THE ABUSE OF SECTION 1115 WAIVERS:
WELFARE REFORM IN SEARCH OF A STANDARD

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Reprinted from
YALE LAW & POLICY REVIEW
Volume 12, Number 1, 1994
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The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard

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Although urban problems extend far beyond the welfare system, policymakers persist in linking inner city problems with the Aid to Families With Dependent Children (AFDC) program. Hence, the rhetoric blames teen pregnancy, high school dropout rates, urban slums, and drug use on the availability of welfare benefits. Furthermore, in recent years the recessionary economy and the impact of reduced federal spending on state budgets have led us to embrace the notion of no-cost solutions to complex problems. In combination, political rhetoric and budget constraints have nurtured the belief that we can solve the intractable problems of urban decay and poverty by simply withholding welfare benefits.

Such withholding is not allowed under the state plan requirements of federal law. However, through the use of a technical and seemingly innocuous research provision contained in section 1115 of the Social Security Act, the federal executive branch has waived a number of congressionally enacted entitlement provisions. These waivers have allowed states to reduce or cut off benefits to thousands of otherwise eligible AFDC mothers and children who do not comply with prescribed behavior.

Given the sorely inadequate AFDC benefit level, additional benefit reductions are devastating for AFDC families. Numerous studies have shown the impact of inadequate income on mental health, infant mortality, low-birthweight children, skipped meals, malnutrition and its resulting health problems, and learning/developmental disabilities.

This Article will document the federal government’s relinquishment, in the name of experimentation, of any obligation to set welfare policy, and the abuse of section 1115 waivers in terms of both methodology and substantive result. In Part I, I explore the historical purpose of section 1115, which was to provide for limited research projects. Parts II and III critique the abuse of section 1115 through broad-based executive waiver approvals, and show how these waiver approvals have resulted in wholesale alterations of the AFDC program by the states. Finally, Part IV focuses on the reasons why unrestricted state discretion is not an appropriate strategy for addressing welfare policy concerns.

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2. Tommy Thompson, Time to Change the Welfare System, ST. LOUIS POST-DISPATCH, Dec. 14, 1992, at 3B (“As governor of Wisconsin, I have been waging my own anti-socialist revolution against a welfare system that has devastated once strong and vibrant urban communities.”).


4. In fiscal year 1978, federal grants to state and local governments amounted to 17% of all federal outlays and 3.6% of gross domestic product. By 1989, the grant level had fallen to 10.7% of federal outlays and 2.6% of gross domestic product. In recent years, these levels have increased slightly. OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1994, 174 (1993).


7. CENTER ON SOCIAL WELFARE POLICY AND LAW, LIVING AT THE BOTTOM: AN ANALYSIS OF AFDC BENEFIT LEVELS 11-14 (1993) (AFDC monthly benefit levels for a family of three in the 49 contiguous states range from $120 in Mississippi to $633 in Los Angeles, California, all below the poverty level).

8. Study of Poor Children Shows a Painful Choice: Heat over Food, N.Y. TIMES, Sept. 9, 1992, at A17 (discussing Boston City Hospital study documenting increase in low-weight babies admitted to emergency rooms in the winter because families have to divert food money to buy fuel); William S. Neuman et al., Childhood Death and Poverty: A Study of All Childhood Deaths in Maine, 1976-1980, 75 PEDIATRICS 41, 48 (1985) (finding that children on social welfare programs died of disease-related causes at a rate 3.5 times that of other children); Edward G. Stockwell et al., Economic Status Differences in Infant Mortality by Cause of Death, 103 PUB. HEALTH REP. 135, 137 (1988) (gap between rate of infant mortality in poor and nonpoor families is widening); David Wood et al., Health of Homeless Children and House, Poor Children, 86 PEDIATRICS 858, 862 (1990) (demonstrating high levels of childhood "morbidity" and ill health in poor children); Steven Porker et al., Double Jeopardy: The Impact of Poverty on Early Childhood Development, 35 PEDIATRIC CLINICS N. AM. 1227, 1231 (1988) (finding that low socioeconomic status increases the risk of contracting cytomegalovirus, which leads to lower IQ scores and 2.7 times more school failure than in matched controls and noting "[i]n contrast, these outcomes were not seen for infected infants of middle or upper class backgrounds."); J.S. Chopra & Arun Sharma, Protein Energy Malnutrition and the Nervous System, 110 J. NEUROLOGICAL SCI. 8 (1992) (linking protein energy malnutrition, a natural ramification of poverty, to significant abnormalities in motor and sensory nerve conduction, resulting in learning deficits and behavioral problems).
I. THE CONGRESSIONAL PURPOSE BEHIND EXECUTIVE WAIVERS OF STATUTORY ENTITLEMENT PROVISIONS

The Social Security Act, enacted in 1935, sets forth specific federal requirements that each state plan must contain in order to receive matching federal reimbursement for benefits paid under the AFDC program. In 1962, Congress added section 1115 to the Social Security Act, providing:

In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of subchapter I, VI, X, XIV, or XIX of this chapter, or Part A of subchapter IV of this chapter, in a State or States... the Secretary may waive compliance with any of the requirements of section 302, 602, 802, 1202, 1332, 1382, or 1396a of this title, as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project...[11]

Thus, this section allows the federal executive branch, through the Secretary of the U.S. Department of Health and Human Services (HHS), to waive a state's compliance with many federal AFDC statutory entitlement provisions in order for the state to run demonstration projects.

Executive waivers, however, are subject to certain restrictions. HHS must determine that the demonstrations promote the objectives of the AFDC program set forth in the Social Security Act. These objectives include "encouraging the care of dependent children in their own homes," helping "maintain and strengthen family life," and helping "such parent or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection."[14]

The limited legislative history of section 1115 suggests that Congress intended the waivers to support projects testing new methods of administration and delivery of the program benefits. The report of the Senate Finance Committee provided:

Projects to be initiated are expected to be selected for approval by the Department and to be those which are designed to improve the techniques of administering assistance and the related rehabilitative service under the assistance titles.[15]

The section of the bill that established 1115 waivers was one of three sections contained under the heading of "Improvement in Administration Through Demonstrations, Training, and Public Advisory Groups," along with a section creating an advisory council on public welfare to study the administration of various programs and a section providing additional funds for training welfare staff.[16]

At the time of enactment, then Secretary of Health, Education and Welfare (HEW) Abraham Ribicoff summarized the purpose of the waiver, stating that section 1115 "would make it easier for States to embark on imaginative pilot or demonstration projects which could lead to improved operations."[17]

The focus of the bill was the provision of better services for recipients, not reduction of benefits. Secretary Ribicoff testified to the Administration's...
benefit intentions in supporting the Public Assistance Act of 1962, which contained section 1115:

The President in his welfare message to the Congress observed that communities which have attempted to save money on welfare expenditures through ruthless and arbitrary cutbacks have met with little success.

[The President] said:

... but communities which have tried the rehabilitative road—the road I have recommended today—have demonstrated what can be done with creative, thoughtfully conceived and properly managed programs of prevention and social rehabilitation, in those communities, families have been restored to self-reliance, and relief roles have been reduced."

