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Changing Legal Contexts for Affirmative Welfare Reform

Cover Page Footnote

President, Legal Services of New Jersey. I gratefully acknowledge the invaluable research efforts of my assistant Kristin Mateo.

CHANGING LEGAL CONTEXTS FOR AFFIRMATIVE WELFARE REFORM PROPOSALS

Melville D. Miller, Jr.*

I. Introduction

In the current welfare debate taking place at both the federal and state levels, reform proponents frequently claim to be seeking greater “flexibility” for meaningful, deep policy change. Proponents often make the case for such enhanced flexibility by urging that responsibility for welfare be turned back to the states, to design and experiment with novel programs.¹ To test whether the block grant approach currently under consideration in Congress actually achieves the goal of providing states with the flexibility necessary to effect meaningful policy changes, this Essay contrasts the way two different reform proposals would be treated in the current legal and regulatory environment to the way they would likely fare under the proposed legislation. One proposal used in this analysis is a comprehensive welfare reform program, self-described as “progressive,” that was developed by a community-based, grass roots coalition in New Jersey. The New Jersey reform proposal aims to improve outcomes for recipients, rather than simply to cut costs. The other proposal is a hypothetical cost-saving program that simply limits welfare receipt to one year.

Part II of this Essay describes the New Jersey reform proposal. Part III contrasts the proposal’s potential for adoption within the existing federal legal framework² with the potential adoption of a one-year time limit proposal. Part IV considers the probable legal status of the two proposals under the restricted block grant legislation now under consideration in Congress. This Essay concludes that the proposed federal changes will complicate any implemen-

* President, Legal Services of New Jersey. I gratefully acknowledge the invaluable research efforts of my assistant Kristin Mateo.

1. Barbara Vobejda, *GOP Outlines Broad Welfare Reform*, WASH. POST, Jan. 7, 1995, at A1; House Committee on Ways and Means, 104th Cong., 1st Sess., *On Welfare Reform: Growth of Means-Tested Programs and Spending, Welfare Entitlements, and Block Grants* (1995) (statement of Robert Greenstein, Exec. Director, Center on Budget and Policy Priorities).

2. 42 U.S.C. §§ 601-617 (1988 & Supp. V 1993).

tation of expansive, recipient-oriented state-level reforms. Restrictive changes, by contrast, will be easier to accomplish.

II. The New Jersey Community-Based Welfare Reform Proposal

Solutions to End Poverty Soon (STEPS) is a partnership of low-income individuals, advocates who seek to assist such individuals, agencies that serve such individuals and other interested parties.³ The coalition emerged in 1992 during a successful effort to rescind previously adopted limitations on the state's General Assistance program that would have limited benefits to six months in any twelve-month period.⁴ In early 1993, recognizing the need for a comprehensive reconsideration of state government policies toward poverty, including but extending well beyond the public assistance program, the coalition began work on a broad reform proposal.⁵ Though conceived as an evolving document, in May 1994 STEPS presented a draft of the proposal to Governor Christine Todd Whitman and began discussions with state officials about possible new initiatives and fundamental changes in state policy.

The proposal focuses largely on the state's public assistance system. Historically, that cluster of benefits constitutes the largest block of government expenditures on behalf of low-income people. The STEPS proposal is of particular interest for two reasons: (i) it was generated by a group consisting in significant part of people with low incomes who are directly affected by poverty policy and (ii) its substance appears to define the outer limit of what is potentially achievable in terms of recipient-oriented reforms in today's political climate. For these reasons, the fundamentals of the program are presented in some detail.

A. Observations of Current Policy

The proposal's critique of federal and state government policy concerning poverty makes three major points. First, current gov-

3. The STEPS by-laws provide for governance by a statewide Coordinating Committee, 50% of which consists of low-income individuals. In addition, at least one of the co-chairs of STEPS and at least one member of each of its principal committees must be a low-income individual.

4. The limitations were contained in an addition to the annual state appropriations bill passed as Senate Bill 1361. S. 1361, 103rd Cong., 1st Sess. (1993).

