1968 WL 112517 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Ruben K. **KING**, Commissioner of the State Department of Pensions and Security, State of Alabama; Lurleen Burns Wallace, Chairman, State Board of Pensions and Security, State of Alabama; James Record, Mrs. Mary Waite, William M. Clarke, Temple Coley, Grant Whiddon, Mrs. Mary Ella Reavis, Members of the State Board of Pensions and Security, State of Alabama; Mrs. Clinton S. Wilkinson, Sr., Director, Dallas County, Department of Pensions and Security, Individually and In Their Official Capacities, Appellants,

v.

Mrs. Sylvester **SMITH**, Individually, and on Behalf of Her Minor Children, Ida Elizabeth **Smith**, Ernestine **Smith**, Willie Louis **Smith** and Willie James **Smith** and on Behalf of All Other Mothers of Needy, Dependent Children Similarly Situated, Appellees.

No. 949.
October Term, 1967.
April 18, 1968.

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division

Reply Brief for Appellants.

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*1 THE CENTRAL ISSUE-REASONABLENESS. OF CLASSIFICATION

Appellees' Brief, as well as briefs of *amici curiae*, go into many questions which Appellants believe are not directly involved in the case before this Court. For this reason Appellants wish to state as succinctly as possible their position on the central issues.

***2** In Alabama an otherwise needy dependent child is ineligible for public assistance if there are two able-bodied parents in the home. In a situation where parents are legally married, the father may not (1) give economic support or (2) give love and affection; in a situation where a husband is the stepfather of the children he may not owe a legal duty of support to the children; yet in all of these situations the children are not eligible for ADC and this conforms with state and federal requirements. Obviously this requirement exists because it is believed that the taxpayer, and the state and federal governments representing the taxpayer, do not wish to encourage dependency, unemployment, or any effort to escape work on the part of parents by permitting them to rely on a regular monthly grant for the child from the government rather than seeking to support them by working. Undoubtedly there are instances of hardship in situations where persons are married to

each other, and it is clear that the Alabama public assistance categories only purport to help those persons who fit within these regulations which carve out those general groups of persons the State elects to assist within the framework of the Social Security Act and applicable federal regulations. "Needy" in every State in the Union is always subject to particular definitions at particular times depending upon available federal money, state money and the laws or regulations developed by Congress, HEW, the State legislature or State Welfare Boards defining the "most needy."

The Alabama regulation contains no definition which restricts aid based on the legal status of any child. It merely purports to define for the purposes of receipt of public assistance ways to identify a substitute parent. The study in Exhibit 24 (A. 587) also shows that these relationships, though not ideal, in many instances do provide children with ***3** some supportive help emotionally and financially. In marginal income groups or groups who would be eligible for Aid to Dependent Children there would no doubt be a bitter resistance to the matter of being ineligible merely because persons in the home were married when other persons similarly situated would be able to receive public assistance solely because they were unmarried. Undoubtedly the public senses this inequity also. Accordingly, Alabama has attempted to arrive at a rule which sets out to identify for purposes of public assistance the "thereness" of able-bodied parents.

The discussion in Brief for Appellees about the right of privacy and burden of proof misses the point of this type of policy. In the clearly defined instances in which the burden does shift to the client or recipient to show that a particular relationship involving cohabitation has ceased, the State does not have to pay employees to snoop around in persons' homes to determine the nature of any particular relationship. This policy when viewed in its broader sense is the direct opposite of the type of policy which places the burden on the State to snoop into the private lives of the indigent to determine the applicability of the policy. There has already been enough research, statistics and other available information to show that these types of relationships exist and that many, many children are born out of wedlock in situations which hardly lend themselves to breaking the cycle of poverty. Alabama in this policy is frankly acknowledging that it has not since 1935 as a State succeeded in breaking this cycle in these situations, and instead of putting more responsibility on state and public agencies for assuming the responsibility in ending these, is attempting to shift the burden to the individuals. Where the individuals wish to comply with the State requirements they are free to do so, and by agency policy, the caseworkers are ***4** required to help them prove that they have done so. Where a report to the agency tells of such relationship, the worker calls a client in to discuss this matter. This must be checked out just as the worker must check out reports of available income and resources.

Appellants contend that the state could view this situation in entirely different ways and still fall within the legal purview of the Social Security Act, the United States Constitution, and applicable laws of Alabama. Since May 1961 HEW has had regulations which now permit Aid to Families with Dependent Children grants with federal matching money to be made to families in which there are two able-bodied parents if these parents are unemployed. The test of eligibility can therefore be made without regard to identifying the "thereness" of two parents in states where a large amount of money is put into **AFDC**. For states which want the State agency to undertake more responsibility in this field and include more persons on **AFDC** rolls, this method offers a broader opportunity for choosing a classification which places fewer restrictions on those families eligible for aid.

But for states who wish to limit the **AFDC** program and who, like Alabama, prefer a limited program in which more adequate grants are given to fewer families, the rule in question does show a reasonable classification and is valid on its face. Appellees have not proved that it is invalid by virtue of application. Whereas some states may view these situations as calling for more financial help to needy families, Alabama has decided to expect more responsibility from persons who wish the State to help them.

The factual situation presented obviously fits in with the judicial decisions construing the Equal Protection Clause of ***5** the Fourteenth Amendment. Reviewing Courts need not agree that the regulation is the most appropriate one to achieve the valid economic purposes sought to be achieved. Instead, according to traditional administrative law doctrine, the reviewing court defers to the judgment of the administrative agency on the wisdom of the regulation, since this regulation is an exercise of the power conferred on the agency by the Legislature. See 1 Davis, *Administrative Law*, page 299 (1958); and *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236-237 (1936). This is not to ignore or belittle the role of the reviewing court as a safeguard against arbitrary or capricious administrative action, and that determination depends on the court's judgment as to whether the regulation is consistent with the purposes of the statutory grant of power.

The substitute parent regulation is a reasonable limitation on the class of dependent children eligible for **AFDC** assistance,

Neither the Social Security Act nor the Constitution requires Alabama to maintain an ADC program. The courts have quite generally held that recipients or applicants under public assistance acts have no inherent or vested right in the public assistance they are receiving or desire to receive, and that the matter of extending, expanding, curtailing or withdrawing public assistance is one of public policy only. E.g. *Ellis v. State Department of Public Health and Welfare,* 365 Mo. 614, 285 S.W.2d 634, 638 (1956). Generally speaking, a state can grant welfare benefits upon such reservations and conditions as it may deem proper. E.g. 81 *C.J.S. Social Security and Public Welfare,* §17, p. 42. The sole limitation upon the state's power to expand or contract (as it did here by the substitute parent regulation) the class eligible for public assistance benefits is the fact that the delineation between ***6** persons included and excluded from the class must have some reasonable basis in view of the over-all purpose of the regulation. We agree with Appellees that Alabama cannot pick and choose persons it will aid in a whimsical or capricious manner. We submit, however, that it has not done so. Quite obviously the amount of money available is a proper and necessary consideration in formulating public assistance programs such as **AFDC** (see 16A C.J.S. *Constitutional Law,* §490, p. 252) and economic resources available to persons applying for or receiving public assistance is a proper and necessary consideration in determining eligibility for public assistance. It is necessary for an administrative agency to address itself "to the one phase of the problem which seems most acute" and apply a remedy to this phase even though necessarily omitting the others. Appellants contend that this is not unconstitutional. See *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961).