At the committee hearing, no witness suggested—nor did the Finance Committee ever intimate—that section 1115 was to be used to reduce benefits by varying eligibility criteria. In fact, the types of limited pilot projects which were presented to the Finance Committee included those testing the benefits of better trained caseworkers under competent supervision with manageable caseloads, those allowing recipients to retain more of their earnings prior to benefit reduction, and those using reduced caseloads and concentrated casework to strengthen family life, bring separated parents back together, and help welfare recipients get paid jobs."

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Two further points important to our discussion emerge from the record. First, Congress appears to have intended that the projects implemented pursuant to the waiver provision be limited in scope. While the AFDC program requires that the state plan provisions apply statewide, the Senate Report stated that this would need to be waived in most demonstration projects. Second, a later Senate Report indicated that duplication of such projects should be avoided.

In short, both the limited legislative history and lack of fanfare accompanying the passage of section 1115 indicate that Congress and the Administration intended this section to be a narrow, technical, and beneficent research option.

II. FEDERAL EXECUTIVE ABUSE OF SECTION 1115 WAIVERS

Over the thirty years of implementation of section 1115 waivers, HHS policy has shifted from approval of confined administrative and service-oriented projects to a radical misuse of waivers that has substantially undermined the federal AFDC eligibility criteria. In order to do this, HHS ultimately promulgated regulations that rejected the opinions of leading authorities about the standard protections that should be employed when conducting research on welfare recipients.

23. "One such requirement, for example, is that the plan be in effect throughout the State. A demonstration project usually cannot be statewide in operation. For this reason, under the bill the Secretary would be authorized to waive plan requirements...." S. REP. NO. 1589, supra note 15, at 19, reprinted in 1962 U.S.C.C.A.N. at 1961.
25. Courts have given wide discretion to the secretary in approving waiver requests and have rejected the argument that § 1115 waivers could not be granted to "eliminate any statutory rights or entitlements." Aguyco v. Richardson, 352 F. Supp. 470 (S.D.N.Y. 1972), aff'd, 473 F.2d 1000, 1104-05 (2d Cir.), cert. denied, 414 U.S. 1146 (1973) (challenge to New York demonstration project requiring all "employable" members of families receiving AFDC to register for training and employment and to accept a referral to a training program, to a job in the public or private sector, or to one established by the program); Phoenix Baptist Hosp. and Medical Ctr. v. United States, 728 F. Supp. 1423, 1427-28 (D. Ariz. 1989) (challenge to Arizona project rejecting the Medicaid reimbursement model, and instead entering into agreements with four "prime contractors" to receive a flat rate for each indigent patient assigned to the contractors, and in exchange to provide all necessary medical care); Georgia Hospital Ass'n v. Dept' of Medicaid Assistance, 518 F. Supp. 1348, 1355 (N.D. Ga. 1982) (challenge by Georgia hospitals to Georgia project implementing an alternative reimbursement system to hospitals for Medicaid); Crane v. Mathews, 417 F. Supp. 532, 539 (N.D. Ga. 1976) (challenge to Georgia demonstration project requiring copayment for certain Medicaid services to apply to all AFDC recipients except children in foster care); California Welfare Rights Org. v. Richardson, 348 F. Supp. 491, 493-95 (N.D. Cal. 1972) (challenge to the "California co-payment experiment," requiring Medi-Cal recipients not receiving cash assistance, earning income in addition to their cash assistance, or possessing resources above certain levels to apply for medical services).
26. In so ruling, however, courts commented on the time-limited nature of the demonstrations and the fact that the experiments were for a limited group of recipients. Aguyco, 352 F. Supp. at 470; California Welfare Rights Org., 348 F. Supp. at 498.
A. Shift in Nature and Scope of Projects Receiving Waiver Approvals

Consistent with legislative intent, HEW’s early waivers were largely directed toward administrative innovations to improve the service delivery of the program or small projects extending social services. For example, between 1963 and 1972, HEW approved at least twenty-five child care development programs, and more than forty programs to integrate services by coordinating and expanding social services and various benefit programs. At least twenty projects involved caseworker training.

HEW initially stated that the purpose of the waivers was "to develop and improve the methods and techniques of administering assistance and related services designed to help needy persons achieve self-support or self-care or to maintain and strengthen family life." Several years later, HEW reiterated this purpose and suggested examples of possible 1115 waivers, all of which involved an expansion of benefits or administrative innovation. According to HEW, the waiver could help:

provide assistance to needy individuals who would not otherwise be eligible; increase the level of payments; provide social services not presently available, including such new services as homemaking and homemaker services; experiment with new patterns and types of medical care; test new approaches to staff development; permit purchase of services or other financial arrangements when necessary for services for needy individuals are not available in public welfare agencies; or, involve new methods of improving any aspect of public assistance administration, including administrative methods, policies, and procedures.

Furthermore, in seeking additional funds for section 1115 demonstration projects in 1967, HEW described the first five years of the waiver authority:

Five years ago, the Congress established a program under the Social Security Act to support demonstration grants in the area of public assistance. The program has become a valuable tool for improving welfare services and administration. By January of this

26. HHS was unable to provide the author with original copies of all waiver approvals despite a long-standing Freedom of Information Act request. However, through other sources I was able to obtain a list of all waivers approved for 1962-1973, 1981-1985, 1987, and 1989-1992. For the missing years, I have relied on references to waivers in litigation and scholarly writing, the HHS waiver priorities listed in the Federal Register from 1978-1983, and conversations with experts who were closely following the waiver process during the relevant time. I have been able to obtain and review copies of the complete federal approvals (and in some cases the state applications as well) for many waivers granted for 1983-1992.


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year, 164 projects had been approved. Projects supported to date have dealt with more efficient ways of administering public assistance; tested the effect of administering public assistance; tested the effect of earned income exemptions as incentives to work; and experimented with the development of new ways of providing services.

In the early 1970s, although the vast majority of waivers continued in the same vein, HEW granted a limited number of waivers that resulted in a potential loss of benefits for recipients: several waivers were approved allowing states to run demonstrations involving mandatory jobs programs with AFDC reductions for those who failed to participate. Indeed, one demonstration was approved which required up to three dollars a month in copayment for medical care for some recipients. However, these projects were restricted in scope and duration: The California Co-Payment Experiment was for one year, with a possible six-month extension, and applied only to individuals with income or resources over a certain limit; the New York Public Service Work Opportunities Project operated in fourteen counties covering twenty-five percent of the state’s AFDC cases for one year, the New York Incentives for Independence Project operated in only three counties, covering 2.5% of the state’s AFDC and state-run Home Relief recipients for one year.

Between 1978 and 1983, HHS decided not to promulgate regulations setting

30. Social Security Amendments of 1967: Hearings on H.R. 12080 Before the Senate Comm. on Finance, 90th Cong., 1st Sess. 271 (1967) (statement of Wilbur Cohen, Under Secretary, Department of Health, Education, and Welfare); see also id. at 1126 (statement of Hon. John V. Lindsay, Mayor, City of New York) (noting the success of a training program that provided child care to all participants and suggesting the expansion of child care provision).

