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Constitutional Law - Doe v. Swank

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CASE NOTES

CONSTITUTIONAL LAW—DOE v. SWANK

On November 30, 1970, Ms. Jane Doe[1] telephoned her caseworker at the Cook County Department of Public Aid to request that public assistance be furnished to her new born baby son, Kumasi-Chad. Ms. Doe's caseworker asked her all the questions necessary to add the child to the family's AFDC grant. The caseworker also inquired as to the name of the child's father, his address, and place of employment, all according to Illinois Department of Public Aid policy,[2] explaining that the information was required in order for the baby to be added to the monthly grant. Ms. Doe refused to supply any information concerning the father of Kumasi-Chad. At this point the Department sent her a letter[3] advising

1. Because of the special circumstances of this case, the plaintiff sued under a fictitious name.

2. ILL. DEP'T OF PUBLIC AID, CATEGORICAL ASSISTANCE MANUAL (hereinafter cited as MANUAL) § 1259.1 (1969), provides in part that: "As a condition of initial or continuing eligibility, the Illinois Public Aid Code provides the parent or other person having custody of a child on whose behalf he is applying for or receiving ADC/ADC-U . . . must request the Attorney General (State's Attorney for Cook County) file action for enforcement of such remedies as the law provides for fulfillment of the support obligation of the absent parent of such child. Absent parent includes the legal parent or father of a child born out of wedlock, whether or not his paternity has been legally established.

Action is required when the absent parent is failing to furnish support, is not meeting the terms of a court order, is financially able to furnish more support than ordered or agreed to, or is not legally determined to be the father of a child born out of wedlock. The parent or other person having custody of the child who has the right to file a support action must cooperate in every material aspect of any legal enforcement procedure, including the signing of such legal documents as may be required and the giving of necessary testimony. . . .

. . . .

Unwillingness to sign DPA 440 or to fully cooperate in the legal procedure immediately renders all children owed a duty of support ineligible for assistance. Ineligibility continues until the Statute of Limitations has expired in paternity cases. Generally this is a two year period. However, legal acknowledgment of paternity or absence of the putative father from the state stops the statute from running, thereby extending the period of ineligibility. . . .

Failure or refusal of the mother of a child to cooperate will not affect the eligibility of any other children in the family nor of the mother if she is the grantee for the children and/or is caring for them . . . ."

3. Form DPA 157 is sent to all recipients whose assistance is decreased in any way or cancelled. It contains a short explanation of the change in the recipient's

her that failure to disclose the father's name and address would make her ineligible for assistance. In addition, the note informed her that her rent and utilities would be pro-rated so that her grant would include only a 3/4 share, excluding the 1/4 share for Kumasi, effective December 1970.[4]

Ms. Doe requested a "fair hearing"[5] at her local district office, where she was again refused aid for Kumasi on the grounds that she had refused to divulge any information concerning the baby's father. She appealed that ruling at an administrative hearing held at the central administrave office of the county department. The appeals officer upheld the action of the county department in its refusal to grant aid to the family for Kumasi-Chad.[6]

Having exhausted her administrative remedies, Ms. Doe went to the federal district court, seeking an injunction prohibiting the department from enforcing the Illinois Public Aid Manual provisions,[7] which required her to divulge the name of Kumasi's father or suffer a reduction of AFDC benefits. Ms. Doe's complaint was in the form of a class action,[8] and was based on the fifth, ninth, and fourteenth amendments to the United States Constitution, the Social Security Act,[9] and the Civil Rights Act.[10] The plaintiffs sought declaratory and permanent injunctive relief, as well as temporary relief and release of benefits wrongfully withheld.

Since the injunction sought the restraining of the enforcement and

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monthly grant, the reason for the change, and informs the client that he has fifteen days in which to contact the district office if there is any reason why he believes that his grant should not be cut. The form also contains a statement of the client's right to appeal. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Note, *Constitutional Law—Due Process—Evidentiary Hearing Required Prior to Termination of Welfare Benefits,* 19 DEPAUL L. REV. 552 (1970).

4. MANUAL § 1504 provides that in the event there is an ineligible member of the family living at home, the family's rental allowance is decreased proportionately.

5. *See* 42 U.S.C. § 602(a)(4) (1964); Goldberg v. Kelly, 397 U.S. 254 (1970).

6. The right to appeal decisions of the Department to terminate or decrease a recipient's public assistance grant is provided for in ILL. REV. STAT. ch. 23, § 11-8 (1969). However, it is important to note that the appeals officer has only limited power to decide a case—he is bound by relevant rules and regulations of the Department.

7. MANUAL § 408.3 was superceded by § 1259.1 promulgated on Oct. 28, 1969. *See* note 2 *supra.*

8. FED. R. CIV. P. 23.

9. 42 U.S.C. § 401 *et. seq.* (1970).

