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Articles

WHY DOES IT MATTER WHERE I LIVE? WELFARE REFORM, EQUAL PROTECTION, AND THE MARYLAND CONSTITUTION

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INTRODUCTION

The policy agenda for welfare reform in 1996 included freeing states and localities from the demands of a uniform national program. Giving states and localities authority for program design can be a boon if the authority is used to create a program that meets the needs of families in a particular place and time. It can also mean that families with similar needs get treated quite differently from one another. Maryland’s not atypical experience of decentralization is the subject of this Article, in which I ask whether flexibility has been a benefit, a detriment, or something of each. After I identify some areas of deep concern, I propose a remedial claim under the equal protection clause of the Maryland Constitution.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),¹ also known as welfare reform, gives states broad authority to decide whether and how they will help poor families with children.² PRWORA created Temporary Assistance for Needy Families (TANF)³ to replace Aid to Families with Dependent Children (AFDC),⁴ the program under which states received federal funding to help impoverished households with minor children.⁵ Unlike AFDC, TANF is not a program with a single national design.⁶

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². Help for families in poverty comes under Title I of PRWORA called "Block Grants for Temporary Assistance for Needy Families" or TANF. Id. (codified as amended at 42 U.S.C. § 601(a)(1) (2000)).
⁵. See generally id.
States, and even subunits of states, are free to create TANF programs of almost any design, so long as the funds are used to achieve one of the statute's four purposes, and so long as the programs satisfy a handful of federal requirements.

Freeing states from the federal proscriptions of AFDC is called "devolution." When states share or delegate program design authority to subunits, such as counties, cities, regional authorities, or contractors, the process is called "double devolution" or "second-order devolution." Described as the "real federalism story of welfare reform," double devolution or "second-order devolution" is the norm in many states. A benign rationale for devolution and double devolution is that both are necessary complements to the new responsibilities imposed under TANF for states to move families away from welfare and into work. AFDC was largely an income-support program. Most families


7. TANF funds may be spent to:
   (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
   (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
   (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
   (4) encourage the formation and maintenance of two-parent families.


8. See 42 U.S.C. § 602 (detailing the plan states must submit to the federal government); § 607 (listing mandatory work requirements); § 608 (listing prohibitions).


11. Nathan & Gais, supra note 10, at 35.

who met financial eligibility standards were entitled to a cash assistance grant. The administrative tasks were straightforward, and the standards, largely national, determined which families met the financial eligibility standards. A check was issued to those found eligible.

TANF is quite different. Families have no entitlement to a cash grant. If a state decides to make cash grants available, they can use federal funds, but only if they comply with certain rules. In most cases, federal funds can be spent for cash assistance only in programs where members of families are participating in activities designed to move the families from receiving welfare to employment. Most families can receive federally funded cash assistance for a maximum of sixty months. Programs must use sanctions when family members fail to comply with work activity requirements.

The administrative tasks imposed by TANF are complex. Applicant families must still be assessed for financial eligibility, but that is not enough. If cash assistance is temporary and someone in the family has to get ready for employment, an adult’s work-readiness and potential barriers to employment should be identified, and a plan developed for the family to leave welfare. Work-readiness is best understood in light of actual employment opportunities and conditions, so administrative tasks also should include gaining an appreciation of local and regional employment and training conditions.


14. See Cimini, supra note 6 (discussing the distribution of welfare benefits under AFDC’s cooperative federalism model); see also Townsend v. Swank, 404 U.S. 282, 287-88 (1971) (finding that the only discretion granted to states in determining whether an 18-20 year old student was entitled to benefits was whether the student “‘regularly attend[ed]’ a bona fide” institution); King v. Smith, 392 U.S. 309, 311-13 (1968) (holding that a state regulation denying benefits to children whose mothers cohabitate with “substitute fathers” was beyond the discretion granted to states under the AFDC program).


16. Id. § 602(a)(1)(A)(ii) (TANF funds available only to states that require parents or caretaker recipients “to engage in work”).

17. Id. § 608(a)(7)(A) (funding is only available to state programs that do not use federal funds for cash assistance to families beyond sixty months, or five years).

18. Id. § 607 (defining mandatory work activity requirements and corresponding sanctions).


21. Id. at 1167-68.
The combination of individualized services and sanctions contemplated under TANF is, theoretically, the opposite of the standardized benefit program of AFDC. To achieve TANF’s goals, administrators and case managers must address individual problems in the particular community where recipients live. Devolution and double-devolution can give administrators flexibility and opportunities to satisfy TANF’s goals.

An example may help to explain the need for local variability. Some suburban locations offer job opportunities for people who share characteristics with many adults who receive welfare: relatively low educational achievement, limited employment history, and responsibility for minor children. Mothers living in suburban locations may be able to get to the jobs, but they may need help with finding and paying for childcare, particularly if the job requires work during non-standard hours such as evenings and weekends. A mother with identical family responsibilities and educational and employment background who lives in an inner city faces rather different problems. She cannot get to the job without transportation help. Having a job far from home, moreover, makes her childcare arrangements more difficult due to her extended travel time and her corresponding inability to respond quickly to an emergency. Under TANF, local administrators can use their knowledge of the barriers to employment faced by the families they serve to develop programs that can help lower those barriers.

Under AFDC, both the suburban and the inner city family received a cash assistance grant if they were financially eligible. Under TANF, on the other hand, each family’s situation should be assessed to determine how the family could leave welfare. A state’s TANF program should make available whatever resources it has determined to be appropriate for that family. After completing its assessment of the suburban family, the TANF agency might provide a small cash assistance grant during the first few months after the mother begins employment. To help the mother retain her employment, the family

23. See NATHAN & GAIS, supra note 10, at 35-39 (discussing the role of devolution and double devolution under TANF).
24. Id.
25. See Cimini, supra note 6, at 254-55 (describing the entitlement approach to welfare distribution under the AFDC).
27. Id. § 604(a).
might also receive help in finding or paying for childcare. TANF funds might be spent to help recipients or others develop and provide a responsive childcare program. After completing its assessment of the inner city family, the TANF agency might help to provide the family with help to buy, fix, or insure a car rather than authorize a monthly cash assistance grant. Alternatively, the agency might fund a vanpool to supplement the public transportation system. The parent might be referred to specialized childcare providers to help meet her need for childcare for an unusually long day away from home. Or the parent might be helped to move to a location closer to available jobs.28

While devolution and double devolution hold out the promise of individualized service and locally tailored programs, they also involve the risk that similarly situated people will be treated quite differently for no apparent reason other than the location of their home. For example, two mothers who live in different parts of a state cannot attend their mandated work activity because of interference by a violent partner. In one county, the mother’s need for protection from domestic violence is identified and her work activity plan is modified to help her gain a degree of safety for herself and her children.29 In another, different service policies and case management practices make it difficult for her situation to be identified or for her safety needs to be met.30

Perhaps two fathers who live a few miles apart in different counties are offered jobs. Neither can get to the new job without a car, and each has a car in need of repair. One county provides money for car repairs, but the other does not.31 Two children with severe emotional

30. Id.
31. Welfare Assistance Grant (WAG) policies vary from jurisdiction to jurisdiction. For example, the policy for WAGs in Baltimore City is to give the recipient who becomes employed an alternative to on-going Temporary Cash Assistance (TCA) after employment, or to speed up or facilitate the return of an employed applicant to the workforce, or to contribute to the start-up of a self-employment venture. BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES, STANDARD OPERATING PROCEDURES MANUAL: #02-01, WELFARE AVOIDANCE GRANTS (revised) 2 (2002) [hereinafter SOP #02-01]. In Montgomery County, WAGs are used more broadly to cover any employment related expense that could prevent employment or job loss. MONTGOMERY COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES, FY 2002 FIP PLAN (2001) [hereinafter MONTGOMERY COUNTY PLAN]. WAGs are used in St. Mary’s County as work expense reimbursements: recipients are reimbursed for expenses related to obtaining and retaining employment such as uniforms, tools, transportation, or
problems live in different counties. In one, the local welfare agency helps parents locate specialized daycare providers; in the other, parents are given two weeks to find a place for the child. If the parent misses the assigned work activity because no specialized daycare is found, he or she faces a sanction. Some jurisdictions do substantial assessments and tailor work-readiness programs closely to the needs of the family and the local employment opportunities. Other jurisdictions do more casual assessments and require family members to spend time in programs that have little relationship to local economic conditions. Some jurisdictions emphasize immediate sanctions as a way to enforce work requirements and other program requirements, while other jurisdictions emphasize case management practices as the way to help families leave welfare.

Given the racialized history of AFDC and the racially-coded rhetoric surrounding welfare reform, two additional questions must be asked. Do devolution and double devolution pose particular risks for African-American families in poverty to be treated less favorably than other families? And does the fact that double devolution empowers state subdivisions to design different programs create a risk that families living in heavily African-American localities will experience less favorable treatment than families living in localities with more European-American families?

Early studies of TANF demonstrated that states electing the more draconian policies in terms of sanctions and time limits under TANF were frequently the same states that had the highest percentages of...
African Americans among their residents. Similar racialized patterns were found where states could make policy choices under AFDC. Where case-managers had opportunities to use discretion under AFDC, further, race discrimination was not unexpected. Similar issues are being found by researchers investigating opportunities for recipients to take advantage of benefits under TANF. Many African Americans live in inner cities. Residents of inner cities, in general, do not experience the same levels of success in TANF as residents of non-urban areas. Where a state permits local variations in TANF programs, locations where African Americans are concentrated are adopting programs that are more draconian or simply less responsive to the needs of local residents.

Since 1997, I have been doing research into and advocacy around welfare reform in Maryland, a State whose welfare administrators embraced a form of double devolution in 1996. My advocacy colleagues and I were impressed with how different welfare reform appeared in Baltimore City, where the largest percentage of welfare recipients live, as compared with welfare reform in the other twenty-


39. See generally John Foster-Bey, Metropolitan Growth and Economic Opportunity for the Poor: If You’re Poor Does Place Matter? (2001). In urban areas, this may be related to double devolution.

40. See Schram & Soss, supra note 35, at 194 (noting that the harshest TANF rules have been disproportionately applied where African Americans comprise a higher proportion of welfare recipients).


three jurisdictions in the state. In Maryland, substantial power is exercised either by the State or by the counties. There are twenty-three counties and one city, Baltimore, that is treated as a county. In this Article, I refer to the twenty-three counties and Baltimore City as the "jurisdictions." Baltimore City is also one of two jurisdictions in the State with a majority of African-American residents. In this Article, I will describe a few examples of how families experience welfare reform differently depending on which of the twenty-four jurisdictions they live in. Where the data permit, I will show how welfare reform in Baltimore City and the other majority African-American jurisdiction, Prince George's County, vary from the experience of welfare reform in the other twenty-two jurisdictions. I will then examine what legal theories might apply to issues of geographic discrimination raised by double devolution in Maryland.

My legal focus is on state constitutional law theories. My conclusion is that double devolution, at least as practiced in Maryland, may be unconstitutional under the state constitution because it results in residents of the state being treated differently solely on the basis of their residence in the absence of adequate justification except, potentially, in the area of narrowly localized employment-related practices. I come to this conclusion using the state's equal protection clause, which has been held to incorporate a rational basis with bite test. I then address how to reorganize welfare reform in light of the constitutional problems.


46. DHR Fact Pack 2002, supra note 43, at 61. In 2000, the African-American population of Baltimore City totaled 418,951, while the white population totaled only 205,982. Id.

47. Id. In 2000, the African-American population of Prince George's County topped 500,000 while its white population totaled only 216,729. Id.

48. Professor Cheryl Miller and I have spent some time examining in greater depth one of the practices, welfare avoidance grants.


51. See infra notes 221-248 and accompanying text.
I. DOUBLE DEVOLUTION IN ACTION
   A. Background

During the early 1990s, Maryland, like many states, began to investigate how to reform its welfare program. At the time, the federal government was accepting proposals from states to waive program requirements under AFDC so that states could experiment with new ways of delivering assistance to families in poverty. A task force, appointed by the governor to formulate an experimental program for Maryland, submitted two reports during 1993 and 1994, but no bill passed the legislature. When PRWORA was passed in 1996, the opportunity for a waiver ended. All states were required to develop plans for implementing welfare reform in order to become eligible for funding. In anticipation of the passage of PRWORA, the Maryland legislature passed a bill in 1996 reflecting many of the task force's recommendations. The State's Department of Human Resources (DHR) relied heavily on the new bill as the basis for the State Plan, submitted to the federal government in 1996 to qualify the State for TANF funding. One significant feature of the State Plan, however, was brand new: double devolution.

As described in the State Plan, double devolution meant that federal funding “will be allocated to local jurisdictions.” Local jurisdictions, the Plan said, “know best the kinds of resources available to, and services needed by, their customers.” While every jurisdiction

52. See Commission on Welfare Policy, Initial Findings, supra note 6, at 1-5 (noting that the current welfare system, AFDC, was in need of reform because of its failure to reward efforts to seek employment, its discrimination of two-parent families, and its provision of benefits greater than those achievable by the working poor); see also Governor's Commission on Welfare Policy, Making Welfare Work “For the Good of the Whole . . . .,” Final Report of the Governor's Commission on Welfare Policy, at 6-8 (1994) [hereinafter Governor’s Commission on Welfare Policy, Final Report] (noting the same programs as acknowledged in the 1993 commission and recommending a number of programs that would require welfare recipients to enter into job skills training and to actively seek employment—making welfare “a program of temporary assistance, rather than a dependent way of life”).

53. Governor’s Commission on Welfare Policy, Initial Findings, supra note 6, at 4.
54. Governor’s Commission on Welfare Policy, Final Report, supra note 52, at 7. Legislation passed earlier was vetoed by the governor for failure to implement a family cap on assistance and because the legislature did not remove restrictions on Medicaid-funded abortions. Id. at 7.
57. See generally State Plan of 1996, supra note 42.
58. Id. at 1.
59. Id.
60. Id.
would be required to make available all the components of the welfare reform program, "[t]he requirements and procedures may be tailored to fit the unique population of the jurisdiction."^61

The two task force reports never mentioned double devolution.\(^62\) In fact, both anticipated that welfare reform would be administered as AFDC had been administered in recent decades.\(^63\) Double devolution is also not mentioned in the 1996 statute authorizing the creation of the Family Investment Program (FIP), as welfare is called in Maryland.\(^64\) The statute, to the contrary, incorporates an assumption that FIP would be a statewide program.\(^65\) For example, the Secretary of DHR is charged with supervising the administration of the program,\(^66\) and recipients sign an agreement with the Department about mutual responsibilities.\(^67\) Local departments are mentioned, but in the same context that would have applied under AFDC: as administrators of a program whose rules and policies are established by DHR.\(^68\) It was not until 1997 that the legislature authorized the Secretary to grant waivers permitting local departments not to comply with state law or regulations under FIP.\(^69\) Local variability under the waiver section is much narrower than that described in the State Plan; variations are

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61. The components of the welfare reform program include Welfare Avoidance Grants, Child Care and Medical Assistance, Temporary Cash Assistance, and other programs targeted at special problems and populations. See generally id.

