

Unborn Child Deemed Ineligible for AFDC Benefits (Wisdom v. Norton)

Marsha A. Hakim

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

POVERTY LAW

UNBORN CHILD DEEMED INELIGIBLE FOR AFDC BENEFITS

Wisdom v. Norton

At a time when the legal status of a fetus is in issue,¹ considerable controversy has been generated over whether the fetus should be classified a "dependent child" under the Aid to Families with Dependent Children (AFDC) program.² Addressing this debate, the Second Circuit, in *Wisdom v. Norton*,³ has determined that the unborn are not entitled to AFDC benefits. By so holding, the court has taken a position contrary to the weight of authority⁴ and has dramatically crystallized a conflict destined for resolution by the Supreme Court.⁵

At the turn of the century, institutionalization was the sole relief for children whose parents could not support them.⁶ Subsequently, the realization that these children would be better protected by remaining with their mothers led to the development of the mothers' pension movement.⁷ Responding to this need, the AFDC program was established by the Social Security Act of 1935⁸ as a "scheme of cooperative federalism"⁹ whereby the federal government matches funds with

¹ See, e.g., *Roe v. Wade*, 410 U.S. 113, 158 (1973), wherein the Supreme Court stated that a fetus is not a "person" within the meaning of the fourteenth amendment. Before the last trimester of pregnancy, its rights are inseparable from those of its mother. See generally Byrn, *Wade and Bolton: Fundamental Legal Errors and Dangerous Implications*, 19 CATH. LAW. 243 (1973); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 BOSTON U.L. REV. 765 (1973); Comment, *AFDC for the Unborn*, 53 NEB. L. REV. 581 (1974).

² 42 U.S.C. § 601 *et seq.* (1970).

³ 507 F.2d 750 (2d Cir. 1974).

⁴ See note 57 and accompanying text *infra*.

⁵ See text accompanying note 80 *infra*.

⁶ See Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825, 826-27 (1974).

⁷ *Id.* A conference called by President Theodore Roosevelt in 1909 recommended that aid be provided to enable needy mothers to remain at home with their children. In response, various groups began lobbying in the state legislatures for appropriate action. The subsequent adoption of mothers' pension laws by many states was later frustrated, however, by the unavailability of state funds during the Depression years. The federal government came to the assistance of the states and the mothers via the Social Security Act of 1935. *Id.*

⁸ 42 U.S.C. §§ 301-1396g (1970). The Social Security Act states that the purpose of AFDC is to

encourag[e] the care of dependent children in their own homes or in the homes of relatives . . . to help maintain and strengthen family life and to help such parents 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

Id. § 601.

⁹ *King v. Smith*, 392 U.S. 309, 316 (1968).

participating states to assist the parents or relatives of "dependent children" in providing for their care and maintenance. The state, in order to qualify for¹⁰ and retain¹¹ federal funding, must administer the program in accordance with the provisions of the Act and the regulations of the Department of Health, Education and Welfare (HEW). Although the Act does not specifically mention the unborn, it has been the policy of HEW, since 1946, to allow the states the option of extending benefits on their behalf.¹² In 1971, this policy was elevated to the status of a formal regulation.¹³

In *Wisdom*, the Second Circuit was confronted with a challenge to Connecticut's decision, under HEW's option, to refuse to recognize a fetus' eligibility for AFDC benefits.¹⁴ A mother, pregnant with her third child and already receiving AFDC aid for two children, was denied additional assistance for the fetus by Connecticut. Additionally, two women, requesting admission for the first time to the AFDC program on the basis of their pregnancies, were denied relief. Although otherwise qualified, they were not admitted for lack of an eligible "child" under Connecticut's standards. Eventually, a class action was instituted on behalf of these and similarly situated women seeking declaratory and injunctive relief to restrain the state from refusing to grant AFDC benefits for the unborn. The plaintiffs claimed that the state policy was inconsistent with the Social Security Act and, therefore, was invalid under the supremacy clause.¹⁵ In addition, they asserted that the practice denied them equal protection of the laws as payments were withheld from pregnant mothers but were granted to mothers whose children were already born.¹⁶ The district court agreed that the policy was improper under the terms of the Social Security Act.¹⁷ The Second Circuit reversed, however, holding that the granting of AFDC

¹⁰ 42 U.S.C. § 602 (1970).

¹¹ *Id.* § 604.