Perfect symmetry of classification is not required and indeed is rarely, if ever, attainable, 16 Am. Jur.2d *Constitutional Law,* §504. It does not have to be the wisest classification which the legislature or administrative agency could have chosen. All that is required is that it have some reasonable basis and be reasonably related to the attainment of the general statutory objective. The policy under consideration is not the invidious discrimination which *McGowan v. Maryland,* supra, says is required to show an Equal Protection violation. The mere fact that the application of a regulatory or statutory classification in practice and in fact results in inequality to particular individuals within the class poses no constitutional problem. *Martin v. Walton,* 368 U.S. 25, 26 (1961); *Morey v. Doud,* 354 U.S. 457, 463 (1957); *Phelps v. Board of Education of West New York,* 300 U.S. 319, 324 (1937); ***7** *Missouri, Kansas and Texas Ry. Co. v. Cade,* 233 U.S. 642 (1913); *Lakeshore and M.S.R. Co. v. Clough,* 242 U.S. 375 (1916); *New York Central R. Co. v. White,* 243 U.S. 188 (1916); *International Harvester Co. v. Missouri,* 234 U.S. 199 (1913); *Ozan Lumber Co. v. Union County Nat. Bank,* 207 U.S. 251, 52 L.Ed. 195, 28 S. Ct. Rep. 89.

The substitute parent regulation was not plucked out of the air in an arbitrary, whimsical manner. As we have shown, it was a reasonable means which the Department of Pensions and Security selected to narrow the class eligible for **AFDC** benefits and thus avoid the hardship which would have been caused to a far greater number of recipients by a reduction of the maximum amount of benefits allowable. The mere fact that some different classification *could,* or even as Appellees contend *should* have been made, is not a matter which addresses itself to the courts. E.g. *Clark v. Paul Grey, Inc.,* 306 U.S. 583, 594 (1939); 16 C.J.S. *Constitutional Law* §151 (4), p. 767. Appellees' contention that the regulation is unconstitutonal in application is devoid of merit.

CORRECTIONS OR CLARIFICATIONS OF OPPOSING BRIEFS

Most of the assertions made by Appellees relating to the findings by caseworkers and county departments confuse the fact finding methods of administrative agencies with the type of evidence required in a judicial proceeding. There would be no point in having administrative agencies if all their actions required court standards to operate. One of the distinctions in the three branches of government is, the unique method each has to accomplish. its specific tasks.

The Alabama agency does disagree with Appellees' Statement of the Facts on page 11. Appellees, assert that the Plaintiff understood that a third party had told the Department ***8** that she was "going with" Mr. Williams and unless Mrs. Smith could prove otherwise, Mr. Williams was to be considered a "substitute father." The Alabama agency's version of the situation is that aid was terminated because of the Plaintiff's statement that she was cohabiting regularly with Mr. Williams and that she did not choose the alternate methods available to stop termination of the grant. We consider this point significant because the method involved in this whole process depends upon the client being the primary source of information. The Alabama agency does not employ the techniques of midnight raids. If the practice of actually believing what people say cannot be relied upon in the matter of establishing public assistance eligibility, if distrust of the system goes this far, then any text writer by assuming that caseworkers are basically dishonest and untrustworthy individuals can create assumptions which not only have no basis in fact but which arrive at conclusions without responsible research to back it up. There would be no

way to operate a public assistance program if clients and workers cannot be assumed to be basically honest and truthful. In one of the *amici* briefs and in Appellees' brief the suggestion is made that the wording of the regulation gives the caseworker the unbridled right to formulate a conclusion and terminate aid if an ADC mother establishes an open friendship with a male. Obviously, an open friendship with a man is not a test in Alabama, nor does gossip give any more leeway to a caseworker to terminate a grant under the substitute parent regulation than in a situation where large sums of money are said to have been stashed away by a public assistance recipient. On pages 49 and 51 of the Brief of Appellees a suggestion is made that the Alabama agency has not promulgated new appeal provisions. This is untrue and further revisions will be made by July 1st as required by ***9** HEW. We specifically deny the statement appearing on page 77 that Appellee and members of her class are not advised of their right to appeal. Mrs. Smith's caseworker testified that she did advise her of her right of appeal (A. 145).

Appellees and *amici* by the simple expedient of attaching the label of sexual behavior[1] to all of the aspects of the Alabama agency's regulation have sought to dispose of the serious question Appellants are asking this Court to resolve. The Department of Health, Education, and Welfare, the agency primarily responsible for interpreting the provisions of the Social Security Act, has permitted states to effectuate classifications based on informal living arrangements in **AFDC** families. In order to take advantage of the grant-inaid programs and in order to permit states to offer limited programs--perhaps instead of none at all--the Department of Health, Education, and Welfare has given broad interpretation to the language of the Social Security Act which provides (42 U.S.C.A., §601) in part as follows:

"For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, *as far as practi cable under the conditions in such State,* to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family ***10** life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter." (Emphasis supplied)

None of the Briefs submitted have answered the question: why the Secretary of Health, Education, and Welfare cannot permit states to limit their programs in accordance with the language of the Social Security Act. The Alabama agency submits that this must be a very liberal interpretation because it is dependent upon another branch of government appropriating funds to enter into what might be called a joint partnership designed to offer some help and services to the needy.[2] The Brief for Appellee alludes to the recent dispute of the Alabama agency with HEW in which the Alabama agency pointed out the difficulties a welfare departpartment has in attempting to achieve the sociological purity[3] ***11** of suppliers of services to the poor as a condition to such suppliers, such as nursing homes and child caring institutions, being permitted to grant services to the poor. There were times during that dispute when the state-federal "partnership" might have resembled John Milton's description of a marriage when two carcasses are chained unnaturally together. Nevertheless, before, during, and since that litigation the caseload percentage of Negro families receiving ADC has increased in Alabama (See Brief for Appellants, pp. 3538). Alabama has executed a Statement of Compliance with HEW and has been busily engaged in attempting to secure commitments of non-discrimination from suppliers of services to the indigent.