62. See generally Governor's Commission on Welfare Policy, Initial Findings, supra note 6; Governor's Commission on Welfare Policy, Final Report, supra note 52.

63. Id. Under AFDC, statewide policies were adopted by the central office of the DHR. Md. Ann. Code art. 88A, §§ 1-2 (1985). In 23 of the 24 local jurisdictions, the benefit program was administered by "local" departments. Id. § 3. Except in one jurisdiction, which has a human resources department under contract to the state, "local" departments are not local in the usual sense of the word. They are instead subdivisions of the State DHR that happen to have boundaries contiguous with the boundaries of the 23 local jurisdictions. Md. Ann. Code art. 88A, § 14A (2003). The only official of a local department whose appointment is subject to influence by the county's government is the director. Id. Each county and the City of Baltimore (treated as equivalent to a county for this purpose) may nominate candidates for the position of director. Id. § (14). The Secretary of DHR makes the appointment and also holds the sole right to dismiss the director. Id. § 1(b).

64. See generally 1996 Md. Laws, ch. 351.

65. Id. § 46 (codified as amended at Md. Ann. Code art. 88A, § 1A (2003)) (enabling the State Department to supervise, direct, and control activities of local departments). Contra, Richard Larson, of the Family Investment Administration, argues that the provision in HB 757 making cash assistance an entitlement gives DHR permission to provide for local authority in everything else. Telephone interview with Richard Larson, Director, Office of Policy, Research & Systems, Family Investment Administration (June 6, 2002).


permitted only upon specific showings about the importance of the waiver.\(^7\) One of the justifications for a waiver, interestingly, is that it will "provide additional flexibility to the local department in administering" FIP.\(^7\) Again, however, the focus is on flexibility in administration, which is quite different from the State Plan, which delegates to the local departments the job of program design.\(^7\) The state is also permitted to fund demonstration projects in several counties.\(^7\) The assumption seems to be that, except where a waiver or a demonstration is involved, the entire state has one design for welfare reform.

Local departments began to submit local plans to the State in late 1996 and early 1997. Plans are to be updated annually.\(^7\) According to the State Plan, plans are subject to review and approval by DHR.\(^7\) Each describes in general terms how the TANF money allocated to the local department will be spent in the coming year.\(^7\) Although some of the plans include information about some local employment conditions, there is no requirement that local employment conditions be described or that the local office identify how the plan is related to local employment conditions.\(^7\) In no instance, it appears, has DHR rejected or required modification of a local plan.

Based on their local plans, as well as on the statute, regulations and statewide policy documents, local departments of social services began to implement TANF in January of 1997. The outcome data indicates that, on a number of measures, the benefits received, and burdens encountered by, applicants and recipients of TANF vary depending on where the applicant or recipient lives.\(^7\)

B. Examples of Variability in TANF Benefits and Burdens

1. Welfare Utilization.—Between 1997 and 2001, economic conditions in Maryland echoed the trend felt throughout the country: growth in jobs accompanied by declines in unemployment.\(^7\)


\(^72\). State Plan of 1996, supra note 42, at 1.

\(^73\). Id. at 7.


\(^75\). State Plan of 1996, supra note 42, at 1.

\(^76\). See, e.g., Montgomery County Plan, supra note 31.


\(^78\). See discussion infra Part I.B.

percentage of families in poverty also fell. But beginning in approximately 2001, employment began to shrink, unemployment rates began to rise, and the percentage of families in poverty began to rise again. Because TANF is, at least in part, an income support program for low and no-income families, caseloads logically should fall during times of economic growth and grow during hard economic times. Nevertheless, the story of welfare utilization in Maryland in the late 1990s and early 2000s is more complex than a predictable counter-cyclical pattern.

The number of families receiving welfare assistance declined by 67% in Maryland during the good economic times of the late 1990s. As shown on Chart 1, the decline was not consistent across the State. Baltimore City’s TANF rolls declined approximately 54% between January 1995 and October 2000. Other jurisdictions experienced declines ranging from 69% to 90%.

The difference between the decline in TANF rolls in Baltimore City and the decline in the rest of the State are most likely explained by the differences in employment opportunities that distinguish Baltimore from most of the rest of the state’s counties. Baltimore experienced an unemployment rate of 8.1% in 2000, one of its better rates in recent years. Compared to the rest of the state, however, the rate


81. In 1999 the average annual unemployment rate in Baltimore was 3.5%; in 2000 the rate was up to 3.8%, and at the end of 2001, had risen just slightly to 4.0% and increased to 4.4% for 2002. DLLR, Maryland Career and Workforce Information, State Statistics, supra note 79.

82. Maryland Department of Human Resources, The Family Investment Administration 2000 Annual Report 20-21 (2000) [hereinafter Family Investment Administration 2000 Annual Report]. In January 1995, 227,887 individuals were receiving benefits under AFDC in Maryland. Id. at 20. In October 2000, the number of individuals receiving cash assistance under TANF was 76,336. Id.

83. See Chart 1 infra (comparing the percentage decline in TANF rolls in Maryland’s counties between January 1995 and October 2000).

84. Baltimore’s experience is similar to that of many urban areas. See Bruce Katz & Katherine Allen, Cities Matter: Shifting the Focus of Welfare Reform, 19 Brookings Rev., Summer 2001, 30, 31 (noting that the decline in welfare roles in “89 urban counties that contain the 100 largest American cities, the aggregate [welfare] caseload fell 41% from 1994 to 1999—more than 10 percentage points short of the 52% drop in the national rate”).

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CHART 1
% DECLINE IN TANF ROLLS, JAN 95 TO OCT 2000

-100% -90% -80% -70% -60% -50% -40% -30% -20% -10% 0

Allegany
Anne Arundel
Baltimore City
Baltimore County
Calvert
Caroline
Carroll
Cecil
Charles
Dorchester
Frederick
Garrett
Harford
Howard
Kent
Montgomery
Prince George's
Queen Anne's
Somerset
St. Mary's
Talbot
Washington
Wicomico
Worcester

was still quite high; the statewide unemployment rate in 2000 was only 3.8%.86 When examining employment opportunities in light of the percentage of the employed population, Baltimore City again does not fare as well as most of the State. Taken as a whole, 59.5% of Maryland’s female residents over the age of sixteen are employed.87 Only 48.8% of Baltimore City’s female residents over the age of sixteen are employed.88

Outside of Baltimore City, the rate of decline in TANF rolls does not consistently mirror either the unemployment rate or the employment rate of the jurisdiction. Charts 2 through 5 compare local TANF roll reductions with local unemployment rates and the rates at which women over the age of sixteen are employed in the six jurisdictions with the highest and lowest TANF roll reductions.

Chart 2 compares the decline in TANF utilization between 1995 and 2000 with the unemployment rates in 2000 in the six jurisdictions that experienced the largest and smallest declines in TANF utilization.89 In the three jurisdictions with the largest declines in TANF utilization (Allegany, Howard, and Washington), the unemployment rate ranged from a low of 2.4% in Howard County to a high of 8.9% in Allegany County. In the three jurisdictions with the smallest declines in TANF utilization, the unemployment rate ranged from a low of 4.2% in Baltimore County to a high of 8.1% in Baltimore City. The jurisdiction with the highest unemployment rate, Allegany County, experienced a 90% decline in TANF utilization, while the jurisdiction with the lowest unemployment rate, Howard County, also experienced a decline of nearly 90% in TANF utilization. The jurisdiction with an unemployment rate closest to Allegany’s, Baltimore City, experienced a TANF utilization decline of only 56%.

86. DLLR MARYLAND CAREER AND WORKFORCE INFORMATION STATE STATISTICS, supra note 79 (noting the following previous Maryland unemployment rates: 1995-5.1%; 1996-4.9%; 1997-5.1%; 1998-4.6%; 1999-3.5%; and 2000-3.8%).
89. See Chart 2 supra. The unemployment rate in 2000 is used as a proxy for the trend in unemployment rates throughout the late 1990s. The same relationship between TANF utilization and unemployment rates would be found if the change in unemployment between 1995 and 2000 were substituted for the unemployment rate in 2000.
Chart 2 demonstrates that TANF utilization and the unemployment rate, at least outside of Baltimore City, are not well correlated. Jurisdictions with high unemployment rates had dissimilar changes in TANF utilization, while jurisdictions with similar rates of change in TANF utilization had dissimilar rates of unemployment.

Chart 3 compares the decline in TANF utilization between 1995 and 2000 with the rates of employment of women age sixteen and over in 1999, as reported in the 2000 census. The Chart provides the data for the six jurisdictions that experienced the largest and smallest declines in TANF utilization.

In the three jurisdictions with the largest declines in TANF utilization (Allegany, Howard, and Washington), the rate of female em-

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90. See Chart 3 supra. The female employment rate in 1999 is used as a proxy for the trend in employment rates throughout the late 1990s.

91. To determine the unemployment rate, a random sample of working-age people are asked if they are unemployed and seeking work. Those who answer yes are counted as unemployed. Those who are not seeking work or who have stopped seeking work are not counted. Employment rates, on the other hand, are based on U.S. Census Bureau surveys asking people if they are employed. Those who answer yes are compared to the set of all people who are of working age. The employment rate, therefore, is a more precise measure of employment than the unemployment rate. Employment surveys are not taken as frequently as unemployment surveys, however, nor is the data commonly made available for jurisdictions as small as counties. Unemployment rates must substitute for employment rates, therefore, when data is required more frequently or for particular geographic areas.
LARGE JURISDICTIONS: COMPARING FEMALE EMPLOYMENT AND TANF CASELOAD REDUCTIONS

Chart 3

Employment varied from 45.3% in Allegany County to 66.8% in Howard County. In the three jurisdictions with the smallest declines in TANF utilization (Garrett, Baltimore County, and Baltimore City), the rate of female employment varied from 48.8% in Baltimore City to 58.5% in Baltimore County. In three jurisdictions (Allegany, Garrett, and Baltimore City), the female employment rate was between 45% and 55%. These jurisdictions have experienced TANF reduction rates of 90%, 72%, and 54%, respectively. In three jurisdictions (Howard, Washington, and Baltimore County), the female employment rate was between 56% and 66%. These jurisdictions have experienced TANF reduction rates of, respectively, 89%, 87%, and 69%.

Chart 3 demonstrates that TANF utilization and the rate of female employment bear little relationship to one another, at least outside of Baltimore City. Jurisdictions with high employment rates had dissimilar rates of change in TANF utilization, while jurisdictions with similar rates of change in TANF utilization had dissimilar rates of female employment.

It is possible that some of the variation is accounted for by the fact that the counties vary considerably in terms of population. When only the five largest jurisdictions are compared, caseload reductions
Chart 4
LARGE JURISDICTIONS: COMPARING FEMALE EMPLOYMENT AND TANF CASELOAD REDUCTIONS

Montgomery County, Anne Arundel County, Prince George's County, Baltimore County, and Baltimore City. Baltimore City had both the lowest rate of female employment, at 48.8%, and the smallest decline in TANF utilization, 54%. The remaining four jurisdictions had female employment rates between 56% and 65%. Their TANF reduction rates ranged from 69% in Baltimore County to 83% in Montgomery County. The jurisdiction with the highest rate of female

92. See Chart 4 supra (comparing female employment and TANF caseload reductions for the five largest Maryland jurisdictions).
employment, Prince George’s County (64.1%), experienced the third greatest decline in TANF utilization, 74%. The jurisdiction with the greatest decline in TANF utilization, Montgomery County (83%), has the third highest rate of female employment, 61.9%.

**Chart 5**

**LARGE JURISDICTIONS, COMPARING TOTAL UNEMPLOYMENT AND TANF CASELOAD REDUCTIONS**

<table>
<thead>
<tr>
<th>Montgomery</th>
<th>Anne Arundel</th>
<th>Prince George’s</th>
<th>Baltimore County</th>
<th>Baltimore City</th>
</tr>
</thead>
<tbody>
<tr>
<td>-83%</td>
<td>-78%</td>
<td>-74%</td>
<td>-69%</td>
<td>-64%</td>
</tr>
</tbody>
</table>

Chart 5 compares the decline in TANF utilization between 1995 and 2000 with the unemployment rates in 2000 in the five largest jurisdictions. Once again, Baltimore City has the highest unemployment rate and the smallest decline in TANF utilization. The two jurisdictions with the lowest unemployment rates, Montgomery and Anne Arundel, also experienced the greatest decline in TANF utilization. The remaining two jurisdictions, Baltimore County and Prince George’s County, produce opposite results. The jurisdiction with the higher unemployment rate, Prince George’s (5.9%), had the larger decline in TANF utilization (74%). The jurisdiction with the lower unemployment rate, Baltimore County (4.2%), had a smaller decline in TANF utilization (69%).

Overall, Charts 4 and 5 demonstrate that, at least in the largest jurisdictions, TANF utilization is more closely tied to rates of female employment than it is to rates of unemployment. Where female employment is strong, TANF utilization usually declines to a greater de-
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In both the larger and the smaller jurisdictions, unemployment rates are not well correlated with TANF utilization.

Another way of examining TANF utilization is to identify what percentage of putatively eligible families receive the benefit. One category of families contains the highest percentage of families likely to qualify for TANF: single-parent families with incomes below the poverty line. The distribution of such families varies widely across Maryland, as shown in Chart 6.

Chart 6 contains the data collected in the 2000 census regarding the percentage of female-headed households with minor children living in poverty. Only 3.2% of the families in the State fell into that category by the end of the economic expansion of the 1990s. In eight counties, fewer than 2% of families met that description. In six counties, however, more than 4% of families met the description, with the largest percentage concentrated in Baltimore City, where they constituted 11.6% of all families.