5. Except as noted, all discussion of the STEPS proposal is based upon the May, 1994 document, *Economic Stability for Families and Individuals: A Proposal for Progressive Public Assistance Reform in New Jersey* (on file with the *Fordham Urban Law Journal*) [hereinafter STEPS].

ernment policies and programs usually do not expressly seek to combat poverty, but rather to address one or more "needs" of those in poverty, such as minimal cash assistance, housing, child care and nutrition. Data collected over the past forty years, however, suggests that poverty rises and falls with economic trends, not with changes in government programs. With the exception of the introduction of the cost-of-living index for Social Security, no government program of the last twenty-five years has had a demonstrable effect in reducing overall poverty.⁶

Second, current policies and programs are badly fragmented because they tend to focus on individual needs in isolation. Different programs are implemented by different agencies at different levels of government. These agencies rarely coordinate or design programs with the recognition that poverty usually results from a complex combination of problems.⁷ Thus, programs are often inconsistent and work at cross-purposes. Such fragmentation is doomed to fail; a policy cannot work when it addresses only one aspect of a problem in isolation from other causes. A job-training program, for example, will not work if there are no efforts to create new jobs.⁸

Third, existing state and federal policies rest on assumptions about poverty and the workforce that are no longer true. For example, the assumption that low-income people can easily find jobs and work their way out of poverty is untrue.⁹ There have been huge job losses nationwide over the past two decades. There simply are not enough jobs that pay decent wages; many people are in poverty despite being employed.¹⁰

The STEPS proposal concludes that children and adults afflicted by poverty over a number of years are a lost resource to society because they frequently suffer irreversible nutritional, health and developmental damage. This human toll has very significant long-

6. STEPS, *supra* note 5, at 3.

7. See, e.g., JAN L. HAGEN & LIANE V. DAVIS, THE NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, *ANOTHER PERSPECTIVE ON WELFARE REFORM: CONVERSATIONS WITH MOTHERS ON WELFARE* (1994).

8. STEPS, *supra* note 5, at 3.

9. Real wages of less skilled laborers have in fact steadily declined since the late 1970s. Rebecca M. Blank, *Policy Watch Proposals for Time Limited Welfare*, 8 J. OF ECON. PERSPECTIVES (1994).

10. See Center for Law and Social Policy, *Making Work Pay*, 6 FAMILY MATTERS 7 (1994). Although labor markets have recently improved, job recovery remains uneven. Nationally, only 1/5 of the recession's factory job losses and 2/3 of construction losses have been restored. N. J. DEP'T OF LABOR, N. J. ECONOMIC INDICATORS (Jan. 1995).

term economic costs, requiring economic maintenance, services, and in some cases, even more costly forms of social intervention, such as institutionalization.

B. Components of the Proposal

The STEPS proposal introduces a new type of welfare reform that is far broader than the traditional cost-oriented reforms proposed by Congress. As the following discussion of the proposal's components demonstrates, the proposal is specifically designed to address the concerns discussed above.

1. *Set and maintain a realistic standard of need that accurately assesses the amount necessary for a safe and decent life.*

New Jersey currently bases its grant levels on an official "standard of need," that ostensibly reflects a percentage of actual living costs (i.e., the amount of income necessary to enjoy a minimally safe and decent life). The standard, however, is outdated by five years: the most recent assessment occurred in 1990.¹¹ As a result, current grant levels, set at only 43% of the assessment figure, are extremely low.¹² To be meaningful, the standard must be updated to reflect present cost-of-living data, and then kept current on an annual basis.¹³ The standard also needs other revisions. Most importantly, the standard must be increased to account for all major essential living costs, including, but not limited to, housing, food, clothing, child care, medical, dental and vision care, transportation, taxes and important personal needs. Additionally, the standard should make some provisions for extraordinary emergency expenses. Government policy should be directed to all those whose incomes fall below this up-dated comprehensive standard.

11. The standard is set forth at N.J. ADMIN. CODE tit. 10, § 2-1.1A (1994). Grant levels are set forth at tit. 10, § 2-1.2.

