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California's GAIN:

*Greater Avenues or
a Narrow Path?*

*The Politics and Policies of Welfare
Reform and AFDC Work Programs in
the 1980s.*

Ann VanDePol†

Katherine E. Meiss‡

INTRODUCTION

In late 1985, the California Legislature enacted a major welfare reform measure—the Greater Avenues for Independence program (GAIN).¹ GAIN is a mandatory work program ostensibly designed to help move adults receiving Aid to Families with Dependent Children (AFDC)² into the labor force while reducing AFDC costs. It provides education, job search, and workfare³ for participants. A compromise

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¹ Greater Avenues for Independence Act of 1985, ch. 1025, 1985 Cal. Stat. (codified at CAL. WELF. & INST. CODE §§ 11320-11320.9 (Deering Supp. 1988)).

² 42 U.S.C. §§ 601-615 (1983 & Supp. 1988). Established in 1935 as Title IV of the Social Security Act, AFDC today provides cash assistance to families with children deprived of parental support due to the "death, continued absence from the home . . . or physical or mental incapacity of a parent . . ." *Id.* § 606 (1983).

³ It is important to distinguish workfare from other employment strategies and job training programs. Workfare is a program in which people who receive benefits are required to work without pay as a condition of receiving those benefits. The work is usually in public service or non-profit organizations. Traditionally, workfare jobs have been make-work activities, such as maintenance of buildings or grounds, and have not offered significant skills training. Goodwin, *Can Workfare Work?*, J. PUB. WELFARE, Fall 1981, at 19, 20-21. Participants are not employees and therefore are not usually entitled to sick leave, vacation, worker's compensation and other benefits. Sklar, *Workfare: Is the Honeymoon Over—Or Yet to Come?*, J. PUB. WELFARE, Winter 1986, at 30, 31. For a thorough discussion of traditional workfare programs and GAIN's workfare provisions, see C. McKeever & M. Greenberg, *False Premises, False Promises: A Critique of California's Greater Avenues for Independence (GAIN)*

measure, GAIN combines liberal elements such as employment training, education, and the provision of childcare with punitive, repressive components such as workfare and sanctions for noncompliance.

Because of the national trend emphasizing work-for-welfare programs, it is imperative that individuals who are concerned about the problems of low-income women and children begin to incorporate advocacy in this area into their broader political work. It is important that AFDC work programs not be promoted falsely or oversold.⁴ Although GAIN and other programs may help some individuals move out of poverty, they will neither eliminate the need for AFDC nor necessarily provide a job paying a living wage to everyone wishing to work. In fact, individuals working under welfare employment programs may bring home less income for their families than the already minimal amount of an AFDC grant.

This Article offers a critical assessment of the GAIN program in terms of its express goal of providing meaningful employment opportunities for individuals receiving AFDC. We also examine the current social and political climate which now heartily greets GAIN and other AFDC employment measures. We analyze the GAIN program critically in terms of specific features which either assist or harm low-income families. In so doing, we intend to stimulate debate among feminists concerning the imposition of mandatory AFDC work requirements and specific provisions needed to make education, job training, and employment programs effective.⁵ Finally, we explore the legal consequences of GAIN, reviewing relevant litigation and suggesting alternative strategies for promoting the interests of the program's participants.

Workfare Program (1987) (unpublished paper, Western Center on Law and Poverty, Sacramento, Cal.).

⁴ For instance, the Massachusetts Employment Training Program (ET), MASS. REGS. CODE tit. 106 § 307 (1988), which was a precursor to GAIN, has been highly praised, especially by some liberals and some welfare advocates. Savner, Williams, & Halas, *The Massachusetts Employment and Training Program*, 20 CLEARINGHOUSE REV. 123 (1986). To some degree, this has resulted in a softening of traditional opposition to workfare and mandatory work programs. In this way, ET contributed to GAIN's passage.

Although statutorily a mandatory program, ET is administered on a voluntary basis. Some advocates continue to question ET's effectiveness, especially with respect to the wages received by participants when they enter employment, the adequacy of childcare, and ET's role in channelling women into sex-segregated jobs. Schulzinger & Roberts, *Welfare Reform in the United States: Fact or Fiction? Part I*, 21 CLEARINGHOUSE REV. 694, 702-3 (1987); J. Kluver, Report on the Massachusetts Employment and Training Program 4-6, 8 (1984) (unpublished paper, American Friends Service Committee, Cambridge, Mass.).

⁵ In 1985, about 11 million people (or 3.7 million families) received AFDC. The vast majority of AFDC families are headed by only one parent, usually a woman. U.S. GENERAL ACCOUNTING OFFICE, WORK AND WELFARE: CURRENT AFDC PROGRAMS AND IMPLICATIONS FOR FEDERAL POLICY, H.R. DOC. NO. 34, 100th Cong., 1st Sess. 19 (1987) [hereinafter GAO WORK AND WELFARE]. Since most AFDC work program participants are likely to be women, *id.*, we have chosen to refer to them as women throughout this Article. We have excluded from the discussion a thorough treatment of the AFDC-U program, codified at 42 U.S.C. § 607 (1983). The AFDC-U program provides cash assistance to two-parent families in which the "principal wage earner" is unemployed, and constitutes less than 10% of the AFDC program. GAO WORK & WELFARE, *supra*, at 19.

Part I discusses the redirection in federal AFDC policymaking and the political trends underlying AFDC work programs. Part II provides an analysis of the legislative process leading to the adoption of the GAIN Statute in California. Part III is a brief description of the GAIN program. Part IV evaluates the GAIN program in detail, giving special attention to the childcare provisions and the educational and other components of the program. Part V focuses on the role of federal litigation in the evolution of welfare work programs.

I. FEDERAL REDIRECTION AND GAIN STRATEGY

A. AFDC Work Programs 1967-1980

Welfare employment programs presently receive more uniform political support and target a broader population than did those of the late 1960s and early 1970s. The principal federal employment program at that time was the Work Incentive Program (WIN).⁶ WIN was introduced in 1967 in an effort to reverse or at least to limit the growth of burgeoning welfare rolls.⁷

In its early years, WIN (WIN I, 1967-1971) was a voluntary program, emphasizing training and employment that would facilitate the transition from welfare to unsubsidized jobs.⁸ However, the 1971 Social Security Amendments⁹ changed the direction of the WIN program from training of self-selected individuals to immediate job placement for all nonexempt AFDC recipients. As a result, WIN became a mandatory program: all AFDC recipients who had no pre-school children or other "barriers" that kept them at home were required to register with the state employment service, to participate in job training or job search activities, and to accept employment offers.¹⁰

⁶ Social Security Amendments, Pub. L. No. 90-248, § 204, 81 Stat. 881 (1968) (amended 1971); *Id.* § 444(b), 81 Stat. 881 (1968) (amended 1971).

⁷ Zall & Bethel, *The WIN Program: Implications For Welfare Reform and Jobs Organizing*, 13 CLEARINGHOUSE REV. 272, 272 (1979).

In the ten years prior to WIN, AFDC participation rose from 646,000 families (2.4 million individuals) to 1.2 million families (5 million individuals). S. REP. NO. 774, 90th Cong., 1st Sess., reprinted in 1967 U.S. CODE CONG. & ADMIN. NEWS 2981.

⁸ U.S. DEP'T OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, IMPLEMENTING WELFARE-EMPLOYMENT PROGRAMS: AN INSTITUTIONAL ANALYSIS OF THE WORK INCENTIVE (WIN) PROGRAM, R&D MONOGRAPH 78, at 6 (1980). Based on a long-term strategy of overcoming employment disabilities, the early WIN program focused on "individual job readiness," with basic education and vocational training the two largest WIN components nationwide in 1970. See Zall & Bethel, *supra* note 7, at 273.

⁹ Social Security Amendments, Pub. L. No. 92-223, 85 Stat. 803 (1971) (current version at 42 U.S.C. §§ 630-645 (1983 & Supp. 1988)). These amendments are frequently referred to as the Talmadge Amendments.

¹⁰ Also exempt were recipients with illness, incapacity, or advanced age; recipients remote from WIN work and training sites; children under age 16 or attending school full time; and people needed in the home to care for others who were ill or incapacitated. Social Security Amendments, Pub. L. No. 92-223, § 3(a)(2), 85 Stat. 803 (1971) (current version at 42 U.S.C. § 630-645 (1983 & Supp. 1988)).

Thus, in the second phase of WIN (WIN II, 1971-1981), training and other services were only provided when job placement was not possible.¹¹ Training to upgrade a participant's skills so she could get a better-paying, stable job was generally not permitted if a less-skilled job was immediately available. This new priority attached to immediate job placement over training encouraged WIN officials to funnel participants into low-wage jobs.¹² Because these provisions increasingly prohibited preparation for higher paid and more stable employment, the job-entry wage paid to WIN participants noticeably declined.¹³

Despite the official assertion in 1975 of a renewed focus on training and other supportive services,¹⁴ WIN was a failure in terms of its principal goal of encouraging AFDC recipients to enter the labor force and leave welfare.¹⁵ WIN never fully escaped the dilemma of low-wage jobs which trapped participants into continued reliance on welfare for economic subsistence.¹⁶ Because the statute equated unsubsidized employment with attainment of self-support, WIN frequently tracked participants into low-wage, short-term labor positions with little opportunity for self-support.¹⁷ Also, factors such as labor market fluctuations and the participant's race, sex, and educational background had far more impact upon long-term employability than did WIN participation alone.¹⁸

¹¹ See Zall & Bethel, *supra* note 7, at 273.

¹² Between 1972 and 1973, the proportion of WIN participants in institutional training declined from 32.9% to 11.3%, while the proportion of WIN participants in unsubsidized employment in the same period increased from 16.5% to almost 30%. *Id.*

¹³ The initial wage received by WIN participants decreased from \$2.28 per hour in 1971 to \$2.02 per hour in 1973, the first full year of WIN II. Low-wage placements were further encouraged by WIN regulations that require that placements pay only the minimum wage and then only where applicable; if the minimum wage does not apply (as in many jobs where WIN participants have been placed), the employer need only pay "substantially" what similar work in that area pays so long as this wage rate is at least 75% of the federal minimum wage. U.S. DEP'T OF LABOR, *supra* note 8.

¹⁴ The shift in program responsibility from welfare to employment and training agencies was carried one step further in the "WIN Redesign" of 1975. Under this administrative restructuring, WIN Redesign clients registered directly with the local WIN employment and training staff at the Employment Development Department (EDD) rather than at the welfare department. Since the 1975 "Redesign" effort, the Labor Department has ostensibly moved toward a more "balanced" approach in its administration of WIN, an approach that emphasizes supportive services, counseling, and training in addition to placement, while improving the quality of placements in terms of entry level age and job retention. *Id.* at 6.

¹⁵ This continued utilization of welfare largely reflected the fact that WIN placements in the private sector averaged just slightly more than the minimum wage, hardly enough to support a family. Zall & Bethel, *supra* note 7, at 275.

¹⁶ In 1977, approximately 50% of new jobholders continued to receive welfare payments. *Id.* at 274.

¹⁷ Government data in 1977 revealed that 25% of those placed were unemployed within 30 days of placement, while statistics in 1974 revealed that between 40% and 50% of those placed were out of work within 90 days. *Id.* at 275.

¹⁸ Researchers found a statistically significant relationship between participants' social characteristics and their employment pattern and departure from AFDC. WIN participants who were younger, married, better educated, had fewer children, and had been on AFDC for fewer years had a greater likelihood of sustaining their employment and leaving AFDC than did other WIN participants. U.S. GOV'T ACCOUNTING OFFICE. REPORT BY THE COMPTROLLER

In 1982, the Government Accounting Office concluded that the program had in effect lost its battle to combat welfare "dependency" since most participants did not achieve economic self-sufficiency.¹⁹ WIN placements on average produced virtually no net reduction in receipt of welfare since many participants found only limited work and continued to receive welfare.²⁰ Large numbers of those receiving welfare were exempt from participation because of statutory exemptions, while limited funding restricted participation of many of those who were otherwise eligible and limited the amount of training that could be provided. Of the approximately 1.6 million individuals who did register for the WIN program, over half were not assigned to an active program component, primarily because of limited funding.²¹

The ineffectiveness of WIN is all the more striking because the program selected registrants on the basis of characteristics that presumably gave them the greatest chance for employment.²² As a result of this "creaming" process, women with few job skills and large families were not likely to be included. Rather, because WIN provided only limited childcare funds, fathers in the AFDC-U program whose wives could provide care for the family's children participated more frequently in WIN than did single mothers.²³

Throughout the '70s, there was no national consensus regarding

GENERAL OF THE UNITED STATES—AN OVERVIEW OF THE WIN PROGRAM: ITS OBJECTIVES, ACCOMPLISHMENTS, AND PROBLEMS, H.R. DOC. NO. 55, 97th Cong., 2d Sess. at iii, 26-28, (1982) [hereinafter GAO WIN].

Leonard Goodwin's research of mothers participating in the WIN program also emphasizes the importance of participants' background variables. L. GOODWIN, *CAUSES AND CURES OF WELFARE: NEW EVIDENCE ON THE SOCIAL PSYCHOLOGY OF THE POOR* (1983). Goodwin found that the strongest predictor of the length of time parents remained on welfare was the amount of pay mothers had previously commanded in the job market: the lower the pay commanded, the longer on welfare. In addition, the lower their education and the more children they have, the longer the time on welfare. *Id.* at 41, 43-45.

¹⁹ See GAO WIN, *supra* note 18, at 19, 20-31. Indeed, the GAO report reads like an obituary of WIN in the wake of the Omnibus Reconciliation Act (OBRA) of 1981 and its new employment measures.

²⁰ Only 36% of active participants in WIN entered employment during 1980, and of those participants who got jobs, 60% were employed in low-paying jobs that allowed them to continue to receive full or partial AFDC grants. *Id.* at 19-21, 23. In addition, approximately half of the employed participants who continued to receive AFDC grants were not working when interviewed eighteen months later. *Id.* at 21, 30.

²¹ Because of budget limitations and legal exemptions from WIN, less than 20% of adult AFDC recipients participated in the program in 1980. *Id.* at 12-13. The Department of Health and Human Services estimated that over 60% of the adult AFDC population were legally exempt from WIN registration, mainly because they were caring for a child under six years of age.

²² WIN participants were usually selected according to the following priority system: (1) unemployed fathers; (2) mothers who volunteered; (3) other mothers and pregnant women under age 19; (4) dependent children and relatives age 16 or older and not in school, working, or in training; and (5) all other registrants. Participants of prime working age, with a high school education, and with prior work experience had the greatest employment potential. *Id.* at 18. Because of this, many participants who succeeded in finding employment might have been able to find employment without any WIN assistance. Indeed, in 1980, about 70% of the 204,000 WIN registrants who entered employment said they found their own jobs. *Id.* at 16.

²³ See generally Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983).

maternal employment that would allow public assertion of the injunction that welfare mothers ought to work for their benefits. Although women, especially mothers, entered the labor force in record numbers throughout the '60s and '70s, this economic phenomenon had not been culturally ratified nor had it received an unqualified stamp of approval by politicians, welfare policymakers, or the public at large.²⁴ In addition to the WIN program, policymakers relied upon financial incentives to encourage employment (the "carrot" approach), amending the federal AFDC statute to provide for the "30 and 1/3" work incentive disregard, which effectively created a small bonus for those employed while receiving welfare.²⁵ Also, liberal proponents of the guaranteed annual income and Negative Income Tax experiments strongly influenced AFDC reform efforts.²⁶ In this context, WIN competed with other reform measures such as the guaranteed annual income that did not center upon maternal employment.

By the late 1970s, inflation and rising unemployment had shattered the American faith in unlimited economic growth. In this climate of economic uncertainty, welfare recipients became easy targets as voters and politicians alike searched for scapegoats and ways to trim public

²⁴ President Nixon's veto in 1971 of federal funds for a comprehensive child development program, including preschool childcare is indicative of negative attitudes at that time; when vetoing the legislation, he commented: "[F]or the Federal Government to plunge headlong financially into supporting child development would commit the vast moral authority of the National Government to the side of communal approaches to child rearing over [and] against the family-centered approach." *Quoted in G. STEINER, THE CHILDREN'S CAUSE* 113 (1976).

²⁵ In 1967, Congress enacted the so-called "work incentive disregard," which required that the welfare department disregard the first thirty dollars of gross income earned monthly, plus the next one-third of income, when calculating AFDC benefits. *Social Security Amendments*, Pub. L. No. 90-248, tit. II, pt. I, § 202, 81 Stat. 881 (1968) (amended 1971). The effect was to decrease the amount of "earned income" and thereby increase overall disposable income. Without such incentive, every dollar of income reduces benefits by one dollar.