Families are eligible for cash assistance under TANF only if minor children live in the household, and if the household has income amounting to approximately 50% of the poverty line or less. Most eligible families are headed by women living without a partner. The census category of female-headed households with children living in poverty, therefore, is likely to include most of the families eligible for cash assistance under TANF. For the purpose of this analysis, these families will be termed “putatively eligible.”


95. See Chart 6 supra.

96. MD. REGS. CODE tit. 7, § .03.03.11 (2004).

97. U.S. DEP’T OF HEALTH & HUMAN SERVICES, supra note 94. The majority of AFDC recipients were single women parents. Id.

98. The remaining TANF-eligible households consist of children who are not living with a parent or other impoverished relative; instead they are living with a non-parent relative who is herself or himself not poor enough to qualify for benefits. These “child-only” households constituted 35.13% of the caseload in 2000 (E-mail from Mark Mills-paugh, Chief, Bureau of Information Analysis and Reporting, Family Investment Administration, to Heather Dorsey, Research Assistant, Thurgood Marshall Law Library (Nov. 13, 2003, 11:16 EST)) (on file with author).
Chart 7 compares, statewide and by jurisdiction, the number of households receiving cash assistance under TANF in 2000 with the number of putatively eligible households in the jurisdiction as reported in the 2000 census. The comparison yields a recipiency rate, that is, the percentage of putatively eligible households that receive cash assistance under TANF.

As of October 2000, the jurisdiction with the highest recipiency rate is Baltimore City, with 113%. Prince George's County had a recipiency rate of 60%. Two jurisdictions, Baltimore and Charles Counties, had recipiency rates between 50% and 59%. Three jurisdictions, Garrett, Harford, and Dorchester Counties, had recipiency rates between 40% and 49%. Eight jurisdictions had recipiency rates between 30% and 39%. The remaining eight jurisdictions had recipiency rates below 30%.

Of the five largest counties, recipiency rates ranged from a high of 113% in Baltimore City to a low of 27% in Montgomery County. The remaining three are Prince George's County at 60%, Baltimore County at 53%, and Anne Arundel County at 38%. Baltimore City also has the lowest female employment rate, at 48.8%. The remaining four large jurisdictions had rather similar female employment rates, ranging from 58.5% in Baltimore County to 64.1% in Prince George's County.

It seems fair to conclude from Chart 7 that, until approximately the end of 2000, Baltimore City was delivering cash assistance under TANF to the largest percentage of eligible families. The remaining jurisdictions were delivering benefits to fewer putatively eligible families. The differences among the larger jurisdictions are not explained by differences in female employment because the recipiency rates in those jurisdictions vary substantially more than their female employment rates vary.

A major change appears to have occurred after October 2000. During 2002, a bad economic year by everyone's account, the statewide tally of TANF cases remained constant. Broken down by juris-

99. See Chart 7 supra.
100. Id. The recipiency rate can exceed 100 because the TANF households include, as explained above, both families that receive cash assistance and child-only households. Only the households with a single-mother are included in the set of putatively eligible households for this analysis.
101. Compare Chart 3, supra, and accompanying text, with Chart 7, supra, and accompanying text.
diction, however, the story was quite different, with the rolls rising in sixteen jurisdictions and falling in eight. Curiously, some of the jurisdictions where the rolls fell were jurisdictions with poor economic conditions, such as Baltimore City and Garrett County.

By the end of 2002, the largest decline in recipiency by putatively eligible families had occurred in Baltimore City. Even though the percentage of putatively eligible families receiving TANF was still higher there than elsewhere in the State, the recipiency rate fell by more than 17%. During the same period, the recipiency rate rose in ten Maryland jurisdictions by more than 10%.

The decline in TANF utilization in Baltimore City could be explained if employment opportunities in Baltimore City were better than in the rest of the State during 2001 and 2002. Unfortunately, the opposite held true. The unemployment rate for the State rose from 3.6% in December 2000, to 4.4% in December 2002. In the same period, the rate rose in Baltimore City from 7.2% to 7.4%. While the state gained a total of 58,211 jobs, Baltimore City lost 926 jobs.

Another possible explanation is that the poverty rate in Baltimore City declined to the point that fewer families were in need by the end of 2002. Unfortunately, there is no indication that the poverty rate in Baltimore City, one of the highest in the state during the 1990s, changed significantly between the end of 1999 and 2002.

The decline in TANF utilization could also be explained if, despite the growth in unemployment generally, adults in TANF-eligible families were nonetheless finding employment. The employment

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103. See id. at Appendix.
104. Id.
105. Id.
106. Id.
107. DLLR MARYLAND CAREER AND WORKFORCE INFORMATION STATE STATISTICS, supra note 79.
108. DLLR MARYLAND CAREER AND WORKFORCE INFORMATION CITY STATISTICS, supra note 85.
109. DLLR MARYLAND CAREER AND WORKFORCE INFORMATION STATE STATISTICS, supra note 79.
110. Id.
111. Compare U.S. Census Bureau, Ranking Tables 2000: Percent of People Below Poverty Level, Population for When Poverty Status is Determined (County Level), available at http://www.census.gov/acs/www/Products/Ranking/C2SS/ROITO50.htm (noting that 22.1% of Baltimore residents lived below the poverty level), with U.S. Census Bureau, Ranking Tables 2002: Percent of People Below Poverty Level, Population for When Poverty Status is Determined (County Level), available at http://www.census.gov/acs/www/Products/Ranking/2002/ROITO50.htm (stating that, in 2002, 20.6% of Baltimore residents lived below the poverty level).
does not need to be substantial: an adult with two children who earns approximately $650 a month makes too much money to qualify for cash assistance under TANF in Maryland. A mother with two children earns too much to qualify for cash assistance if she works twenty-four hours a week at minimum wage.

Whether unusually large numbers of Baltimore City’s TANF-eligible families were finding work during 2002 had not been reported by the state when this Article was written. There is indirect evidence, however, that nothing of the kind was taking place. Since TANF-eligible families, by definition, have minor children, one would expect to see an increase in the use of subsidized childcare if more adults in TANF-eligible families were finding work. In Baltimore City, however, 1103 fewer families received childcare subsidies in 2000 than in 1995.

Another possible explanation for the counter-cyclical decline in TANF utilization during 2002 is that many TANF-eligible families decided that they would stop trying to comply with the work requirements and other mandates of the cash assistance program. Instead, families may have decided to try to “make do” on a combination of family help and whatever work they could find, supplemented by food stamps and Medicaid. If that strategy appealed to many families, one would expect to find an increase in the food stamp rolls among non-

112. Md. Regs. Code tit. 7, §§ 03.03.11, .13, .17 (2004) (stating that the monthly allowable amount to be paid for three individuals in the assistance units is $472 and that 50% of the poverty level is $610).

113. Id. A mother working at the current Federal-Maryland minimum wage of $5.15/hour, 24 hours/week, makes $494.40/month, putting her over the $472 monthly allowable amount to be paid.


115. Family Investment Administration Annual Report 2000, supra note 82, at 21. It is possible that this could be a result of the decrease in the City’s population, which declined 11.5% from 1990 to 2000. DHR Fact Pack 2002, supra note 43, at 61. This decline may or may not have taken place in the population eligible for child care subsidies. A decline in the eligible population seems unlikely, however, as the number of middle-income and upper-middle-income households (those earning between $34,000 and $81,000 a year) declined by 17,000 in Baltimore during the 1990s, and median household income in Baltimore declined over the decade by 7% (now ranking 87th lowest among the top 100 cities). The Brookings Institution, Living Cities: Baltimore in Focus: A Profile from Census 2000 (2003), available at http://www.brookings.edu/es/urban/livingcities/baltimore.htm (last visited Feb. 20, 2004). Baltimore County, alone among the remaining 23 jurisdictions, joined Baltimore City in having fewer families receive a childcare subsidy in 2000 than in 1995. DHR Fact Pack 2002, supra note 43, at 21. The other majority African-American county, Prince George’s, showed an increase of only 70%. Id. That sounds high except that the median change in utilization was an increase of 100%; of the counties at or above the median, none has an African-American population of more than 41%. Id.
welfare families at the same time that there is a decrease in the TANF rolls. During 2002, however, the jurisdictions with the largest TANF rolls in 2000 did not consistently experience the opposite movement in their food stamp rolls.\footnote{See Chart 8 \textit{infra} (comparing changes in households receiving temporary cash assistance with households receiving only food stamps).}

\begin{center}
\textbf{CHART 8}
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\textbf{CHANGES IN TCA AND FS-NPA UTILIZATION, 2002}
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\begin{figure}
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\includegraphics[width=\textwidth]{chart8.png}
\caption{Changes in TCA and FS-NPA Utilization, 2002}
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Chart 8 compares the change, over the course of 2002, in the number of households receiving cash assistance under TANF and the number of households receiving only food stamps.\footnote{See Chart 8 \textit{supra}.} The chart provides data for the ten jurisdictions with the largest populations in order of the decline each jurisdiction experienced in the utilization of cash assistance under TANF. The degree of change is a figure arrived at by comparing the number of households receiving each of the benefits in January 2002 with the number receiving the same benefit in December 2002, according to statistics published by the State Department of Human Resources.\footnote{See FIA December Report 2002, \textit{supra} note 102, at Appendix.}

As shown in Chart 8, three jurisdictions experienced a decline in cash assistance cases: Baltimore County, Baltimore City, and Montgomery County. The rate of decline ranges from 8% in Baltimore
County to 4% in Montgomery County. The remaining seven counties experienced an increase in cash assistance cases. The rate of increase ranges from 13% in Prince George’s County to 23% in Cecil County. Five counties experienced a decline in food stamp cases: Baltimore City, Frederick County, Wicomico County, Charles County, and Cecil County. In Baltimore City, 8% fewer people received food stamps at the end of 2002 than at the beginning. In the remaining four counties, between 13% and 15% fewer people received food stamps at the end of the year than at the beginning. Of the five counties that experienced an increase in food stamp cases, Frederick and Baltimore County had increases of 15% and 16%, respectively. Anne Arundel County’s rolls increased by 19%, while Montgomery and Prince George’s Counties experienced increases of, respectively, 25% and 30%.

A decline in TANF utilization is mirrored by an increase in food stamp utilization in only two jurisdictions, Baltimore County and Montgomery County. In Baltimore City, both TANF and food stamp utilization declined. In the remaining seven jurisdictions, usage of both TANF and food stamps increased, but there is no consistent pattern in the degree of increase in one to the other.

To sum up, since January 1997, when welfare reform began in Maryland, residents of different jurisdictions have had different experiences in accessing cash assistance under TANF. Until 2000, residents of Baltimore City were most likely to receive cash assistance under TANF. Since 2000, the recipiency rate in Baltimore City declined without offsetting increases in food stamp utilization. Residents of the four counties with the largest populations have widely varying degrees of utilization of cash assistance. Some of the variation, at least in the largest jurisdictions, may be related to differences in female employment rates. Unemployment rates do not appear to be related to the variability.

2. Welfare Avoidance Grant (WAG).—Maryland’s FIP statute requires that every applicant and recipient must be assessed to deter-
mine his or her reasons for needing assistance, employability, and personal and family resources.\textsuperscript{125} In appropriate cases, an applicant or recipient should be awarded a welfare avoidance grant (WAG) rather than monthly cash assistance.\textsuperscript{126} The grant is an amount equivalent to between three and twelve months of assistance, and it is designed to "[m]eet immediate needs so that an applicant or recipient can avoid welfare assistance."\textsuperscript{127} For example, if a person has a job offer but cannot get to the job because her car needs to be repaired, a WAG could be awarded for the repair costs and the applicant or recipient would be able to avoid further welfare assistance.\textsuperscript{128} Another applicant or recipient might need money for a uniform required by an employer, or she might need money for books to finish a course that will lead immediately to employment.\textsuperscript{129}

According to the State Plan, every component of FIP is available in every jurisdiction, although the local department can "tailor" the requirements and procedures.\textsuperscript{130} Whether WAGs are available in every jurisdiction, however, is highly questionable, as Chart 9 demonstrates about WAGs awarded in 2000.\textsuperscript{131}

The darker columns in Chart 9 indicate the percentage of TANF recipients living in each jurisdiction in 2000. The lighter columns indicate the percentage of WAGs awarded in that jurisdiction. The percentage of all WAGs awarded during FY 2000 in the various jurisdictions varies, from a high of nearly 20\% in St. Mary's County to a low of .22\% in Dorchester County.

More telling, in terms of geographic differences, is the comparison between the percentage of WAGs awarded in a particular jurisdiction with the percentage of TANF recipients residing in that jurisdiction. That comparison indicates the likelihood that any individual will be awarded a WAG. The likelihood varies from approximately one out of two in the counties that frequently award WAGs to zero in three jurisdictions: Baltimore City, Prince George's County, and Dorchester County.

\begin{itemize}
\item \textsuperscript{126} Id. § 49(a)(2).
\item \textsuperscript{127} Id. § 49(a)(2)(i).
\item \textsuperscript{128} FAMILY INVESTMENT PROGRAM LEGAL CLINIC STATUS REPORT, supra note 41, at 19.
\item \textsuperscript{129} SOP #02-01, supra note 31, at 3-4.
\item \textsuperscript{130} STATE OF MARYLAND, DEPARTMENT OF HUMAN RESOURCES, FAMILY INVESTMENT ADMINISTRATION, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) STATE PLAN 1 (Oct. 1, 2002), available at http://www.dhr.state.md.us/fia/doc/tanfplan.pdf [hereinafter TANF STATE PLAN].
\item \textsuperscript{131} See Chart 9 infra (graphing WAG utilization by county for 2000).
\end{itemize}
Given the wide variability and the claim that double devolution allows for tailoring "to fit the unique population of the jurisdiction," one question is whether some important difference among the jurisdictions explains the differences in WAG awards. The most important difference, given that welfare reform is about moving people from welfare to work, should involve employment conditions. Because a principal purpose of a WAG is to assist an applicant or recipient to become employed, it would appear that jurisdictions with high unemployment should put little emphasis on awarding WAGs. Because few applicants and recipients would be likely to get a job in a place of high unemployment, few would need a WAG to cover an expense that opens the door to a job. The opposite should hold true where unemployment is low. In FY 2000, however, logic held only at the extremes, as Chart 10 demonstrates.

