1968 WL 112516 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Reuben K. **KING**, Commissioner of the State Department of Pensions and Security, State of Alabama, et al., Appellants,
v.
Sylvester **SMITH**, individually and on behalf of her minor children and members of the class, Appellees.

No. 949.
October Term, 1967.
April 6, 1968.

Brief for Appellees

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***1 Opinion Below**

The opinion of the Three Judge District Court for the Middle District of Alabama, Northern Division, dated November 1, 1967 is reported at 277 F. Supp. 31 (1967). The opinion and decree of that court are set forth at pages 41-60 of the Record.

Constitutional Provisions, Statutes, and Regulations Involved

This case involves the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, 42 U. S. C. 601 et seq. (A. 7, 8), 49 Code of Alabama, 17 ***2** (A. 17), and the Alabama "Substitute Father" Regulations.[1]

The Substitute Father regulation provides:
V. *Child Ineligible if There is a Father or Mother Substitute*

A. *Father Substitute:* An able-bodied man, married or single, is considered a substitute father of *all* the children of the applicant/recipient mother living in her home, whether they are his or not, if: (1) he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation; or (2) though not living in the home regularly, he visits frequently for the purpose of cohabiting with the child's natural or adoptive mother; or (3) he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere. Pregnancy or a baby six months or under is prima facie evidence of a substitute father as indicated above.

When there appears to be a substitute father, disapprove an application or terminate aid unless the mother establishes that one of the following situations exists: (1) she and/or the substitute father meets the criteria of disability as described under "Physical or Mental Incapacity"; (2) the substitute father is no longer living in the home or visiting the home for the purpose of cohabiting with her; or (3) the relationship is broken between the mother ***3** and a man who has not been living in the home or frequenting the home.

Evidence showing that the relationship has been discontinued includes proof such as: the father has married another woman; or he is in a public institution; or, if he has been living in the home, he is now living at another address, or a notarized statement by the mother and substitute father that they have discontinued their relationship. This evidence must be corroborated by at least two acceptable references in a position to know. Examples of acceptable references are: law-enforcement officials; minister; neighbors; grocers. If needed, the mother will be given 30 days to present her evidence before her application is disapproved or her case closed unless additional time is needed. If additional time is needed, another 30 days may be allowed. In no instance shall more than 60 days be allowed. Although the burden of proof rests with the

mother, the worker will assist in any way possible to help the mother establish that she has broken a relationship. Also, before rejecting an application or closing a case, the worker will talk with the mother about her right to reapply at any time that she does break the relationship. If the family is otherwise eligible, the case should be recertified for aid immediately (A. 14).

The Appendix to this brief (App. pp. la-5a) sets forth a brief analysis of similar statutes and regulations that exist in other States.[2] The Appendix and the Record on Appeal ***4** contain examples of Regulations found in 6 other states. Portions of the substitute father regulations of the States of Virginia and Arizona are set forth in the Appendix. The following regulations are set forth in their entirety in the Record: Georgia (Appellees' Exhibit 9, A. 492), Mississippi (Appellees' Exhibit 10, A. 494), Arkansas (Appellees' Exhibit 7, A. 483), and the District of Columbia (Appellees' Exhibit 8, A. 485).

Questions Presented

1. Whether the substitute father regulation violates the Equal Protection Clause of the Fourteenth Amendment and contravenes the purposes and intent of Title 42 of the Social Security Act and Title 49 of the Code of Alabama by denying aid to needy dependent children who are deprived of parental support or care by reason of the death, absence from the home, or incapacity of a parent, for an arbitrary and irrational reason-the alleged sexual behavior of the mother.

2. Whether the regulation in discriminating against Negroes, illegitimates and families of illegitimates violates the Equal Protection Clause of the Fourteenth Amendment.

3. Whether the arbitrary procedures and vague standards contained in the regulation deny due process of law and equal protection of the laws under the Fifth and Fourteenth Amendments.

4. Whether rights guaranteed to Appellees by the Due Process Clause of the Fourteenth Amendment are violated by failing to afford Appellee and the members of her class ***5** an opportunity to be heard in an adversary proceeding before termination of assistance.

5. Whether the regulation, in placing the burden of proof upon the mother to show that the relationship has terminated is constitutionally defective in violating due process and in violating the mother's right against selfincrimination.

6. Whether the regulation in invading the mother's privacy and imposing a burden upon her freedom of association violates constitutional rights guaranteed by the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

Summary of Argument

1. The substitute father regulation violates the Equal Protection Clause of the Fourteenth Amendment. Aid to Dependent Children financial assistance is a statutory entitlement under both the laws of Alabama and the Federal Social Security Act, and when the child meets the statutory eligibility requirement, he has a right to receive financial assistance. The substitute parent regulation creates precisely the type of classification prohibited by the Equal Protection Clause for it directs that aid be denied to needy dependent children who are deprived of parental support or care by reason of the death, absence from the home, or incapacity of a parent for an arbitrary and irrational reason-the alleged sexual behavior of the mother. *Gulf, Colorado and Santa Fe Railway Co. v. Ellis,* 165 U. S. 150, 155, *More v. Doud,* 354 U. S. 457, 463-64. (See pp. 33-45 of Appellees' Brief and the opinion of the Court below, A. 53-59.)

***6** Appellants knew prior to the time that the substitute father regulation was promulgated in July, 1964, that the regulation would have a discriminatory effect for it would result in the disproportionate denial of aid to Negro children and their mothers. They also knew it would discriminate against illegitimate children and the brothers, sisters and mothers of illegitimate children. These were the regulation's purposes and it has had that effect. (See pp. 2228 and 33-45 of the Appellees' Brief and footnote 7 of the opinion below (A. 51).)

Needy dependent children who are entitled to aid because they fall within the statutory purpose and scope of 42 USC 601, Code of Alabama, Title 49 Section 17, are excluded solely because of their mother's presumed relationship with a man who is not their father, who need never visit their home, who is not giving them any support and who is not performing any of the

duties of a father. This contravenes the purposes and intent of the Social Security Act and the laws of Alabama and the Department of Health, Education and Welfare's refusal to approve the regulation on this and constitutional grounds was correct. (See pp. 2S-45 of the Appellees' Brief and the opinion of the court below, A. 47-53.)

Appellants' regulation violates the requirements of the Social Security Act and the United States Constitution in attempting to define as a "parent" (the regulation calls him a substitute parent) one who is under no obligation to (and does not) support the child. Appellant cannot, by an attempted redefinition of the word "parent" make this substantive change in its ADC program. (42 U. S. C. 601, 49 Code of Alabama 17. Ruling of the Secretary of Health, Education and Welfare, January 17, 1961, "The Flemming ***7** Ruling," Appellees' Exhibit 4, A. 278-279; Melorandum Concerning Authority of the Secretary of the Department of Health, Education and Welfare under Title IV to disapprove Michigan House Bill 145 on the Ground of its Limitation of Eligibility, Appellees' Exhibit 6, A. 478; See pp. 33-45 of Appellees' Brief.)

2. The arbitrary procedures and vague standards employed in the interpretation and application of the regulation violate the Fifth and Fourteenth Amendments to the Constitution. There are no definable criteria for the application of the standards set forth in the regulation with one of the results being that decisions are made on the basis of color and status. *Yick Wo v. Hopkins,* 198 U. S. 356 (1886). (See pp. 14-16 and 52-55 of Appellees' Brief.)

3. The termination of benefits without an opportunity for a prior fair hearing denied Appellees due process of law. *Slochower v. Board of Higher Education,* 350 U. S. 551 (1955); *Willner v. Committee on Character and Fitness,* 373 U. S. 96 (1963); *Gonzales v. Freeman,* 334 F. 2d 570 (D. C. Cir. 1964); *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961), *cert. den.* 368 U. S. 930 (1961) ; Reich, *The New Property,* 73 Yale L. J. 733; Bunnis and Fessler, Constitutional Due Process Hearing Requirements in the Administration of Public Assistance, 16 Am. U. L. Rev. 199, 217 (1967). Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L. J. 1234, 1244. (See pp. 46-52 of Appellees' Brief.)

4. Placing the burden of proof on the mother to show that the relationship has "terminated" after "hearsay" evidence has been received by the caseworker without giving ***8** the mother an opportunity to confront and cross-examine the source of the evidence violates due process. *Speiser v. Randall,* 357 U. S. 513 (1958); *Rios v. Hackney,* CA 3--1852 N. D. Tex. Dallas Div., Nov. 30, 1967. (See pp. 47-65 of Appellees' Brief.)

5. The requirement that the mother furnish the state with information as to her sexual relations with men (as the price of continuing to receive benefits without any immunity from subsequent criminal prosecution under Alabama's penal laws) violates her privilege against selfincrimination. *Garrity v. New Jersey,* 385 U. S. 493 (1967). (See pp. 55-65 of Appellees' Brief.)

6. The question asked of the mother concerning her most intimate relationships (to which she must give answers if she is to receive benefits) violates her right to privacy. The burdens placed upon her by the regulation to limit the range of those she associates with are destructive of her personal relationships and violate her and her children's constitutional rights. *Griswold v. Connecticut,* 381 U. S. 479 (1965); *N.A.A.C.P. v. Button,* 371 U. S. 451 (1963); *Speiser v. Randall,* 357 U. S. 513 (1958); *Loving v. Virginia,* 388 U. S. 1 (1967); *Parrish v. California,* 66 Cal. 2d 253 (1967). (See pp. 65-80 of Appellees' Brief.)

7. The Alabama administrative remedy is inadequate. Appellees' failure to appeal her caseworker's determination is not grounds for dismissal. *Damico v. California,* 389 U. S. 416 (1967); Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967). (See pp. 75-79 of Appellees' Brief.)

***9 Statement of Facts**

Appellees Sylvester Smith, a resident of the County of Dallas in Alabama and mother of plaintiffs, Ida Elizabeth Smith, aged 14; Ernestine Smith, aged 12; Willie Louis Smith, aged 11; and Willie James Smith, aged 9, brought this action in her own behalf, and in behalf of her minor children, and, pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure, in behalf of all other persons similarly situated.

Appellees sought injunctive relief under 42 U. S. C. 1983 restraining defendant officers of the State of Alabama from the enforcement, operation and execution of the statewide regulation set forth in the Alabama Manual for Administration of

Public Assistance, Part I, Chapter II, Section VI, Par. V, commonly referred to as the "substitute father" regulation, on the ground that the regulation was unconstitutional. The Three Judge Court, in a unanimous decision, held the regulation unconstitutional (A. 41-59).

Appellant King, the Commissioner of the Alabama Department of Pensions and Security has the statutory responsibility for the adoption of the regulations designed to effect the policy and for exercising the executive and administrative duties of the Alabama State Department of Pensions and Security. Appellant Wilkinson, Sr., is responsible for enforcing the policies and regulations of the Alabama agency in the County of Dallas, the County wherein Appellees reside. The other Appellants are the chairman, members, and officials of the Alabama agency, responsible for the adoption of policies, rules, and regulations of the Alabanla State Department of Pensions and Security.

***10** Appellants, in order to receive federal funds for the Aid of Dependent Children program conducted for the State of Alabama, are required by the provisions of 42 U. S. C. Section 601-609 to formulate a "State Plan" for aid to dependent children consistent with the provisions of the Constitution of the United States and the provisions of 42 U. S. C. Sect. 601 et seq. Under the terms of the Code of Alabama, Title 49, Sect. 17 (7), the defendants are also required to "act as the agent of the federal government ... in the administration of any federal funds granted to the state to aid in the furtherance of any of the functions of the state department ..." and otherwise to act as the agents of the federal government in the furtherance of the objectives of the Aid to Dependent Children program. With this arrangement, federal funds are granted under the provisions of 42 U. S. C. Sect. 601 et seq. and these funds constitute the major share (approximately 80%) of Aid to Dependent Children grants in the State of Alabama. Under the term of 42 U. S. C. Sect. 606 (a) a "dependent child" is defined as:

"... a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (a) under the age of eighteen or (b) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the secretary) a student regularly attending a school, college or university, its ***11** equivalent, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."[3] See also Code of Alabama, Title 49, Sect. 17 (14) (A. 7).

The facts concerning Mrs. Smith's case, the manner in which the regulation is applied and interpreted throughout the State, and the communications between the Department of Health, Education and Welfare and the State of Alabama that lead to the determination by the Federal Government that the regulation was not in conformity with, and contravenes, the Social Security Act were developed at trial. We will set forth these facts in turn.

(a) The Termination of Aid to Appellees

The basic facts are not in dispute. For several years prior to October 1, 1966, Appellee Sylvester Smith and her children had been recipients of financial assistance under the Aid to Dependent Children program of the State of Alabama. Appellant, on October 1, 1966, advised Mrs. Smith that an undisclosed third party had told the Welfare Department that Mrs. Smith was "going with" Mr. Williams and unless Mrs. Smith could prove otherwise Mr. Williams was to be considered a "substitute father" within the meaning of the regulation (Appellees' Exhibit 40, A. 275). Appellant did not ask whether Mr. Williams gave any support or care for the maintenance of the children, for Appellants then claimed (and rightly so) that under the regulation those facts are not relevant (A. 250). Appellants claimed Mrs. Smith did not sustain her burden of proving that the ***12** relationship had terminated (A. 47) and by notice dated October 11, 1966, Mrs. Smith and her children were removed, retroactively to September 30, 1966, from the list of eligible to receive such aid because her children allegedly had a "substitute father" (A. 16). The termination notice did not advise Mrs. Smith of her right to appeal the determination. It stated only that Mrs. Smith had a right to "talk with" Appellants if she "wants other information" (A. 16). Appellants dispute Mrs. Smith's claim that she was never orally advised of her right to appeal (A. 256).

Three of Mrs. Smith's children have not received parental support or care from their father since 1955, the year of their father's death (A. 243). The fourth child's father left home in 1963 and the child has not received his father's support or care since then (A. 243). All the children are living in the home of their mother. The children are under the age of 18, are not receiving any other type of public assistance, and all, except for the substitute father regulation are eligible for aid. The sole

income of Mrs. Smith and her children, at the time of the termination of aid, was $20 per week (she worked as a waitress), and this is below the financial standards promulgated by Appellants as necessary for subsistence (A. 244).

Mr. Williams has nine children of his own and he lives with his wife and family, all of whom are dependent upon him for support (A. 46). Mr. Williams, Mrs. Williams and Mrs. Smith (and their children) are all good friends. They visit each other's homes with their children (A. 251, 252, 254). Mr. Williams' parents and Mrs. Smith's parents were friends, and they have known each other "all their days" (A. 246). Mr. Williams is not the father of any of Mrs. Smith's children and is not willing or able to support her ***13** children (A. 247). Mrs. Williams is required to work to help support the Williams household.

(b) The Regulation on Its Face

The regulation directs that aid not be given to certain needy children who are deprived of their father's support or care by reason of his death, incapacity or absence from the home. The aid cannot be given because of the "substitute father" even though the man is not the children's father, is not living in the home, is not giving them any support and is not performing any of the duties of a father. He may be, as is Mr. Williams, living with and supporting his own family.

It directs the agency to terminate aid whenever there "appears" to be such a relationship. It does not state the criteria to be used by the caseworker in determining when such a relationship does "appear".

The regulation presumes that a man who has a sexual relationship with a woman is supporting all of her children. The regulation speaks of a "continuing" relationship and of "frequent" visits. However, a child's birth (a single act) is prima facie evidence of a continuing sexual relationship even though the sexual act took place nine months before birth or fifteen months before a decision to terminate aid. During the course of the initial interview the caseworker can ask (and expects to receive answers) to intimate questions about the mother's private relationships. Undisclosed informants' statements (as in Mrs. Smith's case) are of sufficient weight to require a closure. Facts concerning the support of any of the children are not relevant.

***14** Once the state has decided that a relationship exists the mother bears the burden of proving it has terminated. The regulation does not set down standards defining the mother's burden, only that she, in order to support her burden of proof, must go out into the community and get her neighbors, law enforcement officials and merchants and people who "are in a position to know" the nature and the status of the relationship to corroborate her version of the facts.