²⁶ The Negative Income Tax (NIT) experiments were conducted by economists in four major income maintenance programs at the following sites: New Jersey and Pennsylvania (1968-73); rural areas of North Carolina and Iowa (1970-72); Gary, Indiana (1971-74); and probably the most publicized, Seattle and Denver (1970-78). In each project, an experimental group received negative income tax benefits, while a control group did not. Analysis of these experiments showed that negative income tax benefits created a work disincentive rather than inducement for employment. In the Seattle-Denver experimental income maintenance programs, lower tax rates on earnings by people receiving welfare had only a minor bearing on labor force participation, while adding significantly to the overall costs of welfare. *See Adams, A Reappraisal of the Work Incentive Aspects of Welfare Reform*, 54 *SOC. SERV. REV.* 521, 526 (1980). More detailed economic analyses of the Seattle-Denver NIT experiments demonstrated that heads of families in the experimental NIT group had a greater tendency than controls to leave employment and had substantially longer spells of non-employment. Robins, Tuma, & Yeager, *Effects of SIME/DIME on Changes in Employment Status*, 15 *J. HUM. RESOURCES* 545 (1980). A NIT program nationwide, researchers warned, would lead to "fairly sizable reductions in labor supply . . . in participating families." Spiegelman & Yeager, *Overview*, 15 *J. HUM. RESOURCES* 463, 478 (1980). *See also* Robins & West, *Program Participation and Labor-Supply Response*, 15 *J. HUM. RESOURCES* 499; Groeneveld, Tuma, & Hanan, *The Effects of Negative Income Tax Programs on Marital Dissolution*, 15 *J. HUM. RESOURCES* 654. *Compare Law, supra* note 23, at 1292 (discussing family stability in relation to the NIT experiments).

expenses.²⁷ The Reagan juggernaut of 1980 capitalized on these anti-welfare sentiments and embodied them in federal policy early in the new administration with the 1981 OBRA amendments.²⁸ OBRA ushered in a new era of conservative control over AFDC as Congress acquiesced to Reagan Administration efforts to reduce welfare expenditures.

OBRA signaled a major shift in AFDC policy-making, as Congress enthusiastically embraced employment programs as the mechanism best suited to reduce welfare costs. The OBRA Congress expressed strong disenchantment with the work incentive approach and financial inducements such as the "30 and 1/3" income disregard, which was severely limited.²⁹ Instead, Congress gave the states more freedom to design their own mandatory work programs, including specific authorization for workfare, grant diversion, job search, and WIN demonstration programs.³⁰ The "carrot" was abandoned, the "stick" taken in hand.

As Sylvia Law succinctly states, "Forcing welfare recipients to work was the major goal of the 1981 Amendments."³¹ In defense of this approach, Congress could rely upon the statutory language of the AFDC provisions which state that AFDC, in addition to its child welfare function, should "help parents or relatives attain or retain capability for the maximum self-support and personal independence."³² The United States Senate also declared that encouraging welfare recipients to work for benefits was highly consistent with the American value system reflecting "the consensus of American society that dependency on welfare is an undesirable situation both from the point of view of society and from the point of view of the individual recipient."³³

Armed with this ideology, Congress in 1981 noted that American families increasingly relied upon the employment of both parents to maintain family economic independence. Indeed, in passing OBRA,

²⁷ This brief description of political and economic events during the '70s relies upon the discussion of the "War on Welfare" in M. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 278, 278-91 (1986). See also F. PIVEN & R. CLOWARD, *THE NEW CLASS WAR* (1982).

²⁸ See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (Aug. 13, 1981).

²⁹ See SENATE FINANCE COMM., SUMMARY OF THE FINANCE COMMITTEE'S RECOMMENDATIONS, SOCIAL SECURITY PROVISIONS, S. REP. NO. 139, 97th Cong., 1st Sess. 507, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 768. See also *Heckler v. Turner*, 470 U.S. 184 (1985) (effective amount of income disregard reduced by discontinuance of mandatory tax withholdings as a separate deduction in determining "income"). With the elimination of the income disregard, OBRA reduced the percentage of employed parents among recipients, since fewer qualified for AFDC benefits. See U.S. DEP'T OF HEALTH & HUMAN SERVS., SOCIAL SEC. ADMIN., AID TO FAMILIES WITH DEPENDENT CHILDREN: FINDINGS OF THE MAY 1981-MAY 1982 AID TO FAMILIES WITH DEPENDENT CHILDREN STUDY, RECIPIENT CHARACTERISTICS, FINANCIAL CIRCUMSTANCES: THE EFFECTS OF THE OMNIBUS RECONCILIATION ACT OF 1981, at 7 (1985) [hereinafter HHS, OBRA EFFECTS].

³⁰ See 42 U.S.C. §§ 609, 614, 645 (1983).

³¹ Law, *supra* note 23, at 1274.

³² 42 U.S.C. § 601 (1983).

³³ SENATE FINANCE COMM., *supra* note 29, at 774.

Congressional reports specifically cited statistics showing the increasing percentage of maternal employment within the non-welfare population.³⁴ The implication was that if mothers in households not receiving AFDC have entered the labor force to secure or enhance their families' economic well-being, AFDC mothers ought to be required to do the same. No longer did either conservatives or liberals talk about women's special role as mothers.

B. Federal and State Realignment

In response to OBRA's authorization of employment projects, thirty-eight states have established some form of AFDC work program.³⁵ Although the programs vary considerably in quality and character,³⁶ they represent a realignment with federal standards consistent with conservative efforts to give the states added control and authority over welfare.

Reflecting this approach, the Reagan Administration reaffirmed its faith in AFDC work programs in a special report on welfare that recommended the development of a "new federal-state-community partnership" so that "those who are able to work do so for their public assistance benefits."³⁷ The Administration's report urges that there should be a "general and system-wide waiver authority . . . so that state demonstrations may differ in whole or in large part from established rules and procedures."³⁸ This recommendation indicates the Administration's intent to allow states to develop work programs with minimal federal interference, eliminating potential protections that federal stat-

³⁴ *Id.*

³⁵ GAO WORK AND WELFARE, *supra* note 5. This report provides a good overview of the various state work programs currently in operation. See also J. GUERON, WORK INITIATIVES FOR WELFARE RECIPIENTS: LESSONS FROM A MULTI-STATE EXPERIMENT (1986); B. GOLDMAN, D. FRIEDLANDER, & D. LONG, FINAL REPORT ON THE SAN DIEGO JOB SEARCH AND WORK EXPERIENCE DEMONSTRATION (1986) [hereinafter B. GOLDMAN]; Sorenson, *Women, Work and Welfare: A Summary of Work Incentives and Work Requirements for AFDC Recipients in Michigan*, 20 CLEARINGHOUSE REV. 113 (1986); Savner, Williams, & Halas, *supra* note 4.

³⁶ See, e.g., GAO WORK AND WELFARE, *supra* note 5, at 32.

³⁷ PRESIDENT'S DOMESTIC POLICY COUNCIL, UP FROM DEPENDENCY: A NEW NATIONAL PUBLIC ASSISTANCE STRATEGY 83, 93 (1986). The Policy Council's "Low Income Opportunity Working Group" held public hearings in seven major cities, interviewing current and former welfare recipients, administrators, social workers, and political leaders, and gathering data on "self-help antipoverty projects" across the nation. Their data, however, are not presented in a highly systematic way (and are interspersed with many unnecessary quotes from President Reagan's speeches). Much of this research is highly questionable and the conclusions spurious (see, e.g., the discussion of AFDC's impact on family breakdown, *id.* at 46-47, 55). However, it serves as a clear policy statement from the current Administration regarding the direction of AFDC.

³⁸ *Id.* at 94. The Working Group also strongly recommends reliance on private organizations and voluntary associations for the development of antipoverty programs. See *id.* at 64-74.

utes might have provided.³⁹

Workfare programs and related ideology have captured legislative attention at all levels of government. Leading state officials have joined the current Administration in its redefinition of welfare as a problem of personal incentive and work motivation. The National Governors' Association in 1987 echoed the Reagan Administration's proposals, responding with its own AFDC employment initiatives that include "flexible state-designed work programs that accommodate remedial education, training and job placement and experience" for AFDC recipients with children over the age of three.⁴⁰ In its "Policy on Welfare Reform," the Association articulated its belief that employment programs are the best remedy to welfare dependency: "The Governors' aim in proposing a welfare reform plan is to turn what is now primarily a payments system with a minor work component into a system that is first and foremost a jobs program."⁴¹

The Governors' Association recommends that all employable welfare recipients participate in education, job training, or placement programs, and accept a suitable job when offered.⁴² Absent in this public discussion is any notion of welfare entitlement; the discussion is framed instead in terms of the participant's obligation to work for her benefits.⁴³ GAIN can be viewed as an early version of this dramatic shift in welfare thinking, California's answer to this change in ideology which serves as a harbinger of federal reform.

C. Federal Legislation and the Triumph of Conservatism

Currently pending before Congress are major AFDC reform bills which strikingly reflect the new attitudes regarding welfare that guided GAIN's formation. Although there are important differences among the federal bills, they nevertheless share similar premises regarding the desirability of employment programs and the need to restructure welfare thoroughly. In the discussion that follows, we concentrate on three reform bills: S. 1511,⁴⁴ the "Family Security Act" sponsored by Senator Moyni-

³⁹ See Part V(B) of this Article for a discussion of welfare litigation on matters of statutory conformity.

⁴⁰ Herbers, *Reagan Partly Backs Governors' on Welfare*, N.Y. Times, Feb. 24, 1987, at A20, col. 2.

⁴¹ Nat'l Governors' Ass'n, Policy on Welfare Reform 1 (1987) (unpublished statement).

⁴² *Id.* at 2. According to the Governors' Policy Statement, employable recipients include those with children age three or older. *Id.* The statement sets out no criteria for determining whether or not a job is "suitable." It indicates, generally, that job placement services will be structured so that they suit the employment needs of individual participants. *Id.*

⁴³ For instance, the Governors' Association writes, "The major obligation of the individual in the public assistance contracts we propose is to prepare for and seek, accept, and retain a job." *Id.* at 2.

⁴⁴ S. 1511, 100th Cong., 1st Sess., 133 CONG. REC. 10,410-27 (1987).

han; H.R. 1720 (as amended, H.R. 3644),⁴⁵ the "Family Welfare Reform Act of 1987," which passed the House of Representatives on December 16, 1987; and H.R. 3200,⁴⁶ the defeated Republican welfare reform bill. These federal bills have in common three key elements which illustrate the new ideological framework presently surrounding welfare reform.

1. The Rhetoric of a New Social Contract and the Loss of Welfare Entitlement

The proposed measures all clearly state that it is the family, not the state or the community, that is responsible for child well-being. Senator Moynihan flatly declares that child support must come from parents first, and only thereafter from the community.⁴⁷ Community responsibility, according to Moynihan's Family Security Act, extends primarily "to the obligation to enable parents to fulfill their responsibilities through expanded opportunities in education and training."⁴⁸ The Republican-sponsored bill, H.R. 3200, attempts to establish a societal expectation that "recipients will cooperate with local agencies by participating in education, training and employment programs in good faith and in that way fulfill their civic responsibility to accept welfare benefits only while they prepare for independence and for the briefest possible period of time."⁴⁹

Coupled with this concept of a new civic responsibility⁵⁰ is a preoccupation with long-term "dependency." For example, H.R. 1720 (as amended, H.R. 3644), considered by social advocates for women, the poor, and children to be the most generous and well-designed proposal,⁵¹

⁴⁵ H.R. 3644, 100th Cong., 1st Sess., 133 CONG. REC. 11,536-59 (1987).

⁴⁶ H.R. 3200, 100th Cong., 1st Sess. (1987) (available on microfiche, H.R. Bills 424).

⁴⁷ 133 CONG. REC. S10,400-04 (daily ed. July 21, 1987).

⁴⁸ S. 1511, *supra* note 44, tit. I. All three bills contain provisions to improve the collection of child support from absent fathers. *See id.*, tit. I(c); H.R. 3644, *supra* note 45, tit. V, § 505; H.R. 3200, *supra* note 46, tit. IV, § 407. However, none of the measures views welfare reform simply as a matter of cutting back on benefits; nor do they leave child support a purely private matter, as one conservative critic would recommend in his call for eliminating the AFDC program entirely. *See C. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980*, at 227-31 and *passim* (1984).

⁴⁹ H.R. 3200, *supra* note 46, tit. I, § 101(2).

⁵⁰ Lawrence Mead has influenced the welfare debate by urging adoption of a new civic responsibility. L. MEAD, *BEYOND ENTITLEMENT* 237-40 (1986). He argues that compulsory work programs will improve social functioning in American society, welfare programs in the past having failed because they expected "too little" of recipients. *Id.* at 9. Arguing that AFDC has shielded recipients from the threats and rewards of the private market place, Mead proposes the imposition of work requirements as part of an "authoritative social policy [that would] enforce social obligations" upon the poor. *Id.* at 12. *See also id.* at 30, 40-45. *But cf. id.* at 200-16 (discussion of liberal opposition to work requirements based on the belief that poverty is a societal problem not an individual behavioral problem).

⁵¹ For example, the Coalition on Human Needs, an umbrella organization that includes the Children's Defense Fund, the League of Women Voters, the Urban League, and the National Council of Churches, supported H.R. 1720. *COALITION ON HUMAN NEEDS* (1987) (brochure describing the Coalition, Washington, D.C.).

offers as its express purpose, "to assure that needy children and parents obtain the education, training, and employment which will help them to avoid *long-term welfare dependence*."⁵² As one of the co-sponsors of the measure states, "guiding people out of poverty and dependency, and *into the habits and routines of working people* is the process and goal of H.R. 1720."⁵³ Personality change, not structural change, is the linchpin of reform according to this view. Defining the primary welfare problem in terms of long-term dependency represents to a large extent a conservative victory: the concept frames the issue in terms of psychological passivity, to the exclusion of larger economic forces that contribute to poverty and to welfare use.⁵⁴

In general, proponents of work programs believe that improved benefits, financial incentives, and better opportunities are not enough to motivate welfare recipients, but that programs must also be mandatory. Behavioral requirements and the work ethic must be imposed upon indi-

⁵² H.R. 3644, *supra* note 45, tit. I (emphasis added). Noting that welfare dependency is most likely to occur among teenage parents and high school dropouts, the new federal welfare reform measures each identify as a "target population" those without a high school education and families with teenage parents. See, e.g., *id.*

⁵³ 133 CONG. REC. 11,523 (1987) (statement of Rep. Espy) (emphasis added). The preoccupation with the cycle of poverty and long-term dependency was an oft-repeated theme during the recent Congressional debate; Representative Mfume's comments are typical:

The essence of the approach behind the Family Welfare Reform Act of 1987 is captured by the popular slogan, "Give a Hand, Not a Handout." . . . We are not giving handouts here; we are providing incentives to work and opportunities to break the cycle of dependency of welfare.

133 CONG. REC. 11,527 (1987).

⁵⁴ There is continuing debate over the extent of long-term receipt of welfare. According to Greg Duncan's analysis of the Panel Study of Income Dynamics begun at the University of Michigan in 1968, longitudinal data reveal that only 17% of those receiving any welfare income were persistent welfare users who received welfare for eight years or more of the ten year study period. G. DUNCAN, YEARS OF POVERTY, YEARS OF PLENTY 76 (1984). This group constitutes 4-5% of the entire population, with fewer than half of these long-term recipients relying on welfare to make up more than half of their family income. *Id.* at 77-78. Duncan concludes that, contrary to the stereotype, only 2% of the population could be classified as persistently dependent on welfare income. *Id.*

Mary Jo Bane and David Ellwood arrive at similar, though qualified, conclusions regarding welfare dependency. Bane & Ellwood, *The Dynamics of Dependence: The Routes to Self-Sufficiency* (1983) (unpublished mimeo. for the John F. Kennedy School of Government, Harvard University), cited in Ellwood & Summers, *Poverty in America: Is Welfare the Answer or the Problem?*, in *FIGHTING POVERTY* 96 (S. Danziger & D. Weinberg eds. 1986). Most people, they write, stay on the program a relatively short time: at least 50% leave within two years and 85% leave within eight. However, they also observe that the minority who do stay on the program a long time accumulate more than 50% of the benefits paid out. *Id.* at 96.

Frances Fox Piven and Richard V. Cloward discuss the Bane and Ellwood research data and reiterate Bane and Ellwood's conclusion that although looking at AFDC rolls over a period of time shows a high degree of transience, looking at them at a particular point in time emphasizes persistent use. Forty-nine percent, according to this approach, were undergoing a "welfare spell" that would last eight years or more. Piven & Cloward, *supra* note 27, at 62-67 (1987). Despite these research findings, they conclude: "Nevertheless, considering the total universe of those who turn to AFDC over a period of years, welfare spells are much more temporary than the hardcore imagery implies." *Id.* at 64.

For a good contrast of the methods of calculating welfare use, see Duncan, Hill, & Hoffman, *Welfare Dependence Within and Across Generations*, 239 *SCIENCE* 467 (1988).

viduals through a national effort to remake the AFDC family into an economically independent unit.

