FOREWORD: THE MANY CONTEXTS OF WELFARE REFORM

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As this issue goes to press, Congress awaits a welfare reform proposal from President Clinton. The details have not been disclosed, but the leaders of the President's Welfare Reform Task Force have indicated that they will propose a major overhaul of the Aid to Families With Dependent Children (AFDC) program. The draft legislation is expected to prohibit a single parent from collecting AFDC benefits for more than two years, and to invest at least $6 billion per year in efforts to provide single parents with a more meaningful opportunity to participate in the market economy.[1]

The nation is ready for another attempt at welfare reform. On a superficial level, the timing coincides with what seems to be a seven-year-cycle of legislative initiatives to reform AFDC.[2] More significantly, the end of the 1980s has left Americans of all political stripes anxious about the relationship among individual well-being, the private economy, and the welfare state.

Consider first the economy. Before 1980, periods of economic growth tended to help the poor as well as the rich, by reducing poverty without increasing inequality. The economic expansion of the 1980s, however, was entirely different. It coexisted with declining fortunes for the poor and the less-skilled, rising poverty rates, and steadily increasing income inequality.[3] It was not just the economy—the 1980s also gave us many reasons to worry that social progress had stalled, or even reversed. America continued to be as racially segregated

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1. *See* Jason DeParle, *Clinton Welfare Planners Outline Big Goals Financed by Big Saving*, N.Y. TIMES, Dec. 3, 1993, at A1, A26.

2. Over the past thirty years, the most significant amendments to AFDC were made in 1988, 1981, 1974, and 1967. The Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343; The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357; The Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337; The Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821.

3. *See* UNEVEN TIDES 3–9 (Sheldon Danziger & Peter Gottschalk eds., 1993).

as ever.[4] More and more children faced the challenge of growing up in a single-parent home.[5] And some neighborhoods were becoming lawless battlegrounds where concerns about guns and drugs dominate the lives of ordinary citizens.[6]

Our welfare state is not to blame for these changes in American society.[7] Nevertheless, the welfare state must adapt to them. Moreover, current debate suggests that the process of adaptation may begin once again with AFDC.[8] The challenge for legislators will be to remember that AFDC is only one element in a network of interdependent socioeconomic structures.

To nourish the ongoing debate, the editors of the *University of Michigan Journal of Law Reform* have drawn together contributions from four law professors who have substantial expertise concerning the American welfare state. All of the Articles that compose this Symposium are animated by a desire to broaden our frame of reference for evaluating welfare reform. I believe that their shared project is important. Efforts to change AFDC will send ripples through the multiple legal structures that buoy our public systems of income support and wealth redistribution.

In "Disentitling the Poor," Professors Susan Bennett and Kathleen Sullivan situate welfare reform debates in the context of "Section 1115 Waivers." The waiver system allows states to continue receiving federal funds while their AFDC programs deviate from the federal statutory model. During the past four years, accelerated use of waivers has transformed AFDC into a centrifuge of decentralized variation. Professors Bennett and Sullivan draw on documents they obtained under the Freedom of Information Act to expose a potentially serious defect in the waiver system. In theory, waivers could provide a rich source of new understanding concerning the social consequences of different income support regimes; in practice, many waivers are so badly designed that they seem to reflect a spirit of brute stinginess rather than

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4. *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID (1993).

5. *See, e.g.*, STAFF OF HOUSE COMM. ON WAYS & MEANS, 103D CONG., 1ST SESS., OVERVIEW OF ENTITLEMENT PROGRAMS—1993 GREEN BOOK 1109–33 (Comm. Print 1993).

6. *See, e.g.*, ELIJAH ANDERSON, STREETWISE (1990); ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE (1991).

7. *See, e.g.*, THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE (1990).

8. The federal role in child support enforcement began in the context of AFDC, but now extends beyond it.

one of serious social inquiry. The authors attribute the substantive problems to a procedural defect: the propensity of the Department of Health and Human Services (HHS) to evaluate waiver applications through secretive, informal procedures. They suggest that the process for reviewing waiver applications should be fortified, perhaps through the adoption of notice-and-comment rulemaking procedures.