Chart 10 compares the unemployment rates in 2000 with the rate at which recipients are awarded a WAG in the six jurisdictions that have the highest and lowest WAG award rates. The two jurisdictions

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132. TANF STATE PLAN, supra note 130, at 1.
133. Id. at i.
134. See Chart 10 infra.
with the highest and lowest unemployment rates, Carroll County and Baltimore City, also have the highest and lowest rates of awarding WAGs. In the two jurisdictions where few WAGs were awarded, the unemployment rate was 5.8% and 5.9%. One of the two remaining high-award jurisdictions experienced an unemployment rate of only 4.5%, while the other one experienced a high unemployment rate of 6.8%.

In sum, and assuming that the unemployment rate is related to the existence of job opportunities, WAGs are awarded or not awarded in at least four jurisdictions without much of a relationship to the likelihood of employment. In only two jurisdictions, the ones with the most extreme unemployment and WAG statistics, did unemployment and the availability of a WAG appear to show a relationship. An assessment by local departments about the employment prospects of their applicants and recipients does not, therefore, appear to explain the variability in WAG award practices.
Another possible explanation for variation in WAG awards from one jurisdiction to another is that some jurisdictions may use WAGs as a common alternative to the approval of a monthly cash assistance grant. In these jurisdictions, one would expect to see caseworkers operating in much the same way that the welfare statute appears to require. He or she would do an assessment of what keeps an applicant from finding or keeping employment. If the problem is one that could be solved by an infusion of some cash, then the applicant should be offered a WAG rather than automatically approved for cash assistance. Many recipients of cash assistance receive a grant for a relatively brief period of time, so it may be the case that many can avoid using cash assistance altogether if an appropriate assessment is made at the time of application. Others cannot become immediately employed or avoid imminent unemployment, even with an infusion of cash, and an appropriate assessment should identify their need for cash assistance. In jurisdictions undertaking accurate assessments, there should be a balance of some kind between cases in which temporary cash assistance (TCA) is approved and cases in which WAGs are awarded. In the jurisdictions where a less substantive and accurate assessment is performed, one would expect to see a greater imbalance between cases in which TCA is awarded and those in which WAGs are awarded.

A comparison of TCA approval rates and WAG awards in fact shows that some jurisdictions appear to assess applicants simultaneously for WAGs and for monthly grants, while others appear to ignore the possibility of awarding a WAG altogether. During 2002, the twelve jurisdictions with the highest TCA application approval rates were also among the group of jurisdictions which provided applicants and recipients with a zero percent chance of receiving a WAG during 2000. All of the jurisdictions in which applicants and recipients stood any chance of being awarded a WAG during 2000 were among

135. See TANF State Plan, supra note 130, at 1 (noting that a WAG is based on an agreement between the recipient and the local jurisdiction according to criteria determined by the local department).
138. Compare Chart 9 with Chart 8 supra.
the twelve jurisdictions with the lowest TCA application approval rates during 2002.\textsuperscript{140}

Given the racialized histories of AFDC and TANF,\textsuperscript{141} it is also useful to see whether WAG awards correlate with the race of residents of the counties in which people have the greatest and least opportunities to be awarded a WAG. As Chart 11 shows, the correlation between the racial composition of the county and the likelihood of getting a WAG is much closer than the correlation between unemployment rates and WAG awards.\textsuperscript{142}

**Chart 11**

**WAGS AND AFRICAN-AMERICAN RESIDENTS**

![Chart 11](image)


Chart 11 compares the percentage of African-American residents in the jurisdiction with the rate at which WAGs are awarded to residents of the jurisdiction. Data is provided as to the six counties with the highest and lowest WAG award rates. Baltimore City, Prince George’s County, and Dorchester County, the three jurisdictions with the lowest WAG award rates, have higher percentages of African-American residents than the three jurisdictions (Carroll, St. Mary’s,

\textsuperscript{140} Id.

\textsuperscript{141} Naomi R. Cahn, Representing Race Outside of Explicitly Racialized Contexts, 95 Mich. L. Rev. 965, 965-70 (1997) (arguing that race plays a role in numerous aspects of welfare programs, specifically in AFDC and TANF).

\textsuperscript{142} Compare Chart 11 infra (comparing the percentage of African-American residents with the likelihood of receiving a WAG), with Chart 10 supra.
and Worcester Counties) with the highest WAG award rates. Baltimore City and Prince George’s County are the only two majority African-American jurisdictions in the State. At 28% African-American residents, Dorchester County has the fourth-highest percentage of African-American residents in the State. The three jurisdictions with the highest WAG award rates, Carroll, St. Mary’s, and Worcester Counties, have between 2% and 17% African-American residents.

As startling as it may be, the correlation of WAG award rates and African-American residents is close to perfect: the greater the percentage of African-American residents the jurisdiction has, the less likely it is that a WAG will be awarded. In fact, of the four jurisdictions with the highest African-American populations, three are in the group that award so few WAGs that the likelihood of getting one is zero. This pattern harkens back to AFDC conduct, where states and localities with the highest African-American populations usually also had the least generous and most restrictive AFDC programs.143

3. Domestic Violence.—WAGs are only one component among many in FIP. Another feature of FIP is that applicants and recipients who are subject to domestic violence may be excused from certain program requirements if that is necessary in order for them to leave the situation in which the abuse occurs.144

The connections between domestic violence and family poverty are profound. Studies of welfare recipients indicate that more than a third experienced domestic violence within the last year.145 TANF requirements about seeking independence through work and collecting child support may increase the dangerousness of present and former partners.146 In light of these concerns, Maryland elected an option under TANF to provide special treatment for recipients subject to or threatened with domestic violence.147

143. Schram & Soss, supra note 35, at 194; see also Cahn, supra note 141, at 974-75 (discussing state morality requirements and their disproportionate impact on African Americans and noting the institution of a federal cooperation requirement given the large number of poor African-American women denied AFDC benefits).


It is not easy for a social services bureaucracy to identify or to provide services to women who are subject to domestic violence. There is often a history of distrust between social services caseworkers and people in the community served by the programs. Domestic violence is an area about which many victims experience a sense of shame. At a practical level, parents are concerned that social service workers might initiate a child abuse or neglect proceeding in response to a report of domestic violence. Further, the services that are offered may not respond to a particular family's situation. These among other factors tend to depress the numbers of TANF cases in which domestic violence is identified. In Maryland, only 5.12% of recipients have disclosed a history of domestic violence to the agency. Of those, only 0.31% received an exemption from a program requirement.

Although there is no reason to believe that any one jurisdiction would have a higher incidence of domestic violence than any other jurisdiction, the rate of identifications is not consistent across the State, as Chart 12 shows.

Chart 12 compares the percentage of cash assistance recipients in the jurisdiction who have been identified in administrative records as experiencing family violence with the percentage of cash assistance recipients in the State who reside in that jurisdiction. Data is provided for the twelve jurisdictions with the largest number of TANF recipients. The rate of identification ranges from 7.79% in Dorchester County to 0.1% in Baltimore City. Three jurisdictions identified between 5% and 7% of recipients. Five jurisdictions identified between 2% and 4.9% of recipients. The three remaining jurisdictions identified fewer than 2% of recipients. The percentage of identified residents is highest in those jurisdictions in which 3% or fewer of the State's cash assistance recipients reside. The percentage of identified

148. Hetling-Wernyj & Born, supra note 145, at 33 (noting that domestic violence represents a significant barrier to many on welfare, but that only very few women are actually identified as domestic violence victims).
149. See Czapanskiy, supra note 29, at 461-62 (noting the inherent conflict caseworkers deal with in trying to keep some people off welfare, yet at the same time identifying and helping others who need welfare assistance).
151. Czapanskiy, supra note 29, at 455.
152. Id. at 460-61.
153. See Hetling-Wernyj & Born, supra note 145, at 10 (the 5.12% includes victims not administratively marked, but whose representations indicate domestic violence).
154. Id.
155. See Chart 12 infra (outlining FVO identifications by jurisdiction).
The likelihood of being identified as a TANF recipient subject to domestic violence is not high in any jurisdiction. In Baltimore City, Prince George's County, and Baltimore County, however, the likelihood approaches zero. The size of the caseload in the jurisdiction appears to matter: two of the jurisdictions with the worst records are also the jurisdictions with the largest caseloads. This points to the possibility that assessment practices in those two jurisdictions may be problematic.

Another troubling issue concerning family violence identification is the correlation between the likelihood of identification and the racial composition of the population of the jurisdiction. Chart 13 compares the likelihood that a person is identified as needing family violence option services with the percentage of African-American residents in the jurisdictions. The likelihood of being identified exceeded .01 in every jurisdiction where African Americans are in the minority, except for Baltimore County. Residents of the two jurisdictions with majority African-American populations had the lowest chances of being identified as needing family violence option services.

156. See Chart 13 infra.
4. Post-Welfare Employment.—Another way to compare Maryland’s jurisdictions is to compare some of the characteristics of former recipients. For example, if recipients in a particular jurisdiction leave welfare, get employed and stay employed, the jurisdiction is likely to be counted as a success.

The State does not publish full data about post-welfare employment broken down by jurisdiction. Limited data has been published concerning post-welfare employment in Baltimore City and Prince George’s County. The data on the other twenty-two jurisdictions is not broken down by jurisdiction. The data overstates employment


158. Id. at 41.
in Baltimore City and Baltimore County. Nonetheless, the data helps identify some trends.

In 1997, the first full year of welfare reform, 57% of Baltimore City's existing welfare recipients had jobs during the first quarter after exit, a higher percentage than in Prince George's County (40%) or the average of the other twenty-two jurisdictions (54%).

The employment success of Baltimore City's recipients in the first year was predictable to some degree because Baltimore City's rolls included the highest percentage of recipients with a pre-exit history of employment: 72% for Baltimore City, compared with 56% for Prince George's County and 66% in the rest of the State. Given that people with an employment history are usually more employable than those without an employment history, it is likely that the employment successes in Baltimore City in 1997 should be attributed to the characteristics and efforts of the recipients and the state of the economy, rather than to the welfare program.

The success of the first year has not been replicated. In 1998, 51% of welfare leavers from Baltimore City were employed in the first quarter after leaving welfare, compared with 37% of leavers from Prince George's County, and 52% of those from the other jurisdictions. In 1999, Baltimore City's employment rate was down to 46%, while Prince George's rate rose to 34% and the rest of the jurisdictions averaged 49%.

159. Employment data reported by the state are compiled based on employer reports to the state's unemployment insurance database (Maryland Automated Benefits System, or MABS). Pamela Caudill Owigho et al., Life After Welfare: Seventh Report 8-9 (Family Welfare Research and Training Group, Life After Welfare Series (2002)), available at http://www.familywelfare.umd.edu/reports/life7.pdf (last visited Feb. 26, 2004) [hereinafter Life After Welfare: Seventh Report]. While this is a standard practice among welfare researchers, it has particular implications for Maryland. MABS data does not include employment obtained in states outside of Maryland or with the federal government. Id. Because Baltimore City is located relatively far from the State's borders and places where federal jobs are numerous, residents of Baltimore City are less likely to be employed in a type of employment not reported to MABS than residents of much of the rest of the State. Thus, employment statistics relying on MABS are likely to over-represent employment in Baltimore City. One study found, for example, that "1% or less of Baltimore City exiters work out-of-state in any given quarter. In contrast, 4.8% (quarter of exit) to 10.5% (sixteenth quarter after exit) of exiters from Maryland's 23 counties are employed in a border state or the District of Columbia." Id. at A-70. Of the five largest jurisdictions in the State, Baltimore City and Baltimore County have the fewest residents employed out of state (1.9% and 2%, respectively). Id. at 10. Montgomery County and Prince George's County have the most, with 32.1% and 44.9%, respectively. Id.


161. Id.

162. Id.

163. Id.
Prince George's County's post-exit families were employed in the first quarter after exit, compared to 53% in the rest of the State.\textsuperscript{164}

Baltimore City's relatively high post-welfare unemployment is noteworthy for two reasons. First, the employment of its residents is likely to be over-reported relative to three of the other large jurisdictions in the State, so the difference is greater than it appears.\textsuperscript{165} Second, the percentage of exiting recipients with a prior employment history is nearly as high in Baltimore City as it is in the rest of the State (71\% compared with 73\%, respectively, in 2000),\textsuperscript{166} and prior employment usually is a predictor of good employment prospects for former welfare recipients.\textsuperscript{167} Apparently, the predictor works differently in Baltimore City than in the rest of the State; the question is why.

