but strong substantive belief in women’s ‘separate place’, and an extraordinary methodological casualness in reviewing state legislation based on such stereo-typical views of women . . .”²²⁴

As Congresswoman Martha Griffiths tersely observed, with respect to the necessity of an equal rights amendment for women, “This fight is with the Supreme Court”.²²⁵ The result of the Court’s failure to recognize, let alone properly characterize, the problem has been a “cumulative judgment” that a sex-based classification does not violate the equal protection clause, “rendered . . . with an off-handedness and tolerance for inconsistency which areas of race, national origin, and poverty.”²²⁶ *Reed v. Reed*²²⁷ did little to redress the imbalance because it did not come to grips with the usual reasons for discrimination against women: protection of their childbearing capacity;²²⁸ and protection of the family,²²⁹ and protection of morality.²³⁰ Women, more than men, are seen as uniquely in service to the species.

Women who are discriminated against because they are Black, or alien, or poor are protected; women who are discriminated against because they are women are not. A woman asserting that her right to interstate travel should not be dampened because she is poor has succeeded before the Court²³¹ in part, one suspects, because such travel was not perceived as conflicting with her role as a mother.²³² But a woman asserting her freedom from unreasonable search finds the Supreme

223. See the dissenting opinions of Justices Douglas and Marshall in *Wyman v. James*, 400 U.S. 309, 326, 338 (1971).

224. B. Brown, T. Emerson, G. Falk & A. Freedman, *supra* note 221, at 876.

225. Hearings on S.J. Res. 61 & S.J. Res. 231 Before the Senate Committee on the Judiciary, 91st Cong., 2d Sess. 228 (1970).

226. B. Brown, T. Emerson, G. Falk, & A. Freedman, *supra* note 221, at 876.

227. 404 U.S. 71 (1971).

228. *Muller v. Oregon*, 208 U.S. 412 (1908).

229. *Id.*, and *Bradwell v. State*, 16 Wall 130.

230. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

231. *Shapiro, v. Thompson* 392 U.S. 618 (1969).

232. See note 169, *supra*, and accompanying text.

Court denying even her right to assert the right, because it is perceived as role-related and possibly as conflicting with that role.²³³ This was a factor not present in *Reed v. Reed*, and it is difficult to say whether that opinion is another example of "methodological casualness" or the first indication of an evolving new method of constitutional review.

Benevolent Intrusions and Personhood: The Case for Recognition

The AFDC mother suffers from more "benevolent intrusions" than any other public assistance clients,²³⁴ because she has children, who may be as old as twenty, under her care.²³⁵ According to the state in which she lives, the AFDC mother may be subject to midnight or predawn raids (to find a man in her home),²³⁶ or to intimate inquiries concerning her moral conduct.²³⁷ Although her personal behavior can no longer provide a reason for denying funds to her children, it can lead to their removal from the home, whether or not such conduct has an actual effect on the way in which she cares for them.²³⁸ "Suitable home" rules are in force in several states; such rules permit payments only to those parents who maintain such a home.²³⁹ While theoretically applicable to anyone caring for small children, and to all kinds of behavior, in fact the suitable home policy's application "runs primarily to mothers whose sexual conduct elicits community disapproval":

Disapproved behavior is usually inferred from the fact of giving birth to one or more illegitimate children. This leads one to wonder whether it is sexual immorality or the birth of potential public charges that is the object of attack. "Both" is probably the answer. In any case, the question that presents itself is the intrinsic soundness, in an income maintenance program, of legislative restrictions that relate to a mother's personal moral code or the legal status of the child.²⁴⁰

Even if the desirability of some suitable home policy is conceded, the question should be confined to the mother's capabilities of caring for her children, which

may have no relation whatever to her personal morality. This is a separate question, and ought to be no more the business of the state here than elsewhere.

