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

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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 has blamed 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-communist 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 well below the poverty level).

8. Study of Poor Children Show 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. Nersesian 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 Houseless Children, 86 PEDIATRICS 858, 862 (1990) (demonstrating high levels of childhood “morbidity” and ill health in poor children); Steven Parker 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).
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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 selectively approved 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. 18 Secretary Ribicoff testified to the Administration's

13. The Department of Health, Education and Welfare (HEW) was redesignated as the Department of Health and Human Services in 1980 by the Department of Education Organization Act, 20 U.S.C. § 3508 (1988). Throughout this Article, I have referred to the agency as "HHS," except when it is chronologically correct to designate it "HEW."
15. S. REP. NO. 1589, 87th Cong., 2d Sess. 20 (1962), reprinted in 1962 U.S.C.C.A.N. 1943, 1962. See also HEW testimony describing the bill to the House Committee: “Experimentation and demonstration of new methods of administering public welfare more effectively would be permitted under provisions of the draft bill.” Public Welfare Amendments of 1962: Hearings on H.R. 10032 Before the House Comm. on Ways and Means, 87th Cong., 2d Sess. 3 (1962) (statement of Abraham Ribicoff, Secretary, Department of Health, Education, and Welfare); “We need to make constant efforts to find still more effective ways of providing welfare services.” Id. at 172; “The complex and varied problems of administration of public welfare programs can be solved only by fresh and imaginative approaches. Provision for waiver of plan requirements and some further Federal help with financing should serve as incentives to States to venture out into much needed experimentation with new methods and procedures.” Id. at 638 (statement of Barbara Coughlin, Director, Nevada State Welfare Department).
18. “The Committee on Finance, to whom was referred the bill (H.R. 10060) to extend and improve the public assistance and child welfare services program of the Social Security Act . . . .” S. REP. NO. 1589, supra note 15, at 1, reprinted in 1962 U.S.C.C.A.N. at 1943 (emphasis added). The Senate Report stated that this bill would allow waivers for “demonstration projects designed to improve the public assistance program.” Id. at 1947.

In appropriating additional funds for § 1115 projects in 1967, Congress again stated that the money was “to develop demonstrations in improved methods of providing service to recipients or in improved methods of administration.” S. REP. NO. 764, 90th Cong., 1st Sess. 30 (1967), reprinted in 1967 U.S.C.C.A.N. 2834, 2863; see also id. at 3006 (discussing “ways of improving the quality of administra-
beneficent 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.\(^1\)

At the committee hearing, no witness suggested—or did the Finance Committee ever intimate—that section 1115 was to be used to reduce benefits by varying eligibility criteria.\(^2\) 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.\(^3\)

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Two further points import 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,\(^4\) the Senate Report stated that this would need to be waived in most demonstration projects.\(^5\) Second, a later Senate Report indicated that duplication of such projects should be avoided.\(^6\)

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-orientated projects to a radical misuse of waivers that has substantially undermined the federal AFDC eligibility criteria.\(^7\) 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 plans 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 "diminish any statutory rights or entitlements." Agayu v. Richardson, 352 F. Supp. 642, 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 contractor, and in exchange to provide all necessary medical care); Georgia Hospital Ass’n v. Dept’ of Med. Assistance, 528 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 some 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. Agayu, 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 services as homemaking and homemaker assistance; 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 year, 164 projects had been approved. Projects supported to date have dealt with more efficient ways of administering public assistance; tested the effects of administering public assistance; tested the effects 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...
forth standards and procedures for section 1115 waivers,\textsuperscript{37} 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.”\textsuperscript{38} Prior to 1981, these notices largely limited priority areas for waiver approvals to administrative initiatives.\textsuperscript{39}

Beginning in 1981, pursuant to specific congressional authority,\textsuperscript{40} the Reagan Administration began giving large numbers of waivers of the federal entitlement provision\textsuperscript{41} to test employment-related activities, including job search, community work experience, and grant diversion to subsidize employment.\textsuperscript{42} 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.\textsuperscript{43}

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,\textsuperscript{44} President Reagan announced a total revamping

41. 42 U.S.C. § 602(a)(10) (1988). Without a waiver of 602(a)(10)(A), the state cannot deny benefits to individuals who meet the federal requirements of the projects. See supra note 5.
44. 42 U.S.C. § 602(a)(10) (1988). Without a waiver of 602(a)(10)(A), the state cannot deny benefits to individuals who meet the federal requirements of the projects. See supra note 5.
46. Seven approved projects tested error reduction methods; five experimented with consolidation of AFDC and Food Stamps. Id.