At the core of this effort to reshape morality and behavior is the concept of a "contract" that delineates the rights and responsibilities of both the participant and the welfare agency.⁵⁵ For example, Moynihan's bill, which had a "general emphasis on shared and reciprocal obligation," calls for a "social contract" that obligates state agencies to provide opportunities for families to become self-sufficient, and which obligates participants in return to take advantage of such opportunities.⁵⁶ Similarly, H.R. 3644 requires each work program participant to "negotiate and enter into" an "agency-client agreement" in which the participant commits herself to an employability plan while the state details the services it will provide to facilitate this participation.⁵⁷ Although H.R. 3200 does not explicitly refer to a "contract" providing mutual rights and obligations, the bill does call for the development of "employment plans" which are similar in nature.⁵⁸

This concept of a contract between the participant and the agency is attractive to many Democrats who view it as a way to make welfare more worthy in the public's eye, thereby shielding AFDC from further attack.⁵⁹ The work contract is a change from a system which many people, including some liberals, see as the government asking nothing in return for an AFDC grant.⁶⁰ Mothering is apparently equated with nothing in the view of many lawmakers.

The head of an AFDC household, no longer entitled to AFDC as a matter of right, is to be "contractually" bound to work requirements as a condition of receiving benefits. However, as H.R. 3644 makes explicit,

⁵⁵ Mead's work emphasizes the concept of a social contract. Mead, *supra* note 50. He also stresses the need for a "civic conception" and the common obligation in the relationship between recipient and state. See Mead, *supra* note 50, at 189-258.

⁵⁶ 133 CONG. REC. S10,400-04 (daily ed. July 21, 1987) (statement of Sen. Moynihan).

⁵⁷ H.R. 3644, *supra* note 45, tit. I, § 102(g).

⁵⁸ H.R. 3200, *supra* note 46, tit. II, § 417(d). The Governors' Association report also encourages welfare agencies to develop a "special contract" between the recipient and the bureaucracy, one that will "provide the incentives needed to succeed." Further mirroring the "hands-off" approach of the federal government as endorsed by the Reagan Administration, the Governors' Association states: "[W]e oppose federal requirements that tell us how to implement job related services." Nat'l Governors' Ass'n, *supra* note 41, at 4.

⁵⁹ See, e.g., Democratic Representative Espy's comments that work obligations as embodied in the agency-client contract would allow "dignity and self-respect back into the lives of millions of our neediest citizens." 133 CONG. REC. H11,522-23 (daily ed. Dec. 16, 1987).

⁶⁰ Wisconsin Representative Gunderson, for example, states:

First and foremost, in any effective reform of the welfare program we must develop a *system of mutual obligations*. The government's obligation to see that welfare recipients are able to acquire skills necessary to be self-sufficient, and recipients' obligation to contribute to their own support by working or participating in training to make them job ready.

Id. at 11,520-21 (emphasis added). Implicit in this point of view is an ignorance of the work involved in parenting young children, as well as a lack of recognition for the social value of parenting.

the "contract" is only unilaterally binding; nullifying any mutuality of contractual obligation, H.R. 3644 provides:

In no case shall any agency-client agreement entered into pursuant to this subsection give rise to a cause of action against the federal government or any officer or agency thereof on the grounds of the failure of any party to such an agreement to observe its terms.⁶¹

Thus, only the state can enforce this pseudo-contract, by withholding financial assistance; the statute denies participants any right to enforce the agreement.⁶² Moreover, it is difficult to see what constitutes the bargained-for consideration on the part of the welfare recipients which is necessary for a binding contract. Workfare participants are already under a preexisting duty under the proposed statute to perform in training and employment programs.⁶³

Finally, the new federal reform measures reestablish significant social work control over the AFDC family. H.R. 3644, for example, calls for the assignment of a case manager to each participating family.⁶⁴ In addition to acting as a "broker" to ensure delivery of services to the family, the case manager will "monitor the progress of the participant" and "periodically review and renegotiate the family support plan."⁶⁵ Another important new feature is the requirement in all three measures that teenage parents who receive benefits under the employment programs live with a parent, guardian, or other adult relative.⁶⁶

With case managers specifically assigned to participants and to families with minor parents, federal welfare measures now allow the reentry of the social worker directly into the AFDC family; the social worker supervises and attempts to mold behavior into a desired mode that will lead eventually, it is hoped, to financial independence. This intrusion into the family life of the poor is not simply an effort to shape sexual morality to conform to middle class expectations as welfare rules once were.⁶⁷ Rather, proponents see this as a pragmatic necessity in the effort to break the cycle of poverty. The work ethic, not sexual morality, is the informing ideology, as policymakers attempt to reintroduce the concept of worthiness into the AFDC program.⁶⁸

⁶¹ H.R. 3644, *supra* note 45, tit. I, § 415(g)(B).

⁶² Representatives were aware of the effort to make the agreement litigation-proof. *See, e.g.*, 133 CONG. REC. H11,516-17 (daily ed. Dec. 16, 1987) (statement of Rep. Henry).

⁶³ *See, e.g.*, H.R. 3644, *supra* note 45, tit. I, § 101(c)(1).

⁶⁴ *Id.* § 416(g)(3).

⁶⁵ *Id.* § 416(g)(3)(a-c).

⁶⁶ Teenage parents may also live in a foster home, maternity home, or other adult-supervised "supportive living arrangement." *Id.* at tit. VI, § 417(b)(1)(a). *See also* S. 1511, *supra* note 44, tit. IV, § 401. Both bills allow exemptions from this requirement if the agency finds it impossible, inappropriate or injurious to the health and safety of a minor parent to live with a parent or guardian. *See* H.R. 3644, *supra* note 45, tit. VI, § 417(b)(1)(B); S. 1511, *supra* note 44, tit. IV, § 401.

⁶⁷ *See, e.g.*, W. BELL, AID TO DEPENDENT CHILDREN (1965).

⁶⁸ The concept of worthiness as a prerequisite for receipt of public benefits was dominant in welfare politics prior to 1960. *See generally id.*

2. AFDC Mothers Are Socially Obligated to Work Outside the Home and Their Contribution as Childrearers Has Been Devalued

Requiring AFDC mothers of young children to work outside the home as a condition for receiving AFDC represents a dramatic policy shift. This shift has been fueled by the increased movement of women into the labor force and by the decreased societal valuation of single mothers as childrearers. Speaking on this point, Senator Moynihan introduced his bill by emphasizing that the changing social roles of American women have created new obligations that ought to be embodied in welfare policy. With the vastly changed family arrangements of the intervening half century, the majority of American mothers are now in the labor force.⁶⁹ However, Moynihan continues, "the only women who have not participated in this change are the heads of AFDC families, of whom fewer than five percent work part time or full time."⁷⁰ Noting the national tendency to regard an unemployment rate of seven percent as barely tolerable, Moynihan asks rhetorically, "What then are we to think of a system that keeps ninety-five percent of poor mothers unemployed and out of the labor force?"⁷¹

Moynihan in effect implies that since employment is part of the "normal experience" of American mothers, single custodial mothers should be judged by the same standards as men—employment is not only expected, but ought to be statutorily mandated if one is receiving welfare. The imposition of work requirements is a way to make the lives of mothers receiving welfare parallel those of the majority.⁷²

Republicans have expressed the strongest indignation concerning what they perceive as the "gross injustice" that liberal provision of benefits to AFDC mothers means for the employed mother not on welfare. Rather than providing affirmative measures such as childcare to all employed parents, the Republicans express concern that the provision of services to AFDC mothers might cause resentment among single mothers not receiving such benefits. Typical of such sentiments are Representative Fawell's remarks in opposition to the Democratic bill:

Whereas a majority of nonwelfare mothers with children under age 3 work, H.R. 1720 exempts welfare mothers with such children from participating in NETWork. To the working woman supporting a household this

⁶⁹ 133 CONG. REC. S10,400-04 (daily ed. July 21, 1987).

⁷⁰ *Id.*

⁷¹ *Id.* H.R. 3200 expresses the same idea but more obliquely, stating that "nearly all welfare recipients are potentially able employees capable of self-support." H.R. 3200, *supra* note 46, at tit. I, § 101(1). Obviously, these policymakers do not consider taking care of children to be work.

⁷² It is not just male politicians who have arrived at this conclusion regarding maternal employment and AFDC. Economist Barbara Bergmann also recommends the imposition of work requirements, describing welfare mothers as the rearguard of women's march into the labor force. B. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 231, 242-43 (1986).

double standard tells her not only does she have to work, but that she must find suitable day care, pay for that day care, and pay taxes to support the welfare mothers who remain at home with their children.⁷³

The repressive “put-them-to-work” mentality of the conservatives is now easily harmonized with the social realities of the '80s in which most mothers with children over the age of six are employed.⁷⁴ During the recent Congressional debate, very few Representatives or Senators spoke of the value of raising children, and no one spoke of the feminist notion that “every mother is a working mother.” Indeed, members of Congress frequently displayed a near contempt for the role of mothering, as Representative Slattery’s comment reveals: “If this legislation passes, the day of the welfare parent *sitting home* and doing nothing to enhance their employability will end.”⁷⁵

3. Child Welfare Is Best Served by Having an Economically Self-Sufficient Parent

The widespread acceptance of mandatory work requirements is a complete reversal of the initial drive to institute the AFDC program in the early twentieth century. The early AFDC program was implemented to *prevent* single mothers from having to enter the labor force at a time when maternal employment was equated with child neglect in the minds of welfare reformers.⁷⁶ Today, in contrast, GAIN and other welfare measures *prescribe* maternal employment as the very antidote to childhood poverty and welfare dependency. The new federal welfare proposals tend to concentrate on adult behavior or misbehavior to the near exclusion of child welfare concerns. For single parent families, it is now assumed that children are better off having an employed mother than an unemployed mother.⁷⁷

All three bills require AFDC mothers with young children to participate in work programs, and all require the state to provide some childcare. Ironically, children of women participating in work programs now have the unique status of being the first set of American children for whom substitute childcare is deemed preferable to maternal care, their best opportunities in life resting with their mothers’ employed status.

Congressional Republicans are as content with the provision of sub-

⁷³ 133 CONG. REC. H11,525-26 (daily ed. Dec. 16, 1987).

⁷⁴ The proportion of employed mothers with school-age children ranges from 64% to 71%. Hayghe, *Rise in Mothers’ Labor Force Activity Including Those With Infants*, MONTHLY LAB. REV., Feb. 1986, at 43.

⁷⁵ 133 CONG. REC. H11,532-33 (daily ed. Dec. 16, 1987) (emphasis added).

⁷⁶ See VanDePol, *Dependent Children, Child Custody, and the Mother’s Pensions: The Transformation of State-Family Relations in the Early 20th Century*, 29 SOC. PROBS. 221 (1982). See also W. BELL, *supra* note 67.

⁷⁷ See Representative Miller’s arguments in favor of H.R. 1720: “By helping poor families improve their performance in the labor market, this bill ensures that children living in poverty will stand a better chance.” 133 CONG. REC. H11,528-29 (daily ed. Dec. 16, 1987).

stitute care as any others, having apparently relinquished their hostility to the idea of childcare.⁷⁸ The only difference among Democrats and Republicans concerning the desirability of maternal employment is the age at which children no longer require maternal care such that federal statutes can legitimately impose work requirements. H.R. 3644 and S. 1511 both require mothers of children over the age of three to participate in the work program.⁷⁹ The defeated Republican version, H.R. 3200, would have required mothers with children over the age of six months to enter the workforce if they are to receive AFDC benefits.⁸⁰ This has led to some odd twists in the Congressional debates over AFDC policy; conservative Republicans now argue in favor of the employment of mothers regardless of the age of children, while liberal Democrats defend their bill's three year age provision by stressing the need for maternal care for early childhood development.⁸¹

In sum, federal AFDC reform is uniformly moving in the direction of establishing employment programs. Although the fate of the individual bills discussed here is uncertain, it nevertheless appears that the federal statute will be altered to facilitate implementation of state-sponsored employment programs consistent with the idea that AFDC mothers ought to work outside the home in exchange for benefits. GAIN is California's answer to this sentiment. We turn now to a discussion of GAIN's legislative passage.

II. GAIN: THE LEGISLATIVE STORY⁸²

AFDC workfare and work programs in California have had a

⁷⁸ See *supra* note 24 (an example of previous hostility among Republicans toward childcare).

⁷⁹ H.R. 3644, *supra* note 45, tit. I, § 416(c)(4)(c); S. 1511, *supra* note 44, tit. II, § 416(c)(3)(a).

⁸⁰ H.R. 3200, *supra* note 46, tit. I, § 101(416)(c)(1).

⁸¹ Republicans stressed that six months is the point at which maternal care is secondary to the necessity of maternal employment for welfare families. For example, Representative Gundersen states,

While the 6 months age level is controversial, we must keep in mind that while the welfare program was originally designed to allow mothers to stay at home to raise their children at a time when few mothers worked, now over 61 percent of mothers with young children work. Is an AFDC Program that does not expect the same for its recipients either realistic or fair in today's society?

133 CONG. REC. H11,520-21 (daily ed. Dec. 16, 1987). See also Representative Johnson's similar remarks in *id.* at 11,586-87. Alarmed at the prospect of a three year age limit and expressing an attitude that people who receive welfare are freeloaders, Republican Roukema argues, "Imagine this: A welfare mother could actually continue to have a child every 2 years and never have to go to work at all. That's wrong." *Id.* at 11,515-16.

In contrast, Democrat Miller argues that H.R. 1720, "by mandating participation for mothers with children over 3 years of age permits poor mothers the same choices conferred on nonpoor mothers and the opportunity to give their infants a head start on building a productive life." *Id.* at 11,528-29.

⁸² In 1982 and 1983, Kate Meiss, one of the authors of this Article, worked as a staff attorney for the Western Center on Law and Poverty in Sacramento, specializing in welfare issues. In 1985, she volunteered with Californians for a Fair Share, an organization opposing workfare and formulating more positive AFDC employment alternatives. She participated in the public hearings in the Assembly, and met with various groups throughout the state including unions,

checkered history, but have continued to be the subject of political attention. In 1971, when Ronald Reagan was Governor, a Democratic legislature enacted an AFDC workfare program called the Community Work Experience Program (CWEP).⁸³ Despite the failure of CWEP⁸⁴ and other workfare programs,⁸⁵ the concept of workfare remained popular with conservatives, and each year a number of workfare bills were introduced by both Democrats and Republicans in the California legislature. Democratic leaders in this field supported voluntary work programs and opportunities, while conservatives promoted mandatory schemes including workfare.⁸⁶ This fundamental difference made compromise difficult, and the two sides never reached agreement.

During this period, people receiving welfare were required to register under WIN and look for work, but WIN never served large numbers of people because of a lack of funding.⁸⁷ At the same time, California experimented with various small demonstration projects, including limited training programs and a workfare project in San Diego.⁸⁸

One of the Democrats' most influential leaders on AFDC issues was state Assemblymember Art Agnos from San Francisco. Agnos, a former social worker, was the chair of the subcommittee which studied the AFDC budget and made recommendations to the Assembly. In that position he worked with David Swoap, California's Secretary of Health and Welfare, who was also a long-time proponent of mandatory workfare programs. Swoap had worked on Reagan's staff in California and in Washington, where he was Undersecretary of Health and Human Services. In that position, Swoap was instrumental in bringing about the 1981 OBRA changes which allowed states to set up mandatory workfare programs; he supported the concepts of a mandatory program with

welfare advocates, and women's groups. Much of the following observation and commentary regarding political motivations are personal conclusions based on these experiences.

⁸³ For an interesting liberal versus conservative debate of this first California welfare reform, which was strikingly similar to GAIN, see Beilenson & Agran, *The Welfare Reform of 1971*, 3 PAC. L.J. 475 (1972); Zumbun, Mombouise, & Findley, *Welfare Reform: California Meets the Challenge*, 4 PAC. L.J. 739 (1973).

⁸⁴ CAL. EMPLOYMENT DEVELOPMENT DEP'T, THIRD YEAR AND FINAL REPORT ON THE COMMUNITY WORK EXPERIENCE PROGRAM (1976). This report concluded that workfare was administratively impractical, failed to save money, and failed to increase the self-sufficiency of AFDC families.

⁸⁵ For a good analysis of several other workfare failures, see Sklar, *supra* note 3, at 31.

⁸⁶ Kirp, *How Workfare Became Law—An Amazing Compromise*, Sacramento Bee, Oct. 13, 1985, at H1, col. 5.

⁸⁷ In 1983-84, WIN only served 8% of all eligible individuals in California. LEGISLATIVE ANALYST OFFICE, JOB SEARCH, TRAINING, AND WORK EXPERIENCE: THE LESSONS FOR CALIFORNIA FROM EIGHT EVALUATIONS OF THE WORK INCENTIVE PROGRAM 18 (1985) [hereinafter LAO LESSONS].