31. The unusual nature of these waivers was noted by the court in subsequent litigation of a copayment project:

It is maintained, essentially without contradiction, that no project which would have resulted in a lowering of the level of benefits has ever been approved, prior to this California project. Curiously, there is no showing whatsoever, that any state had ever proposed such a project before, much less that such a proposal had been rejected by the Secretary.


32. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SECTION 1115, DEMONSTRATION PROJECTS APPROVED (1972), supra note 27, at 13 (discussed in Agapayo v. Richardson, 473 F.2d 1090, 1094-96 (2d Cir. 1973)).

33. Id. at 2 (discussed in California Welfare Rights Org., 348 F. Supp. at 494).


35. Agapayo, 473 F.2d at 1094.

36. Id. at 1095. During this period, HEW also approved waivers for the highly analyzed negative income tax and income maintenance experiments in New Jersey, Pennsylvania, Washington, Colorado, Indiana, North Carolina, and Iowa, which guaranteed participants payments bringing their income to a level expressed as a percentage of the poverty line. These programs drew from a range of populations: some enrolled single mothers; others focused on working two-parent families. Joseph Heffernan, Negative Income Tax Studies: Some Preliminary Results of the Graduated-Income-Income Experiment, 46 SOC. SERV. REV. 11 (1972); Robert A. Moffitt & Kenneth C. Kappes, The Effect of Tax and Transfer Programs on Labor Supply, in 4 RES. LAB. ECON. 103 (1981); Felicity Skidmore, Operational Design of the Experiment in Work Incentives and Income Guarantees: The New Jersey Negative Income Tax Experiment 25 (Joseph A. Pechman & P. Michael Timpane eds., 1975).
forth standards and procedures for section 1115 waivers, and instead published "Federal Register notices annually to inform the public of the kinds of projects that may be funded under [1115] and the specific requirements and procedures for making awards." Prior to 1981, these notices largely limited priority areas for waiver approvals to administrative initiatives.

Beginning in 1981, pursuant to specific congressional authority, the Reagan Administration began giving large numbers of waivers of the federal entitlement provision to test employment-related activities, including job search, community work experience, and grant diversion to subsidize employment. Although welfare-to-work demonstrations constituted the majority of waivers granted from 1981 to 1987, HHS continued to grant waivers for a number of administrative projects, including error-rate reduction and coordinated administration of AFDC and Food Stamps.

However, in the mid-1980s, consistent with an earlier proposal to distribute AFDC funds within block grants and convert the program into a wholly state-run and state-financed effort, President Reagan announced a total revamping

40. In addition, a 1980 HHS memo, describing the types of 1115 projects which would be favorably considered, raised the possibility that the program would be used to test the adequacy of the public assistance system and to reduce dependence on welfare. See supra note 5.
41. A general policy of HEW in granting waivers is that the welfare recipient should be on welfare or better off than he would be if there was no project. With this policy in mind, there are subunits within Section 402 that the Secretary has authority to waive but does not exercise that authority in order to preserve the rights of recipients.

43. 42 U.S.C. § 602(a)(1)(B) (1988). Without a waiver of 602(a)(1)(A), the state cannot deny benefits to individuals who meet the federal requirements of the projects. See supra note 5.
45. Seven approved projects tested error reduction methods; five experimented with consolidation of AFDC and Food Stamps. Id.

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of the AFDC program through "state-sponsored, community-based demonstration projects." To facilitate this initiative, the Administration redesigned and simplified the structure of the waiver process, establishing a Low Income Opportunity Advisory Board to expedite state requests for waivers of multiple programs and to recommend action to the secretaries of each relevant department.

The Low Income Opportunity Advisory Board was to consider whether the waiver request: (1) was consistent with the policy goals set forth in Up From Dependency, the 1987 report issued by the Domestic Policy Council Low Income Opportunity Working Group; (2) was cost-neutral; and (3) had an adequate evaluation component. The evaluation was to measure the net effect on dependency, i.e., whether people left the welfare rolls, and the cost effectiveness of the project. Noticeably absent from the evaluation criteria was any notion of assessing harm to the affected recipients. A policy analyst from the conservative Heritage Foundation stated that "[t]hough the Board has attracted scant press and public attention since its creation in 1987, it is one of the most important gains for federalism in recent years."

One of the first two waivers processed through the Low Income Opportunity

REAGAN BLOCK GRANTS: WHAT HAVE WE LEARNED? (1986).
45. Ronald Reagan, Address on the State of the Union (Jan. 27, 1987) (transcript available from the Bureau of Nat'l Affairs, Inc.).
48. The report of the Low-Income Opportunity Working Group strongly recommended widespread, long-term state and local experimentation with welfare programs to accomplish very general goals such as reducing dependency on welfare, encouraging economically self-reliant families, making individualized determinations of need, and making work more rewarding than welfare. DOMESTIC POLICY COUNCIL LOW INCOME OPPORTUNITY WORKING GROUP, UP FROM DEPENDENCY: A NEW NATIONAL PUBLIC ASSISTANCE STRATEGY 5, 51-53 (1986). The report specifically put forth the idea of withholding welfare as a means of controlling behavior:

A centralized system bypasses normal community patterns and support. Federal aid now goes to individuals and households as a right, regardless of their attachment to any community norms or standards. Because the community provides no benefits, it can barely enforce any mutual responsibility or inspire affection.

Id. at 40.
50. THE WHITE HOUSE, supra note 47, at 7.
51. Budner, supra note 60, at 20. We view this as totally a Republican phenomenon, former Democratic Representative Chester Atkins of Massachusetts echoed similar leanings:

ty Advisory Board signaled a major departure from previous waiver practice. The Wisconsin Learnfare proposal “sanctioned,” or reduced, AFDC benefits to families in which teenage AFDC dependents and AFDC teen parents failed to attend high school. Rather than establishing proven support programs to keep kids in school, Learnfare punished welfare families whose children were truant or dropped out. For the first time, a waiver was granted to allow a reduction in AFDC benefits solely to affect the “deviant” behavior of welfare families outside of a labor market context.

The Bush Administration continued to expand the waiver provision, encouraging states to submit waivers so long as they were cost-neutral to the federal government. Similarly, President Clinton favors broad state discretion and flexibility to redesign welfare programs. His Administration has approved numerous waivers, including an eleven-year Wisconsin “experiment” which terminates a family’s entire AFDC grant after twenty-four months even if the parent wants to be in the labor market but is unable to find a job.

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B. Removal of Protection for Subjects of Experimentation by HHS’s Abandonment of Independent Review

While shifting its section 1115 policy from approval of beneficial demonstration projects to executive rescission of congressionally established welfare eligibility criteria, HHS also eliminated regulations providing for independent procedural protections normally mandated in research projects to protect AFDC mothers and children from harm.

In 1971, HEW developed a subregulatory policy to protect human subjects involved in all of its grants or contracts, including section 1115 projects. These protections included a review by an independent committee, subsequently termed the “Independent Review Board” (IRB), of the institution applying for any project in which human subjects “may” be at risk.