10. 28 U.S.C. § 1983 (1964). *See* Note, *Federal Judicial Review of State Welfare Practices,* 67 COL. L. REV. 84 (1967).

operation of a state-wide regulation on the grounds of its unconstitutionality, a three-judge panel was requested. The three-judge panel (Marovitz, J., dissenting), relying on a similar case decided in a Connecticut district court,[11] ruled that:

> refusal to extend benefits in the circumstances recounted here is contrary to congressional intent. Accordingly we hold that the challenged provisions of the Illinois Department of Public Aid Categorical Assistance Manual are void and unenforceable.[12]

The court further ordered the defendants to communicate to anyone denied aid under those provisions that they were now eligible for assistance, and to compute the amount of aid wrongfully withheld from each of them, and to remit such amounts to them. *Jane Doe v. Swank,* 332 F. Supp. 61 (N.D. Ill. 1971).

The defendants, Edward T. Weaver (successor to Harold O. Swank), Director, Illinois Department of Public Aid, and David L. Daniel, Director, Cook County Department of Public Aid, appealed the decision directly to the Supreme Court,[13] which affirmed in a per curiam decision.[14] The effect of this decision is that Illinois is permanently enjoined from making the cooperation of an AFDC mother, in gaining support from a legally responsible, deserting father, a condition of eligibility for receipt of welfare benefits.

The purpose of this casenote is to trace the origins and development of the Notice to Law Enforcement Officials provisions (hereinafter referred to as NOLEO provisions) of the Social Security Act,[15] examine its implementation by the Illinois Department of Public Aid until the *Doe* decision, discuss questions of constitutional magnitude raised by the plaintiff but avoided by the court, and finally, to attempt to outline the dilemma that Illinois and other states now find themselves in when attempting to reduce welfare payments by securing support from legally responsible relatives. In analyzing this decision it will be made abundantly clear that the Supreme Court's affirmance of the order to void the Illinois NOLEO

11. Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed as improperly filed,* 396 U.S. 488, *rehearing denied,* 397 U.S. 970 (1970).

12. 332 F. Supp. 61 (N.D. Ill. 1971).

13. 28 U.S.C. § 1253 (1964) provides: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." *See* Brotherhood of Locomotive Engineers v. Chicago, R.I. & Pac. R.R., 382 U.S. 423, 428 (1966); Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73 (1960).

14. *Aff'd sub nom.,* Doe v. Weaver, 404 U.S. 987 (1971).

15. 42 U.S.C. § 402(a)(17) (1967).

provision will have a lasting effect on welfare law and administration, especially in light of the state program's precarious financial condition.[16]

The Social Security Act provides for assistance to four major categories of needy people: the blind,[17] the aged,[18] the disabled[19] and dependent children (AFDC).[20] The states administer each program, setting up their own criteria of eligibility, administrative procedures and standards of assistance. These must be approved by the Secretary of Health, Education, and Welfare,[21] who bases his evaluation of each individual state program on certain basic requirements provided for in the Act,[22] as well as on regulations imposed by HEW. If the state receives approval of its program, it is eligible for a grant-in-aid from the federal government to defray the major portion of the cost of the program. A state whose program does not receive approval has an opportunity to plead its case at a conformity hearing. If the Secretary is still not satisfied, the state then has the choice of either changing the program to bring it into conformity or to receive no federal matching funds.[23] It is important to note that federal funds have never been withheld from a state for failure to comply with the guidelines set up by HEW and the Social Security Act. The threat of this drastic measure has been enough, in the past, to bring the states into conformity.

One federal provision required of all participating states is the Notice to Law Enforcement Officials provision. This provision first appeared in the 1951 amendments to the Social Security Act as part of a bill introduced by Rep. Thomas Steed of Oklahoma. The bill, as originally introduced, would have made desertion of a child a federal crime;[24] however, the criminal provisions were deleted, leaving only the "notice requirement." The bill was adopted and passed by Congress and provided that:

16. *See* County of Cook v. Ogilvie, 50 Ill. 2d 379, 280 N.E.2d 224 (1972).

17. 42 U.S.C. §§ 1201-06 (1964).

18. 42 U.S.C. §§ 301-06 (1964).

19. 42 U.S.C. §§ 1351-55 (1964).

20. 42 U.S.C. §§ 601-09 (1964).

21. 42 U.S.C. § 1302 (1964). *See also* BELL, AID TO DEPENDENT CHILDREN (1965); Wedemeyer and Moore, *The American Welfare System*, 54 CALIF. L. REV. 326, 342 (1966).

22. 42 U.S.C. §§ 602, 604 (Supp. III, 1967).

23. *See* BELL, *supra* note 23 at 137-51. LEYENDECKER, PROBLEMS AND POLICY IN PUBLIC ASSISTANCE (1955); Note, *Welfare's Condition X*, 76 YALE L.J. 1222 (1967).