⁸⁸ This program was used as a model for parts of GAIN. See D. Kennedy, California Welfare Reform 3-6 (1987) (unpublished case program prepared for the John F. Kennedy School of Government, Harvard University) ("People looked at the San Diego data and made anything they wanted out of it.").

heavy emphasis on job search and workfare.⁸⁹

In 1985 the Governor supported S.B. 863,⁹⁰ a welfare reform bill called STEP-UP,⁹¹ which was sponsored by Senator Jim Nielsen, the Republican Senate Leader. Duplicating many features of San Diego's workfare program, S.B. 863 called for the establishment of job search and workfare in only three counties. Several other bills aimed at welfare reform were also introduced in the state legislature.⁹²

Meanwhile, Agnos and Swoap were working behind the scenes to forge a rare bipartisan agreement⁹³ in favor of statewide welfare reform.⁹⁴ They began in the early spring of 1985 by making a fact-finding tour of AFDC work and welfare programs in East Coast states. When they returned, they continued to meet, inviting legislative staff with welfare expertise to participate in the discussion. Although AFDC advocates were aware of these meetings, they were not permitted to attend.⁹⁵

In July 1985, very late in the legislative session, Agnos and Swoap revealed the GAIN proposal. Given Agnos' influential position and Speaker Willie Brown's support, Assembly passage of GAIN was assured despite opposition from the chair of the Assembly Welfare Policy Committee.⁹⁶ Various groups registered their opposition and suggested modi-

⁸⁹ For a discussion of the differing perspectives of Agnos and Swoap, see D. Kennedy, *supra* note 88, at 2.

⁹⁰ S.B. No. 863 (1985-86 Reg. Sess.).

⁹¹ One interesting feature of the new work programs is the upbeat names given to these onerous programs: STEP-UP, GAIN, MOST (Michigan Opportunity and Skills Training Program), ET.

⁹² Other bills included Senator Garamendi's S.B. No. 15 (1985-1986 Reg. Sess.) which would have extended and expanded the existing Employment Preparation Program in six pilot counties. Senator Watson's S.B. No. 203 (1985-1986 Reg. Sess.) called for the establishment of a voluntary training scheme called Welfare Employment Service and Training Program (WEST) in one demonstration county. S.B. No. 1182 (1985-1986 Reg. Sess.), authored by Senator Bergeson, allowed a participant to be exempt for a period of up to five years after the youngest child has reached age six or until the participant has completed her educational program. A.B. No. 1303 (1985-1986 Reg. Sess.), sponsored by Assemblymember Killea, and S.B. No. 755 (1985-1986 Reg. Sess.), authored by Senator Deddeh, both authorized continuance of the San Diego workfare program for an additional two years. For a further description of these measures, see Wiseman, *Workfare*, CALIF. J., July 1985, at 289.

⁹³ Many credit the passage of GAIN to the unique ability of Swoap and Agnos to communicate despite their philosophical differences. See Kirp, *supra* note 86. However, what happened with GAIN is not a personal story, nor is it unique to California politics. It is a reflection of the day-to-day wheeling and dealing that goes on in all legislative arenas. In the case of GAIN, most of it went on behind closed doors in the proverbial smoke-filled rooms.

⁹⁴ For general coverage of the legislative maneuverings behind GAIN, see generally D. Kennedy, *supra* note 88; *Legislative Session Update*, FRIENDS COMMITTEE ON LEGISLATION NEWSLETTER, Oct. 1985, at 2; Redmond, *Agnos: Dancing With the Duke?*, S.F. Bay Guardian, July 24-31, 1985, at 7; Kirp, *supra* note 86, at H1, col. 1; *Workfare Runs Into Strong Opposition*, S.F. Chronicle, July 18, 1985, at 8, col. 3.

⁹⁵ David M. Kennedy describes the secret negotiations and what led up to them in his case study. Kennedy, *supra* note 88, at 12-14 and *passim*. David L. Kirp also describes the negotiations, but suggests that the process was more open than it appears to have been. Kirp, *supra* note 86, at H6, col. 2.

⁹⁶ Democratic Speaker of the Assembly, Willie Brown, and other Democrats supported the bill because of fears that voters would perceive Democrats as being "soft on welfare." There were

fications,⁹⁷ some of which the authors accepted. However, all fundamental changes were rejected because the political deal had already been struck.⁹⁸ Opponents of GAIN pinned their hopes on blocking or substantially modifying the bill in the state Senate where the Democratic leadership opposed GAIN. The Senate leader, Speaker Pro Tem David Roberti, and Senator Diane Watson, chair of the Senate Health and Welfare Committee had historically opposed workfare. Roberti was particularly concerned about the childcare provisions and also about the possible loss of unionized public employee jobs through displacement by workfare participants.

In the Senate, progress of the bill slowed, and it appeared there would not be enough time for the bill to pass the required committees and floor votes of both houses before the recess.⁹⁹ However, Agnos and his staff, Roberti's staff, the Governor's staff, and some childcare advocates held lengthy negotiations around GAIN. With only one day left in the legislative session, the negotiators had to work until 2:00 a.m. to forge the final proposal. The next morning, the final day of the session, the deal emerged: the Governor would agree to sign an important childcare bill sponsored by Roberti in exchange for Roberti's support of GAIN.¹⁰⁰ Roberti, Agnos, and Deukmejian went to work lobbying the holdouts.¹⁰¹ Later that night, Senator Watson was forced to hold a committee hearing. With both Democratic and Republican leadership on board, all time limits and rules of order, and even the requirement that the bill be available in print before being voted on, were waived.¹⁰² The bills cleared all committees and the floors of both houses and were re-referred and sent to the Governor within one day.¹⁰³

The opportunities for full debate and for public comment from

a number of moderate to conservative Assembly Democrats who faced reelection challenges from Republicans. Kirp, *supra* note 86, at H6, col. 7. It is unclear whether this perception that there were (or are) people who really cared about welfare reform is accurate. In fact, the 1984 elections suggested that the public would support welfare spending. In November 1984, California voters rejected by a 2 to 1 margin an initiative designed to reform welfare by cutting benefits drastically.

⁹⁷ The Western Center on Law and Poverty and the Friends Committee on Legislation were among those groups which actively opposed the bill. However, since they saw its defeat as unlikely, they lobbied for modifications to mitigate the negative effects. See D. Kennedy, *supra* note 88, at 13-14. Also opposed were labor groups, church groups, feminists, and advocates for the poor. C. McKeever & M. Greenberg, *supra* note 3, at 1.

⁹⁸ Redmond, *supra* note 94, at 24.

⁹⁹ *Legislative Session Update*, *supra* note 94, at 2.

¹⁰⁰ The Governor needed this victory to boost his image in the upcoming election and deliver on a campaign promise. Kirp, *supra* note 86, at H6, col. 3-4.

¹⁰¹ Roberti spent the day trying to get approval from Democratic Senator Paul Carpenter, the swing vote on the Senate Health and Welfare Committee.

¹⁰² CAL. LEGIS. RULES §§ 61(h), 62(a) (1985).

¹⁰³ At the last minute, the Assembly Republicans almost scuttled the whole deal over the \$50 million for childcare. Some of them went to the 1:00 a.m. hearing on the latchkey childcare bill with "their fingers down their throats to show their displeasure with the trade." *Legislative Session Update*, *supra* note 94, at 2. But the steamroller could not be stopped and GAIN became law.

advocates and from people receiving AFDC were lost when the procedural requirements were waived. GAIN became law without this vital input. Concerned citizens who thought the legislature had shelved the proposal until January were shocked to discover that the measure had been signed, sealed, and delivered in the last day of the session. GAIN is not the product of a public consensus over the best way to reform welfare. No citizens' coalitions or groundswell of public support were responsible for GAIN's adoption; rather, it is the product of a political deal cut by powerbrokers.

Had liberals not attacked AFDC as fostering dependency, breaking up families, and repressing work opportunities, the "express" might have been slowed down. The passage of GAIN highlights the danger in the trend of attacking welfare as a failure. These attacks create the impression that anything would be better than the status quo; they ignore the fact that welfare is a system designed to feed, clothe, and help house children when the economic system fails to do so.¹⁰⁴ At that it succeeds, if only moderately well. Indeed, by turning AFDC into a work program, even its limited success in providing for poor children is threatened.

III. A BRIEF DESCRIPTION OF THE GAIN PROGRAM

According to the statute, GAIN contains a complex variety of components designed to move heads of AFDC households into employment outside the home. The stated goal is to offer participants education, employment services, and training, which lead to unsubsidized employment. If participants do not find employment, they are given workfare assignments for a year, called Preemployment Preparation (PREP).¹⁰⁵

AFDC adults whose youngest child is over six years old must participate in GAIN from the time they apply for welfare benefits until they no longer receive AFDC.¹⁰⁶ There are exceptions for people who have a disability, a family crisis, or similar conditions.¹⁰⁷ Those not required to

¹⁰⁴ These attacks fail to acknowledge that the use of welfare is a reflection of larger social and economic forces, including the failure of the economic system to provide families, especially those headed by women, the opportunity to find employment paying a living wage. An analysis of the failure of the economic and social systems is beyond the scope of this Article, but see generally: Piven & Cloward, *The Contemporary Relief Debate*, in *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* 46 (F. Block, R. Cloward, B. Ehrenreich, & F. Piven eds. 1987); Thurow, *A Surge in Inequality*, *SCI. AMER.*, May 1987, at 30; Ehrenreich, *A Step Back to the Workhouse*, *MS.*, Nov. 1987, at 40; C. McKeever & M. Greenberg, *supra* note 3.

¹⁰⁵ CAL. WELF. & INST. CODE § 11320.5 (Deering Supp. 1988). Preemployment preparation is work for a public or nonprofit agency that provides the participant with either "work behavior skills and a reference for future unsubsidized employment" or "on-the-job enhancement of existing participant skills in a position related to a participant's experience, training, or education acquired as a result of [her GAIN contract]." *Id.* § 11320.3(d)(2).

¹⁰⁶ *Id.* § 11320.1.

¹⁰⁷ *Id.* § 11320.5(a). The statute also exempts individuals for drug and alcohol problems or illness of family members, and those temporarily laid off.

participate may volunteer.¹⁰⁸

Once registered, the GAIN participant enters into a basic contract with the county which outlines her responsibilities and rights and the services available under the program.¹⁰⁹ This basic contract sets out the activities which the participant will enter first in her GAIN experience. Depending on the participant's education or employment history, the contract may provide for job search or job club activities;¹¹⁰ remedial education or English-as-a-second-language instruction;¹¹¹ continuation of self-initiated vocational training or education;¹¹² or "assessment."¹¹³ If the participant has not found employment by completion of the first component, such as remedial education or job search, her skills and needs are "assessed."¹¹⁴

Based on the assessment, the county devises an employment plan which specifies an employment goal and the supportive services needed to attain that goal.¹¹⁵ The plan also describes the training or educational services which the county will provide for the participant, the criteria for successful completion, the sequence of activities, and when the participant will be expected to find a job.¹¹⁶ The job, training, and educational services are to be selected from existing local educational and vocational training programs set forth by statute.¹¹⁷ If the services are available, the participant enters training or education, which usually lasts from three to nine months.¹¹⁸ If the educational or training services are unavailable at that time, the participant will have to look for work until the training or education becomes available.¹¹⁹

After training or education, the participant reenters job search, this time for 90 days.¹²⁰ If she cannot find a job within those 90 days, she is assigned to workfare for up to one year.¹²¹ She must continue to look for a job while engaged in workfare. If she does not find work at the end of the year, her employment plan and goals are reassessed, she gets re-assigned, and the cycle begins again.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 11320.5(b)(1).

¹¹⁰ *Id.* § 11320.5(b)(2)-(3).

¹¹¹ *Id.* § 11320.5(b)(6).

¹¹² *Id.* § 11320.5(b)(5).

¹¹³ *Id.* § 11320.5(b)(4).

¹¹⁴ *Id.* § 11320.5(c).

¹¹⁵ *Id.* § 11320.5(d).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 11320.3(c)-(d).

¹¹⁸ LEGISLATIVE ANALYST OFFICE, BUDGET PERSPECTIVES AND ISSUES: REPORT OF THE LEGISLATIVE ANALYST TO THE JOINT LEGISLATIVE BUDGET COMMITTEE 145 (1988) [hereinafter LAO PERSPECTIVES].

¹¹⁹ WELF. & INST. CODE § 11320.5(e).

¹²⁰ *Id.* § 11320.5(d).

¹²¹ *Id.* The number of hours of workfare required is arrived at by dividing the AFDC grant amount by \$5.00 per hour. Workfare participants must work up to 32 hours per week without any compensation beyond the amount of their original AFDC grant.

At every stage in this process, mandatory participants face a graduated series of sanctions if they do not cooperate with GAIN and meet performance standards. Refusal to sign the GAIN contract or failure to attend scheduled GAIN appointments is punished by sanctions.¹²² Failure at school or training is punished by assignment to workfare.¹²³ If a participant's failure to cooperate is without good cause, as defined in the statute,¹²⁴ then the participant is sanctioned.

For the first sanction, mandatory participants who fail to cooperate have their AFDC grant paid to a third party for "money management."¹²⁵ For the second sanction, participants lose all or part of their grant for three months. Participants then lose all or part of their grants for six months for each additional instance of non-compliance.¹²⁶ Voluntary participants are excluded from the GAIN program for six months, but do not face loss of their AFDC.¹²⁷ It is important to note that when an individual is sanctioned, the whole family suffers from the loss of income.

Participants may challenge county action by requesting an administrative hearing,¹²⁸ with one exception: the results of the assessment cannot be appealed through the regular state hearing process.¹²⁹ Participants dissatisfied with the training or support services may also invoke the new grievance procedure.¹³⁰ However, they must continue to participate during any grievance at the risk of losing AFDC benefits.¹³¹

An important protection unique to GAIN is the "no-net-loss-of-income provision," which arises in the job-hunting phase of the program.¹³² This provision states that a participant may refuse to accept

¹²² *Id.* § 11320.6(a)-(c).

¹²³ *Id.* § 11320.5(d).

¹²⁴ *Id.* § 11320.7(a)-(l). Good cause includes such things as sickness, family crisis, or lack of transportation. *Id.*

¹²⁵ *Id.* § 11308.

¹²⁶ *Id.* § 11320.6(b). In a two-parent family, the entire grant is lost. In a single head-of-household family, only the parent's portion of the grant is lost. *Id.*

¹²⁷ *Id.* § 11320.6(c).

¹²⁸ *Id.* § 11320.75.

¹²⁹ To handle assessment challenges, the statute establishes a separate third party "independent" arbitration. The arbitrator is picked by the state, and nothing in the statute requires more than a paper review of the original assessment. *Id.* § 11320.5(e). For a discussion of the arbitration provision, see *infra* text accompanying notes 175-78.

¹³⁰ *Id.* § 11320.65. The grievance procedure contains all the due process protections of the state hearings with the exception that the initial adjudicator is a person selected by the Board of Supervisors rather than a State Administrative Law Judge. *Id.* § 11320.65. The results of the county grievance are appealable through the state hearing process. This structure parallels current AFDC law in which a prehearing conference is available prior to going to a state hearing. CAL. STATE DEP'T OF SOCIAL SERVICES, MANUAL OF POLICIES AND PROCEDURES § 22-220.34 (1986) [hereinafter DSS MANUAL]. That protection is rarely used, and if GAIN's first year is any indication, this will also become a superfluous process. While the provision was added to give recipients more power, this may turn out to be no more than a cosmetic or rhetorical device.

¹³¹ WELF. & INST. CODE § 11320.65.

¹³² *Id.* § 11320.7(a)(13), (1). For a more detailed description of this provision, see Part IV(C) of this Article.

particular employment if accepting the job would result in the family having a lower income than they would if they remained on AFDC.¹³³

The statute requires that childcare be available and paid for on behalf of all participants with children under twelve who "need" it.¹³⁴ Other supportive services include the provision of money for transportation, tuition, uniforms, tools, books, and other costs associated with training and education programs;¹³⁵ these same services were also available under WIN. If a GAIN participant becomes employed and thereby loses her AFDC, she can continue to receive Medi-Cal¹³⁶ for a short period of time and childcare for three months at no cost.¹³⁷

V. LEGISLATIVE AND ADVOCACY STRATEGIES

Although their potential for resolving poor families' problems is limited, AFDC work programs should at least be designed to meet the basic needs of participants rather than to punish them. In the following analysis of GAIN, this Article suggests strategies and ideas that advocates for low-income women and children should promote so that work programs may more effectively address the needs of those on welfare. We include suggestions both for formulating state legislation and for monitoring local programs.

A. The New Social Contract

As previously discussed,¹³⁸ workfare and other work programs for welfare recipients are often cast as the expression of a new social contract between the state and AFDC heads of household. GAIN proponents stressed that the program enhances individual choice, making the system more responsive and empowering participants to take control of their lives. Not only would there be higher expectations on people receiving AFDC, but also on the bureaucracy. These new expectations were made

¹³³ The initial contracts buried this provision in pages of rights and did not explain it. Also DSS tried to limit its use to job search. This led to the first litigation in GAIN, which is still pending. *Sanchez v. McMahon*, No. 361-772 7 (Fresno Super. Ct., filed Feb. 26, 1987).

For a more detailed description of the income protection feature, see Part IV(C) of this Article.

¹³⁴ WELF. & INST. CODE § 11320.3(e)(1), (h).

¹³⁵ *Id.* § 11320.3(e)(2)-(4).