In "The Income Tax Treatment of Social Welfare Benefits," Professor Jonathan Barry Forman contemplates the point where social welfare expenditure programs collide with the federal income tax laws. Taxpayers traditionally have been permitted to exclude governmental social welfare benefits from their "income" calculations each April. Over the course of the past decade, however, Congress has begun to abandon the traditional practice, so that today all recipients of Unemployment Insurance benefits, and some recipients of Social Security benefits, must reflect at least a portion of their benefits in their taxable incomes. Professor Forman first provides a detailed overview of the complex universe of contemporary social welfare expenditures. After reviewing the current structure of the federal tax laws, he then analyzes two forces—academic reformism and deficit politics—that seem to be driving the federal government to expand the taxation of social welfare benefits.

Finally, in "Reforming Welfare Through Social Security," Professor Stephen Sugarman probes the membrane that currently separates AFDC from Social Security. The United States provides significantly disparate support to two groups of children: (1) those whose fathers have either died or become disabled, and (2) those whose fathers live elsewhere, but are not disabled. A child in the former group may qualify for relatively generous Social Security benefits; a child in the latter group is relegated to the less generous, more heavily stigmatized AFDC benefits. Professor Sugarman presents the case for establishing a new Social Security beneficiary: the child whose able-bodied absent parent has insured status under the Social Security program. He suggests that the new benefit could be financed in any of three ways: through an increase in the general payroll tax rate, through recoupment from noncustodial parents, or through some combination of the two.

All three of these Articles invite us to reflect deeply on the purposes underlying our legislative structures. They push us

to contemplate the conflicting value commitments that are embodied in our laws. They challenge us to think about why things are the way they are, and how they might be otherwise. In the remainder of this Foreword, I will pose some of the questions about our welfare state that these Articles stimulated for me.

Professors Bennett and Sullivan illuminate a problem that sits at the intersection of several different strands of academic commentary. For example, it might be tempting to understand the waiver process as a delegation of control over welfare policy to lower governmental units. In that light, the waiver process can be seen as pro-democratic, pro-participatory decentralization—as an example of what Cass Sunstein has called "reconstitutive law"[9] and what Europeans call "subsidiarity."[10] Such a perspective might lead one to ask why there should be any substantive HHS-level check on waivers at all. Why should not HHS merely verify whether the state-level processes were adequately open and participatory? Perhaps the best answer is that, whatever the virtues of subsidiarity in other contexts, it does not work in the context of wealth redistribution. We have almost four hundred years of historical experience with local free riding and debates about welfare magnets.[11] In a world where worker and capital mobility is increasing rather than decreasing, it is difficult to endorse a romantic vision of welfare localism.

And yet, one need not understand waivers only in that way. As Bennett and Sullivan suggest, one might instead view waivers as a form of controlled, national-level social

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9. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 506 (1987).

10. *See* Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. CHI. L. REV. 519, 535 (1992); Antonio Lo Faro, *EC Social Policy and 1993: The Dark Side of European Integration?*, 14 COMP. LAB. L.J. 1, 16–18 (1992).

11. The Elizabethan Poor Law of 1601 made income support a public responsibility, but only at the local level. In 1662, the Law of Settlement and Removal endorsed localities' subsequent practice of "warning off" migrants who might become public charges. In modern America, debates about migration effects continue because AFDC allows each state to establish its own level of benefits (even without a Section 1115 waiver). For a concise overview of the history, see Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts To Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 635–46 (1992). For a concise overview of the empirical literature on "welfare magnets," see Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. ECON. LITERATURE 1, 31–36 (1992).

experimentation—cautious and scientific efforts to learn "what works" before we impose sweeping nationwide changes in AFDC.[12] Such a perspective has worthy ancestors dating back to the Progressive Era. Seen in that light, the HHS waiver decisions look much more like a new breed of administrative "policymaking by exception," which is precisely the sort of behavior that might seem to call for notice-and-comment rulemaking.[13]