Suitable home policies, like the home visit, are an integral part of the program in many places.²⁴¹ Because of them, the AFDC mother has been subjected to a cruel dilemma, imposed on the one hand by the state, and on the other by the federal government. The Social Security Act requires that all available resources be taken into account in computing need.²⁴² In the AFDC program, "the resource requirement must be pursued to the point of notifying law enforcement officials if need is caused by the desertion or abandonment of a parent."²⁴³ Instances of illegitimacy must also be reported to establish paternity and to secure support from the father for the child.²⁴⁴ The federal act speaks in terms of establishing a state program for these purposes, to be administered by a single state or local agency which may enter into cooperative arrangements with appropriate courts and law enforcement officials.²⁴⁵ These provisions are known as the NOLEO, or notice to law enforcement officials, requirements. While theoretically applicable to either parent, the NOLEO requirements have practical operation only on mothers, who may be asked to report an abandoning or putative father.²⁴⁶ The father may then be subject to enforcement of his support obligations through appropriate civil or criminal actions. Al-

233. See note 184, *supra*, and accompanying text.

234. See U.S. Dep't. of Health, Education and Welfare, Handbook of Public Assistance Administration pt. IV, § 2200 (d).

235. 42 U.S.C. § 606 (Supp. V, 1970).

236. This practice is yet to be reviewed by the Supreme

237. See *Salz v. Goodwin*, 325 F. Supp. 23, 24 (N. Mex. 1971), citing the New Mexico regulation which requires specific inquiry of the mother regarding the date of conception of an illegitimate child, her promiscuity, her frequency of contact with the putative father, the names of corroborating witnesses who could establish the relationship of the mother with the putative father, and specific facts concerning intercourse at or near the date of conception.

238. See notes 20, 192, *supra*.

239. *Id.*

240. J. Handler & M. Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 Law & Contemp. Prob. 377, 388 (1966).

241. See notes 20, 192, *supra*.

242. See note 21, *supra*.

243. 1 CCH Poverty Law Reports 1310 (1969).

244. See note 21, *supra*.

245. *Id.*

246. 1 CCH Poverty Law Reports 1310 (1969).

though state procedures vary, and although HEW regulations advise against it, in some states a mother was required to institute paternity proceedings against the father as a condition to receiving AFDC assistance.²⁴⁷ The idea is, of course, that the father rather than the state should support his children,²⁴⁸ but the mandatory paternity suit has been criticized as a means of achieving such a sensible goal.²⁴⁹ Her enforced cooperation may ruin any chance the mother may have had for establishing a stable relationship with the father, and it may result in her prosecution for fornication or adultery or perhaps neglect.²⁵⁰

For these and other reasons, state implementation of the NOLEO requirements have several times been challenged in the federal courts,²⁵¹ and reached the Supreme Court last term. Unfortunately, although the Court affirmed decisions in favor of the welfare recipients, there are no opinions.²⁵²

Most of the challenges below were successful on statutory grounds. In *Doe v. Shapiro*,²⁵³ for example, the plaintiff mother attacked a state regulation requiring her to be able to identify, and to identify, the father as a condition of receiving assistance for her children. Although the plaintiff offered several constitutional arguments, the three-judge district court held the regulation invalid on the ground that it imposed a condition of eligibility not required by the Social Security Act. Constitutional arguments of due process and equal protection were dismissed, although the plaintiff's contention that the requirement deprived her of her privilege against self-incrimination received less summary treatment.²⁵⁴

An Oregon case, affirmed by the Supreme Court in a memorandum opinion, also held for the plaintiff mother who, in *Meyers v. Juras*, had attacked the Oregon regulation making compliance with NOLEO procedures a basic eligibility requirement.²⁵⁵ Oregon argued that *Wyman v. James*²⁵⁶ supported its program, but since the three-judge district court in *Meyers* never reached the constitutional

issues, *James* was not in point. The plaintiff's victory in *Meyers* was not a personal one, and the judgment did not vindicate any right claimed by her. Its rationale was that the AFDC program is for the children, whose benefits may not be terminated to coerce the cooperation of the mother.