24. H.R. 4057, 81st Cong., 1st Sess. (1949); *see also* HOUSE COMM. ON THE JUDICIARY, MAKING ABANDONMENT OF DEPENDENTS A FEDERAL CRIME, H.R. Ser. No. 23, 81st Cong., 1st & 2nd Sess. (1950).

A state plan for aid and services to needy families with dependent children must provide for prompt notice to law enforcement officials of the state furnishing aid to families with dependent children in respect of a child who has been abandoned or deserted by a parent.[25]

This amendment placed an additional burden on the states without setting up any procedures for cooperation between welfare departments and law enforcement officials of different states. Congress also failed to take into consideration the fact that it did not make available any additional matching funds to states in order to fulfill the requirement. The measure, originally a criminal statute and later a considerably weakened notice requirement, was a dismal failure in terms of securing additional support from deserting parents.

The 1967 amendments to the Social Security Act, while adding several sections regarding NOLEO,[26] made the 1951 provisions more explicit by authorizing each state to establish the paternity of each child born out of wedlock who is receiving AFDC. Congress was attempting to buttress the NOLEO provisions of 1951, which had languished in impotency without any supportive procedures or funding. The 1967 amendments required each state to staff a centralized support enforcement agency and, more importantly, provided the states with matching funds to defray the additional administrative costs. The amendments authorized the implementation of interstate machinery to enforce support obligations of absconding fathers—and all other legally responsible relatives. The new amendments[27] allowed state enforcement officials access to the files of the Internal Revenue Service and the Social Security Administration in order to obtain the address of a deserting parent—certainly an unprecedented step forward in ease of enforcement. In short, the 1967 additions to the NOLEO provisions of the Social Security Act gave the 1951 requirement procedural "teeth" to aid state officials in the enforcement of a support obligation across state lines.[28]

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25. 42 U.S.C. § 402(a)(17) (1951).

26. Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821, *amending* 42 U.S.C. § 400-800.

27. 42 U.S.C. § 610(a) (1967) provides: "Upon receiving a report from a State agency made pursuant to Section 602(a)(21) of this title, the Secretary shall furnish to the Secretary of the Treasury or his delegate the names and social security account numbers of the parents contained in such report. . . . The Secretary of the Treasury or his delegate shall endeavor to ascertain the address of each such parent from the master files of the Internal Revenue Service, and shall furnish any address so ascertained to the State agency which submitted such report."

28. The pertinent portions of the 1967 additions to the NOLEO provisions of the Social Security Act are:

"402(a) A State plan for aid and services to needy children must provide—(A) for the development and implementation of a program under which the State

The regulations issued by HEW regarding the implementation of the NOLEO legislation of 1951 make it clear that the agency considered the amendment a purely *reporting* requirement and that the agency did not interpret it as adding an additional eligibility requirement:

[The amendment does not] make the assistance agency responsible for requiring the applicant to take action against the deserting parent or *for making eligibility for assistance conditional upon action by the applicant.* . . .

. . . .

The public assistance job is seen as that of providing eligible children with the assistance they need; and *it is not the intent of the legislation to deprive needy children of assistance in order to punish their parents for neglect of their duties.* Although accepting assistance involves notice to the law enforcement officials if a parent has deserted or abandoned his child, *the amendment does not impose an additional eligibility requirement.* . . . [T]he provision . . . requires notice that aid has been furnished "in respect of a child who has been deserted or abandoned by his parent."[29]

HEW apparently based its interpretation on the remarks of Rep. Steed, the original author of the bill, who stated:

In introducing this bill, I did not intend that aid should be withheld from any needy child, but rather this bill is aimed at parents, who without justification, shift the financial responsibility for their children to the federal, state, and local governments.[30]

The HEW regulations suggest that the agency inferred that Congress intended that desertion of a child should no longer be known only to the welfare agency, but that the state agency should communicate that fact to law enforcement officials, who would then take legal action against the deserting parent. The HEW regulations in no way suggest that the state agency could deny assistance to a mother who would refuse to

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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 of support. . . ." *See* REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, ILL. REV. STAT. ch. 68, § 101-42 (1971), which is now in force in one form or another in all states, according to the Handbook of the National Conference of Commissioners of Uniform State Laws at 223 (1969). For a criticism of existing law see Bell, *Relative Responsibility: A Problem in Social Policy*, 12 SOCIAL WORK 32 (1967); Note, *The Un-uniform Reciprocal Enforcement of Support Act*, 9 J. FAM. L. 325 (1969).

29. HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, pt. IV § 8120 (1970) (hereinafter cited as HANDBOOK).

30. House Ways and Means Committee Hearings on H.R. 2893, pt. 2, 81st Cong., 1st Sess., 1949 (remarks of Rep. Steed). *See also* 95 CONG. REC. 13953 (1949).

cooperate with the NOLEO requirement of identifying and attempting to locate the father.