Further, getting off of welfare and staying off are not the same. As one researcher in Maryland has said, "[o]ur data are consistent with other research documenting a high level of work experience or effort among welfare recipients . . . . Together these findings strongly suggest that welfare recipients do not have the greatest difficulty getting a job; rather, job retention and advancement are the keys to self-sufficiency."\textsuperscript{168} On this measure, Baltimore City's experience is rather worse than that of the rest of the State.\textsuperscript{169} Despite the higher employment rates of exiting recipients in Baltimore City initially, former recipients returned to the rolls at higher rates in Baltimore City than elsewhere in the State.\textsuperscript{170} By the time welfare reform had been in place for thirty-six months, 43\% of exiting families from Baltimore City had returned to the rolls, compared to 39\% elsewhere in the State.\textsuperscript{171} People from Baltimore City who left welfare in the second year had an even higher rate of returning to the rolls: 54\% after two years, compared to 48\% in the rest of the State.\textsuperscript{172} By the end of the fourth year of welfare reform, 41\% of the Baltimore City exiting fami-

\begin{thebibliography}{99}
\bibitem{165} See \textit{LIFE AFTER WELFARE: SEVENTH REPORT}, supra note 159, at 10 (noting the high percentage of Cecil, Montgomery, and Prince George's County residents who work outside of the state).
\bibitem{166} \textit{LIFE AFTER WELFARE: SIXTH REPORT}, supra note 164, at 39.
\bibitem{167} \textit{Id.} at 33.
\bibitem{168} \textit{Id.} at 28.
\bibitem{169} \textit{Id.} at 52, 54.
\bibitem{170} See \textit{id.} at 54 (noting that after one year "Baltimore City residents returned to cash assistance at a higher rate than their peers in other jurisdictions").
\bibitem{171} \textit{LIFE AFTER WELFARE: FIFTH REPORT}, supra note 157, at 57.
\bibitem{172} \textit{Id.}
\end{thebibliography}
lies had returned to welfare, while only 29% had done so elsewhere in the State. Like WAGs and family violence identification, the short duration of employment achieved by welfare leavers in Baltimore City may indicate that applicants and recipients are not given careful assessments. Good assessments, based on accurate knowledge about the applicant and available employment, could be helpful in creating a more durable match of employer and employee. Alternatively, a good assessment might help the caseworker to identify a job preparation program or training opportunity that would help the recipient achieve more durable employment.\(^{174}\)

5. Summation.—How a family in Maryland experiences welfare reform probably depends on where the family lives and when the family was in need of help. If the family sought help in Baltimore City before October 2000, the family was more likely to be awarded cash assistance than was true elsewhere in the State. \(^{175}\) There was, at the same time, little likelihood that the family would receive the kind of assessment that would lead to an offer of a welfare avoidance grant, family violence option services, or a job that the parent could keep over the long haul. \(^{176}\) After October 2000, the likelihood that the family would be awarded cash assistance declined somewhat in Baltimore City, while it rose in most of the other jurisdictions. \(^{177}\) Unlike the other two jurisdictions experiencing a continuing decline in the cash assistance rolls, Baltimore City had no complementary increase in food stamps utilization. \(^{178}\)

All twenty-four jurisdictions in the State reduced the number of people relying on cash assistance under TANF between 1995 and 2000. \(^{179}\) Among the largest five jurisdictions, the decline in the cash assistance rolls correlates with rates of female employment and general unemployment in the jurisdiction. \(^{180}\) Jurisdictions with the highest rates of female employment and the lowest rates of unemployment

\(^{173}\) Life After Welfare: Sixth Report, supra note 164, at 52.
\(^{175}\) See Chart 9 supra.
\(^{176}\) See Chart 10 supra (likelihood of WAG award) and Chart 13 (likelihood of FVO identification).
\(^{177}\) See supra notes 102-110 and accompanying text.
\(^{178}\) See Chart 8 supra.
\(^{179}\) See Chart 1 supra.
\(^{180}\) See Chart 2 and Chart 3 supra.
experienced the highest rates of decline in the cash assistance rolls.\textsuperscript{181} Baltimore City, with the lowest rate of female employment and the highest rate of unemployment, experienced the smallest rate of decline in the cash assistance rolls.\textsuperscript{182}

Welfare reform in Maryland promises individual assessments of each family leading to individually tailored plans to help the family leave welfare.\textsuperscript{183} Two components of the program are welfare avoidance grants and family violence option services.\textsuperscript{184} Jurisdictions where WAGs are awarded frequently are also the jurisdictions with some of the lowest approval rates for the alternative of a monthly cash assistance award.\textsuperscript{185} This pattern may mean that assessments in those jurisdictions are done with an awareness of the multiple paths that a family may take to leave welfare. If that is the case, families in those jurisdictions may have a better chance than families in some other jurisdictions of getting help that is responsive to their needs as they make the transition into relying on employment for a larger share of family income.

At the same time, it is important to be aware that awards of WAGs as well as identifications of families for family violence option services correlate with the racial composition of the jurisdiction.\textsuperscript{186} Jurisdictions with the lowest WAG award and FVO identification rates are the same jurisdictions in which a majority of residents are African Americans.\textsuperscript{187} Differential access to program benefits depending on the racial composition of the jurisdiction is a phenomenon with a troubling AFDC history that may be getting replicated under TANF.\textsuperscript{188} Further, poor assessment practices may be most harmful to people who may experience race-based discrimination in employment.

Finally, there is the issue of post-welfare employment. Although Baltimore City appears to have a good post-welfare employment rate, it is overstated because of the way in which the statistics are generated.\textsuperscript{189} When compared with the percentage of the adults on the rolls who had a pre-welfare employment history, the employment rate

\textsuperscript{181} See Chart 4 \textit{supra}.
\textsuperscript{182} Id.
\textsuperscript{183} TANF State Plan, \textit{supra} note 130, at 1.
\textsuperscript{184} See id. (outlining welfare avoidance grants); Czapanskiy, \textit{supra} note 29, at 447 (outlining the family violence option).
\textsuperscript{185} See Chart 9 and Chart 10 \textit{supra}.
\textsuperscript{186} See Chart 11 \textit{supra} and Chart 13 \textit{supra}.
\textsuperscript{187} See Chart 11 \textit{supra} and Chart 13 \textit{supra}.
\textsuperscript{188} Schram & Soss, \textit{supra} note 35, at 194.
\textsuperscript{189} See \textit{supra} note 159 (discussing the method of calculating the employment data).
is less impressive. Further, Baltimore City residents have a harder
time remaining employed and staying off welfare than residents of
other jurisdictions.

The differences that families experience do not arise from a sin-
gle source. Where local administrators are faced with small caseloads,
they may do a better job of assessing the needs of each family and
providing better assistance to the heads of those families to find a way
to become and stay employed or find other supportive resources such
as Supplemental Security Income, food stamps, or child care vouch-
ers. Where the locality has an abundance of jobs for women with chil-
dren and adequate childcare facilities, families face less need for cash
assistance and can be diverted more readily into employment. On the
other hand, a location such as Baltimore City has a large caseload and
poor employment prospects for women with children. Local adminis-
trators in such a situation face quite different challenges. And the
distressing reality must be faced that families living in majority Afri-
can-American jurisdictions are likely to have less access to welfare
avoidance grants and to services for family violence.

Double devolution provides the opportunities for local adminis-
trators to treat families differently solely on the basis of where they
live. Maryland's administrative decision to delegate program de-
sign decisions to local departments has enabled administrators in
twenty-four separate offices to decide whether to emphasize or de-
emphasize various aspects of the benefits and services. The pur-
pose of double devolution was to make it possible for locally based
administrators to use their knowledge of local resources and needs to
design a program "tailored to fit the unique population of the juris-
diction." Local administrators, however, are not required to show
how their plans achieve that goal. Even if they were, it is difficult to
determine how local conditions vary so much that, in some jurisdic-
tions, it is close to impossible for a victim of domestic violence to be
identified.

190. Life After Welfare: Seventh Report, supra note 159, at 54.
191. See supra notes 162-164 and accompanying text (discussing Baltimore City's high
unemployment rate compared to the rest of the State).
192. See Chart 11 supra (WAGs and African Americans) and Chart 13 supra (FVO and
African Americans).
193. See Diller, supra note 20, at 1148-49 (noting the types of discretionary decisions
caseworkers make).
194. TANF State Plan, supra note 130, at 1.
195. Id.
196. See generally id.
197. See Chart 12 supra (outlining FVO identifications by jurisdiction).
One distinct pattern appears to emerge from the data. More than the other jurisdictions, Baltimore City continued to perform much as it had before welfare reform until approximately the middle of 2001. That is, the utilization rate for TANF-funded cash assistance remained extremely high, suggesting that the principal eligibility criteria remained financial rather than non-financial, such as preparing for employment. The likelihood that applicants and recipients would have access to some of the new elements of welfare reform, such as welfare avoidance grants and family violence option services, was lower in Baltimore City than elsewhere. More families in Baltimore City were on the rolls for most of the time after January 1997, so there were more families approaching their sixty-month time limit for federally funded cash assistance by the beginning of 2002.

It also appears that, toward the end of 2000, a change began. The principal evidence of the change is the steep decline in the utilization rate for cash assistance under TANF.¹⁹⁸ There is no evidence that the decline was the product of fewer people applying for benefits or being approved for benefits; Baltimore's approval rate for new applications remained one of the highest in the State during 2002.¹⁹⁹ Nor is there much evidence that Baltimore residents were suddenly being placed in more useful work-preparation programs or that they were becoming more successful in finding long-term employment.²⁰⁰ The change seems to be the product, instead, of people being pushed into leaving the rolls as they approached the federal time limit of sixty months.

Where a family lives should not be the basis for a decision about whether the family needs cash assistance, whether the family should be found eligible for a WAG or family violence option services, or whether the adult in the family should engage in one or another activity to prepare for employment. Those decisions should be made based on the individual situation and resources of the individual family. Double devolution has played a role in making it possible for families to be treated differently solely on the basis of where they live. The remaining question is whether the geographic discrimination

¹⁹⁹. Id. at 3 (noting in Table 2 that Baltimore City only trailed Prince George's County in TANF applications approved).
²⁰⁰. See Life After Welfare: Seventh Report, supra note 159, at 54 (noting the high rate of Baltimore City leavers returning to cash assistance).
that results from double devolution can be the subject of a constitutional claim under the State's constitution.201

II. LEGAL THEORIES

When Maryland's Department of Human Resources decided to delegate authority to the local departments to design as well as to implement welfare reform, it opened the door to two possibilities. Local department officials could study local conditions and create programs designed to meet the specific economic and employment conditions of the locality. Alternatively, local department officials could create programs based on the beliefs and biases of program managers that might or might not relate to local conditions. In the former case, welfare recipients in different parts of the State would be treated differently from one another, but the purposes served by the differential treatment could be justified. In the latter case, welfare recipients would be treated differently, but the differences would not appear to have a connection to local differences. The differences described in Part II of this Article seem to be of the second sort: differences in treatment do not appear to be based on the existence of particular local employment conditions or community practices.202 Assuming that the same conclusion would be produced in litigation, what legal theory might be the basis for relief? And what relief would be constructive?

Federal constitutional doctrine offers little promise. No federal constitutional right to subsistence has been recognized.203 Equal protection claims involving economic and social programs are subject only to a rational basis standard,204 which is easy to satisfy. If the evidence were to show that people of color get worse treatment than European-Americans, no federal constitutional claim could be made in the absence of intentional discrimination.205 Federal civil rights statutory claims might be made on the basis of race discrimination

201. See, e.g., Verzi v. Baltimore County, 333 Md. 411, 427, 635 A.2d 967, 974-75 (1994) (holding that a Baltimore County Code provision that geographically discriminated against out of county tow operators violated the State's constitutional guarantee of equal protection).
203. See, e.g., Dandridge v. Williams, 397 U.S. 471, 486-88 (1970) (upholding regulation capping AFDC benefits at $250 per month regardless of actual need or family size).
204. See id. (applying the rational basis standard).
and disability discrimination. But the Supreme Court's federalism jurisprudence jeopardizes some opportunities for states to be held liable for such violations, and the regulatory procedures hold relatively little promise for complete remediation.

A useful source of law may be the state constitution. Two possible theories, both grounded in the equal protection guarantee of Article 24 of the Maryland Declaration of Rights, hold promise. The first theory addresses location discrimination in the welfare program, applying a "rational basis with bite" test. The second theory proposes applying a heightened scrutiny test to the location discrimination claim on the basis that everyone who is or may be eligible for welfare is a member of a vulnerable group on the basis of gender, age, race or disability.

A. Rational Basis with Bite

Traditionally, economic and social welfare regulations are reviewed under a rational basis test, and the government's classification is usually sustained. Since 1993, however, the Court of Appeals of Maryland held in

206. 42 U.S.C. § 608(d) (2000); 28 C.F.R. § 35.130 (2003); 45 C.F.R. §§ 84.4, 84.52 (2003); see also, e.g., Maine v. Thiboutot, 448 U.S. 1, 7-8 (1980) (finding a constitutional claim based solely on statutory provisions of AFDC).


208. States are required not to discriminate in various ways when spending federal funds, but discriminating on the basis of one's residence is explicitly permitted under TANF. Administrative penalty procedures should be useful to remedy other discriminatory practices, but limited resources are available for compliance reviews and to adjudicate complaints. For example, The Office of Civil Rights of Health and Human Services undertook a compliance review in 2001 concerning whether TANF applicants and recipients in Maryland experienced unlawful discrimination on the basis of disability. Letter from Paul F. Cushing, Regional Manager, Department of Health and Human Services, Office of Civil Rights, to Emelda P. Johnson, Secretary, Maryland Department of Human Resources (Sept. 30, 2002) (on file with author). Advocates reported multiple instances of discriminatory policies and practices, but the final letter from HHS required little change. Id.


210. See infra Part II.A.

211. See infra Part II.B.

Maryland has been applying a "rational basis with bite" test to certain economic and social regulations. The test is stated in a conventional way: the State must articulate a legitimate governmental objective for its classification, and demonstrate that the classification is rationally related to that objective. Where the court has deviated from tradition is in its examination of the fit between the objective and the classification, which it has done in a more sustained and demanding way than would be expected under the traditional test.

The earliest case in the line is *Kirsch v. Prince George's County*, a 1993 decision in which the court held unconstitutional a zoning ordinance that restricted the rental of residential properties to three or more students pursuing higher education. Although the regulation is clearly an economic one, the court examined the differentiation closely and concluded that it was "arbitrary." Under the ordinance, the property could be rented to people identical to the student groups in every way except in their occupation. The court found the distinction between students and non-students to be "wholly unrelated" to the articulated purpose of the ordinance.

In dissent, Judge Chasanow defended the rationality of the ordinance on the basis that students have different needs and perform differently as residents of rental properties than non-students. In his view, the majority "seem[ed] to be either subtly altering the rational basis test, or pay[ing] lip service to that test but refus[ed] to apply it."