Since the Department of Health, Education, and Welfare, the agency charged with responsibility for interpreting the Social Security Act, has approved plans which contain the sub-classification of states defining informal family relationships, it seems clear that the Department of Health, Education, and Welfare in interpreting the Social Security Act has consistently construed the term dependent children who have been deprived of parental support as used in Section 606 of Title 42 to be capable of a separate definition by a state. For as pointed out in all of the briefs, the Department will participate in payments where deprivation of parental support means being deprived of the support of a parent who owes a duty of support by law-but it will also permit the state who might not elect to participate in the broader program to make its own definition of substitute parent so long as it does not offend other HEW requirements and ***12** constitutional requirements. If states with limited resources cannot make classifications based on informal arrangements, such states may with prospects of greatly increased caseloads find themselves in a position of not being able to provide responsible **AFDC** programs in the light of the **AFDC** "freeze" and available state funds. Since the 1967 amendment does affect this very classification of families with children who have been deprived of parental support or care by reason of continued absence from the home and since statistically this appears to be the greatest number affected, the very right of a state to continue to make these classifications could be the basis of a state legislature deciding whether it is worthwhile to continue an **AFDC** program. Certainly one of the reasons a state entered into the partnership arrangement in the first place was the financial inducement and the offer of Federal help in assisting these needy children. Some states may determine that private groups such as churches could offer a more flexible

method of coping with the unique problems of inequality as it relates to dependent children.

It does appear that at the heart of this matter this Court is being asked to analyze the nature of the **AFDC** grant. Is it a grant which inures because of the situation of a child or is it a grant which is payable because of the situation of the family? In 1958 the Social Security amendment changed the name of the grant from Aid to Dependent Children to Aid to Families with Dependent Children. It would appear, therefore, that the whole concept of the grant is to be considered based on the situation of the family. This amendment passed after the Flemming Order does certainly reflect the intention that the grant be based on the situation of the family in which dependent children live. We note that this amendment was passed after the ***13** *Collins v. State Board of Social Welfare*, 248 Iowa 369, 81 N.W.2d 4. In that case the Court considered the situation of the child as the basis for the classification. Whereas there can be no doubt that it is the child and its situation of dependency which brings about the reason for the grant in the first place, the legislation nevertheless recognizes in changing the name to Aid to Families with Dependent Children that the child is dependent upon receiving the benefit of the monthly grant by and through the grantee relative (who generally is the mother).

Since the purposes of the statute are clearly enumerated in Section 601 of Title 42, supra, the aims being to help to maintain and strengthen family life, to help parents or relatives attain or retain capability for maximum self-support or personal independence consistent with the maintenance of continuing parental care and protection, authorizations for appropriations are given. To be realistic, who receives on behalf of the child the benefit of these purposes? When the statute speaks of strengthening family life does it not really mean helping the one parent or other grantee relative who is in charge of making decisions on how the monthly check will be spent? When the statute speaks of maintaining capabilty for the maximum self-support and personal independence and the maintenance of continuing parental care and protection is this not directed toward the grantee relative-in most cases the mother? Is it not the mother Congress wants to help become self supporting and independent? Is it not the mother who receives the check and decides how to spend it? Although some health services are offered children, day care services and other related activities a caseworker can find which will help a child, it does appear that the rehabilitative services outlined as well as the actual receipt of the check all are directed at the mother--and in the final analysis regardless ***14** of the help that the Federal, State, or local governments provide, what happens to the child depends more on the mother than anyone else. Why is it contrary to public policy to refuse to place mothers involved in informal living arrangements in a preferential positon over those who are married?

The Alabama agency re-emphasizes that a grant is a regular payment of public assistance to a person who generally owes a primary duty of support to a child or children. A state is merely agreeing to assume some responsibility to make a payment and give services to help the grantee relative, but is assuming a limited responsibility and considers the responssibility contingent upon the family meeting all of its eligibility requirements. So even though we may speak of the right to receive aid if eligible, the right to be treated with dignity, the right to a fair hearing and the right not to be treated differently from others in the same situation, it is the mother who is expecting to receive the "rights." Public assistance is and always has been a gratuity, even though the above enumerated rights are accorded by the program. Though there may be many ways that Congress may elect to deal with and solve problems having to do with families with needy children, there is no constitutional requirement that they do so, nor is there a constitutional basis for them limiting what previously had been done.

In attempting to analyze the nature of the **AFDC** grant as it relates to Alabama's substitute parent regulation, the Alabama agency would like to re-emphasize that it has never considered that it is classifying the situation of illegitimate children but is basing a classification on the situation of the grantee relative who has a substitute spouse. This Court is being asked to look at each aspect of the Alabama regulation ***15** and now that all of the substitute parent regulations of all the states that have them are set out in one of the *amici* briefs as well as analyzed in Appellees' Brief the agency would like to add this other significant point. The agency had not previously pointed out that the Alabama regulation had been patterned and based upon the Georgia regulation. It is, therefore, noted that the Georgia regulation is substantially like the Alabama regulation except for one point. The Georgia regulation, which has been approved by the Department of Health, Education, and Welfare since 1952, does not include relationships outside of the home but Alabama's does. However, there are several states whose regulations have been approved which do classify out-of-home relationships (See Brief for Appellees, Appendix 4a, No. 6). In view of the fact that other regulations have been approved by the Department of Health, Education, and Welfare, particularly the Georgia one, it is not altogether clear why the Flemming Order has any place in this lawsuit. If the English language means anything, it would appear that the Alabama regulation is no more violative of the spirit and letter of the Flemming Order than any of the similar regulations which have been approved by the Department of Health, Education, and Welfare. Since as recently as a few weeks ago the Department of Health, Education, and Welfare through its representatives

affirmed in Federal District Court (*Roussaw, et al. v. Burson, etc., M.D. Ga.,* Macon Div., Civil Action No. 2323) in Georgia that the Georgia regulation had been approved by HEW, it would be helpful to have clarification as to why the Alabama regulation fails in any material respect to meet the same tests. Since the Alabama agency is asking this Court for judicial analysis of each portion of its regulation and since the lower Court considered this aspect as one of its major considerations, (A. 47-53) it is ***16** believed that this comparison would be constructive and helpful.

Brief for Appellees (pp. 17, et seq.) continues the confusion between agency policy and legislation proposed by others. This confusion existed in the Opinion of the Court below, as was pointed out in Appellants' Brief, pp. 44 et seq. It will be found that the Appendix pages (A. 321, 362) referred to in Brief for Appellees (pp. 17, 18) are references to legislation proposed by others; this was not a proposal the Alabama agency was attempting to have incorporated into its public assistance plan. Any Bill introduced in the Alabama Legislature which would affect the Department of Pensions and Security is, of course, scrutinized by the agency; if any possibility of conflict with Federal requirements appears to exist in the proposed legislation, it is submitted to the Department of Health, Education, and Welfare for a determination of that question. Such Bills continue to be confused by Appellees with policy material submitted by the Alabama agency to the Department of Health, Education, and Welfare as proposed additions to its public assistance plan material. See Brief for Appellants, pp. 44-54. Some confusion has arisen over different uses of the expression "suitable home"--Alabama's only suitable home policy (discussed A. 592) preceded its hazardous home policy (Brief for Appellants, 51-54).