¹³⁶ *Id.* § 11320.3(f). Medi-Cal participants, depending on how their AFDC ends, may keep their medical coverage for four to nine months. *Id.* §§ 14005.1(b), 14005.8. After that they may be eligible for California's medically needy program, but they will have to pay part of the bill as a "share of cost," which is often prohibitive. *Id.* § 14005.7

¹³⁷ WELF. & INST. CODE § 11320.3(f). Although the statute provided for *at least* three months of transitional child care, the State Department of Social Services limited it to a maximum of three months. DSS MANUAL, *supra* note 130, § 42-750.24. For a description of the consequences of this limit, see *infra* text accompanying notes 265-71.

¹³⁸ See *supra* text accompanying notes 55-63.

explicit in the legislation's statement of intent:¹³⁹ the legislature declared that recipients desire to work, but lack the opportunities to do so;¹⁴⁰ that the state must provide sufficient services and support to help recipients to become employed;¹⁴¹ and that recipients will be expected to work.¹⁴²

These new expectations are written into a "contract" entered into between the welfare department and the participant, which enumerates the participant's rights, responsibilities, and choices available under GAIN. Thus, the ideological concepts contained in recent treatises on welfare reform¹⁴³ and expressed at the national level by conservatives as well as liberals¹⁴⁴ are manifested in the contract provisions of GAIN. As the following analysis will show, the concept of a new social contract is nothing more than a rhetorical promise; what the GAIN program offers is neither new nor a contract.

Former Assemblymember Art Agnos highlighted the contract feature as a way of empowering participants.¹⁴⁵ By calling this a contract rather than an employment plan, he created the impression of a process in which recipients have bargaining power. The image is one of negotiation, rational compromise, and finally, agreement; however, the reality is quite different.

GAIN contracts are preprinted, and participants are presented with them and expected to sign.¹⁴⁶ County GAIN workers are required to explain the contracts and any changes to them, but the boilerplate language and the parties' inherent inequality preclude any negotiation over terms. Participants have no bargaining power—no way of wringing concessions out of the welfare department. On the contrary, these are people who are impoverished and seek economic assistance for their very survival from the welfare department, which has the unilateral power to deny or terminate the assistance. Calling a piece of paper a contract does not alter this fundamental inequality.¹⁴⁷

Perhaps most importantly, participants cannot force the department to perform its contractual obligations. For example, if a participant can-

¹³⁹ WELF. & INST. CODE § 11320.

¹⁴⁰ *Id.* § 11320(a).

¹⁴¹ *Id.* § 11320(b).

¹⁴² *Id.* § 11320(c). Implicit in this statement of intent and in the design of the program is the belief that taking care of one's children is not "work."

¹⁴³ See, e.g., L. MEAD, *supra* note 50, at 237-40.

¹⁴⁴ See *supra* Part I(C) of this Article.

¹⁴⁵ ASSEMBLYMAN ART AGNOS, 1985 ANNUAL REPORT 39; Redmond, *supra* note 94, at 7.

¹⁴⁶ WELF. & INST. CODE § 11320.6 and DSS MANUAL, *supra* note 130, at § 42-771, -771.2, -773.1.

¹⁴⁷ If a participant does not sign the contract, she is sanctioned. However, participants are unlikely to hold out for provisions they may be entitled to, because DSS fails to explain them and in fact attempts to limit their use. See *infra* note 210. As one GAIN worker said, "If the client wants services, they sign the contract. Very few question anything. It's just like applying for AFDC; you have to sign a lot of papers." Telephone interview with Sally Lacau, GAIN caseworker, Napa County Employment Training Office (Feb. 15, 1988). The contracts are now the subject of litigation. See *supra* note 133.

not find childcare, she does not have the power under the contract to make the county deliver it. A person can be excused from participation if childcare is not available, but the county has no obligation to provide childcare services as promised in the contract.¹⁴⁸ The same is true for employment services and most of the other critical elements in GAIN. For instance, if the assessment identifies a person as needing a particular form of training, that is written into the contract; however, if that training is unavailable, the participant cannot force the county to provide it. Instead, she must wait for the services to become available.¹⁴⁹ The contract, then, does not create mutual obligations; it is primarily a device in which the county sets out what is expected of the participant and can thereby monitor the participant in the process.

Not only does the contract fail to empower participants, but it can be used to restrict what little choice participants do have under GAIN. An example of this abusive use of the contract has occurred with an important participant protection, the no-net-loss-of-income provision.¹⁵⁰ This provision gives participants the right to refuse a job if accepting it would decrease their family's income. Clearly this provision gives a participant some power to refuse low-paying jobs: she might want to hold out for a high-paying job, or she might wish to take a job that has potential for advancement. However, the statute provides that this right may be waived in the employment contract.¹⁵¹ When the Department of Social Services developed the standard GAIN contract and the contract amendments, it provided no real explanation of the income protection feature, but included instead a blanket waiver of it.¹⁵² The state transformed the contract, which was designed to give participants decision-making control, into a device by which participants unwittingly surrender what modest protections the statute gave them.

As the history of WIN shows,¹⁵³ the requirement that people who receive welfare should work is not new. GAIN supporters claim that GAIN will be different because it will serve more individuals and will offer better training and education options than other programs have done. However, funding constraints have already appeared which threaten GAIN's promise to serve all eligible participants. The Governor's proposed budget does not fully fund GAIN,¹⁵⁴ and the number of

¹⁴⁸ WELF. & INST. CODE § 11320.7(a)(11).

¹⁴⁹ Interestingly, while the participant is waiting, she must "perform" her "contractual obligations" by looking for work. *Id.* § 11320.5(d).

¹⁵⁰ *Id.* §§ 11320.7(a)(13), (l). See Part IV(C) of this Article for a more detailed exploration of this provision.

¹⁵¹ WELF. & INST. CODE § 11320.7(l).

¹⁵² See *infra* note 210.

¹⁵³ See *supra* Part I(A) of this Article.

¹⁵⁴ LAO PERSPECTIVES, *supra* note 118, at 160. The department's estimate of the cost has more than doubled. It is estimated that it would cost \$542 million for GAIN to be fully funded. The Governor proposes spending \$408 million. *Id.* at 145-46. See also Paddock, *Governor's*

participants is now expected to drop by one quarter.¹⁵⁵ This will probably mean that new applicants for aid and people who are volunteers will not be included in the program at all.¹⁵⁶ As was true with WIN, it is questionable whether the system will ever be funded adequately.¹⁵⁷ GAIN demonstrates that the costs of AFDC reform are high,¹⁵⁸ already there are indications that the resources and the political will to fund GAIN adequately may not exist.¹⁵⁹

Budgetary and resource constraints also threaten GAIN's promise to provide better education and training options than traditional workfare programs. GAIN does provide for a variety of job training options.¹⁶⁰ It does so by marshalling preexisting training programs in community colleges and in the welfare department, and the programs provided throughout California's Job Training and Partnership Act.¹⁶¹ Despite this reliance on existing programs, the available data suggest that these components are much more costly than originally anticipated.¹⁶² Given current budget projections, it is unclear whether the range of training options will be fully realized and available.

GAIN may never fully succeed in its effort to distinguish itself from WIN. This is evident if one looks closely at GAIN's assessment, employment plan, and contract features. Under WIN, the welfare department first sent participants to "testing and counselling," and then established an "employment plan."¹⁶³ Like the WIN plan, GAIN's employment plan should, according to the statute, describe barriers to work, supportive services participants will need, and employment services to be provided. To distinguish it from WIN, GAIN architects developed several

Budget Would Scale Back Workfare Plan, L.A. Times, Jan. 12, 1987, at 1, col. 1; Cal. Dep't of Social Services, All County Letter No. 88-08. (Jan. 20, 1988).

¹⁵⁵ Paddock, *supra* note 154.

¹⁵⁶ Volunteers are individuals who have children under six and wish to participate. See Cal. Dep't of Social Services, All County Letter No. 88-08, at 2; LAO PERSPECTIVES, *supra* note 118, at 147.

¹⁵⁷ According to one source, the average rate of WIN participation in 1985 nationally was about 22%; California served just under 15%. This was due to "limited capacity." GAO WORK AND WELFARE, *supra* note 5, at 51-52, 54. See also LAO PERSPECTIVES, *supra* note 118, at 160.

¹⁵⁸ LAO PERSPECTIVES, *supra* note 118, *passim*.

¹⁵⁹ *Id.* at 160.

¹⁶⁰ Because experience with these options is limited, we do not analyze these provisions in depth. Throughout this Article we refer to various studies which should be consulted for more information. In addition, advocates should look to reports and studies available on JTPA training. Finally, for some creative ideas on new work options for people who are receiving welfare, see Bird, *New Approaches to Jobs for Welfare Mothers*, ECON. DEV. AND LAW CENTER REP., Nov.-Feb. 1984, at 24-29.

For an excellent analysis of the limits of workfare and the fears that counties may over-emphasize workfare, see C. McKeever & M. Greenberg, *supra* note 3.

¹⁶¹ CAL. UNEMP. INS. CODE §§ 15000-16010 (Deering 1986 & Supp. 1988) The GAIN statute is replete with references to utilizing existing resources to avoid new expenditures of funds. See CAL. WELF. & INST. CODE §§ 11320(f)(5), 11320.2(b), 11320.2(c), 11320.3(a), 11320.3(d) (Deering Supp. 1988); DSS MANUAL, *supra* note 130, at §§ 42-720.325, -720.571.

¹⁶² LAO PERSPECTIVES, *supra* note 118, at 154.

¹⁶³ 42 U.S.C. § 633(a), (b)(3) (1983 & Supp. 1988).

features to ensure "individualized help" and a "true choice" of options,¹⁶⁴ including an individual assessment;¹⁶⁵ an employment plan contract;¹⁶⁶ and arbitration of disputes.¹⁶⁷ But in fact, these features do little to set GAIN apart.

Job and training assessment, for example, is a key element of individualizing GAIN services. As Art Agnos explains, "Counselors are required to assess each person's needs and find the educational or job training service which provides her with the best chance of finding a job. . . . [E]veryone will participate in an in-depth professional assessment of [her] career interests and capabilities."¹⁶⁸ Although the statute requires a professional assessment,¹⁶⁹ the state allows the welfare department to waive this and use untrained personnel who can ostensibly acquire the needed skill over time.¹⁷⁰ The statute requires an "inventory" of each participant's skills, education, ambitions, and potential,¹⁷¹ but does not explicitly require testing of any kind as part of the assessment.¹⁷² Some counties may choose to adopt a thorough approach and use test instruments and career counseling, but even those with the best of intentions will be limited by cost concerns. There is a danger that assessment information could be reduced to a listing based on questionnaires or on information already in the AFDC file. While a thorough, meaningful assessment might be possible under the statute, it is not guaranteed, and because of cost constraints, it may not occur at all. Because of the limits in the statute and the regulations, this "new" assessment may be far less individualized and professional than hoped. In fact, the assessment may effectively be nothing more than the old WIN appraisal.

Additionally, the GAIN assessment is not done when the participant first enters GAIN. A logical sequence would be to evaluate people individually and then assign them to options which best fit their needs and their interests. Instead, most people go through a job search first; assessment happens only after they fail to find a job. Rather than beginning the program with a positive experience, people who reach the assessment stage have already failed to find a job. The psychological sense of failure this creates may color the entire process, and be critical to a par-

¹⁶⁴ ASSEMBLYMAN ART AGNOS, *supra* note 145, at 36-37; see also NEWSLETTER OF THE JOINT OVERSIGHT COMMITTEE ON GAIN IMPLEMENTATION, Oct. 1986, at 2.

¹⁶⁵ WELF. & INST. CODE § 11320.5(c).

¹⁶⁶ *Id.* § 11320.5(d).

¹⁶⁷ *Id.* § 11320.5(e).

¹⁶⁸ *California's New GAIN Program*, ASSEMBLYMAN ART AGNOS NEWSLETTER, Feb. 1986, at 4, 5.

¹⁶⁹ The statute requires the assessor to be "a person qualified by education or experience to provide counseling, guidance, assessment, or career planning." WELF. & INST. CODE § 11320.5(c)(5).

¹⁷⁰ DSS MANUAL, *supra* note 130, §§ 42-773.5, -773.53.

¹⁷¹ *Id.*

¹⁷² WELF. & INST. CODE § 11320.5(c)(1)-(5).

participant's ultimate success or failure.¹⁷³ Up-front assessment also creates an impression that the system responds to individual needs. Initial job search, in contrast, creates an impression of inflexibility and rigid requirements, a series of hoops that participants must pass through. This feature resulted from a political compromise,¹⁷⁴ and it represents a significant loss for AFDC recipients.

The arbitration provision relating to the employment plan is a unique feature intended to empower participants.¹⁷⁵ If the participant and the worker disagree over the career goal to write into the plan, then the participant can ask for a review by a third party "arbitrator."¹⁷⁶ Although the arbitration provision allows a third party to review the employment plan, it may not lead to such enhanced protection after all. Generally, very few participants challenge the welfare department's decisions, even when termination of aid is at issue.¹⁷⁷ Another drawback is that the arbitrator is hired and paid for by the county.¹⁷⁸ This selection process differs from standard arbitration procedures in which both sides select the arbitrator; to select an arbitrator in this fashion for GAIN disputes would make work programs better mirror employment practices generally and would reduce the likelihood of bias.

Although most of the GAIN contract¹⁷⁹ is essentially a dressed-up version of the old WIN employment plan, it does contain one valuable protection: once a participant begins her education or training she has a 30-day grace period in which to request a change or reassignment to a different component.¹⁸⁰ If a participant does not like her placement, she

¹⁷³ Leonard Goodwin's research found that a woman's perception of herself and ability to succeed was critical to her success in WIN. Goodwin, *supra* note 3, at 22.

¹⁷⁴ See Swoap, *Broad Support Buys California's GAIN*, J. PUB. WELFARE, Winter 1986, at 24, 25. Swoap describes GAIN as "a curious blend of conservative and liberal components." *Id.* at 25. While both liberals and conservatives favor job search, liberals generally prefer up-front assessment, while conservatives prefer the quick fix of up-front job search. *See id.*

¹⁷⁵ See WELF. & INST. CODE § 11320.5(e); DSS MANUAL, *supra* note 130, § 42-773.6.

¹⁷⁶ DSS MANUAL, *supra* note 130, § 42-773.6.

¹⁷⁷ For instance, there were over 3 million negative case actions, case closings, and negative application decisions nationally in fiscal year 1985. Telephone interview with Timothy J. Casey, staff attorney, Center on Social Welfare Policy and Law, New York City (April 26, 1988). Yet there were only 138,713 fair hearing requests during the same period. U.S. DEPT OF HEALTH & HUMAN SERVS., SOCIAL SEC. ADMIN., OFFICE OF POLICY, & FAMILY SUPPORT ADMIN., OFFICE OF FAMILY ASSISTANCE, QUARTERLY PUBLIC ASSISTANCE STATISTICS JANUARY—MARCH 1985, at 29 (1986). Families may also appeal actions affecting them other than those listed above, so the number of appealable actions is actually much greater than 3 million. Even using 3 million as a base, only 4.6% of the adverse decisions are challenged by persons receiving AFDC. This figure is even more striking if New York State is removed from the equation. For whatever reason, almost half of all hearing requests come from people in New York State (in fiscal year 1985, this represented 60,080 requests, or 43% of all requests). *Id.* Yet AFDC families in New York State represent only about 10% of the national AFDC caseload. *Id.* at 3. If New York's negative case actions and appeal rates are excluded, the national appellate rate would probably be closer to 3%.

¹⁷⁸ See WELF. & INST. CODE § 11320.5(e); DSS MANUAL, *supra* note 130, § 42-773.6.

¹⁷⁹ WELF. & INST. CODE § 11320.5(c)-(d).

¹⁸⁰ *Id.* § 11320.5(d).

may request a new one as long as it is consistent with her assessment.¹⁸¹ However, each GAIN participant is permitted to exercise this option only once.

All of these ideas and protections contain positive elements. Arbitration, employment plans, and up-front, in-depth assessments are valuable tools which should be incorporated into work programs. However, alone they are not sufficient to alter the basic power relationship between people who receive welfare and the welfare bureaucracy. None of these devices can empower people who are forced to participate in work programs under penalty of losing their means of survival. The only way truly to empower individuals would be to create a voluntary program in which there were legally enforceable entitlements to childcare and employment services. That would be a new social contract.

B. Promoting Remedial and Higher Education For AFDC Heads of Household

Many advocates who are otherwise skeptical about GAIN's promises identify the educational features of the program as its chief benefit. GAIN recognizes the importance of remedial education and also acknowledges the value of higher education as a way to increase employment potential. GAIN and similar programs can provide a valuable service to many people on AFDC, by supplying necessary childcare and transportation funds and paying for other expenses while participants complete their high school education or receive essential training in English. These educational referrals related to remedial education and language and high school training are critical for the realization of successful employment, and similar concepts should be utilized in work programs elsewhere.

First, GAIN participants are tested for math and literacy skills,¹⁸² to determine whether they have the skills considered necessary to work. Those who do poorly on the tests are assigned to remedial education or to English-as-a-second-language classes,¹⁸³ which are expected to last from nine months to two years.¹⁸⁴ If a participant drops out, fails to attend regularly, or fails the class, she may be sanctioned by loss of the

¹⁸¹ *Id.* This demonstrates how important the initial assessment can be.