The Abuse of § 1115 Waivers of the AFDC program through "state-sponsored, community-based demonstration projects."\textsuperscript{45} To facilitate this initiative, the Administration redesigned and simplified the structure of the waiver process,\textsuperscript{46} 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.\textsuperscript{47}

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;\textsuperscript{48} (2) was cost-neutral; and (3) had an adequate evaluation component.\textsuperscript{49} 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.\textsuperscript{50} 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."\textsuperscript{51}

One of the first two waivers processed through the Low Income Opportun-
ty Advisory Board\(^{52}\) 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.\(^{53}\) 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.\(^{54}\) Similarly, President Clinton favors broad state discretion and flexibility to redesign welfare programs.\(^{55}\) His Administration has approved numerous waivers,\(^{56}\) 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.\(^{57}\)


\(^{54}\) See infra part III for documentation of waivers granted and infra text accompanying notes 134-58, signaled that he intended to make processing waivers easier and quicker in order for states to implement order, "to hold their families together and refrain from having children out of wedlock," and "to obey_WEEKLY COMP. PRES. DOC. 170, 176 (Feb. 3, 1992). Later in 1992, the Bush Administration set up a .a wide range of proposals if the demonstration would be rigorously evaluated and would be .a wide range of proposals if the demonstration would be rigorously evaluated and would be.

\(^{55}\) President Clinton has stated:

We need to encourage experimentation in the states. I will say again what you know so well: there are many promising initiatives right now at the state and local level, and we will encourage that kind of experimentation. I do not want the federal government, in pushing welfare reforms, based on these general principles, to rob you of the ability to do more, to do different things. President Clinton Address to the National Governors' Association, READER TRANSCRIPT REP., Feb. 2, 1993. The President said he would approve waivers that he did not necessarily agree with as long as the projects need to be cost-neutral, although they assess cost neutrality over the life of the project rather than file with author.

\(^{56}\) See DEPARTMENT OF HEALTH AND HUMAN SERVICES, ANNUAL REPORT OF SECTION 1115 AFDC RESEARCH AND DEMONSTRATION PROJECTS IN FISCAL YEAR 1993—INFORMATION (1993) (on file with author) and infra notes 95, 99, 101 for documentation of waivers granted.

\(^{57}\) Letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to Gerald Whiburn, Secretary, Wisconsin Department of Health and Social Services (Nov. 1, 1993) (on file with author) (approving the Wisconsin "Work Not Welfare" demonstration project).

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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 beneficent 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.\(^{58}\) These protections included a review by an independent committee, subsequently termed the "Independent Review Board" (IRB),\(^{59}\) of the institution applying for any project in which human subjects "may" be at risk.\(^{60}\)

In promulgating the policy in the form of regulations in 1974,\(^{61}\) 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."\(^{62}\) If the project placed the subjects at risk, participation had to be limited to those who had given legally effective informed consent.\(^{63}\) These regulations applied to "sociological" as well as physical or psychological harm.\(^{64}\) Since 1974 to 1983, HEW generally applied these human services protections to section 1115 waiver projects.\(^{65}\)


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, § 1-40-108.


\(^{60}\) GRANTS ADMINISTRATION MANUAL, supra note 58, § 1-40-20A.


\(^{63}\) With no explanation, the final regulations added the definition of "subject at risk" a requirement 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. § 46.2(10-3)).


\(^{66}\) See discussion of extensive review and consent in David N. Kershaw, Comments, 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. 533, 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
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that an IRB which reviewed a project could waive or modify the informed consent requirement in certain situations.\(^7\) HHS explicitly stated that no evidence had been presented to support the contention that IRB review and approval impeded social science research.\(^7\) 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,"\(^7\) 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.\(^7\)

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)).


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).