There is not any impartial hearing prior to the termination of aid. The termination notice does not advise the recipient of the facts that led to the termination. It states only that her aid has been terminated because of the regulation. The notice does not advise her of her right to appeal. It provides that if the recipient "wants other information from the County Department, we [the Agency] shall be glad to talk with you" (A. 16). The opportunity for an administrative hearing comes months after the aid has stopped.

(c) Appellant's Interpretation and Application of the Regulation

Appellants do not claim that the regulation has any definite standards. Their Brief states the testimony indicated that the facts of each case have to be considered in determining "how the policy reasonably applies ... the application of the policy would depend on the facts in each situation ... these terms (of the regulation) must be applied in accordance with the facts of each situation" (p. 9 of Appellants' Brief) "... each case would have to be resolved on its own unique factual situation" (p. 6 of Appellants' Brief). The testimony of seven County Directors, Welfare Department officials and Mrs. Smith's ***15** caseworker demonstrated that each interpreted the regulation in a substantially different way and that some of Appellants' employees, in frustration, developed additional criteria of their own which are not found in the regulation (A. 60, 270).

One school of thought was that the regulation authorized the recipient to determine whether or not the relationship with the man was "continuous" (A. 152, 172). This standard is, of course, not in the regulation. If the recipient were wrong (the man saw her once and did not intend to see her again) she and her children would lose aid. The proponents of this interpretation

did not inquire as to the length or frequency of the relationship and did not advise their clients of the kind of relationship prohibited by the regulation. They were perfectly willing to allow the client to decide if the facts of her case required a termination of aid (A. 201, 220, 228).

The second school of thought saw the regulations creating definite standards. Appellant King felt that the regulation should be applied only if the parties had weekly sex (A. 84) and that if any cases were closed where the relationship was less frequent, it would be improper (A. 89). One County Director testified that if the parties had sex once every three months the regulation could and should be applied (A. 181), and another County Director testified that once every *six* months would be enough (A. 172).

Appellants' witnesses all agreed that if a mother had a five month old child, and said she had not had a sexual relationship since the date of conception (14 months before) and had not seen the father since, she was not, based on her uncontradicted statements, entitled to aid even ***16** though there was no evidence to the contrary. She must first prove that the "relationship" had terminated by getting corroborating evidence.

The third school of thought was that there was not and could not be any standard application of the regulation. As Appellant King stated, each case must be judged on its own for no one has defined the words in the regulation to indicate when the regulation should be applied and when it should not (A. 84, 86, Appellants' Brief pp. 6, 9).

The fourth school of thought had adopted other yardsticks (not found in the regulation) to aid them in determining when to apply the regulation. Some of the criteria are whether the caseworker feels the parties are serious about each other (A. 152), whether they will eventually marry (is the man available for marriage), what do the parties' parents and their children think of the relationship, etc. (A. 152).

The kinds of questions to be put to the members of the Appellee's class by the caseworkers varied depending on the varied understanding of the regulation. Some asked about the frequency of sexual relationships, while others felt such questions degrading (A. 138). Every aspect of the recipient's life, according to some of Appellants' employees is open to scrutiny (A. 174).

The evaluation of the "evidence" concerning the alleged relationship is left to the caseworker and Appellants' employees developed different criteria. Each caseworker must determine whether the person supplying the information is motivated by a desire to harm the client, and whether the informant has any facts to support the allegation of impropriety. The regulation offers no guide to help the caseworker in answering these questions.

***17 1.** *Alabama's Attempts Prior to the Adoption of the Substitute Father Regulation to Enact a Suitable Home Policy--The Flemming Ruling*

Appellant King testified that the "present substitute parent policy includes what had been "the previous suitable Home Policy" as well as several new provisions (A. 78). Alabama had a suitable home requirement for many years prior to July, 1964, the date of the enactment of the substitute father policy. The suitable home policy sought to deny aid on the grounds that the moral atmosphere in the home was detrimental to the child's upbringing (Appellees' Exhibit 3, A. 321, 332). The stated purpose of the policy was to (a) reduce aid to Negroes on welfare rolls by terminating cases, (b) penalize Negro children of allegedly promiscuous mothers, whether these children were legitimate or illegitimate, (c) penalize illegitimate children, (d) penalize brothers and sisters of illegitimate children, (e) discourage mothers from acting in an immoral manner and having illegitimate children, and[4] (f) reduce welfare costs.[5] However, the federal Government's opposition to plans or policies (a) denying aid to families with dependent children because of the moral behavior of a parent and (b) imposing penalties on families with illegitimate children, had been well known and Alabama was advised that such policies would not be allowed since they were out of conformity with the Social Security Act and might result in the termination of federal funds for the state's plan (Appellees' ***18** Exhibit 3, A. 321, 362). See also Bell, *Aid to Dependent Children,* Columbia University Press (1965), pp. 93-117.

The reasons for the suitable home policy were the same as the reasons for the substitute father regulation. A brief discussion of federal-state welfare relationships (and the sanctions available to the Department of Health, Education and Welfare when a

state welfare plan is unconstitutional or out of conformity with the Social Security Act) and negotiations concerning the Alabama suitable home policy provides a background for our consideration of the history of the Alabama substitute father regulation.

The sanction available to the Department of Health, Education and Welfare (hereinafter called HEW), in order to exact state compliance with the policy and specific requirements of the Social Security Act, is to withhold federal funds from the state program. The only option is to withhold the entire federal grant under a particular title for non-compliance of any portion of a state plan.[6] This is rarely done. There have been only fifteen so-called "conformity hearings" in which tile requirements of a state plan have been questioned since the enactment of the Social Security Act.

The last conformity hearing was the first hearing involving a state ADC program and goes to the question of ***19** the extent to which a state could validly limit its grants to dependent children. The Louisiana legislature passed an act requiring, as a condition precedent for eligibility for assistance, that the home of a dependent child be determined to be "suitable". The legislation dealt not only with the physical conditions of the home but also with the moral conduct of the child's parents. It provided that any home in which an illegitimate child had been born subsequent to the receipt of public assistance would be considered "unsuitable" and, hence, the family would no longer be eligible for an ADC grant unless proof were submitted that such conditions had been remedied. The act was interpreted by the Attorney General of Louisiana as being retroactive in effect. As a result of this legislation, in August, 1960, over 23,000 children were dropped from ADC rolls in Louisiana.[7]

On January 17, 1961, Secretary Flemming, then Secretary of HEW, in response to the Louisiana legislation, stated in what is known as the Flemming Ruling, that all future state plans with similar provisions would be contrary to the purposes and interest of the Social Security Act:
"I have concluded that when a needy child who otherwise fits within the Aid to Dependent Children program of the State is denied the funds that are admittedly needed to provide the basic essentials of life itself, because of the behavior of his parent or other relative, the State plan imposes a condition of eligibility that bears no just relationship to the Aid to Dependent Children program. I therefore believe that ***20** this Department should inform the State agencies administering Aid to Dependent Children plans that eligibility conditions with the effect described above are not compatible with entitlement for continued Federal grants" (A. 279).

The Commissioner of Social Security, following the Flemming Ruling, stated that effective July 1, 1961:
"A State plan for aid to dependent children may not impose an eligibility condition with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere" (A. 279).

The Federal Government, prior to the 1961 Flemming Ruling, although it had not clearly articulated its position respecting many of the problems posed by the suitable home policy had been refusing to approve policies similar to Louisiana's.[8] The policies in force in Alabama from 1959 to 1963 were not approved for this reason.

For example the State of Alabama, by letter dated April 8, 1956, submitted a suitable home policy to HEW, which provided:
***21** Section 2. As used in this Act, the terms "suitable family home" means a family home which in accordance with the rules and regulations of the State Department of Pensions and Security, provides a stable environment for the child or children residing therein. A determination of a suitable home shall include the pattern of living of the parent or other relatives with whom the child resides, whether the parent or relative is promiscuous, has casual relationships either in or ***22** outside the home, has continued to have illegitimate children and has otherwise failed to demonstrate an intent to establish a stable home.

Section 3. No person who is living with his or her mother and whose mother has had an illegitimate child after receiving a check from any County Department of Pensions and Security, shall receive any assistance under the program for aid to dependent children unless and until proof satisfactory to the County Board of Pensions and Security has been presented showing that the mother has ceased illicit relationships and is maintaining a suitable family home for the children (Appellees' Exhibit 4, A. 463).

After additional correspondence, HEW by letter dated April 23, 1958, indicated the constitutional defects in the proposed legislation.

The State of Alabama replied by submitting numerous other suitable home policy and in each instance HEW replied that the policy was still constitutionally defective. Thereafter, Alabama gave up its attempts to pass a suitable home policy and began to formulate the substitute father regulation (Appellees' Exhibit 3, A. 321-362).

2. *The History of Alabama's Substitute Father Regulation, Its Purpose, the Reason for Its Enactment, the Manner in Which It Was Promulgated and Some of the Statistics Indicating Its Success in Achieving the End Sought by Appellants*

Mr. King, immediately after coming into office, authorized a study whose purpose was to (a) examine the Welfare system to find those areas in which Alabama could limit the ***23** amount of monies it was spending, (b) help formulate a regulation that would terminate assistance in programs that were primarily composed of Negroes and not affect the white recipients, (c) discourage illegitimacy by penalizing Negro illegitimate children and their families by depriving them of aid, and (d) impose regulations that would penalize welfare families where the behavior of one of the parents did not conform to certain moral standards.[9]

The State, in order to accomplish these purposes, was faced with the burden of developing a regulation that appeared not to be discriminatory but did reduce aid disproportionately. The State succeeded, for the regulation, though it makes no racial distinction, has resulted in the denial of aid to a disproportionately higher number of Negro families than white. See *Griffin v. County School Board*, 377 U. S. 218 (1967).[10]

***24** The Alabama Aid to Dependent Children program, the program affected by the "regulation", is the only one of Alabama's major public assistance programs that has more Negroes than whites receiving benefits, and it was in this program (the least expensive of the four major programs) that the state decided to start restricting aid.[11]

***25** The study authorized by Appellant King dated July 12, 1963, entitled "Characteristics of Families and Children Receiving Aid to Dependent Children" indicated, among other things, that of the 22,574 families on ADC, 8,172 were white and 14,345 Negro (Appellees' Exhibit 22, A. 569). Table 2 of the Study, "Status of Father with Respect to Eligibility of Children for ADC" indicates that the NegroWhite ratio with respect to each category concerned (the dead, incapacitated or absent father), is racially proportionate in all but one class, that category concerned with those cases where the absent father is never married to the mother (A. 571). In those families where the absent father's was "divorced or separated" there were twice as many white families as Negro families. However, in that category where the absent father never married the mother, there were nine times as many Negro families receiving aid as there were white families (A. 571).

Table 6, "The Legitimacy Status of Children Receiving Aid to Dependent Children" indicate there were 31,057 legitimate Negro children receiving aid and 21,623 white children. However, there were 16 times as many Negro illegitimate children receiving aid as white children. Hence, a policy aimed at cutting off aid to families where there were illegitimate children would strike primarily at Negro families.[12] The regulation is written so that one illegitimate child in a household of ten could result in the entire family being cut off (Appellees' Exhibit 22, A. 575). ***26** Table 7, "The Status of the Child's Natural Step or Adoptive Father" (Appellees' Exhibit 22, A. 569) indicates the normal racial ratio in all but one category: there were 17 times as many Negro fathers who were not married to the mothers as whites.

Appellees, in order to develop facts to prove the racially discriminatory nature of the regulation, selected seven counties representative of the State of Alabama and asked for the number of terminations due to the regulation for a specified month, the month of July, 1966 (Appellees' Exhibit 25, R. 706). 100% *of the cut-offs were Negro.* Appellees, anticipating the argument that July, 1966 was not representative, had the Alabama Bureau prepare statistics for a 30 month span in those seven counties.[13] In this study, involving 498 cases, the cut-off rate "dropped" to 97% Negro and 3% white (Appellees' Exhibit 31, A. 736).[14] ***27** The statistics leave no room for dispute over whether the regulation affects primarily Negro families.[15]

One of the purposes of the regulation was to cut down the welfare rolls and it has, of course, succeeded. Appellant King

testified that since June 1964, when the "substitute father regulation was promulgated, the Alabama ADC rolls have been reduced from 72,764 children to 56,822 children (fn. 7 of the Court's opinion, A. 51).

Another purpose of the regulation was to deny aid where there are illegitimate children. This may have been the primary reason for its enactment (A. 75). The Alabama Bureau of Research and Statistics by document dated March 22, 1967 (Appellees' Exhibit 25, A. 706) indicated that 11 of the 16 cases involving the denial of an application or the closure of cases during July, 1966, in selected counties were terminated (or the application rejected) because of the mother's pregnancy or because of the presence of an illegitimate child.[16]

***28** Mrs. Stancil, one of Appellant's employees, stated that 14 of the 19 cases closed by her during the course of a two and a half year period in Dallas County because of the regulation were on the grounds of the birth (or oncoming birth) of an illegitimate child.[17]

3. *Communications Between the State of Alabama and HEW Concerning the Substitute Father Regulation and HEW's Refusal to Approve the Regulation Because It Did Not Conform to and Contravened the Purpose of the Social Security Act*

The substitute father regulation presently in effect in Alabama is substantially the same as the regulation first submitted to HEW in September, 1964 and the defects in the first plan exist in the present policy (A. 78).

Mr. Wave Perry, Atlanta Regional Director of HEW by letter dated August 31, 1964 acknowledged receipt of the Alabama Substitute Parent Plan dated July, 1964 (Appellees' Exhibit 1, A. 293), stating:
This policy raises a serious question with Section 404 (b) of the Social Security Act and State Letter No. 452 by denying aid "without respect to a child because of the conditions in the home in which the child resides." Under the identified Federal law and policy a State may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis of behavior of the mother or other unsuitable conditions in the home so long as the child continues to reside ***29** in the home. *The provisions of Administrative Letter No. 1919 seems clearly to be put out of con formity with such laws and policy.*

Other provisions of the policy imposing the burden on the matter with respect to proof of identity of the father or his whereabouts appear *to be so unreasonable as to bring into question their acceptability under Federal policy.* Eligibility may not be conditioned upon requirements which go beyond the parent's ability to meet.

The Regional office is unable to accept Administrative Letter No. 1919 for incorporation into your approved **AFDC** plan. We would suggest, therefore, that you rescind this letter and reinstate the cases that have been closed under this policy.[18]

Appellant King, replied and argued the regulation did conform to the intent of the Social Security Act (A. 294). Mr. Perry by reply letter indicated the plan was a suitable home plan and did not conform.[19]

***30** The Regional Office of HEW, having failed to persuade Alabama to change its plan, asked the Washington, D. C. office to intervene. Thereafter, Mr. Steininger became involved in the discussion, and after a conference in Washington and further correspondence between the parties, Mr. Steininger on December 11, 1964 replied to Alabama's proposed plan and advised them that it was not in conformity.[20] ***31** This is the last letter sent by HEW to Alabama concerning the substitute father regulation.

Appellant King testified he had submitted the substitute father policy to HEW, did not know the status of the policy, and did not know whether it had been accepted or rejected, did not know why it had been rejected (if it had) and that lie was waiting to hear from HEW (A. 93-94). This was flatly contradicted by Mr. Steininger (Steininger Tr. 72). He testified that the statute governing the submission of plans requires him to note the Department objections and then ask the state to resubmit and to attempt to negotiate the plan further. He testified that a determination that the regulation is not in conformity is tantamount to disapproval and that this is what was done (Steininger Tr. 84-85).

***32** Mr. Steininger testified that he was waiting to hear from Alabama[21] that except for the Alabama plan, he had never

"disapproved" any other "man-in-the-house policy" (Steininger Tr. 85-86).

The State of Alabama attempted to evade the significance of the refusal by HEW to approve the regulation rejected in Mr. Steininger's Dec. 11, 1964 letter by arguing that the present policy is different from the one disapproved, does not suffer the defects of its predecessor and hence, the previous determination by HEW is not applicable to the present policy. The Court below found that the regulation submitted in 1964, nearly identical to the one presently in existence, and HEW's determination that the previous plan is "out of conformity" and is applicable to the present ***33** plan. (See the Opinion of the Court below, A. 53, Steininger Tr. 42-43, 45.)[22]

***34 POINT I**

The substitute father regulation violates the equal protection clause of the Fourteenth Amendment and contravenes the purposes of the Social Security Act and the Alabama statutes in arbitrarily and irrationally classifying certain needy dependent children as ineligible for aid.