¹⁸² WELF. & INST. CODE § 11320.5(b)(6); CAL. EDUC. CODE § 33117.5(a) (Deering Supp. 1988); see DSS MANUAL, *supra* note 130, § 42-772.5. The State Department of Social Services uses the *Comprehensive Adult Student Assessment System* (CASAS) test to determine if participants have practical skills, i.e., "basic skills" they can transfer to real-life situations. Cal. State Dep't of Social Services, All County Letter Nos. 86-82 (Aug. 26, 1986), 87-57 (April 21, 1987).

¹⁸³ See WELF. & INST. CODE § 11320.5(b)(6). Existing adult education or community colleges provide remedial education classes to GAIN participants. CAL. EDUC. CODE § 33117.5 (Deering Supp. 1988).

¹⁸⁴ Cal. State Dep't of Social Services, All County Letter No. 87-57 (April 21, 1987).

grant¹⁸⁵ or by assignment to workfare.¹⁸⁶ Once a person's skills have reached an acceptable level or she passes the General Education Development exam (GED—high school equivalency test), she enters GAIN's job search or training components.¹⁸⁷

Initial figures indicate that poor math and English skills are a major problem for many GAIN participants; nearly half are in remedial programs.¹⁸⁸ While remedial education does not necessarily result in quick job placement, the California welfare agency recognizes that it does significantly enhance people's chances of obtaining and keeping a job.¹⁸⁹ Education is an important stepping stone to long-term employability, and it is especially important for the small group of people who have received AFDC for extended periods of time, since many of them have never completed high school.¹⁹⁰

In addition to the remedial education component, GAIN has provisions for higher education which allow participants to attend community college, state college, or university programs which are "likely to lead to employment."¹⁹¹ Participants who are already involved in a self-initiated vocational training program or an educational program leading to unsubsidized employment may receive GAIN support services while continuing in that program. However, GAIN support for individuals in an educational program is limited to a maximum of two years.¹⁹²

Both the limitation on the extent of education and the burden of having to convince the GAIN bureaucracy that a particular educational program will be "likely to lead to employment" are unnecessary obstacles in the implementation of GAIN's education provision. The standard "likely to lead to employment" is vague, giving individual workers wide discretion to deny programs and benefits. For example, GAIN officials told a participant who wanted to go to graduate school to become a journalist that a journalism career was not feasible, but that nursing school would be appropriate.¹⁹³ When case workers have discretion to determine the appropriateness of particular career choices, there is a danger that they will be guided by traditional notions of what is a suitable career

¹⁸⁵ WELF. & INST. CODE § 11320.6(a)-(b).

¹⁸⁶ *Id.* § 11320.5(d).

¹⁸⁷ *Id.*; DSS MANUAL, *supra* note 130, at § 42-772.44 (1986).

¹⁸⁸ C. McKeever, Sixteen Months of GAIN: Troubling Trends, statistical app. 2 (Jan. 1988) (unpublished manuscript, Western Center on Law and Poverty, Sacramento, Cal.). Statewide GAIN data shows that with 26,028 people involved in all GAIN activities, 12,847 of those were in remedial education. The department now estimates that 57-67% will need education services, more than a 200% increase over the original estimate. LAO PERSPECTIVES, *supra* note 118, at 152-53.

¹⁸⁹ *See, e.g.*, Cal. State Dep't of Social Services, All County Letter No. 87-18, at 1 (Feb. 2, 1987).

¹⁹⁰ GAO WORK AND WELFARE, *supra* note 5, at 20 (citing ELLWOOD, TARGETING "WOULD-BE" LONG-TERM RECIPIENTS OF AFDC 41-44 (1986)). *See also supra* note 22.

¹⁹¹ WELF. & INST. CODE § 11320.3(d)(4).

¹⁹² *Id.* § 11320.5(b)(5).

¹⁹³ Udesky, *Workfare: It Isn't Fair and it Doesn't Work*, THE PROGRESSIVE, Dec. 1987, at 14, 17.

for a woman, and women will once again be channeled into lower-paid, traditionally female occupations.¹⁹⁴ While the intention of the statute with regard to higher education is laudable, its execution depends too heavily on worker discretion. An alternative less subject to abuse would be to allow an outside professional, such as a vocational expert, professor, or college guidance counselor evaluate what kinds of education are likely to lead to employment.

In addition to this problem of lack of standards, GAIN's two year limit on higher education options is counterproductive. While limiting options in this way may be politically attractive, it is shortsighted: channelling women into sex-segregated low-wage jobs will not lead to economic self-sufficiency. It also imposes unduly on the autonomy of the participants with regard to their employment options.

GAIN administrators seem determined to limit educational benefits to remedial education and high school equivalency programs, skeptical at best of the value of higher education. For example, Carl Williams, a former director of GAIN, justifies the two year limit and at the same time shows his contempt for higher education in his statement, "No, GAIN will not pay for graduate school. This is an *employment program*. We're not going to pay for a graduate program in basket weaving. There's no way the taxpayers would want to pay for it."¹⁹⁵ While graduate programs offering basket weaving are rare if not nonexistent, it is curious that Mr. Williams thinks women would want to learn basket weaving as a means of supporting their children. It is more likely that women who wish to go to college or graduate school share similar objectives with college students everywhere: to gain the training and credentials necessary to enter the professional world of stable work and higher salaries. Women receiving AFDC have an added incentive: to leave the welfare world.

Some of the most frequently repeated examples of success under GAIN are of women who have become nurses, finishing nursing school (usually a four year program) with GAIN's help to pay for childcare and transportation. Promoters of GAIN repeat these stories in support of the program, but such successes are only possible if the woman has already completed her second year of school before commencing GAIN. If a woman entered a GAIN office today seeking to enter nursing school, she would be told that she could not pursue such a career because it would take too long to complete the education. It is more likely that she would be channelled into a Job Training Partnership Act (JTPA)¹⁹⁶ or community college training program to become a nurse's aid or licensed voca-

¹⁹⁴ *Id.*, *passim*.

¹⁹⁵ *Id.* at 17 (emphasis added).

¹⁹⁶ CAL. UNEMP. INS. CODE §§ 15000-16010 (Deering 1986 & Supp. 1988).

tional nurse, or trained for a similar position that pays lower wages.¹⁹⁷ Indeed, if she were a mandatory GAIN participant, GAIN would prevent her from pursuing nursing school and would force her to participate in some GAIN-approved activity. GAIN proponents classify this as never giving up on participants.¹⁹⁸ Participants, however, may come to view it as never being left alone to pursue their career goals.

C. Dealing with the Dilemma of Low-Wage Jobs: The No-Net-Loss-of-Income Provision

One unique and valuable feature of GAIN is the so-called GAIN wage scale, or no-net-loss-of-income provision.¹⁹⁹ AFDC families often face the risk of income loss when a family member becomes employed, because of the increased costs associated with working. Such costs include childcare, health insurance, transportation, and other mandatory payroll deductions. The GAIN wage scale addresses this problem by allowing a participant to turn down a job without losing her benefits if accepting the job would result in a net loss of income to the family.²⁰⁰

Estimates of the wage rate necessary to offset the costs associated with working indicate that the larger the family, the greater the wage rate needed. These estimates take into account regional market rates for childcare, health care, and transportation.²⁰¹ For a family of two living in a large urban county (Alameda), the estimated required wage rate in 1987 was \$4.88 to \$7.50 per hour.²⁰² For a welfare family of a mother with two children, the estimate was \$5.88 to \$11.13 an hour,²⁰³ for a family of six, the figure shot up to \$9.00 to \$16.88 an hour.²⁰⁴

GAIN's wage scale reflects a legislative concern over the economic reality faced by heads of welfare families. Studies suggest that many individuals earn little more than the minimum wage when they leave the welfare rolls; this is true for those who have been placed through WIN or

¹⁹⁷ For some women, especially those with only one child who might want to choose a licensed vocational nurse option in order to begin their careers, this might suffice. But this is not a viable option for a woman with a large family. The challenge is to avoid inappropriate tracking into dead-end, low-wage jobs where a placement may appear as a success on a form but mean failure in real life.

¹⁹⁸ See, e.g., Swoap, *supra* note 174, at 24, 25.

¹⁹⁹ WELF. & INST. CODE § 11320.7(a)(13).

²⁰⁰ *Id.*

²⁰¹ *Id.* § 11320.7(l).

²⁰² ALAMEDA COUNTY SOCIAL SERVICES AGENCY, ALAMEDA COUNTY GAIN PLAN 8-9 - 8-12 (1987). The two major benefits include health care cost and childcare. The Alameda County Department of Social Services based its figures on the average cost of three health plans and childcare in the area. They then figured out the cost if the job contained health coverage and there was no childcare cost (lowest in range) to the situation where the recipient would have to pay for both (high end of range). The amounts also reflect federal and state taxes, SDI and FICA. *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

similar programs as well as for those who have not.²⁰⁵ Women especially are relegated to minimum wage jobs or to the "secondary labor" market.²⁰⁶

Work programs alone are unable to address such fundamental problems. In the long run, economic self-sufficiency will require increases in the minimum wage²⁰⁷ and the breaking down of sex segregation so that women can move into higher-paying occupations. Therefore, efforts must continue to be made to increase the minimum wage and to promote comparable worth and nontraditional job training for women. But AFDC work programs can at least begin to address these problems by including meaningful wage scale provisions. Without such provisions, work programs may actually help perpetuate²⁰⁸ a cycle of poverty by forcing women into any job offered to them.²⁰⁹

As with many parts of GAIN, the wage scale is an important idea whose full realization is hindered by limits in the statute and by state and county practices. The scale provides participants with some choice in the very basic economic decision of whether or not to accept particular employment. In this way, it increases participants' control over their own lives in a system that is otherwise intrusive and controlling. However, the State Department of Social Services is attempting to restrict the provision so that it will only apply to the initial job search phase.²¹⁰ Such a scale should be available before and after training. But it is not

²⁰⁵ GAO WORK AND WELFARE, *supra* note 5, at 104. The GAO found that 50% of the jobs were paid \$4.14 per hour, and only one-fourth were above \$4.47. The report suggests that wages may be low due to the emphasis on job search strategies rather than on training, and because programs do not try to channel women into the higher-paying jobs traditionally held by men. *Id.*

²⁰⁶ Segregation in the labor force and childrearing expenses often prevent women from getting out of poverty even with a job. In contrast, for men a job often means poverty is alleviated. See NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, *THE AMERICAN PROMISE: EQUAL JUSTICE AND ECONOMIC OPPORTUNITY* 7 (1982).

²⁰⁷ For a good description of minimum wage campaigns as part of a "work/welfare" strategy, see Schulzinger & Roberts, *supra* note 4, at 703-05, 709.

²⁰⁸ Sylvia Law suggests that WIN has perpetuated sex stereotyping by focusing on men and disfavoring women, especially those who are single heads of households. See LAW, *supra* note 23, at 1262, 1264-67.

²⁰⁹ Without the wage scale, participants are forced to accept any job offered. Studies show that WIN in most states focused on job search and did not offer other services in significant numbers. GAO WORK AND WELFARE, *supra* note 5, at 69-70, 104. In 1985, California spent 96% of its employment and training money on job search workshops. LAO LESSONS, *supra* note 87, at 32.

²¹⁰ DSS does this by including a waiver of the loss provision in the standard employment plan, which all participants must sign after assessment. See Cal. Dep't of Social Services, GAIN Contract Activity Agreement: Assessment, and GAIN Contract Activity Agreement: Training or Education Services After Assessment, and GAIN Contract Activity Agreement: Job Services After Assessment, *attachments to All County Letter No. 88-10* (Jan. 21, 1988). See also Forms Instructions, GAIN Contract 4 (the case manager must assure that clients understand that net loss of income is not good cause for refusing a job once the employment plan is developed), *attachment to All County Letter No. 88-10* (Jan. 21, 1988); Cal. Dep't of Social Services, GAIN Policy Questions and Answers 22, *attachment to All County Letter No. 86-125* (Dec. 9, 1986). See also DSS MANUAL, *supra* note 130, at § 42-771.2, -784.2. See generally *supra* note 133.

sufficient to give participants a choice to turn down a job. Training and referrals for jobs should also incorporate the scale, so that appropriate jobs are targeted.²¹¹

The GAIN wage scale should be incorporated more fully into the planning and evaluation stages of AFDC work programs. The success of GAIN and most other programs is measured largely by the number of placements at a certain point in time, rather than by the wage rates of participants.²¹² Data on the wage rates being earned, or even on average rates, are not consistently recorded.²¹³ In order to incorporate the wage scale more fully into work programs, records of wage rates by family size should be recorded and updated by program trainers and counties.

The wage scale would also be an effective basis for evaluating the success of specific work programs or of individual job training providers.²¹⁴ If wage scales were a criterion in the evaluation and payment of trainers and welfare departments, planners would be compelled to structure programs to include a range of wages,²¹⁵ so that all families would have a chance to become independent of welfare.²¹⁶ Until such criteria are adopted, it is likely that programs will continue to channel people into low-wage jobs.

D. Childcare Provisions and Maternal Employment

The GAIN statute gives clear expression to the legislative refusal to consider mothers' childrearing work inside the home as socially significant, cognizable labor. The fact that women receiving welfare are already "at work" as parents is sometimes simply ignored, and often discounted as meaningless. As McKeever and Greenberg point out, "[b]y

²¹¹ Of course, the scale does not guarantee that jobs paying a living wage are available. Some economists have noted a decrease in higher-paid, skilled work, and an increase in lower-paid service jobs. See generally Thurow, *supra* note 104, at 30, 34. Whether the economy can incorporate and absorb these families is unclear. This question is beyond the scope of this Article, but it is one that must be considered in evaluating work programs. Thurow's article also contains a good description of the level of wages that women need in order to move out of poverty. *Id.* at 35.

²¹² See GAO WORK AND WELFARE, *supra* note 5, at 99-101, 103, 104; WELF. & INST. CODE § 11320.2(i)(12).

²¹³ GAO WORK AND WELFARE, *supra* note 5, at 104. The GAIN statute does require that this data be gathered, but overall program effectiveness is measured by placement rates. WELF. & INST. CODE § 11320.2(i)(7)-(8), (12). GAIN does not require the wage records to be linked with family size. See *id.* § 11320.2(2)(i).

²¹⁴ The Legislative Analyst Office report suggested such an approach in California, but it was not incorporated into GAIN. LAO suggested that the legislature "prohibit the use of placement rates . . . and, instead require that increases in participant earnings be the primary performance measure." LAO LESSONS, *supra* note 87, at 4.

²¹⁵ This "goal" might need to be even higher than the net loss wage—a real "living wage." California's grants are still below the poverty level, even though they are higher than most other states. Center on Social Welfare Policy and Law, Analysis of 1987 Benefit Levels in the Program of Aid to Families with Dependent Children, Table 1, at 1, Table 2, at 1, Table 5 (1987) (unpublished report).

²¹⁶ This concern is expressed and explored in C. McKeever & M. Greenberg, *supra* note 3.

conditioning eligibility for a family allowance on work requirements, the state denies the value of parenting. The inherent policy premise is that raising children is not an activity worthy of support in itself."²¹⁷ This is an anomaly, because if the same kind of childrearing activity were performed as paid labor in a childcare center, that would be the very type of legitimate labor that legislators desire for work program participants.²¹⁸

The compulsory nature of GAIN's childcare provisions must be evaluated not only in terms of their reflection of the value of women's work within the home, but also in terms of their compatibility with larger social and economic trends regarding women's employment. Those trends have altered cultural expectations regarding maternal care for children.

Maternal employment has been steadily increasing, beginning with a tremendous surge in the 1970s. Families have become increasingly dependent on a mother's earnings. Moreover, the rates at which single and married mothers participate in the workforce have been converging, and the correlation between a mother's labor force activity and the age of her youngest child has blurred.²¹⁹

Despite this influx of women into the workforce, the lack of childcare options remains a major barrier to women's full economic participation, especially for low-income women. A recent study conducted by the U.S. Census Bureau demonstrates that if women had greater access to reasonably-priced childcare, there would be dramatic increases in their employment rates, especially among single female heads of households.²²⁰ Similarly, 64% of surveyed AFDC recipients in Washington State identified problems with childcare as a primary barrier to finding and keeping a job.²²¹ Indeed, for mothers of small children, childcare is usually the greatest expense associated with working.²²² Studies have also shown that the type of childcare women select depends in significant part on their ability to pay.²²³ For example, poor women tend to rely on friends and relatives for childcare.²²⁴

²¹⁷ *Id.* at 8. McKeever and Greenberg further emphasize that "[c]ommunity property laws, such as those in California, also reflect recognition that maintaining a household entitles the homemaker to share equally in the income and property obtained. Yet this principle is ignored in valuing the role of indigent homemakers." *Id.*

²¹⁸ For a further discussion of this distinction between women's paid and unpaid labor as it relates to domestic work and childcare, see Margaret Benson's classic article: Benson, *The Political Economy of Women's Liberation*, 21 MONTHLY REV. 13 (1969).