> In most instances, States should be able, without changes in State laws, to carry out this requirement of the Federal act by issuing the necessary rules and regulations. *The Bureau advises against legislation that makes the actual commencement of an action on the part of a parent to obtain support from the parent who has deserted or abandoned his children a condition of eligibility.* Such provisions deprive needy children, who would otherwise be eligible, of the right to receive aid to dependent children pending the commencement of an action to obtain support from the absent parent.[31]

Since HEW has no actual power to direct state welfare legislation, this "advice" left states free to enact any legislation that they pleased regarding the NOLEO requirement. One must keep in mind that HEW's only sanction against arbitrary or illegal state action is to refuse to approve the state plan.[32] This procedure involves a type of administrative overkill, which results in the cut-off of all federal matching funds—certainly a drastic result since it would leave all the welfare recipients of the state without any assistance. This inability of HEW to intervene in situations where the states adopt rules which are inconsistent with its own regulations or the Social Security Act is one of the most glaring faults of national welfare administration.[33]

HEW never abandoned its original interpretation of the NOLEO legislation; and in 1967, when Congress amended the requirement, HEW promulgated regulations consistent with its earlier interpretation of NOLEO. HEW again interpreted the NOLEO requirement, including the

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31. HANDBOOK § 8149.

32. 42 U.S.C. § 604 (1964). *See also* Comment, *Intervention in HEW Conformity Proceedings*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 559 (1971).

33. *See* Wedemeyer and Moore, *supra* note 21. Since HEW was hesitant to call for conformity hearings unless the state plan was flagrantly outside the bounds of statutory intent, the states had carte blanche to put restrictive conditions on the receipt of public assistance. People on welfare normally have no money with which to pay lawyers, and so, even in cases where states had terminated or refused assistance under unconstitutional provisions, the state program went unchallenged. HEW would get a state to conform, but a poor person cannot wait six months or even six weeks for the necessities of life. However since the 1967 amendments to the enabling legislation for the Office of Economic Opportunity 42 U.S.C. § 2992 (1967), federal funds have been provided for legal services for persons meeting certain poverty standards. (*See* 2 U.S. CODE CONG. AND ADMIN. NEWS 2451 (1967)). With legal assistance provided them, poor persons have been asserting their rights and challenging various state welfare provisions. There has literally been a flood of welfare litigation since 1967. *See, e.g.*, Townsend v. Swank, 404 U.S. 282 (1971); Lewis v. Martin, 397 U.S. 552 (1970); Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968). Congress has reacted by taking preliminary steps to forbid the use of federal funds for salaries of lawyers who file court challenges of federal welfare laws and policies.

1967 amendments, to be a pure reporting device, which was solely the responsibility of the state—and that the state could not require the cooperation of welfare recipients in order to fulfill its own statutory obligation. HEW apparently considered the 1967 changes as procedural and not substantive in nature. In January, 1969, HEW promulgated regulations with regard to the 1967 amendments:

(a) There must be a program for establishing paternity for children born out-of-wedlock and for securing financial support for them and for all other children receiving AFDC who have been deserted by their parents or other legally responsible relatives. Efforts must be made to locate putative and absent parents and there must be a determination of their potential to provide financial support. There must be provisions for the utilization of reciprocal arrangements with other States to obtain or enforce court orders for support. There must be a single staff unit in the State agency and in large local agencies to administer this program. (The files of the Social Security Administration are available to the State agencies when other efforts have failed to provide the necessary information on the address of a parent.)[34]

The reason that HEW persisted in its original interpretation of the NOLEO requirement, even in the face of the extraordinary measures authorized by Congress to secure support for AFDC children, apparently stems from remarks made by Rep. Wilbur Mills, Chairman of the House Ways and Means Committee, and the author of the 1967 legislation. To judge from his statements, it was not the intent of Congress to make parental cooperation under the NOLEO requirement a condition of eligibility:

Are you satisfied with the fact that illegitimacy in this country is rising . . .? I am not. We have tried to encourage the States to develop programs to do something about it. Now we are requiring them to do something about it. We are not penalizing any child. We are not going to take a child off the rolls in any State nor fail to participate with Federal funds in the care of that child, regardless of what his parent does.[35]

This is strong language and certainly supportive of the HEW position—yet Ms. Doe's son, Kumasi, was refused assistance by CCDPA based upon her refusal to name her son's father. The Department's interpretation of the NOLEO requirement differed significantly from that of HEW.

The Illinois Department of Public Aid and the Illinois legislature have never agreed with the HEW interpretation of the NOLEO requirement as a purely reporting provision. They have consistently interpreted NOLEO as a mandate from Congress to see that support obligations are

34. 45 C.F.R. § 220.48; 34 Fed. Reg. 1359 (1969).