ADC financial assistance is a statutory entitlement under both the laws of Alabama, and the Federal Social Security Act, and where the child meets the statutory eligibility requirements, he has a right to receive benefits. The State's withholding of assistance on an irrational, arbitrary, and discriminatory basis denies the children affected the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.[23] *Gulf, Colorado and Santa Fe Railway v. Ellis,* 165 U. S. 150 (1896).

Alabama cannot pick and choose the mothers and children it will aid in a whimsical and capricious manner; it cannot exclude needy children from the program on an arbitrary or irrational ground, and it cannot classify some ***35** children as eligible and others as ineligible without a reasonable basis for distinguishing one class from the other. It may only create classifications which are rationally related to the purpose of the Federal and Alabama ADC statutes.[24]

The purpose of the Federal ADC statute (Title IV of the Social Security Act, 42 U. S. C. 601 et seq.) and the Alabama ADC statute (Code of Alabama, Title 49, 17) is to provide financial assistance to needy children who are deprived of the support and care of one of their parents. The Alabama statute requires the Defendants to furnish ADC financial assistance "on behalf of any needy child who is a dependent child as defined in the Federal Social Security Act". (Code of Alabama, Title 49, 17.) The Federal Act defines a "dependent child" as one who is "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent." Parent refers only to a ***36** person having a legal duty to support the children (42 U. S. C. 606).[25]

Appellants quote at length (pp. 22 to 28 of their brief) from Lewis and Levy, *Family Law and Welfare Policies,* 54 Calif. L. Rev. 748 (1966). Appellants miss the point of the article. The authors indicate that support should not he required from a "casual paramour" nor from one who does not live in the house and assume the role of father and spouse, nor from the stepfather who is not legally obligated to support the child (fn. 69 at p. 774). Support should be required from the stepfather who is legally married to the mother in those states where he can be compelled to support the child. It discusses only those "man in the house" rules that. "authorizes the Welfare Department to consider the income of a male person assuming the role of the spouse" (p. 24 of Appellants' brief) and only those regulations that deal with "stable and openly acknowledged family relationships" (at 775). Sec Weynauch, Dual Systems of Family Law, 54 Calif. L. Rev. 78O (1966) for a critical review of the Lewis and Levy article. We should note our basic disagreement with those portions of the Lewis and Levy article that go beyond these points.

Despite the clearly stated legislative purpose of both the Federal and Alabama statutes, the Alabama "substitute father" regulation directs that because of the mother's conduct ***37** aid shall not be given to an eligible class of needy dependent children.[26]

***38** It would be arbitrary and irrational even to infer that the phantom father is providing parental care and support to the children. The "substitute father" regulation presumes it. These regulations do not require that the man be living in the home and assuming the role of a father to the children. It is "enough evidence" that some man has had the "privileges of a husband"

that the mother is pregnant or has a small child. The children need never have seen him and yet he is considered their father.

***39** In *Harper v. Virginia State Board of Elections,* 383 U. S. 663 (1967), this Court stated:

"We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be clearly scrutinized and carefully confined. See, e.g., *Skinner v. Oklahoma,* 316 U. S. 535, 541; *Reynolds v. Sims,* 377 U. S. 533; *Carrington v. Rush,* 380 U. S. 89; *Baxtrom v. Herald,* 383 U. S. 107; *Cox v. Louisiana,* 379 U. S. 536."[27]

***40** See also the dissenting Opinions of Mr. Justices Harlan and Stewart at pages 680-686.

This Court has employed two well-established and related standards in determining questions under the Equal Protection Clause. The first looks to the characteristic or trait determining the classification and finds that some classifications are by their nature suspect, and may only be utilized if there "clearly appears ... some overriding statutory purpose ..." *McLaughlin v. Florida,* 379 U. S. 184, 192 or "compelling justification" *Oyama v. California,* 332 U. S. 633, 640; the second looks to the purposes of the statute and the basis of the classification and requires that the two be reasonably related.

The discrimination against the excluded needy children in this case is unconstitutional under both these standards. Alabama in the substitute parent regulation has created two classes of needy children-one that can recover aid and one that cannot. The classification, based on the mother's conduct, the children's race and the status of their birth, is unrelated to the purposes of the Social Security Act, and is not justifiable under the Constitution.

***41** In reference to the first standard, this Court has repeatedly affirmed that classifications based on race, status, ancestry, or morality, are "constitutionally suspect." *Bolling v. Sharpe,* 347 U. S. 497, 499; *Loving v. Virginia,* 388 U. S. 1; *Brown v. Board of Education,* 349 U. S. 294; and "subject ... to the most rigid scrutiny," *Korematsu v. United States,* 323 U. S. 214, 216.[28]

This attack upon classification based on race, status, ancestry or morality comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely front shifting economic arrangements" *Kovacs v. Cooper,* 336 U. S. 77, 95 (Frankfurter, J., concurring). There is no room for the State to claim that the discrimination here should be sustained if there is any "rational basis" to support it. There should be no constitutional distinction between discrimination based on status, that based on race and that based on penalizing innocent children because of the conduct of their mothers; all of these discrimination are "constitutionally suspect."

The second constitutional standard-a reasonable relationship between classification and purpose-was stated as early as 1896 in *Gulf, Colorado & Santa Fe Ry. v. Ellis,* 165 U. S. 150, 155:
"(T)he attempted classification ... must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

***42** This standard has consistently been adhered to by the Court. As stated in *McLaughlin v. Florida,* 379 U. S. 184, 193, the question is "whether the classifications drawn in a statute are reasonable in light of its purpose ..." Or, as laid down in *Traux v. Raich,* 239 U. S. 33, 42, "reasonable classification implies action consistent with the legitimate interests of the State...." See also *Carrington v. Rash,* 380 U. S. 89, 93.

While the Equal Protection Clause does not always require an exact correspondence between the purpose sought to be achieved and the class encompassed by the statute, here there is complete lack of reasonable relation between the two. Judging 42 U. S. C. 606 in light of its purpose and the appropriate constitutional standard, it is plain that it is "arbitrary" and not a "reasonable classification" to deprive needy dependent children of aid on the grounds that their mothers are engaged in sexual conduct.[29]

One argument, relied on to justify the exercise of state police power in this general area, is the asserted right of a state to regulate sexual activity, and to discourage promiscuity. But as with illegitimacy, neither common sense nor practical experience supports the assumption that the regulation will deter illicit sex.[30] The facts are otherwise. ***43** As Mr. Justice

Fortas pointed out in his James Madison Lecture (New York University, 1967), studies cited in Bell, *Aid to Dependent Children*, p. 101, justify the conclusion that termination of aid because of substitute father regulations increases the number and percentage of out of wedlock ***44** pregnancies. Sec also Mr. Justice White's concurring opinion in *Griswold v. Connecticut*, 381 U. S. 479, 485 (1965).[31]

Therefore there is a violation of due process because the State has arbitrarily barred certain children from receiving State aid "on a wholly arbitrary standard or on a consideration that offends the dictates of reason." *Schwuare v. Bd. of Bar Examiners*, 353 U. S. 232, 249 (Frankfurter. J., concurring).[32]

Furthermore, the regulation violates the children's due process rights because both as applied and on its face it denies them rights on the basis of a status (caused by their mother's conduct) which they are powerless ***45** to correct.[33] This Court had recognized in several contexts that it is impermissible to hold an individual responsible for his status or for his conduct over which he has no control. *Robinson v. California*, 370 U. S. 660 (1962) involving a California statute making it a misdemeanor for any person "to be addicted to the use of narcotics." The Court ruled that the "status" of narcotics addiction is "an illness which may be contracted innocently or involuntarily" and that therefore any punishment for the condition is invalid as "cruel and unusual" under the Eighth and Fourteenth Amendments. Or, as Justice Harlan said in his concurring opinion, to subject an individual to penalty for a condition which lie could not control is an "arbitrary imposition" by the State. 370 U. S. at 679. See also *Driver v. Hinnant*, 356 F. 2d 761 (4th Cir. 1966); *Powell v. Texas*, October Term, 1967, No. 405.[34] These cases are not distinguishable because they arise primarily in the criminal area. The denial of aid to a welfare recipient in Alabama is a penalty more severe than the imposition of a small fine or confinement in a civil or criminal institution. It may lead to damage caused by abject hunger and starvation. ***46** The child deprived of food and shelter early in life will be damaged forever.

Oyama v. California, supra, brings us even closer to the instant case. There the Court struck down California's Alien Land Law that inflicted harm on a child due to the status of his father. In holding that extraordinary procedural burdens could not be imposed on a citizen in proving the ownership of land merely because his father was an alien ineligible for citizenship, the Court reiterated that distinctions based on ancestry are "by their very nature odious to a free people." *Id.*, 332 U. S. at 646.[35]

In sum, Alabama has denied rights to blameless individuals for the acts of others without justification and it has flouted some of the most conspicuous decisions of this Court holding that a State cannot harm individuals on the basis of their status. Such action by Alabama is arbitrary and therefore inconsistent with the Due Process Clause of the Fourteenth Amendment.

*47 POINT II

The vague and arbitrary standards and unreasonable procedures of the regulation violate the guarantees of due process of law, equal protection of the laws and the privilege against self-incrimination under the Fifth and Fourteenth Amendments.

Under the Alabama substitute father policy, a county welfare worker can deprive a mother and her small children of the aid they need for survival on the basis of the worker's (or the recipient's) unguided personal judgment-- perhaps based only on hearsay--of a man's visits to the mother's home or the mother's relationship with a man elsewhere. The worker need not be certain; indeed, she is directed to act before she is certain and as soon as a forbidden relationship "appears" to exist. Once the worker has acted, the mother, under the most favorable application of the policy, can only try to carry her burden of proof, to the satisfaction of the worker, that the "relationship" has "terminated". Not until she is granted a hearing (long after the termination of aid) can she attempt to dispute the caseworker's determination and show that the relationship has terminated.

A. Appellee ant Members of Her Class Have a Right to a Fair Hearing Prior to Termination.

Only a due process hearing can insure the individual recourse from arbitrary government action which may be inconsistent with the Constitution.[36]

***48** The requirement that a hearing, whether before the agency or before a court, be held to protect interests of the affected individual is more than a requirement for formal proceedings. It is necessary that the individual be given a realistic opportunity- to confront and come to grips with the reasons for adverse action taken by the government. As this Court stated in *Willner v. Committee on Character and Fitness,* 373 U. S. 96:

It does not appear from the records that either the Committee or the Appellate Division, at any stage in these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division. 373 U. S. at 105.

Thus, a hearing is necessary before an individual may be denied admittance to the state bar (*Willner v. Committee on Character and Fitness,* 373 U. S. 96); before a person may be denied the privilege of practicing before the Board of Tax Appeals (*Goldsmith v. United States Board of Tax Appeals,* 270 U. S. 474); before a state college professor may be dismissed for invoking the privilege against self-incrimination (*Slochower v. Board of Higher Education,* 350 U. S. 351); before individuals may be disbarred from receiving governmental contracts (*Gonzales v. Freeman,* 334 F. 2d 570 (D. C. Cir. 1964)); before a student may be expelled from a state university (*Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961), cert. denied, 368 U. S. 930 (1961)); and before a liquor license ***49** may be denied (*Hornsby v. Allen,* 326 F. 2d 605 (5th Cir. 1964)).[37]

Clearly, Mrs. Smith and the members of her class have their essential interests at stake when benefits vital to life are withdrawn. While the Social Security Act (42 U. S. C. 602(a)(4)) and 49 Code of Alabama 17(18) provide for a "fair hearing" in such cases, the hearing actually provided for by Alabama is hopelessly unfair and long delayed. Months may pass without decision and without the financial assistance which may have been wrongfully withheld. The very lives of the children involved are imperiled. Reich, *Individual Rights and Social Welfare,* 74 Yale L. J. 1245, 1253, Bunnis and Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Alssistance,* 16 Am. U. L. Rev. 199, 217 (1967).[38]

***50** In *Dixon v. Alabama,* 294 F. 2d 150 (1961), the Fifth Circuit held that a state supported college might not, consistently with due process, expel a student before granting him notice of the reasons and opportunity for a hearing with at least "the rudiments of an adversary proceeding." 294 F. 2d at 159. Accord, *Woods v. Wright,* 334 F. 2d 369 (5th Cir. 1964); *Knight v. State Board of Education,* 200 F. Supp. 174 (D. M. D. Tenn. 1961). Cf. *Thorpe v. North Carolina,* 386 U. S. 670 (1967), concurring opinion of Mr. Justice Douglas.

The Court, in *Dixon* (at page 157), held the existence of reasonable regulations (not found in this case) to be irrelevant.

There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is wellnigh inevitable when the board hears only one side of the issue.

***51** The nature of the individual's interest is more imposing here than in *Dixon.* In *Dixon* the governmental action deprived the students of their means "to earn an adequate livelihood, to enjoy life to the fullest" (294 F. 2d at 157), here the termination of aid withdraws recipient's lower than subsistence-level income. The injury here is direct, immediate, irreparable.[39]

***52** Appellants claim that the promulgation of fair hearing regulations by HEW moot this aspect of Appellees' claim. First, it should be noted that the new federal rules do not conform to constitutional standards. They do not, for example, provide for a fair hearing prior to termination. Secondly, as of the time of writing this Brief, the *only* states that are promulgating "fair hearing" rules, have been those where federal suits have been filed and the states have felt compelled to issue new rules. *Williams v. Gandy,* CA 728 N. D. Miss. Nov. 2, 1967; *Kelly v. Wyman,* CA 68-394 S. D. N. Y. (1967). Alabama does not even claim that they have changed the policies that existed when Mrs. Smith lost her aid. HEW's inability to compel state agencies to adopt procedures that are costly to the state and will, in the long run, increase the amount of aid given leaves little doubt that absent federal judicial intervention the states will not adopt constitutionally acceptable fair hearings. HEW is certainly not going to withhold aid from Alabama because they have not adopted fair hearing ***53** rules. (Cf. *Thorpe v. North Carolina,* 386 U. S. 670 (1967).) See Steiner, *Social Insecurity, The Politics of Welfare,* Rand McNally 1966. Alabama's previous history in this area discourages any hope that they will change the system without judicial decree.

B. The Vague Standards and Unreasonable Procedures of the Policy Violate the Guarantees of Due Process of Law, Equal Protection of the Laws, and the Privilege Against Self-Incrimination.

1. *The Vagueness of the Standard and the Failure to Allow Mrs. Smith to Confront and Cross-Examine Her Accusers*

The regulation, because it sets forth no standards of application, has led welfare workers in many cases to abandon their judgment entirely and pass this legal question to the recipients by simply asking them whether the relationship was "permanent" or "continuous." This obviates their definition of terms and evaluation of evidence.[40] But this is hardly a mitigation of the regulation's severity; in Greene County one family lost several months' benefits, to which they were entitled, because the mother made a mistake, or used the wrong words, in predicting whether the man would return (A. 21).

The regulation itself makes no distinction as to the value of evidence, nor does it specify what rate of visits makes them "frequent," or what time period is to be considered; or whether "frequency" may vary from case to case. Because these are obvious and easily answered questions, the policy's silence on them gives Appellants' employees complete discretion. Some of Appellants' employees testified ***54** candidly that "we don't know" what "frequently" and "regularly" mean. Appellants' other employees agreed that the terms were susceptible of different application in each case (A. 84, 86), but disagreed on the outside limits whether six months (A. 172) or a week (A. 84).

Appellants have delegated power over families' existence to the welfare worker, and in many cases, to malicious neighbors or careless gossips. Careless or indicative words may trigger the informal finding of the "appear[ance] of a substitute father." Appellants' employees acknowledged the power of malicious informants (A. 154). The substitute father policy is administered by social workers who may, as in the case of Mrs. Smith, take peremptory action terminating aid, uninhibited by any requirement of a prior hearing or by any meaningful appeal mechanism.[41] Even if there were a meaningful appeal, the language of the regulation would afford the mother small quarter for argument.

