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legislation is under severe constitutional doubt.

The Court applied the Equal Protection Clause in *Levy v. Louisiana*, 391 U.S. 68 (1968), allowing illegitimate children to recover for their mother's wrongful death and also in *Glona v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968), allowing the mother to recover for the wrongful death of her nonmarital child. Changing course, however, the Court, in *Labine v. Vincent*, 401 U.S. 532 (1971) refused to permit a nonmarital child to inherit from her intestate father under Louisiana law, even though her father had acknowledged her during his lifetime.

Back on track, the Court held in *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972), that workman's compensation benefits related to the death of their father *are* due dependent, nonmarital children even if unacknowledged. Continuing in a forward direction, in *Gomez v. Perez*, 409 U.S. 535 (1973), the Court granted the right to paternal support to the nonmarital child, holding:

> Once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.

Shortly thereafter, in *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), a state welfare statute discriminating against nonmarital children was struck down. Consistent with that holding, in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the Court held unconstitutional a provision of the Social Security Act relating to disability benefits because it discriminated between two supposedly distinguishable classes of nonmarital children.

The Court slid backwards, however, in *Mathews v. Lucas*, 427 U.S. 495 (1976), when it upheld a provision of the Social Security Act that presumed dependency with respect to marital children and as various categories of nonmarital children with ascertained paternity but left the task of proving actual dependency to nonmarital children who did not fall into the defined categories. The dissenters convincingly found *Mathews* too difficult to distinguish from *Jimenez* to warrant the dissimilar holding.

Switching course again, in *Trimble v. Gordon*, 430 U.S. 762 (1977), the Court allowed the nonmarital child intestate succession rights involving its father, thus more or less overruling *Labine v. Vincent*, although not quite admitting that much. Seemingly for balance, *Fiallo v. Bell*, 430 U.S. 787 (1977), (decided simultaneously with *Trimble*), held that U.S. immigration laws *may* express a preference for foreign-born nonmarital children of *female* U.S. citizens over foreign-born nonmarital children of *male* citizens.

In *Lalli v. Lalli*, 439 U.S. 259 (1978), the Court upheld a New York statute that conditioned nonmarital children's rights to intestate succession upon having paternity judicially established during the father's lifetime, thus limiting the *Trimble* decision significantly and all but reinstating most of *Labine*. Remaining on a somewhat negative track, *Califano v. Boles*, 443 U.S. 282 (1979), upheld the provisions of the Social Security Act that limited "mother's insurance benefits" to divorced wives or widows of deceased wage earners and denied them to unmarried mothers of nonmarital children of deceased wage earners.

THE FATHER'S RELATIONSHIP

Another line of cases dealt with the relationship between the father and his nonmarital child. In *Stanley v. Illinois*, 405 U.S. 645 (1972), *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051 (1972), and *Vanderlaan v. Vanderlaan*, 405 U.S. 1051 (1972), the U.S. Supreme Court essentially held that a father who had lived with the mother and his nonmarital children in a *de facto* family unit is entitled to receive notice and have a hearing in proceedings involving the custody of his children, that he may possibly challenge a completed adoption, and that he may have visitation rights with his nonmarital children.

After six years of confusion about what these cases meant in terms of adoption practices, *Quilloin v. Walcott*, 434 U.S. 246 (1978), *denied* an unmarried father a "veto power" over the adoption of his child. *Quilloin*, however, involved sufficiently unusual facts that it did not do much to clarify the precarious situation in which the adoption industry had found itself after *Stanley*. One important distinction was that, in *Quilloin*, the children had always been in the mother's custody and never had been a member of the father's *de facto* family. Other differences were that the father had not regularly supported the child, that he had had the opportunity to "legitimate" the child and had not done so, and that it was the mother's current husband who sought to adopt the child.

A year later, the Court decided *Caban v. Mohammed*, 441 U.S. 380 (1979), which involved a natural father who had lived with the mother for five years and, for the next two years, had contributed to the children's support and had seen them frequently. Emphasizing the natural father's *de facto* relationship with his children, the Court permitted him to block the attempted adoption by the mother's new husband. Finally, in *Parham v. Hughes*, 441 U.S. 347 (1979), the Court—seemingly in direct conflict with the *Glona* case—decided that a father may *not* sue for the wrongful death of his nonmarital child whom he had supported and with whom he had maintained continuous contact by visitation.

Two analytical points are of major interest. First, the issue of whether or not illegitimacy is a status that invokes "strict scrutiny" under the Equal Protection Clause was never clearly settled. Justice Rehnquist, criticizing the majority in *Trimble*, concluded that illegitimacy "was not sufficient to require 'our most exacting scrutiny' " and pointed out that "Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' . . . that scrutiny 'is not a toothless one.' "

Elsewhere, especially in *Mathews*, the Court had

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for children were rarely seen in juvenile courts. But that case which held that court-appointed counsel for children in delinquency proceedings is essential as a matter of constitutional law, failed to state whether legal representation would also be required for children in abuse and neglect cases. As a result, many children who are the subjects of maltreatment or related termination of parental rights proceedings do not have a lawyer as a matter of right; it is within the discretion of the trial judge to appoint counsel.

Although a growing number of states are, through statutes, court rules, or judicial decisions, assuring that abused and neglected children have independent representation, a court-appointed advocate for the child often faces both resentment and hostility from others involved in the case as well as confusion over his or her proper role. But no one would question a criminal defendant's need for a lawyer or that of a corporation being sued. Yet many people believe that the child protection agency and the judge are themselves fully capable of protecting the interests of the parties in child maltreatment cases.

Whether or not the child's court-appointed advocate is a lawyer, he or she needs to clearly understand the parameters of his or her responsibilities. But only a few state laws or court rules, as well as the ABA Juvenile Justice Standards, provide any guidance. Questions continue to be raised throughout the country concerning the proper function of a child's lawyer, guardian *ad litem*, or court-appointed special advocate.

We need to create a new field of specialization for those concerned with representation of children, in order to provide a focus for the resolution of such difficult questions. We also need an acceptable code of ethics or professional conduct for those who would undertake the task of advocating for children in court. Don Bross, founder and executive director of the National Association of Counsel for Children, has suggested the creation of a legal specialization called "pediatric law," in which lawyers would be well versed in all children-related areas of the law. This organization has become a leading force in the improvement of legal skills relating to child protection.

ROOM FOR REFORM

The ABA has been instrumental in creating, and pointing appropriate criticism at, the system of state intervention and has proposed elaborate remedies for many of the system's ills. The Association also has been at the forefront of legal efforts to assure the protection of children from serious abuse and neglect.

But the profession also should become more involved in community-based interdisciplinary councils and other local activities related to child abuse and neglect. Special bar committees can be created to formally examine state intervention issues, explore law reform options, and develop legislative proposals. We also need a concerted approach by the bar towards improving the legal representation of parties in child maltreatment cases. Finally, the bar can monitor compliance with federal child welfare laws, such as the Adoption Assistance of Child Welfare Act (P.L. 96-272), to assure full implementation at the state and local levels.

The protection of children through the legal system, however, only can be achieved if we aggressively pursue our responsibilities to children, parents, and child protective agencies alike. ☐

Forcing Fathers

(Continued from page 18)

created the impression that illegitimacy classifications impinging on *familial relationships*, specifically, the custody/adoption/visitation issue, may merit stricter scrutiny than would be given other classifications based on illegitimacy. In *Boles*, four dissenting justices spoke in terms of the now familiar test of "a close and substantial relationship to a permissible government interest" being required to uphold a classification based on illegitimacy. *Caveat emptor!*

SEX DISCRIMINATION

The second point is that the Court seems to have accidentally veered off the "illegitimacy discrimination issue" and landed in the maze of sex discrimination. In *Caban*, for instance, instead of continuing to decide illegitimacy cases on the basis of comparing the relevance of legal distinctions between *married and unmarried fathers* in their relationship to their children, or between *married and unmarital children* in their relationship with their fathers, the Court (foregoing this analysis in a little footnote) compared *mothers and fathers*. Suddenly, the issue was seen as the rationality of legally distinguishing between male and female parents!

Besides unnecessarily drawing the many uncertainties the Supreme Court has introduced into the subject of sex discrimination into the context of illegitimacy, this new approach to illegitimacy is logically faulty. It pursues the more remote rather than the nearer comparison.

The child is not and should not be concerned whether the father, for rational legislative purposes, is the equal of the mother. The child is concerned whether his or her legal position rationally differs from that of a legitimate (half-)sibling. Similarly, the unmarried father should be compared with the married father, not with the unmarried mother.

Foreshadowing this lapse, Justice Marshall, in *Quilloin*, had alluded to the potential of the sex-discrimination approach: "In the last paragraph of his brief, appellant raises the claim that the statutes make gender-based distinctions that violate the Equal Protection Clause. Since this claim was not presented in appellant's Jurisdictional Statement, we do not consider it."

In *Parham*, Justice Powell's separate concurrence reemphasized the gender-based approach he had pioneered in *Caban*. Worse, even the four dissenters (Justices White, Brennan, Marshall and Blackmun)

chose to view this case primarily in terms of sex discrimination.

If "sex discrimination" is to be the Court's new approach to illegitimacy, it is fraught with danger for the nonmarital child. Mothers, especially unmarried mothers, *are* different from fathers. If a distinction between mothers and fathers were the proper touchstone of permissible discrimination in this field, a variety of distinctions might become justifiable. Indeed, several early decisions that did not like the message of *Levy v. Louisiana* distinguished *Levy* on precisely that ground and, for a time and in some places, halted the nonmarital child's progress toward legal equality.

In early 1980, Justice Marshall, seemingly despairing of the mess the Court has made of constitutional argument in these cases, strained to reach a decision on *statutory grounds* favoring a nonmarital child's recovery under the Civil Service Retirement Act, protesting against excessive use of the Equal Protection Clause.

Thus, in a relatively short span, the U.S. Supreme Court has expended an enormous amount of time and effort on this narrow topic. The Court's engagement is remarkable because it runs counter to the long-standing "hands-off" tradition regarding family law invoked by Justices Black and Harlan in early illegitimacy cases and more recently by Justice Rehnquist in a variety of contexts.

It is all the more remarkable in view of the Court's heavy schedule. Was it really necessary to take on many cases to decide the simple proposition that there shall be "hardly any" legal discrimination against the child of unmarried parents?

By now, the confusion stirred up by the Supreme Court's vacillation literally has cost a fortune in wasteful litigation at all levels. Chief Justice Burger's frequent complaints regarding the "inefficiency" of the bar might well be turned around. One well-reasoned case at the outset and *per curiam* decisions in several of the later cases could have avoided the confusion we now face. Nevertheless (and however tortuous the road behind or ahead), we may fairly conclude from these decisions that state and federal law may not significantly discriminate between children on the basis of their parents' marital status in any significant substantive area.

ESTABLISHING PATERNITY

It may be said that the typical state's paternity statute is not yet history, but should no longer be law. Unless state law makes fair provision for the child to find his or her father, the Supreme Court's talk about equality will have been an academic exercise. Accordingly, the question is what is the permissible range of state regulation of procedures to ascertain paternity. A second question is whether the state should initiate an action to establish paternity if the mother fails to do so.

So far, cases have not significantly come to grips with these questions. Similarly, not enough legislatures have reviewed their paternity statutes to see what amendments are needed to conform to the new situation.

In *S. v. D.*, 410 U.S. 614, (1973), the Supreme Court denied itself an opportunity to speak out on this subject. It refused to compel enforcement of a criminal nonsupport statute against the father of a nonmarital child, although the act in question was routinely enforced against fathers of legitimate children. While the case was decided on the narrow issue of the mother's lack of standing (which was technically correct), the Court might have provided guidance to the judiciary and legislatures regarding the right to bring paternity actions.

In several other cases that were directly or remotely related to the issue of ascertainment of paternity such as *Trimble*, *Lalli*, *Quilloin*, *Parham* and *Caban*, the Supreme Court accepted existing state processes without question. In *Lalli*, for instance, no inquiry was directed at the possible unconstitutionality of New York's paternity statute. In *Quilloin* and *Parham*, the Court did not question the procedure by which the unmarried father may legitimate his child in Georgia, nor did it recognize the fact that most states do *not* give unmarried fathers the opportunity to legitimate their children short of marrying the mother. Accordingly, the question remains open whether state laws dealing with adoption or wrongful death would be upheld or struck down in the absence of a procedure for legitimation.

In April 1982, the Supreme Court decided *Mills v. Habluetzel*, 50 U.S.L.W. 4372, (1982), which struck down Texas' one-year statute of limitations on paternity actions as unduly short. This case might have settled the important issue of whether the right to bring the paternity action "belongs" to the mother or to the child, the former being the "owner" under traditional statutes. Regrettably, the Court did not seem to recognize that issue. At one point Justice Rehnquist writes: "[T]he period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity *for those with an interest in such children to assert claims on their behalf*" (emphasis added). Yet shortly thereafter, Rehnquist continues as follows: ". . . by granting *illegitimate children* only one year to establish paternity, Texas has failed to provide *them* with an adequate opportunity to obtain support" (emphasis added).

Mills holds that "the support opportunity provided by the State to illegitimate children must be more than illusory" and that it "would hardly satisfy the demands of equal protection . . . to remove an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." On the other hand, providing "illegitimate children with a bona fide opportunity to obtain paternal support does not mean . . . that [Texas] must adopt procedures . . . that are coterminous with those accorded legitimate children" and the State may "impose greater restrictions on the former than it imposes on the latter."

A full assessment of this case cannot be provided in this short space. The case is significant in that it was decided unanimously, a rare event in this turbulent area, although there were two separate concurrences.

Mills makes absolutely clear that a one-year statute of limitations on paternity actions is too short. It leaves considerable doubt regarding the appropriate minimum

period of limitations, with the five concurring justices agreeing that Texas' current four-year statute may not be long enough either, but not quite saying so.

Most important, one may hope, is the fact that all five concurring justices are expressly impressed with the idea that statutes of limitations generally are tolled during a person's minority, the paternity action being the prominent exception in Texas. Justice O'Connor ends her concurring opinion with the words "the risk that the child will find himself without financial support from his natural father seems as likely throughout his minority as during the first year of his life." On the basis of that line of analysis, the Uniform Parentage Act long ago "decided" that, on *constitutional* grounds, a nonmarital child on whose behalf no action had ever been brought should not be barred until after he or she has reached the age of majority. (*See* H. Krause, *Illegitimacy: Law and Social Policy*, 151, (1971), *also see* reporter's comments to § 7 of the Act.)

Given the substantive legal equality mandated by the U.S. Supreme Court—with or without adequate direction on how to achieve it—fundamental reform of the paternity action has become the most pressing task in the area of illegitimacy. Reform is needed as much to facilitate finding a responsible father for the nonmarital child as it is needed to protect the possibly great number of men who are falsely accused of paternity in vigorous pursuit of the federal child support enforcement program.

THE STATES' RESPONSE

Many state legislatures have not yet enacted new laws to conform with the constitutional mandate of equality. This failing may be forgiveable in view of the confusing Supreme Court signals. As a consequence, however, the gulf between the abstract constitutional principle and the practical realization of legal equality between marital and nonmarital children continues to loom wide. All gains in substantive rights—including support—will mean little or nothing if our procedures for ascertaining paternity are not improved. Because of antiquated paternity and child support enforcement statutes, only a fraction of nonmarital children now achieve legal status vis-à-vis their fathers and actually collect the support they are owed.

Reform must provide a new procedural framework for the paternity action that improves the quality and volume of adjudication. Streamlined, more efficient and speedier proceedings must nevertheless provide fuller safeguards for falsely accused men. Within that new framework and to achieve both objectives, medical evidence must play a central role.

The Uniform Parentage Act was developed specifically to fill the legislative void created by the Supreme Court's venture into this arena and to provide the procedure by which to secure the nonmarital child's substantive rights. The act establishes a framework in which traditional paternity practice is superseded by a more efficient and constitutionally sound process. The central goal is fairness to the child as well as to the accused man.

The Uniform Parentage Act abandons the concept of illegitimacy. All children are equal in terms of their relationship with their parents. An elaborate network of presumptions identifies circumstances in which it is more likely than not that a particular man is the child's father, thus reducing the need for litigation. Specifically defined interested parties—in some circumstances limited to the mother, her husband, and the child—may bring a formal action to affirm or disaffirm any of the formal presumptions.

A proceeding to establish paternity is available when no circumstances exist that presumptively identify the probable father. The first stage of that proceeding is an informal pretrial hearing before a judge or referee who is not bound by formal rules of evidence and who does not render a binding judgment. Instead, on the basis of all the evidence, whenever possible including blood tests, the judge or referee makes a *recommendation* to the parties concerning settlement. The recommended settlement may involve dismissal of the action, the voluntary acknowledgement of the child by the putative father, or may be a compromise which does not establish paternity but fixes a specific economic obligation.

If all parties accept the recommendation made to them, judgment is entered accordingly. If they do not, the matter is set for trial. It is expected that wide-scale use of sophisticated blood typing evidence in these administrative (pretrial) proceedings will greatly stimulate acceptance of recommended settlements so that relatively few cases will need to be tried in court.

By 1980, the Uniform Parentage Act had been enacted in nine states and had left its mark on reform legislation in others. Important courts have prodded their legislatures to adopt the act. (*E.g., Hepfel v. Bashaw*, 279 N.W. 2d 342, 346 (1979)).

The road has not been smooth, however. In several states successful opposition has been generated by the act's concern for the *falsely* accused man. It is clear, however, that the protections in question are a necessary corollary of ascertaining paternity for the benefit of the child. Quite aside from the man, not even the child is served fairly if a biological stranger is tagged as the father.

A stronger stimulus to the implementation of necessary reforms should have come from the federal child support enforcement legislation enacted in 1975. Even before that legislation was enacted, the Senate Finance Committee repeatedly recommended that "in evaluating state child support programs, the Secretary [of HEW] should take into account the Uniform Parentage Act." HEW's (now HHS's) Office of Child Support Enforcement, however, has not yet used its influence to move the act toward wider adoption.

BLOOD TESTS IN THE COURTS

State legislatures and state courts have barely begun to adapt the decision-making processes in disputed paternity cases to rapid advances in blood typing science and technology. Much of this lag is due to an information and communication gap between the legal and medical professions,

a gap which recent efforts on the part of the ABA's Family Law Section working with the AMA have helped to bridge. (*See* Miale, Jennings, Rettberg, Sell, Krause, "Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage," Fall 1976 *Family Law Quarterly*, Vol. 10, pp. 247-85.)

The scientific fact is that blood typing in its various forms now is capable of establishing nonpaternity in the vast majority of cases (95 to 99 percent) in which the man named by the mother actually is not the father. Beyond that, significant statistical evidence may be derived in many circumstances from blood tests and may indicate persuasive probabilities (or improbabilities) of paternity. With further scientific advances, the time may come (but has not yet arrived) when the father of the child can be identified positively through medical expertise.

To understand this better, one must remember the infamous case involving Charlie Chaplin. There a jury chose to disregard blood test results which excluded Mr. Chaplin; instead, the jurors held him to be the father. And one should know that as recently as 1974 the North Carolina Supreme Court went the same route. (The North Carolina statute was amended in 1975 to provide that blood tests excluding paternity be given conclusive effect).

Nevertheless, the smug confidence with which commentators excoriate cases which give less than total credence to blood typing evidence is not always justified. There has been poor work in this area, and the chance of error (indeed, the likelihood of error) is considerable if blood grouping tests are conducted inexpertly.

Specific case studies make a convincing case in favor of stringent quality control of blood grouping tests. Lawyers and courts have not been adequately warned about insisting on full assurance that blood typing tests have been conducted in accordance with the highest standards of care and expertise. More effort is needed from both the medical and legal professions to develop a responsible, knowledgeable, reliable, and cost-effective approach to blood typing in disputed paternity cases.

The possibility of error could be all but eliminated if appropriate medical procedures were agreed on and then required to be followed. Detailed recommendations concerning this are the subject of the joint guidelines prepared by the Committee of the American Medical Association and the American Bar Association referred to above. The guidelines are being welcomed warmly in the courts (*e.g. Little v. Streater*, 452 U.S. 1, (1981); *Mills v. Habluetzel*, 102 S.Ct. 1549, 1554, 1557 (1982)).

This brief discussion highlights the interplay of law and science in terms of the fundamental substantive question of what weight a court will give to blood test evidence. Not to be forgotten are the equally important *technical* aspects of the law of evidence regarding the admissibility of blood tests in court. Space limitations prevent these from being considered here.

The crucial importance of blood testing to the fair and efficient settlement of disputed paternity proceedings is increasingly documented by important court decisions. Two particularly significant decisions may be singled out.

In *State v. Meacham*, 612 P.2d 795, (1980), the Supreme Court of Washington held that court orders under the Uniform Parentage Act requiring putative fathers to submit to the withdrawal of blood for blood typing tests cannot be challenged under the constitutional right to privacy. It also held that taking blood is not an unconstitutional or otherwise illegal search and seizure and that the interests of the minor children and the state outweigh the men's religious objections asserted under the First Amendment.

In *Little v. Streater*, 452 U.S. 1 (1981), the U.S. Supreme Court held that Connecticut denied due process to an indigent man accused in a paternity proceeding when the state refused to pay for blood grouping tests. The Court found that the failure to provide blood tests is tantamount to the lack of "a meaningful opportunity to be heard."

BLOOD TESTS AS EVIDENCE

The question concerning the evidentiary effect of blood test evidence breaks down into four subsidiary issues. While these should be distinguished carefully, their interrelationship must be recognized:

(1) What is the weight and effect of blood typing test

results once they have been admitted by the court?

(2) May the test results be used solely for *exclusionary* or also for *inclusionary* purposes?

(3) How valid is the specific test that is involved and how is that to be proved to the court?

(4) Was proper expertise employed in the actual performance and evaluation of the test?

For the record, let us remind ourselves that state law applies. Fifty states, the District of Columbia, and assorted other U.S. jurisdictions have provided a broad range of legal opinion in answer to any of these questions. Through the federal child support enforcement legislation of 1975, however, federal influence is beginning to be felt and ultimately should have a unifying and modernizing influence.

The first question—the weight and effect to be given to blood test evidence in disputed paternity cases—has been dealt with in some states expressly by statute, while in others it has been left to the courts. Whether the blood typing evidence comes into court under a statute or by judicial discretion, the weight that it will be accorded may differ. On the basis of older cases that have not yet been overruled, a few states may still allow even exclusionary results to be given no more than the same weight as any other evidence—thus, at least theoretically, permitting a jury to overrule a clear exclusion. A somewhat better informed group of states holds that, even though test results excluding paternity are not conclusive, they should be given considerable weight. In the "fully informed" states the rule is that a blood grouping test which excludes paternity is conclusive, if conducted properly.

These three views concern exclusionary evidence and a large number of states permit *only* such evidence to be introduced. To complicate the picture further, the admissibility (and, if admissible, the weight) of statistical evidence attempting to show *probability* or *likelihood* of paternity remains in much greater dispute. What is meant by "probability" or "likelihood" of paternity?

It stands to reason that as more and more reliable blood typing tests (for exclusions) become available and are applied, certain positive inferences become attractive. The question is what does it really mean if: (1) the blood tests run on the alleged father would exclude, say, 95 percent of the general population as possible fathers of the "average" child, and this alleged father is not excluded; (2) the tests run on the mother and the child show that, say, 95 percent of the general population of men would be excluded as possible fathers, and the tests run on the alleged father show that he is not excluded; (3) the tests run on the alleged father, the mother, and the child show that *this* alleged father (given his genetic make-up and focusing on that part of the child's genetic make-up that must stem from its father because the mother could not have passed on what she does not have) is, say, 20 times more likely to have fathered the child than a man picked at random out of the general population?