¹² This practice originated in 1941 in a decision to waive audit exceptions as to payments made in Wisconsin on behalf of the unborn. It became formal policy, apparently, when it was included in the 1946 HEW Handbook. The practice was always considered optional. See *Parks v. Harden*, 354 F. Supp. 620, 625 n.5 (N.D. Ga. 1973), *rev'd*, 504 F.2d 861 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877).

¹³ 45 C.F.R. § 233.90(c)(2)(ii) (1973) states:

(2) Federal financial participation is available in:

....

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis

¹⁴ 507 F.2d at 751-52.

¹⁵ See U.S. CONST. art. VI, cl. 2.

¹⁶ See U. S. CONST. amend. XIV, § 1.

¹⁷ *Wisdom v. Norton*, 372 F. Supp. 1190 (D. Conn. 1974). See note 47 *infra*.

benefits for the unborn is not permitted by the Act.¹⁸ Moreover, since it had disposed of the issue on statutory grounds, the court refused to remand plaintiffs' equal protection claim for resolution by a three-judge district court.¹⁹

Writing for a unanimous panel, Judge Weinfeld observed that the unborn are neither included nor excluded by the express language of the Act.²⁰ Rather, a "dependent child" is defined in the Act as

a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his [various relatives], in a place of residence maintained by one or more of such relatives as his or their own home²¹

A careful consideration of this and various other provisions of the Act²² led the court to conclude that "the language . . . makes sense only if the term 'child' is limited to those who are born."²³

Having further determined that the "ordinary meaning"²⁴ of the word "child" is one already born,²⁵ the court looked to the legislative

¹⁸ 507 F.2d at 755.

¹⁹ See notes 47-54 and accompanying text *infra*.

²⁰ 507 F.2d at 753.

²¹ 42 U.S.C. § 606(a) (1970).

²² These additional provisions include 42 U.S.C. §§ 602(a)(7), (8) (the child's income and resources must be evaluated in determining the amount of benefits); *id.* § 602(a)(11) (law enforcement officials must be notified as to benefits furnished a deserted or abandoned child); *id.* §§ 602(a)(13)-(15) (a plan of social services must be framed to aid the child and his relatives); *id.* § 602(a)(16) (the homes of AFDC children must be examined to insure their suitability); *id.* § 602(a)(17) (the state must try to determine the paternity of a child born illegitimately).

²³ 507 F.2d at 753. The kind of problem that results from including the unborn and then trying to apply these provisions is illustrated in a recent California Supreme Court decision invalidating a state regulation which attempted to measure the recipient's "income" in terms of "the comforts he receives in his mother's womb." *California Welfare Rights Organ. v. Brian*, 11 Cal. 3d 237, 240, 520 P.2d 970, 972, 113 Cal. Rptr. 154, 156 (1974), *cert. denied*, 43 U.S.L.W. 3295 (U.S. Nov. 18, 1974).

²⁴ By considering the ordinary meaning, the court was following a well-established rule of statutory construction. See *Malat v. Riddell*, 383 U.S. 569, 571 (1966); *Hanover Bank v. Commissioner*, 369 U.S. 672, 687 (1962); *Barber v. Gonzales*, 347 U.S. 637, 641 (1954); *Commissioner v. Korell*, 339 U.S. 619, 627-28 (1950); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947).

²⁵ The Second Circuit considered relevant the common statement, "I have two children and one on the way." 507 F.2d at 754.

In *Wilson v. Weaver*, 499 F.2d 155 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637), Judge Pell, in a separate opinion, offered similar arguments. He found it inconceivable that Congress could have "used language so loosely as to mean that a woman carrying an unborn child but with no living children was a family with a dependent child" *id.* at 159, or that the fetus could be considered as living with his mother. *Id.* He also pointed out that neither the prospective mother nor the father were considered "parents" until the child was born. *Id.*

The plaintiffs in *Wisdom* cited four dictionaries as support for their position that

history of the Act for guidance. The court was unpersuaded by the plaintiffs' argument that including "the unborn within the definition of 'dependent child' furthers the underlying purpose of the Act of 'encouraging the care of dependent children.'"²⁶ Instead, Judge Weinfeld reasoned that, although this might be socially desirable, the role of the judiciary was not to advance such "legislative policy considerations" but to consider "whether Congress *intended* to extend the benefits of the Act to an unborn child."²⁷ The court concluded that the AFDC program was enacted to provide aid to families existing without the financial support of a father, thus enabling the mother to care for the children in the home.²⁸ As prenatal health care provisions existed elsewhere in the Social Security Act,²⁹ it was likely that, in enacting the AFDC program, Congress never contemplated the unborn fetus at all.³⁰