35. 113 Cong. Rec. 23053 (1967).

enforced in light of the state's legitimate interest in reducing welfare costs.[36] The Illinois Department promulgated the following Manual provisions according to its interpretation of the NOLEO requirement:

> Federal law requires the Department to give prompt notice to law enforcement officials when aid is furnished a child who has been deserted or abandoned by a parent. Therefore, when a needy child has been deserted or abandoned by parent(s) the applicant for assistance for that child *must consent* to the desertion or abandonment being reported to the proper law enforcement official. . . .[37]
>
> *As a condition of initial or continuing eligibility,* the Illinois Public Aid Code provides the parent or other person having custody of a child on whose behalf he is applying for or receiving ADC/ADC-U or MANG (Cr) (Cu) *must request the Attorney General* (State's Attorney for Cook County) *file action for enforcement of such remedies as the law provides for fulfillment of the support obligation of the absent parent of such child. . . .*[38]

It would seem that the views of HEW and the Department were diametrically opposed regarding the question of whether the NOLEO requirement could be used by the states as a condition of eligibility. The Department insisted that, considered in the context of the entire Social Security Act, the NOLEO requirement not only authorized the states to report desertion or abandonment, but delegated to them a positive duty to gain support for needy children. The Department's argument is certainly plausible—or else why would Congress have required the states to establish programs designed to determine the paternity of illegitimate children? Why would it have authorized the expense of a separate administrative unit within each state agency to be operated in cooperation with courts and law enforcement agencies? Why had Congress authorized the unprecedented step of allowing this new state unit the use of IRS and Social Security Administration files? And, since Congress had not specifically forbidden the use of NOLEO as a condition of eligibility, the Illinois Department felt that it was well within the guidelines of the Social Security Act in interpreting the requirement in the manner in which it did.[39]

Ms. Doe refused to cooperate with Illinois law enforcement officials who were seeking to gain support from Kumasi's father. The Department, however, made her cooperation in fulfilling the NOLEO reporting

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36. *See* Wyman v. James, 400 U.S. 309, 318-19 (1971).

37. MANUAL § 1255.

38. MANUAL § 1259.1. ADC-U is the unemployed father sector of the AFDC program, authorized under 42 U.S.C. § 607 (1967). MANG (Cr)(Cu) is the medicaide program authorized under 42 U.S.C. 1396 (1967).

39. ILL. DEP'T OF PUBLIC AID, ILL. PUBLIC AID CODE § 2-11 (1969) defines "the spouse of an applicant or recipient; the parent or parents of a child who is under age 21" as legally responsible relatives. *Cf.* U.R.E.S.A., *supra,* note 28; Woods v. Miller, 318 F. Supp. 510 (W.D. Pa. 1970).

requirement a condition of eligibility for her son, even though the HEW guidelines clearly stated that NOLEO was not to be construed as a condition of eligibility by the states. HEW was hesitant to hold conformity hearings and threaten Illinois, and the many other states who interpreted the NOLEO requirement as a condition of eligibility, with termination of federal grants-in-aid.[40] Ms. Doe, therefore, brought a class action suit in federal district court to enjoin the Department from enforcing the provision. She based her suit on several theories, the most important of which were: (1) that the NOLEO provision, to the extent that it is used as a condition of eligibility, is inconsistent with the Social Security Act, and (2) that the NOLEO provision, as it is used by the Illinois Department, violates a welfare mother's constitutional right against self-incrimination and the right to preserve the integrity of her family.

The federal district court found that the constitutional claims of Ms. Doe raised substantial issues and that the three-judge panel was properly convened, but the court did not decide the suit on constitutional grounds. Following another three-judge federal district court in Connecticut,[41] it construed the Illinois NOLEO requirement as an unauthorized condition of eligibility. Judge Lynch, speaking for the majority, stated:

We find nothing in the Social Security Act that permits the state to attempt to satisfy its affirmative duty to seek support for the child by cutting that child off from AFDC. We agree with the majority in *Doe v. Shapiro* . . . in holding that re-

40. *Cf.* KY. REV. STAT. 225.200(4), *as amended* (1970): "No assistance under this chapter shall be paid on behalf of a child born out of wedlock until after a paternity proceeding involving the child has been commenced."; *See also* 62 PA. STATS. ANN. 1973 (Purdon, 1968): "3237.14 . . . If the person decides to take court action against a legally responsible relative, assistance is continued until the court makes a decision. . . . If the person refuses to take court action, assistance is discontinued for those members of the assistance unit for whom the relative is legally responsible." 3237.15 Court Action. Court action is an eligibility requirement for assistance . . . ; *See also* CAL. WELF. & INST'NS CODE § 11477 (West 1970). For an example of how a welfare recipient's right to privacy is respected in some states, *see* N.M. HEALTH AND SOC. SERVICES DEP'T REG. 223.321: "In order to determine if the father is the actual father of the child an intensive investigation of the case is necessary. The mere allegation by the mother of the child that a certain man is the father is not sufficient information upon which to base an evaluation. Specific inquiry must be made of the mother regarding: (1) the date of conception; (2) promiscuity; (3) frequency of contact with the putative father; (4) the names of any persons who could corroborate the relationship of the mother and the putative father, and (5) specific facts establishing an act of intercourse with the putative father at or near the date of conception."

41. Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969). *See also* Doe v. Harder, 310 F. Supp. 302 (D. Conn. 1970). (Contempt proceeding against welfare officials based on injunction issued in Doe v. Shapiro, where new regulation would make the mother of an illegitimate child ineligible if she refused to cooperate. The court held that the provision had the "same vice as the original. . . .") *Id.* at 303.

fusal to extend benefits in the circumstances recounted here is contrary to congressional intent. Accordingly we hold that the challenged provisions of the Illinois Department of Public Aid Categorical Assistance Manual are void and unenforceable.[42]

The defendant offered several plausible arguments which merit mention. The defendant correctly stated that the Social Security Act directs state welfare agencies to set standards by which "need" can be determined.[43] Moreover, the states are compelled to weigh the income and resources[44] of any child in determining whether he is "needy" and thus eligible for assistance. Since in Illinois, a putative father is a legally responsible relative, and thus at least a potential resource, the state can't weigh the income and resources of a child unless it knows the identity and financial position of the father.

The court rejected this argument for several reasons. First, the recent Supreme Court decision of *King v. Smith*[45] has held that the income and resources provision of the Social Security Act excludes from consideration any resource "merely assumed to be available."[46] Second, HEW's official position is in accordance with the *Smith* rule:

(ii) in establishing financial eligibility and the amount of the assistance payment . . . (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.[47]

Another argument proffered by the defendant and accepted by the dissent[48] was left unanswered by the court. The dissent asserted that the Social Security Act authorizes state welfare agencies to develop support for needy families from legally responsible relatives. This is a valid statutory goal. The recent Supreme Court case of *Wyman v. James*,[49] in upholding New York's position that "home visitations" are a condition of eligibility for AFDC, held that reasonable administrative tools enacted to help achieve valid statutory goals are constitutional. Certainly, requiring mothers applying for AFDC to name the putative father is a "reasonable" tool which will help further the statutory objective of securing sup-

42. 332 F. Supp. 61, 63 (N.D. Ill. 1971).

43. 42 U.S.C. §§ 601, 602, 603, 604 (1964, Supp. Ill. 1967).

44. 42 U.S.C. § 602(a)(7) (1964).

45. 392 U.S. 309 (1968).

46. King v. Smith, 392 U.S. 309, 319 n.16 (1968). *See* Solman v. Shapiro, 300 F. Supp. 409 (D. Conn. 1969), *aff'd per curiam* 396 U.S. 5 (1969).

47. 45 C.F.R. § 233.20(a)(3)(ii); 34 FED. REG. 1395 (1969). *See also* 42 U.S.C. § 402(a)(7).

48. 332 F. Supp. 64 (1971).

49. 400 U.S. 309 (1971); *See* Note, *Wyman v. James, 4th Amendment—More Restrictions on the Individual's Right to Privacy*, 21 DEPAUL L. REV. 1081 (1972).

port from legally responsible relatives. As stated above, the court did not respond to this argument; indeed, it seems difficult to reconcile this decision with the *James* case.

Although the court did not reach the constitutional issues and chose to base its decision solely on statutory grounds, an interesting question is presented when considering the Illinois NOLEO provision in light of the constitutional right against self-incrimination. A welfare recipient's fears are not groundless in this regard, for in filling out the form required by the Illinois Department, she may be in danger of self-incrimination. Had she provided the information requested by her caseworker, Ms. Doe could have been prosecuted for fornication, adultery, or had her children taken away from her in neglect proceedings.[50] The court in *Doe v. Shapiro* considered this problem and found that the Connecticut NOLEO provision posed a real threat to a welfare mother's fifth amendment rights,[51] even in the face of a 1969 amendment to the Social Security Act which required that states "provide safeguards which restrict the use or disclosure of information concerning applicants to purposes directly connected with the administration of AFDC."[52] The court reasoned that since the state department was required to pass the information on to the state law enforcement officials,[53] this provision providing for confidentiality

50. *See* ILL. REV. STAT. ch. 23 §§ 2360-61; ch. 38 §§ 11-7, 11-8 (1967).

51. *See* State v. Plummer, 5 Conn. Cir. 35, 241 A.2d 198 (1967) (welfare mother prosecuted for and convicted of lascivious carriage); Commonwealth v. Lawrence, 1 Pov. L. Rep. 1310.10 (Mass. Dist. Ct. 1967) (mother supplied information concerning her illegitimate child and signed criminal complaint against the father as required by the mandatory paternity suit provision then existing in Massachusetts. She was subsequently charged with lewd and lascivious cohabitation. The court granted the motion to suppress all statements made to the police and dismissed the suit on the grounds that the use of her statements violated her privilege against self-incrimination).

52. 42 U.S.C. § 609(a)(9) (1969).

