The Equal Protection Clause — A Limitation On Welfare Influence In Family Life

I. INTRODUCTION

Of the laws touching American family life, few convey a more direct impact than public assistance statutes and regulations. Programs which, for example, make eligibility for assistance turn on the presence or absence of certain family members, the closeness of familial relationships, and the ability of family members to contribute to the whole can be expected to affect the form of living arrangement recipient families choose.[1] Not surprisingly, the litigation assailing these standards has been visible and abundant. A frequent line of attack has been through the Equal Protection Clause. This article examines that clause as an instrument of this litigation and, more generally, as a device by which government influence on family life might be evaluated and, in appropriate circumstances, challenged.

One of the frequent results of welfare legislation is its disproportionate impact on minority racial or ethnic groups. The overrepresentation of these groups in the recipient population has been well demonstrated.[2] This article reviews the argument sometimes advanced that such disproportionate racial impact should, in itself, subject welfare regulations to stringent equal protection scrutiny and evaluates the judicial acceptability of this approach.

Further, this article suggests that certain seemingly neutral classifying factors which form the basis of many welfare regulations might more accurately be perceived as inherently racial. That is, certain classifying characteristics around which regulations are written may be so strongly identified with one racial group that the characteristic can reasonably be called a cultural or ethnic trait. Such a finding

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[1] At the least, such regulation might affect the manner in which recipients choose to report their living arrangement. *See, e.g.*, The New Food Stamps Bill of Rights, suggesting ways in which unrelated households might "comply" with U.S. Dept. of Agriculture Foodstamp regulations. Published by the Food Research and Action Center, 432 W. 118th St., N.Y., N.Y., 10027.

[2] *See, e.g., infra* note 47 and accompanying text.

would mean that one is effectively deemed eligible or ineligible for public assistance primarily on the basis of a racial characteristic. The article attempts a definition of such traits and suggests the impact of equal protection standards on such legislation.

Both the demonstration of disproportionate racial effect and the redefinition of classifying criteria are reviewed as possible techniques by which equal protection scrutiny can be focused on the influence of welfare law in family life. An example of public assistance payments under present California law is offered to facilitate analysis of the major arguments and to demonstrate the impact that particular welfare regulations can have on a minority racial group.

Throughout the article, the term "discrimination" is used to describe circumstances in which members of a particular group are subjected to burdens different from those applying to other groups, whether or not these differences in treatment reflect an established *intent* to differentiate.

II. AN EXAMPLE OF GOVERNMENT INFLUENCE ON THE FAMILY IN WELFARE LAW

Though California's labyrinthian welfare law contains numerous instances of classifying legislation, the most fertile ground of controversy, and the area which most directly affects family life, is the Aid to Families with Dependent Children[3] program. By definition, recipients of aid under this program experience an incomplete or disrupted family existence. The basic concept of eligibility is the deprivation of parental care, which may be established by the death, physical or mental incapacity, or incarceration of a parent,[4] the divorce, separation, desertion, or other continued absence of a parent,[5] or the unemployment of a parent or parents.[6] If a family containing a deprived child has income below a basic standard of adequate care,[7] the family then becomes eligible for some amount of aid.[8]

Through the entire California AFDC scheme run the eligibility criteria and support obligations of the male member of the family, if one is present. However, the regulations enunciate varying standards for these male family members depending upon their actual or legal

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[3]42 U.S.C. §601 *et seq.* and CALIFORNIA WELFARE AND INSTITUTIONS CODE §11250 *et seq.* (West 1972).
[4]CALIF. WELF. & INST. CODE §11250(a) (West 1972).
[5]CALIF. WELF. & INST. CODE §11250(b) (West 1972)
[6]CALIF. WELF. & INST. CODE §11250(c) (West 1972).
[7]CALIF. WELF. & INST. CODE §11452 (West 1972).
[8]CALIF. WELF. AND INST. CODE §11450 (West 1972). This section, as amended by the California Welfare Reform Act of 1971, was invalidated by the California Supreme Court in Villa v. Hall, 6 Cal. 3d 227, 490 P.2d 1148, 98 Cal. Rptr. 460 (1971). However, the U.S. Supreme Court has since vacated the state court judgment and remanded for further consideration in light of Jefferson v. Hackney, 406 U.S. 535. The order to vacate is reported at 406 U.S. 965.

relationship to the child. A male may, for AFDC purposes, be classified a natural father, an adoptive father, an unmarried father, a stepfather, or an unrelated adult male (URAM).

The disparate treatment that these regulations produce is demonstrated by the following example. Four household situations, identical in every way, except in the legal relationship among the family members, produce four different sets of conditions under which aid will be granted and three different grant levels.

The example assumes a family unit of five persons; an unemployed adult male, an unemployed adult female, and three minor children. Eligibility for aid in the described circumstances varies as follows:

a) *The adults are the natural parents of the children and are legally married* — Assuming the male meets the federal definition of an unemployed parent,[9] the household would receive a grant of $320.00 per month. The father would be required to register for employment, as would the mother if none of the children are under the age of six years.[10]

b) *The adults are legally married, but the children are all of the wife's previous marriage* — No provision would be made for the stepfather's presence in the home, the amount of the monthly grant being $280.00. He would still be required to register for employment, as might the mother if none of the children are under six.[11]

c) *The adults are not married, two of the children are from the woman's previous marriage, the third (illegitimate) child is the product of this relationship* — Though the grant would again be $280.00 (it does not take account of the unmarried father's needs) the male would be held responsible for the support of his child. Additionally, the male might be subject to the charge of misuse of welfare funds. Unless he demonstrates that he is maintaining himself, it will be presumed that he is supported by the AFDC grant, and he will be asked to leave the household.[12]

d) *The adults are not married, the children are all of the woman's previous marriage* — The grant would be reduced by an amount which the household is presumed to receive from the unrelated adult male. This is considered to be his contribution in satisfaction of his own needs. Should he fail to contribute, he too must leave the household or face the possibility of prosecution for misuse of welfare funds. If he stays, the grant will equal $213.00 per month.[13]

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[9]42 U.S.C. § 607.
[10]CALIFORNIA STATE DEPARTMENT OF SOCIAL WELFARE ELIGIBILITY ASSISTANCE STANDARDS MANUAL (hereinafter cited EAS MANUAL), § 41-440, § 41-401.1(d).
[11]EAS MANUAL § 43-113.6, § 43-113.61, § 41-407.
[12]EAS MANUAL § 43-113.7, § 41-407.
[13]EAS MANUAL § 43-113.3, § 43-113.31.

The potential impact of welfare law on the structure of these family units and on their ability to subsist is obvious. It should be emphasized that these differeing results obtain even though the individuals in each hypothetical example were identical in age, previous employment experience, current income, and in every way other than their legal relationship to one another. Though these examples certainly do not exhaust the possible combinations of relationships among these five persons, they amply demonstrate that persons in like economic circumstances are not always treated alike.

III. THE NON-RACIAL EQUAL PROTECTION ARGUMENTS

Many of the major challenges to welfare legislation have been grounded in an equal protection analysis.[14] People in seemingly like situations expect to be treated equally by the government. To understand why they are not, or to ask whether they should be, it is necessary to examine the personal interests that laws affecting family size and composition infringe, the objectives which the statutes further, and the means by which these policies are effected. It is the sifting and weighing of these factors which produces a decision that disparate treatment of individuals is, or is not, acceptable under the Equal Protection Clause.

As recently as September of 1972, the essence of the equal protection inquiry has been stated by the California State Supreme Court in the following form.

> In determining the validity of legislative distinctions, this court and the United States Supreme Court apply a two-level test. In the typical equal protection case the classification need only bear a rational relationship to a conceivable legitimate state purpose; "[on] the other hand, in cases involving 'suspect classifications' or touching on 'fundamental interests,' . . . [sic] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose."[15]

Though there are indications that this rigid formulation is weakening,[16] this statement of the "traditional" equal protection inquiry

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[14] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Dandridge v. Williams, 397 U.S. 471 (1970); Jefferson v. Hackney, 406 U.S. 535 (1972).

[15] Curtis v. Board of Supervisors, 7 Cal. 3d 942, 953, 501 P.2d 537, 543-544, 104 Cal. Rptr. 297, 303-304 (1972).

For a recent statement by the United States Supreme Court of the equal protection standard, *see* San Antonio Independent School Dist. v. Rodriguez, ___U.S.___, 93 S. Ct. 1278 (1973).