In reaching its decision, the court recognized that committees of both Houses³¹ had unsuccessfully urged an amendment to the Social Security Act which would have specifically excluded the unborn from AFDC eligibility.³² Proponents of including the unborn have viewed

the definition of "child" includes the unborn; the defendants listed six dictionaries as substantiating the opposite view. The court ruled that this "battle of dictionaries" had ended in a stalemate. 507 F.2d at 753. *Accord*, Parks v. Harden, 504 F.2d 861, 869 n.17 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877).

²⁶ 507 F.2d at 754, *quoting* 42 U.S.C. § 601 (1970). *See* Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973):

Since the health, both mental and physical, of children is an integral part of the stability and well-being of family life, it is of some importance to relate the necessity of prenatal care to that end. . . .

. . . It has become a medically accepted proposition that low-birthweight/prenatally-malnourished youth are universally more susceptible to personality disorders.

. . . If adequate fetal nutrition can alleviate in any degree potential burdens upon the State toward the goal of familial betterment, inclusion of the unborn as eligible for AFDC coverage is indicated by the intent of Congress in implementing the Social Security Act.

Id. at 1346 (citations omitted). *See also* Wilson v. Weaver, 499 F.2d 155, 157-58 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637).

²⁷ 507 F.2d at 754 (emphasis added). *See also* Wilson v. Weaver, 499 F.2d 155 (7th Cir. 1974) (Pell, J., concurring & dissenting), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637), wherein it is stated:

[N]o matter how laudable the motivation or the object to be achieved may be, the result reached by the majority of the courts passing on the instant question appears to me so to smack of judicial legislation as to require that laudability of objective be overridden in the interest of the proper scope of the judicial function.

Id. at 161.

²⁸ 507 F.2d at 755.

²⁹ *See* 42 U.S.C. § 701 *et seq.* (1970).

³⁰ 507 F.2d at 755. *But see* Carver v. Hooker, 501 F.2d 1244, 1246 (1st Cir. 1974), wherein the court stated that the provisions of the Act relating to prenatal care are irrelevant to the meaning of the AFDC provisions.

³¹ S. REP. No. 92-1230, 92d Cong., 2d Sess. 108 (1972); H.R. REP. No. 92-231, 92d Cong., 1st Sess. 184 (1971).

³² H.R. REP. No. 92-231, 92d Cong., 1st Sess. 184 (1971) states:

Your committee wants to make clear that an unborn child would not be included

the rejection of this amendment as an acceptance of the fetus' eligibility.³³ Opponents, however, contend that the amendment went unenacted merely because Congress decided to refrain from dealing with the welfare of families at this time.³⁴ Unable to resolve such hypotheses, the Second Circuit could draw "no clear meaning from the 92nd Congress' failure to enact the proposed amendment, and . . . [would] ascribe no significance to it."³⁵

The court also rejected plaintiffs' contention that Connecticut's policy of excluding the unborn from AFDC benefits should be invalidated under what has come to be known as the "trilogy rule."³⁶ Formulated in a series of three Supreme Court decisions,³⁷ this rule directs that

at least *in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history*, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.³⁸

in the definition of a child. This will preclude the practice, now used in the AFDC program in some States, of finding that an unborn child does meet the definition, thereby establishing a "family" even before the child is born.

Similarly, S. REP. NO. 92-1230, 92d Cong., 2d Sess. 108 (1972) provides:

Regulations of the Department of Health, Education and Welfare permit Aid to Families with Dependent Children payments for a child who has not yet been born. The committee bill would make unborn children ineligible for AFDC.

As finally enacted, the amendment to the Social Security Act makes no reference to the unborn. See Act of Oct. 30, 1972, Pub. L. No. 92-603, 86 Stat. 1329.