53. ILL. REV. STATS. ch. 23 § 11-9 (1967) does not afford the recipient much protection: Protection of Records—Exceptions. "For the protection of applicants and recipients, the Illinois Department, the county departments and local governmental units and local governmental units and their respective officers and employees are prohibited, except as hereinafter provided, from disclosing the contents of any records, files, papers and communications, except for purposes directly connected with the administration of public aid under this Code.

In any judicial proceeding, except a proceeding directly concerned with the administration of programs provided for in this Code, or in which the applicant or recipient is a party thereto, such records, files, papers and communication, and their contents shall be deemed privileged communications. . . .

This Section does not prevent the Illinois Department and local governmental units from reporting to local appropriate law enforcement officials the desertion or abandonment by a parent of a child, as a result of which financial aid has been necessitated. . . . The Illinois Department may provide by rule for the county departments and local governmental units to initiate proceedings under the "Juvenile

might not be a bar, in certain circumstances, to the introduction, in a criminal proceeding of evidence which was provided by the recipient.

Certainly these fears are not unreal when scrutinized in light of *In re Cager*,[54] a class action by a group of Maryland welfare mothers, whose children were being taken from them in criminal (later civil) neglect proceedings brought on information supplied by the recipients themselves, in compliance with the state NOLEO disclosure requirement. The neglect statute under consideration stated that in determining whether a child should be removed from a home because it does not provide a stable moral environment, the court should consider the following facts:

> Whether the child's parent or guardian . . . (iv) is pregnant with an illegitimate child; or (v) has, within a period of twelve months preceding the filing of a petition alleging the child to have been neglected, either been pregnant with, or given birth to another child whose putative father she was not legally married to at the time of conception, or has not thereafter married.

The circuit court ordered the children placed in foster homes. The court of appeals reversed on the grounds that the birth of an illegitimate child was not proof of neglect. The court did not hold that the state's NOLEO requirement was violative of the mothers' fifth amendment rights. It did suggest that "[u]ndoubtedly, a State's Attorney is to be furnished Form 218 [the equivalent of the Illinois DPA-440, the NOLEO reporting form] for the purpose of proceeding against absent fathers, but [his] right is limited to the use of the form for [that] purpose."[55]

Ms. Doe asserted that in exercising her privilege against self-incrimination, she could not be penalized by being denied welfare benefits.[56]

Court Act," approved August 5, 1965, to have children declared to be neglected when they deem such action necessary to protect the children from immoral influences present in their home or surroundings." 36 PUBLIC AID IN ILLINOIS 11 (1969).

54. 251 Md. 473, 248 A.2d 384 (1968).

55. *Id.* at 482, 248 A.2d at 390.

56. *Compare* Wyman v. James, 400 U.S. 309, 321-22 (1971): "What Mrs. James appears to want from the agency that provides her and her infant son with the necessities of life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind. . . ." [at 234] "It seems to us that the situation is akin to that where an [IRS] agent, in making a routine civil audit of a taxpayer's income tax return . . . asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his 'rights' in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant

It would seem that this conclusion would flow from several recent cases. In *Spevack v. Klien*,[57] the Supreme Court held that an attorney could not be disbarred for asserting his privilege against self-incrimination. The Court cited *Malloy v. Hogan*,[58] which defined that privilege to mean "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." In this context, the Court said in *Spevack*, " 'penalty' is not restricted to fine or imprisonment. It means as we said in *Griffin v. California*,[59] . . . the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly'." Certainly the denial of welfare benefits is "costly" to the applicant/recipient who goes to the public aid office usually as a last resort, with all possible alternatives for support exhausted.[60]

The court in *Doe v. Swank* held that the Illinois NOLEO requirement was contrary to the intent of Congress. Even if the provision were authorized by Congress and HEW it would probably be ruled unconstitutional as violative of the recipient's fifth amendment rights.[61] It would appear then that Illinois' attempts to investigate avenues of support by conditioning welfare benefits on a mother's cooperation with public aid officials have reached a judicial *cul-de-sac*. What alternatives, if any, does the Illinois Department have in securing support from deserting fathers without the statutory or constitutional infirmities of Manual chapter 1259.1? Can the state avoid the backbreaking expense which it alleged would be the result of the permanent injunction against the Illinois NOLEO provisions?[62]

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additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved."

57. 385 U.S. 511 (1967).

58. 378 U.S. 1 (1964).

59. 380 U.S. 609 (1965).

60. 385 U.S. at 515; *see also* Uniformed Sanitation Men Ass'n Inc. v. Commissioner, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967); Lynumn v. Illinois, 372 U.S. 528 (1963) (police coerce confession from welfare recipient by threatening that her public aid would be cut off and her children taken away).