It is quite obvious that some sort of positive inference can be drawn from such results. What is not so obvious, however, is how the weight of that inference might be properly or most appropriately expressed in a percentage statement of probability of paternity and communicated to the court. Not helping the situation, many physicians who are experts in blood typing confess to being insufficiently conversant with mathematics to work effectively with complex statistical formulae. (Worse, some do not "confess," do not understand, and do the work anyway). This being so, we can assume with confidence that the typical judge, lawyer, or jury (who have less reason to be conversant with the mathematics of statistics and probability) may never fully understand what is involved.

The courts will have to operate on faith. But whom or what to believe? Some calculations of "probability" that have been accepted by some courts abuse common sense. More often, the matter is not so clear. Worse, a drawn-out dispute among experts has not finally resolved what data base is to be employed, what conclusions may fairly be drawn, how these should be communicated to the court, and what weight they may be given there. An international group of experts will seek to settle these questions this year under the auspices of the American Association of Blood Banks, the ABA and the AMA, with the financial sponsorship of HHS's Office of Child Support. Their report will be an update to and extension of the AMA-ABA Guidelines on bloodtyping, which should help them gain new currency and influence.

CONCLUSION

The significance of the federal support enforcement legislation—above and beyond the welfare context—cannot be overemphasized. To date, this legislation represents the most important federal *legislative* venture into family law.

Of special importance are the provisions encouraging support enforcement for those not receiving welfare. These provisions alleviate the common lot of the abandoned mother who has sufficient productive capacity to keep herself and her children above the line of welfare eligibility, but whose earning capacity does not match that of the father. The typical father's earnings enable him to make a reasonable contribution to child support, but few earn enough to do that without some pain. Unless "encouraged," many fathers are unwilling to make their proper contributions which, although significant in terms of their children's needs, seldom are large enough to make it economical to involve lawyers in repeated enforcement proceedings.

On quite another level, the federal child support legislation ranks along with the judicial development of equal rights for the nonmarital child under federal constitutional law. Both developments represent significant breaks with the American tradition of federal abstention in the area of family law—previously the preserve of state sovereignty. In terms of results acheived, both developments must be welcomed, but some doubts may be raised as to the long-term implications for our federal-state structure. □

NOTES

A REVIEW OF THE CHILD SUPPORT ENFORCEMENT PROGRAM

I. INTRODUCTION

A specter is haunting American fathers who fail to support their children, the specter of the Child Support Enforcement Program. The program is a nationwide effort to increase the availability and improve the effectiveness of services for child support enforcement. As a precondition to obtaining support, the program has also undertaken the establishment of paternity in a massive volume of cases. Although created by congressional initiative, the program functions through a web of cooperative federalism extending from the Department of Health and Human Services, through state welfare and social service agencies, down to every county welfare department and local prosecutor's office. Its influence has become pervasive. Its effects have become controversial, both from a social policy and a legal perspective. This Note will attempt a survey of developments generated by this major federal initiative in the field of family law.

Part II of this Note examines the conditions leading up to adoption of the Child Support Enforcement Program. Part III briefly describes how the program operates. Part IV summarizes a number of criticisms and warnings which appeared in legal literature when the program was still in its infancy. Part V examines subsequent cases and administrative developments in light of those criticisms and warnings. Particular attention is paid to the privacy rights of welfare mothers required to cooperate with the program and to the

due process rights of indigent putative fathers who commonly become its targets. Part VI, the conclusion, describes emerging challenges and suggests additional elements for inclusion in the cost-benefit analysis of the program.

II. Background

A. *The Impetus: The Welfare Explosion of 1965-1975*

Beginning in the mid 1960's the percentage of children dependent on the Aid to Families with Dependent Children (AFDC) program exploded. In 1950 thirty-four children out of every thousand were supported by AFDC. By 1960 the proportion had hardly changed, rising to only thirty-five per thousand. By 1965, however, in the midst of an era of relative national prosperity, the proportion had risen to forty-five per thousand. By 1970 it had zoomed to eighty-seven per thousand. By 1975, the year in which the Child Support Enforcement Program went into effect, one-hundred twenty-two out of every thousand children were supported by the AFDC program.[1] The absolute numbers of AFDC recipients and the costs of the program had correspondingly skyrocketed.

The reasons for the 1965-1975 "welfare explosion" were and are hotly debated. Presidential adviser, later Senator, Daniel P. Moynihan ascribed it primarily to a breakdown of the black family and focused on rising rates of illegitimacy.[2] Frances Fox Piven and Richard Cloward in their influential study of public welfare policy, *Regulating the Poor*, ascribed the explosion to a massive change in the attitudes of poor people. People who had always been eligible for public assistance but nad never sought it were no longer ashamed to come forward and demand their "welfare

[1] Staff of Senate Comm. on Finance, 96th Cong., 1st Sess., Staff Data and Materials on Child Support 53 (Comm. Print 1979) [hereinafter cited as Staff Data].

[2] U.S. Dep't of Labor, The Negro Family: The Case for National Action (1965).

rights."[3]

This shift in attitude was reflected in calculations indicating that in 1966 more than one-third of female-headed households which would have been eligible for AFDC upon application were not receiving it. By 1971 only ten percent of such potentially eligible households were not actually receiving AFDC benefits.[4] Adherents of this view of the welfare explosion saw it not as a catastrophe to taxpayers but as a positive development in the War on Poverty, promoting a more equitable distribution of wealth.

The general public was not so pleased by the explosion of the welfare rolls and was more inclined to ascribe it to shirking of responsibilities by the parents of the children on AFDC.[5] Statistics supportive of this view were not wanting.

Families become categorically eligible for AFDC when one parent is dead, incapacitated, or absent from the home. Absent from the home means divorced, separated, deserted, or never married. The proportion of the AFDC caseload eligible because of the death or incapacity of a parent has consistently declined while the proportion eligible because of the absence of one parent from the home has consistently risen. In 1961, 66.7 percent of the AFDC caseload was eligible due to the parental absence factor; in 1969, 75.4 percent was so eligible. In 1973 the corresponding figure had risen to 83 percent.[6] AFDC families must also meet financial eligibility criteria. It is therefore implicit in the above data that in 83 percent of families on AFDC in 1973 one parent was absent from the home *and* failing to provide financial support to his children in an amount adequate to prevent their dependency on public welfare.

One element of the absent from the home category drew particular attention. According to the analysis of the

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[3] F. PIVEN & R. CLOWARD, REGULATING THE POOR (1971).

[4] Doolittle, Levy & Wiseman, *The Mirage of Welfare Reform*, THE PUBLIC INTEREST, Spring 1977, at 66.

[5] *See, e.g.*, W. RYAN, BLAMING THE VICTIM (1971).

[6] STAFF DATA, *supra* note 1, at 4.

Senate Finance Committee staff:

> The largest single factor accounting for the increase in the AFDC rolls, related to those families in which the father never married the mother. In 1961, in 21.3 percent of the families receiving AFDC the mother was not married to the father. This grew to 27.9 percent by 1969. The proportion of children whose parents were never married increased from 22.6 percent in 1970 to 33.8 percent in 1977.[7]

The Child Support Enforcement Program may be viewed as the reaction of a reluctant welfare state to the growing imposition of dependency represented by these trends.

B. *Early Efforts to Stem the Tide*

Even before the welfare explosion, Congress had made some efforts to curb problems associated with illegitimacy and nonsupport. In 1949 legislation was proposed to make desertion a federal crime and require welfare workers to inform law enforcement officials of any cases in which aid was required because of desertion or abandonment. The criminal provision was dropped. The reporting requirement became law in 1950.[8] It had virtually no impact other than to set in motion a procession of forms from welfare departments to prosecutors' offices.[9] No funds were provided for any enforcement staff. Few prosecutors had the resources to keep up with the enormous volume of notices generated by AFDC applications.

In 1968 Congress amended the Social Security Act to require states to set up their own paternity and child support programs with fifty percent federal financing. Provision was also made for state access to federal information sources in seeking to locate missing parents.[10] HEW, by its own admission, did not give the implementation of these

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[7] *Id.*

[8] Social Security Act Amendments of 1950, ch. 809, § 321 (b), 64 Stat. 549 (codified as amended at 42 U.S.C. § 602(a)(11) (1976)).

[9] 1 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 5 (1976).

[10] Social Security Act Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 886 (codified at 42 U.S.C. § 602(a)(17) (1976)).

amendments high priority. The states generally were unable or unwilling to come up with adequate matching funds to establish effective programs.[11]

Those states which did attempt to establish paternity and enforce support on behalf of their AFDC recipients found that they were unable to require cooperation. Because Congress had not amended the Social Security Act to [illegible] cooperation an AFDC eligibility requirement, the federal courts consistently struck down state cooperation requirements as attempts to restrict AFDC eligibility more [illegible] than the Act allowed.[12] Finally, in 1972 a General [illegible]ing Office study found that many absent parents of [illegible] recipient children were not paying support, although financially able, because of lax enforcement efforts by the states and HEW.[13]

C. *Beginning of the IV-D Program*

With the experience of these ineffective precedents and in light of the continuing AFDC caseload explosion, both houses of Congress on December 20, 1974 amended the Social Security Act, adding Title IV Part D—Child Support and Establishment of Paternity. President Ford signed the legislation into law on January 4, 1975 with July 1, 1975 set as the effective date.[14]

The 1974 Amendment resulted in the current Child Support Enforcement Program. It differed from the 1967 Amendment both in holding out a larger carrot to the states and in giving the Secretary of HEW a bigger stick with

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[11] 1 Office of Child Support Enforcement Ann. Rep. 5 (1976).

[12] *See* Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971), *summarily aff'd sub nom.* Weaver v. Doe, 404 U.S. 987 (1971); Meyers v. Juras, 327 F. Supp. 759 (D. Or. 1971), *summarily aff'd*, 404 U.S. 803 (1971); Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal. 1971), *summarily aff'd sub nom.* Carleson v. Taylor, 404 U.S. 950 (1971).

[13] U.S. General Accounting Office, Collection of Child Support Under the Program of Aid to Families with Dependent Children (1972).

[14] Act of Jan. 4, 1975, Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended at scattered sections of 42 U.S.C.).

which to hit them in the event they failed to act. Federal funding for child support enforcement and paternity establishment efforts was made available to cover 75 percent of the costs. The Secretary was empowered to audit state program operations and withhold five percent of the AFDC funds otherwise payable if the state's efforts failed to meet minimum standards. Federal technical assistance was also made available to the states and a Federal Parent Locator Service was established.

Most significantly for AFDC recipients, the Social Security Act was explicitly amended to require their assignment of support rights and cooperation in establishing paternity and securing support.[15] As originally enacted, Title IV Part D included no provision whereby an AFDC recipient could be excused from the duty to cooperate.

The effective date of the program was later postponed to August 1, 1975 and a provision was added whereby an AFDC recipient could be exempted from the duty of cooperation if the state determined that establishing paternity and securing support would not be in the best interest of the child.[16] HEW was directed to adopt standards defining such circumstances. As initially defined, those circumstances were limited to cases involving forcible rape, incest, and pending adoption.[17] AFDC recipients who refused to cooperate for other reasons were faced with the choice of yielding to the will of the state or forfeiting their own portion of the welfare grant. The stage was set for a collision of interests.

III. Program Operation

Since the beginning of the Child Support Enforcement Program, applicants for AFDC have been obliged to assign

[15] 42 U.S.C. § 602(a)(26) (1976).
[16] Act of Aug. 9, 1975, Pub. L. No. 94-88, 89 Stat. 433 (codified at 42 U.S.C. § 602(a)(26)(B) (1976)).
[17] 45 C.F.R. § 303.5(b) (1976).

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[18] 42 U.S.C. § 602(a)(26)
[19] 42 U.S.C. § 602(a)(26)
[20] *Id.*
[21] *Id.* § 654(4)-(5).
[22] *Id.* § 654(5).
[23] *Id.* § 657(b).
[24] *Id.* § 657(c)(1) (1976 &

their rights to child support to the state.[18] Additionally, adult applicants for AFDC are required to cooperate in establishing paternity and securing support.[19] Cooperation may be excused in exceptional circumstances. Otherwise, in the event of the applicant's refusal to cooperate she may either withdraw her application or her children may receive benefits, excluding any funds for her own needs, issued through a "protective payee," such as a grandparent or friend of the family.[20]

Once the assignment of support rights to the state has been made, and assuming cooperation by the recipient, Child Support Enforcement Program staff will work to: locate the noncustodial parent if his whereabouts are unknown, establish paternity if the paternal support obligation is unclear, establish an appropriate support order if there is none in effect, enforce the support order if it is not being paid, and monitor the performance of paying support obligors to ensure continued compliance with the order.[21]

Pursuant to the AFDC recipient's assignment, any support which is paid, whether voluntarily or as a result of enforcement efforts, is paid to the state.[22] The state retains as much of the current monthly support as is required to reimburse the state and federal government for the AFDC paid the recipient that month. Any excess in the current monthly support is then forwarded to the AFDC recipient.[23] When a stable pattern of monthly support payments in excess of the AFDC benefit has been established, the AFDC is discontinued. The assignment is then cancelled. The entirety of the, hopefully still forthcoming, support payments are then made directly available to the former AFDC recipient.[24]

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[18] 42 U.S.C. § 602(a)(26)(A) (1976).
[19] 42 U.S.C. § 602(a)(26)(B) (1976).
[20] *Id.*
[21] *Id.* § 654(4)-(5).
[22] *Id.* § 654(5).
[23] *Id.* § 657(b).
[24] *Id.* § 657(c)(1) (1976 & Supp. III 1979).

The program also provides services to custodial parents whose families are not on AFDC. A small initial fee is generally charged and minimal processing costs are deducted from the collected support before disbursement to the custodial parent.[25] This aspect of the program was intended to serve a deterrent effect. A family might never have to resort to AFDC if a steady flow of child support could be assured.[26] This non-AFDC component of the program has generated few complaints from those who use it. Indeed, complaints that have arisen have come from custodial parents who wanted to use the service but were unable because of their state's preoccupation with pursuing the fathers of children already on AFDC.[27]

These operations, both AFDC and non-AFDC related, have yielded some undeniably impressive results. From the beginning of fiscal year (FY) 1976 through FY 1980, a total of $5,415,194,214.00 in child support has been processed through the system.[28] During the same period, program efforts have resulted in the establishment of paternity in 464,750 cases;[29] and 1,693,118 "missing" noncustodial parents have been located.[30] In FY 1980 alone, federal, state, and local governments retained $593,192,982.00 of the support paid for children on AFDC as reimbursement for the

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[25] 42 U.S.C. § 654(6) (1976).

[26] [1974] U.S. CODE CONG. & AD. NEWS 8153.

[27] *See, e.g.*, New Jersey v. Department of Health and Human Services, No's 80-2809, 81-1400, 81-1445, 81-2147, 81-2240 (3rd Cir. Dec. 23, 1981) (available March 16, 1982, on LEXIS, Genfed Library, Cir. file).

[28] 5 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 56 (1980).

[29] 1 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 133 (1976); OFFICE OF CHILD SUPPORT ENFORCEMENT, SUPPLEMENTAL REPORT 155 (1977); 2 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 107 (1977); 3 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 107 (1978); 4 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 113 (1979); 5 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 86 (1980).

[30] 1 OFFICE OF CHILD SUPPORT ENFORCEMENT 133 (1976); OFFICE OF CHILD SUPPORT ENFORCEMENT, SUPPLEMENTAL REPORTS 154 (1977); 2 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 106 (1977); 3 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 106 (1978); 4 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 112 (1979); 5 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 85 (1980).

amount of welfare expended on those children.[31] There is small wonder that U.S. News and World Report has hailed the program as "saving taxpayers hundreds of millions of dollars a year."[32]

IV. Early Critics

From its inception the program has had critics as well as boosters. In 1976 a number of notes and articles appeared in law journals describing the then new Child Support Enforcement Program and focusing on constitutional ramifications of its mandatory provisions.

One observer noted that the requirement that the recipient assign her rights to child support to the state might be viewed as denial of a property right without due process.[33] It was also contended that the sanction for noncooperation, deletion of any funds for the uncooperative adult applicant, would in actual effect reduce the amount available to the child, thus denying that child equal protection with other AFDC supported children because of an irrelevant factor beyond his control.[34] Just what constituted "cooperation" was found to be so poorly defined as to leave local welfare departments with little guidance and unwarranted discretion in determining who should be sanctioned.[35]

HEW's regulation limiting the good cause circum-

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[31] 5 Office of Child Support Enforcement Ann. Rep. 65, 66, 67 (1980).

[32] U.S. News and World Report, Feb. 12, 1979, at 50.

[33] Note, *Civil Liberties Versus Governmental Interest: A Constitutional Context For The Impact Of Title IV-D Of The Social Security Act On Ohio Families In The Aid To Families With Dependent Children Program*, 5 Cap. U.L. Rev. 245, 257 (1976) [hereinafter cited as *Civil Liberties*].

[34] *Id.* at 257-58. *See also* Note, *The 1974 Child Support Provisions: Constitutional Ramifications*, 6 Cap. U.L. Rev. 275, 292 (1976) [hereinafter cited as *Constitutional Ramifications*]; Note, *Federal Law And The Enforcement Of Child Support Orders: A Critical Look At Subchapter IV Part D Of The Social Services Amendments of 1974*, 6 N.Y.U. Rev. L. & Soc. Change 23, 30 (1976) [hereinafter cited as *A Critical Look*].

[35] *Constitutional Ramifications*, *supra* note 34, at 293. *Civil Liberties*, *supra* note 33, at 254-55.

stances for exemption from the cooperation requirement was criticized as creating both overinclusive and underinclusive class distinctions. The class of recipients to be exempted from cooperation was underinclusive in that one could readily postulate other legitimate circumstances in which cooperation would not be in the best interest of the child. The class to be sanctioned was for the same reason overinclusive.[36] Requiring an unmarried AFDC recipient to name the putative father of her children was also viewed as creating self-incrimination problems in states still maintaining criminal laws against adultery and fornication.[37]

One analysis focused upon the problems of invasion of family privacy.[38] Not only was the AFDC recipient's personal privacy violated by requiring her to, in effect, reveal the identity of her sex partners, her right to privacy as head of her family and her right to privacy in making family related decisions on behalf of her children was also threatened.[39]

HEW's limitation of good cause circumstances for exemption to forcible rape, incest, and adoption excluded many factors which the AFDC recipient as head of her family might take into account in deciding whether to cooperate.[40] If the recipient were unmarried, she might fear that her cooperation in pursuing paternity would so alienate the putative father as to dash hopes of future marriage. She might fear that a putative father who provided at least intermittent financial and emotional support to herself and her child would sever those ties. Although the state might assess the worth of the putative father's ties only in terms

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[36] *Constitutional Ramifications*, *supra* note 34, at 290-91.

[37] *Id.* at 288. *Civil Liberties*, *supra* note 33, at 254-55. *See* Grant v. State, 83 Wis. 2d 77, 264 N.W.2d 587 (1978).

[38] Poulin, *Illegitimacy And Family Privacy: A Note On Maternal Cooperation In Paternity Suits*, 70 N.W. U.L. REV. 910 (1976).

[39] *Id.* at 922-24.

[40] *Id.*; *see also* discussion of the drawbacks to cooperation in *Civil Liberties*, *supra* note 33, at 262-63 and *Constitutional Ramifications*, *supra* note 34, at 287-88.

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[42] Note, *Child Support: E
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§§ 651-60 (Supp. V, 1975)*, 52
supra note 34, at 34-35.

of his potential support contributions, the AFDC recipient might be more concerned about preserving a functioning emotional relationship between her children and the putative father.

Alternatively, the putative father might be of such character that, regardless of his support potential, the AFDC recipient would not wish him to have any legal or psychological ties to her children. If the putative father were a criminal, for instance, the AFDC recipient might prefer to shield the child from knowledge of his father's identity. Cases were also posited in which the putative father would react violently towards the AFDC recipient and her child because of the recipient's cooperation in bringing a paternity or nonsupport suit against him.

The author of the article focusing on the privacy and integrity of the family concluded the mother, not the state, should have the ultimate say in deciding whether establishing paternity and securing support would be in the best interest of her children. She argued that cooperation should be voluntary and that such a revision would have little impact on the effectiveness of the program.[41]

The 1976 articles also noted that invasion of the putative father's privacy rights might be involved in the operation of the Federal Parent Locator Service with its provision for information sharing between federal agencies on persons not accused of any crime.[42] A 1978 article dealing directly with the impact of the Child Support Enforcement Program on putative fathers noted that under pressure to name someone as the father of her child an AFDC recipient

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[41] Poulin, *supra* note 38, at 930-32. Poulin takes the position that compelling cooperation emasculates the cultural characteristics of groups especially dependent on welfare and infringes respect for cultural pluralism. However, her argument that little harm would be done by making cooperation voluntary draws on experience in the homogenous society of Norway.

[42] Note, *Child Support Enforcement And Establishment Of Paternity As Tools Of Welfare Reform—Social Services Amendments of 1974, pt. B, 42 U.S.C. §§ 651-60 (Supp. V, 1975)*, 52 WASH. L. REV. 169, 184 (1976); *A Critical Look*, *supra* note 34, at 34-35.

might name an innocent man in order to protect the true father and avoid alienating him. In such circumstances it was noted that the defendant would be up against all the legal resources of the state, with a possibility of prejudice against him because of the strong state interest in securing support to offset its welfare costs. Greater reliance on advanced blood testing techniques was suggested as a means of preventing the railroading of innocent men in the state's rush to garner maximum support payments.[43]

The overall tone of the early notes and articles was critical. They tended to portray the nascent Child Support Enforcement Program as a repressive measure aimed at providing relief to the taxpayer at the expense of the civil liberties of welfare recipients.

V. Cases and Program Developments

In the time the Child Support Enforcement Program has been operative, since August 1, 1975, not all of the issues raised by these earlier observers have been litigated or otherwise resolved. Two developments are, however, traceable. First, the AFDC recipient's duty to cooperate has been clarified and the circumstances under which she may legitimately decline to cooperate have been expanded. While in a sense a victory for AFDC recipients, the limited expansion of circumstances under which noncooperation may be excused can also be viewed as "stealing the thunder" of critics who predicted oppressive consequences from making cooperation mandatory. Having become more reasonable, the mandate may also have become invulnerable to charges that it violates privacy rights. Second, there has emerged a recognition that the increased state involvment and strong state interest in the outcome of paternity and support en-

[43] Note, *Requiring An AFDC Applicant To Name Her Child's Father: Are The Rights Of The Putative Fathers Being Protected*, 23 S.D.L. Rev. 379 (1979) (hereinafter cited as *Putative Fathers*). For a view of how the program was working in one state after nearly three years of operation, *see* McClelland & Eby, *Child Support Enforcement: The New Mexico Experience*, 9 N.M.L. Rev. 25 (1978).

forcement cases makes the provision of counsel and blood testing services to indigent defendants in such actions a matter of due process.

A. *The Good Cause Exemption*

1. A Long Search for Standards

As amended on August 1, 1975, Title IV Part D of the Social Security Act provided that every state's plan for AFDC administration must include the requirement that, as a condition of eligibility, recipients must cooperate in establishing paternity and securing support:

> unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency *in accordance with standards prescribed by the Secretary*, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed . . .[44]

Problems arose for AFDC recipients and AFDC administrators alike in that the Secretary did not prescribe those standards in final form until October 3, 1978, to be effective December 4, 1978,[45] more than three years after they had become a practical necessity.