In promulgating the policy in the form of regulations in 1974, HEW concluded that requiring that the committee include members who are not employees of the institution applying for the project “is an essential protection against the development of insular or parochial committee attitudes, that it assists in maintaining community contacts, and would augment the credibility of the committee’s independent role in protection of the subject.” If the project placed the subjects at risk, participation had to be limited to those who had given legally effective informed consent. These regulations applied to “sociological” as well as physical or psychological harm. From 1974 to 1983, HEW generally applied these human services protections to section 1115 waiver projects.


An individual was considered to be at risk “if he may be exposed to the possibility of harm—physical, psychological, sociological, or other—as a consequence of any activity which goes beyond the application of those established and accepted methods necessary to meet his needs.” GRANTS ADMINISTRATION MANUAL, supra, § 1-40-10B.


60. GRANTS ADMINISTRATION MANUAL, supra note 58, § 1-40-20A.


63. With no explanation, the final regulations added the definition of “subject at risk” requiring that the potential injury increase “the ordinary risks of daily life.” 39 Fed. Reg. 18,914, 18,917 (1974) (codified at 45 C.F.R. § 46.3(b)).

64. Id. (codified at 45 C.F.R. § 46.20(n)(3)).


66. See discussion of extensive review and consent in David N. Kershaw, Comment, in Robert M. Veatch, Ethical Principles in Medical Experimentation, in ETHICAL AND LEGAL ISSUES OF SOCIAL EXPERIMENTATION 59 (Alice M. Rivlin & P. Michael Timpane eds., 1975). But see Crane v. Mathews, 417 F. Supp. 532, 545 (N.D. Ga. 1976) (Department of Health, Education, and Welfare representation to the court that it “has never resolved the question whether § 1115-type projects should be included within

However, in 1976, in response to *Crane v. Mathews,* which upheld the applicability of the protection of human subjects regulations to section 1115 waiver projects, HEW attempted to narrow the group of people protected by these regulations. In a notice of interpretation of "Subject at Risk," it stated that the regulations:

were not, and have never been, intended to protect individuals against the effects of research and development activities directed at social or economic changes, even though those changes might have an impact on the individual. More particularly, they were not designed to protect against possible financial injury which may result from alteration in a governmental program.

According to HEW, examples of research projects that would not place someone "at risk" included ones in which:

some welfare recipients report more frequently than others their income for purposes of determining their eligibility for, or the amount of, their welfare benefits, or a requirement of welfare, or a diminution in the level of welfare benefits (within prescribed boundaries) payable to some but not all similarly situated welfare beneficiaries, or a requirement that some but not all welfare recipients make a co-payment toward the cost of governmentally-financed medical care . . . ."

The Carter Administration had considered extensively whether to exempt section 1115 waivers from Institutional Review Board oversight. However, on January 26, 1981, just as the Reagan Administration was taking office, HHS expressly decided not to rescind those protections and instead provided the purview of 45 C.F.R. Part 46, "although it had decided that parts of the project in question were within the scope of the regulations."

68. 41 Fed. Reg. 26,572 (1976). This interpretation was published two weeks after the decision in *Crane*. 417 F. Supp. 532. In that case, HEW granted § 1115 waivers to allow Georgia to test the behavioral response of recipients to economic disincentives by imposing $2-25 copayments on Medicaid recipients for doctor's visits. In finding that the project involved human subjects, the court stated: "The Georgia copayment project has the effect of diminishing the amount of money that a family might have available for basic living needs and forces the family to make a determination whether to apply medical care, defined in the Social Security Act as the categorically needy, are required to pay for medical care and would not otherwise have to pay income to that need, is an activity which "deliberately and personally imposes" upon those human beings.
417 F. Supp. at 546. The court refrained from reaching the issue of whether the subjects were "at risk," but required that the project be submitted to an Institutional Review Board for such a determination. HEW's Lon Mullen, *Human Experimentation Regulations of HEW Bar Georgia Medicaid Cutback, Clearinghouse R.* Aug. 1976, at 259-60.
70. HEW had proposed an exemption for large scale research on the "effects of proposed social or economic change," from Part 46 in 1979. 44 Fed. Reg. 47,688, 47,692 (1979).

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that an IRB which reviewed a project could waive or modify the informed consent requirement in certain situations. HHS explicitly stated that no evidence had been presented to support the contention that IRB review and approval impeded social science research. Shortly thereafter, HHS confirmed its position: "We believe that IRB review of such evaluation research involving human subjects is appropriate even where, and perhaps particularly where, informed consent is not required," and stated that the previous "subject at risk" interpretation did not apply to the 1974 regulations which required informed consent for sociological as well as physical harm.

This affirmation of independent protections for section 1115 research subjects was in response to the findings and recommendations of two influential national commissions established by Congress to identify the basic ethical principles that should underlie biomedical and behavioral government research. The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research had stated:

The Commission's deliberations begin with the premise that investigators should not have sole responsibility for determining whether research involving human subjects fulfills ethical standards. Others, who are independent of the research, must share this responsibility, because investigators are always in positions of potential conflict by virtue of their concern with the pursuit of knowledge as well as the welfare of the human subjects of

71. 46 Fed. Reg. 8370 (1981). The final regulations stated that "IRB review of studies of federal, state, or local benefit or service program is appropriate even where it may be impracticable to obtain the informed consent of the subject." 46 Fed. Reg. 8366, 8383 (1981). However, the regulations allowed the IRB to modify or waive the informed consent requirement if the IRB documented that (1) the demonstration was of a benefit or service program and the research could not be carried out if consent was required, or (2) "the research involves no more than minimal risk to the subjects and "the waiver . . . will not adversely affect the rights and welfare of the subjects." 46 Fed. Reg. 8366, 8390 (1981) (codified at 45 C.F.R. §§ 46.116(c), (d)).
74. The protections resulting from this procedure became evident in the aftermath of the decision in *Crane*, discussed supra note 68. The IRB disapproved the project, determining that a substantial risk of physical harm existed because poor people would fail to receive medical treatment, that the benefits of the project did not outweigh the risks, and that the research design was "so seriously inadequate that it would be very unlikely to provide any accurate or reliable information upon which to base policy decisions regarding Medicaid copayments." Institutional Review Boards: Report and Recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 43 Fed. Reg. 56,174, 56,197 (1978).
75. Letter from Charles McCarthy to Barbara Mistikin, supra note 73. In promulgating the regulations and incorporating the recommendation of the National Commission, HHS had stated that "minimal risk" involved "those risks encountered in the daily lives of the subjects of the research," 46 Fed. Reg. 8366, 8373 (1981), thus rejecting the "subject at risk" interpretation of the "normal life experiences which other Americans can expect to encounter in their daily lives." 41 Fed. Reg. 26,572, 26,573 (1976).
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Rejecting the opinion of the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research that some form of independent IRB review was necessary, HHS stated that only agency personnel, under an obligation set forth in Appropriations Act riders, would review each section 1115 request to determine whether it presented “a danger to the physical, mental or emotional well-being of a participant.” The Commission strongly disagreed with HHS’s contention that no risks exist for the people involved in social policy experiments, noting that research projects covered by the proposed exemption can create medical risks as well as risk of nonphysical intrusions into personal or confidential matters and that such risks should be considered by an IRB. Indicative of the need for independent rather than solely agency review, HHS has recently taken the position that, “as a matter of law,” demonstration projects that reduce public assistance do not constitute a danger to welfare families.