12. For example, the value of the maximum AFDC benefit for a three-person household in New Jersey fell by 63% between 1970 and 1994. HOUSE COMMITTEE ON WAYS AND MEANS, 103rd Cong., 2d Sess., OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREEN BOOK 376 (Comm. Print 1994)[hereinafter 1994 GREEN BOOK]. After accounting for inflation, New Jersey's basic grant of \$302 in 1970 would equal over \$1100 today; the current grant for a three-person household is \$424. *See id.* at 377 n.3.

13. New Jersey is required by state law to articulate an accurate standard periodically. *See In re Petitions for Rulemaking*, N.J.A.C. 10:82-1.2 and 10:85-4.1, 566 A.2d 1154 (N.J. 1989).

2. *Allow people to work and be on or remain eligible for public assistance until their household incomes reach the standard of need, as long as they follow all required elements of an individualized plan (called a "service plan") designed to allow them to be able to find and keep work that pays a living income.*

At present, eligibility for public assistance in New Jersey is capped at less than half of the standard of need.¹⁴ As a result, the system contains a significant disincentive to work: those who work and earn significantly more than the grant level are forced off welfare, even though their income may be well below the standard of need.

The STEPS proposal urges New Jersey to move toward a "fill the gap" approach, which would allow people to work and supplement all or most of what they earn with welfare benefits until their household's total income reaches the standard of need.¹⁵ The new approach would use an inclusive and comprehensive definition of "income from all sources" that includes: wages; welfare grants; other forms of public assistance received (to the extent that the amounts of those benefits have also been included in the calculation of the standard of need); child support; tax credits that result in actual increases in household resources; and other applicable income. The new system would further redefine public assistance eligibility so that all households whose total income is below the standard of need are eligible for public assistance.

The "fill the gap" approach is centered on an individualized service plan. This plan would state the responsibilities of both parties to the public assistance contract. The recipient would be bound to take reasonable steps to access programs, services, training and education designed to assist the transition from welfare to work. In return, the government agency would be required, within budget limits, to provide or coordinate referrals to such programs, services, training, and education. The service plan would have clear time frames for performance that can be adjusted subsequently in the light of new realities. These time frames could serve as more realistic, individualized "time limits," but should be subject to extension whenever necessary.

14. In 1994, the maximum AFDC grant in New Jersey for a one-parent family of three persons was \$424. Combined with food stamps, that family's benefits would total \$700 for the month. At the same time the standard of need in New Jersey was \$985. 1994 GREEN BOOK, *supra* note 12, at 366.

15. STEPS, *supra* note 5, at 8.

3. *Provide income security at the standard of need for those unable to work or to find work, and reform the grant structure to include a housing component so that everyone is able economically to remain in stable housing.*

For a variety of reasons, including disability, unavailability of jobs and need for training or other services that government does not have the funding for, many people currently in need of public assistance are unable to earn their way out of poverty, and require ongoing assistance if they are to avoid complete destitution. For families with children, the STEPS proposal suggests that continuing assistance should be designed as a child support assurance program, under which the government insures that the difference between child support payments and the standard of need will be filled if the family's wage earners cannot or do not do so themselves.¹⁶

Current welfare grants do not provide special allowance or consideration given for housing costs. This structure, combined with the inadequacy of the grants themselves, contributes to recurring client homelessness. A family's or individual's housing situation must be stable before there is a reasonable chance of securing economic stability. To insure housing stability, and to achieve greater equity between welfare clients on a basic grant, who receive no special housing allowance, and those who face imminent homelessness, who may be eligible for some additional emergency housing assistance, the state must implement a housing component to the standard grant. The housing component should be coordinated with an ongoing state-based rental assistance program analogous to the federal Section 8 program.¹⁷

The separate housing component of the STEPS proposal would provide needy families with an amount necessary to secure shelter in New Jersey, based on information generated in the updated standard of need analysis.¹⁸ This separate component could be co-