Another federal court viewed the question differently and interpreted *Wyman v. James*²⁵⁷ not only as permission to the states to use children as a lever to pry information from the mother, but also as a basis for its conclusion that "nothing of constitutional magnitude is involved." *Saiz v. Goodwin* refused to convene a three-judge court, but the judgment was vacated and remanded on appeal.²⁵⁸ The merits of Mrs. Saiz's argument were not reached. She had rested her case on her right to privacy and equal protection as secured by the Fourteenth Amendment. Citing *Wyman v. James*, the lower court held that "a regulation promulgated under a state statute which constitutes a reasonable administrative tool; that . . . serves a valid and proper administrative purpose for the dispensation of the AFDC program . . . is not an unwarranted invasion of personal privacy."²⁵⁹ *Wyman* had held that the Fourth Amendment could not be utilized as a wedge for imposing a recipient's own informational terms upon the dispensing agency. The lower court in

247. *Id.*

248. On NOLEO's underlying rationales, see M. Rosenheim, *supra* note 222, at 542.

249. Comment, *AFDC Eligibility and the Mandatory Paternity Suit*, 10 J. Fam. L. 174 (1970).

250. *Id.*, at 174-75. See e.g., *State v. Clark*, 58 N.J. 72, 275 A. 2d 137 (1971), where a mother's admission to relations with the putative father, made in a welfare proceeding, was used to obtain a fornication conviction. Although reversed on Fifth Amendment ground by the state supreme court, the case illustrates the risk of prosecution borne by the welfare mother.

251. The issue had split several federal panels across the country. See, e.g., *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969); *Doe v. Swant*, 332 F. Supp. 61 (N.D. Ill. 1971), *aff'd mem. sub. nom.* *Weaver v. Doe*, 404 U.S. 907 (1971); *Meyers v. Juras*, 327 F. Supp. 759 (D. Ore. 1971), *aff'd mem.* 404 U.S. 803 (1971); *Saiz v. Goodwin*, 450 F. 2d 788 (1971), *aff'd mem.* 40 U.S.L.W. 3562 (U.S. Dec. 7, 1971).

252. The affirmances were by memorandum opinions.

253. 302 F. Supp. 761 (D. Conn., 1969).

254. Comment, *AFDC Eligibility and the Mandatory Paternity Suit*, *supra* note 249, at 178.

255. 327 F. Supp. 759 (D. Ore. 1971), *aff'd mem.* 404 U.S. 803 (1971).

256. 400 U.S. 309 (1971); see *supra* notes 188, 219 and accompanying text.

257. 400 U.S. 309 (1971).

258. 325 F. Supp. 23 (N. Mex. 1971), *vacated and remanded* 450 F. 2d 788 (1971).

259. 325 F. Supp., at 25.

Saiz saw Mrs. Saiz's "assertion" of Fourteenth Amendment rights as an attempt to impose a similar wedge. Indeed, the tenor of the opinion is an echo of the majority opinion in *Wyman*, with similar observations (respecting or disrespecting) the mother. Said the district court:

Has not the child's right of privacy been destroyed? Has not the mother already effectively prejudiced her right of privacy? The only party whose right of privacy is sought to be protected is the father whose duty by statute is to maintain and support the child . . . I cannot envision the doctrine of constitutional right of privacy established in *Griswold v. Connecticut*. . . extended to protect a reluctant parent under these circumstances.²⁶⁰

The effect of this holding was that in order to qualify her children for aid, a mother must answer questions concerning her "promiscuity"; frequency of contact with the putative father; the possible corroborative witnesses; and "specific facts establishing an act of intercourse with the putative father at or near the date of conception".²⁶¹ It staggers both the imagination and common sense to think that this is not the kind of privacy *Griswold*²⁶² protects, unless the district court intended to emphasize, which it did not do, intimacy in marriage alone as being within the penumbra of privacy.²⁶³

If a woman wishes to bring paternity proceedings, then, of course, she has voluntarily relinquished privacy; if she voluntarily reveals the name of her baby's father, she has similarly chosen to relinquish privacy. So long as extramarital relations are criminal in theory even if not prosecuted in fact, however, she ought not be compelled by the state to reveal the details of her sexual activity to a welfare worker or to anyone else, even though the use to which such revelations can be put is limited.²⁶⁴ The risk of prosecution is high, even though the risk of conviction is not. More seriously, when made a condition of welfare eligibility, the sanction for refusing to surrender privacy is not jail, not a fine, but support of a child. Using a child in such a manner is a kind of exploitation of the child by

the state for the purpose of securing the quiet conformity of the mother, which the district court in *Saiz* frankly admitted:

. . . these mothers would have common interest in seeking, or at least acquiescing, in efforts which might be made to procure paternal support for their children.²⁶⁵