Since this agency is asking for an interpretation of each part of the regulation we do not think that the Flemming Order should be considered as it relates to any parts of the Alabama regulation since the Georgia regulation has received approval by HEW except in any way the Alabama regulation may differ from the Georgia regulation and any other than has been approved by HEW, Brief for Appellees, Table 2, 4a, ***17** The Social Security Flemming Amendment merely restricted the operation of the Flemming Order.

One of the *amici* indicates that in an affluent society children have a "right" to welfare assistance.[4] Another *amici* writes as follows:

"*At issue is whether or not the children in question shall live or starve.* (One might note, as the chairman of a special Senate subcommittee did recently, that 'whether the term used is malnutrition, hunger, or starvation makes little differences. Eyewitnesses, including members of this subcommittee, have observed and reported conditions that this subcommittee has described as 'shocking' and as constituting a national emergency. These conditions are not new .... Nor are they peculiar to Mississippi. They exist in other states. They exist in other areas of the country.' Senator Clark, *Hearings on Hunger and Malnutrition in America,* Before the Subcommittee on Employment, Manpower and Poverty of the Committee on Labor and Public Welfare, U.S. Senate, 90th Cong., 1st Sess., July 11, 12, 1967.)..."[5]

The concepts expressed in these two points show a rather startling lack of recognition of the effect of the 1967 Amendments of the Social Security Act upon the states administering the Aid to Families with Dependent Children programs. One. answer to these briefs might be that the same Congress which had the benefit of the testimony of the hearings on hunger and malnutrition in America enacted the **AFDC** "freeze." That same Congress enacted the new work incentive provisions in **AFDC**. At no. time has the Social-Security Act, ***18** as currently amended, moved more in the direction of limiting the money payment in **AFDC** as a method of alleviating need. If the issue in this case is whether or not the children in question shall live or starve and the amount of the ADC grant remains the same or is reduced, it does not look as though the ADC grant will play a particularly large part in alleviating malnutrition, hunger, or starvation regardless of the decision of this Court. The **AFDC** grant has never insured any child of a balanced diet. The check goes to the mother. It has been expressed judicially that there is concern and alarm in some quarters that she might spend this check in a manner which would inure to the material benefit of the man-in-the-house rather than the children.[6] In Alabama the matter of actually feeding the children is considered to be more in the areas of the programs offered through the Department of Agriculture in its Food Stamp and Surplus Commodity Distribution programs.[7] The purpose in **AFDC** ***19** is to get a check and services to the **AFDC** family; and the purpose of the Department of Agriculture pursuant to its legislative authority in connection with Surplus Commodity and Food Stamp programs throughout the country is to provide food to needy families. Under the new Work Incentive Program the purpose of the Federal and State Labor Departments is to get the **AFDC** mother employed. In Brief for Appellants, pages 16-19, we attempt to show some of the other efforts under way to assist needy families with children pointing out that the **AFDC** grant as a way of alleviating need is on the decline. If the present **AFDC** "freeze" legislation remains in effect there will no doubt be considerable need to utilize other types of resources to help needy families.[8] The

statistical information received from the ***20** Bureau of Vital Statistics, Alabama Department of Health, does not reveal the actual facts of deaths caused by starvation--particularly as this relates to children--and some of the "noises" created about increased starvation appear considerably exaggerated.[9] The Alabama agency does take the position in its Brief, as well as to Congress,[10] that there are great unmet needs. We earnestly contend, however, that these problems should be addressed to the legislative branch of government.

We believe the discussions in all of the briefs which state that the substitute parent rules discourage marriage are specious. As long as the Social Security Act permits classifications based on two able-bodied persons in the home, it does not appear that a state rule including informal relationships discourages marriage. The opposite is true. The references to the California rule were not confused and the Brief for Appellants did not confuse the California approach to stepparents and the man-in-the-house. The public policy issue is the same. The discussion on pages 22-27, Brief for Appellants sets out in principle that a sensible way to eliminate the deterrent effects of the informal living arrangements over the marriage arrangements is by eliminating the financial premium on those informal relationships. Under the present situation a state either encourages or discourages the stability of those families who expect to receive a governmental income ***21** increment. We do not accept the reasoning that the possibility of the unemployed parent option can cure this. The State of Michigan, for example, has exercised the unemployed parent option and also has a substitute parent rule.

It is possible that some of the persons who receive welfare grants have believed they were receiving something in the nature of a Social Security grant. Many of the efforts in changing terminology in welfare practice no doubt confuse recipients about the nature of the grant. It may be that Appellee Smith in this case had actually believed that her children were entitled to receive a welfare grant almost as though it were an OASDI benefit. (A. 133) This is why the term "as a matter of right" in public assistance can be confusing and misleading and if a person believes as a matter of right she is entitled to receive a public assistance grant, as though it were Social Security benefits, the rules of eligibility would indeed appear to be harsh. Nevertheless, all of the efforts which are made to be sure the grant is made in a dignified way cannot change the responsibility of a caseworker to determine if the person is or is not eligible.

Opposing briefs appear to wish to solve the problems of the needy mothers by re-arranging the way HEW through the years has interpreted the Social Security Act. The Alabama agency urges that a reshifting of legal words in a court decision cannot result in larger money grants to more needy persons. At this moment no one knows if Congress will make substantial changes in the Social Security legislation. The responsibility for finding a creative method of solving such problems cannot be the problem of the judiciary. The time to make new bottles in matters of government largess is ***22** when the new wine of appropriations can be poured into the bottles.[11]

PURPOSES OF AFDC

The rather startling statement appearing in one of the *amici* briefs that "a state may not adopt a measure to limit the birthrate of poor people" should come as a surprise to Congress since in the 1967 Amendments to the Social Security Act Congress requires the states to do just that. (See Brief for Appellants, page 59, footnote 39). The Alabama agency does not believe that *Skinner v. Oklahoma,* 316 U.S. 535, intends anything more than the inability of a state to set up unfair classifications relating to sterilization. It seems strange that at this point in history any nation would by a rule of law be prevented from dealing with what many persons consider to be the number one problem facing humanity.[12]

***23** Section 201 of the 1967 Amendments amending §402 (P.L. 90-248) of the Social Security Act includes the following language:

" '... (14) provide for the development and application of a program for such family services, as defined in section 406(d), and child-welfare services, as defined in section 425, for each child and relative who receives aid to families with dependent children, and each appropriate individual (living in the same house as a relative and child receiving such aid whose needs are taken into account in making the determination under clause (7)), as may be necessary in the light of the particular home conditions and other needs of such child, relative, and individual, in order to assist such child, relative, and indivdual to attain or retain capability for self-support and care and in order to maintain and strengthen family life and to foster child development'; and

(C) adding after clause (14) the following new clauses: '(15) provide --

'(A) for the development of a program for each appropriate relative and dependent child receiving aid under the plan, and

each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), with the objective of --

'(i) assuring, to the maximum extent possible, that such relative, child, and individual will enter the labor force and accept employment so that they will become self-sufficient, and

'(ii) preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life,

***24** '(B) for the implementation of such programs by --

'(i) assuring that such relative, child, or individual who is referred to the Secretary of Labor pursuant to clause (19) is furnished child-care services and that in all appropriate cases family planning services are offered them, and

'(ii) in appropriate cases, providing aid to families with dependent children in the form of payments of the types described in section 406(b) (2), and

'(C) that the acceptance by such child, relative, or individual of family planning services provided under the plan shall be voluntary on the part of such child, relative, or individual and shall not be a prerequisite to eligibility for or the receipt of any other service or aid under the the plan, ..."

It is to be noticed that some of the language concerning purposes of **AFDC** which had been contained in Section 401 of the Social Security Act, pertaining to appropriations, has been restated in Section 402 which relates to state plans for aid and services to families with needy children. It is quite clear from the 1967 Amendments that the state plans must relate to maintaining and strengthening family life and helping parents or relatives attain or retain capability for self-support and care. It is quite clear that Congress may withhold all sorts of facilities for a better life. *American Communications Ass'n. v. Douds,* 339 U.S. 382, 417 (1950). Equal protection of the law when it relates to a State-wide grant could be described as the haunting problem in a bureaucracy, for everything must be measured by equal standards even when the task to be solved in problems relating to poverty is the problem of inequality itself in its most blatant and puzzling form. The problem of ***25** the administrator of the Alabama welfare agency, therefore, is how to effectively and creatively give genuine assistance and make a responsible effort to accomplish the goals of the Social Security Act and deal with the unique problems of inequality within the context of the equal protection concept.

Is it possible to arrive at a fair rule and apply equal protection of the law without analyzing the nature of the riddle of inequality as well as Governments' efforts to deal with this? These questions have been posed by Paul Tillich as follows:

"But the question of inequality has not yet been answered. For now we must ask -- why do some of us receive more than others in the very beginning, before using or wasting our talents is even possible? Why does the one servant receive five talents, and the second, two, and the third, one? Why is one person born to desperate poverty, and another to affluence? To reply that much will be demanded of those to whom much is given, and little of those to whom little is given, is not adequate. For it is just this original inequality, internal and external, that gives rise to the question."[13]

In analyzing efforts of Congress to deal with the beneficent interest of government to alleviate human suffering it is obvious that these efforts focus on particular problems and the efforts in and of themselves attempt to limit the scope to the particular problem to be dealt with. For example, in health problems it would not be unusual if Congress chose to make particular efforts in programs to help sufferers of cancer or heart trouble and not undertake other tormenting diseases. Later another health problem might be presented and Congress ***26** may or may not choose to enact legislation and appropriate funds to deal with the matter presented. The way in which inequalities receive governmental attention at the national level may pose problems of social inequality which is not a denial of equal protection of law. In other words, there are many needs and many social problems which may or may not be tackled by government--local, state, or federal. One of the problems a state government has when it undertakes to assist a group of persons in public assistance is that of limiting the assistance, particularly in instances when it has once been given. This will certainly be the problem in states which attempt to limit assstance and engage in a program which permits fewer recipients to receive larger grants in line with the 1967 Social Security Amendments.

In arriving at methods to limit assistance a welfare agency is not always claiming that the groups who are no longer receiving assistance no longer have needs. The Alabama agency does not desire to limit assistance in a manner which limits human dignity, but it is looking for a fair method of limiting the groups assisted. Paul Tillich writes further:

"Let us not confuse the riddle of inequality with the fact that each of us is a unique and incomparable self. Our being individual certainly belongs to our dignity as men. This being was given to us, and must be made use of and intensified, not drowned in the gray waters of conformity that threaten us so much today. One should defend every individuality and the uniqueness of every human self. But one should not be deluded into believing that this is a solution to the riddle of inequality."[14]

It must be maintained that the individual has a unique worth ***27** independent of his social usefulness. Nevertheless, the immediate abolition of inequality does not appear imminent.

"He who has witnessed hospitals for the ill and insane, prisons, sweat shops, battlefields, people starving, family tragedies, or moral aberrations should be cured of any confusion of the gift of individuality with the riddle of inequality. He should be cured of any sense of easy consolation."[15]

There is not only the problem of the donor arriving at the right gift, there is always the problem of the recipient's ability to receive it.

***28 APPELLEES HAVE NOT ESTABLISHED RACIAL DISCRIMINATION**

Appellees have altogether failed to establish that there has been racial discrimination in the formulation or application of the regulation. None of the appendix pages referred to by Appellees come close to establishing this. Such purposes as Appellees refer to as the "stated purposes" of the substitute parent regulation never existed and are not supported by the Appendix references cited in Brief for Appellees. Appellants submit that the evidence in this case shows that needy Negroes in Alabama are not receiving a wrongful distribution of government largess in ADC (Brief for Appellants, pp. 3538). We do not believe that Appellees have shown that they are being subjected to an unfair regulation which is being applied in a discriminatory fashion.

Appellees seek to dispute the obvious fact that Negro families receive the largest share of ADC benefits and that the number of these grants steadily increased during the time the regulation was in effect by quotations from texts which do not in any way negate the facts in this case. There is an attempt to equate statements of political personalities from other states who had opposed desegregation and an attempt to conclude that the fact that they opposed desegregation must be a basis for imputing to those leaders a desire to wreak wrath upon ADC mothers. Regardless of what any text writers have assumed in any other state, the facts in this case show that the percentage of the ADC caseload as it relates to members of the Negro race steadily increased during the time the regulation.was-in;effect and there is no evidence that the Alabama Negro population has increased proportionally. Appellees have cited no drastic employment crises or other ***29** reasons why the caseload would have risen to offset this obvious fact. There is no evidence that any white person has been treated differently.

NO AS DISTINGUISHED FROM YES AND NO

When viewed in the light of the resources[16] the state has to strengthen family life and rehabilitate **AFDC** families, it does not seem invidious to say no to persons living together out of wedlock if aid is also denied when there are two able-bodied married parents. In a state with limited resources it is most important that the public assistance recipients themselves feel a sense of fairness. A needy mother of any race whose aid is denied because she is married would be right in asking why her neighbor who lives with a man out of wedlock should get a welfare check.