It turned out that Judge Chasanow was right, as the Court confirmed in *Verzi v. Baltimore County* the next year. Baltimore County adopted an ordinance requiring tow operators to have a place...
of business within the county before the police could call them to tow away vehicles disabled by accidents.\textsuperscript{225} Plaintiff’s place of business was located less than three miles from the county line, and he was denied the opportunity to be called to accident sites.\textsuperscript{226} The court overturned the ordinance on the basis that it constituted an unlawful classification that denied equal protection to the nonresident businesses.\textsuperscript{227}

In a revealing paragraph, the court explained its rational basis test by quoting from \textit{State Board of Barber Examiners v. Kuhn}.\textsuperscript{228} The \textit{Verzi} court stated: "Although we have traditionally accorded legislative determinations a strong presumption of constitutionality, . . . we have also required that a legislative classification rest upon 'some ground of difference having a fair and substantial relation to the object of the legislation.'"\textsuperscript{229}

The County’s stated purposes for the towing restriction were to protect the public from fraud and to decrease traffic congestion and delays.\textsuperscript{230} According to the court, the justifications would be legitimate except that the relationship between the purposes and the classification was so weak that it was instead a pretext for giving an economic benefit to local residents, to the economic detriment of nonresidents.\textsuperscript{231} The ordinance was different from territorial classifications that were previously upheld because, according to the court, in those cases the "primary legislative purpose of the classification was other than economic, and . . . the classification bore a real and substantial relation to the object of the legislation."\textsuperscript{232}

\textit{Kirsch} and \textit{Verzi} both involve economic regulation by a local government.\textsuperscript{233} Neither involves a social welfare program run by the state government. Although, traditionally, economic and social regulation are both subject to the same level of scrutiny, \textit{Kirsch} and \textit{Verzi} left open the possibilities that the court would not apply the rational basis with bite standard to a social program and that the court would subject

\begin{itemize}
  \item \textsuperscript{225} Id. at 413, 635 A.2d at 967-68.
  \item \textsuperscript{226} Id. at 414-15, 635 A.2d at 968-69.
  \item \textsuperscript{227} Id. at 427-28, 635 A.2d at 975.
  \item \textsuperscript{228} 270 Md. 496, 312 A.2d 216 (1973). \textit{Kuhn} involved a sex discrimination case decided shortly after Maryland’s Equal Rights Amendment was adopted, and the Supreme Court had begun to subject classifications based on sex to heightened scrutiny. \textit{Id}.
  \item \textsuperscript{229} \textit{Verzi}, 333 Md. at 419, 635 A.2d at 971 (citations omitted).
  \item \textsuperscript{230} Id. at 425, 635 A.2d at 974.
  \item \textsuperscript{231} Id. at 427, 635 A.2d at 975.
  \item \textsuperscript{232} Id. at 422, 635 A.2d at 972.
  \item \textsuperscript{233} Kirsch v. Prince George’s County, 331 Md. 89, 107-08, 626 A.2d 372, 381 (1993); \textit{Verzi}, 333 Md. at 413, 635 A.2d at 967.
\end{itemize}
discrimination by the state government differently from discrimination by local governments.234

Both possibilities were negated by the court's most recent decision in this line, *Frankel v. Board of Regents*.235 In *Frankel*, the Court of Appeals, once again applying a rational basis with bite standard, invalidated a state university policy of denying in-state tuition status to students who receive more than half of their support from non-residents, regardless of other indicia of the student's domicile.236 In-state tuition is a form of social welfare program in that it provides a special opportunity for students to obtain higher education.237 Further, it is a program funded by the State, so discrimination in the opportunity to benefit from in-state tuition is a state policy, not a policy of a local jurisdiction.238

As in the earlier cases, the *Frankel* court took no issue with the State's objective of providing the benefit of lower tuition costs to Maryland residents and denying that benefit to those from out-of-state.239 The problem arose with the means used to achieve that objective.240 The university's policy classified residents as in-state or out-of-state based on the source of their monetary support.241 To qualify for in-state status, the student had to receive more than half of his or her economic support from a resident of the State.242 The court noted that the policy could deny in-state status to *bona fide* Maryland residents, such as a student born in-state whose parent moves out-of-state and a resident student whose tuition is paid by a generous out-of-state grandparent.243 The policy, the court concluded, imposed economic burdens on some Maryland residents to the benefit of others without a rational basis for doing so.244

"Rational basis with bite," as described and applied by the Court of Appeals of Maryland, subjects classifications to a more stringent re-

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234. *See Kirsch*, 331 Md. at 106, 626 A.2d at 380 (explaining that the crucial question was whether a county ordinance classification advanced its economic objectives, such as parking congestion); *see also Verzi*, 333 Md. at 425, 626 A.2d at 974 (examining whether a Baltimore County ordinance affecting out of county businesses related to government interests).
236. Id. at 312, 761 A.2d at 331.
237. Id. at 302, 761 A.2d at 326.
238. Id. at 301, 761 A.2d at 325.
239. Id. at 317, 761 A.2d at 334.
240. Id.
241. Id. at 302-03, 761 A.2d at 326-27.
242. Id. at 317, 761 A.2d at 334.
243. Id. at 317-18, 761 A.2d at 334.
244. Id. at 314-15, 761 A.2d at 333.
view than the traditional rational basis test.\textsuperscript{245} Even though the State must have a legitimate objective which, in theory, could be scrutinized, the court has focused so far on the fit between the State's objective and the classification. In the three cases where the fit has been found wanting, the court appears to be requiring the State to produce actual evidence that the classification serves the purpose, rather than the hypothetical justifications usually accepted under the rational basis test. For example, in \textit{Verzi}, the court rejected the County's unsupported assertion that out-of-county towing companies would be harder to regulate in light of evidence that the County had a process for supervising towing companies operating in the County.\textsuperscript{246} In \textit{Frankel}, the court refused to accept the Board of Regents' claim that non-residents were the target of the policy, when at least two categories of \textit{bona fide} residents were harmed by it.\textsuperscript{247}

The three cases also demonstrate a particular sensitivity for situations in which benefits and burdens are distributed differently among residents of the State. In \textit{Verzi}, in fact, the court analogized the State's equal protection doctrine to the Privileges and Immunities Clause of the United States Constitution:

Just as the Privileges and Immunities Clause frowns on arbitrary distinctions among citizens of different states, particularly in the area of economic regulation, the concept of equal protection of the laws found in Article 24 frowns on arbitrary distinctions among citizens of different counties within Maryland.\textsuperscript{248}

\section*{B. Heightened Scrutiny}

Double devolution is constitutionally suspect because classifying people solely on the basis of their residence or locality for the purpose of deciding whether and how they should be treated in the welfare program cannot withstand rational basis scrutiny, at least in the manner the test has been applied in recent years by the Court of Appeals of Maryland.\textsuperscript{249} Discrimination on the basis of residence, however, is not a fully satisfactory approach. Welfare is a social welfare program that affects the most vulnerable residents of any state: children,

\begin{itemize}
\item\textsuperscript{245} See \textit{Verzi} v. Baltimore County, 333 Md. 411, 419, 635 A.2d 967, 971 (1994) (stating that the court has required that legislative classifications have a fair and substantial relation to the object of the legislation).
\item\textsuperscript{246} \textit{Id.} at 426, 635 A.2d at 974.
\item\textsuperscript{247} \textit{Frankel}, 361 Md. at 317-18, 761 A.2d at 334.
\item\textsuperscript{248} \textit{Verzi}, 333 Md. at 424, 635 A.2d at 973.
\item\textsuperscript{249} See \textit{supra} Part II.A.
\end{itemize}
women of color, and adults and children with disabilities.\textsuperscript{250} If a government program treats people needing welfare unfairly, the special vulnerability of the government's victims should, if possible, be made visible in the legal theories argued on their behalf.\textsuperscript{251} Residence discrimination is not a theory that makes their special vulnerability visible.\textsuperscript{252}

An alternative level of review applied by the Court of Appeals is heightened scrutiny. Heightened scrutiny is a valuable form of review, because it calls on the court to determine whether the government's objectives are important, not only whether, as in rational basis review, the government has chosen the proper means to achieve the objective.\textsuperscript{253} In the case of welfare reform, the question would be the validity of the objective of double devolution. As stated by the Department of Human Resources, the objective is to give local administrators autonomy to design requirements and procedures adapted to their local circumstances.\textsuperscript{254}

The importance of considering heightened scrutiny as the appropriate level of review in the context of double devolution is highlighted by two of the examples provided earlier: the differences in the award of welfare avoidance grants and the differences in the identification of families experiencing domestic violence.\textsuperscript{255} In both situations, the correlation is impressive between the availability of the benefit and the racial makeup of the county in which one applies. Residents of counties with the largest percentage of African Americans were the least likely, on the whole, to receive the benefits of WAGs and family violence identification. If double devolution has permitted racialized outcomes to occur and to go unnoticed and uncorrected by state officials, the only likely source of assistance is in the judiciary.\textsuperscript{256} If courts apply a deferential standard such as rational ba-

\textsuperscript{250} See infra notes 274-279 and accompanying text.

\textsuperscript{251} See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 541 (1973) (discussing the vulnerability of impoverished individuals).

\textsuperscript{252} See, e.g., Frankel, 361 Md. at 314-15, 761 A.2d at 333 (assuming that a residency classification that imposes economic burdens is not based on a suspect class).

\textsuperscript{253} Reed v. Reed, 404 U.S. 71, 75 (1971) (requiring states to base classifications that provide different treatment "upon some ground of difference having a fair and substantial relation to the objective of the legislation, so that all persons similarly circumstanced shall be treated alike").

\textsuperscript{254} The Family Investment Administration 2000 Annual Report, supra note 82, at 17.

\textsuperscript{255} See supra text accompanying notes 143-156.

\textsuperscript{256} See Diller, supra note 20, at 1212 (noting that devolution may mean critical decisions are made at government levels that do not have a strong tradition of factoring public input into their rulemaking).
sis review, even rational basis review with bite, the judiciary may not perform its protective role with sufficient force.\footnote{257}

The door to heightened scrutiny review under Article 24 of the Maryland Constitution opened in the case of \textit{Attorney General of Maryland v. Waldron},\footnote{258} where the Court of Appeals found a denial of equal protection in a statute that required retired judges to forfeit their pensions if they engaged in the practice of law for pay.\footnote{259} After a lengthy exploration of the development of heightened scrutiny review by the United States Supreme Court under the Fifth and Fourteenth Amendments, the \textit{Waldron} court concluded that the right to pursue one's chosen occupation was not fundamental, but it was important enough to require more than the most deferential form of rational basis review.\footnote{260} The court tailored its review to take into account the "vital personal interests . . . substantially affected by a statutory classification."\footnote{261} The subsequent interpretations of the court's decision see it as applying a "heightened scrutiny" standard.\footnote{262} Under such a standard, "courts should not reach out and speculate as to the existence of possible justifications for the challenged enactment."\footnote{263} "Rather, [the court] must evaluate either those statutory purposes which are readily discernible or a legitimate purpose that, presumably, motivated an impartial legislature."\footnote{264}

In \textit{Waldron}, the court rejected two of the Attorney General's three proffered objectives.\footnote{265} The first was rejected on the basis that it was inconsistent with the statute's language and structure.\footnote{266} The second was rejected as an illegitimate "post hoc rationalization" which would have required the court to engage in "tautological equal protection analysis by deducing purpose from result."\footnote{267} The third proffered objective was accepted as legitimate, but the fit between the objective and the classification scheme was found inadequate in light of the

\footnotesize{\begin{itemize}
\item \footnote{257. See, e.g., Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 657, 458 A.2d 758, 790 (1983) (applying a rational basis standard in upholding a Maryland school financing system that resulted in disparity among school districts).}
\item \footnote{258. 289 Md. 683, 426 A.2d 929 (1981).}
\item \footnote{259. \textit{Id.} at 726-27, 426 A.2d at 953.}
\item \footnote{260. \textit{Id.} at 717-19, 426 A.2d at 948-49.}
\item \footnote{261. \textit{Id.} at 717, 426 A.2d at 948.}
\item \footnote{263. \textit{Waldron}, 289 Md. at 717, 426 A.2d at 948.}
\item \footnote{264. \textit{Id.} at 722, 426 A.2d at 950.}
\item \footnote{265. \textit{See id.} at 722-24, 426 A.2d at 950-51 (discussing the three purposes the Attorney General gave and explaining why two were not legitimate).}
\item \footnote{266. \textit{Id.} at 722-23, 426 A.2d at 950-51.}
\item \footnote{267. \textit{Id.} at 724, 426 A.2d at 951.}
\end{itemize}}
importance of the interest of retired judges in being allowed to pursue their occupational choice.\footnote{268}{Id.}

In several subsequent cases, the Court of Appeals has declined to apply heightened scrutiny review.\footnote{269}{See Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 653, 458 A.2d 758, 788 (1983) (deciding that the State's mixed state and local school financing scheme, which resulted in different expenditures on public education in different counties, had "no significant interference with, infringement upon, or deprivation of the underlying right to take advantage of a thorough and efficient education . . ." and, therefore, there was no reason to apply heightened scrutiny review); Murphy v. Edmonds, 325 Md. 342, 362-67, 601 A.2d 102, 112-14 (1992) (concluding that a plaintiff subject to a legislative cap on non-economic damages in tort cases was not deprived of "important personal rights," because the right to a jury trial was not violated and no right to a common law measure of damages existed, and therefore heightened scrutiny review was not triggered); Maryland Aggregates Ass'n v. State, 337 Md. 658, 673 n.10, 655 A.2d 886, 893 n.10 (1995) (stating that there is no right to heightened scrutiny for legislation affecting a common law right).} In each case, the party seeking heightened scrutiny review argued that the standard should be applied because the party had been deprived of an important right.\footnote{270}{See, e.g., Hornbeck, 295 Md. at 653, 458 A.2d at 788; Murphy, 325 Md. at 362, 601 A.2d at 111-12; Maryland Aggregates, 337 Md. at 673 n.10, 655 A.2d at 893 n.10.} In each, the court found the right did not exist or that no significant interference with the right had occurred.\footnote{271}{See discussion supra note 269.} In no case did the discrimination affect groups of people with particular vulnerabilities.\footnote{272}{See, e.g., Hornbeck, 295 Md. at 603, 458 A.2d at 761 (affecting school districts); Murphy, 325 Md. at 362, 601 A.2d at 111-12 (affecting tort plaintiffs); Maryland Aggregates, 337 Md. at 663, 655 A.2d at 888-89 (affecting surface mine operators).}

The best argument for applying heightened scrutiny to double devolution in welfare reform is that applicants for, and recipients of, cash assistance under TANF have a vital personal interest in a welfare system that delivers benefits and services to people depending on their individual circumstances and not based on their county of residence.\footnote{273}{See Cimini, supra note 12, at 91-92.} The essence of the argument is that applicants and recipients have a right to be treated as a "citizen of the State" rather than a citizen of a county, at least in regard to a program that is funded and administered by or through a state agency rather than through a local agency. As citizens of the State, applicants and recipients should be at no greater risk of being treated disparately for reasons that might be related to one's sex, race, age, or physical or mental condition, or for reasons that conflate several of those characteristics.