The effects of the Secretary's delay were mirrored in a number of cases. In *Coe v. Mathews*,[46] the National Welfare Rights Organization, five AFDC recipients from various parts of the country, and the State of Alaska banded together to seek resolution of the predicament caused by the Secretary's failure to prescribe standards for exemption. They sought an order in the nature of mandamus requiring the Secretary to issue standards within twenty days. Alternatively, they sought declaratory and injunctive relief suspending enforcement of the mandatory cooperation requirement until such time as the standards for exemption were issued.

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[44] 42 U.S.C. § 602(a)(26)(B) (1976) (emphasis added).
[45] 43 Fed. Reg. 45,742 (1978) (codified at 45 C.F.R. § 232.40 to .49 (1980)).
[46] 426 F. Supp. 774 (D.D.C. 1976).

At the time of the litigation, the only circumstances officially recognized by HEW as excusing noncooperation were instances of forcible rape, incest, and pending adoption. HEW's recognition of those circumstances did not, however, constitute a full prescription of standards of good cause for noncooperation.

The court noted that the acting Secretary of HEW had issued a notice of proposed rulemaking on the exemption standards on August 6, 1976, and held that this action rendered the mandamus request moot.[47] The court further held that the mandatory cooperation requirement was in effect as of August 1, 1975, even though the exemption provision could not be effective until HEW promulgated its standards in final form.[48] The court based its decision on what it found to be the congressional intent that cooperation be made mandatory as of August 1, 1975, manifested on that very date, which was also the date that the good cause exemption provision was added. Clearly, Congress must have foreseen that there would be an hiatus between the effective date of the requirement and HEW's implementation of the exception standards.

The court's conclusion that Congress had expected some hiatus between the effective date of the requirement and the implementation of the exception appears evident. But, one wonders if either Congress or the court, in finding the mandamus request moot, foresaw just how long that hiatus would be. While it continued, AFDC recipients remained subject to a requirement to which there was an explicit exception, the extent of which no one could determine. State welfare officials remained charged with enforcing a requirement on persons whom they might later discover were properly exempt.

The legal tangle caused by the absence of HEW standards also served to sidetrack what otherwise would have

[47] *Id.* at 776-77.
[48] *Id.* at 778-79.

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[49] 365 F. Supp. 65 (D. C
[50] *Id.* at 84-86.

likely been a decisive Supreme Court review of the constitutionality of the cooperation requirement.

Doe v. Norton[49] was originally decided by the U.S. District Court for the District of Connecticut in 1973, prior to the Child Support Enforcement Program legislation. It represented a challenge to a Connecticut statute which obliged all unwed mothers, whether or not on AFDC, to reveal the name of the putative father and cooperate in a paternity action. The applicable sanction for noncooperation was not AFDC ineligibility but a civil contempt citation. The statute was nevertheless challenged as being contrary to the Social Security Act in that it was considered likely to result in the incarceration of AFDC recipients, denying children dependent on AFDC the companionship and guidance of their mothers. The provision was also claimed to violate plaintiff's right of privacy and to represent a discriminatory classification based on illegitimacy. Denial of due process was also asserted based on the state's failure to provide for a case-by-case determination of whether the mother's refusal to cooperate in establishing paternity was in the best interest of her child.

In the original decision of the district court each of plaintiff's constitutional arguments, particularly those relating to privacy, was carefully considered and rejected. In a concurring opinion, Judge Newman referred to special privacy rights incident to the unwed mother's role as head of her family. Her right to privacy in making family decisions, such as whether to shield her child from knowledge of incestuous parentage, might, according to Judge Newman, override the state interest in particular situations.[50]

On appeal to the Supreme Court in 1975, the decision was vacated and remanded for reconsideration in light of the intervening passage of the Child Support Enforcement

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[49] 365 F. Supp. 65 (D. Conn. 1973).
[50] *Id.* at 84-86.

Program Amendment to the Social Security Act.[51] The Amendment required cooperation as a condition of eligibility but without such sanctions as would flow from application of the Connecticut statute.

On remand in 1976, the district court held that the Child Support Amendment did not preempt the state law but that the good cause for noncooperation exception provided in the new legislation would have to be applied before any state contempt proceedings would be appropriate.[52]

The state then appealed claiming, as Alaska had in *Coe*, that since the good cause exception could not be implemented until the Secretary of HEW adopted standards, the state could not enforce cooperation until those standards were promulgated.

The Supreme Court in 1977 again vacated and remanded for the district court to consider whether Connecticut could make its own good cause determination in the absence of HEW regulations defining good cause standards.[53] No further action was reported. Thus the Supreme Court never ruled on the constitutional issues, particularly the privacy question, so well presented in the original decision of the district court.

In *Harer v. Commonwealth*[54] and *Martella v. Commonwealth*,[55] the Commonwealth Court of Pennsylvania answered in the negative the question which the Supreme Court had presented to the Connecticut district court on remand. In the absence of HEW regulations implementing the good cause exception, it was held that the state could not adopt and enforce its own good cause standards. In *Harer* the court held the state could impose no sanction for noncooperation in the absence of HEW regulations. In *Martella* it was held that the state was similarly precluded

[51] *Sub nom.* Roe v. Norton, 442 U.S. 391 (1975).
[52] *Sub nom.* Doe v. Maher, 414 F. Supp. 1368 (1976).
[53] Maher v. Doe, 432 U.S. 52t (1977).
[54] ___ Pa. Commw. Ct. ___, 375 A.2d 865 (1977).
[55] ___ Pa. Commw. Ct. ___, 375 A.2d 869 (1977).

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[56] 31 Or. App. 631, 571 P.2d
[57] 35 Or. App. 493, 582 P.2d
[58] 43 Fed. Reg. 2170 (1978).
[59] *Id.* at 45,742-52.
[60] *Id.* at 45,743.

from applying sanctions when the AFDC recipient refused to assign her rights to support. However, in *Hansen v. McKay*[56] and *Gibson v. Johnson*,[57] the Court of Appeals of Oregon held that the good cause exception applied only to the requirement of cooperation in establishing paternity and securing support. It did not apply to the requirement that AFDC recipients assign their support rights to the state. Thus, in Oregon the state could impose the sanction for failure to execute an assignment even in the absence of HEW regulations defining the good cause standard.

HEW finally published the final form of its good cause regulations on January 16, 1978, to be effective March 17, 1978.[58] However, these regulations were subject to a comment period. When these regulations were superseded by regulations published on October 3, 1978, to be effective December 4, 1978,[59] the supplementary information included in the publication gave some insight into the balancing problems which had caused so much delay. HEW had been required to strike a balance between client interest groups, psychiatric professional associations, and children's rights groups on the one hand and welfare officials and district attorneys on the other.

The client and child advocate groups and the psychiatric professional associations were supportive of the original regulations which had included the prevention of emotional harm to either mother or child as a legitimate reason for noncooperation. The welfare administrators and district attorneys criticized that provision as creating a loophole which would permit unjustified noncooperation and impose administrative burdens.[60] In its final regulations published October 3, 1978, HEW attempted to balance these concerns by retaining the exception for circumstances which would

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[56] 31 Or. App. 631, 571 P.2d 166 (1977).
[57] 35 Or. App. 493, 582 P.2d 452 (1978).
[58] 43 Fed. Reg. 2170 (1978).
[59] *Id.* at 45,742-52.
[60] *Id.* at 45,743.

cause emotional harm to the child and also maintaining the exception where cooperation would cause emotional harm to the mother, but, in her case, only where such harm would be "of such nature or degree that it reduces such person's capacity to care for the child adequately."[61] HEW further added a section to the regulations defining "emotional harm." It specified, "A finding of good cause for emotional harm may only be based upon a demonstration of an emotional impairment that substantially affects the individual's functioning."[62]

Besides qualified exceptions where physical or emotional harm was reasonably anticipated to befall the child or caretaker relative in the event of cooperation, the final regulations continued the provision for excusing noncooperation where the child was conceived as the result of incest or forcible rape, where legal proceedings for the adoption of the child were pending, or where the mother was currently being assisted by a competent agency to determine whether or not to surrender the child for adoption.[63]

Client interest groups and welfare administrators also differed over a provision in the original regulations which had appeared to place upon the welfare agency the burden of documenting the noncooperating recipient's case for a good cause exemption.[64] In the final regulations published October 3, 1978, it was specified that the burden of providing all necessary documentation for a good cause exemption was on the AFDC recipient seeking such exemption, but that the welfare agency would advise her as to how she might obtain such documentation and make requests on her behalf in limited circumstances where the recipient could not reasonably be expected to obtain the documentation on her own.[65]

[61] 45 C.F.R. § 232.42(a)(1)(iv) (1980).
[62] *Id.* § 232.42(b).
[63] *Id.* § 232.42(a)(2).
[64] 43 Fed. Reg. 45,745 (1978).
[65] 45 C.F.R. § 232.43(e) (1980).

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[66] 45 C.F.R. § 232.43
[67] 43 Fed. Reg. 45,74
[68] Vasquez v. Brezen
(available March 18, 1982
[69] *Id.* at n3.
[70] *Id.* at n4.

The final regulations also permitted a finding of good cause based on reasonable anticipation of physical harm without any documentation in the event that an investigation indicated the credibility of claims of past beatings and such findings were approved by supervisory personnel.[66] Although every other sort of claim had to be documented, an exception was made in this case on behalf of battered women who, it was reported, often concealed their beatings out of shame and thus never established any police or other documentary record to substantiate the basis of their fears.[67]

2. *Application of the Standards*

The application of the cooperation requirement, as modified by the final regulations defining good cause for exemption, was challenged in *Vasquez v. Brezenoff*.[68] There, AFDC recipients sought an injuction forbidding welfare administrators from invoking the sanction for noncooperation where recipients denied knowledge of facts concerning the missing or putative father. Welfare administrators were invoking the sanction when they considered the recipient's denial of knowledge to be less than credible.

The court held defendant welfare administrators were entitled to summary judgment dismissing plaintiff's claim that the administrators were flatly barred from making credibility determinations.[69] However, the court did not dismiss plaintiff's claim in its entirety because it noted that part of the claim could be read as an assertion that administrators were making their credibility determinations in an irrational and arbitrary way.[70] The court noted, "A showing that defendants were using the cooperation requirement in a manner which detracted from the statutory purpose of

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[66] 45 C.F.R. § 232.43(f) (1980).

[67] 43 Fed. Reg. 45,745 (1978).

[68] Vasquez v. Brezenoff, No. 80 Civ. 0045 (PNL) (S.D.N.Y. April 9, 1981) (available March 18, 1982, on LEXIS, Genfed Library, Dist. file).

[69] *Id.* at n3.

[70] *Id.* at n4.

finding and obtaining support from the absent parent might establish the invalidity of defendants' policy."[71] In other words, the cooperation requirement could not be used as a vehicle for harassing recipients off the welfare roles. The court deferred decision on class action certification noting that review of results from administrative hearings indicated the state hearing officers were generally siding with recipients whose credibility had been questioned by local officials.[72]

No other cases have yet been reported challenging the cooperation requirement and the application of the good cause standards which became effective December 4, 1978. It appears that future challenges to the cooperation requirement will be shunted off into the realm of administrative hearings. The judicial review would likely present a narrow issue of whether one of the exception provisions applied. It also seems likely that any case in which cooperation would pose a truly serious harm to the child or AFDC recipient caretaker would be settled to the recipient's satisfaction in the administrative process. Such a result should follow under the current regulations unless the documentation standard required in most cases by the HEW regulations proves impractical. The practicality of this standard would also present a narrow issue on review.

In short it now appears unlikely that the courts will be faced with the full-blown confrontation between state interest and family privacy which appeared so likely when the cooperation requirement was adopted. The regulations do not provide an exception where the AFDC recipient wishes not to cooperate so as to avoid alienating the putative father. However, if the recipient can make out a case that such alienation can be "reasonably anticipated" to result in "serious emotional harm" to her child or such emotional harm to herself as to "reduce her capacity to care for the child adequately," she can gain an exemption. If the recipi-

[71] *Id.* at n5.
[72] *Id.* at n6.

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ent fails to make out such a case in the administrative process, a judge on review may well be inclined to view the claimed potential deprivation as inconsequential when balanced against the state interest. The HEW regulations, though long in coming, have done their job well. They have stolen the thunder of critics of the cooperation requirement and rendered a judicial invalidation most unlikely.

3. Administration of the Standards

The Office of Child Support Enforcement first began reporting the number of cases in which the custodial parent refused to cooperate and the number of cases in which good cause was found for such noncooperation in its Third Annual Report to the Congress for the Period Ending September 30, 1978. The statistics reported therein and in the fourth and fifth annual reports indicate that inadequate attention may be being paid to consistency in application of the exemption at the administrative hearing level.

A number of jurisdictions have consistently failed to report statistics relevant to refusals to cooperate or findings of good cause. Hawaii, Iowa, Maine, Massachusetts, New York, Puerto Rico, and Washington have never reported these figures.[73] Other states have reported in some years but not in others or have reported only partial or inconsistent data. Oklahoma for example reports only thirty-seven refusals to cooperate in fiscal year 1980 but forty-two findings of good cause.[74]

Where the reports are adequate to allow comparison, significant variations appear. In Utah 100% of the recipients refusing to cooperate in FY 1980 were found to have

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[73] 3 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 113 (1978); 4 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 119 (1979); 5 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 90 (1980).

[74] This may represent a carryover of refusals from 1979 on which there was no good cause determination until 1980. However, the report does not clarify the seeming inconsistency, 5 OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP. 90 (1980).

good cause and were exempted.[75] In the District of Columbia only 1% of the recipients refusing to cooperate in FY 1980 were found to have good cause and were exempted.[76] In Tennessee 69% of recipients refusing to cooperate were exempted in FY 1980.[77] In North Carolina only 4% of recipients refusing to cooperate were exempted in that period.[78] The standards for granting an exemption as contained in the Code of Federal Regulations[79] are applicable to every state. Yet the magnitude of these variations suggest that, in practice, significantly different standards are being applied in different jurisdictions.

Responsibility for administering the good cause exemption is vested in the Office of Family Assistance (OFA) within the Department of Health and Human Services rather than the Office of Child Support Enforcement.[80] The OFA has stated that significant variations will be looked into but noted that none of the regional offices have reported any gross inconsistencies in application of the exemption.[81] However, reliance by the central office of OFA on regional office perceptions leaves the central office blind to interregional variations. OFA also reports that reviews are conducted of state good cause determinations by regional office staff on an "as needed" basis, but review findings are not routinely reported to the central office.[82] Finally, OFA reports that it does not compile or disseminate to the states any digest or reporting service concerning administrative and judicial interpretations of the good cause

[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] 45 C.F.R. § 232.42 to .43 (1980).
[80] Letter from Fred Schutzman, Deputy Director, Office of Child Support Enforcement, Dep't of Health and Human Services, to the author (Dec. 28, 1981) [hereinafter cited as Schutzman Letter].
[81] Letter from Linda S. McMahon, Associate Commissioner for Family Assistance, Dep't of Health and Human Services, to the author (Mar. 1, 1982).
[82] *Id.*

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[83] *Id.*
[84] *Putative Fathers, supr*
[85] 101 S. Ct. 2202 (1981)
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standard.[83]

In the absence of coordination by the OFA, a body of possibly inconsistent administrative rulings applying a uniform standard is developing in each state. Advocates for AFDC recipients declining to cooperate should be aware of these variations. The central office of OFA should penetrate the vacuum in which each state's hearing officers are now working by more closely monitoring state administrative good cause determinations and disseminating reports of decisions which OFA would endorse as precedent.

B. Due Process For Putative Fathers

1. Provision of Blood Group Testing

The only early comment on the Child Support Enforcement Program which focused exclusively on the problems raised for defendant putative fathers concluded the best safeguard for such men would be wider use of exclusionary blood group tests.[84] Recently, the Supreme Court appeared to hold such tests must be provided to indigent defendants at state expense when the accusing mother is assisted by the power of the prosecutor.

In *Little v. Streater*,[85] an unmarried mother named an incarcerated man as the father of her child, pursuant to her obligation as a recipient of AFDC. Defendant obtained the assistance of a legal aid attorney and moved for an order requiring mother and her child to undergo blood tests. He claimed he could not pay the costs and asked the court to order the state to pay.[86] The Connecticut trial court authorized tests but refused to provide them at state expense. Consequently, no tests were made, defendant was found to be the father, and a judgment and support order were en-

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[83] *Id.*

[84] *Putative Fathers*, *supra* note 43, at 402.

[85] 101 S. Ct. 2202 (1981).

[86] As an inmate of a state prison, defendant had weekly income and expenses of $5.00. He had no assets. *Id.* at 2204 n.3.

tered against him.[87] The Appellate Session of the Connecticut Superior Court affirmed, holding there had been no denial of due process or equal protection. The Connecticut Supreme Court denied certiorari and defendant appealed to the U.S. Supreme Court.

Chief Justice Burger, writing for a unanimous Court, applied the three-pronged *Mathews v. Eldridge*[88] test to determine whether due process required provision of the tests at state expense. First, the private interest affected was held to be substantial:

> Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanction for non-compliance, at issue is the creation of a parent-child relationship. . . . Just as the termination of such bonds demands procedural fairness, . . . so too does their imposition. . . . Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.[89]

Second, the risk that the procedures used would lead to erroneous results was large and the value of the suggested procedural safeguard was great. Connecticut law provided that the mother made out a prima facie case merely by persistently claiming that the accused was the father. Defendant then had the burden of showing his innocence. Further, even if defendant's testimony was found to be the more credible by the trier of fact, it was not adequate to overcome the mother's prima facie case.[90] The Chief Justice further noted the strong social pressures which often color testimony in paternity cases.[91] In contrast a properly administered battery of blood tests offered defendant a means of scientifically and conclusively disproving his paternity.[92]

[87] The Child Support Enforcement Program gained an order that defendant pay $2.00 per month child support to the state, $1.00 as arrearage on a judgment of $6,974.48 and $1.00 on a current monthly award of $163.58. *Id.* at 2205.

[88] 424 U.S. 319 (1976).

[89] 101 S. Ct. at 2209.

[90] *Id.* at 2207-08.

[91] *Id.* at 2206-07.

[92] *Id.* at 2209.

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[94] *Id.* at 2210.

[95] *Id.*

Finally, the governmental interest would not be substantially impaired by provision of the blood test safeguard. The state has a legitimate interest in securing child support to offset welfare costs. However, this is not an interest in indiscriminately fixing paternity and support obligations. It is an interest in securing "an accurate and just determination of paternity."[93] The state interest in avoiding the expense of blood group testing is slight since the Child Support Enforcement Program provides the federal government will pick up 75% of the costs of such tests.[94]

Application of the *Eldridge* test thus led to the conclusion:

> Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks "a meaningful opportunity to be heard." . . . Therefore, "the requirement of 'fundamental fairness'" expressed by the Due Process Clause was not satisfied here.[95]

The judgment of the Appellate Session of the Connecticut Superior Court was therefore reversed.

Although the Court paid particular attention to the unusual evidentiary burden imposed by Connecticut, it seems the decision would be the same for jurisdictions lacking such a provison. Neither the substantial private interest at stake nor the relative insignificance of the state interest in avoiding testing costs would be affected. The great value of blood tests in disproving paternity would be undiminished, and the need for them would be little less given the inherently high risks of erroneous results in paternity cases.

Before *Little*, a number of state courts had held that due process and equal protection require provision of blood tests at state expense for indigent paternity defendants, especially when confronting accusers supported by the Child

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[93] *Id.*
[94] *Id.* at 2210.
[95] *Id.*

Support Enforcement Program.[96] After *Little*, provision of this element of due process appears guaranteed. The right to counsel provided at state expense is not presently so clear.

2. *Right To Counsel*

A previous *Journal of Family Law* Note focused on the recognition that due process requires appointment of counsel for indigent defendants in paternity proceedings, at least where the state appears as a party or appears on behalf of the mother or child.[97] The main case enunciating that requirement was *Salas v. Cortez*.[98]

Salas was clearly a product of the Child Support Enforcement Program. The decision takes explicit note of the changed nature of the paternity proceedings brought about by the 1974 Child Support Amendment to the Social Security Act[99] and draws heavily on this changed nature in formulating the rationale of its holding. Thus, while the Child Support Enforcement Program has and will continue to exert great pressure on putative fathers, it has also served to heighten awareness of the need for procedural safeguards on behalf of indigent defendants in paternity actions.

Because the Child Support Enforcement Program is a pervasive national force, changing the nature of the paternity proceeding in every state no less than in California,[100] it may well serve to enhance the persuasive force of the holding in *Salas*. The very volume of paternity actions

[96] *See, e.g.*, Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977); Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d [illegible] (1969); Walker v. Stokes, 45 Ohio App. 2d 275, 344 N.E.2d 159 (1975); State *ex rel.* Graves v. Daugherty, 266 S.E.2d 142 (W. Va. 1980).

[97] Note, *The Right To Appointed Counsel In Paternity Actions*, 19 J. FAM. L. 497 (1981).

[98] 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979).

[99] *Id.* at 29-30, 593 P.2d at 231, 154 Cal. Rptr. at 534-35.

[100] Concerning the quasi-criminal nature of paternity actions and due process problems arising from failure to recognize the full implications of such a proceeding for the defendant, see Note, *The Nature of Paternity Actions*, 19 J. FAM. L. 475 (1981).

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[101] 524 F. Supp. 242 (
[102] *Id.* at 246.
[103] *Id.* at 243.
[104] 101 S. Ct. 2153 (19
[105] *Id.* at 2160.

against indigents produced by the Child Support Enforcement Program must, it seems, hasten the day when appointment of counsel for indigent defendants in paternity proceedings is recognized as standard due process nationwide.

One recent decision appears to deal this growing recognition a setback. In *Nordgren v. Mitchell*,[101] indigent state prison inmates sought a declaratory judgment in federal district court ordering the state to furnish them with counsel. The inmates were defendants in paternity actions brought by the state pursuant to the Child Support Enforcement Program. The court granted summary judgment to defendant state officials.[102]

The court distinguished *Salas* and similar state court decisions, viewing them as based on state constitutional guarantees of due process which were broader than those contained in the federal Constitution.[103] Since plaintiffs here relied exclusively on the federal Constitution, the court looked instead to the Supreme Court decisions in *Little* and *Lassiter v. Department of Social Services*.[104]

In *Lassiter*, the Court refused to establish a rule that all indigent parents faced with a proceeding to terminate parental rights were entitled to counsel. The determination of whether appointment of counsel was required to assure due process was to be made by the trial court in light of the circumstances of each case and subject to appellate review.[105]

The *Nordgren* court noted that *Lassiter* added another step to the *Mathews v. Eldridge* test applied in *Little*. After all other factors had been balanced, the *Lassiter* decision held their "net weight" had to be further balanced against the "presumption that an indigent litigant has a

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[101] 524 F. Supp. 242 (D. Utah 1981).
[102] *Id.* at 246.
[103] *Id.* at 243.
[104] 101 S. Ct. 2153 (1981).
[105] *Id.* at 2160.

right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[106] The court stated, "Many paternity actions do not involve complicated legal or evidentiary problems."[107] Further, the court noted that defendants were assured by state statute of the benefit of blood group tests to be paid for by the state.[108]

In light of these factors, *Lassiter* was found to be controlling. The court would not make a prospective rule that counsel be appointed. Plaintiffs were left with the possibility of making an appeal at the conclusion of the paternity proceedings.[109]

Clearly, the *Nordgren* decision cannot be viewed as the last word. It represents a response to the posture of plaintiffs' claim rather than to their substantive arguments. It overlooks the quasi-criminal nature of paternity proceedings and the "liberty interest threatened by the possible sanction for noncompliance"[110] [with a support order] which was explicitly recognized in *Little*. It assumes that a "simple" paternity case can be safely tried without defense counsel, when, in fact, only by providing such counsel can latent complexities and proper defense strategies be properly identified. Worst of all, it condones the creation of a parent-child relationship subject to almost certain appeal. The psychological welfare of the child will not be served by quickly and cheaply establishing such a fundamental relationship only to have it torn asunder on review. The best interest of the child as well as the due process rights of the indigent putative father require a full measure of fairness at the initial paternity determination.