³³ See *Carver v. Hooker*, 501 F.2d 1244, 1247 (1st Cir. 1974) ("The fact that Congress thought it necessary to amend the Act to exclude the unborn suggests to us that the Act as written does make the unborn eligible for AFDC assistance . . ."); *Whitfield v. Minter*, 368 F. Supp. 798, 803 (D. Mass. 1973) (the failure to enact indicates Congress' wish to retain HEW's flexible policy); *Harris v. Mississippi State Dep't of Pub. Welfare*, 363 F. Supp. 1293, 1296 (N.D. Miss. 1973), *aff'd*, 504 F.2d 861 (5th Cir. 1974) (if Congress would not exclude the unborn, a state cannot without violating the Act); *Wilson v. Weaver*, 358 F. Supp. 1147, 1154-55 (N.D. Ill. 1972), *aff'd in part, rev'd in part on other grounds*, 499 F.2d 155 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637) (Congress indicated that the unborn are receiving benefits under present provisions and that the Act would have to be amended to change this practice).

³⁴ "[T]he reason the legislation was not passed was because the Congress decided to deal only with the Adult Categories of Public Assistance . . ." *Mixon v. Keller*, 372 F. Supp. 51, 55 (M.D. Fla. 1974) (citations omitted), *cert. denied*, 43 U.S.L.W. 3203 (U.S. Oct. 15, 1974). See Act of Oct. 30, 1972, Pub. L. No. 92-603, 86 Stat. 1329.

³⁵ 507 F.2d at 757. Cf. *Stuart v. Canary*, 367 F. Supp. 1343, 1344 (N.D. Ohio 1973); *Parks v. Harden*, 354 F. Supp. 620, 624-25 (N.D. Ga. 1973), *rev'd*, 504 F.2d 861 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877) (expression of the view that these unenacted proposals merely indicate Congress' awareness that optional payments are being made to the unborn).

³⁶ 507 F.2d at 755-56.

³⁷ See *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968).

³⁸ 507 F.2d at 755-56, *quoting* *Townsend v. Swank*, 404 U.S. 282, 286 (1971).

As the unborn are nowhere expressly excluded by the Social Security Act, some courts have relied upon the "trilogy rule" as authority mandating inclusion.³⁹ The Second Circuit, however, noted that the Supreme Court in *New York Department of Social Services v. Dublino*⁴⁰ indicated that the rule is applicable only "to those cases where 'it [is] clear that state law exclude[s] people from AFDC benefits who the Social Security Act expressly provided would be eligible.'" ⁴¹ Since the Act did not expressly provide for the fetus, the court declined to recognize the applicability of the trilogy rule to *Wisdom*.⁴²

Significantly, the court further determined that HEW had exceeded its statutory authority in granting states the option to extend AFDC benefits for the unborn.⁴³ In the court's view, eligibility for AFDC benefits must be determined solely by reference to the Social Security Act.⁴⁴ If the unborn are eligible, the "trilogy rule" dictates that HEW has no authority to allow states the option of withholding payments.⁴⁵ By the same token, if they are ineligible under the Act, HEW has no authority to approve the extension of payments.⁴⁶

³⁹ See note 68 *infra*. For an expanded analysis of the trilogy rule and its effect, see text accompanying notes 60-69 *infra*.

⁴⁰ 413 U.S. 405 (1973).

⁴¹ 507 F.2d at 756, quoting *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (emphasis added).

⁴² See also *Wilson v. Weaver*, 499 F.2d 155, 161 (7th Cir. 1974) (Pell, J., concurring & dissenting), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637).

⁴³ 507 F.2d at 756.

⁴⁴ For a more detailed consideration of basic eligibility as the threshold issue, see text accompanying notes 66-69 *infra*.

⁴⁵ See *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968).

⁴⁶ 507 F.2d at 756. *But see* cases cited in note 56 *infra*.

The Second Circuit was not influenced by HEW's role as administrator of the Social Security Act. While it acknowledged that "the construction of a statute by the agency charged with administering it is entitled to be given weight," the Second Circuit felt it was the court's duty in the last analysis to interpret a statute. 507 F.2d at 756. *But see* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), where the Supreme Court stated:

[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Id. at 381 (footnotes omitted).

Judge Weinfeld noted that HEW had conceded that a fetus is not within the definition of "dependent child" set forth in the Act. 507 F.2d at 757. *See also* *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1972), *aff'd in part, rev'd in part on other grounds*, 499 F.2d 155 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637), where the court observed:

HEW contends that unlike the terms "parent" in *King v. Smith* . . . and "continued absence from the home" in *Carleson v. Remillard*, . . . the meaning of the term "dependent child" . . . is unclear, that it cannot unequivocally be said to include unborn children, and that it therefore should not be so construed.