***55** The regulation may be judged by its tendency and effects. *Gomillion v. Lightfoot,* 364 U. S. 339 (1960); *Lane v. Wilson,* 307 U. S. 268 (1939). It must be judged, therefore, not as a serious interpretation of eligibility, but as a statement encouraging arbitrary termination of aid. The function of the eligibility criteria set forth by the Social Security Act and the Alabama legislation is to establish entitlement to aid and to enable persons who may be entitled to make their claims on the basis of objective standards. The Social Security Act provides "that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid ... shall be furnished with reasonable promptness to *all eligible* individuals." 42 U. S. C. Sec. 602(a)(9). Due process requires that an administrative agency or officer charged with the administration of a statute base orders and decisions on findings of fact which have some relation to the statutory criteria. It is a denial of due process to promulgate and apply a regulation which is designed to subvert the criteria of eligibility and to encourage, the arbitrary termination of aid. S. *E. C. v. Chenery Corp.,* 318 U. S. 80 (1943); *Horusby v. Allen,* 326 F. 2d 605 (5th Cir. 1964); *Boudin v. Dulles,* 235 F. 2d 532 (D. C. Cir. 1956).

Because it is impossible to calculate what personal discrimination this specious discretion may accommodate, the regulation may also be judged on its face. The vice of investing power in administrative officials without standards is that the authorization makes possible any kind of discrimination and abuse, not only racial but also personal, political and religious.[42]

***56** 2. *The Burden of Proof*

a. The Regulation Is Unconstitutional in Placing the Burden of Proof on the Mother to Show the Relationship Never Existed and to Prove It Has Terminated

We know that "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall,* 357 U. S. 513, 517, 1958. The regulation's burden of proof provision is constitutionally defective for it is not a measured allocation of responsibility for the evidence.[43] The

regulation states that once the worker has found that there appears to be a substitute father, "the burden of proof rests with the mother." The imposition of the burden of proof (combined with the regulation's "prima facie evidence" criteria) denies due process for it tends to operate conclusively, requires a showing ***57** unduly difficult for the mother to make and entails surrender of the privilege against self-incrimination.

The regulation states two cases which give rise to a presumption relevant to the mother's burden of proof. "Pregnancy or a baby six months or under is a prima facie evidence of a substitute father ..." If a "substitute father" denoted merely the act of sexual intercourse between the mother and a man at some point in time, this creation of the presumption alone would not violate the requirements of due process. But it is agreed that the "substitute father relationship" means more than an isolated sexual act.

Cases are also routinely terminated where there is neither a pregnancy nor a baby under six months. The basis for determination may be an informant's statement (A. 154). The existence of such evidence shifts the burden of proof to the mother. There is not necessarily any rational relation between such existence of such "evidence" and the imposition of the burden of proof on the mother. Such a rational relation would derive from the character and weight of the evidence underlying the finding.

It is the inevitable tendency of the regulation's imposition of the burden of proof on the mother to be applied as if it represented a conclusive presumption. Hence, the regulation "under the guise of regulating the presentation of evidence, operate[s] to preclude the party from the right to present his defense to the main fact thus presumed" in violation of due process. *Mobile, J & KC RR. v. Turnipseed,* 219 U. S. 35, 43 (1910); *Heiner v. Donnnan,* 284 U. S. 312 (1931)."[45]

***58** The burden of proof requirement renders the regulation unconstitutional because it is so difficult for the mother to carry. The mother in addition to presenting her version ***59** of the facts must also have "evidence ... corroborated by at least two acceptable references in a position to know. Examples of acceptable references are: law-enforcement officials; ministers; neighbors; grocers." But the policy's examples of proof imply that the mother may not just show the man's absence, but has an affirmative burden to establish a fact consistent with the continuation of the relationship. This is constitutionally impermissible. Cf. *Shaw v. United States,* 357 F. 2d 949 (Ct. of Claims, 1966). If the mother establishes that the man has been imprisoned or has married and is living with another woman, it is unreasonable to require her to obtain witnesses to prove that she is not carrying on a forbidden relationship. Furthermore, law-enforcement officials would ahnost always be unapproachable from the woman's standpoint and her neighhors may be the very informants who had her aid terminated. The policy thus tosses her back on the mercy of the community and the due process to neighborhood good will. In a case where the man has left the area and the mother does not know where le is, the policy does not suggest by ***60** what "evidence" she might discharge her burden. She must do all this while she has no source of income and in light of the very remote possibility of her eventual success. (See Bell and Norvell, *Texas Welfare Appeal, The Hidden. Right,* 46 Tex. L. Rev. 223 (1967).)[46]

b. The Burden of Proof Requirement Is Unconstitutional Because It Requires Surrender of the Privilege Against Self-Incrimination

Due process is violated when the receipt of benefits is conditioned upon the surrender of constitutional rights. *Sherbert v. Verner,* 374 U. S. 398, 404; *Parrish v. California,* 66 Cal. 2d 253 (1967). O'Neil, ***61** *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 Calif. L. Rev. 443 (1967). Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595 (1960). The State cannot condition a benefit on the individuals carrying the burden of proving his eligibility when meeting that burden entails surrender of constitutional rights. In *Speiser v. Randall,* 357 U. S. 513 (1958), the Supreme Court held that a California procedure which placed on the taxpayer, as a condition of gaining a tax exemption, the affirmative burden of proving that he had not engaged in political speech violated due process.

The privilege against self-incrimination extends to information which would furnish a link in the chain of evidence needed to prosecute for a crime. *Hoffman v. United States,* 341 U. S. 479 (1951). See also *Spevack v. Klein,* 385 U. S. 511 (1967); *Garrity v. New Jersey,* 385 U. S. 493 (1967). The regulation places the burden on the claimant, once the welfare worker has made a finding that there "appears" to be a substitute father, to prove the termination of the relationship. The claimant in attempting to sustain this proof must put into the hands of the welfare department and into the hands of the prosecutor, evidence which would support, or supply investigative leads for, a prosecution of her for adultery or welfare fraud.

Alabama contends that appellees waive their Fifth Amendment rights as a condition of their getting aid and that their is no real showing of potential self-incrimination.[47] In *Parrish v. California*, 66 Cal. 2d 253 (1967), the ***62** Welfare Department contended the recipient's consent to midnight raids and attendant searches and seizures were a necessary "condition" to the receipt of benefits and that ***63** the raids need not meet "criminal standards" because the searches were "designed primarily to secure proof of welfare ineligibility so as to reduce the number of persons ***64** on welfare rather than to lay the basis for criminal prosecutions" (at 256). The court rejected these arguments stating "the County could not constitutionally condition the continued receipt of welfare benefits upon the giving of such consent" and that the Welfare Department "cannot now effectively preclude the possibility that, in an appropriate case, it would not have undertaken criminal proceedings on the basis of evidence secured in the operation. That possibility suggests the danger that the administrative officer who invades the privacy of the home may be only a front for the police who are thus saved the nuisance of getting a warrant" (at 256).

Some of the questions which a welfare worker asks a claimant about the substitute father directly relate to an adultery offense. How often did the couple have sex? Was the man married? Was it in or out of the home? Was it a continuous sexual relationship. These questions are relevant to a criminal prosecution, since adultery cannot be established by a single act or even occasional acts of illicit intercourse, but requires a continuing pattern or an agreement to continue. *Burgett v. State*, 37 Ala. App. 469 (Ct. App. Ala. 1954); *Wilson v. State*, 34 Ala. App. 219 (Ct. App. Ala. 1949). The regulation requires the recipient to bring forth two witnesses to corroborate her statements that the relationship was terminated (hence that it existed). Thus she is compelled to show the state their witnesses and the direction of their investigation for a prosecution for adultery in exchange for continuing to receive benefits.

The state's interest here, in conditioning continued public assistance benefits upon the claimant's disclosure of her social and sexual relationships, can hardly bear comparison with New Jersey's interest in ***65** *Garrity v. New Jersey*, 385 U. S. 493 (1967) in uncovering police and judicial corruption.[48] Even where the government has undertaken by statute to compel disclosure of activities on the basis of its interest in self-preservation, the disclosure requirement cannot require the waiving of the privilege. *Commwnist Party v. United States*, 331 F. 2d S07 (D. C. Cir. 1963); *Albertson v. Subversive Activities Control Board*, 382 U. S. 70 (1965).[49] It follows necessarily that Alabama cannot, consistently with the Constitution condition Appellee's continued receipt of aid on her disclosure of her relationship with an alleged "substitute father."[50]

***66 POINT III**

Alabama's substitute father regulation unconstilulion ally invades the privacy of mothers receiving ADC and imposes an unconstitutional restriction on their lives and liberty.

In *Parrish v. California*, 66 Cal. 2nd 253 (1967) California's highest Court held that the right to privacy established by *Griswold v. Conn.*, 381 U. S. 479 (1965) protects the home and activities of welfare recipients. The Court held that a state welfare department cannot require, as a condition of continuing eligibility that mothers receiving ***67** benefits must allow welfare workers into their homes to search "for purposes of detecting the presence of 'unauthorized males,' " California's equivalent 'of substitute fathers. The Court stated "By their timing and scope those searches pose constitutional questions relating both to the Fourth Amendment's structures against unreasonable searches and seizures and to the penumbral right of privacy and repose recently vindicated by the United States Supreme Court in *Griswold v. Conn.*, 381 U. S. 479 (1965)." (at 258)[51]

The Alabama regulation has two aspects: first, the case worker attempts through her own investigation to determine if a prohibited relationship exists by questioning the mother freely; secondly, the mother, if she wishes to continue to get aid, is compelled to go out into the community and discuss her private life with her neighbors. Under the guise of defining "parent", Alabama's regulation intrudes into, inhibits and prohibits relationships between mothers receiving ADC and their male friends and associates. The regulation directs termination of aid whenever a local welfare official feels that a man whom the mother sees outside her home "appears" to be having a sexual relationship with her, and a man who frequently visits the mother's home "appears" to be visiting "for the purpose of" sexual intercourse with her (as if the man's purpose was consummation with the woman). Mrs. Smith was called before the caseworker to discuss the possible termination of her benefits because she was suspected of "going with" a man. "Going with" a man or allowing a man to come into the ***68** home

(even if only to see one of his children) are grounds for termination (A. 131.)[52]

Since the regulation does not specify what evidence a local welfare official must have before determining that a man appears to be having or intending sexual intercourse with a particular mother receiving ADC, that mother's relationship with most any man whom she sees frequently--even a childhood friend, as in Appellee's case--can and most probably will be relied upon as a basis for terminating aid. To save the aid essential to her children's survival, the mother will have to persuade local welfare officials that each man she sees is not interested in her sexually.[53] If the official is not satisfied, the mother is required to open her relationships to neighbors, law enforcement officials, even "grocers", all of whom are free to spread her story throughout the community. The State is not satisfied merely with the affidavits of these other witnesses. After reviewing them the State goes out and cross-examines (with or without the mother's consent) the supporting witnesses to see "how they know that it is broken" (A. 155).[54] If the mother can eventually convince state or local welfare officials of the propriety of the details of the relationship she may well drive the man away.

In many states the giving of this information may lead to a determination of unsuitability and the mother may lose her child. We discuss in Point II, the very real danger ***69** of criminal prosecution and the institution of proceedings to take the children from the mother (pp. 61-63 of Appellee's Brief). It is not surprising that many families when faced with the choice of recovery of aid only if they (a) completely divulge their private life, (b) terminate any relationship (sexual or otherwise) with any man, (c) expose themselves to harmful legal proceedings, may choose not to get involved with the welfare system.[55]

Alabama's regulation thus invades the constitutionality, protected privacy of the home and personal associations of mothers receiving ADC. ***70** *Griswold v. Conn.,* 381 U. S. 479 (1965). Under *Griswold,* the Federal Constitution protects against state action all activities and relationships lying "within the zone of privacy created by several fundamental constitutional guarantees."[56] Mr. Justice White pointed out, in reasoning applicable to this case, that the State may seek to restrict "illicit relationships", but in both cases there is no reason to believe that the statutory scheme is reasonably related to the state need.[57] ***71** In fact the application of the substitute father regulation *increases* illegitimacy and illicit relationships.[58]

***72** The majority opinion in *Griswold* also invoked its prior decisions under the First Amendment protecting "privacy in one's associations," expressly including "social" as well as political associations (at p. 483). See also *NAACP v. Alabama,* 357 U. S. 499 (1958); *Bates v. Little Rock,* 361 U. S. 516 (1960); *Gibson v. Florida Legislative Investigation Committee,* 372 U. S. 539 (1962).

The *Griswold.* Court gave as an example of the danger of the law it struck down, the possibility of investigations of the most intimate detail of one's private life, a consequence far more likely to flow from Alabama's substitute father regulation than from Connecticut's statute prohibiting birth control advice. See *Parrish v. California,* 66 Cal. 2d 253 (1967); Reich, *Midiight Welfare Searches and the Social Security Act,* 72 Yale L. J. 1347-1350 (1963). See also Ten Broek, ***73** *California's Dual System of Family Law; Its Origins, Development and Present Status,* 17 Stan. L. Rev. 614, 670 (1965).

The freedom to marry is meaningful only so long as there is a freedom to begin relationships that may lead to marriage. This the Alabama regulation hinders.[59] In *Loving v. Virginia,* 388 U. S. 1 (1967), this Court stated:

***74** "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

Appellants argue that Appellee and members of her class waive their right of privacy as a condition of their getting government benefits A regulation which conditions eligibility for a publicly-conferred benefit on waiver of a constitutional right cannot be justified simply on the ground that it is related to the purposes of the benefit program. Two other tests must be met. First, there must be a showing of a compelling interest. "Only the gravest abuses endangering a paramount interest, give occasion for permissible limitation." *Thomas v. Collins,* 323 U. S. 516, 530. Second, there must be available no alternative means which can achieve the compelling purpose in a manner less subversive of the constitutional right. A "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area ***75** of protected freedoms." *Griswold v. Conn.,* 381 U. S. 479 (1965).

Alabama's substitute father regulation meets neither test. The regulation is far from necessary to achieve its purported purpose of denying assistance to needy children deprived of the support and care of their legal father, but blessed with another man who acts as if he were their father. Even if this were a legitimate purpose (despite the fact that the man is not legally obligated to support the children or their mother), Alabama's substitute father regulation is an irrational method for achieving that purpose. Although ADC laws require a "parent," not a "husband," the substitute father regulation looks only to a man's apparent relationship with a child's mother. A man can be a parent to children, regularly caring for them and supporting them to the best of his ability, without ever having sexual intercourse with their mother. Conversely, a man can regularly engage in sexual activity with a woman and never even meet her children, let alone act or be obligated to act as their father. Inquiry into support and care need not involve the removal of dignity and privacy necessarily effected by Alabama's search for sex.[60]

***76** Appellants argue that those on welfare have less rights than those not on welfare. There are presently over 10 million Americans receiving aid and the argument that these people have less constitutional rights than the rest of our citizens is inconsistent with our concepts of equality. There cannot be one law for the poor and one for the rich; there cannot be one standard of privacy for these ten million and another for the remainder of the country. See *Shelton v. Tucker,* 364 U. S. 479 (1960).

POINT IV

Appellee's action is brought under the Civil Rights Act and her failure to do a useless act (exhaust inadequate state administrative remedies) is not grounds for dismissal.

In *Damico v. California,* 389 U. S. 416 (1967), this Court held that relief sought under 42 U. S. C. 1983, 28 U. S. C. 1343 could not be defeated because of failure to exhaust state administrative remedies. Plaintiffs in *Damico* alleged that certain provisions of the California Aid to Dependent Children's Programs were unconstitutional. A Three-Judge Federal Court dismissed their complaint on ***77** exhaustion grounds. The Supreme Court in a *per curarin* decision signed by eight members of the Court, reversed the dismissal, citing *McNeese v. Board of Education,* 373 U. S. 66S and *Monroe v. Pape,* 365 U. S. 167, and directed the Court to hear the case on the merits.

Mr. Justice Harlan dissented because of the existence of a state remedy that had not been shown to be inadequate and said the majority decision "made without benefit of briefs and oral argument and on a skimpy record" does not rest upon facts which justify the use of 42 U. S. C. 1983 to bypass 42 U. S. C. 602.