[16] *See* Gunther, *The Supreme Court 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86

provides a suitable description of the issues to be considered. In this framework, one can explore the rationale that might be suggested for welfare influence on family composition and the possible bases for questioning this influence.[17]

Certainly different assistance standards for persons of like need might be assailed on several grounds. One might well argue that the classifications established by the scheme of AFDC regulations described above do not provide equal protection under state law, regardless of their racial impact. The regulations promulgated by the State Department of Social Welfare pursuant to provisions of the Welfare and Institutions Code clearly constitute state action. The distinctions they establish at least partially discriminate among recipients of equal need on the basis of non-financial characteristics and provide for unequal rights, obligations and benefits. Are male members of California AFDC households, then, being granted the equal protection of the laws?

One rationale for the distinctions among AFDC households might be an attempt by the state to impose a standard of morality on public assistance recipients. If this was the essence of the regulations,

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Citing cases of the 1971 term, Professor Gunther suggests that the current court is putting a new "bite" in the "traditionally toothless minimal scrutiny standard." He states:

> Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing. 86 HARV. L. REV. 21.

He also believes this approach would "concern itself solely with means, not with ends." *Id.* at 21. However, he further states:

> That expanded reasonable means inquiry would not mean the end of strict scrutiny. In the context of fundamental interests or suspect classifications, the Court would continue to demand that the means be more than reasonable — e.g., that they be "necessary," or the "least restrictive" ones. *Id.* at 24.

On the other hand, *see* U.S. v. Kras, __U.S.__, 93 S. Ct. 631 (1973), applying the traditional two-tiered model.

[17]Even recently one commentator was able to declare that, "This dual standard of equal protection has proven to be result-determinative; relaxed, traditional review has ensured that the state classification will be upheld, and review under the compelling state interest test has almost guaranteed its invalidation." Note, *New Tenets in Old Houses: Changing Concepts of Equal Protection in Lindsey v. Normet*, 58 VA. L. REV. 930, 937. The author of the note recognizes as exceptions to this statement Morey v. Doud, 354 U.S. 457 (1957), Korematsu v. United States, 323 U.S. 214 (1944). A recent exception to the statement is DeFunis v. Odegaard, No. 42198 (Supreme Court of Washington, March 8, 1973) finding the elimination of racial imbalance, caused by underrepresentation of certain minorities within public legal education, to be a compelling state interest.

families would seem to be classified as eligible or ineligible on the basis of a criterion which is not rationally related to the purpose of the AFDC statutes — that is, the provision of aid to needy dependent children. In *King v. Smith*,[18] the United States Supreme Court found that states are precluded, " . . . from otherwise denying AFDC assistance to dependent children on the basis of their mother's alleged immorality or to discourage illegitimate births."[19] However, the Court reached this conclusion on statutory, rather than constitutional, grounds.[20] Additionally, the Court recognized that a state may discourage illegitimacy and immorality through devices other than the "absolute disqualification of needy children."[21]

The recognition of this state interest and the accompanying recognition that states may impose legal support obligations on "substitute fathers" suggests that sanctions in the form of classifying welfare statutes may be an acceptable manner of encouraging legally recognized family relationships. In this regard, one federal district court has stated that, " . . . there is a long recognized value in the traditional family relationship which does not attach to the 'voluntary family.' "[22] In upholding zoning ordinances limiting the size of communal living groups, this court recognized what it called, " . . . the States' clear interest in preserving the integrity of the biological and/or legal family . . . . "[23]

One writer has suggested another possible approach to welfare regulations, based on the captive status of the children in the home. This article suggests that association with a commune may be an unalterable characteristic of *children* living in such circumstances and that statutory differentiations between communes and traditional families carry a stigma of inferiority. On this basis, it is suggested that such classifications should be declared suspect.[24] The same

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[18] 392 U.S. 309 (1967).

[19] 392 U.S. at 324.

[20] In his concurring opinion, Mr. Justice Douglas reaches the same result through an application of the Equal Protection Clause, 392 U.S. at 336. For a full discussion of the issue in equal protection terms, see the three-judge District Court opinion in the same case, 277 F. Supp. 31, 38-40 (M.D. Ala. 1967).

[21] 392 U.S. at 326, 334. *See also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) in which Mr. Justice Powell speaks of, "[t]he State interest in legitimate family relationships . . . ." He aptly states that, "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage."

[22] Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 911 (N.D. Calif. 1970).

[23] *Id.* at 912. Another thought-provoking example of a judicial attitude toward non-traditional families appears in Cancel v. Wyman, 321 F. Supp. 528, 531 (S.D.N.Y. 1970). Examples of the judicial outlook displayed in this opinion emphasize that this particular equal protection challenge to government influence on family composition and structure may not be acceptable to many courts.

[24] *See* Comment, *All in the Family: Legal Problems of Communes*, 7 HARV.

argument would appear to apply to children living in non-legal AFDC families. Perhaps focusing on the *children's* status presents the case for equal treatment of households in equal need more strongly, but the states' interest in preserving the "biological and/or legal family" would seem to be the same. The specific issue has not been litigated.

Discovery of a "fundamental interest" presents another possibility for equal protection review. The recognition of such an interest involves the more stringent equal protection standard and would render the father regulations highly suspect.[25] The Supreme Court most recently recognized such an interest in striking down residency requirements which are said to violate the right to travel.[26] However, it has been suggested that the seminal case in this area, *Shapiro v. Thompson*,[27] portends the recognition of another fundamental interest, that being the right to the *means to subsist.*[28] If a court were to recognize such an interest as fundamental, one might argue that it is jeopardized by classifications affecting the amount of assistance granted a needy family which are based on the marital status of the parents or the legal relationship of the male family member to the children.

Though the dictum of *Shapiro v. Thompson* looked promising for the recognition of a right to the means to subsist,[29] no cases have subsequently picked up the suggestion, and *Shapiro* is now seen to rest squarely on the right to travel.[30] In addition, though certain

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[25] *See supra*, note 15 and accompanying text. *See also* Note, *Developments in the Law — Equal Protection*, [hereinafter cited as *Developments*], 82 HARV. L. REV. 1065, 1120, 1127-31. Cases recognizing such interests include Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation), Griffin v. Illinois, 351 U.S. 12 (1956) (rights with respect to criminal procedures), and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting).

[26] Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969) invalidated three state statutes which imposed residence requirements on potential welfare recipients as violative of the applicants' right to travel. In Graham v. Richardson, 403 U.S. 365, the Court implies that aliens moving into the United States have a similar right to travel which may not be abridged by waiting period requirements. However, the Court holds that the challenged Arizona and Pennsylvania welfare statutes are invalid because they classify on the basis of *alienage*, itself a suspect classification. 403 U.S. at 375-76. *See also* Dunn v. Blumstein, 405 U.S. 330 (1972).

[27] 394 U.S. 618.

[28] *See* Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CAL. L. REV. at 589, note 207.

[29] On the basis of this sole difference [length of residence] the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist — food, shelter and other necessities of life. 394 U.S. at 627. *See also* Mr. Justice Harlan's dissent, *Id.* at 661.

[30] It is enough to say that the classification involved in *Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it infringed upon the funda-

fundamental interests or rights seem well established, there is some question as to the willingness of courts to expand the "fundamental interest" concept.[31] The doctrine has been attacked as a subjective and ill-defined means by which courts may second guess legislative judgments.[32] Thus, an argument based on the right to subsist or the right to fundamental necessities of life would be a speculative venture at best. Even if such a right should be recognized as fundamental, it is at least possible that it would be subordinated to the states' compelling interest in nurturing legally recognized families (see notes 20 and 21, *supra*).

Finally, it must be noted that the Supreme Court in recent years has been inclined to favor state action in the welfare area with a heavy presumption of validity. The Court has begun to categorize social welfare as an area in which it is loathe to apply the Equal Protection Clause as an invalidating device. For example, in both *Dandridge v. Williams*[33] and *Jefferson v. Hackney*,[34] the Court has stated that in "the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Richardson v. Belcher*,[35] also reiterated the Court's refusal to subject the allocation of welfare benefits to strict scrutiny. This solicitude for the states' approach to welfare law apparently stems from a recognition that fiscal resources available for such programs are often quite limited[36] and a realiza-

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mental right of interstate movement. Graham v. Richardson, 302 U.S. 365, 375 (1970).