VI. Conclusion

The chances of key provisions of the Child Support

[106] 524 F. Supp. at 244.
[107] *Id.* at 245.
[108] *Id.*
[109] *Id.*
[110] 101 S. Ct. at 2209.

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[115] *Id.*

Enforcement Program being invalidated on constitutional grounds now appear remote. The standards for good cause exemption from the cooperation requirement should, if properly administered, prevent any case from reaching the courts where the privacy interest of the mother outweighs the allied interests of the child and the state in establishing paternity and securing support. Any case which reaches the courts with the interests of mother and child allied against the state will indicate something amiss in the administrative process. The inconsistency among the states in the proportion of applicants refusing to cooperate who receive good cause exemptions may indicate that something is indeed amiss in the application of the uniform standard for exemption.[111] However, this raises curable administrative rather than fatal constitutional problems.

The Supreme Court decision in *Little v. Streater* and the tendency of state court decisions such as *Salas v. Cortez* indicate that the point of maximum danger for indigent putative fathers may have passed. As war compels advances in technology, so the government's war on nonpaying fathers has compelled advances in our definition of due process.

Fear must remain, however, that the due process decisions of higher courts will have inadequate influence on actual practice. The deputy prosecutor as child support collection agent is subject to role conflicts and temptations which may result in abuses of power at the local level.[112] The question of how to provide counsel to a large volume of indigent paternity defendants remains unclear as the Reagan administration moves to dismantle the Legal Services Organization,[113] the ABA points to the impracticality of lawyers absorbing all indigent work pro bono,[114] and the Of-

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[111] *See* appendix to this Note.

[112] *See* Lee, *District Attorney Collection of Child Support: The Need for Reform*, 55 CAL. ST. B.J. 156 (1980).

[113] Editorial Opinion & Comment, 68 A.B.A.J. 236 (1982).

[114] *Id.*

fice of Child Support Enforcement (OCSE) stoutly resists charging the costs of defense counsel to the program[115] (although as previously noted, reimbursement is available to the states for 75% of the costs of providing blood tests).

The resistance of OCSE to charging the costs of defense counsel to the Child Support Enforcement Program might be seen as an effort to preserve a favorable cost-benefit ratio. An assessment of the program in the journal of American Public Welfare Association has praised its cost effectiveness, noting that the program nationwide brings in $3.27 for every dollar it expends in administrative costs.[116]

This measure is deficient in two respects. First, it gives the Child Support Enforcement Program credit for bringing in all of the support collections which are funneled through the system. In fact, a significant percentage of the support money paid in would have been paid whether or not the program existed. Prior to the program, support payments on behalf of children on AFDC were less than they might have been but they were not non-existent. Many fathers of AFDC children did regularly make support payments. Because these payments were assigned to the state, they all now pass through the Child Support Enforcement Program accounting process and are treated as if generated by the enforcement efforts of the program. It would be more accurate to rely on the amount of increase realized in support

[115] Schutzman Letter, *supra* note 80. Mr. Schutzman states:

> The cost of providing legal representation to indigent paternity defendants is not included in IV-D program expenditures. It is our firm policy that the Federal government should not pay both the costs of prosecuting and defending a paternity suit. Payment of defendants' legal fees has never been considered by OCSE to be an expenditure for the *establishment* of paternity.
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> We recognize that a few States require as a matter of due process that indigent paternity defendants be entitled to court-appointed counsel. . . . Payment of fees, however, must be borne by the State or local jurisdiction and not by the IV-D agency (emphasis in original).

[116] Schossler, *An Assessment of IV-D's First Four Years*, PUB. WELFARE, Fall 1979, at 22. However, a companion article, Cassetty, *Program Conflicts and Human Considerations*, *id.* at 33, was critical of the program. Neither article represented the official view of the American Public Welfare Association.

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The present favorable cost-benefit ratio may also be seriously impaired if, following *Little*, many more indigent defendants begin to insist on blood tests, particularly the highly accurate though expensive HLA test.[117] Adding the cost of defense counsel to mushrooming blood testing expenses while at the same time trimming the number of collections credited to program efforts could conceivably result in an unfavorable cost-benefit ratio. Yet, such an accounting system seems the best way to gain a true picture of the costs of the program. The price of due process should not be externalized.

In the view of this author, the program should not be scuttled even if a marginally unfavorable cost-benefit ratio were to emerge. The program yields benefits which cannot be quantified. It reinforces socially essential attitudes toward parental responsibility. It counters a casual attitude toward imposing dependency on the state. Even the most socialistic societies must elicit from their citizens an irreduceable minimum of self-responsibility. Requiring a father, in so far as possible, to help support his offspring and requiring a mother, except in extraordinary circumstances,

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[117] The Deputy Director of the Office of Child Support Enforcement recently wrote: "OCSE generally endorses the use of serologic testing to increase the accuracy of paternity determination. . . . We anticipate that serologic testing will be used more extensively as State legislatures and courts recognize the value of inclusionary blood test reports for the determination of paternity." Schutzman Letter, *supra* note 80. Mr. Schutzman further stated OCSE was unaware of any study estimating the total cost of providing legal representation and/or serologic testing to indigent paternity defendants in Child Support Enforcement Program related suits. *Id.* A footnote in Little v. Streater refers to a 1977 study by the Office of Child Support Enforcement which found an average cost of $245.00 for a battery of tests leading to a minimum exclusion rate of 80%. The costs for the tests successfully sought by the putative father in *Little* had risen to $460.00 by the time of the decision. 101 S. Ct. at 2210 n.10. This cost for blood testing alone contrasts sharply with the meager $2.00 per month the putative father was ordered to pay by the trial court. 101 S. Ct. at 2205.

to cooperate in obtaining support is not repression; it is the self-defense of society.[118]

STEVEN M. FLEECE

Appendix
Administration of The Good Cause Exceptions to Requirement of Cooperation in Establishing Paternity And Obtaining Support.

	Average AFDC Caseload FY1980[1]	Number Of AFDC Cases In Which Custodial Parent Refused To Cooperate[2]	Number Of Refusals As Percent Of Avg. Caseload	Number Of Cases In Which Good Cause Found[3]	Number Of Cases In Which Good Cause Was Found As Percent Of Number of Refusals
Alabama	76,512	1,500	1.96%	157	10%
Alaska	14,818	20	13%	5	25%

[118] For a more comprehensive review of the Child Support Enforcement Program, *see* H. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE (1981), reviewed elsewhere in this issue. *See also* Krause, *Child Support Enforcement: Legislative Tasks for the Early 1980s*, 15 FAM. L.Q. 349 (1982).

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Alabama	76,512	1,500	1.96%	157	10%
Alaska	14,818	20	.13%	5	25%
Arizona	3,917	315	8.00%	*	*
Arkansas	42,295	20	.05%	16	80%
California	850,077	673	.08%	249	37%
Colorado	59,950	69	.11%	23	33%
Connecticut	30,821	*	*	*	*
Delaware	9,527	1,449	15.00%	*	*
Dist. of Columbia	47,236	1,843	.04%	18	1%
Florida	176,612	*	*	46	*
Georgia	108,152	*	*	0	*
Guam	1,614	4	.00%	3	75%
Hawaii	23,005	*	*	*	*
Idaho	15,947	30	.00%	6	20%
Illinois	153,215	14,945	.10%	*	*
Indiana	107,057	63	.00%	20	32%
Iowa	42,744	*	*	*	*
Kansas	81,772	325	.00%	21	6%
Kentucky	117,465	209	.00%	65	31%
Louisiana	56,906	150	.00%	*	*
Maine	21,519	*	*	*	*
Maryland	113,671	298	.00%	22	7%

		*	*	*	*	*	*	*	*
Massachusetts	48,558	*	*	*	*	*	*	*	8%
Michigan	303,776	3,135	.01%	258	258	0	0	0	11%
Minnesota	61,655	2,554	.04%	274	274	0	0	0	28%
Mississippi	12,037	35	.00%	10	10	0	0	0	2%
Missouri	88,404	5,259	.06%	112	112	0	0	0	37%
Montana	19,515	186	.01%	66	66	0	0	0	104%
Nebraska	13,593	24	.00%	25	25	0	0	0	312%
Nevada	11,720	16	.00%	50	50	0	0	0	*
New Hampshire	4,190	*	*	*	*	*	*	*	*
New Jersey	213,516	1,174	.00%	111	111	0	0	0	9%
New Mexico	56,334	*	*	*	*	*	*	*	*
New York	484,944	*	*	*	*	*	*	*	*
North Carolina	83,286	772	.01%	31	31	0	0	0	4%
North Dakota	9,727	221	.02%	54	54	0	0	0	24%
Ohio	241,947	295	.00%	152	152	0	0	0	51%
Oklahoma	34,795	37	.00%	42	42	0	0	0	113%
Oregon	15,593	135	.01%	*	*	*	*	*	*
Pennsylvania	110,432	2,810	.02%	228	228	0	0	0	8%
Puerto Rico	42,149	*	*	*	*	*	*	*	*
Rhode Island	15,644	0	.00%	0	0	0	0	0	*
South Carolina	16,614	561	.03%	43	43	0	0	0	8%
South Dakota	19,468	25	.00%	5	5	0	0	0	20%
Tennessee	95,914	303	.00%	208	208	0	0	0	67%
Texas	120,481	86	.00%	62	62	0	0	0	72%
Utah	27,587	41	.00%	41	41	0	0	0	100%
Vermont	8,721	*	*	21	21	0	0	0	*
Virgin Islands	1,589	1	.00%	0	0	0	0	0	0%
Virginia	61,281	922	.02%	49	49	0	0	0	5%
Washington	62,106	*	*	*	*	*	*	*	*
West Virginia	40,596	379	.01%	282	282	0	0	0	74%
Wisconsin	110,112	192	.00%	61	61	0	0	0	32%
Wyoming	8,623	44	.02%	1	1	0	0	0	2%

*Information not reported or could not be compiled

NINE MONTH
AND THE PRE

I.

Female prisoners
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of a serious nature.[3] T
the number of females

Presently the size
the allocation of mone
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lack of financial supp
block, and as an excu
The feeling among pri
not afford programs f
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This attitude refl
trends in prisons toc
aimed at women as p
men.[6] In particular, fe

[1] In 1973 less than 6000
prisons were women. Note, *Th*
LJ. 1229, 1231 (1973).

[2] The ratio of men's arre
dropped to 6:1. Price, *The For*
102 (1977).

[3] Fabian, *Toward the Be*
Working!, 6 New Eng. J. Pris

[4] Note, *Women's Prisons:*
210, 219.

[5] *Id.* at 219 n.68.

[6] Note, *Female Offenders*

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A REVIEW OF SOME PROPOSED MEASURES FOR THE IMPROVEMENT OF CHILD SUPPORT DELIVERY

by Lynn Nakamoto, Charlotte Owens-Wise and Laurie Woods

(This article is the conclusion of "Child Support—A National Disgrace" which appeared in the September issue of this newsletter)

RECENT FEDERAL PROPOSALS

During 1983 several bills concerned with various aspects of child support have been submitted for Congressional consideration: The Child Support Tax Act S 1398 (Sen. Wallop); HR 1014 (Rep. Biaggi), to create a National Commission on improved child support; Child Support Enforcement Amendments of 1983, HR 3546 (Rep. Conable); The Economic Equity Act, (HR 2090 and S 888) and related bills in the house such as the Child Support Enforcement Improvement Act, HR 2374 (Rep. Kennelly) and HR 2411 (Rep. Schroeder); The National Child Support Enforcement Act, HR 3354 (Rep. Roukema); and the Child Support Enforcement Act of 1983, HR 3545 (Rep. Campbell).

HR 1014 would create a bipartisan national commission to study ways of improving federal and state efforts to enforce support obligations. The commission would study the factors currently impeding effective support enforcement; it would examine the feasibility of establishing a nationally applicable formula for assessing the amount of child support to be ordered; and would consider the feasibility of a federal wage-deduction system. (Several states have recently established such commissions.)[1]

The Kennelly initiative and Title V of the proposed Economic Equity Act contain several provisions relating to child support: The bills propose that each state must 1) have a clearinghouse through which payments are made and forwarded; 2) provide for mandatory wage withholding of past-due support; 3) provide for state withholding of state tax refunds; 4) develop administrative procedures for determining paternity and establishing and collecting child support; 5) seek medical support for children; and 6) impose property liens. States must also establish three of the following: 1) The requirement of security from absent parents with a pattern of past-due support; 2) a procedure to continue paternity determination even if alleged father refuses to participate; 3) voluntary wage assignments; 4) the use of new, highly accurate paternity tests; and 5) an objective standard measuring the amount of support needed and the ability of the absent parent to pay. The principle behind this standard for determining support amounts is disadvantageous to the custodial parent, as will be explained later. The bill would also clarify Congress' intent to secure child support enforcement for non-AFDC cases as well as AFDC cases.

The Child Support Tax Act (S 1398), introduced by Senator Wallop, would replace the present support collection efforts with a new system of child support benefits payable on behalf of all children with legally liable absent parents and a child support tax payable by absent parents and collected through a procedure similar to the income tax withholding system. The new child support tax would provide that a pre-determined percentage of the income of the absent parent be paid for child support. This amount, adjusted for the number of children to be supported, would be assessed against the supporter's wages. Under the Wallop bill, any child with one or more absent parents liable for his or her support would be able to apply for a child support benefit from the federal government. This benefit would be paid only up to the amount of tax collected from the absent parent.[2] Such a system

(Cont'd on p. 2)

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[1] E.g. New York, Temporary Commission to Recodify the Family Court Act and California's Commission on Child Support Development and Enforcement. 9 FLR, May 17, 1983.

[2] A similar proposal is suggested by Prof. Judith Cassetty in *Child Support and Public Policy: Securing Support from Absent Fathers*.

A REVIEW OF SOME PROPOSED MEASURES FOR THE IMPROVEMENT OF CHILD SUPPORT DELIVERY

(Cont'd from p. 1)

would eliminate the inequities and uncertainties existing under the present system of case by case determination of child support.

HR 3354 (Roukema) requires all states to impose automatic mandatory wage withholding, without waiting for a delinquency to occur. The provisions in the other bills require withholding only after default. However, the bill does not provide for collection from non-wage earners.

HR 3546 (Conable) is the Administration's bill. It would require states to implement mandatory wage withholding laws (either immediately as the support order becomes effective or automatically with the accumulation of two months' arrearages), to put in place quasi-judicial or administrative procedures for establishing support, and direct states with a state income tax to develop a refund intercept for past due support. There is no authority for a federal income tax intercept in this bill. Finally, the bill would create a system of incentives which would be distributed in the form of bonuses to reward states for collecting support from both non-AFDC and AFDC families. A $200 million fund would be established through the reduction of the federal payment of administrative costs from 70% to 60%, and by instituting two fees for enforcement services. In addition to providing financial incentives, HR 3546 would also encourage states to focus their energies on improving collection rates by creating a graduated penalty scale instead of the current 5% fixed penalty provision to punish those states which are lax in their collection efforts.

HR 3545 (Campbell) contains provisions on state wage withholding after default, state *and* federal income tax refund intercept, and property liens. It proposes another four-part incentive plan for federal reimbursement to the states. The bill requires states to report outstanding past due support obligations to consumer credit agencies. Absent parents would have to pay arrearages to clear their credit rating.

The Kennelly, Campbell, and Conable proposals provide grants to states to computerize their systems. However, only Rep. Kennelly's bill requires the establishment of state clearinghouses to monitor payments and automatically trigger enforcement mechanisms.

HR 2411 and Title V of the Economic Equity Act would create automatic assignment of federal civilian employee's wages when child support is ordered, modified or enforced by states.

Of the bills mentioned above, only Senator Wallop's bill seeks fundamental reforms, and even his bill may not provide the best answers to the problems of child support. The other bills would merely increase federal direction of state efforts, but would leave enforcement to the 50 states with their widely varying interpretations of their responsibilities. It is important that we address the child support problem on a national basis. Fundamental changes in our approach are needed if we are to achieve a fair and enforceable child support system that will protect the rights and well-being of America's children.

There are many other new and innovative proposals for dealing with the problem of child support currently being discussed by policy makers. These include the proposal for proportionate income sharing rather than the present system of cost sharing as the basis for apportioning child support, cost of living adjustments in child support awards, and a floating federal wage garnishment or withholding system.

AUTOMATIC COST OF LIVING ADJUSTMENT SHOULD BE ENACTED

The introduction of automatic cost-of-living increases (COLA's or "escalation clauses") in child support awards would protect these awards from the erosive effects of inflation. It has also been suggested that there should be automatic increases in the awards as the children get older to meet the increased costs of raising older children. Without such automatic escalation clauses, the burden for securing modification of support awards rests with the recipient parent (usually the mother) who must return to court on behalf of the child and petition for modification based on "changed circumstances." A claim of "changed circumstances" should put her in a favorable position for winning modification, but some courts have held that inflation alone is not sufficient evidence for claiming "changed circumstances." The present modification process involves many other difficulties for the recipient mother. Many such mothers lack funds to pay for legal expenses, cannot lose time from work to go to court, or find the emotional costs of returning to court too severe. Some mothers justifiably fear retaliation by the non-custodial parent if they initiate upward modification proceedings. Ironical as it may seem, such retaliation has taken the form of

IN THIS ISSUE

withholding child support or requesting custody not because it was really wanted but solely as a weapon to force the mother to lower her financial demands. The custodial mother is thus left with two equally unsatisfactory alternatives. Either she must absorb the impact of the deteriorating purchasing power of the initial award, or she must incur substantial delays, distress and legal expenses with the attendant risk of loss of custody. A cost of living escalation clause would not infringe upon either parent's right to petition for modification on a showing of "changed circumstances." However, in cases of "unchanged circumstances" (based on inflation) it would shift to the paying parent the burden of proving inability to pay cost of living increases when these are due rather than having it the responsibility of the custodial parent to initiate legal action to secure cost of living increases.

Since modification proceedings and automatic escalation clauses seek the same result, i.e., increasing child support to conform with the growing needs of children, the adoption of automatic escalation clauses as the means to that end would promote judicial economy, eliminate the need to incur additional legal expenses, and would result in more timely increases.

Similar cost-of-living increases in labor contracts, leases, and other private sector agreements are considered an efficient means of mitigating the effects of inflation and assuring economic stability to the parties concerned. Automatic escalation clauses in child support orders would help to assure economic stability to women and children by objectively and realistically measuring and responding to their ongoing and increasing needs.

NEW STANDARDS FOR SETTING AWARDS NEEDED

The standards that are in use for the amount of support to be awarded are, at present, unfavorable to custodial mothers because they are based on the minimal amount on which they and their children can subsist. Almost all courts employ some kind of cost-sharing system which attempts to compute the minimum costs of rearing the particular children in question and allocates these costs between the parents.

Most courts use a simple cost-division system, basing awards on information supplied by parents about the net earnings of each parent.[4] The judge usually uses this information to calculate a figure said to represent a reasonable share of child support expenses for the particular father to pay, considering the father's salary. But unofficially, many judges adopt a "cap" on child support amounts, above which they almost never go.[5]

In some jurisdictions tables have been adopted setting specific award amounts based on a limited percentage of the father's income and the "cost." Although unstated, such a system necessarily assigns a fixed cost to the care of the child or children and does not deal with the amount of money that will actually be needed since that sum is not known at the time the award is fixed. The burden is then placed on the mother to supply the difference between the estimated and actual costs. This unfair financial burden on the mother is omitted from the award question as it is currently figured. This present system does, however, provide predictable awards and this predictability decreases the need for litigation.

There is no universally acceptable standard for establishing the cost of rearing a child. The cost of child rearing cannot be determined except by reference to the economic status of the parents. The setting of a more uniform formula for the cost of child rearing might eliminate gross discrepancies among cases, but for the measures stated above would not be equitable as between custodial mothers and fathers. A more equitable system in this regard would be the application of an income-sharing or equalization principle, which would seek to equalize the financial burden so that each family member would experience roughly the same proportional change in living standards.[6]

For further information on child support and child support enforcement, including the legislation discussed above, please request NCOWFL's Child Support Resource List which lists materials on the subject available from NCOWFL and other resource organizations. ■

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[4] Cassetty, Emerging Issues in Child Support Policy and Practice *The Parental Child-Support Obligation*, Research, Practice & Policy 3, 1983

[5] Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards, 28 *U.C.L.A. Law Review*; Yee, What Really Happens in Child Support Cases: An Empirical Study of the Establishment and Enforcement of Child Support Orders in the Denver District Courts, 57 *Denver L.J.* 21 (1979) at p. 6

[6] Hunter, N., Child Support Law & Policy: The Systematic Imposition of Costs on Women, *Harvard Women's Law Journal Vol. 6 No. 1, 1983 pp 9-13, reviewed in The Women's Advocate* Vol. IV No. 3, July 1983, p. 1

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Editor: Ellen Max

SHENANDOAH WOMEN'S CENTER AND WEST VIRGINIA LEGAL SERVICES PLAN, INC. WIN A SIGNIFICANT VICTORY

by William T. Wertman, Jr., Managing Attorney
West Virginia Legal Services Plan, Inc.

An intense legal battle involving the Shenandoah Women's Center (SWC), in Martinsburg, West Virginia, is nearing an end as a result of a federal judge's dismissal on July 6, 1983, of the $10,000,000.00 lawsuit against the Center. The problems which led to the abbreviated suit began when the SWC, a shelter and counseling center for abused spouses, sheltered a woman and her two children in October 1982, after she had been abused by her husband.

Gene Bennett, the husband, a prominent local realtor, discovered that his wife was being sheltered at the SWC. Thereafter, according to SWC affidavits, he repeatedly phoned the Center, sometimes monopolizing incoming phone lines; he trespassed on SWC property; and he threatened the lives of Center workers and volunteers.

A disturbing incident occurred when Mr. Bennett first called the Center. A new volunteer worker, who later was named as a defendant in the case, answered Bennett's call. He threatened to come to the SWC with a shotgun to kill her and then kill himself. This bizarre dialogue lasted for nearly an hour.

According to the volunteer, shortly afterward, Bennett called again. After the volunteer had successfully arranged to include a Mental Health Center representative in the conversation, Bennett fired two shots, leaving the impression that he had committed suicide. A police officer went to the scene and found that Bennett had not shot himself. This incident provided the setting for the ensuing lawsuit.

In the meantime Mrs. Bennett obtained a protective order under the West Virginia Prevention of Domestic Violence Act, yet Mr. Bennett persisted in harassing her. His actions resulted in at least two criminal warrants being brought against him and his wife twice charged him with violation of the Prevention of Domestic Violence Act Order.

The staff was afraid that Mr. Bennett might become violent and his activites were notably hampering their ability to function. The Center therefore contacted the West Virginia Legal Services Plan, which sought an injunction on their behalf against Gene Bennett. When the local Circuit Court refused to hear the action, the injunction was presented to the West Virginia Supreme Court of Appeals which granted it, enjoining Bennett from harassing the Center, its employees, volunteers, and clients, and from otherwise impeding the Center's efforts to offer and provide services to those in needs of its services. That injunction remains in effect.