²¹⁹ Hayghe, *supra* note 74, at 43.

²²⁰ *Id.* at 7-8 (summary of 1982 U.S. Census Bureau survey). As noted therein, "[c]hild care is a greater obstacle for single than for married women." *Id.* at 8.

²²¹ A. WICKS & C. CARO, FACTORS AFFECTING THE EMPLOYABILITY OF WELFARE RECIPIENTS: A SURVEY OF WOMEN RECEIVING AID TO FAMILIES WITH DEPENDENT CHILDREN BENEFITS IN WASHINGTON STATE at v-vi (1986).

²²² O'Connell & Bloom, *Juggling Jobs and Babies: America's Child Care Challenge*, POPULATION TRENDS & PUB. POLICY, Feb. 1987, at 7.

²²³ *Id.* at 9.

²²⁴ *Id.*; CALIFORNIA ASSEMBLY OFFICE OF RESEARCH, CALIFORNIA 2000: A PEOPLE IN TRAN-

In California, a dramatic shortage of childcare persists despite a relatively extensive system of state-subsidized childcare. A recent study on the future of California identifies childcare as a major need for all income groups throughout the state.²²⁵ Less than 7% of the children eligible for subsidized care are now being served.²²⁶

The sponsors of GAIN were acutely aware of this problem, and distinguished GAIN from previous AFDC work programs with the promise of adequate childcare. Indeed, it was Governor Deukmejian's willingness to trade his signature on a latchkey childcare bill which won the necessary support of Senate President Pro Tem David Roberti, allowing GAIN to become law.²²⁷ Although GAIN's budget will be negotiated each year, its legislative authors agreed to spend \$118 million per year for childcare once the program is fully implemented.²²⁸

While GAIN provides new money to pay for the currently available care, it will also significantly increase the demand for that care. GAIN is expected to add 50,000 to 90,000 to the number of children needing childcare.²²⁹ Despite this increase in demand, neither GAIN nor the "latchkey" bill provide an adequate plan to increase the *supply* of childcare.²³⁰ There is already a lack of quality, affordable programs; even those parents who can afford to purchase care often cannot find satisfactory care for their children.²³¹ In many areas there are long waiting lists for subsidized care,²³² especially for infants and toddlers.²³³ Even the additional \$118 million allotted for childcare may not generate new childcare placements unless it can somehow generate new openings.²³⁴

On the other hand, GAIN's childcare provisions have some noteworthy features that are definite improvements over childcare provisions in earlier AFDC work programs. Rather than capping the cost of childcare at an arbitrary limit or average, as WIN and some of the proposed federal bills do, GAIN bases its payout on the "regional market rate."²³⁵ Under this system, the county can pay for care up to 1.5 standard devia-

SITION: MAJOR ISSUES AFFECTING HUMAN RESOURCES 8 (June 1986) [hereinafter AOR CALIFORNIA 2000].

²²⁵ AOR CALIFORNIA 2000, *supra* note 224, at 7-8, 13, 42.

²²⁶ *Id.* at 13.

²²⁷ See *supra* text accompanying note 100.

²²⁸ Strassburger, *California's GAIN Program Falls Short in Meeting Child Care Needs*, 8 YOUTH LAW NEWS, May-June 1987, at 12, 13.

²²⁹ *Id.* at 15.

²³⁰ See *id.* at 13, 15-16.

²³¹ COMMISSION ON CAL. STATE GOV'T ORG. AND ECONOMY, FINAL REPORT: THE CHILDREN'S SERVICE DELIVERY SYSTEM IN CALIFORNIA 18-20 (1987) [hereinafter COMMISSION FINAL REPORT].

²³² Strassburger, *supra* note 228, at 15; COMMISSION FINAL REPORT, *supra* note 231, at 22-23.

²³³ AD HOC DAY CARE COALITION, THE CRISIS IN INFANT AND TODDLER CHILD CARE 1-1 (1985); COMMISSION FINAL REPORT, *supra* note 231, at 22-23.

²³⁴ COMMISSION FINAL REPORT, *supra* note 231, at 22-23.

²³⁵ WELF. & INST. CODE § 11320.3(f).

tions *above* the mean market cost of care in the area.²³⁶ Although GAIN does not guarantee a participant that care will be provided, it will pay for childcare if a participant can find it. The statute encourages counties to set up flexible payment schedules to meet parents' needs,²³⁷ and authorizes payments for care whenever a participant is in a program component and care is "needed."²³⁸ If care is unavailable, a participant has good cause not to participate.²³⁹ In addition, the statute authorizes at least three months of transitional childcare for those participants who become employed through GAIN and lose their AFDC.²⁴⁰

The statute is replete with references to parental choice. It requires as a general principle that "[p]articipants shall be allowed to *choose* legal child care . . . if the cost is within the regional market rate."²⁴¹ Elsewhere, the bill states that "[d]ay care by family members shall be encouraged, but the *choice* between licensed or exempt day care arrangements shall be made by the recipient."²⁴² Although the statutory language emphasizes parental choice, there are some ways in which choice as to childcare may nevertheless be restricted. As discussed earlier, the AFDC parent's choice of childcare is limited by the lack of an adequate supply. Failure to find childcare may lead to participants being excused from the program, but that is neither productive nor desirable for those who wish to acquire skills training or an education.

An aspect of GAIN itself which impinges on parental choice concerns the statutory definition of nonavailable childcare and the sanctions imposed for refusing "available" childcare. Finding satisfactory childcare is not easy for most working parents, and there are no guarantees built into the GAIN statutory framework that adequate childcare will be found. According to the statute, this is primarily a parental responsibility, although the county is required to "assist participants to locate child care during and after participation [in GAIN]."²⁴³ While the inability to find adequate childcare is considered a "good cause" for failure to participate,²⁴⁴ the statute qualifies this by defining "reasonable available

²³⁶ Heidi Strassburger states that this gives participants economic access to 90% of the subsidized slots in the state. *Ensuring the Provision of Quality Child Care to AFDC Recipients Participating in Employment and Training Programs: Hearings Before the Education and Labor Committee, U.S. House of Representatives, 100th Cong., 1st Sess. 5* (1987) (testimony of Heidi Strassburger, staff attorney, Child Care Law Center).

²³⁷ WELF. & INST. CODE § 11320.3(h)(2), (6).

²³⁸ *Id.* § 11320.3(e)(1). Need, however, is a very subjective standard.

²³⁹ *Id.* §§ 11320.7(a)(11), (i).

²⁴⁰ *Id.* § 11320.3(f).

²⁴¹ *Id.* (emphasis added).

²⁴² *Id.* (emphasis added). Exempt day care under California law includes care such as care by relatives; family day care providers who provide care in their own home for the children of one other family; certain after-school programs; and Parks and Recreation programs. CAL. HEALTH & SAFETY CODE § 1596.792 (Deering Supp. 1988).

²⁴³ WELF. & INST. CODE § 11320.3(h)(1).

²⁴⁴ *Id.* § 11320.7(i).

childcare" as "having at least two choices of childcare arrangements."²⁴⁵ Mandatory participants must accept a childcare arrangement as long as they are offered at least two possible caregivers; if they are dissatisfied with both, they risk losing their grants. Two choices may not be enough for many parents, particularly in a matter as highly idiosyncratic as choosing childcare. Thus, this "two-choice" limitation before the imposition of sanctions may in practice be highly restrictive for parents dissatisfied with both childcare arrangements.²⁴⁶

The exclusion of children over twelve years old from childcare coverage²⁴⁷ also creates some cause for concern.²⁴⁸ Although parental or adult supervision may not be as critical for the health and safety of adolescents as it is for younger children, state law does not treat the adolescent as "mature" or without need of adult guidance and some supervised recreational activity. Moreover, concerns for children's safety do not terminate when a child reaches the age of twelve, particularly for parents living in neighborhoods troubled by crime.

In sum, the legislative confines of the GAIN measure do limit parental choice: parents who wish to work may not be able to find childcare; parents who do not like either of the two licensed or exempt day care arrangements proposed by the county may be sanctioned for refusing to participate; and parents wanting some supervision for their teenage children must leave them to fend for themselves after school. A further denial of parental choice confronts the parent who simply feels that she is the best person to care for her child during the after-school hours.

Preliminary data reveal that only 30% of single-parent families participating in GAIN currently receive paid childcare.²⁴⁹ These statistics, along with anecdotal evidence from participants, advocates, and childcare providers suggest that welfare departments may be limiting participants' childcare options. Participants may not know that they are entitled to paid childcare from GAIN.²⁵⁰ If a participant does not herself identify lack of childcare as a barrier, she may not be properly

²⁴⁵ *Id.*

²⁴⁶ This provision recognizes, however, that the childcare requirements of "special needs children" with disabilities, chronic illnesses, or other special needs, must be taken into consideration. *Id.*

²⁴⁷ *Id.* § 11320.3(h)(5).

²⁴⁸ However, the preoccupation with "latchkey" children of this age probably does not warrant the rather alarmist fears expressed by Michyle LaPedis. Compare LaPedis, *California Welfare Legislation and the Right of Privacy*, 13 HASTINGS CONST. L.Q. 761, 779-80 (1986) (Note) with Udesky, *supra* note 193, at 16.

²⁴⁹ C. McKeever, *supra* note 188, at 3. This may be due to any number of factors, including the provision of services during school hours to reduce need for care; the high use of education options by the initial participants; a slow flow of participants; counties' limits on payments; and reliance on family caregivers. *Id.* at 4; *The Need to Maintain a High Level of Funding for GAIN Child Care Services and to Improve the GAIN Child Care Delivery System: Hearings Before the Joint Oversight Committee on GAIN Implementation 1* (1988) (testimony of Heidi Strassburger, staff attorney, Child Care Law Center).

²⁵⁰ See COMMISSION FINAL REPORT, *supra* note 231, at 57.

advised of her right to childcare. Even if she does identify childcare as a problem, she may be pressured to seek care from relatives. The statute mandates that care by relatives "shall be encouraged, but the choice . . . shall be made by the recipient,"²⁵¹ and the regulations²⁵² mimic this requirement. According to one analyst, this has led some county GAIN workers to explore all possibilities for care to be provided by relatives before giving participants information about licensed childcare.²⁵³

Even participants who know of their rights to paid care are unlikely to insist upon them because of the threat of sanctions for noncooperation.²⁵⁴ This would be especially true for mandatory participants. One way to assist participants effectively to address their childcare needs would be to utilize childcare experts from non-profit resource and referral agencies²⁵⁵ in the GAIN intake process. GAIN has taken a step in this direction by requiring referral of those who need care to their local resource and referral agency for help.²⁵⁶ Some counties only send lists of participant names to the agencies, while others actually refer participants who need care.²⁵⁷

Resource and referral agencies possess knowledge and expertise in the area of childcare which welfare departments lack. Consequently, the agencies are able more effectively to assist parents in the choice of appropriate childcare. The agencies understand the advantages of using licensed care better than welfare departments, and are not driven to minimize people's need for childcare by incentives to cut costs. In order for women fully to explore and utilize different options for childcare, resource and referral agencies should be used to orient individuals and to refer them to appropriate childcare providers.

Those individuals who choose paid care still face problems in obtaining such care because of the program's payment mechanisms and rates. Several counties use a scheme of paying for care by the hour, which can both restrict the parent's choice of provider and disrupt continuous care by a single provider. Because most licensed day care providers charge by the week or month, they may be reluctant to take a child who will only be in care for four hours a day, three days a week.²⁵⁸ Also, for parents attending school, coverage may not be extended to pay

²⁵¹ WELF. & INST. CODE § 11320.3(f).

²⁵² DSS MANUAL, *supra* note 130, at § 42-750.2.

²⁵³ H. Strassburger, *supra* note 249, at 4.

²⁵⁴ For childcare-related exemptions to sanctions for noncooperation, see WELF. & INST. CODE § 11320.7(i).

²⁵⁵ Resource and referral agencies are publicly funded community service agencies. There is at least one in every county in California; they refer parents to childcare programs, develop new childcare resources, and provide technical assistance to childcare providers. They also educate and assist parents in choosing appropriate childcare. Strassburger, *supra* note 228, at 13.

²⁵⁶ WELF. & INST. CODE § 11320.3(i).

²⁵⁷ Strassburger, *supra* note 228, at 15.

²⁵⁸ H. Strassburger, *supra* note 249, at 3.

for care during breaks such as summer vacations. Parents may thus have to pay for care during such periods or risk losing providers.

Because licensed day care providers may not be willing to take children under the GAIN payment scheme, GAIN parents may look to unlicensed providers for care. If a participant chooses a provider who is exempt from the licensing requirement, the state may pay.²⁵⁹ But counties may be reluctant to pay the full cost of non-licensed care, even when it is below the regional market rate. San Mateo County decided to pay only \$1.25 per hour for unlicensed care, and the state approved that plan²⁶⁰ despite the fact that the statute clearly requires payment for childcare that is within the regional market rate.²⁶¹ The county increased this rate to the market rate only after a GAIN participant won a state hearing requiring it to do so.²⁶² If a county only provides \$1.25 per hour for care, the participant is faced with the unpleasant choice of using her AFDC grant to pay a portion of the care or doing without childcare.

The three-month limit on transitional childcare is possibly the most significant limitation on childcare under GAIN. The statute authorizes "not less than three months" of childcare for those participants who find a job and leave welfare as a result of their participation in GAIN.²⁶³ While the statute sets three months as the *minimum* period for transition, the State Department of Social Services has decided to set three months as a *maximum* period as well.²⁶⁴ Three months is a very short period; it is unlikely that many women will be able to find other subsidized childcare in that time.²⁶⁵ Some women may well lose their jobs due to childcare problems, while those who find childcare that is unsubsidized may not be able to afford to work.²⁶⁶ As a result, many families could end up back on welfare.

Offering women free or sliding scale childcare could significantly increase their opportunities to become independent of welfare.²⁶⁷ One study in Florida found that care on a sliding fee basis resulted in an

²⁵⁹ WELF. & INST. CODE § 11320.3(f), (j).

²⁶⁰ H. Strassburger, *supra* note 249, at 2.

²⁶¹ WELF. & INST. CODE § 11320.3(f).

²⁶² H. Strassburger, *supra* note 249, at 2.

²⁶³ WELF. & INST. CODE § 11320.3(f).

²⁶⁴ DSS MANUAL, *supra* note 130, § 42-750.24.

²⁶⁵ The Little Hoover Commission echoes the concern over the insufficient supply of subsidized childcare. COMMISSION FINAL REPORT, *supra* note 231, at iii, 20, 22-24, 57-58.

²⁶⁶ Others are also concerned that women may leave their children alone. *See id.* at 49, 51, 57; Strassburger, *supra* note 228, at 14; AOR CALIFORNIA 2000, *supra* note 224, at 11.

²⁶⁷ This is not to say childcare alone is enough.

Yet, child care support alone cannot break the cycle of poverty[,] as mothers are still low-income earners and concentrate[d] in low-paying jobs. Serious need for additional training, retraining, and upgrading of skills seem justifiable in that context. However, such opportunities, if available, would not be effective without child care support.

D. HOSNI & B. DONNAN, AN ECONOMIC ANALYSIS OF CHILD CARE SUPPORT TO LOW INCOME MOTHERS 9 and *passim* (1979).

almost 50% reduction in participants' receipt of AFDC, a 122% improvement in employment and a 117% increase in family income.²⁶⁸ A similar study in California showed that family income (and taxes paid) increased 6.5 times among families who used sliding scale childcare for two years as compared to those who used it only for six months,²⁶⁹ while AFDC costs were reduced by half.²⁷⁰

Clearly, the likelihood of a family staying off welfare increases dramatically over time. Transitional care should therefore be provided until such time as a subsidized slot becomes available, or for a longer period such as two years. As stated by Hosni, "a short enrollment is definitely not rewarding."²⁷¹

Because adequate childcare may be the most important element of any welfare employment program, guaranteeing an adequate supply, a generous market rate of payment, and meaningful choices regarding quality is essential. Without these safeguards, even the most progressive welfare reform measure will fail.

V. GAIN AND WELFARE LITIGATION

This Part discusses the history and limitations of welfare litigation that may provide the basis for legal challenges to GAIN. In particular, we explore legal challenges that can be made on behalf of GAIN and other AFDC work program participants.

A. The *Dandridge* Legacy and Federal Constitutional Action

Important litigation victories during the 1960s and 1970s gave AFDC families due process rights²⁷² and limited the right of social workers to intervene in the personal lives of welfare recipients.²⁷³ With their constitutional claims, welfare advocates joined prison reform advocates, busing proponents, and other champions of institutional change in following the "time honored tradition that those who lose in the legislature or the bureaucracy may turn to the courts . . ."²⁷⁴ However, the prefer-

²⁶⁸ *Id.* at 6-8.