358 F. Supp. at 1153. Judge Weinfeld concluded that, rather than an expression of official statutory construction, HEW's policy is merely "an exercise of administrative discretion authorized by the Secretary's broad rule-making authority . . ." 507 F.2d at 757. *But see* *Carver v. Hooker*, 501 F.2d 1244, 1247 (1st Cir. 1974).

Having disposed of the plaintiffs' statutory claims, the court refused to remand the case to a three-judge district court for consideration of the plaintiffs' constitutional objection.⁴⁷ Although it admitted that a colorable claim was raised,⁴⁸ the court reasoned that a remand would serve no purpose since the district court, "bound as it would be by our determination of the statutory issue, would have to deny the equal protection claim."⁴⁹

In reaching this conclusion, the court appears to have adopted a view which is inconsistent with both the Supreme Court's direction in *Hagans v. Lavine*⁵⁰ and the procedure followed recently by another Second Circuit panel in *Taylor v. Lavine*.⁵¹ The *Hagans* Court directed that "if a single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue."⁵² Accordingly, since the *Wisdom* court rejected the statutory claim, a three-judge district court should have been convened to consider the plaintiffs' constitutional claim. In *Taylor*, the Second Circuit reversed two district court findings that certain New York AFDC regulations were offensive to the Social Security Act. However, the court remanded the case to a three-judge district court to consider the plaintiffs' claim that the reg-

⁴⁷ 507 F.2d at 758. The plaintiffs had originally requested that a three-judge district court be convened pursuant to 28 U.S.C. § 2281 (1970). The district judge first determined that the plaintiffs' constitutional claim was sufficient to give the court jurisdiction. Then, under the doctrine of pendent jurisdiction, he struck down the state policy on the statutory, *i.e.*, supremacy clause, argument raised by the plaintiffs. Thus, there existed no need to address the plaintiffs' constitutional claim. 372 F. Supp. 1190 (D. Conn. 1974). This procedure was approved by the Supreme Court in *Hagans v. Lavine*, 415 U.S. 528 (1974).

⁴⁸ 507 F.2d at 757-58. The court assumed, without deciding, that a mother has standing in her own right to raise the issue. *Id.* at 758. The Fifth Circuit, attacking the question directly, held that the mother had standing. *Parks v. Harden*, 504 F.2d 861 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877). Since the purpose of the program is to provide "money payments with respect to . . . a dependent child . . . to meet the needs of the relative with whom any dependent child is living," 42 U.S.C. § 606(b)(1) (1970), the court reasoned that the mother's rights are direct, not derivative. 504 F.2d at 865. This stance avoids conflict with the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), that a fetus is not a "person" in terms of the fourteenth amendment. *Id.* at 158. *See note 1 supra. Contra, Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), wherein the court held that *Roe's* holding foreclosed plaintiffs' allegation of denial of equal protection:

[T]he unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment.

Id. at 1383 (citations omitted).

⁴⁹ 507 F.2d at 758 (footnotes omitted).

⁵⁰ 415 U.S. 528 (1974).

⁵¹ 497 F.2d 1208 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3330 (U.S. Dec. 9, 1974) (No. 74-5054).

⁵² 415 U.S. at 544. *Cf. Murrow v. Clifford*, 502 F.2d 1066 (3d Cir. 1974), wherein it was held

improper for a single district court judge to decide a supremacy clause claim against the claimant when it is pendent to a constitutional claim which must be decided by a three-judge district court.

Id. at 1070.

ulations denied them due process of law.⁵³ Despite these apparent inconsistencies, however, the *Wisdom* court was perhaps justified in failing to convene the three-judge district court since it accurately predicted that the question of whether the unborn are entitled to AFDC benefits would soon be entertained by the Supreme Court.⁵⁴

By holding not only that the unborn are ineligible for AFDC benefits under the Social Security Act but also that HEW does not have the authority to provide for their optional inclusion, the Second Circuit stands alone.⁵⁵ Although three district courts have agreed that benefits for the unborn were not intended by Congress, they have upheld HEW's option plan.⁵⁶ Moreover, five courts of appeals and ten district courts, while agreeing that HEW's option policy is incorrect, have concluded that the unborn are entitled to benefits and that no state may exclude them.⁵⁷

⁵³ The three-judge district court, in turn, declared the regulations unconstitutional as violative of due process. *Hurley v. Van Lare*, 43 U.S.L.W. 2080 (U.S. Aug. 27, 1974), *prob. juris. noted*, 43 U.S.L.W. 3330 (U.S. Dec. 9, 1974) (No. 74-453).