Sex, race, disability, and age are not explicit classifying factors in welfare. As a matter of practical reality, however, nearly everyone who suffers the life experiences that lead to eligibility for benefits belongs
to the less-favored half of at least one of the four classifications. A far more women than men experience severe poverty when becoming parents. A far larger percentage of people of color than European-Americans experience poverty and unemployment. A far greater proportion of people with disabilities experience extreme poverty and unemployment, as compared to people without disabilities. Similarly, people who care for children with disabilities are more likely to suffer poverty than people whose children do not have disabling conditions. Finally, far more children experience desperate economic need as compared with adults. Welfare reform policies, therefore, need not explicitly identify the classification scheme that, in practice, occurs: African-American women with children, particularly those with disabilities or whose children have disabilities, are in one group, while everyone else is in the other. The absence of explicit discriminatory classification may insulate welfare policies from the most searching level of equal protection review. It should not blind decision-makers, however, from the practical import of welfare policies. A level of judicial review that takes into account the possibilities that state welfare policies permit mistreatment of disfavored groups is essential.

Maryland constitutional jurisprudence lends weight to the argument that heightened scrutiny is appropriate when a state program may put at risk the interests of members of certain groups of re-


275. *Id.* Men represent only 10% of all adult recipients. *Id.* In 2000, African Americans and Hispanic Americans comprised 6.7% of all welfare recipients. *Id.*

276. *Id.*

277. LaCheen, *supra* note 206, at 110 (noting that more than half of families applying for or receiving TANF benefits have at least one member with a disability recognized under the ADA).


279. DHHS, *Characteristics and Financial Circumstances of TANF Recipients, supra* note 274, at table 1. The average number of persons in TANF families was 2.6, while two-thirds of TANF families had only one adult recipient. *Id.*

280. *See supra* notes 274-279 and accompanying text (describing the percentages of welfare recipients).

281. *See Attorney Gen. of Md. v. Waldron, 289 Md. 683, 705-06, 426 A.2d 929, 941-42 (1981) (noting that strict scrutiny only applies where a statute discriminates based upon suspect criteria, or where it infringes upon a fundamental right).*
Maryland has a long history of race discrimination, beginning in its earliest history as a state that permitted the ownership of slaves until the end of the Civil War. Maryland's courts came late to the struggle to overcome race discrimination, but a body of doctrine now exists asserting the right of people of color to be treated as equals. Maryland's sex discrimination law includes the Article 46, the State Equal Rights Amendment, which has been interpreted as requiring strict scrutiny in situations where a benefit or a burden is allocated on the basis of gender. The degree of scrutiny exceeds that required under federal law, which requires only heightened scrutiny in cases of gender discrimination. Exercising its special mandate under Article 46, Maryland courts have recognized the need to protect men and women from discrimination on the basis of gender. For example, the Court of Appeals banned the use of preemptory strikes against jurors on the basis of gender before the practice was barred by the Supreme Court.

Significant interference with the vital personal right of welfare applicants and recipients to be treated as citizens of the State is demonstrated by the data discussed above, which, at a minimum, strongly suggest that assessment practices are worse in some parts of the State than in others, and that the worst places are often the places with majority African-American populations. The data also demonstrates that financial eligibility is probably weighed differently in some parts of the State than in others, with the result that eligibility determinations affecting financially eligible families vary from place to place on the basis of locally established criteria and in the absence of substantial state supervision.

The vital personal interests of applicants and recipients to be treated fairly and with a reasonable degree of uniformity as citizens of the State should justify application of the heightened scrutiny standard of review. The question then becomes, what important objective

282. See, e.g., id. at 726-27, 426 A.2d at 953 (applying heightened scrutiny to a statute that denied retired judges their pension plans if they engaged in the practice of law for pay).
289. See supra notes 193-197 and accompanying text.
will the State argue underlies the decision to permit differential treatment of applicants for, and recipients of, cash assistance depending on their county of residence?

C. Rational Basis with Bite, Heightened Scrutiny and Double Devolution

The policy of the State to permit subdivisions of the Department of Human Resources to design, as well as administer, welfare reform at the county level means, as shown earlier in this Article, that what benefits any particular resident of the State receives and how that person is treated varies widely depending on where the resident lives. Differences begin with recipiency rates: residents of some counties have a chance of being awarded cash assistance that is less than half the chance experienced by a resident of other counties.290 Differences continue in regard to assessment and program services.291 In some jurisdictions, residents have no chance, at least at a statistical level, of being awarded a welfare avoidance grant or being identified as experiencing family violence or needing services to overcome family violence.292 In other jurisdictions, WAGs, family violence identification and services, and useful work activity assignments are more common.293

In Maryland’s plan, delivered to the United States Department of Human Resources to support the payment of federal TANF funds, the State maintained that local departments needed the opportunity to tailor the requirements and procedures of their programs because local officials would “kno[w] best the kinds of resources available to, and services needed by, their customers.”294 Local flexibility, however, was not intended to deny customers access to core components of the program. The government’s objective of delivering services tailored to what TANF applicants and recipients need in light of local resources and customer needs is presumed valid.295 The question under heightened scrutiny becomes whether the means chosen to meet that objective bear a fair and substantial relation to the objective.296 The means chosen, in this instance, is to classify applicants and recipients according to the county of their residence. A resident

290. See supra Part I.B.2 and accompanying text.
291. See supra Part I.B.1, 3-4.
292. See supra Part I.B.1-3.
293. Id.
296. See supra notes 258-274 and accompanying text.
of a county is entitled to be treated according to the requirements and procedures adopted by the local department operating in that county. For these differentiations based on residence to be valid under heightened scrutiny, double devolution must bear a fair and substantial relationship to the objective of providing locally responsive programs and services to TANF applicants and recipients.

It is a hard case for the State to make. For example, a family in poverty in Baltimore City, prior to October 2000, was much more likely to be awarded cash assistance than a family in poverty anywhere else in the State. Baltimore City experienced a high unemployment rate, which helps to explain why its local residents were probably well served by requirements and procedures that permitted people to receive cash assistance. Families in some jurisdictions outside of Baltimore City, however, faced similar unemployment rates, and they were not welcomed as frequently into the cash assistance program even though employment was probably no more likely for them as an alternative means of support. If access to employment, at least as measured by unemployment rates, did not vary among residents of different jurisdictions, then allowing Maryland residents to be treated differently solely on the basis of their residence can hardly be said to bear a fair and substantial relationship to the State’s objective.

Similarly, after October 2000, the recipiency rates of Baltimore families declined while rates rose in many other jurisdictions. Economic conditions, including access to paid employment, cannot explain the differences, because Baltimore did not experience better employment conditions than other jurisdictions. Indeed, Baltimore probably experienced worse conditions. Residents of Baltimore City received less favorable treatment than in the past, while residents of other jurisdictions received more favorable treatment. The differences turned on where they lived, not on whether employment was available to them as an alternative to cash assistance.

The Court of Appeals has upheld differential treatment by the State of residents on the basis that they live in different local jurisdictions. The key case is Hornbeck v. Somerset County Board of Educa-

297. See supra notes 175-178 and accompanying text.
298. See supra notes 84-88 and accompanying text.
299. See supra notes 95-101 and accompanying text.
300. See supra notes 102-106 and accompanying text.
301. See supra notes 107-110 and accompanying text.
303. Id.
304. See infra notes 305-307 and accompanying text.
The issue in Hornbeck was whether the combined state and local school financing scheme was constitutional because it failed to equalize funding and, therefore, left students in poorer jurisdictions with fewer educational resources. The court upheld the financing scheme as rational and thus constitutional. But the court's decision predated its adoption of the rational basis with bite standard of review. For that and other reasons discussed later, the court's decision provides little reason to predict that double devolution in the context of TANF would be found a constitutional form of locality discrimination.

One reason given by the Court of Appeals for upholding local funding of public schools, with the concomitant disparities in funding across the State, is that local funding is related to the quality of local control over education. According to the court, more interest and concern will be shown by local jurisdictions over programs into which they have to invest money, and that is beneficial for schools. TANF is funded on a statewide basis, however, either through the block grant from the federal government or the State matching funds required by law. Because there is no political interest accountability that might accompany local funding decisions, that justification found in Hornbeck would not be satisfied.

To understand the importance of local accountability, it is useful to imagine what, if anything, might a locally controlled program do differently from a program controlled by officials responsive only to state priorities? Baltimore City is the jurisdiction that must be studied for this purpose because it is both the jurisdiction with the most TANF recipients and one of the jurisdictions that experiences high rates of poverty and low-to-negative rates of economic growth. If the City were in control of the TANF program, rather than the State, how would it be different? Presumably, in a time of negative job growth, the City has an interest in satisfying potential and current employers that the City has a workforce available to meet the needs of those employers. TANF planning and funding could be used to further this goal in a variety of ways. For example, people with families could rely

306. Id. at 603, 458 A.2d at 761-62.
307. Id. at 657, 458 A.2d at 790.
310. Id.
312. See supra Part I.B.1.
on TANF cash assistance to help free up the time needed to complete certification or training programs useful to employers. The City has an interest in efficiently delivering relevant training and certification opportunities to residents, so it is important that programs leading to employment get funded and appropriate people are selected to participate. It would be likely, therefore, that the City would want TANF administrators to work closely with the local workforce development process to ensure that work development expertise guide TANF funding decisions and that TANF recipients are selected for programs that best suited their talents, interests, and prospects. In times of high unemployment in the City, further, the City would want to use TANF funding to open doors to residents finding jobs outside of the City, as their income would benefit the City through income and other taxes. Because the job market in Baltimore, as in most cities, is regional, the City would want TANF administrators to work with other programs in the region to identify ways to open doors to employment by Baltimore City residents throughout the region.

The City's interests in TANF extend beyond employment opportunities and conditions. For example, in recent years, the City has taken an interest in improving services for families experiencing domestic violence. Changes have been made in police, judicial, and medical systems to make it more likely that people will be identified and that proper services will be delivered. The TANF program could add an additional component to this process, by ensuring that impoverished families suffering from violence can access public benefits while taking advantage of other protective and supportive programs. Similarly, the City has an interest in making sure that children and parents who experience disabilities get support from the public benefits system.

A close examination of the Department of Social Services 2002 TANF plan and other policy documents are illuminating for the ways in which the plan does not seem to have much connection to what the City might want if the City were in charge of TANF.

313. See Family Investment Program Legal Clinic, Status Report, supra note 41, at 12-14 (noting some of the family violence option procedures adopted by the Baltimore City Department of Social Services).
314. See id. at 9-10, 14, 24 (noting the correction of illegal Medicaid terminations, procedures used to identify individuals who qualify under the family violence option, and the use of expungement procedures to clear arrests).
315. See Hetling-Werny & Born, supra note 145, at 4 (stating that welfare and cash assistance programs are critical for individuals who suffer from domestic violence and poverty in achieving self-sufficiency).
316. See generally TANF State Plan, supra note 130.
Recall first that residents of Baltimore City have had a statistically zero chance of getting a Welfare Avoidance Grant, or WAG. In January 2002, the Baltimore City Local Department of Social Services (BCDSS) issued a new policy statement about WAGs, replacing policy statements issued in 1997 and 1998. Under the new policy, a WAG is available where it would provide “any needs that would allow for immediate employment.” WAGs can be awarded to pay for tools and equipment, to purchase, repair or insure a car, to help a person become self-employed, to pay for emergency child care, to cover moving expenses, and, on rare occasions, to cover basic living expenses.

The major change in 2002 is the opportunity for a WAG to be used to buy, repair, or insure a car. Prior to the issuance of the new guidance, the BCDSS Plan contained only two types of transportation assistance. Recipients could get bus passes or they could participate in a van program providing transportation to jobs located in a suburban location. No assistance was available for private transportation, such as a car.

If Baltimore City's plan reflected the local employment conditions, then one would expect that, prior to 2002, people looking for jobs did not need cars. Public transportation and the van program were sufficient. That was not the case, however: over 35% of entry-level jobs in the Baltimore region were not accessible by public transportation.

Next, recall that residents of Baltimore who are experiencing domestic violence have little chance of being identified by the BCDSS when they apply for or receive TANF benefits; examining the Plan helps to explain this void because it makes no mention at all of the family violence option under TANF. With the exception of some money for staff training, the Plan is silent on how the Department will

317. See Part I.B.2 and Chart 9 supra.
318. SOP #02-01, supra note 31.
319. Id. at 5.
320. Id. at 3-5.
321. Id. at 2-3.
323. Id.
324. See generally id.
326. See Part I.B.3 and Chart 13 supra (noting the low likelihood of being identified under the family violence option in Baltimore City).
327. See generally BALTIMORE CITY PLAN, supra note 322.
spend money to identify and service families where domestic violence is occurring, whether through or in coordination with other programs undertaken through the City government or separately.

The Plan includes a number of work activity programs through which recipients get help preparing for and obtaining employment. The programs are administered under contracts with non-profit agencies and with government agencies, including the Mayor's Office of Employment Development and Baltimore City Head Start. Although these contracts, as well as language in the Plan about working with community agencies, suggest that the TANF program is developed in response to local needs, a closer reading of the descriptions leads to a somewhat different conclusion. For example, the Plan includes no information about what kinds of jobs are available in or near Baltimore, how much they pay, or what kinds of employees employers are looking for. It contains no detailed descriptions about the characteristics of adult TANF recipients, how those characteristics make them more or less attractive to employers in the region, or how less attractive recipients could become more likely to obtain employment. It contains no information about what the City's planning or workforce investment board processes have identified as priorities for the City's economic well-being, or how TANF funding decisions serve those priorities. While many of the service-providers may indeed help people get employed, the Plan does not explain why that should be the result. In short, the Plan makes it look as if the BCDSS randomly concluded that certain non-profit and governmental agencies should get money based on little more than hunches about what kinds of jobs might be available to, and appropriate for, people in Baltimore who rely on TANF.

A fourth area where city officials might differ with the BCDSS is in the treatment of people with disabilities. While federal law mandates that no more than twenty percent of a state's TANF-funded caseload can receive cash assistance for longer than sixty months, state law eliminates the twenty percent limit if a larger number of families are experiencing hardships. As a result, there is no necessity for families struggling with disabilities (affecting the parent, the child, or both) to leave the rolls for work. City employment planners might prefer keeping these families on public benefits and out of the job market for two reasons. First, fewer people seeking work reduces

328. See, e.g., id. at 4-5 (outlining the work activity programs).
329. See, e.g., id. at 21.
331. Md. REGS. CODE tit. 7, § .03.03.30(A)(10) (2004).
competition for the few jobs available in the City. Second, job training resources could be focused on people whose barriers to employment may be easier to remove because they are not disabled or caring for a person with a disability.