While the Center was pursuing the injunction, Gene Bennett initiated his lawsuit against the SWC, three of its employees, and one of its volunteers; the County Board of Education and one of its employees; the City Police Department and three of its officers; as well as the United Way and the State of West Virginia, seeking $10,000,000.00 against each defendant. The focuses of his complaint were his claims that the defendants had discriminated against him on the basis of his sex and had conspired to deprive him of his right to associate freely with his wife and children. His claims also included pendent state claims of false arrest, malicious prosecution, assault and battery, negligence, defamation of character, intentional infliction of emotional distress, and harassment.

The Center sought to strike the complaint on the basis that Bennett's claims were flagrantly impertinent, scandalous and false. They also moved to dismiss the case *in toto* based on the Court's lack of jurisdiction and the plaintiff's failure to state a constitutional claim.

Numerous motions followed, including a motion by Bennett's counsel to stay the proceeding or to disqualify myself and the West Virginia Legal Services Plan from representing the SWC. The motion was based on a complaint plaintiff's counsel had filed with the Legal Services Corporation, claiming that the SWC, as well as its employees and volunteers, were not eligible for Legal Services representation. The complaint failed to state any basis for this conclusion.

In the meantime, on behalf of the Center, we pursued efforts to obtain discovery from the plaintiff, some of which were resisted until plaintiff was compelled by the Court to provide the discovery requested.

The next major development involved an effort by Bennett's attorney to amend the complaint to include as other plaintiffs, Linda Miller, a woman who had been sheltered at the Center, and her husband, David Miller. We obtained the information which confirmed that Linda Miller had been abused repeatedly by her husband and was now being coerced by him to participate in the action.

Thereafter, Linda Miller apparently returned to her husband and informed him of her conversation with us. As a result, Bennett's attorney brought a Motion for Injunction and Admonition against myself and Dana Dales, a counselor at the Center, claiming we had threatened and coerced Linda Miller to prevent her from participating in the lawsuit. In the motion Bennett sought sanctions against Ms. Dales and

PLEASE SEND BACK THIS QUESTIONNAIRE ON POLICY SETTING FOR NCOWFL

Each year NCOWFL engages in a priority-setting process to determine what issues or areas of concern we will address. We are now beginning the priority setting process for 1984. We encourage your input into this process. Please complete the form below. Then fold the form below in thirds, staple it closed and stamp and mail it to us. We will tabulate the responses and the Board of Directors of NCOWFL will use the results in its decision making.

Name _____

Title (if any) _____

Program/Organization/Employer (if any) _____

Address _____ City _____

State _____ Zip _____

Telephone ( ) _____
area code number

Is your program funded by LSC? ☐ yes ☐ no

Are you eligible for Legal Services? ☐ yes ☐ no

What part of your overall caseload/program is family law issues?

___ Substantial ___ Moderate ___ Small

Please indicate and rate which family law issues you or your office are most active on. Give a #1 (one) to the issues in which the office maintains a heavy involvement; #2 (two) to those in which the involvement is moderate; and, a #3 (three) to those which arise occasionally.

_____ Adoption

_____ Battered Women Impact Litigation

_____ Battered Women Individual Advocacy

_____ Child Support/Enforcement

_____ Child Care

_____ Discrimination Against Single Mothers

_____ Displaced Homemakers, Alimony, Wife Support

_____ Divorce/Division of Property

_____ Illegitimacy/Paternity

_____ Intra Family Custody

_____ Names

_____ Pregnancy and Parental Rights in Employment

_____ Rape, Marital Rape, Incest

_____ Women in Prisons

_____ Other _____

Please list in priority order the issues which you believe NCOWFL should emphasize in the coming year.

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

Please indicate and rate the ways in which NCOWFL can be most helpful to your program over the next year. Give a #1 (one) to the services which would be most beneficial, a #2 (two) to those moderately useful and a #3 (three) to those desirable, but only occasionally useful.

_____ Technical Assistance on Special Cases or Issues

_____ Substantial Support on Impact Litigation (co-counsel, amicus)

_____ Training Manuals

_____ Updates on Priority Issues

_____ Networking/Coalition Building

_____ Consultation on Legal Strategies

_____ Back-up/Consultation on Impact Litigation

_____ Training on Family Law Strategies

_____ Training Sessions on Family Law

_____ Issues Articles/Papers

_____ Other (please specify as your input is helpful)

_____

Do you have a family law specialist (s) in your organization? If yes, please give name and address _____

_____

Does your state have a family law task force coordinator? If so, please give name and address _____

_____

What other networks and coalitions active on family law issues are you tied into? _____

_____

What special conditions in the communities serviced by your office/project are making an impact on your work?

_____

→

including a monetary award of 000,000.00 and disqualification of myself from ...ner representating any of the defendants.

...rder to confirm to the Court's satisfaction that ...nda Miller was indeed an unwilling participant in ...orts to include her as a plaintiff, we deposed two ...ounselors of CASA, a counselling organization in ...agerstown, Md., which had also assisted Ms. Miller. They testified under oath that Linda Miller had informed them before contacting Ms. Dales or myself, that she had been beaten and was not a willing party to any legal action against the Center.

In the meantime Bennett attacked the SWC in the media. In June he held a press conference in which he accused the SWC of harassing him and of discriminating against him on the basis of his sex, and made various other extreme and false charges. Bennett noted at the press conference that the case might be pursued as a class action on behalf of men and "brainwashed women."

There being numerous motions pending before the Court, most of which had not been heard or ruled upon, the presiding Judge, Robert Maxwell of the U.S. District Court for the Northern District of W.Va., scheduled pending motions to dismiss for hearing on July 6th. On that date, he heard oral arguments of counsel for nearly three hours, after which time he ruled from the bench in favor of all defendants and orcered that the action be dismissed, referring to the insubstantial nature of Bennett's case.

With respect to the SWC and the defendants associated with it, the Court noted, *inter alia:* Bennett's wife apparently left him willingly and under a state court Prevention of Domestic Violence Act order to which a presumption of propriety attaches; since Bennett failed to allege any substantial constitutional claim, the court is without subject matter jurisdiction; Bennett failed to allege a link of defendants with state action and deprivation of his constitutional rights sufficient to allow him to proceed under 42 U.S.C. §1983; the fact that a minority percentage of the Center's funds comes from the state is insufficient alone to establish state action. Bennett's complaint is a collection of legal conclusions insufficient to establish a deprivation of any constitutional right; Bennett failed to allege that the Center refused him services or that he ever sought them; Bennett failed to allege the necessary elements of a conspiracy claim under 42 U.S.C. §1985, nor read in a light most favorable to Bennett can his complaint be read to allege conspiracy.

The Court then took up the matter of imposing sanctions, including attorney's fees, against litigants and their attorneys who act in bad faith. Judge Maxwell noted that prevailing defendants may be entitled to attorney's fees as well as costs and that this action may be an instance of abuse of civil process in which the court has a responsibility to impose sanctions.

The Court accordingly directed counsel for all defendants to submit a statement of their costs and attorney's fees, accompanied by a memorandum regarding the propriety of imposing sanctions against Bennett and his attorney. The Court closed by emphasizing that there is a "tremendous amount of frivolous and insubstantial litigation being filed" which is "choking the court system."

The SWC is seeking an order requiring Bennett to give security for costs and attorney's fees, which are calculated to be in excess of $15,000. The motion is necessary because Bennett has moved to Florida and has disposed of his locally owned property.

After the ruling of dismissal, Bennett's attorney moved for reconsideration of the ruling and (for the third time) for leave to file an amended complaint. That motion has been denied. Bennett's attorney also moved to withdraw as counsel; that motion has been denied.

Despite this significant victory, final resolution remains elusive, and the Center is working hard to rebound from the adverse impact of the litigation and the unwelcome publicity surrounding it, which has resulted in a drop in funding contributions.

Since dismissal of the case, Mr. Bennett has filed notice of his intent to appeal. The appeal was docketed by the Fourth Circuit Court of Appeals on August 17th. Mr. Bennett has contacted yet another attorney to represent him in the appeal.

Despite the Court's forceful ruling in favor of the defendants, Bennett shows little sign of conceding defeat. He has filed a complaint against the Center with the West Virginia Human Rights Commission based on alleged sex discrimination; he has called for an IRS investigation into the Center's nonprofit tax status; and he has reportedly stated his intention to write a book about the "Martinsburg conspiracy" against him.

Though none of these approaches is likely to succeed, the conflict is not yet over. It is hoped that the Center's success will be the subject of a future article in this newsletter. ■

The writer of this article wishes to thank the National Center on Women and Family Law and Ilene Klein, Esq., of Fairmont, West Virginia for their suggestions and encouragement during the course of the litigation. The pleadings are available from Clearinghouse, No. 35,035.

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BOOKS, PERIODICALS AND ARTICLES OF INTEREST TO WOMEN'S ADVOCATES

Law and Inequality: A Journal of Theory and Practice, Volume I, Number 1, June, 1983. University of Minnesota Law School, 229 19th Avenue South, Minneapolis, Minnesota 55455. Subscription Price: $6.00.

This new law journal to be published twice yearly by law students of the University of Minnesota has taken as its focus the subject of inequality as it is dealt with in legal theory and practice as well as its manifestations in the society at large. The editors felt that existing journalistic formats did not permit analyzing the subject in sufficient depth and scope and therefore have adopted a more broadly based approach which will add to legal writing experiential, literary and community based articles by lawyers and non-lawyers, scholars, organizers, and writers from a variety of disciplines.

Each issue of **Law & Inequality** will concentrate on a single aspect of the problem. Volume I, Number 1 is devoted to gender inequality and contains a thorough retrospective on the fight for E.R.A. with suggestions for future new directions for women's struggle for equality, an economic analysis of the earning gap between men and women which is attributed more to the exclusion of women from many male dominated occupations than to unequal pay within the same occupation, and analysis of abortion policy and law as it relates to forced sex.

The Parental Child-Support Obligation, Edited by Judith Cassetty. Published by Lexington Books, D.C. Heath and Company, Lexington, MA. 300 pp. Price: $28.95.

Twenty percent of all the children in the United States have absent parents from whom they are entitled to financial support.[1] Due to now widely recognized inequities, inefficiencies, and defaults in our current child support enforcement systems, many of these children will suffer economic hardship (often unnecessary) and/or impoverishment.

Judith Cassetty's **The Parental Child-Support Obligation** is one of the first comprehensive interdisciplinary efforts to identify the fundamental problems relating to child support, present a variety of views about them, and outline corrective remedies.

Some of the issues under scrutiny include the standards to be used for setting child support (cost-sharing or income-sharing); the liability for child support (parental obligation and the role of the public sector); undersupport; inequities in amounts set based on varying attitudes of local judges, district attorneys, and welfare officials; minimum standards and the danger that they will become the norm; the rights of a first family and a family of re-marriage; the development of normative standards and the setting of appropriate levels of support.

Of particular interest is the chapter devoted to a plan developed in Wisconsin by the Institute for Research on Poverty (under contract with the Wisconsin Department of Health and Human Services). This plan proposes a tax-withholding system through wage deductions by employers on the earnings of all parents under court orders of support. The Wisconsin proposal has the triple advantages of establishing parental responsibility, providing machinery for collecting parental support, and providing funds from the public sector in cases where parental collections are not sufficient to meet state standards for child support.

Responsibility for the administration of the child support withholding tax would be shifted from the courts to the Wisconsin Department of Health and Human Services (the State IV-D agency). Supplementation of income up to the minimum stipulated would come from general revenues that might otherwise have had to be spent on welfare. Thus the necessity to be on welfare would be avoided and a woman head-of-household, working even part-time, could have a higher income than she would receive on welfare where outside earnings are penalized. Although the Wisconsin plan has many positive features including adjustments to growth in the economy (GNP), it also contains arguable features which space forbids discussing here. All in all, the Wisconsin model, while not perfect, offers a good basis for further planning and action.

Another alternative to our present inadequate approach to child support is a proposal from Harold W. Watts, a widely experienced economist now at Columbia University, who puts forward a Child Support Insurance plan. He suggests that a commission be established to study the status of children in single-parent households and to set appropriate support levels for them consistent with prevailing standards in our society. These standards are to be periodically reviewed and updated. Where there is a shortfall between the prescribed standard

[1] Child Support and Alimony: 1978 (Advance Report), Bureau of Census, Table 1.

[2] The Parental Child Support Obligation, Judith Cassetty, p. 261.

(Cont'd. on p. 7)

[illegible] the amount actually received by the child, the child could collect insurance to cover 80% of the basic standard.

The plan also suggests changes in the income tax form so that it includes a listing of all minor children and information on how their support needs are met. There would be a schedule of penalty taxes and surtaxes for default of parental obligations, audited like other income tax information. Collections of defaulted obligations would go into the insurance fund which would be further supported from general revenues. Benefit payments would be taxable to the custodial parent.

Our present unsatisfactory voluntary system for providing for the many children in single parent households is plagued by serious problems of parental irresponsibility regarding support, gross inequities in payment amounts, inadequate enforcement of court orders of support, and unrealistically low support awards. *The Parental Child-Support Obligation* provides theory, statistical analysis and a variety of suggestions for solving many of these problems.

Your Children Should Know: Teach Your Children the Strategies That Will Keep Them Safe from Assault and Crime, by Flora Colao and Tamar Hosansky. Bobbs Merrill Co., Inc., 4300 West 62nd Street, P.O. Box 7083, Indianapolis, Indiana 46206, 265 pp. Price: $16.95.

This book is a guide to teaching personal safety to kids. It teaches parents how to talk with children about their personal safety. The authors show parents how to explain the situations in words children can understand. The book corrects the stereotypes that the perpetrator will always be a stranger, that the attempt will occur in an isolated place and that there will be overt violence. The authors teach the parents to encourage children to develop a sense of physical integrity and privacy, such as letting them say no to any unwanted physical affection, even a kiss from grandma. It is also an assertiveness training manual that empowers a child to pinpoint and avert manipulative behavior. Children learn how and when to say no to danger by practicing verbal exercises that equip them with ready responses designed to throw off a perpetrator. The authors are organizers of SAFE (Safety and Fitness Exchange), a New York City program which is a model children's awareness program. ■

BETTER POLICE TECHNIQUES FOR HANDLING BATTERY CALLS ARE BEING WON THROUGH LITIGATION AND NEGOTIATED EFFORTS

A VICTORY FOR BATTERED WOMEN IN DOE V. CITY OF BELLEVILLE

A settlement decree in *Doe v. Belleville* in favor of the women plaintiffs and on behalf of the class of women residents of East St. Louis, Illinois, has been approved by the United State District Court, Southern District of Illinois.

The plaintiffs had charged that the Belleville and East St. Louis Police Departments discriminated against women by not intervening or by responding with delay to domestic violence calls and by advising a "cooling off" period before making complaints. While not admitting to the allegations of the complaint, the defendants agreed that it was "in the public interest and in the interest of the orderly and effective administration of justice" that the police will immediately respond to requests for assistance from victims of domestic violence, that they will advise women that they can file a complaint without a waiting period and that police officers shall not refrain from making arrests based on the relationship of the victim and the accuser.

Nancy Molland of the Land of Lincoln Legal Assistance Foundation represented the women. The suit was filed two years ago after discussions with the defendants proved fruitless. Copies of the consent decree are available from Clearinghouse, Number 31,780.

IMPROVEMENTS IN POLICE PROCEDURES WON IN A COLORADO BATTERY SETTLEMENT

After the refusal by the police in a small Colorado city to arrest the batterer/husband of one of their clients, the Colorado Rural Legal Services, Inc. (CRLS) was successful in negotiating a new set of procedures with the Police Department of Alamosa which will result in better protection of the rights and safety of battered women. In addition, CRLS won a settlement of $5,000 to be paid by the city to their client.

The 16-point policy agreement with the Alamosa Police Department was negotiated by Alice Price of the CRLS Women's Law Project, with assistance from Pete Peters, an attorney formerly with CRLS. The agreement provides that there shall be no policy of "arrest avoidance"; that domestic violence shall be treated as a crime, not merely as a civil matter; that abusers shall be removed from the premises; that officers shall arrest if probable cause exists whether or not they saw the offense committed; and that officers shall assist victims to temporary out-of-home shelters.

Copies of this agreement are available from NCOWFL. ■

PRIORITY SETTING PROCESS: PLEASE HELP US IDENTIFY PRIORITIES

Each year the National Center on Women and Family Law redetermines our subtstantive and service priorities. Our priorities are based on what legal services staff, poor women, and attorneys and advocates for poor women indicate are your needs. Because of our limited funding we can't possibly meet all the substantive needs, nor can we provide all the services you require. Therefore we must identify the most needed areas and services and focus our attention on them. Our major source of information about your needs is your responses on our annual priority setting questionnaire. The priority setting questionnaire is enclosed in this newsletter. Please take the time to complete and return this form. Any additional thoughts or comments are welcome. ■

NEW PROJECT

The Child Care Law Center, a project of the San Francisco Lawyers' Committee for Urban Affairs, recently initiated the National Child Care Project.

The National Child Care Project will provide legal services, education and policy analysis to the national child care community. The Project will also stimulate *pro bono* attorney involvement in child care legal issues. This Project is funded through a two year grant from the Carnegie Corporation of New York.

Their address is the National Child Care Project, Child Care Law Center, 625 Market Street, Suite 815, San Francisco, CA 94105; (415) 495-5498.

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Thanks to Gender Politics, Federal Child Support Aid Is No Longer a Stepchild

The Reagan Administration is now asking that some of its proposed cuts in the program be restored; even so, states say they will get less federal money.

BY DAN FAGIN

Dity Margaret M. Heckler. As President Reagan's Health and Human Services Secretary since March, she must wrestle with the perhaps unresolvable financial crises of those HHS programs that seem almost cosmic in scope: programs such as medicare, social security and welfare.

It's no wonder then that Heckler has seized upon a relatively minor but highly visible issue, enforcement of child support payments, to make her mark upon the department. Helped by both the growing clout of women voters and the increasing awareness that the enforcement system is ineffective, Heckler is trying to push a bill through a skeptical Congress and a wary Administration that would overhaul the management and financing of the system. But there are alternatives on Capitol Hill, and Heckler's proposal has been drawing fire from Members of Congress and state administrators who complain that there will be less federal money to pay for an expanded program.

In the past, the child support enforcement program has not been a priority item with Congress or the Administration; neither, in fact, have hesitated to cut it in the name of balancing the budget. Last year, concerned about skyrocketing federal costs, $344.3 million in fiscal 1982, up 50 per cent in four years—the Administration proposed a bill that would have changed the aid formula and thus effectively reduce the federal share of state administrative expenses from 75 per cent to approximately 50 per cent. Instead, Congress decided to retain the existing formula but cut the federal share to 70 per cent.

Another major drain on federal child-support spending, a bonus to the states for collecting payments on behalf of families receiving aid under the state-federal program of aid to families with dependent children (AFDC), was also quietly reduced, from 15 per cent to 12 per cent of such collections.

But this year, no one is treating the program as a stepchild. There are four major House-Senate pairs of bills before Congress to strengthen the program, including one offered by the Administration, and there appears to be a consensus to deliver legislation to the President quickly. "There's a lot of pressure on this subcommittee from a lot of groups, including the Administration, to come up with something soon," said an aide to the House Ways and Means Subcommittee on Public Assistance and Unemployment Compensation.

On Sept. 30, the subcommittee appeared ready to approve a compromise proposal drawn up by the subcommittee staff, but was unable to complete its work because of a pending unemployment compensation bill. The staff proposal, drafted with the unofficial participation of HHS, contained elements from all four bills. The compromise, which would retain 70 per cent federal financing, provide state performance incentives and attempt to stiffen enforcement, is expected to be approved by the subcommittee before the end of the month. In the Senate, the Finance Subcommittee on Social Security and Income Maintenance Programs held hearings on Sept. 15 and is planning to mark up the bill this month.

LAGGING PERFORMANCE

Congress and the Administration both agree that the program needs to be changed. "I've been very unhappy with the program," Heckler said in an interview. "Performance has fallen behind promise." But, she added, "I have a sense of relish about this program because it's one that I am delighted to work to perfect. It's just so long overdue and so deserving, and the facts are compelling."

Heckler and others now interested in the issue have based their conclusions upon data that have powerful social and political ramifications. According to a recent Census Bureau report, only 47 per cent of the four million American women who were due child support in 1981 received the full amount they were legally entitled to, and 28 per cent got nothing at all. Meanwhile the real value of support received declined 16 per cent between 1978 and 1981. *(See box, p. 2116.)*

According to Heckler, the failure to receive adequate child support has become an important contributing factor to the broad social phenomenon of the "feminization of poverty" because 96 per cent of the time the mother is the parent owed the support. The system of child support enforcement has taken much of the blame.

Because of the peculiar nature of the present program, middle-class women are especially ill-served. Assignment of child support rights to the state and federal government is a condition of eligibility for benefits under the AFDC program, and in 1975 the government seized the opportunity to increase federal costs by encouraging the states to collect child support for welfare mothers. The federal government had a double incentive for encouraging AFDC collections. Not only would the revenue go directly to the government, the increased income would also push some of the families off of the welfare rolls. The AFDC bonus payment was created to encourage the states to make welfare collections.

The Office of Child Support Enforcement, created in 1975 to administer the new federal financial role in the program, set enforcement standards that the states would have to fulfill to qualify for the AFDC bonus. In practice, however, the

bonus has never been withheld. Consequently, most of the state child support enforcement agencies concentrate on AFDC mothers, while some, especially in the South, virtually ignore non-welfare cases. The result is that under the current system, it is difficult in many states for non-AFDC parents to collect the full support they are owed to them and nearly impossible for mothers to collect payments from a father residing in another state.

Patty Kelly, a divorced mother from Flint, Mich., said that "within two weeks of when my ex-husband stopped paying child support, I was on welfare." Frustrated with her inability to compel him to pay up, she co-founded KINDER, among the largest of the grassroots child support groups springing up across the country, to push for tougher enforcement laws.

Support from the National Organization for Women (NOW), the largest of the national women's advocacy groups, was not forthcoming, however. "NOW has been absolutely not supportive," Kelly said. "They weren't really concerned with the issues that hit us hardest." Other national groups were more interested, Kelly said, but the fact that the issue is more crucial to poorer women and housewives made it unattractive to many of the national groups. Martha Phillips, a member of the minority staff of the Ways and Means Committee, agreed that "in the past, many of the women's groups didn't perceive it as a front-burner issue." But last year, a child support provision was attached to the Economic Equity Act, a package of bills on women's issues, and interest began to grow. Although the measure was not enacted, "We've made it an issue," Kelly said, "and it's something they have to address."

Health and Human Services Secretary Margaret M. Heckler says that many of the state child support enforcement administrators are opposed to the changes she has proposed for altering the way the program is financed because "they're going to be held accountable for their performance in a way they never have been before."

REVISING THE BILL

For an Administration battling to overcome a gender gap, and a Congress increasingly responsive to the agendas of women's groups, a program that appears [illegible] to work to the disadvantage of [illegible] women may have become politically intolerable. The political sensitivity that the issue has now attained can be readily measured by the battle within the Administration to come up with a comprehensive proposal. The Administration originally submitted legislation earlier in the year that would have continued the pattern of deep cuts in federal support. The bill, similar to the proposal the Administration failed to get through Congress last year, would have discontinued federal reimbursement as a percentage of state administrative costs and substituted a new system that would have the effect of lowering federal matching to approximately 50 per cent.