⁵⁴ The Court has granted certiorari in *Alcala v. Burns*, 494 F.2d 743 (8th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3187 (U.S. Oct. 15, 1974) (No. 73-1708).

Although the *Wisdom* court considered it unnecessary to remand the case to a three-judge district court, it gratuitously offered its opinion that the denial of AFDC benefits to the unborn is constitutional:

Appellees do not allege that it is invidiously discriminatory in a constitutional sense, and the classification is a rational means of advancing the purpose of the AFDC program: encouraging the presence of a relative in the home of a dependent child to supervise the child's upbringing.

507 F.2d at 759. See also *Doe v. Lukhard*, 493 F.2d 54, 57 (4th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3075 (U.S. Aug. 18, 1974) (No. 73-1763) (court "doubted" that a "colorable" claim of denial of equal protection "would prove to be meritorious"). But see *Whitfield v. Minter*, 368 F. Supp. 798 (D. Mass. 1973):

[T]his Court believes if the department of public welfare's denial for AFDC applications to the plaintiff rests solely because their children had not yet been born and granted the application to other women whose children had been born, then it very well could violate plaintiffs' rights to equal protection of the laws.

Id. at 804.

⁵⁵ The *Mixon* court, while adverting to HEW as having "overstepped itself," denied relief without definitively striking down the optional plan. See *Mixon v. Keller*, 372 F. Supp. 51, 54-55 (M.D. Fla. 1974), *cert. denied*, 43 U.S.L.W. 3203 (U.S. Oct. 15, 1974).

⁵⁶ *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974); *Murrow v. Clifford*, Civil No. 114-73 (D.N.J., June 12, 1973), *vacated and remanded*, 502 F.2d 1066 (3d Cir. 1974); *Parks v. Harden*, 354 F. Supp. 620 (N.D. Ga. 1973), *rev'd*, 504 F.2d 861 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877).

⁵⁷ *Harris v. Mississippi*, 504 F.2d 861 (5th Cir. 1974), *aff'g* 363 F. Supp. 1293 (N.D. Miss. 1973); *Carver v. Hooker*, 501 F.2d 1244 (1st Cir. 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973); *Wilson v. Weaver*, 499 F.2d 155 (7th Cir. 1974), *aff'g in part, rev'g in part on other grounds*, 358 F. Supp. 1147 (N.D. Ill. 1973) and *Green v. Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637); *Alcala v. Burns*, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973), *cert. granted*, 43 U.S.L.W. 3187 (U.S. Oct. 15, 1974) (No. 73-1708); *Doe v. Lukhard*, 493 F.2d 54 (4th Cir. 1974), *aff'g* 363 F. Supp. 823 (E.D. Va. 1973), *petition for cert. filed*, 43 U.S.L.W. 3075 (U.S. Aug. 18, 1974) (No. 73-1763); *Wisdom v. Norton*, 372 F. Supp. 1190 (D. Conn. 1974); *Whitfield v. Minter*, 368 F. Supp. 798 (D. Mass. 1973); *Stuart v. Canary*,

The existing controversy results primarily from Congress' failure to reveal a clear intent⁵⁸ and HEW's refusal to take a positive stance.⁵⁹ Also clouding the issue, however, is the meaning to be attributed to the "trilogy rule" relied upon by the *Wisdom* plaintiffs. The "trilogy rule" is the product of the Supreme Court decisions in *King v. Smith*,⁶⁰ *Carleson v. Remillard*,⁶¹ and *Townsend v. Swank*.⁶² In *King*, the Court rejected Alabama's "substitute father" regulation wherein payments were denied to children if their mother "cohabited" with an able-bodied man. In determining the meaning of "parent" in terms of the definition of a "dependent child" as one "deprived of parental support,"⁶³ the Court looked to the language of the Act and its purpose. In *Carleson*, the Court invalidated a California regulation holding ineligible a "dependent child" whose parent's "continued absence from the home"⁶⁴ was the result of military service. The Court defined "continued absence" as including absence of a parent for any reason whatever. In *Townsend*, the Court refused to allow Illinois to exclude college students, between 18 and 20 years of age, from benefits allowed to children within that age group attending high school or vocational training school. It determined that such a distinction was not supported by the Act.⁶⁵

From these decisions has evolved the rule that a state eligibility criterion serving to exclude those eligible by federal standards is invalid in the absence of clear congressional authorization.⁶⁶ Some courts

367 F. Supp. 1343 (N.D. Ohio 1973); *Jones v. Graham*, Civil No. 73-L-235 (D. Neb., Sept. 5, 1973).

⁵⁸ Most courts have agreed that ambiguity exists as to whether the term "dependent child" within the Social Security Act was intended to include an unborn child. *See, e.g., Carver v. Hooker*, 501 F.2d 1244, 1246 (1st Cir. 1974); *Wilson v. Weaver*, 499 F.2d 155, 157 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637).