The regulation does affect many members of the Negro race. To fail to say *no* to practices which do not help the low income

groups achieve economic wholeness does not honor the very low income groups nor the Negro families who have come from slavery to responsible citizenship and leadership. Abraham Lincoln observed that you cannot help men permanently by doing for them what they could and should do for themselves. At this moment in our history is a paternalistic differentiation required? Does a firm "No" dishonor any low income member of any race? The Social Security Act has as one of its objectives the goal ***30** of stopping dependency upon the government (Brief for Appellants, pp. 14-17, 60-61). That the Alabama regulation approaches the problem from the standpoint of the negative is not unlike the Bill of Rights, which to preserve the dignity of individual man, tells government what it cannot do. Eight of the Ten Commandments also thunder *no.*

In Brief for Appellees, page 44, footnote 31, Appellees refer to the report of the National Advisory Commission on Civil Disorders and quote a portion of the report. It is significant that the man-in-the-house rule (and *not* a substitute father rule as stated by Appellee P.72 Appellees Brief) referred to in the report includes a husband. It appears that the report is advocating that the two able-bodied parents rule be abolished whether the person living in the home is or is not married to the mother. It appears that the report is not referring to the practice of classifying families who live in informal arrangements as opposed to those where there is a marriage, but the report advocates a rule which allows family grants to needy families regardless of the presence of a man in the home, whether the man be a husband, a father or a person owing no legal duty of support. It appears that the classification change the Commission's report wishes to effect is a classification which involves any rule based on marriage or any other test of the "thereness" of a man-in-the-house. Such a change clearly addresses itself to the Legislative branch of government.[17]

The Alabama agency does want a rule which will best help the mother to say "no" to situations which do not help ***31** her or which result in more children who need care at government expense. The Alabama agency does not have the complete answer to that question, but early returns from the study[18] that is now being made of the caseload affected, which is available since the vacation of Justice Black's original stay Order, shows some very positive results of the regulation.[19]

Although, as pointed out by one of the *amici* briefs, the Alabama regulation does not require complete chastity as a condition precedent to public aid in Alabama, it does seem to require that the mother agree to some degree of continence. Is there anything really *bad* about continence? Does the literature of the New Morality or the Kinsey Reports actually prove that continence is not a better way of life? Unbridled sex in this country recently has been more stylish. But a number of practices in the American society have been "stylish" before this court reversed the trends. Can it really be seriously advanced that informal living arrangements and unruly promiscuity actually help the poor or the affluent? The lower Court said "The approval or disapproval of sexual promiscuity is not here involved," (A. 57) maybe welfare agencies will believe this, and maybe learned lawyers who know how to group and regroup legal theories will believe this -- maybe many very well meaning organizations who want very much to help the low income members of society have more than they now have will believe this -- but will the low income ***32** married family who does not receive a public assistance check and who sees the postman deliver one to the neighbor in similar economic circumstances who does live out of wedlock believe this?

If informal marriage arrangements -- and Appellants have asked this Court to rule on three types of these arrangements (Brief for Appellants, pp. 54-69) do not in the long run actually help the poor, why should there be a national policy favoring this? If Congress or State Legislatures wish to obviate the necessity for limiting caseloads and these classificatons, let them write the statutes and appropriate the money to do it. But as far as this case goes, Appellants submit that there is a lot to be said for continence whether it is being expressed by a low income person from New England who has his roots in stern puritanism, whether it is expressed by a low income member of the Negro race who has risen from the sexual abuses practiced during slavery and recognizes that "to be free at last" also means giving up the practices which may now be described as a form of self-imposed slavery, or whether it is expressed by the poor Biblebelt white Southerner who knows he has not solved all of his problems either, or the low income Westerner who recognizes somewhow that the Hollywood image of sex life is not really what everybody wants.

Without being moralistic, hypocritical or puritanical, there is much to be said for continence. It would be a most refreshing breeze to blow over this country. Imagine turning on television and listening to programs which not only extolled continence and chastity but which also pointed out the attractive aspects of purity. Appellants submit that the important reason that married low income families and the public wants the ADC mother to be able to say "no" is really because there is a ***33** great longing in everyone for all mothers, poor and affluent, to say "no." There is no government grant or service which would give more to an ADC child--or any other child--than a social order which, again, makes it wholesome and stylish for a mother to say *No* to adultery and fornication.

Nature places a great privilege and a great responsibility on women. Neither Appellees nor *amici* have shown exactly why saying a judicial *yes* to cohabitors out of wedlock is going to help a deserted mother, widow, or unwed poor mother or affluent mother get a husband -- particularly one who is apt to be helpful with the children. It may be an extremely old fashioned notion, but Appellants advance that the opposite is more nearly true (not that merely getting a husband would necessarily solve all of her problems).

In the long run continence and chastity make better homes. Continence and chastity make better mothers and fathers. This is true for affluent fathers and mothers and poor fathers and mothers. The Alabama agency does not think this Court would apply such a public policy matter differently to an affluent family in an analogous situation. The mere fact that the question coming to this Court affects poor persons right now does not mean that this Court would later set up another rule of law for the affluent.

There appears to be a belief held among many that sexual relations are necessary to health. This belief could have been the motive for Appellee Smith's statements that she intended to maintain a relationship with some man (A. 256, 267, 268). Appellants deny the validity of this belief and assert that chastity does accord with good health.

This Court in viewing questions on rights of privacy and self-incrimination can refuse to be led off on all sorts of ***34** tangents which could make it difficult for States to make such classifications, and by looking very closely at the confidentiality statutes can recognize that these statutes do protect the ADC mother. This Court can also recognize that this regulation relates to future conduct and like *Gardner* does *not* condemn past conduct. The regulation says to the mother "Go and 'cohabit out wedlock' no more" just like *Gardner* says to persons who supply services to the poor "Go and discriminate, because of race no more" if you want the public assistance payment.

If this Court was asked to make a decision affecting the right of a State to make a classification affecting children of affluent persons in an analogous situation, would there be any hesitation to move in the direction of rules which encouraged continence? Would this Court have any reluctance to say to the affluent that continence and chastity are the cement of civilization? Do you help the poor by setting up a different standard? There is nothing this Court, Congress, Legislators, public and private agencies, and churches can give needy children in today's unglued society that would be better than the hope that some day all children will have better parents.