16. STEPS, *supra* note 5, at 9.

17. Congress created the Section 8 Housing Program under the Housing Community Development Act of 1974. See 42 U.S.C. § 1437(f) (1988 & Supp. V 1993). The program provides low income and elderly tenants assistance in the private housing market through five programs: existing housing, moderate rehabilitation, substantial rehabilitation, new construction and voucher programs. *Id.* Through these programs, tenants pay from 10% to 30% of their income towards their rent. The remaining portion of the fair market rent, as determined by the Secretary of Housing and Urban Development, is supplemented by the federal government. *Id.*

18. STEPS, *supra* note 5, at 9-10.

ordinated with—and welfare funds could help support—a stable, ongoing housing assistance program, that would rely principally on rental subsidies. Such a program would ease the present situation, in which recipients face a chaotic cycle of eviction, homelessness, and long-term “temporary” housing. Additionally, this component would be fair to all public assistance recipients in that both homeless recipients and persons relying on a standard grant would receive enough to meet their housing costs.¹⁹

4. *Continue state income tax reform so that people whose earnings and other income below the standard of need are not taxed.*

As a matter of policy, it is illogical to tax those who make significantly less than the standard of need. By taxing persons living below the poverty level, the state reinforces the problem of poverty and creates a greater need for public assistance. In recent years, New Jersey has taken steps in the right direction by raising the state minimum income tax threshold. The new threshold would be even more effective, however, if it were combined with a State Earned Income Tax Credit for persons whose total income remains below the standard of need. Under the STEPS proposal, the tax credit would be available to both family and individual wage earners. This would further support efforts to achieve economic stability through work.²⁰

5. *Repeal the child exclusion provision and resist other arbitrary limits or restrictions.*

In 1992, New Jersey became the first state to adopt a Child Exclusion provision, under which children born to families that were on welfare for ten months prior to the birth do not receive an additional grant; the total grant for such an eligible family unit remains the same as it was prior to the birth.²¹ The Child Exclusion provision is an extreme example of a policy that harms and punishes blameless children in an attempt to change the conduct of parents.²² It should be repealed as a punitive measure on innocent

19. STEPS, *supra* note 5, at 10.

20. STEPS, *supra* note 5, at 10.

21. N.J. STAT. ANN. § 44:10-3.5 (West 1992).

22. As to the waiver process generally and its application to the child exclusion, see Susan Bennett & Kathleen Sullivan, *Disentitling the Poor: Waivers and Welfare Reform*, 26 MICH. J.L. REFORM 741 (1993).

persons.²³ If the state wishes to influence the behavior of parents, it should more carefully tailor its programs to protect children.

6. *Provide adequate support for work so that those obstacles that prevent people from finding work can be overcome whenever possible.*

The STEPS proposal argues that training, education, job placement and child care will improve the ability of some recipients to find work.²⁴ Because public dollars are scarce, states will always face difficult decisions over how much funding to allocate to these purposes, as opposed to providing basic income security or other important anti-poverty programs. While it is impossible to state how this balance should be struck, such support services can be critical for many people trying to achieve economic stability.²⁵

The STEPS proposal stresses intensive, individualized case management that includes a careful assessment of each individual's work readiness and other needs, followed by ongoing and meaningful case management to help address those needs.²⁶ The proposed program would also provide participants with the opportunity to obtain the education and training necessary to obtain work with wages that satisfy realistic sustenance needs. It would further provide job search assistance and support services, as well as meaningful publicly-funded jobs for those individuals who are already employable but are unable to find work. The publicly-funded work envisioned by the STEPS program would provide the opportunity to build or preserve skills that would enable an individual to secure a private sector or regular public sector job.

A final aspect of the plan would recognize that poor persons with recently-found jobs continue to need support. Thus, the program would continue to provide essential services such as health care, child care and housing assistance, during the critical period after a family leaves welfare but before wages reach the established standard of need. The continued assistance would insure that no one is forced to choose between a job and quality child care, health care, or housing.