For a lower court analysis to the same effect, *see* Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971). "The fundamental right dealt with in *Shapiro* was the right to interstate travel, not the right to the fundamental necessities of life." *Id.* at 632.

[31] *E.g.*, Lindsey v. Normet, 405 U.S. 56 (1972). In upholding an Oregon forcible entry and wrongful detainer statute, the Court refused to recognize the "need for decent shelter" and the "right to peaceful possession of one's house" as "fundamental interests." *Id.* at 73. The Court remarks that " . . . the Constitution does not provide judicial remedies for every social and economic ill." *Id.* at 74. *See also* U.S. v. Kras, ___U.S.___, 93 S. Ct. 631 (1973) and Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 910-912 (N.D. Calif. 1970).

[32] *See* Mr. Justice Harlan's dissenting opinion in Shapiro v. Thompson, 394 U.S. 618, 661-662, and Mr. Justice Rehnquist's dissent in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 179. *Also Developments*, HARV. L. REV. 1065, 1130, and San Antonio Independent School Dist. v. Rodriguez, ___U.S.___, 93 S. Ct. 1278 (1973).

[33] 397 U.S. 471, 485 (1970).

[34] 406 U.S. 535, 546 (1972).

[35] 404 U.S. 78 (1971).

[36] In *Dandridge*, the U.S. Supreme Court upheld a Maryland "maximum grant regulation" which limited the amount of money any single household might receive under the Aid to Families with Dependent Children Program. 397 U.S. at 471. Mr. Justice Stewart seized upon the oft-quoted language of King v. Smith, 392 U.S. 309, in his emphasis on "Maryland's finite resources." 397 U.S. at 479.

There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own

tion that the alternative to limited state participation in federal assistance programs might be no participation at all.[37]

IV. REVIEWING FAMILY INFLUENCE IN RACIAL TERMS

The instances of classifying legislation which have been scrutinized most closely have been those based on race. In 1944, Mr. Justice Black, speaking for the Court, said, "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[38] In the intervening years, the Court has applied a stringent standard of review to such classifications wherever they have appeared.[39] The standard has been so strict that no state classifications found to be based on race have been upheld in the Supreme Court since *Korematsu v. United States*[40] in 1944. This, then, has been the surest route to invalidation of state law under the Equal Protection Clause. It is the thesis of this article that many welfare regulations which affect family structure and composition may be susceptible to attack as effective racial classifications when analyzed in terms of the statistical composition of the welfare population.

The seeds of such an approach are found in a footnote to the Court's opinion in *Dandridge v. Williams.*[41] Mr. Justice Stewart remarked that,

> It is important to note that there is no contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect.

The present undertaking analyzes the viablity of a racial impact analysis under the Equal Protection Clause, particularly in light of *Jefferson v. Hackney*,[42] decided May 30, 1972.

For clarity's sake, it should be stated here that there are two ways in which the concept of adverse racial impact might be utilized in an equal protection analysis. The first would be to a claim that regulations are discriminatory because they affect racial groups which are disproportionately represented in the welfare recipient population.

> standard of need and to determine the level of benefits by the amount of funds it devotes to the program. 392 U.S. at 318-319, quoted at 397 U.S. 478.

The Court has continued to recognize the validity of fixed State welfare budgets in Rosado v. Wyman, 397 U.S. 397, 414 and, most recently, Jefferson v. Hackney, 406 U.S. 535, 541.

[37] For example, Jefferson v. Hackney, 406 U.S. 535 at 546.

[38] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[39] For a compendium of relevant cases and commentary through 1968, *see Developments,* 82 HARV. L. REV. 1065, 1087-1091.

[40] 323 U.S. 214 (1944).

[41] 397 U.S. 471, 485, note 17.

[42] 406 U.S. 535 (1972).

This approach has been widely unsuccessful.[43] The second approach would be an attempt to prove that regulatory or legislative classifications may inadvertently be based on a factor which is actually a cultural trait of particular minority and ethnic groups. Both approaches attack the *means* of accomplishing governmental objectives. The first approach suggests that laws or regulations effectuating a state policy must be subjected to stringent equal protection scrutiny because of their unequal impact on different racial groups, though they involve no *inherently racial criteria.* That is, the *means* of effecting the policy is "neutral" in its intent and its terms, and the racial impact is a result of an interaction with extraneous factors. The second conceptualization also assails the laws or regulations as devices for effectuating state policy, but it does so on the ground that they are inherently racial in nature. Neither formulation attempts to demand justification of underlying state *policy.* The California AFDC regulations illustrated above are employed as a subject of these analyses.

A. A DEMONSTRATION OF RACIAL IMPACT

The statistical demonstration that a given law or scheme of regulations produces a discriminatory impact on a particular group might be attempted in any number of ways. The following demonstration of the possible impact of regulations affecting males in AFDC households is structured to accommodate the available data.

As noted, the basic concept of the Aid to Families with Dependent Children program is deprivation of parental care.[44] In California, approximately eighty-five percent of the families on AFDC are eligible because of the absence of the father from the home.[45] The other fifteen percent of the eligible families are deprived on the basis of the absence or incapacity of the mother, or the incapacity or death of the father. (These figures do not include unemployed parents.) When this information is broken down by racial or ethnic groups, particular characteristics of family life which are prevalent among the various groups begin to appear. Based on a December 1970 sample of 6162 AFDC families in California, the following

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[43] *See infra,* notes 109-120 and accompanying text.

[44] *See supra,* notes 4-6 and accompanying text.

[45] California State Department of Social Welfare, AFDC — Social and Economic Characteristics of Families Receiving Aid During December 1970 [hereinafter cited as AFDC — Social and Economic Characteristics] (Jan. 1972), *see* Table 15. Note that this statistic does *not* include the families who are eligible as a result of the father's unemployment. For comparable statistics on a national scale, *see* U.S. Dept. of Health, Education, and Welfare, Findings of the 1971 AFDC Study — Part I [hereinafter cited as 1971 AFDC Study] (December 1971), Table 15.

sources of deprivation emerge.[46]

TABLE I: SOURCE OF DEPRIVATION BY ETHNICITY OF MOTHER

Source of Deprivation	Total	White (Non-Mexican)	White (Mexican)	Negro
Child Not Deprived of Father	1.7	1.5	1.4	1.4
Father Incapacitated	9.3	9.6	12.5	6.2
Father Dead	3.1	2.2	4.7	3.3
Father Absent				
Imprisoned	2.3	2.6	2.9	1.2
Estranged				
Divorced or Annulled	21.7	31.0	14.1	11.5
Legally Separated	4.9	5.6	4.2	4.2
Married, Separated w/o Court Decree	15.6	15.7	14.1	16.6
Married, Deserted	6.1	6.1	6.4	5.5
Never Married to Mother, Never Lived Together	27.3	19.8	26.8	42.1
Never Married to Mother, But Lived Together	4.3	3.1	8.0	4.1
Unknown	3.8	3.0	5.1	8.9
	100.0%	100.0%	100.0%	100.0%

Of particular interest for purposes of this analysis is the fact that a black child receiving AFDC is far less likely to ever have had his father living in the same home, as shown by the fact that many more black fathers were never married to the AFDC mother and never established residence with her. It should also be noted that a father's absence due to legal dissolution of the marriage is least frequent among black families.

Another ethnicity statistic that sheds light on the family structure among racial groups is a comparison of families founding their deprivation on the father's unemployment with those basing deprivation on other factors. Deprivation status based on the father's unemployment is far less common among black families than might be expected in light of overall black participation in the AFDC program. Nationwide, black recipients constitute 43.3% of the total AFDC

[46]This table is derived from previously unpublished data prepared by the Management Information Systems Division of the State Department of Social Welfare for inclusion in this article. The original print-out containing this information is on file with the UCD Law Review, School of Law, University of California, Davis.

The appellations given racial groups in these tables are those used by the State Department of Social Welfare.

participation base; in California, the percentage is 26.1.[47] Yet the following table[48] demonstrates a far lower level of participation by blacks, at least in California, in the unemployed father's program.[49]

TABLE II: UNEMPLOYMENT AS DEPRIVATION SOURCE BY ETHNICITY

Ethnic Origin	Deprivation Based on Other Than Father's Unemployment	Deprivation Based on Father's Unemployment
White, Non-Mexican	46.6	51.5
White, Mexican	20.6	28.5
Negro	26.4	13.0
American Indian	0.9	0.6
Other	1.3	1.9
Unknown	4.2	4.5
Total	100.0%	100.0%

Proportionately, only half as many blacks receive the benefits available to families of unemployed fathers as receive benefits accruing on other grounds. That is, of the total number of children deprived of parental care for a reason other than unemployment, 26.4% are black; of the total group deprived of parental care because of the father's unemployment, only 13.0% are black. To assume that blacks fail or refuse to avail themselves of benefits under the unemployed parent program would seem illogical in light of the disproportionately heavy participation of blacks in the overall program.[50] The answer more probably lies in the composition of the typical needy black family.