⁵⁹ *See Parks v. Harden*, 354 F. Supp. 620 (N.D. Ga. 1973), *rev'd*, 504 F.2d 861 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877):

Distressingly, [this is] yet another instance in which the federal agency involved, HEW, has failed to utilize its powers to resolve such issues in the first instance with national uniformity.

354 F. Supp. at 622 (citations omitted). *Cf. Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 872 n.87 (1974).

⁶⁰ 392 U.S. 309 (1968).

⁶¹ 406 U.S. 598 (1972).

⁶² 404 U.S. 282 (1971).

⁶³ 42 U.S.C. § 606(a) (1970).

⁶⁴ *Id.*

⁶⁵ This distinction is not made in 42 U.S.C. § 606(a)(2)(B) (1970), which provides: When used in this part—

(a) The term "dependent child" means a needy child . . . (2) who is . . . (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment

⁶⁶ *Townsend v. Swank*, 404 U.S. 282, 286 (1971).

have interpreted this dictate as mandating inclusion when there is no specific exclusion.⁶⁷ More significantly, however, in terms of the unborn, the rule has led courts to provide coverage without meeting the threshold question, addressed by the Second Circuit, of statutory eligibility.⁶⁸ In effect, after the AFDC claimant has made a showing of the reasonableness of inclusion, this more liberal interpretation shifts the burden to the state to show Congress' explicit intent to exclude the unborn.⁶⁹ It is fairly evident, therefore, that the varying interpretations emanating from the trilogy rule serve only to further confound the issue of the unborn child's right to AFDC benefits.

Adding to the confusion surrounding the unborn's rights are various Supreme Court decisions which appear to allow the states some discretion in fixing eligibility standards. In *Wyman v. James*,⁷⁰ the Court permitted a "home visit" condition for eligibility not authorized by the Act. *Jefferson v. Hackney*⁷¹ resulted in Court approval of a percentage factor used to reduce a family's level of need in order to allocate Texas' limited available funds. A maximum grant provision in Maryland, which also served to reduce benefits to larger families, was similarly approved in *Dandridge v. Williams*.⁷² However, the issues in these cases, *viz.*, the management of funds by the state, should not be confused with the determination of eligibility under the AFDC program.⁷³ Due to the nature of the program's funding, the states have always had "considerable latitude in allocating their AFDC resources,"⁷⁴ each state "set[ting] its own standard of need and . . . determin[ing]

⁶⁷ See cases cited in note 68 *infra*.

⁶⁸ See, e.g., *Green v. Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973), *aff'd in part, rev'd in part on other grounds*, 499 F.2d 155 (7th Cir. 1974); *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973), *aff'd in part, rev'd in part on other grounds*, 499 F.2d 155 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637). The Fifth Circuit, while purporting to consider basic eligibility first, used the trilogy rule as an "aid to . . . statutory reading." *Parks v. Harden*, 504 F.2d 861, 868 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877).

⁶⁹ See *Stuart v. Canary*, 367 F. Supp. 1343, 1345 (N.D. Ohio 1973); *Doe v. Lukhard*, 363 F. Supp. 823, 827 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3075 (U.S. Aug. 18, 1974) (No. 73-1763); *Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 868 n.63 (1974).

⁷⁰ 400 U.S. 309 (1971).

⁷¹ 406 U.S. 535 (1972).

⁷² 397 U.S. 471 (1970).

⁷³ See *Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 869 n.69 (1974).

Actually, eligibility is determined by the Act, even as to those portions of the AFDC program in which state participation is truly optional. For example, section 406(a)(2)(B) of the Social Security Act expressly allows states the option to extend AFDC benefits to children under 21 years of age who are continuing their education. 42 U.S.C. § 606(a)(2)(B) (1970). However, a state which has elected to participate in the age group extension program by expending funds therein may not withhold benefits from a student who is eligible under the federal criteria. *Townsend v. Swank*, 404 U.S. 282, 288 (1971).