We believe this case sets forth those facts which justify the involvement of the Federal Courts prior to the exhaustion of inadequate state remedies. We are of course dealing with federally protected rights and allege, among other things, that the regulation discriminates racially. Preliminarily we note that Appellees and the members of her class are not advised of their right to appeal (A. 16). The Alabama administrative remedy, the alleged fair hearing and the right of appeal have previously been discussed (pp. 47-53 of this Brief). The right to Welfare appeals are not adequate[61] remedy. The Federal Courts must ***78** make themselves available for cases challenging the administration of welfare law. *Federal Judicial Review of State Welfare Practices,* 67 Col. L. Rev. 84 (1967). The regulations ***79** presently coming under Court challenge in this and other cases have existed for decades. Welfare clients do not have lawyers and they, without lawyers, are unable to confront the system. (Briar, *Welfare from Below: Recipients' Views of the Public Welfare System,* 54 Calif. L. Rev. 370 (1966). See also *Parrish v. California,* 66 Cal. 2d 253, 262 (1967). As a result until very recently, there was little litigation involving welfare issues. There will never be nearly enough lawyers or lay advocates to represent that portion of the ten million who each year have their aid terminated or reduced. Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1234 (1967). Forcing these lawyers through state remedies when they are attacking regulations promulgated by the states is a wasteful, destructive act. See *Wills v. U. S.,* October Term, 1967, No. 756, petition for cert. filed October 25, 1967.[62] The only reason that ***80** there has been any change in "welfare" law is because the Federal Courts, in a variety of cases, have taken jurisdiction of welfare cases.[63]

***81 CONCLUSION**

The judgment below should be affirmed.

Appendix not available.

Footnotes

[1] The Alabama regulation referred to in Appellants' Brief and in the Alabama Welfare Manual as the "Substitute Father" regulation. The description is incorrect, for the regulation has little to do with parentage. We shall, in order to avoid confusion, use the same descriptive term.

[2] We believe that many of these regulations are unconstitutional and will be affected by the decision of this Court.

[3] States also have the option (Alabama has not exercised it) to include children "deprived of parental support or care by reason of the unemployment ... of a parent." 42 U. S. C. 607.

[4] Alabama now claims that one of the purposes of the regulation was to increase the amouut of the grant to those then receiving aid. This was not tbe reason then, and even if it was, it does not justify the regulation. (See pp. 38 and 39 of Appellees' Brief.)

[5] This was a minor reason, since only a small fraction of the welfare budget was involved (Appellees' Exhibits 21A, 21B, 21C, and 21D).

[6] *In Gardner v. Alabama,* 385 F. 2d 804 (5th Cir. 1967) cert. denied, 36 USLW 3287 (Jan. 16, 1968) the Court upheld HEW's right to require assurances, upon a threat of termination of federal funds, that Alabama's federally funded State program (including the ADC program) be administered without racial discrimination and assurances that the state is attempting to remove present discrimination. The State of Alabama had refused to give those assurances and their claim at p. 36 of their brief that the program is being fairly administered must be treated with some degree of scepticism.

[7] (Address of Mr. Justice Fortas, James Madison Lecture, N. Y. U., 1967, p. 17, citing Bell, Aid to Dependent Children, Columbia University Press (1965), 137-151).

[8] The Department of Health, Education and Welfare's reason for rejecting such policies were that:

"It is of great importance that State agencies should be concerned about the effects on children of the environment in which they are living and that services be provided which will be directed toward affording the children maximum protection and strengthening their family life. Whenever there is a question of the suitability of the home for the child's upbringing. steps should be taken to correct the situation, or, in the alternative, to arrange for other appropriate care of the child. It is completely inconsistent, however, to declare a home unsuitable for a child to receive assistance and at the same time permit him to remain in the same environment" (A. 279).

The major significance of the Flemming Ruling does not lie in the narrow issue of parental moral behavior as an impermissible eligibility condition. Rather, it lies in the mode of analysis it utilized for evaluating permissible as against impermissible conditions. The Flemming Ruling prohibits consideration of the behavior of the parent as an eligibility condition because *"that bears no just relationship to the Aid to Dcpendent Children Program."* The morality of a parent, like the legitimacy or illegitimacy

of the birth status of the child, is not a "reasonable classification" in light of the purpose of Title IV: aiding needy children deprived of a parent's support. As stressed by HEW:

". it should be remembered that throughout the history of the Social Security Act, the position of the administering Federal Agencies ... has been that, if a state chooses to utilize criteria of eligibility, narrower than those permitted by the Federal statute, the State plan is approvable only if the classification effecting such limitation is a rational one in the light of the purposes of public assistance programs" (Appellees' Exhibit 6, A. 478).

See Bell, *Aid to Dependent Children* (1965), pp. 142-151; Steiner, *Social Insecurity, The Politics of Welfare,* Rand McNally (1966); Appellces' Exhibit 4 (A. 463). Despite the Flemmiug Ruling, the Department of Health, Education and Welfare has failed to disapprove other "substitute parent" regulations violative of the Ruling. It is difficult for the Department to reject parts of plans because it may endanger the rest of the program. It is also difficult for HEWT to disapprove of eligibility requirements that save the State and Federal Government monies.

9 This purpose is, of course, relevant in seeking to determine the propriety of state action. *Lane v. Wilson,* 307 U. S. 268. See also Mr. Justice Douglas concurring opinion in *N. A. A. C. P. v. Button,* 371 U. S. 415, 445-446 (1963). The history of the interpretation and application of "substitute father" regulations and suitable home policies throughout the country showed that it resulted in a disproportionate exclusion of Negroes and other non-white children. Myrdal, *An American Dilemma* (Harper & Row, 1944), p. 359. Bell, *Aid to Dependent Children,* Columbia University Press, 1965. May, *The Wasted Amlericans,* Signet (1963) chapter 6. See Moynihan, The Crisis in Welfare, Governor Rockefeller's Conference on Welfare, 1968, p. 66, implying that restrictions on ADC programs (they are becoming Negro programs) are racially motivated. See also the amicus brief submitted by the NAACP Legal Defense Fund in *Levy v. Louisiana,* Oct. Term 1967, No. 508.

10 The same reasoning lies behind the promulgation of similar substitute parent regulations in Arkansas. Georgia, New Jersey, Oregon and other states (cf. Appellants' Brief, p. 39). The Arkansas Gazette in September, 1959 reported that:

"... in addressing a convention at Hot Springs, Governor Faubus mounted the well-worn hobby horse of criticizing welfare payments to mothers of illegitimate children: 'By taxing the good people to pay for these programs, we are putting a premium on illegitimacy never before known in the world.' To anyone who has ever heard this line before, which includes all of us in Arkansas, there was little doubt that Mr. Fanbus was referring primarily to Negro unwed mothers and not to any 'good, honest, hard-working white folks who have been remiss in getting down to the licensing bureau ... It is a fairly safe theme. Nobody, of course, wants to be put in the light of defending both bastardy and Negroes in the same breath, and the few who might point to lack of educational opportunity and generally depressed economic and social conditions as a factor in illegitimacy are soon shushed into silence." Bell, p. 68.

In January, 1951, in Georgia, Governor Herman Talmadge was quoted as being "willing to tolerate an unwed mother who makes one 'mistake' but not when the 'mistake' is repeated two, three, four or five times." He proposed restrictive policies which the state welfare director claimed would "save the state $440,000 a year, mainly by limiting aid to children of unwed Negro mothers." The director further noted that "70 percent of all mothers of more than one illegitimate child are Negroes ... Some of them finding themselves tied down with one child are not adverse to adding others as a business proposition." Bell, pp. 67, 81-84. See Moynihan, The Crisis in Welfare, Governor Rockefeller's Conference on Welfare, 1968, p. 65. See in. 47 of this brief at pp. 61-63.

11 The Alabama Social Welfare Annual Report for the Fiscal Year 1963-4 (Appellees' Exhibit 21A) indicates that the Aid to Dependent Children program constitutes 10.4% of the total agency expenditures. The various programs are set forth in Appellees' Exhibits 21A, 21B, 21C, 21D, 21E. Each of these programs (except for the Aid to Dependent Children program) when examined in the light of the economic statistics of Alabama, has a disproportionately large number of white families compared to Negro families. The ADC program in Alabama (and throughout the country) because it is the "Negro program" pays, in all of the categorical assistance programs, the lowest percentage of need. May, *The Wasted Americans,* Signet (1963), p. 24.

12 There are 45 times as many Negro illegitimates in Alabama as white illegitimates (Appellees' Exhibit 34, A. 472). See also pp. 18-22 of the amicus brief submitted by the NAACP Legal Defense Fund in *Levy v. Louisiana,* October Term 1967, No. 508 and N. Y. Times, "It's Tough to Be Illegitimate," March 31, 1968, p. 10E.

13 The ADC rolls in Alabama are approximately two-thirds Negro and one-third white, so one would expect the closure rate on the basis of a nondiscriminatory regulation to approximate that figure.

14 The seven counties selected by a sociologist in the employ of Appellee as representative of the state on the basis of 1960 census figures furnished to Appellee by Appellant were as follows: Baldwin, Chambers, Clarke, Dallas, Greene, Montgomery and Russell Counties. The characteristics of these counties are set forth in Appellees' Exhibit 26. Appellant argued below that these counties were not representative (they did indicate why they were not representative) and Appellee agreed to let Appellant submit figures for *any* county over *any* period of time. Appellees' Exhibit 41 (A. 777) submitted by Appellant indicates that in the four counties selected by Appellant, 88% of the cut-offs involved Negro families. We believe we can assume these four counties (out of a total of 61) have the lowest percentage of Negro cut-offs and that statewide figures are well above 95%.

A close analysis of Appellant's four counties prove the discriminatory nature of the policy. In Barbour County where there are 10 times as many Negroes receiving aid as whites, the cut-off ratio is 40 to 1. In Jefferson County where there are 14 times as many Negroes receiving aid as whites, the cut-off rate because of the regulation was 12 to 1 (Appellees' Exhibit 41, A. 777). See *Whitus v. Georgia,* 385 U. S. 545 (1967); *U. S. v. Jefferson County Board of Education,* 372 F. 2d 836, 887 (5th Cir. 1966), aff'd on reh. 380 F. 2d 383 (1967); *U. S. v. Ward,* 349 F. 2d 795.

15 During the period July, 1964 to January, 1967, 305 cases were closed in Dallas County because of reasons *other* than the substitute parent rule. Of these, 282 of the families were Negro, 23 of the families were white (A. 583). One would expect the same Negro-white closure rate if the regulation were not diseriminatory. Mrs. Jacqueline Staneil, caseworker, testified that during the period of her employment with the State of Alabama in Dallas County, she had closed 19 cases because of the substitute parent regulation and *all.* of them involved Negro families. Appellees' Exhibit 23b (R. 586) indicates 184 cases were closed in Dallas County between July, 1964 and January 31, 1967 and 182 of the cases involved Negroes.

16 This is a common effect of substitute father and suitable home policies. Bell, *Aid to Dependent Children,* Columbia University Press (1966), p. 101.

17 Appellee could not determine. whether different kinds of information were used in applying the rule against Negro and white cases because every case summary in the test month was that of a Negro family (Appellees' Exhibits 30-37, A. 782-785).

18 The procedure for the submission of a state plan to HEW was testified to by Fred Steininger, the Director of the Family Services Program. Sec also Note, Welfare's Condition X, 76 Yale L. J. 1222, 1967.

19 Mr. Perry's letter states, in part:

"While the provisions in the administrative letter purport to restrict further your policies governing deprivation of parental support or care in relation in absence and are in the section of your **AFDC** plan pertaining to these policies, *we still view them. as in fact introducing consideration of the behavior of the parent in the home and this in actuality as imposing a suitable home requirement.* The total effect of these provisions appears to result in denial of aid 'with respect to a child because of the conditions in the home in which the child resides.' *As stated in our letter of August 31, the provisions of Administrative Letter No. 1919 seem clearly to be out of conformity with Section 404(b) of the Social Security Act and State Letter No. 452*" (A. 296).

20 Mr. Steininger's letter states in part:

"As was made known to you in the letters from Mr. Perry and during our meeting,--we view these provisions as establishing a

'suitable home' requirement because their effect in the main is to base eligibility of a child for **AFDC** on the behavior of his mother rather than on the presence in the home of a man whose relationship to the family is like that of a husband and father.

"Condition (2) covers the case where the man is merely a frequent visitor in the home 'for the purpose of cohabiting' with the mother. On its face, it *requires a finding that the man is a 'substitute father' of the mother's children entirely on the basis of a pattern of moral behavior, namely, the frequency of a relationship that is solely meretricious in nature.* It is questionable whether, in such a factual situation, a parental rclationship can be even presumed--much less established--that would justify exclusion of the children from the program.

"We believe that condition (3), which relates to the case where a man does not live in the home or visit the home and where his relationship with the mother is carried on entirely outside of the home, provides no basis for a finding that the children in the home in fact have a 'substitute father'. As this condition is related solely to the behavior of the mother and is without regard to any relationship of the man to the children in the home, it is beyond question a suitable home provision and *is thus not in conformity with section 404(b) of the Social Secur ity Act and State Letter No. 452.*

"A problem is also presented by the provisions with respect to the burden imposed on the mother to controvert the finding, required by the proposed conditions, that there is a 'substitute parent' of her children. The problem relates to all three conditions, but is particularly acute with respect to condition (3). Despite the clearest evidence that the 'substitute father' is a complete stranger to the children and the home in which they live, the mother can disprove that lie is their 'father' only by discontinuing her 'cohabitation' (i.e., we understand sexual encounters) with him and corroborating this by 'acceptable references in a position to know'. This accentuates the irrelevance and unacceptability of the proposed basis for excluding cases from assistance. *Moreover, we believe that a requirement that a person seeking benefits must prove a negative is not a reasonable one where it imposes a condition that goes beyond the individual's ability to meet.* Similarly, a requirement that third persons furnish evidence or take other action may he unfair because an individual cannot force others to act.

"We request that you revise the Alabama materials to conform to the provisions of the Federal law and current policy" (A. 303).

The communication between Alabama and HEW are illustrative of correspondence between the various Bureaus of Public Assistance and HEW and other states. See Bureau of Public Assistance, Illegitimacy and its Impact on the ADC program (Washington, D. C., G. P. 0. 1960), pp. 47-49; Bell, pp. 71-73.

21 Mr. Steininger testified as follows:

Q. That is what was done in this case, rather than to formally disapprove, you asked Alabama to submit another plan to you that you felt was in conformity with the Social Security law. Is that correct? A. Yes, sir.

Q. And one of the reasons that there has been this delay in your negotiations with Alabama, has been the presence of this Title VI hearing. Isn't that right? A. This has interfered with our further negotiations with the state.

Q. The formal practice would be that you would have a resolution much more quickly after our disapproving letter? A. Yes.

Q. Than a two year lag that we have seen here A. Yes.

Mr. Garbus (Attorney for Appellee): You then sent it back to the State of Alabama to see if they would acknowledge, resubmit, and mitigate some of the questions that were raised?

Mr. Steininger: Yes.

Mr. Garbus: It is my understanding of your testimony that up to this point, the State of Alabama has not mitigated the objection to your letter of December 11, 1964, with respect to any submission since that date, is that right?

Mr. Steininger: That is right (Steininger, Tr. 72).

22 Mr. Steininger testified as follows:

"Q. Mr. Steininger, have you had an opportunity today to read administrative letter No. 2133 [the most recent suhmittal of the State

of Alabama, dated February 18, 1966 A. Yes.

Q. I ask you whether that particular document submitted by the State of Alabama, would in your opinion, be sufficient to meet the objection set forth in your letter of December 11, 1964? A. My answer is no" (Steininger Tr. 45).

Mr. Joel Cohen, Assistant Counsel to HEW, gave his office's view of the Alabama regulation:

"With some over-simplification, just to try to be clear on this, if a policy is directed at the conduct of the mother, let's say, outside of the home, we would consider this, and in the situation, certainly where the children did not even know of the existence of the man, and this is overstating the situation, just to be very clear about it, *we would consider that a state policy that excluded that case from ADC was in violation of our suit able home policies,* * * *

"Now, in the case of the Alabama submittal, although everything was included under the terminology of substitute parent, *we considered that parts of that dealt particularly with conduct ontside of the home, and presumptions arising from the birth of an illegitimate child and that sort of thing, were in violation of the suitable home policies, that had already been issued."* (Italics ours.) (Steininger Tr. 76-77.)