At first glance, these statistics reveal no discriminatory effect. For example, in the unemployed parent category, where the white (non-Mexican) to white (Mexican) to black ratio is approximately 52:29:13, any change in the substance or application of a regulation would apply equally to all, affecting the three groups in this same 52:29:13 ratio. Thus, such a change affects black or Mexican families in exactly the same proportion that it affects the other ethnic groups. However, the Supreme Court has made clear that, "Judicial

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[47] 1971 AFDC Study, Table 2.

[48] Prepared from statistics found in AFDC — Social and Economic Characteristics, Tables 6 and 37. Though Table 6 is based on the mother's ethnic origin and Table 37 on the father's ethnic origin, the comparison is valid if one assumes that the number of AFDC children born of multiracial relationships is not significant.

[49] The program for unemployed parents is referred to as AFDC-U and is operated under conditions which differ from those applying to the rest of the AFDC structure. *See supra,* note 6. Though this program is available to qualified unemployed mothers in California, the participation of women is minimal, and this category is generally referred to as the "unemployed father's program." EAS MANUAL § 41-401.1(d).

[50] *See supra,* note 47 and accompanying text.

inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

The effect of the disparity in black participation in the two aspects of the AFDC program might be more accurately demonstrated in the following way. Since there are approximately one-sixth as many unemployed father cases as other types,[51] we will assume a total AFDC population of 1000 families — 833 basing deprivation on other than unemployment and 167 (1/6) participating by virtue of the father's unemployment. Reliance on Table II shows that of this group, 242 families would be black and 473 white (non-Mexican).[52] The remainder, of course, come from other ethnic groups. Among the white (non-Mexican) families, 85, or 18% of the total number, would receive additional income for the support of the unemployed parent. Of the black families, only 22, or 9% of the total number, would receive such support. Thus, on a proportionate basis, twice as many white (non-Mexican) families receive this type of aid as do black families. This is one demonstration that a minority group (blacks, here) does not share equally in a benefit scheme neutral on its face.

It has been noted above that proportionately fewer black children on AFDC are likely to have had their natural father living in the home. Though the desertion rate for whites (non-Mexican) and blacks is about the same, more than twice as many black family units arose from a relationship in which the natural mother and father were never married and never lived together.[53] This fact may at least partially explain the lesser amount of black AFDC participation grounded in parent unemployment and certainly indicates that fewer black families would be relying upon the natural father for support. The latter thought is reinforced by the observed "tendency for Negro families to discount the economic importance of the father as a factor in applying for aid in comparison to white families and families of other minority groups . . . ."[54] The logical inference is that black families are less likely to exhibit a classic family structure, with all family members legally intact, including a natural or adoptive father.

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[51] In December, 1970, there were 61,193 AFDC-U cases in California and 363,989 cases with another deprivation status. See AFDC — Social and Economic Characteristics, Tables 1 and 33.

[52] 388 (46.6% x 833) + 85 (51.5% x 167) = a total of 473 white, non-Mexican families. 220 (26.4% x 833) + 22 (13% x 167) = a total of 242 black families.

[53] *See* Table I. The percentages in the "Never married to mother, never lived together" category are: white (non-Mexican) 19.8, black 42.1.

[54] Unpublished report of California State Department of Social Welfare entitled Ethnicity and Duration of Aid, page 1. On file with the UCD Law Review.

This conclusion is buttressed by Table I, showing that a legal dissolution of marriage is less common among blacks than among other groups on AFDC. The percentage of the total number of black families in which the father is absent by reason of divorce, annullment or legal separation is 15.7, while the corresponding percentage for white (non-Mexican) families is 36.6. This may indicate that a black AFDC mother is less often in a position to remarry and thereby bestow stepfather status on the male family member and possibly pave the way for adoption of the children. A man who wished to become part of such a family unit would have no choice but to accept the disfavored status of URAM or unmarried father. This appears to be further statistical evidence that benefits might not be equally available to all racial groups.

These statistics taken as a whole suggest that the particular characteristic around which fundamental welfare classifications are formulated — the marital status of the adult householders — has a disproportionately adverse impact on at least one racial group. Black family units are demonstrably less likely to have a natural or adoptive father (and perhaps even a stepfather) in the home. As demonstrated,[55] the legal relationship of the adult householders has a considerable impact on AFDC benefit delivery. This disparate treatment accorded male family members at least arguably manifests a policy judgment respecting the desirability of certain family types. The classifications effectuating that judgment appear to convey a particularly heavy racial burden. Whether a court might accept this demonstration of adverse racial effect as constitutionally significant must be explored as the next logical question.

B. THE AMENABILITY OF COURTS TO AN IMPACT ANALYSIS

The following section concerns the first of the suggested uses of the racial impact analysis. This is the argument that because a legislative scheme disproportionately affects a particular racial group, it should be subject to the more rigid equal protection scrutiny normally demanded by the presence of official discrimination based on race.[56] The second possible use of an impact analysis — the suggestion that legislative objectives are accomplished by means of classifying criteria which may actually be cultural traits of a racial group — is reviewed separately as an alternative to this emphasis on adverse racial *result.*

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[55] *See supra*, notes 9-13 and accompanying text.

[56] *See*, as representative articulations of this approach, Korematsu v. United States, 323 U.S. 214 (1944); Bolling v. Sharpe, 347 U.S. 497 (1954); McLaughlin v. Florida, 379 U.S. 184 (1964); Hunter v. Erickson, 393 U.S. 385 (1969).

1. LOWER COURT REACTION TO THE IMPACT ANALYSIS

In *Hobson v. Hansen*,[57] the compendious review of the racial composition and financing scheme of Washington, D.C. schools, Circuit Judge Wright delivered the most vigorous articulation of the racial impact argument to date. Judge Wright stated:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.[58]

Though the Circuit Court sitting *en banc* did not directly discuss this point in its opinion affirming the decision, it is noteworthy that Judge Burger (now Mr. Chief Justice Burger) joined in a dissenting opinion which admitted, "That discrimination had been continued for many years or had arisen since May 19, 1954 was abundantly established by Judge Wright's findings in *Hobson v. Hansen.*"[59] Perhaps this statement implies a recognition of the viability of a statistical impact analysis.

In *Keyes v. School District Number One* (another school desegregation case),[60] a district court held that while Denver's adherence to a policy of neighborhood schools is not in itself unlawful,[61] the Equal Protection Clause requires, at a minimum, that all schools offer an equal educational opportunity. Regarding the segregated pattern of pupil enrollment, much of it was declared *de facto* and therefore not per se unconstitutional. However, on the issue of the equality of learning opportunity, the court found that an unconstitutional disparity among district schools had been proven, without regard to official motive.

> Under a claim for relief based upon separate-but-unequal school facilities, purpose or intent to discriminate is not a necessary factor. Where state action results in unequal treatment of the poor or minority groups, it is no defense that the state action was not taken with a purpose to injuriously affect only the poor or minorities as a class.[62]

This finding of inadvertent adverse impact was deemed an adequate

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[57] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *affirmed sub nom* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).
[58] 296 F. Supp. at 497.
[59] 408 F.2d at 192-193.
[60] Keyes v. School District Number One, Denver, Colorado, 313 F. Supp. 61 (D. Colo. 1970).
[61] *Id.* at 76.
[62] *Id.* at 82, n. 25.

basis for a number of remedies designed to equalize educational opportunity.

A case in which a court explicitly rests its decision on discriminatory effect rather than on a possible finding of unequal application of the law in question is *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968). In striking down prison regulations limiting prisoner newspaper subscriptions to hometown publications, the court recognized as pertinent, " . . . the cases which have struck down rules and regulations which on their face appear to be non-discriminatory but which in practice and effect, if not purposeful design, impose a heavy burden on Negroes and not on whites, and operate in a racially discriminatory manner."[63] The court rested its holding on the statistically demonstrable fact that few cities or towns support a newspaper published by and for the black population.