⁷⁴ *King v. Smith*, 392 U.S. 309, 318 (1968).

the level of benefits by the amount of funds it devotes to the program."⁷⁵ This latitude explains both *Jefferson* and *Dandridge*. *Wyman's* "home visit" condition presents more of a problem, although it can be considered an administrative means whereby the state verifies eligibility criteria.⁷⁶

Apparently, a number of courts, as well as HEW, have viewed the inclusion or exclusion of the unborn as a means, similar to those presented in *Jefferson* and *Dandridge*, whereby the states can elect to disburse more or less in the way of benefits.⁷⁷ However, if a state cannot use "the device of adopting eligibility requirements restricting the class of children made eligible by federal standards,"⁷⁸ it should not have the option of extending the class of those federally eligible. As the Second Circuit pointed out in *Wisdom*, basic eligibility under the Act is "either mandatory or it is not"⁷⁹

Fortunately, final judicial resolution in this area should be forthcoming. The Supreme Court has granted review of the Eighth Circuit's holding in *Alcala v. Burns*⁸⁰ which entitled unborns to AFDC benefits under the Social Security Act.* It is submitted that the Court should resolve the issue through statutory interpretation, making clear that the "trilogy rule" is applicable only after an initial determination of eligibility has been made. As properly noted by the Second Circuit, the language of the AFDC provisions of the Social Security Act appears to refer only to children already born. Nevertheless, it must be acknowledged that satisfactory prenatal care should result in a healthier, happier child. Indeed, benefitting children is the purpose of AFDC.⁸¹

⁷⁵ *Id.* at 318-19 (footnotes and citations omitted).

⁷⁶ See *Wyman v. James*, 400 U.S. 309, 322, 326 (1971).

⁷⁷ When HEW held similarly as to the absence of a parent because of military service, the *Carleson* Court disagreed. *Carleson v. Remillard*, 406 U.S. 598, 604 (1972). The applicable HEW regulation provides:

Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. If these conditions exist, the parent may be absent for any reason, and he may have left only recently or some time previously.

⁴⁵ C.F.R. § 233.90(c)(1)(iii) (1973). While HEW interpreted "continued absence" as including that due to military service, it allowed the states the option of either covering such situations or not. See *Carleson v. Remillard*, 406 U.S. 598, 602 (1972).

⁷⁸ *Townsend v. Swank*, 404 U.S. 282, 291 (1971).

⁷⁹ 507 F.2d at 756. *Accord*, *Parks v. Harden*, 504 F.2d 861, 872 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877) (holding the unborn eligible).

⁸⁰ 494 F.2d 743 (8th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3187 (U.S. Oct. 15, 1974) (No. 73-1708).

* See Editor's Note, overleaf.

⁸¹ See note 8 *supra*. Since pregnant women are frequently unable to work, the unborn

However, in the final analysis, the issue is not whether care should be provided for the unborn but whether the AFDC program was intended to perform this function.⁸²

Marsha A. Hakim

may be considered in greater need for financial aid than those children already born. See *Wilson v. Weaver*, 499 F.2d 155, 158 n.4 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3319 (U.S. Nov. 23, 1974) (No. 74-637); *Parks v. Harden*, 354 F. Supp. 620, 622 (N.D. Ga. 1973), *rev'd*, 504 F.2d 861 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 17, 1975) (No. 74-877).

⁸² Various cases have pointed out that there are other programs specifically designed for prenatal care. See *Poole v. Endsley*, 371 F. Supp. 1379, 1383 (N.D. Fla. 1974) (Florida provides Medicaid benefits for medical expenses incurred during the last trimester of pregnancy); *Whitfield v. Minter*, 368 F. Supp. 798, 804 (D. Mass. 1973) (pregnant women over 18 can apply for general relief assistance from the state). The Second Circuit itself referred to Title V of the Social Security Act, 42 U.S.C. § 701 *et seq.* (1970), which deals with prenatal care. 507 F.2d at 755.

Editor's Note. While this article was being printed, the Supreme Court reversed *Alcala v. Burns*, holding that the term "dependent child," as used in the Social Security Act, does not include unborn children. 43 U.S.L.W. 4374 (U.S. Mar. 18, 1975). The Court explained that the triology rule is inapplicable until an initial determination of eligibility has been made. The Court rendered no opinion as to whether HEW has the authority to allow states the option to extend AFDC benefits to the unborn.