The bill received a chilly reception in Congress, however. Rep. Barber B. Conable Jr. of New York, the senior Republican on the Ways and Means Committee, refused to sponsor it, telling the Administration he would introduce the bill only by request, according to several congressional staff members. Other Republicans also refused to sponsor the bill.

Within the Administration, Heckler and Transportation Secretary Elizabeth H. Dole strongly opposed the proposal, arguing that the new formula would have based the federal matching contribution almost exclusively on how successful the states were at collecting payments for AFDC parents, thus giving states even less of an incentive to enforce non-AFDC collections.

"The proposal was shaped without my involvement, during the tenure of my predecessor, Richard Schweiker," Heckler said. "My greatest concern was to broaden the scope of the bill to include non-AFDC families, and to do so without increasing the cost of the program."

She and Dole had pressed their case with deputy White House chief of staff Michael K. Deaver and others and thought that a consensus had been reached to submit a new financing package. "The first rewrite of the bill occurred at the Cabinet council level," Heckler said. "It still had not gone as far as I wanted, and in the interim I benefited from the visit of the Republican Congresswomen to the President, since this was one of the priorities they established which reinforced my position."

But opposition within the Office of Management and Budget and the child-support office delayed the change, and it was not until July 12, two days before the first scheduled congressional hearing, that a last-minute phone call from Dole to Deaver prompted the drafting of an entirely new financing package. The new bill would retain the present matching formula but cut the federal share from 70 per cent to 60 per cent. It would also set up incentives to reward states for "exemplary performance" and attempt to improve collections of non-AFDC cases by replacing the current 12 per cent incentive fee for collecting payments for AFDC cases and using the $500 million savings to set up an incentive pool to reward states equally for AFDC and non-

Taking Up a Collection

Since 1975, when the federal child-support enforcement program began, the federal financial commitment to the program has rapidly increased, as these statistics from the federal Office of Child Support Enforcement show. While collections have also increased, they have failed to keep pace with rising administrative costs (in thousands of dollars).

	FY 1978	FY 1982	Per cent change
Total child-support collections	$1,046,690.00	$1,771,482.00	+69%
Total administrative expenses	312,339.00	592,368.00	+90
Total child-support collections per dollar of administrative expenses	3.35	2.99	−11

Nor have increasing collections decreased the percentage of women receiving only partial or no child support, according to a recent Census Bureau report (in thousands of people). The same report showed that the average amount of child support actually received declined, in terms of real value, from $2,510 in 1978 to $2,166 in 1981.

	1978	Per cent	1981	Per cent
Women with children under 21 from an absent father	7,094	100%	8,357	100%
Women supposed to receive child support payments	3,424	48.3	4,043	48.2
Women due support who received the full amount	1,675	48.9	1,888	46.7
Women due support who received a partial amount	777	22.7	1,014	25.1
Women who received nothing	971	28.4	1,140	28.2

AFDC collection, at the HHS Secretary's discretion.

Heckler wants to use the $200 million pool to prod the states to improve their programs. She thinks that many states have grown complacent under the present system of guaranteed matching of administrative and AFDC costs. In testimony before the Finance Committee, she noted that seven states collect 75 per cent of non-AFDC funds nationwide and six collect 68 per cent of AFDC savings. Pointing out that "the flow of federal dollars to the states is based on what states spend, not on the results they achieve," Heckler said that the states have no real incentive to improve their performance.

The Administration proposal to cut the guaranteed administrative match has drawn the most fire, but Heckler defends the reduction. "I don't think that the level of funding going from 70 per cent to 50 per cent is at all destroying the program's base. It's certainly modifying it a little," she said, adding that "there has been no correlation between the amount of money that funded a program and the collection of child support."

STATE REACTIONS

Accordingly, most directors of the state programs take a different view. Michael Hanson, director of Nebraska's enforcement program, said a reduction "would have a really severe impact on the states," and Sandra Gilmore, the director of West Virginia's program, predicted that if the Administration bill passes, "we will see even less cooperation, both intra and interstate."

Dan Copeland, the president of the National Council of State Child Support Enforcement Administrators, has been flying back and forth between Washington and Alaska, where he heads that state's program, to plead the states' case. He applauds the Administration's avowed goal of expanding non-AFDC enforcement, but points out that the Administration bottom line is that there will be less federal money to go around.

"Everyone says that they want to see the program expanded," Copeland said, "but you can't give the states less money to work both caseloads instead of one." Nor is he eager to trade the 12 per cent AFDC match, a guaranteed source of funds for the state programs, for a system of bonuses to be rewarded at the HHS Secretary's discretion. "Some of the state directors are wondering how much of the money will actually come out," he said.

Fred Schuetzman, deputy director of the federal child support office, counters that the federal commitment to the program is expanded because it is based on matching state spending, albeit at a reduced percentage. "We are not holding the funding in any way," he said. "If the states spend more, we will spend more."

Heckler suggested that much of the state resistance is coming from the fact that the state directors "are going to be in the spotlight, and they're going to be held accountable for their performance in a way they never have been before, and there are comparisons that will be drawn between the activities of one state and the potential apathy of another. There's going to be a new challenge to the state directors, there's no doubt about that, but really, one has to ask why the 70 per cent funding has not yielded better results."

The state directors have some powerful allies on Capitol Hill, however. Of the four bills currently being considered, only the Administration's would decrease the federal administrative match. There is also widespread opposition to allowing incentive payments to be disbursed at the Secretary's discretion.

The Administration appears ready to bend, as HHS unofficial participation in the Ways and Means staff compromise proposal indicates. "I don't think the variations in the proposals are vast," Heckler said, adding, "I would not preclude any other approach."

The Ways and Means staff compromise would retain the 70 per cent federal share and offer the states guaranteed 4 per cent incentives for both AFDC and non-AFDC collections and up to 10 per cent extra for excellent performance in each collection area. Although the bill would replace HHS discretion with a formula for determining how much extra each state would receive, the compromise still incorporates the Administration's idea of giving the states an incentive to run programs that are both effective and cost-effective.

In response to complaints from fathers that child support payments are often late because the mother refuses to let her ex-husband visit the children, the staff proposal would compel each state to set up a commission to examine child support and visitation issues in one forum. In the Senate, it is likely that a resolution will be introduced to express concern over visitation rights. There are no plans to attach any substantive changes in visitation laws to child support legislation, however, and the Administration wants to keep the two issues separate. "I really am sympathetic to fathers' rights," Heckler said, "but on the other hand, I think that that issue can not be used to demean or disparage the issue of financial support. They're separable."

BARGAINING ON THE HILL

Although the Administration has made child support bill a high priority, Democratic members of the Ways and Means

subcommittee say they are not planning to attach any other issues to the legislation as a way to avoid a veto on an issue that is more controversial. Members of the Administration's legislative liaison office have met with subcommittee and committee members, urging them to keep the bill unencumbered. Rep. Barbara B. Kennelly, D-Conn., a member of the subcommittee, and Ken Bohler, the subcommittee staff director, agreed that there are no plans to attach any other legislation to the bill.

The House subcommittee appears likely to approve the staff compromise unanimously. The price of unanimity, however, may be a watered-down bill. "The changes may not be as drastic as some people have proposed," Bohler said. "This is a lowest common denominator," another staff member said.

In the Senate, committee aides are also optimistic that a consensus may be found and that the Administration is willing to compromise. Testifying before the Finance Committee, Heckler reinforced this contention when she departed from her prepared text to say that the President would like to sign legislation based on the Administration bill "with whatever additions or subtractions the committee feels appropriate."

Republicans on the subcommittee are unlikely to approve the Administration bill as a whole. "I'm not sure the financing plan will get out of committee," a Republican aide said. Instead, the subcommittee will likely follow the House's lead and assemble a bill containing elements of all four proposals. Joseph R. Humphreys, a member of the full committee's minority staff, predicted that "what the committee does will look somewhat different from any of the individual bills." Committee chairman Robert Dole, R-Kan., has shown a willingness to work closely with ranking minority member Russell B. Long, D-La., in hammering out a compromise. Long, as committee chairman in 1975, was instrumental in pushing the original legislation through a reluctant Congress.

ENFORCEMENT

Although the financing formula appears to be the main area of contention, many of the women's groups involved in the issue say that the most important component of a new bill will be the enforcement tools. They say that the law allows or compels the states to employ. Ann [illegible], a policy analyst with the National Women's Law Center, said, "I don't think that changing the federal-state match is the way to improve the system; improving enforcement is." Kelly of KINDER said that under the present enforcement procedures, "the states have proven that they're not capable of doing the job."

Ann Kolker of the National Women's Law Center: "I don't think that changing the federal-state match is the way to improve the [child support] system, improving enforcement is."

Kolker and Kelly favor the child support proposals of the Economic Equity Act, but all of the bills would allow or compel the states to take advantage of some powerful and controversial tools to enforce collection. Some of the enforcement techniques that may be included in a new law are:

- Wage withholding. The enforcement provision that proponents of a tougher program are most enthusiastic about is withholding of overdue support from wages. All four pairs of bills, including the Administration's, would institute some degree of involuntary withholding. The final bill is likely to allow two months of arrears to accumulate before withholding would begin, although one of the bills would permit no such grace period.
- Clearinghouses. Two of the bills would require the states to set up information clearinghouses to assure that support withheld from wages due from out-of-state parents would be paid, and all of the bills would also require the states to create quasi-judicial or administrative procedures to speed up collections. The Administration's bill would not require clearinghouses, but would continue the present method of offering to pay 70/80 per cent of a state's costs if it chose to set up a clearinghouse. The Ways and Means staff's compromise proposal would make clearinghouses optional and set the federal matching rate at 90 per cent.
- State tax withholding. All of the bills would require withholding of past-due support from state income tax refunds, but the Administration bill and the Ways and Means staff compromise, with the enthusiastic support of some state directors, would limit it to AFDC collections. Huston, director of the Nebraska program, said he is "scared to death" of extending the program to non-AFDC collections, and Heckler agrees that increasing the scope of the program would be too expensive.
- Federal tax withholding. Withholding for overdue payments owed to AFDC families is now required, but the proposal in three of the bills to extend this to non-AFDC families is among the stickiest of the unresolved issues. Heckler's position is that the Internal Revenue Service, which is preparing to release a study on the proposal to extend tax withholding to non-AFDC cases, does not have the capacity to make institution of such a massive program worth the expense. Neither the Administration bill nor the Ways and Means staff's proposal would extend withholding.
- Property liens. Three bills, including the Ways and Means staff proposal, would require states to impose liens equal to the amounts of past-due support on property of delinquent individuals.

No matter which enforcement techniques are adopted, the measure of the legislation's success will come at the state level, and Heckler said she will keep the pressure on governors and state directors to make child support a priority. She plans to meet with many of the governors, and wants to make child support a political issue in state campaigns. "The commitment of a governor to a program in any state, or lack thereof, could make the difference in terms of creating an effective program," she said. "Failure to have a program that kept pace with the other states could create a political issue that I think the women's groups and others could well point to."

Heckler also warned: "If there have been any instances of making the program a discipline ground for political cronies, this will have to stop.... It's not going to be a political haven for any nonperformer." □

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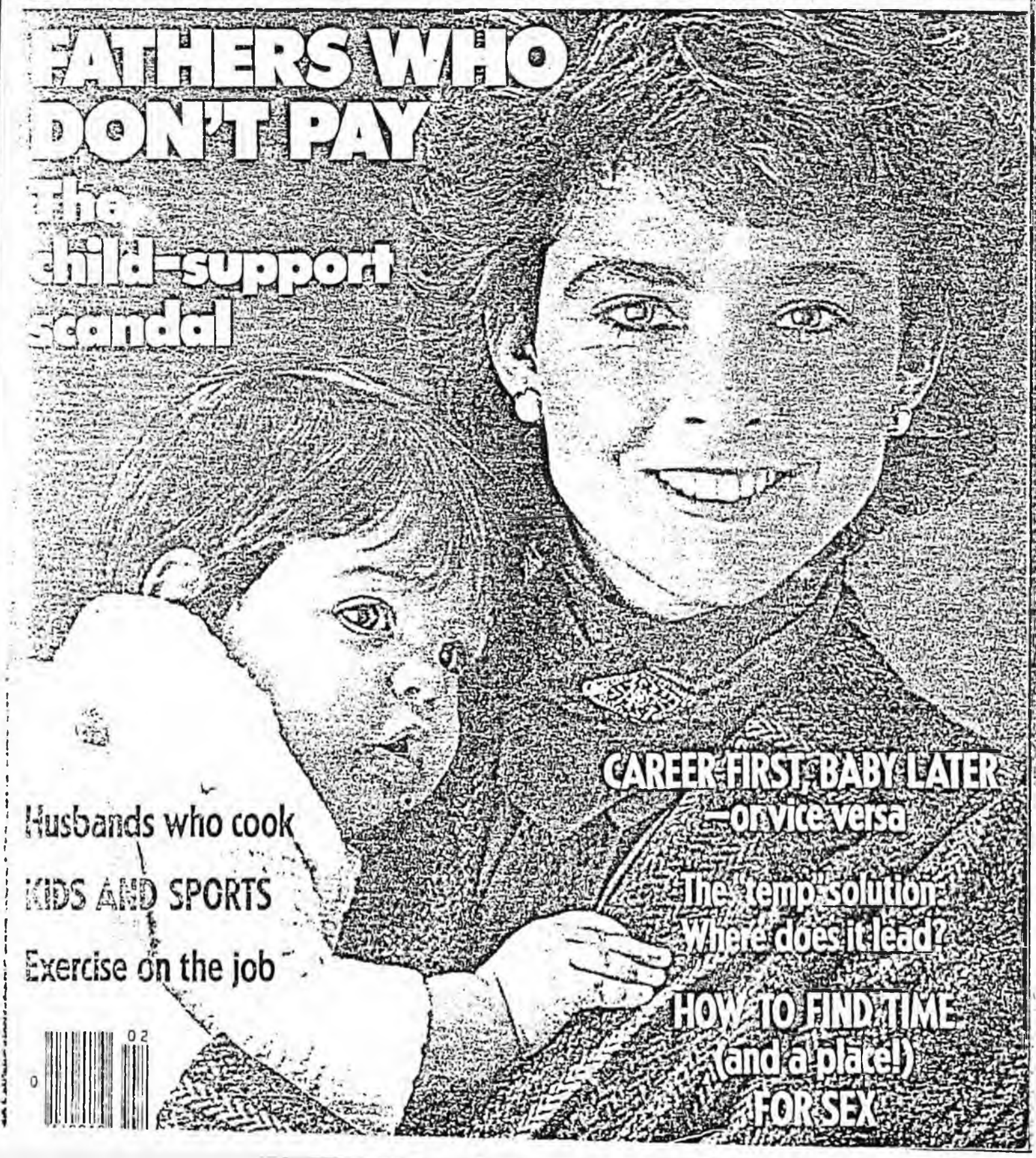


CHILD SUPPORT? FORGET IT!

BY FERN MARJA ECKMAN

One mother is talking, but 1.7 million women in the United States, as well as hundreds of thousands still to be officially counted, share her predicament. Listen:

"My divorce was so traumatic that at first I couldn't bring myself to go back to court about child support even though my former husband stopped paying me after the first month," says a nurse we'll call Elizabeth Weston. She lives in a small town on Long Island, New York, and has a son, Luke, who is eight.

"When I finally forced myself to file a petition for the money that Steve—my ex—owed me, he was eight thousand dollars in arrears. I was then making fifteen thousand a year and he was earning over thirty thousand. But he kept finding excuses not to pay me the three hundred dollars a month ordered by the judge for Luke's support. I had to borrow from my relatives. It was humiliating.

"I've been to court so many times in the last five years that I've lost count. Each time I go back I lose at least half a day's work and usually a full day. I worry about using up all my vacation and sick days so that if Luke gets sick and I have to stay home with him, I won't get paid. And my bills won't get paid. I'm a head nurse now, so I worry about my staff too.

"Right now Steve hasn't paid me anything in two months. This time I think he's lost his job. My rent bill is coming due—four hundred dollars—but I don't want to go to court again. I get so uptight each time that I can't sleep and my stomach's in knots. A lot of pain in my marriage, in my divorce, resurfaces.

"I feel this tremendous surge of resentment and frustration. I wonder, should I just forget about child support and try to make it on my own? But as Luke grows older, my expenses grow too. You can't imagine the anxiety. It's hard to handle."

Today, in this country, child support is more often than not an ironic synonym for child *non*-support. Only 49 percent of the 3.4 million women known to have been due child support in 1978 were actually receiving the full amount, according to the most recent study of the federal Bureau of the Census. (Note, please, that "the full amount" averaged $1,800 a year.) Twenty-three percent of the mothers received partial payment, ranging from a single check to 90 percent of the payments awarded by the court (anything over 90 percent is considered full payment). And 28 percent received no payment at all. Zero.

NATIONALLY, ENFORCEMENT IS A PATCHWORK OF CONFUSION, APATHY AND NEGLECT. THERE ARE, HOWEVER, A FEW BRIGHT SPOTS ON THE HORIZON

Some authorities regard even those disheartening figures as far too roseate. Harry Wiggin, chief of the New Jersey Bureau of Child Support, told the *New York Times* a few months ago that a divorced woman in his state has "a ten-percent chance of being paid on time and in full."

Keep in mind that these figures do not include women who, out of a mixture of despair and exhaustion, have given up trying to collect, nor those who are trying to collect through private channels, such as their own attorneys, and you begin to get a glimmer of the dimensions of the fadeaway-father problem.

Since 95 percent of custodial parents are women, delinquent payments mean an additional drop in economic power for post-divorce mothers, a group already experiencing a dramatic decline in average income.

"Divorce is a financial catastrophe for most women," Dr. Lenore J. Weitzman, a sociologist at Stanford University, wrote in an article published in *The Family Law Reporter* last August.

Dr. Weitzman, director of the California Divorce Law Research Project for the past 10 years, drew the following conclusions from the data compiled in her state:

"First, the amount of child support ordered is typically quite modest in terms of the husband's ability to pay. Second, the amount of child support ordered typically does not cover even half of the cost of actually raising the children. Third, the major burden of child support is typically placed on the wife even though normally she has fewer resources and an inferior 'ability to pay.' " *(continued)*

(continued)

California is hardly unique.

"From the data I have seen, I would endorse the statement that nonpayment is an economic disaster for custodial mothers," Fred Schutzman, deputy director of the federal Office of Child Support Enforcement (OCSE), said. "The absentee father is usually much better off economically than the mother—and probably will remain so.

"The problem of nonpayment is extremely serious and still growing because of the high divorce rate. A million divorces a year—many involving children and child support—compounds itself, even if the divorce rate remains level. We're predicting that more than forty percent of American marriages will end in divorce and that only fifty-six percent of all children will spend their entire childhood living with both natural parents."

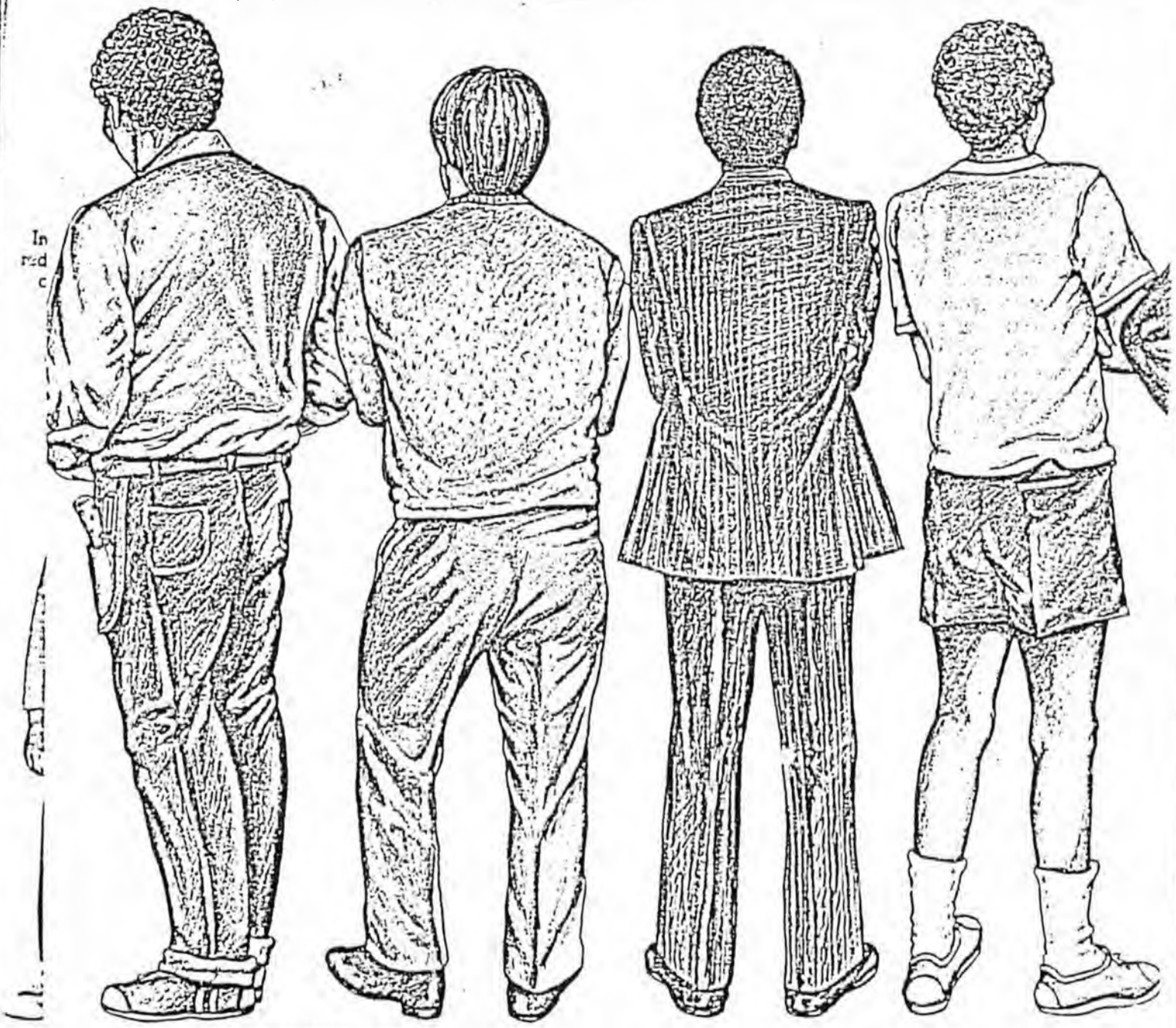
Nationally, child-support enforcement is a patchwork of confusion, apathy and neglect.

True, new legislation has belatedly been adopted by Congress, with promising results. The federal government is now more enthusiastically undertaking the business of pursuing fathers whose failure to pay child support costs the government money. Mothers with only a marginal income of their own, unable to survive without child-support payments, may be eligible for public assistance. To reimburse the welfare agencies that subsidize such mothers through Aid to Families with Dependent Children (popularly dubbed AFDC or ADC), Schutzman's OCSE has in recent years set up a federal-state alliance to collect back payments from the fathers.

The OCSE, which comes under the federal Department of Health and Human Services, has an increasingly impressive collection record: $1.65 billion in 1981. A solid $975 million of that sum went to custodial mothers who were not receiving AFDC.

The Federal Locator Service, an arm of the OCSE with unprecedented access to the files of the Internal Revenue Service and the Social Security Administration, last year tracked down more than 70 percent of one million runaway fathers who had moved to other states without leaving forwarding addresses.