The STEPS proposal concludes by acknowledging that the broader changes listed above, are not exclusive. Many other re-

23. STEPS, *supra* note 5, at 10.

24. *Id.*

25. *Id.*

26. *Id.* at 11.

forms in the administration of public assistance need to be instituted.²⁷

In total, these proposals would significantly enhance the assistance and supports available to impoverished welfare recipients. Proponents of such fill-the-gap approaches contend that average welfare grant levels per recipient will decrease because the number of recipients working and supplementing their incomes with earnings will increase. The amount saved from the decreased average grant levels will offset the increased costs that will result from the expansion of eligible clients under the proposal's more generous assistance/eligibility standard. In addition, proponents suggest that there will be long-term savings in governmental expenditures because investing more in children's welfare will avoid far greater expenditures in later remedial and service costs. Nonetheless, in the short run the STEPS proposal is highly likely to result in higher government expenditures. As discussed below, this higher cost would have significant consequences for the program's implementation if the proposed block grant legislation is passed.²⁸

27. The proposal's specific recommendations included the following:

a) Make all households eligible, without regard to whether they are one-parent or two-parent headed units.

b) Make the start date for collecting benefits to be the date of application, as is now the case in Food Stamps.

c) Consider only income and resources that are actually and currently available in determining eligibility for benefits. Do not consider "income" that is not actually received or property that can't really be sold quickly.

d) Provide realistic deductions from income for child care costs and work expenses; significantly raise the current limits on the amount of earnings which may be disregarded for child care costs and other work expenses to reflect a fair estimate of the costs.

e) Increase the limit on the amount of resources a family can own and still be eligible from \$1000 to at least \$2000, as is now the case with Food Stamps.

f) Allow a family to own at least one vehicle without counting the value of the vehicle as a resource. Otherwise, change the rule that counts any value above \$1500 as a resource to \$4500, as is now the case with Food Stamps.

g) Do not seek to recover overpayments to a family if the overpayment happened because of a technical error, or the family was not at fault and is still in need, as is now the case in Social Security and SSI.

h) Allow AFDC families receiving a share or pass-through of current child support collections, if paid when due, to also receive a share or pass-through of arrears payments.

i) Treat a child's Social Security benefits like any other child support payments for the purpose of the disregard of the first \$50 of current child support payments received by a family in a month.

j) Disregard the first \$50 of current child support payments received by a family in a month in the Food Stamps program, as is now the case in AFDC.

STEPS, *supra* note 5, at 11-12.

28. See *infra* part IV.

III. Reform Under the Current Legal System

The present legal framework for the national public assistance system is the Social Security Act,²⁹ especially the Aid to Families with Dependent Children (AFDC) program.³⁰ The statutory sections and accompanying regulations³¹ of AFDC impose a set of national requirements that state AFDC systems must meet in order to receive federal money. In general, if a proposed state change in its welfare system offends one of these requirements, the state is required to show that it is an "experimental, pilot, or demonstration project" that will promote the objectives of the Social Security Act,³² and therefore should be granted a waiver of the violated federal requirements from the Secretary of the Department of Health and Human Services.

The federal requirements have produced a high degree of uniformity among states in certain key areas of welfare plan design. There are numerous regulatory requirements for state plans,³³ including mandatory determination of need on "an objective and equitable basis,"³⁴ and utilization of a statewide standard for determining need.³⁵ Uniformity is also insured by statutory provisions such as the requirement "that Aid to Families with Dependent Children shall . . . be furnished . . . to all eligible individuals . . ."³⁶

The granting of, or refusal to grant, waivers generated a number of challenges in the courts over the years. As stated by the Third Circuit, AFDC "is not a scheme of unlimited state discretion" because "Congress [has] defined an area of state prerogative, the boundaries of which are defined by the congressional policies both explicit and implicit."³⁷ The waiver process has also become an opportunity and forum for the formulation and execution of federal welfare policy. The administration of President George Bush first used the waiver vehicle as a pathway for states to propose sometimes dramatic new programs in welfare administration. This use of waiver processes and encouragement of state experimentation was carried on with new enthusiasm under President Bill Clinton.

29. 42 U.S.C. § 1315(a) (1988 & Supp. V 1993).

30. 42 U.S.C. §§ 601-17 (1988 & Supp. V 1993).