In *Norwalk CORE v. Norwalk Redevelopment Agency*,[64] the Second Circuit found a possible equal protection violation in a situation similar to the California AFDC scheme. The court found that if proof could be produced showing that as an accidental effect of a neutral and equally administered plan to relocate citizens of all races blacks suffered a greater hardship, a case of equal protection violation would have been made out. This would be so despite the fact that the greater hardship arose as a result of a societal condition (discrimination in the housing market) which the state officials were unable to influence in any way.[65] This might be analogized to the situation in which blacks are deprived of AFDC benefits because of a particularly common characteristic of black family life.

In *Southern Alameda Span. Sp. Org. v. City of Union City, Cal.*[66] the Ninth Circuit also looked to adverse impact on a minority as evidence of an equal protection violation. The court recognized that a referendum effectively blocking a low income housing development was probably motivated by hostile feeling toward racial minorities and low income residents. Admitting that such a motive might be impossible to prove, the court found it irrelevant. "If, apart from voter motive, the result of this zoning by referendum is discriminatory . . . , in our view a substantial constitutional question is presented."[67] Though the court here plainly considers the *poor* to be the minority threatened, this conclusion draws heavily on cases holding *racial* impact to be evidence of equal protection violations, suggesting that the Ninth Circuit might adopt such an approach in an appropriate case.

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[63] 400 F.2d 529, 538-539.
[64] 395 F.2d 920 (2d Cir. 1968).
[65] *Id.* at 930-931.
[66] 424 F.2d 291 (9th Cir. 1970).
[67] *Id.* at 295.

The Fifth Circuit has recently utilized one form of impact analysis in finding unconstitutional the manner in which a Mississippi town provides municipal services to its black and white populations in *Hawkins v. Town of Shaw.*[68] Relying heavily on statistical evidence of unequal rendition of the city's services,[69] the three-judge panel disposed of the question of intent as follows:

> Yet, despite the fact that we conclude that no compelling state interests can justify the disparities that exist in the black and white portions of town, it may be argued that this result was not intended. That is to say, the record contains no direct evidence aimed at establishing bad faith, ill will or an evil motive on the part of the Town of Shaw and its public officials. We feel, however, that the law on this point is clear. In a civil rights suit alleging racial discrimination in contravention of the Fourteenth Amendment, actual intent or motive need not be directly proved . . . .[70]

In affirming this decision, the entire Fifth Circuit, sitting *en banc*, reached much the same conclusion. The Court positively states, "In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials."[71] Though the demonstration of adverse impact here almost surely reflected a conscious policy of discrimination, the statistical evidence rendered an attempt to prove that policy unnecessary.

Finally, even in cases where the holding clearly rests on a different basis, courts are recognizing the validity of the impact analysis. In *Kennedy Park Homes Ass'n . v. City of Lackawanna, N.Y.*,[72] another case involving a low income housing project, the Second Circuit affirmed the district court's finding of racially discriminatory actions by city officials. Nonetheless, citing *Norwalk CORE* and *Southern Alameda*, the court's opinion includes dictum admitting the integrity of a challenge based only on proven *effect*. "Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify."[73]

These cases indicate that many courts have been willing to em-

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[68] 437 F.2d 1286 (5th Cir. 1970); *affirmed en banc*, 461 F.2d 1171 (5th Cir. 1972).

[69] For example, the court cited the facts that 98% of all homes in Shaw fronting on an unpaved street are occupied by blacks and that 97% of the homes not served by sanitary sewers are in black neighborhoods. *Id.* at 1288.

[70] *Id.* at 1291.

[71] 461 F.2d 1171, 1172 (5th Cir. 1972). *See also* Judge Wisdom's reemphasis of these principles in his special concurrence. *Id.* at 1174. Note the contention of three dissenting judges that the majority has mistaken *prima facie* evidence of a racial classification for a *prima facie* case of denial of equal protection. *Id.* at 1179.

[72] 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

[73] *Id.* at 114.

brace a statistical showing of discrimination as proof of an equal protection violation in a variety of contexts. Several of these decisions suggest a shift to judicial reliance on an impact theory, even where a finding of improper intent or unequal application of a law might be possible. Proof of discriminatory *result* may in certain fact situations be more easily attained and demonstrated than may proof of intentionally discriminatory official conduct. Most significantly, perhaps, these cases demonstrate that courts will accept such proof even where the factors or traits creating the discriminatory result are unrelated to, and beyond the control of, the governmental entity and its officials. Other cases, however, have taken a less hospitable approach to attempted demonstrations of adverse racial impact.

One of the cases rejecting a racial impact argument is *Maxwell v. Bishop*,[74] in which the Eighth Circuit reviewed the frequency with which the death penalty was imposed on convicted rapists in the state of Arkansas. Despite statistical evidence that " . . . a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence . . . whereas a man who is convicted of criminally assaulting a woman of his own race stands about only a 14 percent chance of receiving the death sentence,"[75] the court did not find this evidence of discrimination sufficiently compelling to overturn a death sentence imposed on a black defendant. In so holding, the court seems to have been strongly influenced by the fact that a contrary ruling would have rendered the imposition of the death penalty on any convicted black rapist constitutionally impermissable in the state of Arkansas[76] and by the persuasive evidence of the guilt of this particular defendant. Though the statistical evidence in this case was aimed at proving a pattern of *intentional* [77] racial discrimination among Arkansas juries, the failure of the court to accept this type of analysis where an actively discriminatory practice is challenged bodes ill for the success of the approach where the discriminatory result is genuinely unwitting.[78]

Even more ominous, however, have been cases reviewing a racial impact analysis in the field of welfare law. In *Stanley v. Brown*,[79] plaintiffs specifically sought to capitalize on the suggestion in *Dandridge* that a showing of racial effect would restrict the state's

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[74] 398 F.2d 138 (8th Cir. 1968).
[75] *Id.* at 145.
[76] *Id.* at 148.
[77] This is not meant to imply that every jury which imposed the death penalty did so for racial motives. Rather, the sum of their actions reflects the judgment that blacks should be punished more severely than whites for the same crime. No such discretionary process can be found in the application of the California AFDC regulations.
[78] Also noteworthy is the fact that the opinion was written by Judge Blackmun, now Mr. Justice Blackmun.
[79] 313 F. Supp. 749 (W.D. Va. 1970).

latitude in dispensing welfare benefits.[80] Although the court recognized that discrimination may exist even in the presence of a regulation fair on its face and equally applied among all members of the class defined, it found no discrimination in the regulation putting a grant limit on that aid program (AFDC) populated most heavily by blacks. No similar ceiling was applied to other programs (Old Age Security and Aid to the Totally Disabled) in which a majority of the recipients were white.[81] The three-judge district court found that the greater participation of blacks in the AFDC program did not render the grant limit discriminatory and applied a lenient equal protection standard in evaluating the state's regulation. The basis of the court's finding of no discrimination is not entirely clear.[82] The court apparently considers the statistical evidence of disproportionate effect on blacks adequately disposed of by its observations that, " . . . the AFDC program embraces many white people,"[83] and, " . . . black people in large numbers are assisted by the other welfare programs on which no maximum is placed."[84] The result was that the regulation was upheld.

A factually similar case is *Goodwin v. Wyman*,[85] challenging a ten percent reduction in the level of assistance payments in two of five aid programs administered by the State of New York. The two categories subject to the cutback (Aid to Families with Dependent Children and Home Relief) consisted primarily of blacks and Puerto Ricans, while among the three categories not affected, one (Aid to the Disabled) consisted of approximately 50 percent whites and the remaining two (Old Age Assistance and Aid to the Blind) were predominantly white.[86] Unlike the *Stanley* court, this three-judge panel accepted these statistics as evidence of racial discrimination. Nonetheless, the court found "an inherent and announced compelling state interest"[87] in the state's desire to maintain a higher level of welfare benefits to those recipients least capable of becoming self-supporting. The court emphasizes, however, that prior cases should *not* be read to permit a greater disregard of racial impact in the field of welfare expenditures. The opinion states:

> We reach this conclusion not by adopting the State's contention that the Chapter 133 [the challenged regulation] cutback, though con-

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[80] *See supra*, note 41 and accompanying text.
[81] 313 F. Supp. at 751.
[82] The court speaks of "lack of overt discrimination," despite a recognition that neither intent nor obvious unfairness is necessary to a discriminatory result. *See* discussion of the term, *supra*, at the conclusion of Part I.
[83] 313 F. Supp. at 751.
[84] *Id.* at 751.
[85] 330 F. Supp. 1038 (S.D. N.Y. 1971).
[86] *Id.* at 1039.
[87] *Id.* at 1041

> cededly racially disproportionate in effect, is specifically authorized by the Supreme Court's holdings in *Rosado v. Wyman* and *Dandridge v. Williams* . . . [88] (Citations omitted).