Thus, through both executive encouragement of broad-based and wide-

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77. Cited in Crane v. Mathews from any IRB review. HHS specifically stated that escalating Medicaid costs required this change. Shortly thereafter, HHS totally exempted all section 1115 projects from an independent IRB review. The stated reason was that section 1115 projects were subject to review by HHS officials anyway and were different from “biomedical and behavioral” research.

78. The Commission repeated that IRB review was not duplicative of HHS review unless the HHS process included persons with no interest in the outcome of the research and qualifications for evaluating ethical aspects of the project. President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Comments of the President’s Commission to the Department of Health and Human Services, March 22, 1982, Notice of Proposal to Exempt Certain Research Projects from 45 CFR 46 (April 21, 1982), in IMPLEMENTING HUMAN RESEARCH REGULATIONS: THE ADEQUACY AND UNIFORMITY OF FEDERAL RULES AND OF THEIR IMPLEMENTATION, supra note 73, at 177. Each fiscal year appropriation for HHS from 1974 to 1993 included a provision that funds appropriated to HHS must not be used for any research program or project . . . of an experimental nature, or any other activity involving human participants, which is determined by the Secretary or a court of competent jurisdiction to present a danger to the physical, mental or emotional well-being of a participant or subject of such program . . . without the written, informed consent of each participant . . . .

80. 48 Fed. Reg. 9266, 9268 (1983). The Commission recommended that all research projects which limited or reduced benefits be subject to an independent IRB review. Id.

81. 48 Fed. Reg. 9266, 9268 (1983). This litigation challenged the “work incentive” component of a proposed California demonstration project, decreasing AFDC benefit levels by 13%, and waiving limits on earned income (the other component of the project imposed a one year residency requirement limiting benefits to the amount the applicant would have received in her state of prior residence). Its application was enjoined in Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993). While denying the plaintiffs’ motion for a preliminary injunction, the district court rejected HHS’s position that benefit reduction does not endanger recipients, stating that the language and history of the safeguards for human research subjects in HHS’s Appropriations Act and 45 C.F.R. § 46 do not expressly exempt financial harm from the definition of danger. Id.
ranging state AFDC experimentation as well as the restriction of independent protections for the AFDC mothers and children who are the subjects of such experiments.64 HHS has turned a carefully regulated federal entitlement program into a group of highly discretionary state programs.

III. RESULT OF EXPANDED STATE EXPERIMENTATION

The federal government's willingness to approve virtually any cost-neutral state demonstration project has led to a stampede of such proposals, many of which result in reduced subsistence benefits for welfare recipients.65 These fall into a number of categories, including Learnfare (reducing benefits if a child has too many school absences or fails to maintain a certain grade average), Family Cap (denying increased benefits for additional children conceived while on AFDC), family planning (requiring Norplant injection as an eligibility criteria for benefits), immunization (reducing benefits for failure to get children immunized or to seek regular medical care), migration restrictions (reducing AFDC benefits for people who move from one state to another).66 Workfare (reducing benefits if recipients do not work for their benefits), and across-the-board AFDC benefit cuts.67

Viewed as a whole, these programs reveal an extremely disturbing trend—states using AFDC as a punitive stick to attempt to affect the behavior of "deviant" welfare recipients, and the federal government indiscriminately approving section 1115 waivers for other than true experimental projects. The underlying assumption is that any change in a welfare rule constitutes welfare reform, and any policy change can be justified as an experiment. By focusing solely on long-term AFDC recipients68 and erroneously viewing them as the vast bulk of the urban underclass,69 policymakers view changing the behavior of this small subgroup as the basis for solving broader societal problems.70

As I have observed elsewhere,71 many of these behavioral modification programs have little substantive merit. They simply do not work as a mechanism to change welfare recipients' behavior. In addition, many of the demonstration projects do not meet the standard social science criteria for the design and implementation of an experimental program.72

For example, projects have been routinely approved that cover the entire state AFDC population instead of being limited to the statistically significant number of subjects needed for an experimental and a control group.73 This

86. There are, of course, additional difficulties with an internal process—for example, lack of public notice and opportunity to comment, lack of articulated and reviewable findings regarding harm to recipients, but a detailed discussion of these problems is beyond the scope of this Article.


89. LEVIN-EPSTEIN & GREENBERG, supra note 87, at 1. The authors also document three areas of state demonstration that improve benefits: allowing a family to retain more of its earnings when a member becomes employed, expanding eligibility for certain two-parent families, and reducing the amount of a step-parent's income when an AFDC parent marries. Id. at 30-39.

90. The median stay on AFDC in 1991 was only 19 months. STAFF OF HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS/1993 GREEN BOOK: BACKGROUND MATERIAL AND

is a particularly critical violation of standard procedures when the experiment involves a reduction in subsistence benefits to mothers and children, many of whom may not meet the necessary qualifications to be part of the experimental group. Moreover, rather than testing different hypotheses or different approaches to addressing the same hypothesis, virtually identical projects have been approved for multiple states. For example, there are currently five approved projects denying or reducing aid for children born or conceived during the family’s receipt of AFDC, two projects that lower benefits for “new” resi-

fraction Project); Letter from Jo Anne B. Barnhart to Gerald H. Miller, Director, Michigan Department of Social Services (Aug. 25, 1992) (on file with author) (granting approval of the Michigan To Strengthen Research and Demonstrations, Health Care Financing Administration, Department of Health and Human Services, to Alan J. Gibb, Commissioner, New Jersey Department of Human Services (July 20, 1992) (on file with author) (granting approval of the New Jersey Family Development Program); Letter from Ois R. Bowen, M.D., Secretary of Health and Human Services, to Richard F. Celeste, Governor of Ohio (June 2, 1988) (on file with author) (granting approval of the Ohio Transitions to Independence Program); Resources (July 17, 1992) (on file with author) (granting approval of the Oregon JOBS Waiver Project); Letter from Laurence J. Love, Acting Assistant Secretary for Children and Families, Department of Health and Human Services, to Cornelius Hogan, Secretary, Vermont Agency of Human Services (April 2, 1992) A. Stanton, Administrator, Family Support Administration, Department of Health and Human Services, file with Office of (granting approval of the Wisconsin Family Independence Project); Letter from Wayne to Timothy Cullen, Secretary, Wisconsin Department of Health and Social Services, file with Office of (granting approval of Wisconsin’s Welfare Reform Demonstration Program); B. Barnhart, Assistant Secretary for Family Support, Department of Health and Human Services, to Patricia author (granting approval of Part II of the Wisconsin Welfare Reform Demonstration).