31. 45 C.F.R. §§ 201.0-201.70 (1994).

32. 42 U.S.C. § 1315(a) (1988 & Supp. V 1993).

33. 45 C.F.R. § 233.20(a) (1994).

34. 45 C.F.R. § 233.20(a)(1)(i) (1994).

35. 45 C.F.R. § 233.20 (a)(2)(i) (1994).

36. 42 U.S.C. § 602(a)(10)(A) (1988).

37. *Doe v. Beal*, 523 F.2d 611, 615 (3d Cir. 1975) (en banc), *rev'd* 432 U.S. 438 (1977).

In testimony to Congress last fall, a leading Clinton Administration welfare official underscored this encouragement of experimentation:

[T]he Administration is committed to granting states the flexibility to test innovations designed to help the state's AFDC program better meet the objectives of the Act. In general, states submitting demonstration projects are attempting to put together packages that, taken as a whole, seek to promote all of the objectives of the Acts not to elevate one objective over the other.³⁸

The same Administration official indicated the way in which Administration welfare policy can be effectuated through the waiver process:

In reviewing these applications, we follow a number of basic principles: avoiding harm to recipients within the demonstrations; rigorous evaluation; cost neutrality; and, encouraging the testing of policies that are in line with the principles of the President's welfare reform proposal, the Work and Responsibility Act, while remaining open to additional approaches.³⁹

As of September 1994, the Administration approved eighteen demonstration projects. Indeed, there was such a sharp increase in waiver activity that on September 27, 1994, the U.S. Department of Health and Human Services proposed a new formal statement on "Demonstration Proposals Pursuant to Section 1115(a) of the Social Security Act General Policies And Procedures."⁴⁰

In addition to compliance with Social Security Act requirements and the concomitant regulatory framework, other federal requirements are applicable to states seeking waivers. Perhaps most significantly, the Department of Health and Human Services must review waiver applications in accordance with basic principles of administrative law under the Administrative Procedure Act.⁴¹ While the law is not settled, it is likely that other statutory and even constitutional provisions will apply to waiver review as well.

38. *AFDC Waiver Demonstration Programs Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Operations*, 103d Cong., 2d Sess. (1994) (statement of Mary Jo Bane, Assistant Secretary for Children and Families, Administration for Children and Families, U.S. Department of Health and Human Services), available in Westlaw, USTESTIMONY Library, 1994 WL 527419, at 4.

39. *Id.* at 4-5.

40. 59 Fed. Reg. 49, 249-49, 251 (1994).

41. 5 U.S.C. § 702 (1988); see also 5 U.S.C. § 702 (1977 & Supp. 1995).

In litigation recently decided in the District Court of New Jersey,⁴² plaintiffs raised claims of violations of Department of Health and Human Services regulations governing experimentation involving pregnant women and fetuses,⁴³ as well as constitutional claims involving violations of both due process and equal protection. In this instance, the claims were dismissed.⁴⁴

It is unlikely that any of the provisions of the STEPS Coalition welfare reform proposal would be held to violate express provisions of the Social Security Act. The decidedly affirmative thrust of the proposal goes well beyond, and appears fully consistent with, the baseline requirements of the statute. The additional cost involved in the expanded eligibility and increased supportive services entailed by the proposal would, however, likely run afoul of the principle of "cost neutrality" currently applied by the Department of Health and Human Services.⁴⁵ The proposal does not appear to pose any cognizable constitutional issues, nor does it appear to run afoul of the regulation on the testing of human subjects because its thrust is to expand rather than curtail benefits.

By contrast, a welfare waiver proposal that would place a strict one-year time limit on receipt of welfare benefits, or that entailed similar limits or restrictions, is virtually certain to meet a variety of challenges, including violation of the basic purposes of the AFDC program.⁴⁶ In addition, it is certain to raise constitutional claims with regard to the arbitrary cutoff of assistance.⁴⁷ In general, as long as reform proposals are recipient-centered and tend to expand rights, and are applied in a consistent and uniform way on a state-wide basis, they are likely to have little problem with waiver review under the current statutory scheme. By contrast, proposals that terminate or limit benefits, especially where they are applied in a differential way, may be expected to pose substantial difficulties on waiver review.