23 A persuasive argument that the needy have a *right* to receive welfare aid is set forth in Reich, *Individual Rights and Social Welfare, The Emerging Legal Issues,* 74 Yale L. J. 1245 (1965), and Reich, *The New Property,* 73 Yale L. J. 733 (1964). See dissenting opinion of Judge Kaufmann citing the Reich articles in *Snell v. Wyman,* C. A. 67-2676, S. D. N. Y., Feb. 29, 1968, discussing the recipients' rights to "liberty and equality secured to them by the Fourteenth Amendment" (page 2 of the dissent). See also Reich, *The Law of the Planned Society,* 75 Yale L. J. 1227, 1265, 1267 (1967), discussing "equality in the sense of a minimum share in the Commonwealth," at 1265; and, Harvith, *Federal Equal Protection and Welfare Assistance,* 31 Alb. L. R. 210 (1967).

24 Sec Harvith, *Federal Equal Protection and Welfare Assistance,* 31 Alb. L. R. 210, 229 (1967) and Connor, The Man in the House Rule. 2 Harvard Civil Rights-Civil Liberties Law Review, 299, 313 (1967), citing the filing of the complaint in this case. Appellants in the summary of their argument state "welfare agencies must restrict categories in order to include the most needy" (page 11 of their brief) but do not (nor can they) indicate how this regulation helps in achieving that purpose. Appellants state, at page 59 of their brief, that "the primary purpose of the regulation is to place the responsibility for support of the family on men who enjoy the privileges of a husband". The regulation on its face, and as applied to Mrs. Smith and the members of her class, is not in any way related to the issue of support. Mrs. Staucil, Appellee's caseworker, never even inquired into the question of Mr. William's financial responsibility or whether or not lie was supporting Appellee (A. 125-148). Appellant King did not know of one case involving the 3,000 families whose aid was terminated because of the regulation's application where the substitute father ever contributed to the support of the children (A. 105).

25 A holding by this Court to that effect will render unconstitutional many of the "substitute father" and "man in the house" regulations existing in other states. This kind of decision will have a greater effect than the reasoning of the Court below. The Federal Handbook of Public Assistance Administration, Part IV, §3412 (4), draws the critical distinction between men with a legal obligation to support the children and those with no such obligation, even though legally married to the mother. A stepparent is not a "parent" within the meaning of the Act unless he legally adopts the children. The Handbook states: "in the absence of legal obligation to assume a parental role, a stepparent is no more of a "parent" than any other person acting *in loco parents.* In these situations, *the only safegward* to the child's right to assistance is his eligibility under the condition of being deprived of the support or care of the natural parent. In states in which the stepparent is required to assume a parental role, a child may be deprived of support or care if the stepparent is dead, absent, or incapacitated. (Our emphasis.)

The other "parents" spoken of in Section 3412 are all *natural* parents (whether married or not) and *adoptive* parents (with a legal obligation to support). HEW will not qualify a child as eligible because of the absence of any other kind of "parent"; nor should the child be disqualified on the ground of the alleged presence of some other kind of so-called "parent".

The irrationality of welfare rules regarding substitute fathers is revealed by comparison with treatment of blood relatives who are responsible under law for the financial support of needy dependent children. In many states, including Alabama, persons other than parents arc required by law to support needy relatives. Grandparents must support grandchildren, brothers and sisters must support one another, and so forth. See 44 Code of Alabama 8. But the existence of a legally liable relative cannot disqualify a needy dependent child from receiving ADC. Even if the relative lives in the child's home, has substantial income, and contributes to the child's support, the child remains eligible for ADC as long as the support contributions are not sufficient to meet the child's needs

as estimated by the State. One child may live with his mother and an employed grandfather who lives, cares for, and supports the child. Another may live with his mother and a man he barely knows, who has children elsewhere and provides neither support nor more than minimal care. Under the substitute father regulations in effect in Alabama and other states the first child receives ADC to supplement his grandfather's support while the second child is denied the aid he needs for the clothing and food essential to his survival.

"Parent" in non welfare situations is normally defined as "the lawful father or the mother of a person", *Appeal of Cibson,* 154 Mass. 378, 28 N. E. 296 (1891) and does not include a stepfather or stepmother or one standing *in loco parentis,* e.g., *Coakley v. Coakley,* 216 Mass. 71, 102 N. E. 930 (1913), Black Law Dictionary, 4th Ed., 1961. See also Connor, The Man in the House Rule, 2 Harvard Civil Rights--Civil Liberties Law Review, 299 (1967).

26 There can be no doubt that the regulation is aimed at sexual conduct. The phrase "for the purpose of cohabitation" is repeated in each of the three clauses of the regulation defiuing the conduct which establishes the "substitute father" relationship. In each clause, the phrase is coupled with another element of the conduct: liv(ing) in the house"; or "go(ing) elsewhere." "Cohabitation" in legal usage means only is "living together," Black's Law Dictionary (4th Ed.). Yet this cannot be the mcaning here because it would make no sense to speak of "liv(ing) in the home or visit(ing) the home but go(ing) elsewhere for the purpose of living together." If "living together" had been the phrase used, it would just as clearly have been another euphemism for sexual relations. Appellant King and all of Appellant's other witnesses testified "cohabitation" means "sexual relations" (A. 77).

The Alabama Department of Pensions and Security has explicitly confirmed that sexual intercourse is the conduct at which the regulation is directed:

Under the [substitute father] policy, a man is considered a substitute father and liable for support of all the children, if, though not married to the mother, he has the *privileges of a husband.* (Annual Report, Alabama Department of Pensions and Security, Nov., Dec., 1964, p. 10.)

The term "privileges of a husband" is according to all the witnesses, another obvious euphemism for sexual relations. That this is the meaning of the term is also made clear by the regulation's only specific statement regarding evidence establishing the relationship: "Pregnancy or a child six months old or under shall be prima facie evidence of a substitute father." The only fact that can properly be inferred from pregnancy or the birth of a child is that the mother has had sexual relations with someone.

The Department confirms this interpretation in a statement issued as guidance to the substitute father regulation:

Under the [substitute father] regulation county departments are directed to consider a mau a substitute father and liable for support of all children in a home if, though not married to the mother, he has *privileges of a husband.* If the mother is expecting a child or has one six months old or under, this is considered *enough evidence* that the man is a substitute father. ("Interpretation of new ADC Policies of the Department of Pensions and Security", July, 1964. (A. 292) (Emphasis supplied.)

27 Appellant contends that the limitation of state funds justifies the arbitrary classification created by the substitute father regulation. See *Thompson. v. Shapiro,* October Term, 1967, No. 813. The Supreme Court has repeatedly stated that constitutional protections may not be denied because of their cost to the State. *Griffin v. Illinois,* 351 U. S. 12, 1967. Thus, in *Edwards v. California,* 314 U. S. 160 (1941), a statute which prohibited persons from assisting indigent non-residents to enter the state was held unconstitutional despite California's effort to justify the statute on the ground that the influx of indigent persons in need of public assistance would create financial problems of "staggering" proportions (314 U. S. at 173). If protection of the public purse is not a proper justification for the arbitrary denial of legal rights to non-residents such a purpose cannot justify arbitrary classification of residents. Indeed, as this Court stated in *Hoeper v. Tax Commission,* 284 U. S. 206, 217 (1913):

The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever. The Equal Protection Clause requires that any classification made for the purpose of saving funds must rest on a distribution between the persons who comprise the respective classes which bears a reasonable and just relation to the purpose of the statutes with respect to wbich the classification is made.

The only reasonable method of effecting the ADC's purpose is to aid *all* needy dependent children by distributing available public assistance funds in an equitable manner, even if that results in a somewhat. lower economic level of assistance for all needy children. The Social Security Act directs that aid "shall" be given to "*all* eligible" children, 42 U. S. C. 602. As the Supreme Court of Iowa stated in *Collins v. State Board of Welfare.* 81 N. W. 2d 4 (1957), in holding a maximum grant provision to be violative of

the equal protection provision of the State Commission:

The amendment (the maximum family grant) on its face appears to be, and was, we think an economy measure. In effect, it is a subdivision of the original classification, i.e., dependent children, based solely on the number of children in the home, with no consideration as to need, a circumstance completely disconnected with the basic classification and purpose and reason therefore (citations). We think the amendment is clearly discriminatory between dependent children as defined in #239.1 (4), and is purely arbitrary and unreasonable in view of the announced purpose of the act.

See also *Department of Mental Hygiene v. Kirchner,* 60 Cal. 2d 716, 388 P. 2d 720 (1964).

28 This Court, in *Skinner v. Oklahoma,* 316 U. S. 535 required "strict scrutiny of the classification" because of the right to procreate. It also spoke of the basic right to marry. The right to feed, clothe, shelter and keep alive a child eligible for aid is of like importance.

29 The only ground on which it may be permissible to terminate or reduce aid to those children is upon a showing at a fair hearing that they are receiving support from a man. Those regulations that allow for withdrawal of aid upon a mere showing that the substitute parent has an income but does not contribute to the children's support, also violate equal protection.

30 In *Levy v. Louisiana,* Oct. Term 1967, No. 508, argued March 1968, the question presented was whether Louisiana Civil Code Article 2315 is invalid under the Due Process and Equal Protection Clauses because it denies a right of action to illegitimate children for the wrongful death of their mother, on whom they were dependent, solely because of their status as persons of illegitimate birth. In some respects the Louisiana Court's rationale in upholding Article 2315 is similar to Appellant's argument. The Supreme Court of Louisiana wrote no opinion, and the sole justification given by the Court of Appeals of Louisiana for upholding Article 2315 discrimination against illegitimates was that "it discourages bringiug children into the world out of wedlock." The Louisiana Court (and Appellants in this ease) cite no evidence to support the reasonableness of this means of controlling illegitimate births. It would be truly remarkable if persons contemplating a sexual relationship or in the process of producing a child out-of-wedlock would be deterred by the possibility that the child might not be eligible for aid. The New York Times, March 31, 1968 p. 10E states " 'Illegitimacy' like 'Crime in the Streets' is becoming a substitute in many minds for the 'Negro' problem and there are signs that the new official toughness over illegitimacy in some commnnities is actually aimed at Negroes".

Some argue (Appellants' Brief, p. 39), that welfare mothers have illegitimate children solely to get increased state aid. The amount of money received is a small percentage of the child's actual "need" and is far below his, or his family's subsistence level. Even Appellants' Brief at page 39 states "social workers vigorously protest that mothers are not going to bring into this world a baby in order to receive a welfare grant of $11.69 a month." See Ellman, *The Poorhouse State,* Pantheon (1967). Hodding Carter in "The Negro Exodus from the Delta Continues," New York *Times,* Magazine Section, March 10, 1968, p. 26, discussing the Mississippi Welfare System, which is similar to Alabama's, states:

"Another problem is the state's welfare system, which excludes as many potential recipients as possible and sets the payments so low that nobody can really take care of his basic needs,' as one welfare worker put it. Aid to Dependent Children averages $S.50 a week per family; the maximum is $50 a month, no matter how large the family. The official state standard of living for the aged adult living alone is $101.32 a month, but the maximum the Welfare Department can currently provide is $50 a month, because of the low level of legislative appropriations. These figures are not anything near the accepted poverty cut-off of $3,000 a year."

31 Another argument urged by Appellants relies on the "promotion of family unity" theory. The theory is that the regulation helps to persuade the "substitute father" to marry the recipient. However, "family unity" is harmed rather than aided. The Report of the National Advisory Commission on Civil Disorders (Bantam Books, 1968). p. 459, states:

"This so-called 'Man-in-the-House' rule was intended to prevent payments to children who have an alternative potential source of support. In fact, the rule seems to have fostered the breakup of bomes and perpetuated reliance on welfare."

32 While "the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U. S. 300; the substitute father regulation is not such a regulation but is rather akin to the statutes involving an aspect of personal liberty. As to such statutes the Court has required a showing under the Due Process Clause that some proper state purpose is being pursued through reasonable means. See, e.g., *Pierce v. Society of Sisters*, 268 U. S. 510; *Griswold v. Conn.*, 381 U. S. 479; *Poe v. Ullman*, 367 U. S. 497, 543 (Harlan, J., dissenting). This requirement is consistent with the Court's statement in *Bolling v. Sharpe, supra*, 347 U. S. 499, that "The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive..."

33 Professor Fuller asserts that a rule which an individual had no opportunity to obey is not a law at all but an arbitrary application of governmental force. L. Fuller, *The Morality of Law*, 39, 70-73 (1964).

34 A recent article discusses the *Robinson* opinion and concludes, "Even the narrowest of these interpretations (supports) the notion that punishing a status involuntarily entered into and which cannot voluntarily be abandoned is unconstitutional," Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status. Crimes of General Obnoxiousness. Crimes of Displeasing Police Officers, and we Like*, 3 Crim. L. Bull. 205 (1967). This precisely describes the status of the children affected by the regulation.

See also the recent decision of the New York Court of Appeals holding that a vagrancy statute violates due process because it penalizes "a condition, such as one resulting from illness, over which an individual has no control." *Fenster v. Leary*, 20 N. Y. 2d 309, 314 (1967). Two other courts have reached the same result. *Baker v. Bindner*, C. A. No. 5648, W. D. Ky., Oct. 13, 1967; *Alegeta v. Commonwealth*, 36 U. S. L. W. 2324 (Mass. Sup. Jud. Ct., Nov. 1967).

NAACP v. Overstreet, 384 U. S. 118, is also on point. There the Court dismissed as improvidently granted a petition for certiorari which earlier had been granted, limited to the question whether the lower court, by holding the NAACP liable "for acts performed without its knowledge and by persons beyond its control," denied its right secured by the Fourteenth Amendment, 382 U. S. 937. Although a majority of the Court voted to dismiss the petition, thereby expressing no opinion on the merits, four Justices through an opinion of Justice Douglas concluded that it violated the Fourteenth Amendment to hold the NAACP liable for acts over which it had no control. *Id.*, 384 U. S. at 123-26.

35 See Harvith, *The Constitutionality of Residence Tests*, 54 Calif. L. Rev. 567, 613 (1967).

36 Each year approximately three million people find their public assistance discontinued. Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L. J. 1234, 1236 (1967). See Bell and Norvell, *Texas Welfare Appeals, The Hidden Right*, 46 Tex. Law Rev. 223 (1967).

37 The right to a hearing is frequently denied in those cases involving government employee loyalty programs and aliens and passport issuance. The underlying rationale for their denial in those cases is the presence of questions concerning national security and foreign relations. In less sensitive areas such as licensing, qualification to contract with the government and attendance at state schools, the federal courts have discarded the "privilege" label and created a due process requirement for a full trial type hearing. (Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L. J. 1234, 1244 (1967).)

38 Public assistance benefits are calculated to meet recipients' *minimum* needs for living after all other income is considered. In Alabama ADC recipients gets 41% of their need. During the period of time in which the recipient is waiting for a hearing decision, she is living far below the level which defendants themselves state to be necessary for survival and decency. Such suffering, dangerous to the maintenance of life, cannot he remedied once endured.

"taken together, these considerations compel the conclusion that the government interest in guarding the public treasury by postponing hearings should not justify subordination of the private interest in the individual cases and, *a fortiori*, in the totality of

cases. The recipient should have a constitutional right to a hearing before his welfare payments are discontinued." Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1234, 1244 (1967).

The state can recover the monies "wrongfully" paid from the time the grounds for reducing aid are discovered until the time of the hearing. It may be that the recipient will not have monies to pay back the government. In the majority of cases the amount of the government's loss is minimal. For example, in July, 1966 the average payment involved would have been approximately $43 per person per month. Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1234, 1236 (1967). This is a good deal less than keeping a student in school during the same period. See *Dixon v. Alabama*, 294 F. 2d 150, 5th Cir. (1966).

Against the argument that the cost of continuing assistance to the individual recipients is relatively slight, some may contend that the large number of recipients involved will make the cost so high as to justify subordinating the recipient's interest. As the dollar cost to the public is multiplied so are the number of suffering individuals multiplied. The balancing equation is multiplied on both sides.