Encouraging as this machinery is, it works better on paper than in practice. Not all custodial parents know it exists,



and many are unaware that even though OCSE's primary purpose is to relieve the taxpayer of some of the burden of the AFDC programs, its services are also available to non-welfare parents. The OCSE prides itself on being "one of the few government programs that helps needy families while also saving tax dollars."

Each state operates its own child-support enforcement bureau and locator service, usually as part of the state or county welfare or social-service units. Reimbursed by the federal government for a major portion of their expenses, these local agencies are known as IV-D agencies, a name derived from their statutory designation: Child Support Title (IV-D)

However, the IV-D network lacks consistency. Services and fees (which are modest, when charged at all) vary from state to state. Some agencies are efficient, some are lackadaisical. Moreover, interstate cooperation, which in theory flourishes, in reality leaves a great deal to be desired.

"FOR CUSTODIAL MOTHERS, NONPAYMENT OF CHILD SUPPORT IS AN ECONOMIC DISASTER"

Paul Cummings

Harry D. Krause, alumni distinguished professor of law at the University of Illinois, applauds the federal government's role as "an active stimulator, overseer and financier of state collection systems." But, in an article last summer in the American Bar Association's publication, *The Family Advocate*, Krause sharply criticized the OCSE for its failure to provide leadership in developing "more sensible, more uniform and more predictable support laws," which he views as "crucial."

Krause has gone so far as to suggest somewhat tartly that the existing child-support laws have been tolerated this long "in their present state of disarray, unevenness and consequent unfairness only because they have *not* been enforced with any degree of regularity." (His italics.)

Ferreting out errant fathers for maintenance checks is a formidable task for IV-D. New Jersey and New York have passed new laws authorizing automatic confiscation of the wages of noncustodial parents who are in arrears.

"We collect for women who are on ADC and women who are not," said Irwin Brooks, director of New York City's Bureau of Child Support, which has a superior collection record. Unfortunately, as Brooks pointed out, the mothers who manage to squeeze by without resorting to public aid are in effect penalized for their independence.

For welfare families, Brooks's staff can tap the computer system of the state's Department of Taxation and Finance, which stores employers' reports of the Social Security number, quarterly earnings and address of each employee. Once the nonpaying father is traced, it's a comparatively simple matter to authorize his employer to deduct the arrears from the man's paycheck before he gets it. That money then goes to welfare to offset the ADC subsidy paid to the family.

"But," Brooks explained, "we don't have access to the computer for non-welfare cases. Those women have to go into court on their own. We don't represent them. The judge will then issue a support order, payable through our collection unit. We monitor the payments, sending the full amount to the family.

"Talk to women in the non-welfare group and you find them bitter and frustrated. A hard look has to be taken at what can be done for that group. The system has to be restructured to put teeth into the program for the non-welfare population, which would ultimately save the government money."

In virtually every state, cases in family courts can drag on for weeks, even months. Judges, confronted with overcrowded dockets and reduced personnel, tend to give priority to child abuse and neglect, leaving support applications for another day. One official, who requested anonymity, bluntly described the family courts in his area as "a mess."

Although some states sporadically jail deserting parents, usually for weekends only, a number of judges lean to the side of the deserting father. They reason that support payments present "an undue hardship" for the man, who has probably remarried, while the needs of his first family will be shouldered by welfare.

That judicial philosophy inevitably swells the welfare rolls. "A little over eighty percent of families receiving AFDC are there because of nonpayment of child support," said Michelle D. Jefferson, OCSE information officer.

Add all of this together and it's easy to see why noncustodial parents feel it's safe to shrug off their financial commitments. "I do not need to tell you," a New York State legislator summed up, "that men who have been ordered to pay child support learn all too quickly and easily that nonpayment is likely to be ignored, both by the courts and by the law-enforcement authorities."

(continued on page 93)

CHILD SUPPORT? FORGET IT!

(continued from page 65)

The impact on the mothers is overwhelming. "We see mothers entitled to child support who are worn out by the process of trying to collect," said Sue Jones, director of The Single Parent Family Project in New York City. "We see it all the time. One woman told us: 'I've been in court seventeen times this year. I've used up all my vacation time, all my sick leave, all my personal days. I am going to risk losing my job if I continue this way. So I'm throwing in the towel. I give up.'"

According to Mrs. Jones, even periodic lapses in support payments create a chronic sense of panic in the custodial mother: "Let's say a man really tries to keep up with his payments but is hospitalized. There's a gap of three months before he can pay all his arrears. Meantime, she has to borrow from relatives and friends. She takes out a bank loan, if the bank will give her one. Her phone may be cut off. She can't provide dental care for her children. Any little luxury must be sacrificed. Her credit rating is shot and none of her friends wants to see her coming.

"When she finally gets the money, it all has to go to pay off her debts. We're not talking here about account executives with healthy bank balances. We're talking about secretaries, bank tellers, lower-management kinds of people who have no accumulated savings. Long-range planning is impossible for these women. Learning to budget your money—that's a joke when your income is erratic."

The mothers' anxiety overshadows the children's lives, of course. "When a family splits up," said Marilyn Gordon, case-work supervisor at the Mid-Brooklyn Office of the Jewish Board of Family and Children's Services, "the man can walk away. *He* doesn't get up at three in the morning if the child has a fever. *He* doesn't take time off to see the teacher when there's a school problem.

"It's incredibly difficult for one parent. If you then pull out the security blanket of child support, the women often feel they can't cope. They react first with anger, then with feelings of hopelessness and helplessness, then get very depressed and frightened—though I'm amazed at how strong many of these women are.

"There's another aspect, too. Kids are very much in the middle. A seven-year-old doesn't understand why his mother,

THE MATTER OF MOTIVE

David L. Chambers is the author of *Making Fathers Pay* (University of Chicago Press, 1979), a book frequently quoted by members of child-support activist groups. In fact, Chambers might almost be called the guru of the movement, an honorific that made him chuckle.

Soft-voiced, erudite, accessible and eminently reasonable, Chambers is a professor of law at the University of Michigan Law School. His in-depth study of child-support enforcement in 28 counties in Michigan, the state that has been most successful in inducing fathers to pay, illuminates the entire process of maintenance collection in the United States.

Before he knew "too much," Chambers admitted, he would have guessed that most parents—except those who were unemployed or who earned so little that they could barely survive—would pay without prodding. Now sadder and wiser, he attributes failure to pay not only to anger and depression, but to darker motivations:

"The man who used his wife's access to money during marriage as a way of keeping her servile and dependent may maintain this pattern after divorce for the same purpose." And:

"Unpredictability in payments induces anxiety in the woman and is thus a source of power for the male, assuring him at once of her dependence on him and her comparative lesser worth."

Michigan is one of many states that jail fathers for nonpayment, a debtor's prison kind of deterrent that Chambers does not endorse. "Jailing works not so much on people who are actually sent to jail, but rather by scaring those who aren't," he said in a telephone interview.

The maximum sentence for support-dodging fathers in Michigan is one year. "But for first offenders, this has just been changed by statute to forty-five days," Chambers said. "I think that's a very healthy move. There is evidence that jailing people works if it's part of a well-organized system of collection. But there's no evidence that holding people for long terms is helpful."

On the whole, Chambers would prefer a system that relied on wage assignments rather than bars. "And if we really wanted to increase payments in this country," he said, "we would largely chuck the present system.

"Now," he explained, "an employer pays a man his check every week or two weeks. And the man has to remember to write that support check and send it to his former wife. The state tries to scare him into remembering to do that. If we really want to improve the child-support operation, we have to deduct support payments regularly at the source—*before* the employee gets the paycheck."

"Like Social Security?"

"Exactly," Chambers said. "Many states permit wage assignments, but no state has the power to bind an employer in another state. So for that reason, among others, only a national wage-assignment system would work. One that Congress could implement. But my guess is that it wouldn't pass Congress."

"Why not?"

"The principal reason is that we're in a stage of history in which the President and Congress are primarily thinking in terms of returning programs to the states. They're not interested in creating new, large federal systems for any purpose.

"A further reason is that Congress may appropriately be reluctant to set up a national computer system that knows all about people's broken marriages and illegitimate children."

"You said 'appropriately.' If that reluctance is appropriate, why do you favor such a national system?"

"I believe in tough choices," Chambers said. "If it comes down to choosing between low collections and lots of jailing on the one hand and high collections and intrusion into privacy on the other, on balance I prefer high collections."

Not everyone, of course, is willing to make that compromise.

who is worried because she can't pay the rent, blows up when he asks her for a new pair of sneakers. It's very hard for the mother not to let her anger spill over, so the children feel it's wrong for them to love their father because the mother's so angry with him.

"It's also very hard for a mother not to say to the kids, 'We wouldn't be in this rotten place if your father hadn't abandoned us.' What sometimes happens is that the mother tells the father, 'Listen, if you're not going to give support, you're not going to see the kids.' So what looks like a dollars-and-cents issue has far-reaching implications for everybody in the family."

The bottom line, then, is that child-support payments are largely what Dr. Judith H. Cassetty of the University of Texas calls "a voluntary phenomenon and one which cuts across income classes."

Why do so many fathers evade their responsibilities to their children? That question produced a variety of answers from the experts we consulted.

Lloyd Cutsumpas of Danbury, Connecticut, a lawyer specializing exclusively in matrimonial cases, clicked off three basic reasons.

"First, financial pressures," he said. "When you split one household into two households, the shelter expense is al-

MOTHERS' GROUPS

Grass-roots affirmative-action groups are springing up around the country to lobby for effective enforcement of child maintenance; to share legal information and to help their members with emotional support.

The organizations have names like KINDER (Kids in Need Deserve Equal Rights, in Flint, Michigan), PECOS (Parents Enforcing Court Ordered Support, in Enfield, Connecticut), POSE (Parents' Organization for Support Enforcement, in Bakersfield, California), FOCUS (For Our Children's Unpaid Support, in Vienna, Virginia), and OECS (Organization for the Enforcement of Child Support, in Baltimore County, Maryland).

Some, like OECS, hold regular meetings, send out newsletters and make referrals to other sources.

Elaine Fromm, who is now happily remarried and operates one of OECS's four hotlines, spent 10 years on welfare after her first husband walked out on her: "I was eight months pregnant and had three small children when he left. After a few payments, he never gave me another penny. My kids wouldn't know him if they met him on the street."

Founded three years ago, OECS now has two chapters and 450 members, including a sprinkling of men ("brothers, second husbands, a couple of custodial fathers"). The organization hopes to expand into a national crusading force.

"The very existence of our organization and others like it shows that the child-support system isn't working," said Mrs. Fromm. "Most Americans don't realize that child support is everyone's problem. When absent parents don't support their children, in many cases taxpayers do."

OECS has a Legislative Committee that has given testimony before the Maryland General Assembly in Annapolis. A Public Relations Committee reaches out to the media and participates in the production and distribution of literature. "All of the information learned," an OECS fact sheet states, "is freely dispensed, either verbally or printed."

Mrs. Fromm has a list of 11 action groups that she will mail to anyone who requests it. Write to her at 119 Nicodemus Road, Reisterstown, MD 21136. Enclose a stamped, self-addressed envelope. In an emergency only, call her at 301-833-2458.

PECOS, much smaller, less than a year old, has about 30 members. Yvonne Prestwich, the co-founder and an editorial assistant for three weekly newspapers, was also forced to turn to public assistance when child-support payments for her three youngsters faltered. She found welfare "a demeaning experience," as did Mrs. Fromm.

This reporter asked Mrs. Prestwich if she could give us the name of a custodial mother who has won her battle for child support, so that we could interview her for "a success story."

"A success story lasts only from check to check," she countered. "I now receive child support every two weeks. But it's a waiting game. I never know when the payments will stop. The week I receive the check, I am successful. But I don't know if I will be successful two weeks from now. Everyone receiving child-support payments feels the same way."

THE FACT IS THAT AT ALL INCOME LEVELS, CHILD-SUPPORT PAYMENTS ARE LARGELY A "VOLUNTARY PHENOMENON"

ways doubled. You now have two units, with new light, heat, telephone and maintenance bills, as well as a new mortgage or an additional rent to pay. So the father's ability to pay is constricted.

"Second, with diminished contact, the fathers lose interest in their children. The man may transfer to a job in another city, his ex-wife may remarry and move to another jurisdiction. Out of sight, out of mind, maybe.

"Third, he may himself remarry and incur other financial obligations, which leads him to fall short on his original obligation. If he's hauled into court for arrears, he says, 'Well, I'm remarried and now I have a baby who has to eat too.' Judges are faced with this all the time. Legally, the father's obligation is still to the first family."

But don't these fathers continue to feel love and concern for the children of that first marriage?

"I suppose they do," Cutsumpas said. "They express it to me all the time—*verbally*. But I also hear women saying to me over and over again, 'He never comes around to see the kids, never sends them a card, never buys them a gift, never telephones. And he never sends support.'

"Let's say a man works at a pharmaceutical company in Danbury. He and his wife grew up here. Their extended family is here. He makes, say, thirty thousand a year, she makes sixteen, and there are two children. If there's a divorce, he's going to pay because he's a stable person. He cares about his children. There are rarely problems with that kind of individual, even if he remarries.

"But now mix in a little of mobile America—someone who works for Union Carbide here but was in Atlanta last year, and next year is going to Cleveland. His wife's from Arkansas. After the divorce, she goes back there to be with her family. He still lives here, and it's easier for him to forget his kids, particularly if there are financial constraints. Now he gets married again. You mix that in. The new wife's right there, looking at him and saying, 'You've got to take care of *this* obligation.' And it's easy for him to slough off his other obligations."

From OCSE chief Schutzman came statistical confirmation: "Five out of six fathers remarry and start a second family within a few years. That second family takes precedence in terms of money."

The nation's soaring unemployment has thrown a monkey wrench into some of the best-intentioned fathers' capacity to pay. "I'm not discounting the fact that joblessness has really contributed a great deal to the widespread rate of nonpayment. You can't get blood from a turnip," said Dr. Doris Jonas Freed, family-law specialist and chairperson of the American Bar Association's Child Custody and Support Committee. "But dissatisfied or disinterested fathers and ex-husbands would just be stubborn enough not to pay, even if they had the money.

"A great many fathers engage lawyers who stall the courts. Lots of those dodging fathers are not satisfied with the custody arrangement. They claim they don't get to see the kids, except on Sunday. I have found that when both parents have input into the whole decision-making process—what the support figure will be, when he'll see the kids, what schools they'll go to, what the vacation arrangements will be—the fathers will pay on time if it's humanly possible."

Anger and depression were cited by several authorities as strong motives for delinquency in payment: anger at former wives, anger at judges, anger at being denied the pleasure of their children's daily company. Such men feel like outsiders, deprived of the domestic comforts they previously enjoyed.

Remembering the past can prove painful, even for men who initiated the divorce suit. If writing a support check is a jolting reminder of the contrast between then and now, fathers are apt to avoid both the pain and the payment. Not infrequently, men justify these acts of omission by charging that their ex-wives would have spent the money on themselves instead of on the children.

Although our American system of support enforcement is heavily stacked

A TAX BREAK

An important tax law favors the noncustodial father. With it, lawyers representing husbands try to structure divorce settlements so that their clients pay to their wives and children what is legally referred to as "unallocated alimony and child support," rather than simple "child support."

" 'Child support' has no tax consequences," explained Lloyd Cutsumpas, a Connecticut matrimonial attorney. "It has neither tax benefits for the payer nor adverse consequences for the recipient. However, payment of 'unallocated alimony and child support' has very substantial tax benefits for the payer and is detrimental to the recipient, who pays taxes as though the amount received were earned income."

However, another matrimonial specialist in the same state, Roland F. Moots Jr., said this tax break for the husband "enables him to pay his former family more money and still have enough to live on himself."

Moots added: "To that extent, the federal government is underwriting the expenses of a lot of these divorce settlements."

FATHERS FIGHT BACK

In the past year, the federal Office of Child Support Enforcement (OCSE) has been authorized to deliver to the Internal Revenue Service a list of parents three months and at least $150 behind in child-support payments. The IRS is then empowered to deduct the amount of the arrears from any tax refunds to which the recalcitrant payers are entitled.

OCSE deputy director Fred Schutzman reported that the agency offset 260,000 cases for a total of $165,000,000 in 1981. "But," he added, "we can do that in welfare cases only."

From outraged fathers, there have thundered charges of invasion of privacy. And, in Philadelphia, six couples are bringing a class-action suit against the federal government to bar it from confiscating refunds from jointly filed income-tax returns. Their lawyer, Stephen F. Gold, contends such action is unconstitutional since the wives cannot be held legally liable for the support obligations of their husbands' previous marriages.

THE VACATION QUESTION

Should child-support payments continue to be made to the custodial mother during the summer weeks or months that the children spend with their father?

"That's one of the pitfalls," Roland F. Moots Jr., a Connecticut matrimonial lawyer, explained. "Attorneys sometimes forget to include a provision about vacation time in the separation and divorce agreements.

"The father traditionally takes the attitude, 'Well, I've got the children for three weeks and I'm paying all their expenses, so I should not pay child support to their mother for that period.'

"And her position is: 'Many of my expenses are fixed. It doesn't matter whether you have the children with you or not. I'm still paying more rent because I have to maintain a three-bedroom apartment instead of the one-bedroom apartment that is all I would need for myself.'"

A heated argument follows—and perhaps another courtroom scene, with more legal fees on both sides. All that can be avoided, Moots said, by settling the issue in advance and spelling it out in the agreement.

against the custodial mother, glaring inequities can also be meted out to the divorced father by what Professor Krause terms "the unbridled discretion" of the judiciary.

Two judges sitting in the same court on the same day can order two men with the same income to pay drastically different amounts of child maintenance. Conversely, an unskilled worker whose wages barely lift him above the poverty level may be required to make the same support payment as a doctor or a lawyer. The injustice of these decisions does not encourage—or sometimes even permit—the smooth transfer of maintenance checks to ex-wives and children.

Surprisingly, the professionals and custodial mothers we interviewed displayed very little outrage toward support-evading fathers. From the experts, there was concern for the mothers and kids, and a detached attitude toward the men. Even the women whose payments are, at best, irregular confined themselves to their own dilemma. From all quarters, there was, to be sure, strong disapproval of the pattern of paternal callousness. But the disapproval was implicit, not explicit, and seemed to stem from a kind of resigned acceptance.

The notable exception was Roland F. Moots Jr., matrimonial attorney and former town counsel of New Milford, Connecticut. His indictment of the runaway father was direct, impassioned and unsparing.

At 38, Moots has witnessed "a tremendous shift" from housewives to working mothers among his clients. "The women I feel sorriest for," he said, "are those who, at thirty or thirty-five, have to go untrained into today's economy. They've got to work a forty-hour week, and so they've got babysitting expenses they don't have enough money to pay for—especially if the husband cuts out on them and takes off."

How can that be prevented?

"Well-ll! There ought to be some type of streamlined procedure that would go interstate in chasing these individuals who are"—one hand slapped the desk—"totally, *totally* irresponsible toward their children! We've tried the Uniform Reciprocal Enforcement of Support Act [URESA, which makes it possible to sue for child support when parents are living in different states].

"But that's a very cumbersome process that takes forever. Because you're dealing with bureaucracy—*two* bureaucracies. And there's nothing to prevent the man, once he gets served the papers in the state where he's relocated, from just taking off again."

Moots leaned forward. "There's a certain element of men who are totally irresponsible," he said. "This is most infuriating to me. Just absolutely the *most* infuriating to me!" His voice billowed, like a sail in high wind.

"A case in point. I represented a woman—it had to be six or seven years ago. She wound up with the house, the kids and child support. Her husband took off for New York City. We have not found him yet. We did track him once to New Jersey and then he disappeared again. At this point, he owes her well over thirty thousand dollars in child support.

"It is the most *frustrating* and, to me, the most *unfair* thing in the world!" Moots's baritone bounced off the back wall of his office. "This man has two kids that he's totally turned his *back* on! He will take no responsibility for raising them; he won't share the emotional problems that she goes through in raising them. And he will not even give her ONE DIME!" The last two words were an explosion of almost biblical wrath. "It's just unfair! Moots said. "It's totally *unfair!*" ■

CURTAILED RESOURCES

The 1981 report of the federal Office of Child Support Enforcement (OCSE) to Congress warned that economic conditions across the nation are hampering the efforts of the child-support enforcement bureaus (IV-D agencies) of each state to increase their support collections. The report also listed these major problems:

"Many states are laboring under severe budget limitations, hiring cutbacks and staff shortages. Therefore work loads have increased as resources decrease. In addition, several states reported that lengthy internal reorganizations were hampering operations."

DOWN THE ROAD

"The likelihood of remarriage is largely a function of the woman's age at the time of divorce. If a woman is under thirty, she has a seventy-five-percent chance of remarrying. But her chances are significantly lower if she is older: between thirty and forty, it's closer to fifty percent, and if she is forty or more she has only a twenty-eight-percent chance of remarriage," according to Dr. Lenore J. Weitzman, director of the California Divorce Law Research Project.

SJR

32

FILE WITH SJR 32

Alaska State Legislature

Senate Committee on State Affairs

Vic Fischer, Chair • Pouch V
Juneau, Alaska 99811
(907) 465-4954

Official Business

February 29, 1984

Norm Gorsuch
Attorney General
Pouch K
Juneau, AK 99811

Dear Norm:

I have many reservations about SJR 32, which would set up the major capital projects fund. However, even if I thought it a good idea, I would oppose the resolution as now drawn because the proposed language would desecrate the state constitution!

SJR 32 does violence to Alaska's constitution in terms of basic drafting, style, and basic principle. It is inconceivable to me that whoever drafted SJR 32 had any understanding of these elements as they were considered in writing the constitution originally.

Though, I must admit, the proposed new section 17 of article IX is certainly not much worse than what Hammond perpetrated in pushing section 16, which ought to be totally rewritten if SJR 32 goes ahead.

(As a first step toward dealing with this, I would suggest a close comparison of language with the present constitution. And if anyone cares, I'm sure Tom Stewart, Burke Riley, Katherine Nordale and others associated with writing the constitution would happily join me in offering their services toward a better approach to style and drafting.)

Yours, for a clean constitution,

Senator Vic Fischer

cc: Senator Bill Ray

MEMORANDUM State of Alaska

TO: Honorable Bill Sheffield
Governor

DATE: January 5, 1984

FILE NO: 83I-172

THROUGH: Gordon Harrison, Associate Director
Division of Strategic Planning

TELEPHONE NO: 465-3568

FROM: Richard Emerman, Manager RE
Office of Management and Budget
Division of Strategic Planning

SUBJECT: Major Project Fund

Although the State treasury will continue to receive substantial petroleum revenues for many years to come, best estimates indicate that large annual cash surpluses above operating budget requirements will cease to be available by the early 1990's. There is still time to use these surpluses for one or more major capital projects that can serve as foundations for Alaska's future economy, but that opportunity will probably be gone within the next six or seven years. Primary examples of such projects are Susitna hydro and the Knik Arm crossing, while other examples with lower price tags include Bradley Lake hydro, Eklutna water supply, road and port infrastructure for the Red Dog mine and other nearby mining prospects, and renovation and/or extension of the Alaska Railroad.

Currently, it appears that several hundred million dollars per year would have to be set aside for the rest of this decade in order for Susitna to be financially viable. Each year of delay substantially reduces the probability that enough funds will be available to build it. Even if Susitna is not built, it is unlikely that a major share of the funding necessary to build other large and important projects will be set aside unless it is begun in the very near future.