Appellants submit that the ADC mother who brought this suit has been benefitted[20] by the regulation. Appellants submit that in Alabama the regulation comes closer to achieving the purposes of the Social Security Act - to "strengthen family life" than an opposite course of action in view of the fact that the regulation operates in a State where aid is denied "ablebodied" families when there is a marriage. Obviously the adultery and fornication statutes are not effective vehicles ***35** for meeting the Twentieth Century's public interest in strengthening family life. Recognizing that a welfare agency is not apt to achieve total continence on the part of the poor (or anyone else) and with full knowledge that the agency would not be in this Court if it knew all of the answers to informal practices and with full recognition that getting checks and services to needy families is the primary responsibility in the ADC program, Appellants do urge this Court to grant whatever relief is meet and proper in the premises.

In its present role in attempting to achieve sociological purity of the suppliers of services to the poor pursuant to *Gardner*, the Circuit Court of Appeals did point out that all the agency had to do was *try.* The Alabama agency argued that somehow it seemed wrong to withhold a public assistance vendor payment to a nursing home or child caring institution who was giving a service to the needy as a method of achieving sociological purity. The Agency lost that case.

In the event this Court wishes to honor the concern for chastity and continence on the part of the needy families who do not get welfare checks, as well as the desire of the agency to give higher payments to those who remain on the rolls (the ADC payment has now risen from 38% to 50% of the budgetary deficit, with an average payment of $64.54 per family in February, 1968, as distinguished from $48.15 in June of 1964), the Alabama agency, a servant of the public whose job is to offer some service to the poor, stands ready in this matter to *try.*

CONCLUSION

No one knows what the future holds with respect to the shape of new solutions to the problems of the indigent which ***36** pose the problem of inequality and man's efforts to overcome it, but there are certain unique features of man and functions of law which appear in every age and every society to consider.[21]

The Alabama agency submits, as it pointed out in its Brief, that the presumption is that the ADC mother can make good use of the assistance which the State gives her, but the agency also is confronted with the problem of informal arrangements and the public's interest in not favoring these arrangements over legally contracted marriage. The Alabama agency does not know if the future planning for the needs of the indigent will obviate the necessity for judicial determination of the right of the State agency to make fair classifications of these informal practices, but it is within the legislative ***37** province to do so.[22] To deny ADC benefits when the mother chooses to keep her substitute spouse rather than the ADC ***38** grant does not deprive her or her children of a constitutional guaranty or effect an invidious discrimination when a married mother in similar circumstances is also denied aid. The problems posed by informal marriage arrangements cannot be solved by favoring them over marriage in **AFDC** programs or other programs.

For the reasons stated in Appellants' Brief and Reply Brief, it is respectfully submitted that the Order and Decree of the District Court for the Middle District of Alabama, Northern Division, in this case should be reversed.

Appendix not available.

Footnotes

1 In an age in which many persons apparently seek meaning out of life by and through physical sensations is it unwise to consider that when these physical sensations occur between men and women, conception is also apt to occur. Birth control as a measure of limiting the number of births of persons born out of wedlock may be helpful in reducing the number of births, but it cannot be forced upon persons. Irresponsible procreation is considered by some to be the number one problem of the century.

2 It is to be noted that basically family law is a matter of state definition-unless and until HEW defines what a substitute parent is this definition necessarily falls to the state legislature or state welfare agency.

3 We consider that the primary significance of Gardner v. Alabama, 385 F. 2d 804 (5th Cir. 1967), cert. den. 36 USLW 3287 (Jan. 16, 1968) is that it establishes that public assistance monies may be withheld in order to accomplish collateral purposes when such purposes are necessary to accomplish national policy. In that case it was held that the Federal agency could require a state agency to execute a statement of compliance and assure the Federal agency that it would not utilize services of private vendors who will not offer services to public assistance recipients in compliance with Civil Rights regulations promulgated by HEW after passage of Title VI of the Civil Rights Act of 1964. The Alabama agency believes, therefore, that there is precedent for the concept that a public assistance grant may be withheld in the exercise of a far-reaching public policy collateral purpose. Another similarity to the position of Alabama in this case is that just as the Gardner case affirms the position that it is the future willingness and not the past practices of vendors to be sociologically in a position to receive payments. The Alabama regulation is similar in this respect also (Appellants' Brief, pp. 49-50).

4 Brief of Child Welfare League, et al page 6.

5 Brief of the NAACP Legal Defense and Educational Fund, Inc., et al., page 39.

6 A portion of the court reporter's transcript of the case is quoted in the Congressional Record, Senate, October 21, 1966, at page 27324; opinion of the Court appearing as Smith et al., v. Board of Commissioners of the District of Columbia, 259 F. Supp. 423, particularly the statement that "... we have seen a great deal of discussion on the man of the house rule. Of course that rule is

intended to prevent diversion of funds intended for children to the support of an unemployed idle paramour ....”

7 It is difficult to discover the source of the publicity circulated through Washington, D. C. during the course of the recent litigation surrounding the Department of Agriculture in a suit relating to distribution of commodities and food stamps to needy families in Alabama. Upon hearing that hundreds of children were dying of starvation in Alabama, counsel secured information from the Bureau of Vital Statistics which indicated that no statistics had been compiled for the year 1967 on deaths caused by malnutrition or starvation and that the total deaths of children in Alabama in 1966 which could be reasonably attributed to malnutrition were 8 and that there were no indications that the 1967 figures would be proportionately in excess, that these figures were not out of line with other years, and that there were very few children and in most instances the lack of food was not the actual cause of death.

8 The Alabama agency is delighted to learn of the interest of the National Council of Churches in the plight of needy children. Without tremendous appropriations to make adequate provision for the increasing number of children born to poor families, the resources of all private agencies will need to be utilized to the fullest. Accordingly, in a civilized society, particularly an affluent one, it would be hoped that the National Council of Churches and individual churches, particularly the affluent ones, will make appropriate responses. Some of the ways in which churches and church members may be helpful to dependent children would be to: provide funds and facilities for day care including after-school care; recruit family day care homes and boarding foster homes; pay for medical care and psychological services for children; establish babysitting services; develop recreational facilities and provide leaders and chaperonage at recreational facilities; develop classes for teaching, sewing, personal care, hobbies, etc.; pay dues to YMCA and YWCO clubs, scouts, etc.; provide summer campships; tutor children, provide funds for music lessons, etc.; distribute used magazines; collect, renovate, and staff clothing closets; become informed about existing programs of agencies; interpret needs; develop Family Life Conferences; support and provide funds for improvement and enrichment of church child-caring institutions programs; assist in locating part-time and summer jobs for children and youth; provide funds for scholarships for nursing courses, business courses, courses in cosmetology, etc.; and provide funds for maternity care, including layettes, etc. (cf. Are You Running With Me Jesus, Malcolm Boyd, Sixth Avon Library Edition. Sept. 1967, pages 38. paragraph 3, 53, paragraph 4, 104, last paragraph.)

9 See Exhibit A hereto.

10 The branch of government which is able to remedy the problems set out in appellees’ and the amici briefs, we believe, should be the legislative branch of government, for without proper fiscal responsibility there can be no improvements. See Exhibit B hereto.