In spite of this, the Bush Administration encouraged states to submit “[w]aiver projects that [include] almost all of the programs’ participants in a state.” The WHITE HOUSE, ADDING RINGS TO THE LADDER OF OPPORTUNITY: THE BUSH ADMINISTRATION’S STRATEGY FOR FURTHER WELFARE REFORM 7 (1992). For example, California’s grant reduction project is allegedly to test whether the grant reduction and increased earnings disregard will create a work incentive. However, because the grant reduction is applied statewide, residents are unable to work under the state welfare department itself will be subject to the population. CALIFORNIA DEPT. OF SOCIAL SERV., AFDC CHARACTERISTICS SURVEY: STUDY MONI 98. While multiple testing may be appropriate where each site is limited in scope and chosen for its has chosen to approve projects at multiple sites with no finding that each site provides additional evaluative STRATEGY FOR WELFARE EMPLOYMENT AND Training Programs 33-36 (Institute for Research on Poverty, Discussion Paper No. 999-3, 1993).

99. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Russell S. Gould, Secretary, California Health and Welfare Agency (July 14, 1992) (on file with author) (granting approval of California Welfare Reform Demonstration Project); Letter from Mary B. Jones, Associate Commissioner, Georgia Department of Human Resources (Nov. 2, 1993) (on file with author) (granting the statewide Georgia Personal Accountability and Responsibility demonstration project); Letter from Joseph R. Antos, Ph.D., Director, Office of Research and Demostra-

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dents, and three projects that impose sanctions for failure to receive appropriate immunizations. There are seven approved state waivers to run Learnfare programs, four of which have provisions that specifically target pregnant and parenting teens, and more states continue to pass Learnfare legislation. No Learnfare waiver requests have been denied. The only check on how many states can test the same hypothesis seems to be whether the state legislature will authorize the designated project.

Furthermore, demonstrations are also being approved to test previously studied hypotheses that have been empirically disproved. For example, although research has regularly shown that the level of AFDC benefits does not

90. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Eloise Anderson, Director, California Department of Social Services (Sept. 2, 1992) (on file with author) (granting approval of the statewide New Jersey Family Development Program); Letter from Jo Anne B. Barnhart to Gerald Whittenburg, Secretary, Wisconsin Department of Health and Social Services (April 10, 1992) (on file with author) (approving the four-county Wisconsin Parental and Family Responsibility Demonstration Project); Letter from Mary J. Jones to Gerald Whittenburg (Nov. 1, 1993) (on file with author) (approving Wisconsin’s two-county Work Not Welfare Demonstration Project).

100. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Eloise Anderson, Director, California Department of Social Services (Oct. 1, 1992) (on file with author) (approving the statewide California Assistance Payments Demonstration Project); Letter from Jo Anne B. Barnhart to Gerald Whittenburg, Secretary, Wisconsin Department of Health and Social Services (July 27, 1992) (on file with author) (approving Wisconsin’s six-county Two Year Antipoverty Benefit Demonstration Project); Letter from Jo Anne B. Barnhart to Gary J. Stagner, Director, Missouri Department of Health and Human Services (Oct. 1, 1992) (on file with author) (approving the statewide Missouri Preschool Immunization Project); Letter from Jo Anne B. Barnhart to Carolyn W. Colvin, Secretary, Maryland Department of Human Resources (June 30, 1992) (on file with author) (approving the statewide Maryland Children and Families Demonstration Project); Letter from Jo Anne B. Barnhart, Assistant Secretary for Family Support, Department of Health and Human Services, to Karen Beye, Executive Director, Colorado Department of Social Services (Jan. 13, 1994) (on file with author) (approving the statewide Colorado Personal Responsibility and Employment Program).

101. For example, California’s project, which has been approved for California, Maryland, Missouri, Ohio, Oregon, Virginia, and Wisconsin, and waiver requests are pending for Arkansas and Oklahoma. CENTER ON SOCIAL WELFARE POLICY AND LAW, supra note 87, at 3. These states with provisions targeting pregnant and parenting teens are California, Maryland, Missouri, Ohio, and Wisconsin. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Russell S. Gould, Secretary, California Health and Welfare Agency (July 14, 1992) (on file with author) (approving the statewide California Welfare Reform Demonstration Project); Letter from Jo Anne B. Barnhart to Gary J. Stagner, Director, Missouri Department of Health and Human Services (Oct. 26, 1992) (on file with author) (approving the statewide Missouri Preschool Immunization Project); Letter from Jo Anne B. Barnhart, Assistant Secretary for Family Support, Department of Health and Human Services, to Robert Goodrich, Secretary, Wisconsin Department of Health and Social Services (June 6, 1993) (on file with author) (approving the "Learnfare Modification" to Wisconsin’s statewide Welfare Reform Demonstration project).

102. In 1993, Mississippi passed such a bill, 1993 Miss. Sess. Laws, ch. 614, and California’s legislature authorized its previously approved “Cal Learns” program, 1993 Cal. Legis. Serv. 69. Likewise, although three Family Cap experiments were currently operational, Georgia passed legislation implementing a family cap during the 1993 session. 1993 Ga. Laws 612.

104. For example, in 1992 Learnfare proposals were introduced but not passed in 15 state legislatures.

LEVINE-EPSIT & GREENBERG, supra note 87, at 10.
affect the size of AFDC families or a recipient's decision to have another child, HHS approved waivers in California, Georgia, New Jersey, and Wisconsin to test just that hypothesis. Similarly, numerous studies in a variety of states have shown that higher AFDC benefit levels are not a significant reason why most families move into a higher-benefit state. However, in 1992, HHS approved waivers for both California and Wisconsin to allow them to pay lower benefits to new residents in order to determine the effect of AFDC benefit levels on mobility decisions of paying AFDC benefits based on the previous state of residence. Studies specific to both of these states had already found this hypothesis inapplicable to the majority of affected recipients.

Additionally, although one of the few restrictions mandated by section 1115 is that waivers must promote the objectives of the relevant statute, demonstrations have been approved which test no objective of the Social Security Act. The state residency requirement of the California and Wisconsin projects mentioned above is an example, in that discouraging people from moving interstate does not "encourage the care of dependent children," "help maintain and strengthen family life," or help parents "attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection." Nonetheless, the evaluation model does not provide an assessment of whether services without sanctions would have an impact.

The evaluation format of approved projects is also faulty. Too often, these projects are not designed to evaluate critical effects on subjects or to develop data on models that do not involve a reduction in benefits. For example, Wisconsin's Leinhard demonstration project ultimately provides additional oase management and alternative educational placements along with financial disincentives. Nonetheless, the evaluation model does not provide an assessment of whether services without sanctions would have an impact.

106. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Chairman, Missouri Legislative Committee, Secretary, Wisconsin Department of Health and Social Services (July 23, 1992) (on file with author) (approving Wisconsin Two-Tier AFDC Benefit Demonstration Project Proposal); Letter from Jo Anne B. Barnhart to Eliston Anderson, Director, California Department of Social Services (Oct. 29, 1992) (on file with author) (approving the California Assistance Payments Demonstration Project Proposal).