61. An interesting question not considered by the court was plaintiff's constitutional right to maintain the integrity of her family. *See* Levy v. Louisiana, 391 U.S. 68 (1968); Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Ullman, 367 U.S. 497 (1961); Meyer v. Nebraska, 262 U.S. 390 (1923). Certainly forcing a woman to bastardize her child is as an important an area for the Court to intervene as the area of birth control information (*Griswold, Poe*) or learning the German language (*Meyer*). *See* KANTOWICZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969).

62. Appellant's jurisdictional statement at 44, Doe v. Weaver, 404 U.S. 987

An alternative has been suggested which points out in vivid detail the dilemma which Illinois is faced with. It would increase support from deserting fathers but would have other, less ameliorative effects as well. Under the plan, law enforcement officers (the State's Attorney's office in Cook County, the Attorney General in all other counties) would initiate prosecutions of mothers of all illegitimate children applying for or receiving public aid for fornication or adultery. The mother would be granted immunity, and would be required to testify as to the name, address, and place of employment of her paramour/co-misdemeanant. If the mother refused to cooperate she would be jailed for contempt of court. The objectionable feature of this plan is obvious—the wholesale jailing of welfare mothers would certainly be a volatile procedure, one not calculated to match the political expediencies of two politically sensitive offices. Any attempts by the Department to coerce welfare recipients by traditional legal means always results in a dilemma: you cannot fine someone on welfare, he's poor to begin with, and you cannot jail mothers with children.[63] Unless a state legislator is prepared to emulate the political career of Attila the Hun, he had better search out new methods of legal enforcement in welfare situations.

The states may not be forced to find their own solutions, however, since the question will be made moot by the passage of President Nixon's Family Assistance Plan (FAP). The measure, as originally proposed,[64] would delete the requirement of the present Social Security Act, that states notify law enforcement officials whenever aid is furnished to a child who has been deserted or abandoned by a parent.[65] The deletion of this notice requirement would deprive the states of any justification for condi-

(1971). The Illinois Department estimates that the injunction against MANUAL provision 1259.1 (set out in note 2, *supra*) would cost $20 to $30 million in retroactive payments added to the total expense of the AFDC program during fiscal 1972.

63. *See In re* Carradine, 72 C 2874 (N.D. Ill. filed 11-15-72) (welfare mother sentenced to 6 months in jail for contempt of court for her refusal to testify in a murder trial). Mrs. Carradine was pardoned by Governor Ogilvie on Dec. 7, 1972.

64. Family Assistance Act of 1970, H.R. 16311, 91st Cong., 2d Sess. (1970). The bill failed to pass the Senate. It was resurrected as the Social Security Amendments of 1972, H.R. 1, 92d Cong., 2d Sess. (1972) but failed to be reported out of committee in the Senate. *See* 118 Cong. Rec. S-16509 (daily edition October 2, 1972) (The exchange between Senators Long and Pastore is enlightening with regard to present Senate attitudes toward legislation aimed at securing support.) Congress seems to have come full circle in this matter—a bill was submitted which would make it a federal crime, punishable by a fine of not more than $1,000 and/or imprisonment for one year to move or travel in interstate or foreign commerce to avoid compliance with a support order. H.R. 17329, 91st Cong., 2d Sess. (1970).

65. H.R. 16311, *supra*, § 103(b)(1)(G) (1970).

tioning eligibility on disclosure requirements. The plan sets up a full range of federal eligibility requirements, which are to be exclusive of any other criteria. Under FAP, the states would have to implement the federal scheme without adding any requirements of their own. But under the Plan, even as amended, the states would continue to have the responsibility to secure support for needy children.[66] They cannot require cooperation from recipients, but they must get support from responsible relatives or face bankruptcy.

Illinois will not be able to look to FAP for the solution to its problem regarding support from absent parents. This problem is at the heart of the so-called welfare crisis, because throughout the years, the major reason families have applied for public assistance has been loss of support when the father left home.[67] Approximately one half of the cases receiving AFDC in Illinois during the past six years have included one or more illegitimate children.[68] As of June, 1971, only 6.8 percent of the AFDC cases in Illinois were receiving contributions from parents—and those contributions equaled only 1.5 percent of the total needs of the AFDC caseload.[69] FAP would completely ignore this problem, and leave this responsibility with the states. The Illinois Attorney General does not have the manpower to establish the paternity of the approximately 139,725 children born out of wedlock receiving AFDC in April, 1971[70]—but that is the situation in which the decision in *Doe v. Swank* leaves Illinois. If there is a solution, for Illinois and other states, to this intricate problem, it lies with Congress.

Michael J. Morrissey

66. The present 42 U.S.C. § 402(a)(17) (*see* note 28, *supra*) is preserved in its entirety in FAP as § 402(a)(11).

67. *See* 36 PUBLIC AID IN ILLINOIS 4, 27 (1969).

68. *See* 38 PUBLIC AID IN ILLINOIS 28 (table 5) (1971).

69. *Id.* at 30, table 9.

70. Appellant's jurisdictional statement, *supra* note 79, at 54.