\(^{74}\) Letter from Charles McCarthy to Barbara Mishkin, 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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their research." 

Subsequently, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research stated that an exemption for "social, economic, or health service research conducted under governmental aegis" from the requirements of the human subjects regulations should be granted only when "the research involves no limitation or withholding of a benefit to which the subjects are legally entitled or which other individuals, similarly situated, continue to receive under the program being evaluated." 76

However, only one year later, the Reagan HHS decided to remove all Medicaid cost-sharing demonstration projects such as the copayment project involved in Crane v. Mathews from any IRB review. HHS specifically stated that escalating Medicaid costs required this change. 77 Shortly thereafter, HHS totally exempted all section 1115 projects from an independent IRB review. 78

The stated reason was that section 1115 projects were subject to review by HHS officials anyway and were different from "biomedical and behavioral" research. 79


76. Letter from Morris B. Abram, Chairman, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, to Patricia Roberts Harris, Secretary, Department of Health and Human Resources [atc] app. at 5 (Sept. 18, 1980) (emphasis added) (on file with author).

77. Notice of Waiver, 47 Fed. Reg. 9208 (1982). Although the IRB, following the Crane decision, determined that IRB review was present in even a $2 copayment proposal, supra note 73, HHS stated that IRB review was unnecessary since "the possibility of any risk arises solely from the modification of demonstration projects conducted under section 1115." Id. This regulation was immediately rescinded by Congress. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 367 (codified as amended at 42 U.S.C. § 1396d (1980)).


79. With no evidence to contradict its previous finding, supra text accompanying notes 70-74, HHS stated that the independent IRB review was duplicative and burdensome, and that eliminating it was biomedical and behavioral research were unnecessary to research changing benefit levels. 48 Fed. Reg. 9262, 9268 (1983).

It has been noted that the HHS Under Secretary at the time had designed the § 1115 California Medicaid cost-sharing experiment under then Governor Reagan, which was challenged in California Welfare Rights Org. v. Richardson, 348 F. Supp. 491 (N.D. Cal. 1972), and fully understood the impact of independent IRB review on broad-based state discretion. Sara Rosenbaum, Mothers and Children Last: The Oregon Medicaid Experiment, 18 AM. J.L. & MED. 97, 121 n.117 (1992).

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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, 80 HHS stated that only agency personnel, under an obligation set forth in Appropriations Act riders, 81 would review each section 1115 request to determine whether it presented "a danger to the physical, mental or emotional well-being of a participant." 82 The Commission strongly disagreed with HHS's contention that no risks exist for the people involved in social policy experiments, 83 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. 84 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. 85

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

80. The Commission noted 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' Notice of Proposed IRB Exemption from Research from 45 CFR 46 (April 21, 1982), in IMPLEMETING HUMAN RESEARCH REGULATIONS: THE ADEQUACY AND UNIFORMITY OF FEDERAL RULES AND OF THEIR IMPLEMENTATION, supra note 73, at 177.

81. 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 . . . . Added by Floor amendment offered by Senators Buckley and Biden, 120 Cong. Rec. S31,596-98 (daily ed. Sept. 18, 1974). Most recent provision for fiscal year 1993 contained in Departments of Labor, Health and Human Services and Education and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-394, § 211, 106 Stat. 1812 (1992), codified at 42 U.S.C. § 3515b. In proposing the appropriations rider, Senator Biden specifically stated that the language of the rider expanded the "coverage of existing HEW regulations to include activities carried out by HEW itself," and that the requirement of informed consent applied to "any program or project which has been determined to present a danger to the physical, mental, or emotional well-being of the participant." 120 Cong. Rec. S31,597 (emphasis added). This section has recently been held to apply to projects approved through § 1115 waivers. Beno v. Shalala, No. S-92-2135, slip op. at 21 (E.D. Cal. July 1, 1993) (appeal pending).

82. See supra note 78 (emphasis added).

83. IMPLEMETING HUMAN RESEARCH REGULATIONS: THE ADEQUACY AND UNIFORMITY OF FEDERAL RULES AND OF THEIR IMPLEMENTATION, supra note 73, at 178.