These mothers might also have an interest in attempting to solidify rather than imperil any stable relationship with the father that might be developing, and which might be destroyed by compliance with departmental regulations. Such mothers may wish to assure that their children will know their fathers in a "normal" family unit. Perhaps if Mrs. Saiz had cast her argument in such terms, the district court judge would have been more receptive. Unfortunately, she had the temerity to suggest that her rights were in issue and ought not be so jeopardized. She was thus perceived by the district court judge as asserting a right which conflicted with his notion of her role as mother. Mrs. Saiz did cite *Doe v. Shapiro*²⁶⁶ in support of her constitutional position, and while Mrs. Saiz appears not to have offered the point, Mrs. Doe did emphasize the children's rights. She claimed that her children's Fourteenth Amendment right of equal protection was violated by the creation, in Connecticut, of two classes of needy, illegitimate children, indistinguishable from one another "except for the obstinacy of their mothers".²⁶⁷ This argument was never passed upon in the Connecticut case, however, and the New Mexico judge, after referring to it, expressly stated that he found no constitutional violation.²⁶⁸

260. *Id.*, at 26.

261. *See supra*, note 238.

262. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

263. There are many references to intimacy in the marital relationship in *Griswold*. However, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) invalidated a Massachusetts statute limiting the access of unmarried persons to contraceptives.

264. *See generally* Comment, *AFDC Eligibility and the Mandatory Paternity Suit*, *supra* note 249. *See also* *State v. Clark*, 58 N.J. 72 (1971).

265. 325 F. Supp., at 26.

266. *Id.*

267. 302 F. Supp. 761, 762 (D. Conn. 1969).

268. 320 F. Supp., at 27. The tenth circuit found the presence of a constitutional question and ordered the convening of the three-judge district court. 450 F.2d at 790.

The NOLEO requirements reached the Supreme Court, which affirmed the district courts which found the disclosure and mandatory paternity suit requirements in conflict with the Social Security Act as imposing an eligibility requirement in addition to those created by Congress.²⁶⁹ The constitutional issues were not reached.

In the absence of opinions on the question, it cannot be known whether the attitude underlying *Wyman v. James* and reflected in *Saiz v. Goodwin* still prevails on the Court. When the opportunity arises, it is to be hoped that women, whether welfare mothers or not, will be regarded as full persons whether they have children or not. The fact that a woman may be asserting her own right of privacy, or of equal protection, or of due process, or her right against self-incrimination, rather than the right of her children, ought not prejudice her case. Only then can the merits of the case be examined, unhampered by the expectation that a poor mother ought willingly to forego her constitutional rights in order to secure food for her children. The idea of self-sacrifice is not denigrated here; what is protested is the state's and the court's requiring it. Constitutional protection against self-incrimination is worthless, for example, if judges perceive with respect to women, or women who are mothers, that there is no "self" to incriminate.

The NOLEO cases could have afforded an opportunity for a development paralleling the cases on illegitimate chil-

dren. From *Levy and Glona* to *Labine* and finally to *Weber*²⁷⁰ the personhood of these children under the Constitution was established, limited, and then reconfirmed in *Weber*, with the limitation of *Labine*. The *Weber* case is important for its recognition of the essential innocence of the children, and also because the majority opinion seems to have undermined *Dandridge v. Williams*²⁷¹ in its removal of socio-economic legislation from the Fourteenth Amendment. Indeed, it is difficult to say now where equal protection concepts are going. After *Weber*, however, the conceptual framework should permit a reassessment of the Supreme Court's assessment of the status of women. *Weber* spoke in terms of fundamental personal interests, and weakened the latitude given the states in social and economic legislation.²⁷² This may argue well for welfare mothers. It remains to be seen how individual personal rights of a fundamental nature will fare when asserted by women against a claimed state purpose to foster family life. Much will depend on what the new Court chooses to call "fundamental" to begin with. Even more will depend on whether it continues to adhere to the conceptual framework of strict and permissive review, of fundamental interest and suspect classifications, of compelling and rational state interests. Prediction at this juncture is riskier than usual.

269. See note 251, *supra*.

270. See notes 159-60, *supra*, and accompanying text.

271. 397 U.S. 471 (1970).

272. See notes 152-60, *supra*, and accompanying text.