42. *C.K. v. Shalala*, 883 F. Supp. 991 (D. N.J., 1995).

43. 45 C.F.R. § 46.101-124 (1994).

44. *C.K.*, 883 F. Supp. at 1015.

45. See statement of Mary Jo Bane, *supra* note 38, at 7. The principle of cost neutrality is aimed at "ensuring responsible stewardship of federal funds while allowing state flexibility." *Id.* The Department compares the costs of the state experiment to those of a control group to ensure that the costs of the experiment are not too high. *Id.*

46. 42 U.S.C. § 601 (1988).

47. See, e.g., *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995); *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994).

IV. Prospects for Welfare Reform Within a Block-Grant Setting

Current proposals in Congress call for an amalgam of certain aspects of the Personal Responsibility Act, with a new block-grant approach for the AFDC program.⁴⁸ Under the Personal Responsibility Act, passed by the House of Representatives on March 29, 1995, a single new cash welfare block grant would be created in order to "provide assistance to needy families,"⁴⁹ "promote work and marriage,"⁵⁰ and "discourage illegitimate births."⁵¹

The new block grants would replace four current cash welfare programs: AFDC,⁵² AFDC Administration,⁵³ the Job Opportunities and Basic Skills (JOBS) Program,⁵⁴ and the Emergency Assistance Program.⁵⁵ While formally presented as a measure designed to create maximum flexibility for the states by freeing them from federal restrictions, the proposed block grant would in fact impose several new restrictive conditions on any cash assistance block grant funding passed to the states.

States would be prohibited from using block grant funds to provide cash welfare to:

- (1) Mothers under eighteen who have a child out of wedlock;⁵⁶
- (2) Families that have an additional child while on welfare;⁵⁷
- (3) Parents not working after two years of receiving cash welfare;⁵⁸
- (4) Families receiving cash welfare for more than five years;⁵⁹
and
- (5) Non-citizens⁶⁰

48. H.R. 4, 104th Cong., 1st Sess. (1995).

49. H.R. 4 § 401.

50. *Id.*

51. *Id.*

52. 42 U.S.C. §§ 601-17 (1988 & Supp. V 1993).

53. 42 U.S.C. § 602 (1988 & Supp. V 1993).

54. 42 U.S.C. § 681-87 (1988 & Supp. V 1993).

55. 42 U.S.C. § 681-687 (1988 & Supp. V 1993).

56. H.R. 4 § 101 (striking part A of Title IV of the Social Security Act and inserting § 405(a)(4)).

57. H.R. 4 § 101 (striking part A of Title IV of the Social Security Act and inserting § 405(a)(5)).

58. H.R. 4 § 101 (striking part A of Title IV of the Social Security Act and inserting § 402(a)(1)(B)).

59. H.R. 4 § 101 (striking part A of Title IV of the Social Security Act and inserting § 405(a)(6)).

60. H.R. 4 § 101 (striking part A of Title IV of the Social Security Act and inserting § 405(a)(3)).

With the exception of these new restrictions, the entire web of statutory provisions and accompanying regulations contained in the Social Security Act would be repealed.⁶¹ The range of protections related to statewide consistency, objectivity, the promotion of basic purposes of the Act and many others would be withdrawn. This would constitute a dramatic reversal of the pattern of federal funding for public assistance, converting it from a program that incorporates an array of protections for recipients in addition to other strictures relating to program administration to a short list of specific restrictions on recipients' participation and benefits. The present waiver process for reviewing experimental or demonstration projects would be eliminated. Other than periodically providing requisite data on expenditures and performance to the federal government, states would be free to design programs they wished within the parameters of the short list of specific restrictions.

At first glance, block grants appear to confer substantially increased flexibility. Not only are the vast majority of federal standards removed, but the intensive discretionary involvement of federal officials through the waiver process would also be eliminated.