84. 48 Fed. Reg. 9206, 9268 (1983). The Commission recommended that all research projects which limited or reduced benefits be subject to an independent IRB review. Id.

85. Beno v. Shalala, No. S-92-2135, slip op. at 23. (E.D. Cal. July 1, 1993). This litigation challenged the "work incentive" component of a proposed California demonstration project, decreasing AFDC benefit levels by 1.3%, 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. 1990)). While denying the plaintiff's 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. 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. 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). Workfare (reducing benefits if recipients do not work for their benefits), and across-the-board AFDC benefit cuts.

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 recipients and erroneously viewing them as the vast bulk of the urban underclass, policymakers view changing the behavior of this small subgroup as the basis for solving broader societal problems.

As I have observed elsewhere, 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.

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. This

DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS, 103d Cong., 1st Sess. 697 (1993) [hereinafter 1993 GREEN BOOK]. Recent state studies have shown that the median stay on AFDC for new entrants is one year or less, that more than two-thirds of new entrants leave the system within two years, and that less than 15% of new entrants will receive AFDC continuously for five years. MARK GREENBERG, CENTER FOR LAW AND SOCIAL POLICY, BEYOND STEREOTYPES: WHAT STATE AFDC STUDIES ON LENGTH OF STAY TELL US ABOUT WELFARE AS A "WAY OF LIFE" vi (1993).

91. Long-term AFDC recipients living in poverty areas make up only 2.9% of the U.S. poverty population. Erol R. Ricketts & Isabel V. Sawhill, Deconstructing and Measuring the Underclass, 7 J. POL'Y ANALYSIS & MGMT. 316, 319 (1988).

92. Although reducing welfare "dependency" has become the driving force in both the rhetoric and implementation of welfare reform, very little empirical research has been done to illuminate the causes of long-term AFDC receipt. STATES UPDATE (Center for Law and Social Policy), Oct. 9, 1992, at 7. While we know that short-term AFDC mothers are better educated, more likely to be married, have been employed more recently, and have not had their first child while a teenager, we know little of what barriers are faced by long-term AFDC mothers. Douglas J. Besharov, Targeting Long-Term Welfare Recipients, in WELFARE POLICY FOR THE 1990s, at 146, 151-54 (Phoebe H. Contegrated & David T. Ellwood eds., 1989); DAVID T. ELLWOOD, TARGETING "WOULD-BE" LONG-TERM WELFARE RECIPENTS OF AFDC 30, 42, 50 (1986). For example, a study of the 1983-84 National Survey of Income and Program Participation has indicated that over 20% of female AFDC heads of household under age 45 are disabled, but are not receiving the more generous disability program, Supplemental Security Income. MICHELLE ADLER, DEPT. OF HEALTH AND HUMAN SERVICES, HEALTH AND DISABILITY STATUS OF AFDC FAMILIES (1988); see also DAVID T. ELLWOOD, supra at 42-47 (18.4% of recipients report they have a disability which limits work); GREGORY C. WEEKS, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, TARGETING PUBLIC ASSISTANCE 5 (1992) (finding that 16.5% of Washington AFDC recipients reported a disability in the last 12 months).

Likewise, even though many of the state demonstration projects are designed to test ways of moving recipients into the labor force, a recent Chicago study showed that virtually all welfare recipients are working already, because they are unable to meet basic survival needs with AFDC grant. The authors found that "single mothers do not turn to welfare because they are pathologically dependent on handouts or unusually reluctant to work—they do so because they cannot get jobs that pay better than welfare." Kathryn Edin & Christopher Jencks, Reforming Welfare, IN JENCKS, supra note 1, at 204.

93. Williams, supra note 53.

94. See generally Garasny & Barnow, supra note 49; WISEMAN, supra note 87, at 6-8.

95. For its work-incentive grant reduction project, California has designated 15,000 eligibles from four counties as the research sample, including 5000 as a control group and 10,000 as a treatment group. 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 app. at 5-6, ¶ 3.6-3.7 (Oct. 29, 1992) (on file with author) (granting waiver approval).