In light of this statement, perhaps this case should more properly be classified as one adopting the concept of impact analysis. However, the discovery of a suitable justification for discriminatory action in the state's economic exigencies surely represents an erosion of the usually insurmountable equal protection standard that is applied to racial classifications.[89] Thus, it would seem this court finds evidence of impact less persuasive than other types of discriminatory action and feels obligated to impose a somewhat diluted standard of review.

Finally, the Second Circuit's recent affirmance of an employment discrimination case explains a major reason for judicial reluctance to accept a statistical demonstration of adverse racial impact as sufficient to require strict equal protection scrutiny of the underlying state action. In *Chance v. Board of Examiners*,[90] the court faced the allegation that the system of selecting supervisory personnel in the New York City school system had an unconstitutionally unequal effect on black and Puerto Rican aspirants. This impact was established by statistical evidence of the ethnic composition of the current supervisory population. The court stated the inquiry as whether the statistical differences were sufficient to meet the constitutional test of invidiousness and amount to a *prima facie* case of *de facto* discrimination.[91]

Though the circuit court upheld the imposition of a heavy burden of justification on the Board of Examiners, it purported to do so only under the more lenient equal protection standard applicable to non-suspect classifications. Stating succinctly the questionable viability of a racial impact approach, the court said:

> Although state action invidiously discriminating on the basis of race has long called for the "most rigid scrutiny," the Supreme Court has yet to apply that stringent test to a case such as this, in which the allegedly unconstitutional action unintentionally resulted in discriminatory effects. Manifestly, the question whether that test should be applied to *de facto* discriminatory classifications is a difficult one and is not to be resolved by facile reference to cases involving intentional racial classifications (Citations omitted).[92]

This passage well indicates why the acceptability of a racial impact

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[88] *Id.* at 1040.
[89] *See supra*, notes 16 and 17 and accompanying text.
[90] 458 F. 2d 1167 (2d Cir. 1972). *See also* the discussion of the lower court opinion in this case, *infra*, in footnote 124 and the accompanying text.
[91] *Id.* at 1176.
[92] *Id.* at 1177.

analysis is open to question, despite its enthusiastic adoption by some courts.

2. *UNITED STATES SUPREME COURT CASES*

The United States Supreme Court has long recognized the possibility of racial or ethnic discrimination in statutes which were neutral on their face. The most obviously suspect of such statutes are those that are *applied* in a discriminatory manner. When evidence is produced that a seemingly neutral statute in fact constitutes "a device to make racial discrimination easy,"[93] the Court will be quick to strike it down.[94]

More troublesome has been the Court's approach to classifications which are neutral on their face and are applied equitably, but which nonetheless, produce a discriminatory impact. In 1966, in *Butts v. Harrison*,[95] the Court was presented with the argument that the Virginia poll tax operated as a greater obstacle to the exercise of the franchise among blacks than among whites due to the generally lower economic standard of blacks living in Virginia. The Court invalidated the poll tax without reaching this argument, and we have only Mr. Justice Harlan's dissenting note to the effect that he found this suggestion unpersuasive.[96] However, behind the Court's holding that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process,"[97] must lie the premise that a poll tax, no matter how innocent its motive and application, has a greater *impact* on the ability of the poor to participate in the democratic process.

The possibility of *racial* impact as a basis for strict equal protection scrutiny was more strongly suggested in the open housing case, *Hunter v. Erickson*, 393 U.S. 385 (1969). The case challenged an amendment to the Akron city charter, enacted by popular vote, which required majority approval by the electorate of any ordinance regulating the transfer of real estate on the basis of race.[98] The decision invalidating this voter action rests on the fact that the amendment created a distinction among proposed ordinances, the referendum being required only where a proposal dealt with racial

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[93] Lassiter v. Northampton Election Bd., 360 U.S. 45, 53 (1959).
[94] Yick Wo v. Hopkins, 118 U.S. 356 (1886); Davis V. Schnell, 81 F. Supp. 872, *affirmed* 336 U.S. 933 (1949); Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959); Louisiana v. United States, 380 U.S. 145 (1965).
[95] Decided as the companion case to Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
[96] *Id.* at 683-684, note 5.
[97] *Id.* at 668.
[98] *See also* Reitman v. Mulkey, 387 U.S. 369 (1967), notable primarily for its definition of state action, finding a California constitutional amendment, neutral on its face, to be discriminatory in effect.

conditions on the sale of real property. The Court found that this, " . . . was an explicitly racial classification treating racial housing matters differently from other racial and housing matters."[99] Thus, an analysis of the law's potential effect was unnecessary. Nonetheless, the Court looked beyond this fact to explore the amendment's discriminatory impact.

> It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But § 137 [the Charter amendment] nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would otherwise regulate the real estate market in their favor.... [A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority.[100]

This language, though dictum, looked promising for the recognition of the racial impact concept, as did the language of several other cases.

In *Baker v. Carr*,[101] the Court had made clear that actions which are truly "founded on neutral principles" and have no discriminatory purpose (hidden or otherwise) may be declared suspect because of their racial impact under certain conditions.[102] The Court stated:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.[103]

Though the court may have been ready to look to racial effect in this situation, the infrequency of truly arbitrary and capricious state action would mean that this recognition was of limited utility.

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[99] 393 U.S. at 389.

[100] 393 U.S. at 390-91. In a concurring opinion, Mr. Justice Harlan agreed that Akron had not borne the heavy burden of justification imposed by the racial nature of the amendment's provision. Though here finding the amendment discriminatory on its face, he specifically rejected the impact argument, stating that statutes,

> . . . do not violate the Equal Protection Clause simply because they occasionally operate to disadvantage Negro political interests.... Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest. 393 U.S. at 394-95.

Of particular interest is his statement that state actions "may not be attacked [when] they are founded on neutral principles." *Id.* at 394.

[101] 369 U.S. 186 (1962).

[102] For cases regarding laws which have an unintended effect upon *religious* organizations, *see* Reynolds v. United States, 98 U.S. 145 (1878); Prince v. Massachusetts, 321 U.S. 158 (1944); Two Guys v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).

[103] 369 U.S. at 226.

Among other cases in which the Supreme Court has faced attempts to statistically demonstrate racial discrimination are those challenging jury composition and selection methods. In *Carter v. Jury Commission*,[104] the Court found that clear evidence of disproportionately limited black presence on jury rolls was sufficient to justify a district court's order that a new jury list be compiled. However, the absence of blacks from the jury commission for a period of twelve years prior to the litigation was not considered a " . . . *prima facie* showing of discriminatory exclusion."[105] The Court thus declined to compel the appointment of black commissioners.

In the companion case of *Turner v. Fouche*,[106] evidence was presented that though 60% of the county's population was black, the list of persons from which the grand jury was selected contained only 37% blacks.[107] The statistics demonstrating this disparate treatment were deemed substantial enough to warrant court intervention. The Court states that,

> . . . the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made out a *prima facie* case of jury discrimination, and the burden fell on the appellees to overcome it.[108]

In neither *Carter* nor *Turner* was there a "countervailing explanation"[109] of the statistical evidence of discrimination. In *Turner*, the officials selecting the jury at least testified to their non-discriminatory intent, though this was not sufficient to overcome the *prima facie* case of discrimination. In contrast, there was no evidence offered of the governor's (the appointing official) intent in *Carter* where the Court refused to find a *prima facie* case of discriminatory appointment to the jury commission. What accounts for the different responses elicited from the Court by these separate statistical allegations of discrimination?