To test the actual affect such block grant proposals would have, it is instructive to contrast the viability of the STEPS proposal with the viability of the hypothetical one-year limit proposal under the proposed congressional scheme. The recipient-focused STEPS proposal would violate new House-passed all restrictions (e.g., limits on aid to mothers under eighteen⁶² and the five year assistance cap⁶³), and in its current form would thus not be allowable. The STEPS proposal would have to be modified to incorporate the substantive restrictions, and even after such modifications, the higher short-term cost of the STEPS proposal would likely make it prohibitively expensive under newly capped block grant allocations to states. Total federal funding for the block grant is capped at the level of federal spending for AFDC, JOBS, and Emergency Assistance for fiscal 1994.⁶⁴

61. H.R. 4 § 101 ("Title IV of the Social Security Act . . . is amended by striking part A, except sections 403(h) and 417, and inserting the following . . .").

62. H.R. 4, § 405(4).

63. H.R. 4, § 405(6).

64. H.R. 4, § 101 (striking part A of Title IV of the Social Security Act and inserting § 403(a)(1)). The exact computation for the grant is described at the newly inserted § 403(b)(1) and is based on generally the amount of AFDC funds that the state claimed in 1994. The total amount of AFDC expenditures for all the states cannot exceed \$15,390, 296,000. *Id.* (inserting § 403(b)(1)(C)).

In contrast, the restrictive one-year proposal would likely pass muster under the new block grant scheme. The one-year limitation is actually more severe than current federal proposals, but it is similarly restrictive, and thus, a potential challenge on federal preemption grounds, because the proposal's one-year limit is more severe than the five-year term in the federal legislation, would likely fail.⁶⁵

Thus, all the substantive requirements of the new legislation, as well as the underlying fiscal pressures, militate toward reduction or curtailment of benefits, services, and recipient population, rather than their expansion. While it is certainly possible that some states will initially seek to continue existing benefit and service levels now offered to AFDC recipients, inevitably, many states, encouraged by the restrictive substance of the federal legislation, will choose to cut back their programs. As a consequence, states with relatively more generous benefit, service or eligibility provisions are likely to find themselves in demand, perhaps under siege, as other states pursue reduction strategies. Higher benefit states would have a limited number of options available to them in seeking to protect their fiscal situations. One solution for such states would be to try to reach agreements with neighboring states, seeking some common ground in benefits. Such compacts, if achieved, would likely find compromise well toward the lower end of the scale, because states already providing low benefits would have little incentive to raise them dramatically.

A second option would be the passage of legislation restricting the ability of people to move in from other states and immediately take advantage of higher benefit levels. Such anti-mobility schemes are of doubtful constitutionality.⁶⁶ As a result, states are not likely to be able to rely on such anti-mobility laws for protection, adding further impetus to a severe downward pressure, and very definite anti-expansive pressure in welfare benefits, eligibility, and services.

In sum, whether intentionally or not the new federal block-grant proposal, if enacted, will encumber its grant of greater flexibility to states and will add pressure and incentives for greater restrictions

65. See H.R. 4, § 403(c).

66. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd* 26 F.3d 95 (9th Cir. 1994), *vacated as moot*, 115 S. Ct. 1059 (1995); Jonathan Romberg, *Is There a Doctrine in the House?: Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 *FORDHAM URB. L.J.* 1051 (1995).

on eligibility, benefits, and services. Such likely consequences, however, have not been a focus of the legislative debate to date.

IV. Conclusion

As the STEPS proposal asserts, much of current welfare reform policy is driven by inaccurate assumptions regarding the labor market and on inaccurate assessments of the level of income that will enable persons to enjoy a minimally decent life. These information gaps must be filled so that the public discourse at the state and local level will be more meaningful and effective.

The STEPS proposal acknowledges the realities of poverty. It is better equipped to actually help people move out of poverty. It would, however, violate the mandates of the Personal Responsibility Act and thus, is not likely to be implemented in the current legislative climate. Meaningful welfare reform requires further discussion of the issues raised by the doubtful viability of the STEPS proposal under the proposed block grants legislation.