96. 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
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dents,100 and three projects that impose sanctions for failure to receive appropriate immunizations.101 There are seven approved state waivers to run Learnfare programs, four of which have provisions that specifically target pregnant and parenting teens,102 and more states continue to pass Learnfare legislation.103 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.104

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

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100. 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. Gibbs, 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 Joseph B. Antos, Ph.D., Director, Office of Health Care Financing Administration, Department 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 12, 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 Cornellius Hogan, Secretary, Vermont Agency of Human Services (April 12, 1991) A. Stanton, Administrator, Family Support Administration, Department of Health and Human Services, file with (on file with author) (granting approval of the Wisconsin Family Independence Project); Letter from Wayne to Timothy Cullen, Secretary, Wisconsin Department of Health and Social Services, file with (on file with author) (granting approval of the Wisconsin Welfare Reform Demonstration); Letter from Jo Anne B. Barnhart to Stephen D. Mimnic, Administrator, Oregon Department of Human Resources, (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 Cornellius Hogan, Secretary, Vermont Agency of Human Services (April 12, 1991) A. Stanton, Administrator, Family Support Administration, Department of Health and Human Services, file with (on file with author) (granting approval of the Wisconsin Family Independence Project); Letter from Wayne to Timothy Cullen, Secretary, Wisconsin Department of Health and Social Services, file with (on file with author) (granting approval of the Wisconsin Welfare Reform Demonstration); Letter from Jo Anne B. Barnhart to Stephen D. Mimnic, Administrator, Oregon Department of Human Resources, (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 Cornellius Hogan, Secretary, Vermont Agency of Human Services (April 12, 1991) A. Stanton, Administrator, Family Support Administration, Department of Health and Human Services, file with (on file with author) (granting approval of the Wisconsin Family Independence Project); Letter from Wayne to Timothy Cullen, Secretary, Wisconsin Department of Health and Social Services, file with (on file with author) (granting approval of the Wisconsin Welfare Reform Demonstration); Letter from Jo Anne B. Barnhart to Susan G. Gould, Secretary, California Health and Human Services, to Russell S. Gould, Secretary, California Health and Human Services (July 14, 1992) (on file with author) (approving the statewide California Welfare Reform Demonstration Project); Letter from Mary B. Jones, Assistant Secretary for Children and Families, Department of Health and Human Services, to James G. Lohette, Ph.D., Commissioner, Georgia Department of Human Resources (Nov. 2, 1993) (on file with author) (approving the statewide Georgia Personal Accountability and Responsibility demonstration project); Letter from Joseph B. Antos, Ph.D., Director, Office of Research and Demonstration...
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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 demonstration 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.

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 Learnfare demonstration project ultimately provides additional case 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.

105. "TheEffect of Welfare and Wage Levels on the Location Decisions of Female-Headed Households" by Rebecca M. Blank, Urban Economics, 21(1), 188-188 (1988). In this study, which was a significant contribution to the field, Blank found that "wages are an important determinant of welfare participation," and that "wages are an important determinant of welfare participation." These findings have been confirmed by subsequent studies, and have been used to support the claim that welfare benefits are an important determinant of welfare participation.

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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.114 Of course, unlike the commonly held perception that Learnfare is cost-neutral or saves money, the dropout prevention programs require additional appropriations.115 Likewise, experiments are approved that test multiple variables without control groups for each variable.116 Thus, no valid assessment can be made for the effect of each variable on the hypothesis.117

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.118 Rather, the focus is on government cost savings or change in recipient behavior.119 This is contrary to standard social

114. MDRC finds LEAP improves School Attendance, States Update (Center for Law and Social Policy), Apr. 26, 1993, at 7-8. Yet the LEAP evaluation did not assess the impact of GRADS independently of the sanctions. BLOOM, supra, at 87-104.

115. Administrative costs for Learnfare in Wisconsin in 1991 were $7,491,614, without including costs of litigation, state staff assigned to Learnfare, or administrative staff required for fair hearings. Id. at 13.