The cases might be distinguished by the reliability of the statistical demonstrations of racial impact. In *Carter* the evidence showed black exclusion from a panel of only five jury commissioners. In *Turner*, the selection process involved 1252 potential jurors at its inception and produced a final list of 304 persons from whom the jury was actually chosen. In the latter case, there would be a far less chance that the discrimination was a result of random factors. An equally likely explanation of the difference, however, is the Court's

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[104] 396 U.S. 320 (1970).
[105] *Id.* at 338.
[106] 396 U.S. 346 (1970).
[107] *Id.* at 359.
[108] *Id.* at 360.
[109] *Id.* at 359.

recognition in *Carter* of its inability to supervise the governor's exercise of discretion in selecting jury commissioners.[110]

Both cases consider a statistical demonstration of adverse racial impact: in *Carter* to uphold the lower court's injunction and in *Turner* to find a *prima facie* case of discrimination shifting the burden of proof. Neither case, of course, speaks directly to the issue at hand, since both are attempts to statistically demonstrate subjective discrimination rather than a discriminatory impact arising from the application of objective standards. They are interesting, however, for their discussion of a *prima facie* case of discrimination. Though the Court does not spell out the evidentiary showing that might successfully rebut a *prima facie* case, this burden of proof would appear to be a far less imposing obstacle to justifying a racially disproportionate result than would the requirement of a "compelling state interest."

A similar recent case which reinforces this suggestion is *Alexander v. Louisiana.*[111] Again, the Court was presented strong statistical evidence of adverse racial impact. Though 21% of those persons eligible for jury selection were black, the final pool from which panels were drawn contained only 7% blacks.[112] Further, the selection process included opportunities for the racial identification of prospective jurors. The Court found that these factors together constituted a *prima facie* case of discrimination. The Court stated:

> The progressive decimation of potential Negro grand jurors is indeed striking here, but we do not rest our conclusion that petitioner has demonstrated a *prima facie* case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. The racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination.[113]

The case thus leaves in doubt the persuasiveness of an allegation of discrimination based solely on statistical data and untainted by the possibility of subjective action.

In *Alexander*, the Court discusses the burden shifted to the State of Louisiana once the *prima facie* case is established. Reiterating that declarations of good faith by jury selection officials are insufficient, the Court says:

> Once a *prima facie* case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of

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[110] 396 U.S. at 338. *Also note Turner's* emphasis on the subjective nature of the processes which produced the discriminatory result. Surely, the appointments by the governor to the jury commission in *Carter* entailed no less opportunity for subjective action, though one might understand the Court's reluctance to declare the governor's appointments presumptively discriminatory.

[111] 405 U.S. 625 (1972).

[112] *Id.* at 627-628.

[113] *Id.* at 630.

> unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.[114]

This language suggests there may be a number of ways in which the disproportionate racial result might be explained. For example, the jury commission might give a reason for each potential juror's disqualification or might interpose its own statistical argument showing why blacks are less likely to meet the standards which the commission observes in selecting jurors. Whatever the likelihood that such proof could actually be produced in this case, the burden of demonstrating neutral criteria and procedures seems a far more lenient requirement than the production of a "compelling state interest." Perhaps these cases suggest that when an equal protection challenge on racial grounds is framed as an attempt to establish a *prima facie* case of discrimination the standard of judicial scrutiny will be less stringent. Reasons why this conceptualization of an equal protection argument might be imposed on a case are explored *infra.*

a. The Unfavorable Outlook — Jefferson v. Hackney

The most important racial impact case decided to date is *Jefferson v. Hackney*, decided May 30, 1972.[115] This case contested the State of Texas' practice of reducing by a fixed percentage the amount of each welfare grant in order to keep the total state expenditure within a spending limit established by the Texas Constitution. The Fourteenth Amendment challenge rested on the fact that the percentage of acknowledged need actually paid to AFDC recipients was less than that paid to participants in other programs. For example, the "percentage reduction factor" for the Aid to the Blind Program was 95%, while the Aid to Families with Dependent Children factor was 75%.[116] The accompanying statistics which allegedly lent a racial impact to these classifications showed a far greater percentage of blacks and Mexican-Americans participating in AFDC than in the others programs.[117] Over strong dissent, Mr. Justice Rehnquist, writing for the Court, concluded that the Texas benefit scheme was not constitutionally suspect despite this proof. The case squarely decides that disproportionate racial impact which results from disproportionate racial participation in a welfare program does *not* require stringent equal protection review of regulations affecting the program. Finding a lack of intent to discriminate on the part of welfare officials, Rehnquist addressed appellant's "naked statistical

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[114] *Id.* at 631-632.
[115] 406 U.S. 535 (1972).
[116] *Id.* at 537, n. 3
[117] *Id.* at 548, n. 17.

argument"[118] and concluded that it did not demand the imposition of the more rigid equal protection test. He stated:

> [G]iven the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.[119]

Thus applying the less stringent rational relationship test, Rehnquist finds the classification based on aid category justifiable on the basis that AFDC recipients may be better able "to bear the hardships of an inadequate standard of living."[120]

Though the case appears to deal a fatal blow to the concept of invoking strict scrutiny through statistical evidence of disproportionate racial effect, the holding may actually leave room for a rehabilitation of the approach. That possibility is explored within. Nonetheless, there can be no doubt that this case has narrowed the range and manner in which one might hope to utilize a racial impact argument.

b. A Remaining Possibility —
The Non-Constitutional Griggs Model

A largely non-constitutional area of litigation in which an adverse racial impact has been recognized as demanding particularly strict justification is the field of employment practices. In a decision with major implications for the field of personnel administration, *Griggs v. Duke Power Co.*,[121] the Court strongly attacked discriminatory personnel practices. The suit was brought under Title VII of the Civil Rights Act of 1964,[122] and the Court found that,

> The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited . . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built in headwinds" for minority groups and are unrelated to measuring job capability.[123]

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[118] *Id.* at 548.
[119] *Id.* at 548-549. A similar concern over reliance on statistical evidence of discrimination, unaccompanied by evidence of intent, is found in Whitcomb v. Chavis, 403 U.S. 124, 156-157 (1971).
[120] 406 U.S. at 549.
[121] 401 U.S. 424 (1971).
[122] 42 U.S.C. § 2000 *et seq.*
[123] 401 U.S. at 431-432.

The decision reinforces guidelines of the Equal Employment Opportunity Commission[124] requiring that an employer come forth with data demonstrating the validity of his employment practices in response to any showing of adverse racial impact. Though the decision rests on a violation of Title VII of the Civil Rights Act of 1964 rather than the Fourteenth Amendment, the language and approach of the Court might apply equally well in an equal protection analysis, should the discriminatory results arise from state action rather than private conduct.

Of the many suits following in the wake of *Griggs v. Duke Power Co.*, one has developed a close and explicit analogy between the test formulated in *Griggs* and the constitutional burden of justification that a discriminatory device must bear under the Equal Protection Clause.[125] In *Chance v. Board of Examiners*,[126] the district court properly found *Griggs* and its progeny to be relevant but not controlling authority. The court, quoting *Griggs*, finds the constitutional and statutory challenges "closely parallel"[127] and holds that where, " . . . plaintiffs show that the examinations result in *substantial* discrimination against a minority racial group qualified to take them, a strong showing must be made by the Board that the examinations are required to measure abilities essential to performance of the supervisory positions for which they are given."[128]

This analogy suggests that the *Griggs* approach to justifying adverse racial impact might be suitably adopted to *constitutional* arguments based on similar statistical demonstrations.[129] Though the *Chance* court does not enunciate the exact burden the Board of Examiners must bear to justify use of the examinations, the analogy to *Griggs* might well be interpreted to require less than a compelling state interest. In *Griggs*, there existed the actual possibility of satisfying the Court's scrutiny. The statute and administrative regulations which *Griggs* interprets and upholds admit the possibility of actually

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[124] 29 C.F.R. § 1607.

[125] Most of the suits that followed Griggs v. Duke Power Co. were directed at private employers since the original Act did not cover state and local governmental entities. Thus, plaintiffs wishing to challenge employment discrimination by a government organization had to do so in constitutional terms. The Act was amended to apply to governmental entities on March 24, 1972. *See* 42 U.S.C. § 2000(e).

[126] 330 F. Supp. 203 (S.D. N.Y. 1971), *affirmed* 458 F.2d 1167 (2d Cir. 1972). *Also see supra*, notes 88-90, and accompanying text.

[127] 330 F. Supp. 203, 215.

[128] *Id.* at 215.

[129] Another example of a case drawing heavily from Griggs, but challenging state employment practices is NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972). This opinion is less clear in its enunciation of the separate constitutional and statutory tests, though the analogy between challenges brought on these alternate grounds is apparent. *Id.* at 709, 710.

justifying discriminatory results,[130] and do not demand the kind of automatic invalidation that the compelling interest standard has required in cases concerning race.