11 In the light of the sweeping changes recommended by the President’s Commission on Civil Disorders and with full recognition that other commissions and groups are studying other new proposals (e.g., the President’s Commission on Income Maintenance Programs), it seems particularly appropriate that the problems to be solved here are those of a related nature dealing with the unique aspects of this case and the particular Alabama regulation in the light of the Alabama welfare program and the Social Security Act within the context of equal protection concepts. “Of course, present problems will be clarified by reference to future ends; but ends, although they have a future bearing, must obtain their significance in present consequences, otherwise those ends lose their significance.... If the decision of a particular case takes the form of the enunciation of a rule with emphasis on its future Incidence, the tendency will be to connect the past by smooth continuities with the future, and the consequence will be an overlooking of the distinctive novelties of the present ....” Law and the Modern Mind, Jerome Frank, Anchor Books, Doubleday & Company, Inc., Garden City, New York, page 166.

12 See Chapter 4, pages 159-210 entitled “The Economic Precipice” in The Anguish of India, Ronald Segal, A Signet Book, 1965.

13 The Eternal Now, Paul Tillich, Charles Scribners’ Sons, New York, 1963, pp. 40-41.

14 Paul Tillich, ibid., pp. 41-42.

15 Paul Tillich, ibid., p. 42. There are those who do visualize utopia.

"I would nevertheless insist on the relevance of the utopian, decentralized, and democratic state where, within the bounds of ever more effective overall policies laid down for the whole national community, the citizens themselves carry more and more of the responsibility for organizing their work and life by means of local and sectional cooperation and bargaining with only the necessary minimum of direct state interference. This utopia is, in my belief, a real goal. It is inherent in those ideals of liberty, equality, and brotherhood that are the ultimate driving forces behind the development of the modern democratic Welfare State." Gunnar Myrdal, Beyond the Welfare State, Yale University Press, Fifth Printing (1966), p. 96.

Another point of view, however, with respect to utopia has been expressed as follows:

"We may notice, incidentally, about any such ideals from Plato's Republic onwards, that no one really wants to live in the ideal state as depicted by anyone else. Moreover, there is the desperate difficulty of getting there. When I read any description of an Ideal State and think how we are to begin transforming our own society into that, I am reminded of the Englishman in Ireland who asked the way to Roscommon. 'Is it Roscommon you want to go to?' asked the Irishman. 'Yes,' said the Englishman; 'that's why I asked the way.' 'Well,' said the. Irishman, 'if I wanted to go to Roscommon, I wouldn't be starting from here.' " Christianity and Social Order, William Temple, SCM Press Ltd, pp. 51-52.

16 Some Schools of Social Work have taught through the years that it is difficult to establish a casework relationship which would be strong enough to break or substitute for the sex relationship. In the substitute parent regulation, the Alabama agency is clearly acknowledging the proof of this principle. During the time. pay ments were made to families who live in these informal arrangements mothers did not appear to have an incentive to say no.

17 It is also to be noticed that several of the places referred to in the Commission's report did not have a substitute parent or a substitute spouse rule.

18 See statistics and Exhibit E in Brief for Appellants, pp. 85-91.

19 The lower Court did not have the benefit of this. In answer to one of the amid questions about what happened to those who did not marry in Dallas County, the answer is set out on p. 91 in Brief for Appellants. See also memorandum p. 87. c.f. "A Continuing Dialogue on Marriage: Why Just Living Together Won't Work," Redbook, April 1968, pp. 44 et seq. and in the same issue "When Hippies Become Parents," Dixie Dean Trainer, pp. 66 et seq.

20 In a press interview it has been reported that the relationship has been broken now and that Appellee has secured better employment. The Birmingham News, February 4, 1968, p. B-4.

21 St. Thomas Aquinas in his Treatise on Law explores in his chapter "Of Human Law" the following:

"... As stated above ... man has a natural aptitude for virtue; but the perfection of virtue must be acquired by man by means of some kind of training. Thus we observe that man is helped by industry in his necessities, for instance, in food and clothing. Certain beginnings of these he has from nature, viz., his reason and his hands; but he has not the full compliment, as other animals have, to whom nature has given sufficiency of clothing and food. Now it is difficult to see how man could suffice for himself in the matter of this training: since the perfection of virtue consists chiefly in withdrawing man from undue pleasures, to which above all man is

inclined, and especially the young, who are more capable of being trained. Consequently a man needs to receive this training from another, whereby to arrive at the perfection of virtue.... as man is the most noble of animals. if he be perfect in virtue, so is he the lowest of all, if he be severed from law and righteousness; ...” Thomas Aquinas, Treatise on Law, (Summa Theologica, Questions 90-97), A Gateway Edition, Chicago, Henry Regnery Company, pp. 74-76.

22 In The Christian Science Monitor of April 3, 1968, “New day on Poverty Row?”, William H. Stringer writes in part as follows:

“ ‘Nobody’s gonna tell me how many kids I can have,’ exclaimed the militant black matron on the television documentary. All right ma’am, but who’s going to pay for their upbringing, and provide their motivation? Maybe you were thinking of Uncle Samuel as the good provider?

“Concepts of welfare are undergoing plenty of re-thinking in the United States. What to do about the eight to 30 million Americans below the poverty line (depending on where you draw that line)? The issue is identified by the new Secretary of Health, Education, and Welfare, Wilbur Cohen, as ‘the problem of people with low-education and low work skills and lots of children.’ In the cities these are mostly Negroes; in the Appalachians, they are whites.

Shall there be a multiplicity of service programs-Head Start, community aid, family planning, vocational training for mothers, and many more? Or shall there be mainly a family allowance system, as in Canada; plus a federal guarantee of full employment, as proposed by Daniel Moynihan, director of the Harvard-MIT Joint Center for Urban Studies? Secretary Cohen says the United States is going to spend $10 billion a year on welfare anyway. How build more efficiency, self-reliance, into the present sprawl?

“The search must be for a program that breaks the cycle which repeats poverty and lack of motivation, generation to generation. Will a family allowance plus guaranteed full employment do the trick? Or should we try this newfangled ‘negative income tax,’ which means that if your income is above a certain figure you pay the government, but if it’s below, the government pays you. A presidential commission is studying these controversial proposals.

“America may be a wealthy society, but Secretary Cohen reminds that the Protestant ethic strongly influences people to be against giving money to somebody for doing nothing. Why should I pay some 35-year-old guy with a wife and kids just to sit on his front porch?’ Just lately Britain, which has stood for cradle-to-grave welfare available to everybody, has decided that some assistance must be selective-available only to the really needy,’ if the country is not to go broke.

“The essential goal, really, is to provide children with good parents! ...”

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