107. Other issues include the following:

- Lack of data on the percentage of families in Wisconsin who participate in the demonstration projects.
- Disregard for the impact of the projects on other states.
- Failure to consider the long-term effects on recipients.

108. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Chairman, Missouri Legislative Committee, Secretary, Wisconsin Department of Health and Social Services (July 23, 1992) (on file with author) (approving Wisconsin Two-Tier AFDC Benefit Demonstration Project Proposal); Letter from Jo Anne B. Barnhart to Eliston Anderson, Director, California Department of Social Services (Oct. 29, 1992) (on file with author) (approving the California Assistance Payments Demonstration Project Proposal).

109. Legislative Analyst, Public Assistance in California: Facts and Figures 52-54 (1984) ("The data...does not lend support to the theory that CaliforIna has a larger percentage of its population on AFDC because eligible families are moving to California in order to take advantage of higher benefits."); Wisconsin Expenditure Comm., Report of the Welfare Magnitude Study Committee 50-80 (1980).


112. Letter from Jo Anne B. Barnhart, Assistant Secretary for Family Support, Department of Health and Human Services, to Patricia A. Goodrich, Secretary, Wisconsin Department of Health and Human Services, and attachments (June 1, 1990) (on file with author) (approving expansion to Learnfare demonstration project).

113. Office of Family Assistance, Department of Health and Human Services, Amendments to Wisconsin's Special Terms and Conditions for its Welfare Reform Demonstration, Part II-Learnfare Modification, Section 5: Evaluation 7-12 (June 1, 1990) (on file with author). Likewise, the evaluation methodology used by the Ohio Learnfare program (LEAP) notes that GRADS, a preexisting, state teen parent program, may have helped bolster LEAP's effects. Dan Bloom et al., MANPOWER DEMONSTRATION RESEARCH CORPORATION, LEAP: IMPLEMENTING A WELFARE INITIATIVE TO IMPROVE SCHOOL ATTENDANCE AMONG PROGRAM ELIGIBLE YOUTH, TEENAGE PARENTS 77-85 (1991). One county welfare director noted: "We have had a successful GRADS program; I firmly believe the GRADS staff played more of a role in keeping kids in school than the money ever will. A point that often gets overlooked, as well, is that a lot of teen parents do not receive AFDC. In our county, the over 95% of those receive AFDC, GRADS program, for example, serves 95 students and only about 3/4 of those receive AFDC."

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addition, there are many successful dropout prevention programs for AFDC teens that do not reduce benefits. However, no one is evaluating whether these accomplish more than the “Learnfare” model. Of course, unlike the commonly held perception that Learnfare is cost-neutral or saves money, the dropout prevention programs require additional appropriations. Likewise, experiments are approved that test multiple variables without control groups for each variable. Thus, we cannot make any valid assessment for the effect of each variable on the hypothesis.

Most noticeably absent from virtually all the evaluations is any assessment of the impact on the thousands of women and children who are subject to the reduced subsistence benefits. Rather, the focus is on government cost savings or change in recipient behavior. This is contrary to standard social science research practice, which mandates a heightened oversight when children who cannot consent for themselves are involved.

In fact, it appears that in some situations waivers were granted solely as a budget-reduction measure, raising the core question whether we are trying to solve urban problems or only save money. California’s across-the-board 5.8% AFDC reduction reputedly tested the hypothesis of whether increased deprivation of subsistence benefits would increase work participation. However, the state’s waiver application highlighted the state’s fiscal crisis, predicted annual state and county savings of over $126 million for the grant reduction provision alone, and stated an intended implementation date only three months after the waiver request was first submitted for approval.

In addition, the demonstration does not require that any job be offered or available to the recipient prior to the reduction, nor that there even be an employable adult in the household.

Consistent with the rhetoric of the Reagan and Bush Administrations and continued under President Clinton, these waiver approvals send the message that states can reduce benefits for the entire state AFDC population on duplicate hypotheses without a design that will provide useful information. This implementation of section 1115 ignores well-established social science procedures, procedures developed specifically to protect the innocent human subjects.

The recent HHS approval of the Wisconsin Work Not Welfare Program, which terminates the entire AFDC grant to families regardless of need, does not require an evaluation report until 4 1/4 years after the project begins. “Waiver Terms and Conditions,” attachment to letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to Gerald Whittburn, Secretary for Children and Families, Department of Health and Human Services, pp. 12-13, 1993, at 12-13.

210. Veatch, supra note 66, at 41-44. 211. Governor Pete Wilson’s original proposal, which received federal § 1115 approval, would have cut the basic benefit for all AFDC families of three by 10% immediately (with no determination of whether anyone in the family was employed) and would have further reduced benefits by 15% six months later anyone in the family was employed. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Russell S. Gould, Secretary, California Health and Families, Department of Health and Human Services, pp. 12-13, 1993, at 12-13.

212. The recent HHS approval of the Wisconsin Work Not Welfare Program, which terminates the entire AFDC grant to families regardless of need, does not require an evaluation report until 4 1/4 years after the project begins. “Waiver Terms and Conditions,” attachment to letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to Gerald Whittburn, Secretary for Children and Families, Department of Health and Human Services, pp. 12-13, 1993, at 12-13.
IV. STATES ARE NOT THE PROPER FORUM FOR UNRESTRICTED WELFARE REFORM

In a climate of no spending, the rush to approve cost-neutral broad-based state demonstration projects has been heralded as the avenue to true welfare reform. In turn, welfare reform is viewed as the mechanism to solve urban problems.

But the underlying choice to allow states broad and essentially unrestricted discretion to experiment with subsistence benefits is wrong. State and local officials operate under built-in fiscal incentives to control costs as well as political pressures arising from deep-seated myths about welfare recipients. As a result, unrestricted discretion leads to programs that cause substantial harm to women and children, rather than being realistically designed to solve urban problems. 124

State and local governments have a strong fiscal incentive to reduce benefits based on interstate competition for businesses and wealthy individuals. 125

The ability of jurisdictions to break the link between taxes and expenditures is limited by the threat of relocation by highly mobile, relatively wealthy individuals. In an effort to attract these relocators, jurisdictions offer selective tax breaks or lower the overall

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Although the reality of such wealth relocation is widely disputed, 129 state policymakers’ fear of this outmigration is influential in decisions regarding state budget allocations. 130 In addition, since budgetary items, like roads, water supply, sewage, and education are considered essential to retaining corporate personnel, less room remains in the state budget for providing adequate welfare programs. 131 In fact, a “welfare reform” idea may spread from state to state 132 not because it has merit, but because states do not want to lose revenue to other states. 133 On the other hand, the federal government, which need not fear driving away a revenue base, is in a much more objective position to design welfare programs. 134

The state’s fiscal incentives to reduce benefits were heightened by the recession of the early 1980s, which increased state fiscal stress 135 and re-

duced federal infusion of money to fund state programs. In addition, the Reagan/Bush section 1115 waiver policy required all demonstrations to be cost-
neutral, and provided that any average be borne totally by the states. States therefore had a powerful incentive to reduce benefits or to run programs with short-term savings results; they had no fiscal motivation to test demonstrations with early costs (e.g., more expensive education/training programs) but potential long-term savings.