Perhaps not surprisingly, Mr. Justice Rehnquist's cursory dismissal of *Griggs* in *Jefferson v. Hackney* does not bode well for this approach.[131] Testing the administration of the Texas program against Title VI of the Civil Rights Act of 1964 (prohibiting discrimination in federally financed programs), Rehnquist finds *Griggs* inapposite since in that case the racially discriminatory tests were *not* found to be job related, while the Texas welfare provisions *are* related to the purposes of the program. Accepting the latter point *arguendo*, this analysis still ignores the fact that in *Griggs* adverse racial impact alone was deemed to compel a heavy standard of justification. In *Jefferson*, Rehnquist denies that evidence of racial impact calls for such strict scrutiny, whether arising under the constitution or the Civil Rights statute. Though this opinion may detract from the import of the *Griggs* decision, the possibility of a less than insurmountable standard of equal protection review might still soften the Court's unwillingness, as exemplified in *Jefferson*, to rely on discriminatory *effect* even when unaccompanied by evidence of subjective action.

3. THE PRIMA FACIE CASE AS AN APPROACH TO ADVERSE RACIAL IMPACT

The jury cases, reviewed above, and the *Griggs* statutory model suggest one manner in which the Court might begin relying on statistical effect without courting the dangers of mass statutory invalidation feared by Mr. Justice Rehnquist. That method would involve (1) recognition of statistical evidence of discrimination, without more, as adequate to shift the burden of justifying causative state action to the government, and (2) adoption of a more reasonable standard of acceptable justification. It would permit courts to fairly scrutinize possibly discriminatory state action without being forced to pigeonhole the case into one of two result determinative categories. This appears to have been the Supreme Court's inclination in *Turner* and *Alexander*, where the possibility of subjective action was present, and in *Griggs*, under the Civil Rights statute. There are reasons why the approach might be preferred in other circumstances as well.

In addition to the fact that this approach permits scrutiny without automatic invalidation, it would also often be preferable to application of the lenient rational relationship test. When a court believed

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[130] 29 C.F.R. § 1607 *et seq.*

[131] 406 U.S. at 549, 550, n. 19. *See*, however, Mr. Justice Douglas' reliance on a statistical showing of unequal application of the death penalty in Furman v. Georgia, 408 U.S. 238, 249-252 (1972).

that action producing a discriminatory result was justified, it could so declare. This would seem preferable to denying that discrimination exists and then subjecting the action to only cursory review.

Cases in which racial discrmination is alleged only on the basis of statistical results created by "neutral" or "objective" state action seem appropriate instances in which to apply this approach. The interests of minority racial groups, which are often difficult to protect through political processes, deserve vigilant protection by the courts. On the other hand, courts are understandably reluctant to find state actions invalid on the basis of less than conclusive evidence or without due deference to the legitimate interests these actions might further. Permitting a challenger of state action to establish a *prima facie* case of discrimination by statistics alone and then shifting a reasonable burden of justification to the state might be a satisfactory solution to this dilemma.

This approach would leave intact the more rigorous compelling interest standard where *intentional* action or an inherently racial device created the discrimination. It also need not disturb the holding that arbitrary and capricious actions adversely affecting racial groups are invalid, since, by definition, these actions could not be justified. In the specific area of welfare law, courts could recognize a state's fiscal limitations more openly and engage in a more genuine balancing of interests. The approach might breathe new life into equal protection review. And, if indications of the Supreme Court's dissatisfaction with the traditional two-tiered application of the Equal Protection Clause[132] have been correctly perceived, the Court might well be amenable to such a concept.

It is reiterated that this approach (as well as the alternative suggested in Part IV C, *infra*) deals with the *means* of effecting a state policy and not with the policy itself. To utilize the *Griggs* fact pattern once again, the statistics there assailed not the policy of hiring qualified workers, but the discriminatory means by which the policy was furthered. It should be realized, therefore, that this approach will be useful only where the classifications which effectuate the state policy are at least arguably the cause of the adverse racial impact. Where the means themselves are not the causative factor, and it is the underlying policy which creates the discriminatory impact, this approach will not carry the day. Thus, in challenging the California AFDC scheme, one would be arguing that the regulations themselves create the adverse racial impact and that the underlying policy might be effectuated by means which are less productive of a discriminatory result. The burden shifted to the state would be that of demonstrating the necessity and precision of its regulations.

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[132] *See supra*, note 16.

C. AN ALTERNATIVE — RECOGNIZING "NEUTRAL" CLASSIFYING CRITERIA AS RACIAL OR ETHNIC TRAITS

Finally, it is perhaps possible to use evidence of disproportionate racial impact to demonstrate that the *means* utilized in accomplishing state objectives sometimes constitute inherently racial criteria. That is, by demonstrating the extreme extent to which a racial group bears the burden of a particular law, it may be possible to convince a court that a seemingly neutral classifying factor has become so strongly characteristic of a particular group as to have risen to the level of a cultural pattern or trait. The demonstration of an *inherently racial* means of effectuating a government objective surely requires rigid equal protection scrutiny.[133] And, it is conceivable that courts might sometimes wish to look beyond skin color and ancestry as *racial* indicia. Many personal traits, from language to bodily mannerisms, may be indicative of racial or ethnic origin. Perhaps a court would also be willing to regard less personal characteristics closely identified with particular racial groups in the same light.

This idea would change the conceptual framework in which evidence of disproportionate racial impact is viewed. The issue would no longer be whether a neutral means of accomplishing a legitimate state interest has inadvertently produced an adverse effect on a racial group. Rather, the question becomes whether the means of accomplishing that legitimate objective utilized a distinction among races. For example, in the AFDC regulations set out above, recognition of the statistical data found in Tables I and II as evidence of the close correlation between being black and experiencing an incomplete family structure would fundamentally alter a court's perception of an equal protection challenge. Instead of asking if it is acceptable to enforce a state's preferences for certain family structures and interpersonal obligations by denying grants to unrelated male householders, one would be asking if it is acceptable to enforce these preferences by denying grants to blacks. The impact of the latter formulation is apparent.

The objection to this approach would be the difficulty of defining those characteristics which could justifiably be called racial or ethnic traits. Though the concern is a valid one, several guideposts might be suggested as judicially manageable conditions on the recognition of such a trait or pattern. These factors might include:

(1) the challenger must produce a *strong* statistical showing that the classifying characteristic is significantly more prevalent in one racial population than in others,

(2) the presence of the trait cannot be the result of localized or

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[133] This emphasis on *means* would fit well into Professor Grunther's perception of the current Court's inclinations. *See supra*, note 16.

temporary influences, and

(3) the classifying factor must itself be a cultural trait and not merely a manifestation of other traits or influences.

These suggested considerations obviously leave room for a great amount of judicial discretion, as should be the case if greater flexibility in equal protection analyses is considered desirable. For example, the black family's unconventional nature has, in some studies, been declared a persistent and widespread pattern.[134] Whether this is an independent characteristic of black family life is more questionable. Though it is affected by employment patterns and other economic factors, it may be more than a mere manifestation of one or two independent pressures. A court would have to decide if this observed phenomena results from a set of factors so complex and undiscoverable that it should be deemed an independent trait of black family life. At least the suggested criteria can be weighed and analyzed as guides to recognizing inherently racial means of effectuating state policy.

The factors suggested above contain an inherent flexibility which may render the concept of statistically demonstrable racial traits judicially manageable and acceptable. If so, statistical evidence of adverse racial impact would become one way to focus a court's serious scrutiny on laws and regulations whose effect is felt most heavily by minority groups. As discussed above, such scrutiny might often be an effective device by which influence on family life, particularly in the area of welfare law, could be challenged.

V. CONCLUSION

The Equal Protection Clause is a frequent and logical means of attacking government influence on family life. The applications of this clause discussed above are possible variations of equal protection law in situations where influence on family life can be tied to a strong effect on minority racial groups. As noted, this might often be the case in the field of welfare law.

The approaches discussed above often may not be feasible devices for contesting state action affecting the family. The attempt to prove adverse racial impact is often cumbersome, the evidence sometimes difficult or impossible to obtain, the judicial acceptability of the analysis uncertain, and the applicability of the approach to many family situations doubtful. However, in the appropriate circumstances, courts might be willing to embrace these approaches in a search for a more flexible equal protection.

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[134] *E.g.*, U.S. Dept. of Labor, The Negro Family: The Case for National Action ("The Moynihan Report"), 1965.