116. 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 Human Services Agency (July 18, 1992) (on file with author) (approving California Welfare Reform Demonstration Project, which imposes statewide grant reductions, lower benefits for new residents, Family Cap, Learnfare, and Workfare of Health and Human Services, to Alan J. Gibbs, Commissioner, New Jersey Department of Human Services (July 20, 1992) (on file with author) (approving the New Jersey Development Program, which includes both Family Cap and Workfare components); Letter from Laurence J. Love, Acting Hogan, Secretary for Children and Families, Department of Health and Human Services, to Cornelius B. Whitman, Executive Director, Agency for Health Services, to Cornelia Whitman, General Counsel, Agency for Health Services (April 12, 1993) (on file with author) (approving the Vermont Family Independence Project, which imposes time limits for AFDC, Workfare, and require- domestic violence by a child six years of age or under. DEPT’H OF HUMAN RESOURCES, STATE OF MARYLAND, DISABILITY AND CAREGIVER CARE PLAN (July 2, 1993) (on file with author).

119. For example, Wisconsin received a waiver to study the effect of paying lower AFDC benefits to families whose child moved into the state less than six months previously. While the study plan did not mention potential hardships faced by the family as a result of receiving reduced benefits, Wisconsin DEPT’H OF FEDERAL ASSISTANCE, TWO-TIER AFDC BENEFIT DEMONSTRATION PROJECT, APPLICATION FOR FEDERAL ASSISTANCE, FAMILY INDEPENDENCE PROJECT (Oct. 29, 1992) (on file with author). The Vermont Family Independence Program imposes time limits on AFDC as well as stringent work requirements, but does not require any study of the impact of such drastic reductions. VERMONT DEPT’H OF SOCIAL WELFARE, FAMILY INDEPENDENCE PROJECT, APPLICATION FOR FEDERAL ASSISTANCE IV-49-59 (Oct. 29, 1992) (on file with author).

The Abuse of § 1115 Waivers science research practice, which mandates a heightened oversight when children who cannot consent for themselves are involved.120

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.121 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.122 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.123

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 1 4/14 years after the project has begun. “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 Whitburn, Secretary, Wisconsin Department of Health and Social Services, app. at 12-13, § 3.10 (Nov. 1, 1993).
of "reform" experiments. These waivers do not test alternative hypotheses; instead, they drive a huge path through the basic protections of the Social Security Act.

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.

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

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

124. I do not mean to advocate a scientific model as the only or best approach for social legislation. I do mean, however, to raise serious doubts about the cavalier way in which HHS has changed section 1115 in attendant restrictions it appropriate for experiments under § 1115, but is not necessarily required for


126. Of course, some state governments have resisted the fiscal and political pressures described

127. "Many who would support a particular progressive tax and spending program in a unitary system oppose it in hierarchical federalism if the law prompts state "beggar-my-neighbor" laws which benefit 89 J. POL. ECON. 152, 158 (1981).


130. Harold Wolman, Local Economic Development Policy: What Explains the Divergence Between Policy Analysis and Political Behavior?, 10 J. URB. AFF. 19, 24-27 (1988) (suggesting that local political actors use fiscal incentives to attract industry despite empirical data showing their ineffectiveness because (1) politicians are ignorant of empirical data, and, instead, rely on conversations with local business people who say "taxes make an important difference," (2) the offering has symbolic content to the electorate as a visible response to unemployment, and (3) governments try to match their competitors because they fear the consequences if they are wrong); see also Albert Davis & Robert Luce, The Rich-State-Poor-State Problem in a Federal System, 35 NAT'L TAX J. 337, 341 (1982); Richard B. Stewart, Federation and Rights, 19 GA. L. REV. 19, 919, 919, 949-50, 953, 964 (1985).

132. See discussion of numerous states testing the same demonstration hypotheses, supra text accompanying notes 98-104.

133. Rose-Ackerman, supra note 127, at 158. The additional factor of wide disparities in states' revenue capacity and resources argues against decentralization of categorical eligibility, creating an incentive to reduce eligiblity. See Davis & Ladd, supra note 130, at 340-41, 345, 351-52.


135. Ladd & Doolittle, supra note 134, at 329 (finding that "with decentralized financing, increasing welfare burdens at a time of recession would require states to raise taxes in a cyclical countercyclical fashion.

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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. This 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: "[T]he reports of local government officials as to what welfare programs to have must be written into the Federal law as a protection against temporary and local pressures."

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 fail, 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 one 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.

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