Moreover, state and local public officials, traditionally closer to their constituents, are more subject to the electorate’s political whims and therefore have often been less willing to implement programs that protect and support minority, disenfranchised, and unpopular constituencies.

Today, of course, welfare recipients are becoming the focus of much popular anger. The vast majority of the current American electorate views welfare recipients as African-American urban ghetto-dwellers who are lazy, dysfunctional mothers, having many children to avoid work and to get welfare. This erroneous, racist image is a key reason for welfare’s unpopularity.

It also explains why many of the state demonstration projects 1991 (noting that from 1976 to 1989, as state spending for Medicaid health care costs skyrocketed, state spending for other benefit programs including AFDC plunged).


137. See supra text accompanying notes 48-57.


Likewise, any savings could be returned to the states. See discussion of savings return in New Jersey REACH program, Grumsky & Barnow, supra note 49, at 629.


140. For example, in the 1960s and 1970s, local officials were notoriously unwilling to assist in school desegregation efforts. See, e.g., Cooper v. Aaron, 358 U.S. 1, 19-20 (1958) (finding state officials’ hostility to racial desegregation of schools no defense to failure to implement plan); GEORGE METCALF, FROM LITTLE ROCK TO BOSTON: THE HISTORY OF SCHOOL DESSEGREGATION 1983; J. BRADFORD SHEEHAN, THE BOSTON SCHOOL INTEGRATION DILEMMA: SOCIAL CHANGE AND LEGAL MANEUVERS 1984.


143. Only 38.8% of AFDC recipients in 1991 were African-American. 1993 GREEN BOOK, supra note 90, at 697. AFDC families have no more children than two-parent families in the general population. Id. at 696. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1991 (1992). See note 105, supra, for studies showing that AFDC mothers do not have more children in order to increase their grant levels; see also Paul A. Jargowsky & Mary Jo Bane, Poverty Poverty in the United States, in THE URBAN UNDERCLASS 235, 251-52 (Christopher Jencks & Paul E. Peterson eds., 1991) (stating that less than nine percent of all poor lived in ghettos in 1979). “It has been estimated that only one poor child in fifty-six is African-American, born of an unmarried teen mother who dropped out of school, and lives in the central city.” Corbett, supra note 1, at 8 (citing Ronald B. Miny, The Underclass: Concept, Controversy, Evidence, Papers Presented at IRP-ASPE Conference on Poverty and Public Policy (May 1992)).

144. Both our historical ambivalence about financially assisting the poor and our current frustration that we have not solved poverty add to this unpopularity. Thomas Ross, The Rhetoric of Poverty: Their Immorality, Our Helplessness, 79 GEO. L.J. 1499, 1509, 1543-44 (1991); Williams, supra note 53, at 721-25, 741-46.

The Abuse of § 1115 Waivers attempt to use reductions in AFDC benefits to change the recipient’s behavior that is viewed as the cause of broad-based urban problems. State and local politicians know that they can increase their popularity by inflammatory rhetoric and political action that blames welfare recipients for their own situations and thereby permits reduction of benefits. It seems true even when increased expenditures might result in programs that would reduce welfare costs in the long-run.

Indeed, AFDC was nationalized in 1935 partly because local government units were simply not providing sufficient benefits. The reality of local political and economic pressures was recognized as early as the hearings prior to enacting section 1115 initially: “It is helpful to the sound administration of welfare programs to have basic standards written into the Federal law as a protection against temporary and local pressures.”

145. While we might think of local control as giving a voice to people’s public issues and fantazize about local involvement in design of a welfare program as a means of increasing citizen support, people really do not get to choose what programs they want. See focus on their private agendas, such as keeping poor people out of their neighborhoods and schools. See generally Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 COLUM. L. REV. 1 (1990).


147. Although local involvement in the design of a welfare program might increase citizen support, the current degree of unreality and political hysteria at a local level about welfare recipients leads to poorly designed reactive programs.

148. “However, the problem with the political incentives created by the waiver option is that most of the political benefits appear to come from the announcement, not the implementation. And, indeed, the benefits obtained appear to have come from the announcement of the reform.” Wiseman, supra note 87, at 43. Of course, a federal presence is not a federal panacea. The same myths and biases have inflamed our national debate regarding welfare reform for a long time. See Wiseman, supra note 87, at 23, 45 (discussing conflicts between the politics 1993 NATION 693, 696; for a discussion of the politics of the debate, see Wiseman, supra note 87, at 23, 45 (discussing conflicts between the politics 1993 NATION 693, 696; see also Wiseman, supra note 87, at 23, 45 (discussing conflicts between the politics 1993 NATION 693, 696). Our national debate regarding welfare reform is a political war and policy science, and concluding that the need to address political dissatisfaction with the definition of need and policy science, and concluding that the need to address political dissatisfaction with the definition of need and policy science. 

149. Data from the implementation of the Family Support Act shows that states are not appropriating the funds set aside for the major welfare reform which occurred in 1988. In 1992, the states drew down only 65.5% of the available federal matching funds. 1993 GREEN BOOK, supra note 90, at 634.

150. The Report of the Committee on Economic Security, submitted to President Franklin D. Roosevelt in 1935, made recommendations leading to the Social Security Act, noting that: Less than one-half of the local units authorized to grant mothers’ aid are actually doing so. Many others are granting amounts insufficient to meet the needs of the families involved. Part of this situation is due to indifference, but in part it is due to the poverty of many local governmental units. 

151. Hearings, supra note 17, at 289 (statement of Clark W. Blackburn, General Director, Family Service Association of America) (justifying in opposition to § 107 of the Act, allowing states to do vendor arrangements in Section 33, 34, 35 (1935), 1993).
In short, contrary to the presumptions underlying the current trend, state and local governments are not in the best position to undertake bold welfare reform. This is not to say that there should be no waivers for state experimentation. Using states as laboratories to experiment with small, statistically significant groups is one way to gather empirical data on improvements in the welfare system. But there must be a strong federal presence in the design, limitations, and analysis of these waiver requests. To serve that function, the federal executive must have clear nonpartisan standards for judging waiver requests, analyzing the empirical data to determine if the premise being tested is sound, defining a base benefit under which no state may fall, and providing for an independent determination of harm and need for informed consent.

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V. CONCLUSION

Originally, policymakers intended for section 1115 to serve as a vehicle to run demonstrations. These demonstrations were to be limited in scope and were to be designed to improve the situation of recipients. These goals are consistent with the standards considered essential for experimentation in the social science world and should once again serve as the cornerstones of HHS waiver policy. By interpreting section 1115 waivers overbroadly, HHS has undermined congressionally mandated eligibility criteria and, in so doing, has corrupted the sensitive federalism balance between national and local authority. That balance must be arrived at by legislative consensus, and we cannot allow any agency to corrupt or undercut it. Broad-based state experimentation without adequate evaluative processes and protections for those whose lives are being disrupted is little more than a simplistic political response to the electorate’s hostility to welfare recipients. It is not an honest attempt to solve underlying urban problems.