It is important to ask, however, what values the added formality of such rulemaking would serve. Bennett and Sullivan remind us that, as a general matter, the powerless tend to distrust informal discretionary structures, but is it clear that they would be more inclined to trust formal notice-and-comment rulemaking?[14] To what extent do waivers really implicate the concerns for dignity that we protect in the context of individualized adjudication?[15] On the other hand, perhaps other values should figure more directly in our thinking about waivers. When there is no obvious need for secrecy, is it not reasonable to expect that public authorities will reveal their reasoning, at least after the fact? And even if it might not be feasible for individual welfare recipients to participate in the process, does not the process at least gain some additional measure of legitimacy if organizations that can plausibly claim to represent welfare recipients have an opportunity to participate?[16] Moving beyond procedural values to the instrumental question of accuracy, do not Bennett and Sullivan make a powerful case that the cause of good technocratic judgment would be served if HHS systematically considered a more comprehensive range of perspectives and information?[17]

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12. After all, the statute speaks of "experimental, pilot, or demonstration project[s]." 42 U.S.C. § 1315(a) (1988).

13. *See generally* Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163; Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983); Elise F. Lambrou, Comment, *The Exceptions Process: The Administrative Counterpart to a Court of Equity and the Dangers It Presents to the Rulemaking Process*, 30 EMORY L.J. 1135 (1981).

14. *Cf.* William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) (discussing some of the dehumanization costs of formalizing the adjudication of individual welfare entitlements).

15. *See* Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

16. *See* Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1708–09 (1993).

17. *See id.* at 1702–03 ("sensible, reasoned decision-making requires complete

Even so, one wonders if there might not be a better way. The experience with notice-and-comment rulemaking has surely been a mixed bag at best.[18] Do we want to impose the delay and expense that have been associated with "informal rulemaking" on the process for granting waivers for demonstration projects? Do we need substantive judicial review? Bennett and Sullivan recognize the value of well-run demonstration projects. Perhaps there might be room for small changes within the local culture of HHS that would create a more satisfactory process and pattern of outcomes. Perhaps one could design, from the ground up, a new waiver process that is both efficient and participatory.[19]

Professor Forman brings to light some of the tensions in tax and redistributive policy that flow from the overlapping economic heterogeneity of those who support and those who benefit from the welfare state. Not only the poor enjoy government largesse.[20] Not only the rich pay taxes.[21] At least in theory, we might have created a single program that made net transfers from net payors to net recipients. We did not. Instead, it is usually thought that we tried to establish independently coherent taxing and spending programs, in the faith that the interactions among them will not prove too incoherent.

So how should public benefits be treated under an "independently coherent" income tax system? Like gifts from relatives (excluded from income)[22] or like money found in the street (included)?[23] How is using a Medicaid card different from sending one's child to a public school, or borrowing a book from a public library? Should it matter if the benefits are means tested? Should it matter if the benefits cannot be sold

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information and full consideration precisely because there are no standards to guide the decision").

18. *See* Thomas O. McGarity, *Some Thoughts On "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

19. *See* Marshall Breger, *Defining Administrative Law*, 60 GEO. WASH. L. REV. 268, 276–78 (1991) (reviewing PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES (1989)) (discussing the "quiet revolution in administrative procedure" that has featured innovations such as negotiated rulemaking); Jerry Mashaw, *The Fear of Discretion in Government Procurement*, 8 YALE J. ON REG. 511 (1991) (reviewing STEVEN KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE (1990)).

20. *See* NOT ONLY THE POOR (Robert E. Goodin & Julian Le Grand eds., 1987).

21. *See* JOSEPH A. PECHMAN, WHO PAID THE TAXES, 1966–85? (1985).

22. *See* I.R.C. § 102(a) (1988).

23. *See* Treas. Reg. § 1.61-14(a) (as amended in 1993).

and turned into cash? Ultimately, should our income tax policy be more concerned with having the government share in newly acquired individual economic power, or in newly acquired individual economic well-being? Forman's study connects our public spending programs to some of the most difficult conundra of tax policy.[24] And he notes the political significance of the fact that most advocates of "comprehensive income taxation" believe that an "ideal" income tax should include social welfare benefits.