39 Although provisions of the Manual imply that a 50-day limitation applies to the holding of the hearing if the recipient requests it (V 10), and a three week limitation to the issuance of the decision (V 11), the Manual does not specify any overall time limitation. Having been without aid for at least 71 days, more than two payment periods, the claimant, if the decision were in her favor, would not receive an award covering that period. The Manual makes no provision for retroactive payments upon a fair hearing decision, and hence the power of ex parte peremptory termination is the power to suspend entitlement under the eligibility criterion (Manual III 52-53; V 11-13).

Additionally, notice and hearing prior to effective action are required, because such a procedure is the only means of ensuring the availability of a hearing at all. The brutal need of the recipient erroneously denied assistance will make her less able to pursue the subsequent hearing now available. Faced with the need to live, she can scarcely devote the time and energy necessary to prove the relationship has terminated and to show her continued eligibility. Because of this it is rare that recipients ever request a hearing after termination of payments In Illinois appeals were filed in less than one-third of one per cent of the 33,000 public assistance cases closed between July, 1963 and June, 1964 for reasons other than death of the recipient and in Texas 0.69% at the recipient's termination sought review. Bell and Norvell, *Texas Welfare Appeals, The Hidden Right,* 46 Texas Law Rev. 223 (1967). Bell, *op. cit.* p. 116.

The five county directors and a caseworker testified in this ease that there had been no appeals under the regulation (A. 205, 207, 208, 219, 225). Appellant King testified there had been 5 appeals in the entire system since lie took office 3½ years ago (A. 92). The generality of the notice of reason for the termination ("substitute father policy"), and the failure to advise of the right of appeal discourages belief that there may be any specific basis of con testing the determination. The Alabama figures appear to be less than .01%.

If Appellants were required to grant reasonable notice and opportunity for a hearing *before* termination benefits, a sense of care and caution in the administration of the regulation might arise which would make it possible for the recipient to have a meaningful hearing. None is likely so long as county departments are authorized to terminate peremptorily and ex parte.

Mr. Justice Brennan's opinion in *Berman v. Parker,* 348 U. S. 26 (1954) is pertinent:

"Miserable and disreputable housing [welfare] conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to cattle. They may, indeed, make living an almost insufferable burden. The misery of housing [welfare] may despoil a community as an open sewer may ruin a river. The concept of public welfare is broad and inclusive ... The values it represents are spiritual as well as physical, aesthetic as well as monetary (*id.* at 32-33).

40 See *Rowoldt v. Perfetto,* 355 U. S. 120, on the validity of a claimant's judgment adverse to himself.

41 In *Rios v. Hackney* (CA 3--1852, N. D. Tex. Dallas Div., Nov. 30, 1967), a federal district court held a welfare recipient (whose aid has been terminated because of an alleged substitute father) must be returned to the rolls because the requirements of due process had not been complied with in the hearing and decision making process that reviewed the cutoff. The court found: (1) no evidence supporting the agency's action had been adduced; (2) the agency's action had been arbitrary and capricious; and (3) reliance had

been put entirely on hearsay evidence and there had been no opportunity to cross-examine the persons making charges.

In an administrative proceeding, "it is not proper to admit ex parte evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party." *Hornsby v. Allen,* 326 P. 2d 605, 608 (5th Cir. 1964) ; see also *Bridges v. Nixon,* 326 U. S. 135 (1945). Yet the policy tells the worker simply: "When there *appears* to be a substitute father, disapprove an application or terminate aid ..." The standard here is subjective, the judgment personal.

42 It has been established that the statutory or administrative authorization which by its lack of standards makes such discrimination possible may be shown to be void on its face In *Yick Wo v. Hopkins,* 198 U. S. 356 (1886), which involved discrimination against Chinese in the licensing of laundries in wooden buildings in San Francisco, the Court held the regulation void on its face, identified as in itself a constitutional defect of the ordinance that it "confer[red] ... a naked and arbitrary power to give or withhold consent, not only as to places but as to persons ..." 198 U. S. at 366. In *Louisiana v. United States,* 380 U. S. 145 (1965), an action to have declared invalid a Louisiana test requiring that an application for voter registration be able to give a reasonable interpretation of the Louisiana or the United States Constitutions, the Court affirmed the district court's ruling that the unlimited "discretion" in the registrars made the test "invalid on its face... 380 U. S. at 150. See also *Davis v. Schnell,* 81 F. Supp. 872 (D. S. D. Ala. 1949), affirmed 336 U. S. 933 (1949).

43 One of the justifications for midnight raids of welfare clients (and a justification for the procedures set forth in determining who the substitute parent is) is that it cuts down on Welfare fraud. In *Parrish v. California,* 66 Cal. 2d 253 (1967), the Court noted that midnight raids "indicate so marked a lack of congruence between the scope of fraud as to deprive that procedure of any constitutional justification" (*id.* at 257).

45 There is no rational connection between a mother's sexual relations with a man, who has no legal obligations to her children, and a conclusion that the man is acting as a father and is supporting the children. Even if it were established that the man was not supporting the children, they would still be ineligible for ADC under the "substitute father" regulation, which states that only the fact of the relationship may be rebutted, not the presumption of support. See also *Heiner v. Donnan,* 284 U. S. 312, 329 (1931); *Carrington v. Rash.,* 380 U. S. 89, 96 (1964). The Constitutional prohibition against irrebuttable presumptions is as applicable to administrative determinations as it is to those forming the basis of judicial decisions. See *Luria v. United States,* 231 U. S. 9, 25 (1913); *Adler v. Board of Education,* 342 U. S. 183, 190 (1952); *Slochower v. Board of Education,* 350 U. S. 551, 559 (1955). A recent analysis concluded that under these cases:

"The substitute father rule ... violates due process for two reasons. First, it creates an arbitrary presumption; there is no a priori reason to assume that a man acting as surrogate husband must also be acting as surrogate father to children he has no legal duty to support ... Second, even if experience shows that the presumption is not arbitrary, it still fails because the applicant may not disprove the dispositive fact presumed in her case; although the mother might establish non-support of her children, she still loses her **AFDC** payments because she is permitted to rebut only the fact of illegal relationship and nothing more." Note, *Welfare's Condition X,* 76 Yale L. J. 1222, 1231 (1967).

The nature of decisions about sex and sexual morality when combined with the placement of the burden on the mother, often leads the welfare worker to substitute a moral judgment for findings of fact.

The case of Miss Jane Henley, a welfare recipient of Greene County, Alabama, set forth in Appellees' Exhibit 45A is illustrative. Miss Henley stated that she has seven children, five of whom were under 18. Miss Henley's caseworker, Mrs. Prout, stated that she had terminated aid to the Henley family in July, 1964, on the basis of the substitute father regulation. Miss Henley's child, Carnell, was then about five months old. Mrs. Proust stated:

"She [Miss Henley] stated that she was not continuing to have sexual relations with Mr. Knott [the child's father] at this time. I interviewed Mr. Knott on June 12th, 1964 at which time he admitted paternity ... and stated that he is continuing to 'go with' the mother, by which expression I understood Mr. Knott to mean that he was continuing to have sexual relations with Miss Henley."

Thus, aid was terminated on the basis of Mrs. Prout's preference of Mr. knott's vaguer description of the relationship, from which she *inferred* a fact contrary to Miss Henley's direct and specific statement. Yet aid has never been restored to the Henley family, although Miss Henley is now 38 years old and her youngest child is age 3. Miss Henley stated:

"The last time I went in was winter before last. I had no income and hadn't worked since summer when I had worked in the fields.

I was getting government commodities and was staying at my sister's house. The welfare worker told me, 'You should have known better than to come back and apply-- we already told you that you couldn't get help.' ... I told her I didn't have a man staying with me. The welfare worker told me they still couldn't put me on."

46 Due process requires that, in the imposition of a burden of proof, consideration be given to the relative advantage of the parties, and, as to each, the convenience of proof, *Morrison v. California,* 291 U. S. 82, 91, 94 (1934). Without counsel, or lay assistance, the mother, in over 99% of the cases, does not pursue the matter any further. So long as the Appellants prescribe the termination of vital benefits without prior hearing, they should bear a heavy burden of justifying the regulation in terms of due process. Here the information about the man's whereabouts are not necessarily more accessible to the mother than to the County Department, and in many cases less so. The County Department has extensive relations with other government and social agencies, which it uses for other similar purposes such as verifying a father's income. The mother is also deterred from attempting to carry her burden by her desire for privacy. Another element is the possible criminal prosecution to be brought against the father or the mother of the child. It has long been held that in a civil proceeding to deport an alien on grounds of conduct subsequent to his entry, the government bears the burden of proof. "It goes without saying that, under the presumption of innocence which exists in his favor and the due process clauses of the Constitution, the burden rests on the state or government which in some formal proceeding, criminal or otherwise, undertakes to establish the fact." *Hughes v. Tropello,* 296 F. 306, 307 (3d Cir. 1924). "Unless this burden is meticulously maintained, discharge [from the Army] for race, for religion, for political opinion or for beliefs may masquerade under improved charges." *Reard v. Stahr,* 370 U. S. 41, 43 (1962) (separate opinion of Douglas, J. and Black, J.); *Wood v. Roy,* 266 F. 2d 825 (9th Cir. 1959).

47 The central standard for the privileges application has been whether the claimant is confronted by substantial and "real" and not merely trifling or imaginary hazards of incrimination. The risks of criminal prosecutions confronted by Welfare recipients are not "remote possibilities out of the ordinary course of the law." *Heike v. United States,* 277 U. S. 131. See also *Haynes v. United States,* 388 U. S. 150; *Grosso v. United States,* 388 U. S. 145; *Rogers v. United States,* 340 U. S. 367, 374; *Brown v. Walker,* 161 U. S. 591, 600. In the last year there have been a multiplicity of suits, both criminal in nature and suits to take children away from their mothers, as part of welfare crackdowns. In New Jersey fornication prosecutions were commenced against 1000 welfare mothers who had one or more illegitimate children. Paterson Municipal Court Judge Kushner ordered the criminal prosecutions of the mothers to "make the fathers of illegitimate children pay support." Bulletin, American Civil Liberties Union of New Jersey, Vol. 3, No. 4 (1). Monmouth County, New Jersey had started the same procedure (*id.* p. 4). A similar crackdown occurred in Maryland, where 200 fraud prosecutions (based on the fact that male friends were near the home and were presumed to be supporting the mother's children and that the mother failed to so advise the Department) were commenced. The Welfare Board of Prince George's County in Maryland began proceedings in 1967 to take children away from mothers on the grounds that they were neglected, where the mother, in her application for welfare aid, indicated one of her children was illegitimate. See, for example, *In Re Cager,* Court of Appeals of Maryland, September Term 1967, No. 353. The *Washington Post,* August 29, 1967, p. 16 sets forth the following report from Marylaud's Circuit Judge Bowen court room: "At a hearing yesterday Bowen indicated he agreed with the prosecution's position that simply by having several illegitimate children a woman is guilty of criminal neglect."

See also N. Y. Times, "It's Tough to Be Illegitimate," March 31, 1968, p. 10E stating "Thus when Louisiana and Mississippi recently made it a crime to have more than two illegitimate children and a Maryland judge ruled that unwed mothers must practice birth control or lose custody of their children, Negro leaders saw the actions as being aimed privately at their race."

Some feel that the crackdown on ADC recipients (which is disproportionately Negro) is an attempt to strike back at Negroes. (See Loren Miller, *Race, Poverty and the Law,* 54 Calif. L. Rev., 380 (May 1966).) Professor Moynihan, in "The Crisis in Welfare" (Governor Rockefeller's Welfare Conference (1968)) states the same fact differently. He points out (at p. 66) that **AFDC** has changed from what was originally a widow's program to a Negro program and that, "from being a program designed to aid unfortunate individuals, **AFDC** gradually turned into a subsistence program for individuals and for a class ... This silent transformation is the essential fact behind the present crisis in Welfare. The public is beginning to see it as a crisis in public expenditure. Social scientists are beginning to see it as a crisis in social structure: the development of a permanently dependent class. And the members of that class are beginning to see, in the inadequacies of the system, the source of their dependency, to a point that an even greater crisis must be created in order to force the larger society to change the system." See also, May, The Wasted Americans, Signet, 1963, Introduction and Chapters 1 and 6.

14 Code of Alabama 16 makes adultery an offense punishable upon first conviction, by six months imprisonment and a fine of at least $100. See Note: *Dependent Children and Special Welfare Legislation,* 15 J. Publ. L. 349, 360. n. 50 (1966) (discussing the possibility of criminal prosecution under the substitute father policy of Georgia, whose terms are similar to Alabama's).

49 Code of Alabama 17 (21) makes criminally liable,

Any person who by means of a false statement knowing it to be false, or by wilful misrepresentation, impersonation or other fraudulent device, obtains or attempts to obtain ... a public assistance grant ... to such person is not entitled ...

Welfare fraud is punishable to twelve months bard labor and a fine up to $500. This provision is not explicitly limited to misrepresentation or concealment of income or resources. By its terms it is sufficient that the recipient was technically ineligible and that he knowingly misled the Departmeut of Pensions and Security as to that factor of eligibility, regardless of whether the family continued to be iu need. This seems to be the administrative construetion of the statute (Manual III 46, 47), and the Manual requires that a claimant be told, at the initial interview, that she may be criminally prosecuted for "misrepresentation of facts." Manual I *8. Cf.* Tit. 114, La. Stat. Ann. So long as a family is made ineligible by the mother's relationship with an unrelated man, her revealing this relationship will tend to incriminate her under 17 (21).

The Manual's provisions for confidentiality of information reach principally to public disclosure (V 12-15, dated March 1967). Tit. 49-17 (8) of the Alabama Code *requires* county directors to submit to grand juries, *upon request,* lists of persons receiving public assistance and provides that "confidential information" may also be submitted for purposes direetly connected with" grand jury "investigations" of the administration of public aid.

48 *Spevack v. Klein,* 385 U. S. 511 (1967) and *Garrity v. New Jersey,* 385 U. S. 493 (1967) dictate the result in this case. In *Spevack v. Klein,* a New York attorney refused to submit certain required financial records on the grounds that they would tend to incriminate him. The Appellate Division ordered him disbarred. disbarment (his right to employment of his choice) because of his claim of the privilege in a disciplinary proceeding. In *Garity v. New Jersey,* policemen had been interrogated by state investigators about corruption in certain municipal courts. The policemen were told that the privilege was available to them but that its exercise would subject them to removal from office. The Court said:

"The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice or to remain silent. That practice, like interrogation practices we reviewed in *Miranda v. Arizona,* 384 U. S. 436, 464-651 is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in the scheme of questioning, and cannot be sustained as voluntary tinder our prior decisions" (385 U. S. at 497-98).

49 Appellants contend that the privilege is waived by Mrs. Smith's response to their questions at the first interview with the case worker ("he stayed overnight") and cannot be asserted here. Mrs. Smith made First and Fifth Amendment claims at the trial. IN *Parrish v. California,* 66 Cal. 2d 253, 25S (1967) the Court held that recipients in permitting the investigators into their home gave their consent unwillingly. The court said that "the threat of loss of public assistance underscores the coercive nature of the demand for entry."

The result in *Parrish* and the argument for finding involuntariness in the present case are supported by the decisions of this Court in the area of coerced confessions. The promise of a benefit by the interrogator in exchange for the defendant's confession is enough to make the confession involuntary. In *Lynumn v. Illinois,* 372 U. S. 528 (1963), this Court held a confession involuntary where the police had threatened the defendant with loss of ADC aid for her and her children, if she refused to cooperate (372 U. S. at 534). In the instant case the basic elements are more direct and threatening. The alternatives are obedience or starvation. See Ten Broek and Wilson, *Public Assistance and Social Insurance-A Normutive Evaluation,* 12 U. C. L. A. L. Rev. 237, 264-66 (1954). See also *Johnson v. U. S.,* 333 U. S. 510 (1948); *Pekar v. U. S.,* 315 F. 2d 319, 324-325 (5th Cir. 1963); *Canida v. U. S.,* 250 F. 2d 822 (5th Cir. 1958); *Judd v. U. S.,* 190 F. 2d 649, 651 (D. C. Cir. 1951). See also *Report of the Nalional Advisory Commission on Civil Disorders,* Bantam Books, 1968, p. 460.