There are at least two reasons why a "business as usual" approach is likely to produce less than is needed for these projects. The first is that, for many of these large projects and especially for Susitna, there still is not enough clear information to warrant unequivocal commitment. Actual construction might not begin for a number of years due to the time necessary for required engineering, environmental study, permitting, and demonstration of economic feasibility. It is difficult under "business as usual" to secure large, advance appropriations for projects that will not enter the construction phase for a year or more, and to which the State is not yet willing to specifically commit. Yet, if setting aside the necessary funds is delayed until construction is about to begin, the chances are that the financial window of opportunity will be too far closed. The proper response is not to rush into massive financial commitments before oil production goes into decline,

but to systematically set aside the funds needed to accomplish major projects, and draw down on the funds only when satisfied that a full scale commitment is in order.

The second reason that a continuation of conventional capital budgeting practices is not likely to meet the needs for large project funding is that the funds available for annual capital expenditure tend to be split into many small pieces for purposes of geographic and political equity. If all such funds are made subject to a political allocation system similar to that in recent years, accumulation of sufficient funds over several years for any major project would seem to be an unlikely outcome.

The most plausible solution to these problems is the establishment of a major project fund in which dollars can be stored for large projects that are not yet specified. Among the questions raised by this proposal are the following:

1. Should the fund be established by statute or by constitutional amendment?

2. What rules should be established for making disbursements from the fund?

3. Will it be necessary for the pattern of fund disbursements to exhibit geographic equity, or is there another way to assure that such equity concerns will be effectively addressed?

4. How much money should be deposited in the fund, from what source, and for how long?

Statute or Constitutional Amendment?

A dedicated fund created by constitutional amendment would enjoy the highest level of protection against future uses that are not in keeping with the fund's original intent. In addition, automatic deposits to the fund could be mandated, as well as automatic retention of the fund's interest earnings. However, it is necessary to persuade two-thirds of each house in the Legislature to propose such an amendment in order to get it on the ballot at a general election. The next general election opportunities will occur in November, 1984 and November, 1986. As explained below, there is reason to think that an amendment passed in November, 1986 would come too late in the expected life of surplus oil revenues to accomplish the intended purposes of the fund. In order to be fully effective, a constitutional amendment to establish the fund should appear on the November, 1984 ballot. This means that two-thirds of each house in the Legislature would have to approve the proposal during 1984. Before pursuing this approach to the exclusion of others, it

will be important to assess the likelihood of passage in the current Legislature.

A statutory fund is easier to create. It is also easier to amend or repeal. A statutory fund can be effective only as long as support for its original purpose resides in the Legislature and the Governor's office. Each deposit to a statutory fund would require enactment of an appropriation bill. On the positive side, the relative ease with which statutes can be changed might turn out to be a welcome feature should the State be faced with abrupt and unanticipated declines in petroleum revenue.

Rules for Fund Disbursements

It would be simplest to require only that an appropriation bill be passed by the Legislature and signed by the Governor. But there are other possibilities that warrant some discussion. Should the statute or constitutional amendment creating the fund require that it be spent only for projects that cost more than some threshold amount? Should it require that disbursements be made only after the full amount needed to complete a project, or perhaps to complete a "stand-alone" phase of a project, has already been accumulated or obtained? Should any sort of advisory group be established to recommend uses of the fund based on estimates of relative need, merit, and feasibility?

Geographic Equity

It will be difficult to deal with questions of geographic equity until the projects to be financed by the fund are specifically identified, and they are not likely to be identified until after the fund is created.

Perhaps the Legislature and the Governor can provide for disproportionate spending in other areas of the state at the time that fund disbursements are made. This could be encouraged by providing that disbursements from the fund require more than a simple majority vote in the Legislature.

Size of the Fund

Under current financing projections, construction of Susitna hydro will require accumulation of at least $3 billion (in nominal dollars) by the end of this decade. In establishing the deposit rates for an investment fund, it will be necessary to determine whether the State is willing to forego alternative expenditures of this magnitude, or settle instead for a smaller accumulation that, while still very significant, would not be adequate for Susitna.

The analysis below is intended to illustrate the Administration's evolving view of the fiscal situation we face. It is

based on the Department of Revenue December 1983 forecast of petroleum royalties and severance taxes, supplemented by the OMB long-range forecast of other revenue sources. It assumes no reimposition of personal income taxes nor repeal of the permanent fund dividend program. Annual inflation of 6 percent is assumed. The many features and assumptions of the analysis are important subjects for debate; the intention of presenting this information is to communicate the broad contours of the Administration's current view. Spending assumptions are made for purposes of illustration only.

Table 1 displays estimates of total, unrestricted general fund revenue based on 30th and 50th percentile petroleum revenue forecasts, and general fund operating budget expenditures at 6 percent annual growth and 8.5 percent annual growth (the latter reflecting adjustment for both inflation and expected population increase).

Table 1

UNRESTRICTED GENERAL FUND REVENUES AND OPERATING EXPENDITURES

	Revenues		Expenditures	
FY	30th Percentile Forecast	50th Percentile Forecast	Oper. Budget Growth @ 6%	Oper. Budget Growth @ 8.5%
1985	$ 3238	$ 3436	$2023	$2023
1986	3359	3622	2144	2195
1987	3633	3961	2273	2382
1988	3625	3999	2409	2584
1989	3941	4436	2554	2804
1990	3786	4546	2707	3042
1991	3509	4179	2870	3300
1992	3431	4085	3042	3581
1993	3278	4050	3224	3885
1994	3169	3973	3418	4216
1995	3074	3784	3623	4574
1996	2902	3533	3840	4963
1997	2954	3625	4071	5385
1998	3007	3695	4315	5842

In tables 2 and 3, operating expenditures are subtracted from expected revenues. In this case, the lower spending figures are subtracted from the more conservative, 30th percentile revenues; and the higher spending figures from the 50th percentile revenues. In addition, currently known G.O. debt service obligations are deducted in each case:

Table 2

REVENUE AND EXPENDITURE ANALYSIS: 30th PERCENTILE REVENUES

FY	30th Percentile Total Revenue	Operating Budget @ 6% Growth	G.O. Debt Service	Residual Funds
1985	$ 3238	$2023	$ 170	$1045
1986	3359	2144	163	1052
1987	3633	2273	155	1205
1988	3625	2409	148	1068
1989	3941	2554	136	1251
1990	3786	2707	120	959
1991	3509	2870	95	544
1992	3431	3042	68	321
1993	3278	3224	60	neg.
1994	3169	3418	34	neg.
1995	3074	3623	23	neg.
1996	2902	3840	21	neg.
1997	2954	4071	17	neg.
1998	3007	4315	14	neg.

Table 3

REVENUE AND EXPENDITURE ANALYSIS: 50th PERCENTILE REVENUES

FY	50th Percentile Total Revenue	Operating Budget @ 8.5% Growth	G.O. Debt Service	Residual Funds
1985	$ 3436	$2023	$170	$1243
1986	3622	2195	163	1264
1987	3961	2382	155	1424
1988	3999	2584	148	1267
1989	4436	2804	136	1496
1990	4546	3042	120	1384
1991	4179	3300	95	784
1992	4085	3581	68	436
1993	4050	3885	60	105
1994	3973	4216	34	neg.
1995	3784	4574	23	neg.
1996	3533	4963	21	neg.
1997	3625	5385	17	neg.
1998	3695	5842	14	neg.

For these cases, the forecasts show eight to nine years of surpluses in excess of operating needs. To these surpluses must be added the FY 85 expected carryover of available general funds. From the surpluses must be subtracted all the loan

appropriations, supplementals and planned special deposits to the Permanent Fund to calculate net funds available for capital purposes. Here again some assumptions are necessary:

1. Loan appropriations of $260 million per year from FY 1985 through FY 1992.

2. Special Permanent Fund deposits of $100 million per year for eight years.

3. Supplementals of $50 million per year.

Tables 4 and 5 show the calculation of funds available for capital in view of these various adjustments:

Table 4

MONEY AVAILABLE FOR CAPITAL AT 30th PERCENTILE REVENUES

FY	Residual Funds	Loan Appropriations	Special PF Deposits	Supplementals	Available For Total Capital
1985	$1445*	$ 260	$ 100	$ 50	$ 1035
1986	1052	260	100	50	642
1987	1205	260	100	50	795
1988	1068	260	100	50	658
1989	1251	260	100	50	841
1990	959	260	100	50	549
1991	544	260	100	50	134
1992	321	260	100	50	--

* Includes $400 million in estimated GF carry forward.

Table 5

MONEY AVAILABLE FOR CAPITAL AT 50th PERCENTILE REVENUES

FY	Residual Funds	Loan Appropriations	Special PF Deposits	Supplementals	Available For Total Capital
1985	$ 1643 *	$ 260	$ 100	$ 50	$ 1233
1986	1264	260	100	50	854
1987	1424	260	100	50	1014
1988	1267	260	100	50	857
1989	1496	260	100	50	1086
1990	1384	260	100	50	974
1991	784	260	100	50	374
1992	436	260	100	50	26

* Includes $400 million of estimated GF carry forward.

Table 6 displays the amounts that could be available for deposit in a major project fund assuming "regular" capital budgets of $500 million per year and $700 million per year (unadjusted for inflation) through 1990:

Table 6

MONEY AVAILABLE FOR DEPOSIT
IN A MAJOR PROJECT
FUND

(in millions)

	30th Percentile Revenues		50th Percentile Revenues	
FY	@ $500 Other Capital	@ $700 Other Capital	@ $500 Other Capital	@ $700 Other Capital
1985	535	335	733	533
1986	142	---	354	154
1987	295	95	514	314
1988	158	---	357	157
1989	341	141	586	386
1990	49	---	474	274
Total	1520	571	3018	1818

These funds would earn interest prior to being expended, and might thereby increase the total depending on whether the earnings are retained in the major project fund or deposited in the general fund. The amount of interest accumulated would also depend on the schedule of disbursements from the fund.

The analysis suggests that deposits to the fund should be scheduled to end in FY 1990, since the projection of funds available for all capital spending indicates serious decline by FY 1991. The State should have a maximum level of fiscal flexibility once the expected contraction in revenues begins in earnest.

Finally, Table 7 displays the percentage of various revenue streams that would have to be dedicated to generate the target fund levels shown in Table 6:

Table 7

ANNUAL CONTRIBUTIONS REQUIRED TO REACH TARGETED FUND LEVELS

	30th Percentile		50th Percentile	
Contribution	($1520)	($571)	($3018)	($1818)
% of non-tax petroleum revenue*	17%	6%	28%	17%
% of total petroleum revenue*	7%	3%	13%	8%
% of total unrestricted G.F. revenue	7%	3%	13%	8%

Thus, for example, 8 percent of total petroleum revenue** (before Permanent Fund deposits) would have to be dedicated to build a fund of approximately $1.8 billion assuming that the 50th percentile forecast were realized, and without consideration of reinvested interest earnings.

* Before any Permanent Fund deposits

** Total petroleum revenue includes primarily royalties, severance taxes, corporate income tax on oil and gas producers, and property tax on oil and gas production property.

Draft of Alternatives

Draft language for the following alternatives has been prepared by the Department of Law and is attached to this memo:

A. a joint resolution to place on the ballot a constitutional amendment creating a Major Project Fund (MPF)

B. a bill to create a statutory MPF

C. a bill to appropriate $300 million to the Power Development Fund for construction of unspecified energy projects other than those already under construction.

Characteristics of these options are discussed topically below:

Time Frame for Deposits

The proposed constitutional amendment would mandate that deposits to the MPF begin in FY85 and continue through FY90, in keeping with current expectations for future revenue availability. There would be no mention of future deposits at all in the proposed statutory alternatives, since statutory language regarding such deposits could not be binding on future Legislatures.

Amount of Deposits

The proposed constitutional amendment would require that annual deposits to the MPF amount to 10 percent of total petroleum revenue, for the following reasons:

1. This appears to be enough to consider the possibility of financing Susitna sometime in the future. Excluding interest, deposits of this magnitude should create a fund of approximately $2.2 billion by FY91 (assuming 6 percent inflation, 50th percentile petroleum revenue forecasts from December, 1983). Assuming that 9 percent interest is earned and redeposited in the MPF, and that no disbursements are made until FY91, the fund could amount to approximately $3.0 billion at that time.

2. Ten percent of total petroleum revenue is a concept that is easily grasped, approximates the proportion that is currently dedicated to the Permanent Fund, and the amount should not seem overwhelming. For FY85, this would require a deposit of approximately $300 million, which still allows an operating budget of $2.1 billion, a regular capital budget of $700

million, loan appropriations of $260 million, and sufficient remaining funds for debt service and other likely obligations.

Use of MPF Interest

The proposed constitutional amendment requires that interest earned on deposits automatically accrues to the MPF. The same intent is written into the proposed bill creating a statutory fund. However, interest on an FY85 deposit to the Power Development Fund would accrue to the general fund in the absence of a separate appropriation of such interest back into the Power Development Fund.

Threshold Size of Eligible Projects

A minimum cost of $100 million per project is proposed in both the constitutional and statutory versions. This is set to allow a reasonable amount of flexibility for covering such projects as Bradley Lake, the Knik Arm crossing, or extension of the Alaska Railroad, without opening the fund to capital projects that can be effectively addressed in the regular capital budget process.

Complete Financing Must Be In Place

Both the constitutional and statutory versions provide that disbursements for a project cannot be made from the MPF until financing for the complete project (or for a stand-alone phase of a project) is in place. "Financing" includes both debt and equity sources of funds.

Two-Thirds Majority Required

The constitutional version provides that appropriation bills to spend from the MPF must have two-thirds majority vote in order to pass the Legislature. The intention is to assure that geographic equity concerns are properly addressed at the time that disbursements are made. This provision is not mentioned in the statutory fund language since it would be pointless to do so (a simple majority could repeal the provision).

Self-Liquidating Feature

Both the constitutional and statutory versions provide that appropriations from the Fund be recovered and returned to the State during the operational life of the project. The intent is to recover principal, without interest, from user fees.

Relation to Constitutional Appropriation Limit

For the constitutional MPF, deposits would not require appropriations and would therefore not be subject to the

appropriation limit. Disbursements would require appropriations, but would be exempted from the limit by language proposed in the constitutional amendment.

Appropriations to the Power Development Fund would be subject to the limit. However, expenditures from the Fund require simply that the Legislature approve the project, not that another appropriation bill be passed. Therefore, expenditures from the Power Development Fund are not subject to the limit.

Draft language to create a statutory MPF is analogous to the Power Development Fund in this regard. Appropriations that are subject to the limit would be required to make deposits to the MPF. However, expenditures would simply require passage of legislation approving a particular project, and would not require an additional appropriation bill that would be subject to the limit.

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Attachments

cc: w/attachments

Norman Gorsuch, Attorney General, Department of Law
Peter McDowell, Director, Office of Management and Budget
Emil Notti, Commissioner, Department of Community and Regional Affairs
John Shively, Chief of Staff, Office of the Governor

MEMORANDUM State of Alaska

TO: The Honorable Bill Sheffield

DATE: April 4, 1984

FILE NO: 84E-7

TELEPHONE NO: 465-3568

FROM: Gordon S. Harrison
Associate Director
Division of Strategic Planning

SUBJECT: Updated Budget Worksheet

These budget numbers supersede those that Peter McDowell provided you over the weekend. They incorporate the recent DOR revenue estimates. As you see, there is almost $4 billion on the table. Note that we have added to the "unfunded requirements" list. For example, we show the Major Projects Fund and HB 684 at $259 million; and we added an FY 85 deposit to the Permanent Fund of $100 million (?).

mm

cc: John Shively, Chief of Staff
Peter B. McDowell, Director, Office of Management and Budget
Ray Gillespie, Director of Legislative Relations
Jay Hogan, Associate Director, Division of Budget Review

BUDGET WORKSHEET

($ Millions, Unrestricted General Funds)

FY 85 Funds Available for Appropriation	3,957.9
Governor's Recommended Operating Budget	(2,224.9)
Loans	(170.0)
FY 84 Operating Supplementals	(8.0)
Seven Capital Appropriation Bills Signed to Date	(715.2) 400
Balance Available for Remaining Requirements	839.8

Remaining Requirements (Estimates)

HB 684	
Deposit to Power Development Fund	200.0
Rate Stabilization	49.0
Power Cost Assistance	10.0
Susitna Licensing	32.0
Anchorage - Fairbanks Intertie	17.0
Alaska Railroad	60.0
Major Projects Fund	300.0
Tobeluk Consent Decree	8.0
Corrections	36.6
Eklutna	34.0
Pribilof Harbor	12.0
Permanent Fund Contribution (FY 85)	100.0
FY 85 Year End Balance	75.0
TOTAL	933.6

84E-7
4-3-84
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UNRESTRICTED GENERAL FUND BALANCES AVAILABLE FOR APPROPRIATION: FY 84 - 85
($ Millions, March 1984 Estimate)

Fiscal Year 1984

FY 1983 Balance Forward	79.9
Projected FY 84 Revenue [1]	3,418.4
Estimated Lapse of Prior Appropriations	100.0
Repayment of Principal on Restricted Investments	24.0
Exploratory Well Drilling Credit	(12.0)
Appropriations During 1983 Session	(2,832.6)
Transferred to Permanent Fund as of April 3, 1984	(300.0)
Fiscal Year End Balance Available for Appropriation	477.7

Fiscal Year 1985

FY 84 Balance Forward	477.7
Projected FY 85 Revenue [2]	3,418.2
Estimated Lapse of Prior Appropriations	50.0
Repayment of Principal on Restricted Investments	24.0
Exploratory Well Drilling Credit	(12.0)
Available for Appropriation	3,957.9

[1] Department of Revenue mean estimate.

[2] Department of Revenue 30th percentile estimate.

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SJR

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Alaska State Legislature

Senate Committee on State Affairs

Vic Fischer, Chair • Pouch V
Juneau, Alaska 99811
(907) 465-4954

Official Business

MEMORANDUM

TO: All Senators

FROM: Senator Vic Fischer

RE: Permanent Fund Investment in Alaska

DATE: February 10, 1984

Attached is information on what the Alaska Permanent Fund Corporation is doing in the area of Alaska investments.

It looks to me as if the Fund is moving in the right direction, and the Board appears to be aware of the need to meet public expectations with at least some significant investments within the state.

Alaska Permanent Fund Corporation
Pouch 4-1000 Juneau, Alaska 99802
TEL 907/465-2047 TLX 099-46-323

February 7, 1984

The Honorable Vic Fischer
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Senator Fischer:

You have inquired as to what programs are in place--and what is planned for the future--with respect to Alaska Permanent Fund Corporation investments in Alaska.

Programs in Place

1. The Trustees have allocated $80 million for investments in home mortgages (owner occupied, one to four units). These are offered at market rates, thirty-year term, floating rate adjusted once annually. Currently, about $30 million has been utilized and $50 million is available The program has been in existence for about two years. Use of the program has been minimal since the Alaska Housing Finance Corporation provides subsidized rather than market rates. Our program is popular with those seeking housing loans over AHFC limits and with those wishing to avoid AHFC step-up rates and the AHFC shorter maturity.

2. The Fund is a purchaser of AHFC taxable bonds backed by Alaskan home mortgages. When market yields are satisfactory, we have purchased up to ten percent of an AHFC bond issue. Our current holdings are $25 million. The Fund cannot buy foreign bonds and cannot participate in AHFC Eurobond transactions.

New Program - March 1984

The Trustees have been working on a program which could place up to $200 million in Alaskan banks for use in our local economy. Under this plan, the Fund would purchase certificates of deposit from banks and would accept Alaska loans as collateral. The program has been finalized and will be before the Trustees for adoption at their next meeting on March 23, 1984. Action on this program was tabled from the last meeting when representatives of one of Alaska's largest banks testified that most banks were awash with funds and the program would not be used. The Trustees believe the program should be put into place now, even though major banks do not need the funds, so that when funds are needed, a well designed rather than "baling wire" program will be available.

On the Drawing Board

The Trustees have retained a consultant to draw a comprehensive plan for real estate investing. A component of the plan will address Alaskan properties. It is anticipated that a preliminary report will be available at the March meeting. Hopefully, we will be able to address ways of investing which (1) will not compete with private sector Alaskan investors; (2) will not create new projects (shopping centers and office buildings) which, through competition, will force marginal producers into financial stress; (3) will not create glut which could result in poor earnings to both the Fund and the private sector.

Standby Program

The Fund can be a purchaser of those portions of loans which are federally guaranteed (i.e., it could buy 90% of an SBA loan--the guaranteed portion). To date the Alaska Industrial Development Authority has an active program and is meeting the total statewide need. If AIDA could no longer solely meet the need, the Fund could assist on a participating basis with AIDA.

I am sure you appreciate our desire to invest within Alaska in such a manner that (1) we do not destroy the long-term formation of capital and along with it the banking system; (2) we do not destroy the equilibrium of the competitive private sector; or (3) we do not utilize the Fund as a social or political tool through hidden subsidization rather than utilize it as a sound, economics-driven savings account for all of our people.

Investing in Alaska is a challenge which will be met. It will take time and the exercise of great care. I'm confident that we can do it.

Please contact me if I can be of further assistance.

Warm regards,

David A. Rose
Executive Director

DAR/aef
Enclosures

ADOPTED BY TRUSTEES AT MEETING

RESOLUTION OF THE BOARD OF TRUSTEES
OF THE ALASKA PERMANENT FUND CORPORATION
PERTAINING TO INITIATION OF A CERTIFICATE OF DEPOSIT PURCHASE
PROGRAM FOR ALASKAN FINANCIAL INSTITUTIONS

RESOLUTION 83-13

WHEREAS, a portion of the Permanent Fund portfolio is generally invested in short-term United States Treasury Bills; and

WHEREAS, this asset allocation provides acceptable yields to the Fund; and

WHEREAS, the same return can be generated by initiation of a collateralized certificate of deposit purchase program; and

WHEREAS, such a program may assist economic development of the State of Alaska while providing market rates of return and minimal risk;

NOW THEREFORE BE IT RESOLVED that the Trustees adopt the attached guidelines which set forth an "ALASKA BANK CERTIFICATES OF DEPOSIT PROGRAM"; and

BE IT FURTHER RESOLVED that the Trustees direct the Executive Director to implement said program; and

BE IT FURTHER RESOLVED that the Trustees will address the amount of funds to be allocated to the program as part of each quarterly investment review.

PASSED AND APPROVED by the Board of Trustees of the Alaska Permanent Fund Corporation, this 2nd day of December, 1983.

Steve Cowper, Chairman
Board of Trustees
Alaska Permanent Fund Corporation

ATTEST:

David A. Rose, Executive Director

Revised 11/29/83

ALASKA PERMANENT FUND

ALASKA BANK CERTIFICATES OF DEPOSIT PROGRAM

POLICY

The Alaska Permanent Fund will purchase certificates of deposit issued by Alaskan banks at floating interest rates for certificates of deposit for a three-year term. Amount of certificates of deposit to be purchased and interest rate paid are predetermined by established guidelines. Floating rates are utilized to provide maximum protection in volatile markets to the Fund.

PURPOSE

To make funds available to Alaskan banking institutions, as required, on an open and continuous basis in an effort to make funds available to accommodate an expansion of the Alaska economy. It is not intended that these funds will be used for arbitrage operations, although it is recognized that a portion may be temporarily utilized for that purpose. While not mandatory, this program envisions that banks will make floating rate loans which minimize risks to banks and borrowers.

PROGRAM GU

1. Funds will be available on a continuous basis. The program is open ended without a determined termination date.

2. Certificates of deposit will be issued by banks and purchased by the Fund for a specific period of three years.

3. Interest rates will float quarterly throughout the three-year period.