But Forman does not limit his discussion to the domain of tax theory. He highlights the political salience of the current budget deficit, and the extent to which it has caused politicians to value changes in the tax laws that "expand the base." More concretely, it appears that the 1990 budget summit agreement has made it easier to finance new public benefits spending programs by taxing the proceeds of existing programs than it would be to finance those programs by changing the marginal rate structure. In this discussion, I believe that Forman highlights a central analytical problem for students of welfare policy: if our political institutions fashion effective "links" between two phenomena that are, in theory, independent, how should those links affect our analysis of prospective policy change?[25] Do such links call into question the notion advanced several paragraphs earlier, that we can build a wealth redistribution system on the basis of "independently coherent" components? To what extent do such linkages undermine efforts to talk sensibly about the "ideal structure" of our tax laws? And if such a discussion cannot take place, is there another basis for constructive, critical commentary about existing legal rules?

Professor Sugarman challenges us to envision a world in which the child support obligation that we currently attribute to an individual noncustodial parent is instead attributed, in

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24. For a sampling of different attempts to get theoretical leverage on those conundra, see William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343 (1989); Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831 (1979); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679 (1988).

25. *Cf.* Jeffrey S. Lehman, *To Conceptualize, To Criticize, To Defend, To Improve: Understanding America's Welfare State*, 101 YALE L.J. 685, 720–23 (1991) (discussing the perceived linkage between the Earned Income Tax Credit and the Social Security payroll tax).

the first instance, to society at large. He forces us to ask why a child's financial well-being is currently linked to the financial capacity of an absent parent. But if, as he suggests, we should move to a world where absent parents' financial capacity does not control children's material standing, we must then ask why we should perpetuate and extend the Social Security system's practice of pegging benefits to the absent parent's earnings history. Would it really be that much more stigmatizing to adopt an egalitarian system that paid an equal amount to each eligible child? Moreover, if our ultimate concern is child poverty, why deny benefits to poor families where both parents are present? In other words, why not accept Sugarman's implicit invitation to move to a universal children's allowance?[26]

Other aspects of Sugarman's discussion raise a different set of questions. If expanded Social Security benefits were recouped from absent parents, then his proposal would be little different from Irwin Garfinkel's well-known Child Support Assurance proposal.[27] But Sugarman seems more interested in the possibility of financing the new benefits via broad-based employee taxes. Why is it that the recent history of child support enforcement has moved in the opposite direction, demanding that absent biological fathers accept greater "responsibility" for their children?

Apart from political considerations, is there any reason why a child should have a greater claim on the assets of her noncustodial, biological father than she does on an unrelated man, or on the public at large? Is it Malthusianism—do we worry that there will be too many children if they are seen as a public and not a private responsibility? Is it a quid pro quo—a price we exact in exchange for the opportunity (whether or not exercised) to claim the parental prerogative to control a child? Is it a sanction that we impose on account of the father's causal role in having placed the child in a socially and economically disadvantaged position? Sugarman challenges us to consider whether, in a world where children would be

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26. *See* ALFRED J. KAHN & SHEILA B. KAMERMAN, INCOME TRANSFERS FOR FAMILIES WITH CHILDREN 200–14 (1983); Sheila B. Kamerman & Alfred J. Kahn, *Social Policy and Children in the United States and Europe*, *in* THE VULNERABLE 351–52 (John L. Palmer et al. eds., 1988); Michael O'Higgins, *The Allocation of Public Resources to Children and the Elderly in OECD Countries*, *in* THE VULNERABLE, *supra* at 201.

27. IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY (1992).

assured of at least a Social Security benefit, we might be willing to socialize the risk of becoming a noncustodial parent.[28]

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To study the welfare state is, inevitably, to look inward. Our public benefits programs are the concrete expression of how we reconcile the tensions among our most basic public values. To take a position on welfare reform is to take a position on the kind of society in which we want to live.

This issue of the *University of Michigan Journal of Law Reform* shows, however, that to study the welfare state is also to look outward. Welfare policy inevitably implicates questions of administrative policy, tax policy, and family policy. Anyone who is trying to gain perspective on the current round of welfare reform debates will benefit from careful study of the informative and provocative commentary in the pages that follow.

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28. For earlier discussions of such a possibility, see David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982); Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367.