BCDSS's plan takes the opposite tack. The Plan emphasizes the difficulties faced by BCDSS because it appears that many people in the caseload experience extensive or difficult barriers to work, such as disabilities.332 The solution, however, is not to keep on the rolls any among these "hard-to-serve" families that are unlikely to find employment, at least in the near future in the existing economy. Instead, the solution is to do individualized assessments leading to employability plans. Out of a budget of $14,591,929 for work activity programs available to TANF recipients, forty percent, nearly $6,000,000, was budgeted for projects serving people with multiple or difficult barriers to work, including disabilities of various kinds affecting both adults and children in the families.333 City planners could look at that $6,000,000 and, no doubt, find multiple ways to spend it on people whose average likelihood of employment is demonstrably greater.

Even after allocating so much money for people facing above-average difficulties, BCDSS has been a leader in the State in the last few years in terminating benefits for families because of noncompliance with the work activity requirement, both before and after they exceed the sixty-month time limit.334 Again, the City would probably prefer to keep such families supplied with the minimal support that public benefits provide rather than having them fall into even deeper poverty. With public benefits, the families have income that is the equivalent, approximately, of sixty-one percent of the poverty line.335 Without it, they often fall into extreme poverty. These families are less likely to become employed than families leaving welfare under other circumstances. In general, children in extreme poverty perform worse in school and generally have more troubled childhoods than other children in poverty.336 Given the condition of the schools in the City, having even more children in extreme poverty would not be welcome.

Another reason the court upheld the differentiated school funding scheme in Hornbeck is the long tradition in the State of local funding for schools, apparently dating back, at least by some accounts, to

332. BALTIMORE CITY PLAN, supra note 322, at 4.
333. Id. at 75-76.
334. LIFE AFTER WELFARE: FIFTH REPORT, supra note 157, at 18.
335. See Md. REGS. CODE tit. 7, § 03.03.17 (2003).
336. Czapanskiy, supra note 22, at 352.
the nineteenth-century creation of public schools. Public benefits have a quite different history. While many localities created and funded relief programs for local residents, since the New Deal, most of the relief available to families with minor children has been funded by federal and state sources. Local administration continued for decades after the creation of Aid to Dependent Children in 1935, but even that ended, except in one jurisdiction, by the mid-1960s. In 1967, when administration of state and federally funded public benefits programs became a state function, local jurisdictions were required to create a local commission to provide state officials with input about whether the programs properly served local needs. These committees have no authority to require a local department of social services to change anything, however. The committee in Baltimore City has never heard from advocates about FIA, and may know little about the program. The only routine input that local jurisdictions have into the operation of the public benefits program is the power to nominate people to serve as the director of the local department. The power to appoint and to remove the director, however, rests with the Secretary of the Department of Human Resources, a state official.

Finally, an important consideration for the Hornbeck court was the failure of the plaintiffs to demonstrate that children in any of the jurisdictions were receiving less than a minimally acceptable standard of education. The same cannot be said of the State’s TANF program under double devolution. For example, it is a requirement that every family in the State be assessed to determine whether a welfare avoid-

338. Diller, supra note 20, at 1134-37.
339. Id. at 1135-37.
341. Id. The local commissions have a duty to evaluate local departments and programs, make recommendations in connection with annual funds, and take active steps to secure funds, but have no authority to make special policy changes. Id.
342. Id. § 14(A)(14).
343. Id. § 13(b). Although Baltimore’s mayor has a formal role in the appointment of the director, the Secretary of DHR has asserted that he does not need the mayor’s concurrence when making a temporary appointment. That assertion was the subject of a lawsuit, Mayor and City Council of Baltimore and Martin O’Malley v. Robert Ehrlich and Christopher McCabe, which was filed November 24, 2003, in Baltimore Circuit Court. Tim Craig & Lori Montgomery, O’Malley Sues Ehrlich for Appointing City Official, Wash. Post, Nov. 25, 2003, at B2, available at http://www.washingtonpost.com/wp-dyn/articles/A12062-2003Nov24.html (last visited Feb. 23, 2004).
ance grant could be a substitute for a monthly cash grant.\textsuperscript{345} In more than one jurisdiction, however, the possibility that a family will be awarded a WAG is essentially zero, even though it is impossible to believe that no family in that jurisdiction might have become employed if given a grant to buy a uniform or repair a car.\textsuperscript{346} It is also a requirement throughout the State that every family have the opportunity to be identified as experiencing family violence and receive services if needed.\textsuperscript{347} Yet, as shown earlier, in many jurisdictions the possibility that a family will be identified as experiencing family violence or of receiving necessary services is statistically zero.\textsuperscript{348} Unexplained variations in recipiency rates also indicate that, in some jurisdictions, the program may not be delivering the minimums required under state law.\textsuperscript{349}

Conceivably, the State will be able to demonstrate that there is a basis in local economic conditions that justifies the differential treatment that residents have received in the TANF program based on the jurisdiction in which they reside. Unfortunately for the State, the evidence will not be easy to find. The difficulty can be traced to the fact that local departments are under no obligation to justify the choices made to adopt requirements and procedures.\textsuperscript{350} In fact, they are under no obligation to educate themselves about local economic and employment conditions. As a result, the State has nothing in the contemporaneous record to explain why local department officials in Baltimore City concluded that WAGs were unnecessary for residents of Baltimore County or why local department officials in another County came to the opposite conclusion.

Based on the differences in outcomes in the different jurisdictions and the absence of a requirement that local officials formulate their programs based on knowledge of local economic and employment conditions, it is tempting to conclude that the State adopted double devolution for reasons other than a commitment to deliver locally tailored services to TANF applicants and recipients. The most likely explanations lie in the internal politics of the Department of Human Resources, coupled with the political environment surrounding local and state responses to the concentration of families in poverty in Baltimore City.

\textsuperscript{346} See supra Part I.B.2 and supra Chart 9.
\textsuperscript{347} Md. Regs. Code tit. 7, § 03.03.07(1)(4)(f) (2004).
\textsuperscript{348} See supra Part I.B.3.
\textsuperscript{349} Id.
\textsuperscript{350} See generally TANF State Plan, supra note 130.
Within the Department, State officials located in the county offices were eager for more opportunities to exercise control over their operations. Their enthusiasm for “flexibility” was fully evident at a meeting called by the Family Investment Administration in 2000.\footnote{351} Participants included a small number of advocates and service providers, a group from the one county with a separate agency, and a large number of officials of DHR from central offices and from local departments.\footnote{352} Twenty participants listed “local flexibility” as a strength of the welfare program.\footnote{353} The next item on the list garnered only ten votes.\footnote{354} At the same time, “poor communication between locals and central offices” was listed as one of the weaknesses of the program by seventeen participants.\footnote{355} Only six participants identified as a weakness “local flexibility without accountability”; only three so identified “inconsistency of program delivery from jurisdiction to jurisdiction.”\footnote{356} 

The political environment is also at the heart of the decision to devolve authority to “local” departments of social services. State officials could easily predict in 1996 that the problems of shifting from AFDC to TANF would be the most difficult in Baltimore City, where the caseloads were the highest and economic and employment conditions among the worst.\footnote{357} Double devolution allowed the State to permit department officials located in Baltimore City not to make the change from an income maintenance culture to a welfare-to-work culture while, at the same time, permitting the other jurisdictions to try to make the change. Isolating Baltimore City is not a politically unpopular thing to do in Maryland, unfortunately. In this case, allowing Baltimore City residents to continue to collect cash assistance as if they were still in an income maintenance program was good for families in the short run. In the long run, however, it appears to mean that thousands of families lost or are losing TANF eligibility while the economy is slowing and thousands of jobs are being lost. Many of these families might have had a better chance to weather the economic storm if they had entered employment in the late 1990s during

\footnote{351. See Maryland Department of Human Resources, Family Investment Administration, Whole System Collaborative Strategic Planning (2000) (on file with author) [hereinafter Whole System Collaborative Strategic Planning], for a summary of the meeting.}
\footnote{352. See generally id.}
\footnote{353. Id. at 21.}
\footnote{354. Id.}
\footnote{355. Id.}
\footnote{356. Id.}
\footnote{357. See Part I.B.1.}
the first five years of welfare reform. Instead, they were denied the assessments and services that might have made employment possible. Residents of the other counties, on the other hand, had more opportunities to make the transition and, if they were then laid off, at least they would still have some remaining months of eligibility for cash assistance.

If heightened scrutiny were held to apply to the State's TANF Plan, the State's objective in allowing local subdivisions of the Department of Human Resources to have autonomy in the design of program requirements and procedures could be scrutinized. As explored earlier, the objective could be beneficial, if, as stated, the purpose of double devolution is to conform requirements and procedures to give applicants and recipients access to employment and support that will help them become self-sufficient. For that to be the actual objective of double devolution, however, would require that, in some important way, economic and employment conditions in the State conform to the boundaries of the twenty-four local jurisdictions. There is little evidence for that proposition. On the whole, economic conditions in Maryland are regional rather than local; no single jurisdiction is a self-sufficient economic engine. Economic planning is largely a statewide function rather than a local one, because local jurisdictions have so little impact on the economic and employment conditions affecting them.

Even if economic and employment conditions do not conform to the boundaries of the cachement areas of local departments of social services, the objective of allowing local flexibility might help applicants and recipients become self-sufficient, if local administrators gained substantial awareness of particular employment opportunities and barriers, and took steps to organize programs for applicants and recipients in response to those particular conditions. None of that local knowledge is required of local department officials, however, nor is there any requirement that state-level officials review local plans to determine whether they take into account the particular issues affecting their geographic area.358

In conclusion, it appears possible that double devolution is susceptible to attack on the basis that the State's objectives for classifying applicants and recipients according to their place of residence are not legitimate, and that, even if the objectives were legitimate, the fit between the objectives and the classification is poor.

358. See generally TANF STATE PLAN, supra note 130.
III. Remedies

If there is no legitimate objective behind double devolution, or if there is a legitimate objective but an insufficient nexus between the purpose and the means of achieving the purpose, double devolution should be found unconstitutional. The question then becomes, what is the remedy?

Several possibilities exist. First, the State could be required to administer a program that delivers the same benefits, assessments and services regardless of the applicant or recipient's location. Second, the State could be required to supervise more closely certain elements of a program whose requirements and standards continue to be designed by administrators in “local” offices. Third, the State could be required to establish standards for programs and to require local administrators to provide feedback about whether they have achieved the standards. Fourth, the State could be required to work with the governments of local jurisdictions to determine if they would accept responsibility for all or part of the funding and administration of the TANF program for their residents. The choices are complex, and I can only sketch some principles here.

First, the State must be required to distinguish between aspects of the program where local information and connections are important and aspects of the program where uniform statewide standards are key. For example, every applicant and recipient may be experiencing violence in his or her family, so each needs an adequate assessment and opportunity to get help. Most of the appropriate service programs, however, are run by local government or non-profit agencies. The State should develop statewide procedures for assessing whether an applicant or recipient needs help because of family violence, and administrators in “local” offices should be required to adhere to the statewide standards. At the same time, administrators in “local” offices are probably in a better position than officials at the state level to identify appropriate service providers in the neighborhood. The State’s role in that part of the program should be to set standards about both the types of service providers needed and the nature of the relationship that the “local” office should develop with those service providers.

Second, the State must ensure that adequate funding is available to serve the needs of recipients regardless of their location. Funding decisions cannot be made by jurisdiction, in other words; they must be made based on the needs of applicants and recipients so that they can be treated as citizens of the State rather than as residents of a particular jurisdiction. It is no coincidence, for example, that Baltimore City
has the largest percentage of long-term recipients of any jurisdiction in the State, as it also has one of the lowest female employment rates and large areas of concentrated poverty.\textsuperscript{359} Allocating funds to Baltimore's local department of social services on the basis of the percentage of recipients who live in Baltimore City will not permit the individuals living in the City to have access to sufficient resources.

Third, it must be acknowledged that race may matter in the delivery of TANF benefits, services and sanctions. If it continues to be the case that certain aspects of the TANF program seem to work differently in places where more European-Americans live than in places where more African Americans live,\textsuperscript{360} the State must be held to its affirmative duty to identify the issues and find solutions.

Fourth, the State welfare bureaucracy must develop competence in understanding the economic and employment conditions in which TANF applicants and recipients live and to make that understanding a dynamic part of TANF services and requirements. The State must acknowledge that many employment issues are regional or statewide, rather than defined by local political boundaries, and it must find a way to deliver employment-related services to TANF applicants and recipients that respond to local, regional, and statewide employment and economic conditions. Where possible, the State must enhance the knowledge of administrators working at the local level about local, regional, and statewide economic and employment conditions, so that they can be more aware of the opportunities for economic self-sufficiency that might be open for applicants and recipients in their area.

\textbf{CONCLUSION}

Double devolution held the promise that families in deep poverty would be helped to achieve self-sufficiency through access to programs tailored to local economic and employment conditions.\textsuperscript{361} What appears to have happened instead in Maryland is that the State officials exercising control over the program within the boundaries of twenty-three of the State's twenty-four jurisdictions have created different programs, but the differences do not respond to the differences in employment opportunities in different parts of the State.\textsuperscript{362} The result is that, rather than being treated as citizens of the State, applicants for and recipients of cash assistance under TANF are

\begin{itemize}
\item \textsuperscript{359} See supra Part I.B.1.
\item \textsuperscript{360} See supra Part I.B.2.
\item \textsuperscript{361} H.R. REP. NO. 104-651, introduction, at 5-6 (1996).
\item \textsuperscript{362} See generally supra Part I.B.
\end{itemize}
treated as citizens only of the jurisdiction in which they live. Their access to, and services under, the state’s program vary according to the location of their residence. Unless the variability is justified, it cannot be sustained.

Arguments can be made for the application of two standards of review under the State constitution: rational basis with bite and heightened scrutiny. Under both, it is likely that double devolution will be found wanting, either for the absence of an important State interest in allowing State officials to treat people differently solely on the basis of the location of their residence, or on the basis that the means chosen to accomplish the objective of appropriately tailored treatment for applicants and recipients does not in fact serve that objective.

It is essential for the State to take seriously the consequences of double devolution for families in deep poverty. These families, like all families, are entitled to be treated as citizens of the State. Their access to state-funded resources and to federally funded resources that are funneled through the State should not depend on which local jurisdiction in which they happen to live.