50 The imposition of the burden of proof on the mother is especially unnecessary where a point of technical eligibility, not the family need, is the question. The mother initially seeks to establish her eligibility with the help of appellant. The burden of establishing her initial eligibility is slight (Manual I 7-8, L 10-12, II 25a, II 29, 11 39-41). Once eligibility is established, the County Department periodically reviews continuing eligibility itself, but the burden never automatically reverts to the claimant to re-establish her eligibility.

51 See also the dissenting opinion of Judge Kaufman in *Snell v. Wyman,* C. A. 67-2676 S. D. N. *Y.* (Feb. 29, 1968) citing *Griswold*

and the welfare recipient's right to privacy.

52 "the liberty ... to direct the upbringing of children" *Pierce v. Society of Sisters,* 268 U. S. 510 applies to illegitimate as well as legitimate chlidren.

53 One of the witnesses testifies that a man's presence in the home is "prima faeie" proof of a sexual relationship (A. 178).

54 Unlike welfare department employees, such persons are not legally bound to maintain any confidences.

55 A study by the Florida Welfare Agency indicates that this course was chosen by 1,927 families, and that many others were apparently discouraged from applying for assistance after word spread among the poor of a new law similar to the one before this Court. In its report, the Department of Public Welfare noted that although the caseload increased by an average of 239 families monthly between May, 1958, and June, 1959 (when the new law went into effect), there was a decrease of 273 families monthly over the following fourteen months. Florida Department of Public Welware, Suitable home (1962) pp. 25-26

This consequence was unanticipated by those closest to the scene. The Florida Agency noted:

"One of the surprising results of the law has been the large number of withdrawals from ADC. During the first year, there was a decrease of nearly 4,000 cases.... Sometimes the mother withdraws ... when the worker explains the unsuitability requirement during the intake process. Many recipients have asked to have ADC discontinued rather than have the worker submit a Social Data Report.... Many mothers wait for the Team decisions and then withdraw if placement is recommended" (Bell, *op. cit.* 131).

Hence, a caseload that had been rising steadily before the law was enacted and reached a peak of 27,828 families in August, 1959, fell abruptly in twelve months to 23,871. This was not a regional trend nor is there any reason to conclude that it reflected improved economic circumstances for Florida's poor families. In looking more closely at some of the mothers in the group, the Department of Public Welfare noted that many feared permanent loss of their children and wished to "take no chances" (Bell, *op. cit.* 131, 132).

56 The concurring opinion of Mr. Justice Goldberg, joined in by Justices Brennan and Warren, referred (at 495) to the marital relation as "a particularly important and sensitive area of privacy," and referred to the existence of other areas of privacy, some perhaps equally as important and sensitive. The Opinion of the Court in *Griswold* relied especially on the Fourth and Fifth Amendments as interpreted in *Boyd v. U. S.,* 116 U. S. 616 (1885) to "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life". The principal concurring opinion cited, as indicating the scope of the right to privacy, the declaration by Mr. Justice Brandeis, in *Olmslead v. U. S.,* 277 U. S. 438, 476 (1928) (dissenting opinion), that the Fourth and Fifth Amendments confer "the right to he let alone" from "every individual, whatever the means employed ..." (quoted at 494). In *Camera v. Municipal Court,* 389 U. S. 12 (1967), Mr. Justice White, speaking for the Court, noted "When the right of privacy must reasonably yield to the right of search it is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agency."

57 Alabama's right to regulate non-marital relationships through general statutes, such as Code of Alabama, 14, §16 making it a crime for any man or woman to "live together in adultery or fornication", is not at issue here. The purpose which such laws may be necessary to achieve prevention of illegitimacy and enforcement of moral standards regarding sexual conduct cannot be invoked to justify Alabama's substitute father regulation. A state may not deny assistance to children living with their mother on the basis of an eligibility condition designed to discipline the mother and to control illegitimacy. Assuming that Alabama may punish unmarried persons upon proof in a court of law-in an adversary proceeding with all the procedural safeguards of due process-that those persons actually had sexual relations, the issue here is whether Alabama can for a very different purpose condition welfare eligibility on mere appearance of such relations.

The right (or the duty) of the state to prohibit "immoral" conduct which damages no other ascertainable public interest has been the

center of much discussion in recent years. The reporters of the Model Penal Code, sponsored by the American Law Institute, and those of The British Wolfenden Commission have recommended the legalization of all private non-violent consensual sexual conduct between adults. Sec Schwartz, *Moral Offences and the Model Penal Code,* Col. L. Rev. 669 (1963); Model Penal Code, Section 207.1, comment at 207 (Tent. draft 4, 1955); Dworkin, *Lord Devlin and the Enforcement of Morals,* 75 Yale L. Rev. 986 (1966); Note, *Private Consensual Adult Behavior: The Rcquirement of Harm to Others in the Enforcement of Morality,* 14 U. C. L. A. 581 (1967). The reporters of the Model Penal Code concluded that since laws enforcing purely moral or religious standards raised both constitutional and practical problems in a diverse society, they were "inappropriate for government." Model Penal Code, Section 207.1. comment at 207 (Tent. Draft No. 4, 1955). The Wolfenden Commission decided that the "realm of private morality (was) ... not the law's business." Dworkin, *Lord Devlin and the Enforcement of Morals,* 75 Yale L. Rev. 986, 990 (1966). The logic and constitutional approach is as meaningful in the welfare area as in the criminal area.

The decision of these groups seems the only possible one in a free society. Otherwise virtually any statutory interference in the lives of citizens could be justified in terms of moral regulation. The basic decision of the American social and economic system, embodied in the Constitution, is that individual morality and thus social strength are maximized by the freedom of the individual to make his own decisions about his life, unless those decisions interfere with the right of others.

"It ... appears from the constitutional position of the state that harm must consist of more than the immorality of that act. Since the state is not a moralistic institution, but protects its citizens from ulawvful interference with their rights and interests, government would transgress its power if it attempted to correct the internal faults of its subjects rather than limiting its goals to the prevention of injury to their lives, liberties, and property interests." Eser, *The Principle of Harm in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests,* 4 Duquesne, U. L. Rev. 345, 366 (1966).

58 There is, of course, no evidence to show that the denial of public aid serves as a rein upon maternal misbehavior or paternal irresponsibility or that mothers who bore illegitimate children while receiving public aid either planned to become pregnant or wanted the child. The argument that cutting off families with illegitimate children will lower the illegitimacy rate is not supported by the facts. The Greenleigh Association Study of Cook County, indicated most mothers in a randomly selected sample of ADC families had not wanted their illegitimate babies, but that the reduction or termination of small money grants combined with loneliness and rejection served to increase their need for male companionship and any money or practical assistance their men friends could provide. In a randomly selected sample of 323 families in Mississippi who had been denied ADC aid between June 1954 and June 1956, the incidence of illegitimacy soared *after* the families were rejected by the program. 41% of the children born to sample families during 1954 and 1956 were illegitimate. They were again interviewed in 1957, after they had their aid terminated and it was found that 91.4% of the children born in the intervening years to the 323 families were illegitimate. Bell, *Aid to Dependent Children,* Columbia University Press (1965), pp. 69, 101.

The report of the *National Advisory Commission on, Civil Disorders* states that the substitute father rules have "fostered the break up of homes." Bantam Books, 1968, p. 459.

59 Privacy in intimate relationships is of course, basic to the individual's personal dignity and worth.

"... privacy is not just one possible means among others to insure some other value, but ... it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy or the possibility of privacy they simply are inconccivable. A threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the very heart of our notion of ourselves as persons among persons." Fried, "Privacy," 77 Yale L. J. 475, 490-492 (1968).

The frcedom to determine the extent to which others may share in one's spiritual nature and the ability to protect one's beliefs, thoughts, emotions, and sensations from unreasonable intrusions are the very essence of life in a free society." Beaney, *The Griswold Case and the Expnldinlg Right to Privacy,* Wis. L. Rev. 979, 995 (1966). See also, Emerson, *Nine Justices in Search of a Doctrine,* 64 Mich. L. Rev. 219, 229 (1965).

This regulation, like the methods used to invade privacy described in the Fried article, *supra,* "obviously presents vast opportunities for malice and misunderstanding on the part of authorized personnel. For that reason the subject has reason to be constantly apprehensive and inhibited in what he does. There is always an unseen audience. But even assuming the benevolence and understanding of the official audience, there are serious consequences to the fact that no degree of true intimacy is possible for the subject. Privacy is not, as we have seen, just a defensible right. It rather forms the necessary context for the intimate relations of love and friendship which give our lives much of whatever affirmative value they have. Yet where any intimate revelation may be

heard by officials, it loses the quality of exclusive intimacy required of a gesture of love or friendship."

The regulation, "alters only in a subtle and unobtrusive waythough a significant one--the context for relations. The subject appears free to perform the same actions as others and to enter the same relations, but in fact an important element of autonomy, of control over one's environment is missing: he cannot be private. A prisoner can adopt a stance of withdrawal, of hibernation as it were, and thus preserve his sense of privacy intact to a degree. Finally, the insidiousness of a technique which forces a man to betray himself in this humiliating way or else seem inhuman is compounded when one considers that the subject is also forced to betray others who may become intimate with him. Even persons in the overt oppressiveness of a prison do not labor under the burden of this double betrayal." Fried, "Privacy", 77 Yale L. J., 475, pp. 490-492 (1968).

60 Not only is Alabama's regulation unnecessary to the achievement of the purposes of ADC, it directly contradicts these purposes, by invading the recipient's privacy. The United States Department of Health, Education and Welfare Transmittal 77 amending its Handbook of Public Assistance states:

2220. Reqluirements for State Plans. Effective July 1. 1967, a *State plan* under Titles I, IV, X, XIV and XVI *must:*

1. *Include policies and procedures for determination of cligibility* for assistance or other services that are consistent with the objectives of the program, and that respect the rights of individuals under the United States Constitution, the Social Security Act, Title *Vt* of the Civil Rights Act of 1964 (see Supplement C), and all other relevant provisions of Federal and State laws, and *that will not result in practises that violate the individual's privacy or personal dignity, or harass him, or violate his personal* constitutional rights. (Emphasis added.)

The purposes of the Act, that of guaranteeing the right of all eligible persons to financial assistance when in need and helping such persons become self-supporting and independent, is frustrated and destroyed by conditions on eligibility which harass and humiliate recipients, and force them to choose between assistance and privacy in their homes and free association outside of their homes.

61 Recipients rarely take appeals because they do not know of their right to have one and, even if they did know, they are so intimidated by the system, that they would not take the appeal.

A recent study found that while 141,286 Texas recipients in 1968 were given adverse determinations only 693 (0.49%) filed appeals. This compares to a 8.7% appeal rate from federal courts in Texas to Court of Appeals during the same period. Furthermore, while only 21.7% of the appeals to the County were reversed or denied, 55% were similarly disposed of by the Welfare Appeals Board. Bell and Norwell, Texas Welfare Appeals: The Hidden Right, 46 Tex. L. R. 223, 224 (1967). The percentage of appeals in Alabama appears to be far below that of Texas (R. 83) and we estimate it at less than one-tenth of one percent. Appellants had five appeals in 31/2 years when there were at least 5000 terminations (A. 83). A California study indicated 60% of the recipients do not know they have a right to appeal. Briar, Welfare From Below: Recipients' View of the Public Welfare System, 54 Calif. 370, 377 (1966). The article contains reeipents' responses to a question asking to whom a recipient should appeal if he disagrees with a decision made about his case by the Welfare Department. Nearly one-third of the recipients indicated they did not know where to appeal and the remainder lacked a consistent conception about where to initiate an appeal. The New York experience is similar. The Moreland Commission *Report on Public Welfare in the State of New York* (1963) at p. 27.

Judge Skelly Wright's observation in *Hobsen v. Hansen*, 269 P. Supp. 401 (D. C. 1967) calling for greater involvement. of the Federal Courts in eases dealing with the poor and other politically impotent minorities is pertinent:

"This need for careful scrutiny is strengthened when the practice, though not explicitly singling out for special treatment any of the groups for which the Constitution has a special solicitude, operates in such a way that one such group is harshly and disproportionately disadvantaged. See *Griffin v. Illinois*, 351 U. S. 12 (1956) and its progeny ... See also *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966) ...

"The explanation for this additional scrutiny of practices which, although not directly discriminatory, nevertheless fall harshly on such groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the abiding danger that the power structure ... may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities and the poor, than would

otherwise be necessary."

See also *United States v. Caroline Products Co.*, 307 U. S. 144, 152 n.4 (1938), in which this Court recognized that "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which calls for a correspondingly more searching judicial inquiry."

62 The record and the facts in this case and the previous attempts to utilize 42 U. S. C. 404 to enjoin the substitute father regulation answers questions about other remedies provided by the Social Security Act itself. Section 404 allows a litigant to file a complaint with HEW in an attempt to change a particular regulation. A complaint attacking substitute father regulations was filed two years ago and nothing has been done about it. Connor, The Man in the Rouse Rule, 2 Harv. Civil Rights, Civil Liberties L. Rev. 299 (1967). It is unrealistic to expect HEW to take any action that would reduce limitations on eligibility and thereby increase the welfare caseload and welfare costs. The history of the pressures placed by Congress on HEW, the entire history of the substitute father and suitable home policies and the negotiants between HEW and the states indicate that constitutional infirmities will be struck down only if the judiciary does it.

The Government's involvement in this case is indicative of their attitude. The only reason the Government entered the case was because Judge Johnson ordered it (R. 20). They were joined as "amicus and as a party" and were required to participate. They did not. They never filed any pleadings, did not give an amicus brief to the court below (they furnished the Court with a two page letter explaining their position (p. 111 of Appellants' Brief)) and refused to participate (until requested to do so by Mr. Justice Black) in the various stay applications before the Court. They originally refused to submit to discovery proceedings. Appellant King, was in a large part right in stating:

"Well, to be honest and frank about it, Mr. Garbus (Attorney for Appellee), the Federal Government has never liked the policy; but they have never had enough guts, and I say this for the record-the Federal Government has never had enough guts themselves to define what a substitute part policy would be. They were about ready to until Senator Byrd's investigation of the ADC problems in Washington, D. C. and after that they have been afraid to ..."

Mr. Justice Harlan's observation that the Federal Government "closely supervises" the program and that there is a "highly successful federal-state working relationship created by Congress in this area" is in large part correct. It does not always apply where unconstitutional practises allegedly save the Federal and State governments monies. HEW does not really know how the states administer many aspects of the politically sensitive ADC programs. See Steiner, *Social Insecurity, The Politics of Welfare*, Rand McNally (1966), p. 80.

63 See for example *Williams v. Gandy*, C. A. 728 N. D. Miss. (1967); *Wheller v. Montgomery*, C. A. No. 48303 N. D. Calif. (1967); *Lage v. Dowing*, Civil Action, No. 7-2089 S. D. Iowa, Nov. 21, 1967; *Mantell v. Dandridge*, No. 18792 D. Md. Dee. 4, 1967; *Johnson v. Robinson*, C. A. 67-C-1883 N. D. Ill. Dec. 28, 1967; *Rios v. Hackney*, C. A. 3-1852 N. D. Texas, Dallas Div. Nov. 30, 1967; *Harrel v. Tobriner*, C. A. No. 1497-67 (D. C. Sept. 11, 1967); *Smith v. Reynolds*, C. A. No. 42419 W. C. Ed. Penna. June 1, 1967; *Ramas v. Health and Social Service Board*, C. A. No. 67-c-329 E. D. Wise. Nov. 7, 1967; *Denny v. Health and Social Service Board*, Civil Action No. 67-c-426 E. D. Wise. Dec. 22. 1967; *Suell v. Wyman*, C. A. 67-2676, S. D. N. Y. Feb. 29, 1968; *Ponter v. Graham*, C. A. 2348 Tucson, Ariz., Jan. 24, 1968; *Thompson v. Shapiro*, October Term, 1967, No. 813. See New York Times, Nov. 26, 1967, "Welfare in Court," "The News of the Week in Review," p. 8.