²⁶⁹ Freis & Miller & Assoc., *The Economic Impact of Subsidized Child Care* 16 (1980) (unpublished manuscript). The authors of this study conclude that "This increase is substantially more than that of inflation and is possibly related to the ability of families to maintain their jobs and increase their skills. It is likely that the availability of child care contributes to the increased economic independence of these families." *Id.*

²⁷⁰ *Id.* at 1; see also *id.* at 15. These also parallel Hosni's findings in 1979 and 1987. See D. HOSNI & B. DONNAN, *supra* note 267; D. HOSNI, *CHILD CARE ASSISTANCE: A LABOR MARKET ASSESSMENT OF RECIPIENTS* 27-29, 32 (1987).

²⁷¹ D. HOSNI, *supra* note 270, at 36.

²⁷² See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (persons receiving welfare must be given notice and a hearing prior to discontinuance of welfare benefits).

²⁷³ See, e.g., *King v. Smith*, 392 U.S. 309 (1968) (state rule excluding children whose mother was "cohabiting" with a man held to be impermissible under the Social Security Act).

²⁷⁴ D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 10 (1977).

ence for litigation was more than just a response to the American proclivity to think of social problems in legal terms.²⁷⁵ Welfare litigation was in large part a realistic response to political realities in which people who receive AFDC wield little if any political power. AFDC recipients share a similar set of social characteristics: they are poor; they are disproportionately minorities; they are relatively young; and among the adults, they are overwhelmingly female.²⁷⁶ Taken as a composite, these social characteristics are frequently associated with little voting power and interest group representation at the federal, state, or local level. Thus, AFDC recipients, like public law litigants,²⁷⁷ are effectively unorganized and to a large extent politically powerless.

With the availability of free legal services through the Legal Services Corporation, AFDC families were able to march to the courthouse along with other deprived social groups to enforce federal law, thereby vindicating rights they were unable to secure through the state legislative or administrative process alone. During this period, welfare litigation conferred significant legal entitlement upon recipients.²⁷⁸

Most federal constitutional welfare litigation, however, involved

²⁷⁵ See S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* 3-38 (1974).

²⁷⁶ In 1983, 43% of AFDC families nationally were Black and 13% were Hispanic. Approximately 80% of AFDC households were female-headed, single parent families. The Unemployed Parent division, assisting two-parent households in which the primary wage earner is unemployed, comprised 10% of the total AFDC families. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *FAMILY SUPPORT ADMIN., AID TO FAMILIES WITH DEPENDENT CHILDREN: RECIPIENT CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS 1* (1983). Over 70% of those receiving aid are children (7,340,926 children and 3,412,670 parents received aid in 1981-82). HHS, *OBRA EFFECTS*, *supra* note 29, at 4, 6. Most AFDC mothers are under 30 years old, with a median age of 28 in 1982. *Id.* at 6. AFDC families averaged 2 children. For the one adult/two child families, the AFDC payment averaged \$322 per month nationally in 1982. *Id.* at 1, 9.

²⁷⁷ The term "public law litigation" is drawn primarily from the work of Abram Chayes. The crucial characteristics of public law litigation are: (1) the scope of the lawsuit is not exogenously given, but is primarily shaped by the courts; (2) the party structure is not rigidly bilateral, but sprawling and amorphous; (3) the fact inquiry is not historical and adjudicative but predictive and legislative; (4) relief is forward-looking, and fashioned on ad hoc, flexible lines, with remedies often having important consequences for absentees to the litigation; (5) the decree is not imposed but is negotiated; (6) the decree does not terminate judicial involvement in the affair; rather, its administration requires the continuing participation of the court; (7) the judge is not passive, but active, with responsibility not only for credible fact evaluation but also for organizing and shaping the litigation to insure a just and viable outcome; and (8) the subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy. Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1302 (1976).

²⁷⁸ Sylvia Law calls this process the "legalization of welfare." Law, *supra* note 23, at 1261. For a critical discussion of the achievements of this era of welfare litigation and some of its unexpected consequences for AFDC administration, see Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 *YALE L.J.* 1199 (1983).

Moreover, as courts used the federal AFDC statute and the Constitution to strike down state restrictions on welfare benefits, AFDC litigation had widespread budgetary effects, causing a fiscal impact that largely circumvented the legislative power of the purse. See S. SCHEINGOLD, *supra* note 275. For example, as a result of federal court actions in the early 1970s, it is estimated that an additional 100,000 people became eligible for assistance. *Id.* at 126.

procedural rather than substantive rights.²⁷⁹ These procedural rights protected people who had already secured benefits from unjust termination or curtailment,²⁸⁰ AFDC litigation led to few successful substantive challenges to AFDC policy-making. This is largely a result of the Supreme Court's holding in *Dandridge v. Williams*,²⁸¹ which set the contours of constitutional challenges to state practices and federal welfare law for the next two decades. In *Dandridge*, the Court held that constitutional review of welfare litigation was limited to the rational relationship test. The Court wrote:

[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs, are not the business of this court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.²⁸²

This early constitutional defeat chilled substantive constitutional litigation. Thus, federal courts have rarely addressed substantive constitutional issues concerning welfare, and especially the authority of a state welfare agency to demand compliance with work requirements in exchange for benefits. In one such case, a federal district court held that a mother has no constitutional right to refuse employment while receiving assistance in order to remain at home with her children.²⁸³ Another court maintained that work requirements did not frustrate the purpose of AFDC by preventing the parent from remaining at home.²⁸⁴ In neither case did the court seriously question the legislative rationale for mandatory work requirements.

B. State Work Programs, Statutory Conformity, and *Dublino* Immunity

Instead of direct constitutional challenges, welfare lawyers have focused AFDC claims on statutory grounds, where they have met with greater success. In this area, litigation surrounding work requirements has concentrated on two basic issues: (1) the calculation and application of the "work incentive disregard" for employed AFDC recipients whose low income allows them still to qualify for AFDC,²⁸⁵ and (2) the con-

²⁷⁹ See Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211, 223 (1973). See also Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1131, 1486-1504, 1513-16 (1986) (discussing the limited success of welfare litigants in forging constitutional rights beyond the limited areas of procedural protection).

²⁸⁰ See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁸¹ *Dandridge v. Williams*, 397 U.S. 471 (1970) (2-3-3 decision upholding Maryland's maximum welfare grant provision which ignored family size).

²⁸² *Id.* at 487.

²⁸³ *Anderson v. Burson*, 300 F. Supp. 401 (N.D. Ga. 1968).

²⁸⁴ *Stacy v. Ashland County Dep't of Pub. Welfare*, 164 Wis. 56, 159 N.W.2d 630, 636 (1968).

²⁸⁵ For a description of the "30 and 1/3" income disregard, see *supra* note 26 and accompanying

formity or contravention of state work programs with federal legislation, specifically Subchapter IV of the Social Security Act.²⁸⁶ The latter area—the relationship of state legislation to the federal AFDC statute—has particular bearing on the prospects for challenges to GAIN under federal law, and thus requires further exploration.

Federal courts have generally determined whether particular provisions of state work rules contravene the purposes or provisions of federal work incentive programs, resolving any conflicts of substance between federal and state work programs.²⁸⁷ On the whole, states have greater latitude in the development of state work programs and separate rules governing such programs than in other areas of AFDC administration.

The United States Supreme Court's decision in *New York State Department of Social Services v. Dublino*²⁸⁸ set the tone in its holding that federal WIN provisions did not preempt the New York state work program, but merely limited its scope and application. Congress, the Court concluded, did not intend the WIN program to lead to the termination of all state work programs, nor did it intend WIN requirements to be the exclusive work rules for AFDC recipients.²⁸⁹ The Court found that "[t]he Act allows for complementary state work incentive programs and procedures incident thereto—even if they become conditions for continued assistance."²⁹⁰

In *Dublino*, the Court appeared to depart from the strict construction of the AFDC statute with regard to federal standards.²⁹¹ However, as Frank Bloch notes,²⁹² *Dublino* can be harmonized with other cases requiring strict federal conformity if the AFDC statute is treated as composed of discrete units rather than analyzed as a unified whole. Describing the Supreme Court's response to the AFDC program, Bloch maintains that the Court looks first to the general section of the federal statute, but then interprets the specific language within a chosen analytical framework that varies section by section. Whereas eligibility cases

text. Indicative of the state and federal cases challenging the method of calculating this earned income disregard are: *Heckler v. Turner*, 470 U.S. 184 (1985) (effective amount of income disregard reduced by discontinuance of mandatory tax withholdings as a separate deduction in determining "income"), *rev'g Turner v. Prod.*, 707 F.2d 1109 (9th Cir. 1983) ("income" for AFDC purposes did not include mandatory payroll withholdings), *superseding Shea v. Vialpando*, 416 U.S. 251 (1974) (state cannot adopt a standardized allowance for work-related expenses which does not allow an applicant to deduct expenses that exceed the standard); *James v. O'Bannon*, 715 F.2d 794 (3d Cir. 1983) (amounts mandatorily withheld from wages were not required to be deducted or disregarded from beneficiaries' income) (declining to follow *Turner v. Prod.*, *supra*), *cert. denied sub nom. James v. Cohen*, 170 U.S. 1050 (1985).

²⁸⁶ 42 U.S.C. §§ 601-679(a) (1983 & Supp. 1988).

²⁸⁷ *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405 (1973).

²⁸⁸ 413 U.S. 405.

²⁸⁹ *Id.* at 414-21.

²⁹⁰ *Id.* at 422.

²⁹¹ See *Carlson v. Remillard*, 406 U.S. 598, 600 (1972); *King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971).

²⁹² Bloch, *Cooperative Federalism and the Role of Litigation in the Development of Federal AFDC Eligibility Policy*, 1979 WIS. L. REV. 1.

involving the definition of "dependent child" have been consistently interpreted since *King v. Smith*²⁹³ to require strict compliance with the federal statutory definition, the WIN provisions of the Act, on the other hand, have been held to be based on a looser concept of cooperative federalism.²⁹⁴

In cases since *Dublino*, courts have generally allowed state social services to develop independent work rules.²⁹⁵ As the court stated in *Davis v. Reagan*,²⁹⁶ "courts are not to void the additional requirements only '[s]o long as the State's actions are not in violation of any specific provision of the Constitution or Social Security Act.'" ²⁹⁷ Only when there is substantial conflict will work requirements be struck down.²⁹⁸

This posture toward state sponsored employment programs on the part of federal courts coincides with the strong Congressional endorsement of state initiatives found in the OBRA amendments and the current redirection of federal AFDC policy.²⁹⁹ OBRA relies heavily upon state sponsorship, with little in the way of federal standards or overall guidance.³⁰⁰ Given the precedent established by *Dublino* and its progeny, and the lack of federal standards since OBRA, there will undoubtedly be few litigation impediments in the federal courts to the process of defederalization which allows states flexibility to design their own work

²⁹³ 392 U.S. 309.

²⁹⁴ See Bloch, *supra* note 292. The only exception to this pattern of judicial restraint has been in cases involving the AFDC-U program, where states have denied aid to entire families because of the head of household's refusal (without good cause) to accept employment through WIN. On the basis of the supremacy clause, this was determined to be a violation of the federal WIN legislation which calls only for termination of aid to the uncooperative parent but not to his or her children. See, e.g., *Fritsch v. Wohlgemuth*, 474 Pa. 390, 378 A.2d 849 (1977); *Davis v. Reagan*, 485 F. Supp. 1225 (S.D. Iowa 1980), *aff'd* 630 F.2d 1299 (8th Cir. 1983).

²⁹⁵ The leading case in this area is *Woolfolk v. Brown*, 538 F.2d 598 (4th Cir. 1976), in which the court held that state rules requiring persons not within a work incentive program area to comply with state work rules rather than registering voluntarily for service under the federal WIN program, were not in conflict with federal regulations. See also *Fitch v. Public Welfare Division*, 27 Or. App. 799, 557 P.2d 253 (1976) (state rule requiring automatic suspension of benefits to recipient refusing job referrals without good cause not in conflict with federal work incentive program).

²⁹⁶ 485 F. Supp. 1255.

²⁹⁷ *Id.* at 1261 (citing *Jefferson v. Hackney*, 406 U.S. 535, 541 (1972)).

²⁹⁸ *Id.*

²⁹⁹ When enacting the 1981 OBRA amendments, the Senate Finance Committee made the following comment concerning the impact of welfare litigation upon state-sponsored employment programs: "[U]nder court decisions, States are precluded from establishing AFDC work programs on any basis which differs significantly from the operations of the WIN program." However, this interpretation of court decisions sharply overstates the federal courts' response to state employment programs and federal guidelines. SENATE FINANCE COMM., *supra* note 29, at 774-75.

³⁰⁰ The language in the three new work provisions added by OBRA, 42 U.S.C. §§ 609, 614, and 645, is fairly broad, suggesting only the rough contours of a suitable employment program. State legislatures have been highly responsive to OBRA's invitation to design their own work program: by May, 1982, over half the states had applied to operate Work Incentive Demonstration projects, while an additional ten states operated community Work Experience Programs (CWEP) authorized under OBRA. Martin-Leff, *Survey of State WIN Demonstration Application*, 16 CLEARINGHOUSE REV. 42 (1982). See also Sklar, *supra* note 3, at 30.

programs.³⁰¹

At present, litigation on behalf of GAIN participants is not likely to be based on either federal constitutional or statutory grounds. However, state law, particularly any state constitutions which provide enhanced rights to privacy³⁰² or equal protection,³⁰³ may offer protection to program participants. Also, because the GAIN statute reintroduces a significant degree of direction and control by the case manager in regard to training options, work assignments, and other aspects of the program, an element of subjectivity reenters AFDC administration which may lead to litigation.³⁰⁴

Another important area of potential litigation lies in the discretion given to each county under the statute to design its own program.³⁰⁵ This flexibility will produce program differences from county to county which may lead to litigation in which welfare advocates rely on the state GAIN statute as the standard for minimum requirements rather than the federal Social Security Act. As the State Department of Social Services adopts regulations and implements GAIN, advocates are already challenging county and state action on the basis of nonconformity to the state statute.³⁰⁶ Indeed, the first lawsuit involving GAIN³⁰⁷ asserts that the state's limitation of the no-net-loss-of-income provision is in violation of the state statutory requirements.

On the whole, however, GAIN faces few immediate litigation challenges; nor does it appear that the program will become immediately mired in the courts. This is not to say that the legal rights of participants are necessarily unprotected, but rather to suggest that the first line of support by welfare advocates lies in helping participants to be informed of their rights under the statute itself.³⁰⁸

³⁰¹ If Congress adopts new standards in a federal reform bill, see *supra* Part I, this would create a new litigation terrain in the area of state conformity to federal statutes.

³⁰² See, e.g., Michyle LaPedis' interesting constitutional argument on behalf of GAIN participants, based on the right to privacy in the California Constitution. LaPedis, *supra* note 248.

³⁰³ California's equal protection clause, for example, offers enhanced protection in comparison to the federal Constitution. See *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied* 432 U.S. 907 (1977); *Darces v. Woods*, 35 Cal. 3d 871, 679 P.2d 458, 201 Cal. Rptr. 807 (1984); *King v. McMahon*, 186 Cal. App. 3d 648, 656-58, 230 Cal. Rptr. 911, 914-16 (1986).

³⁰⁴ This may especially be the case if current proposals for federal welfare reform are implemented which contemplate a reassertion of case management and social work control over AFDC family life. See *supra* text accompanying notes 64-68 for a discussion.

³⁰⁵ CAL. WELF. & INST. CODE §§ 11320.2, 11320.3 (Deering Supp. 1988).

³⁰⁶ See, for example, the discussion of market rates for childcare, *supra* text accompanying notes 235-36.

³⁰⁷ *Sanchez v. McMahon*, No. 361-772 7 (Fresno Super. Ct., filed Feb. 26, 1987).

³⁰⁸ In many counties, attorneys from legal services offices have actively participated in GAIN development on the Local Advisory Councils. Thus, county GAIN administrators have received some degree of legal input from welfare advocates at the development stage, perhaps reducing areas of potential legal conflict.

CONCLUSION

GAIN is part of a new wave of AFDC reform, as states throughout the country design and implement AFDC work programs. Whether or not these programs will actually benefit women rests in the specifics of program design. Because of the diversity of the AFDC population, and the complexity of both economic and social forces affecting AFDC families, it is not enough for advocates simply to favor or oppose workfare and work programs. Programs must be judged in terms of their success in lifting families out of poverty, rather than just getting them off welfare. Sanctions for noncooperation should be carefully scrutinized for their potential to render an AFDC family homeless or without basic survival requirements.

In this Article, we have discussed the history of federal AFDC work programs and the recent shifts in federal AFDC policy. We have also provided a relatively detailed analysis of GAIN, a program which is considered one of the more progressive state initiatives among AFDC work programs. Our hope is that advocates can use this information to join in the policy debate and also monitor the implementation of local AFDC work programs.

At a minimum, AFDC programs should be voluntary and free from economic sanctions. AFDC is, after all, a mainstay of our country's tattered poverty safety net. It exists because the economic and social system fails to provide jobs that pay a living wage. Mandatory AFDC work programs that can result in loss of this last means of support for unemployed families should not be tolerated.

To implement an effective voluntary system requires examining not only the welfare system, but the local education, childcare, and job training programs as well. A better understanding of GAIN and its consequences for low-income women and children may help advocates to effectuate concrete changes in all of these programs.