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## ARTICLES

### PUBLIC ASSISTANCE: CONGRESS AND THE EMPLOYABLE MOTHER

*James J. Graham\**

#### INTRODUCTION

THE recent inauguration of a new Chief Executive in Washington, who has already indicated some willingness to try bold solutions to the twin problems of welfare and poverty,<sup>1</sup> may help create a more realistic political climate for liberals and conservatives.<sup>2</sup> Both groups may be less eager to attribute spiralling increases in the "family" relief<sup>3</sup>

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<sup>1</sup>Robert H. Finch, Secretary of the Department of Health, Education and Welfare [hereinafter cited as HEW], implementing a campaign proposal by President Richard Nixon, has called for the Federal Government to impose on the states national minimum standards of payments to the nation's 8.5 million welfare clients. N.Y. Times, Feb. 3, 1969 at 1, col. 1. President Nixon also has appointed as a White House Assistant on Urban Affairs the "urbanologist" Daniel P. Moynihan, who served as an official in the Kennedy and Johnson Administrations and who advocates a system of family allowances as a partial solution to the problem of poverty. *Id.*; see U.S. OFFICE OF POLICY PLANNING AND RESEARCH, DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 21 (1965).

<sup>2</sup>The columnist and influential leader of the Conservative Party in New York State, William F. Buckley, Jr., and the conservative economist, Professor Milton Friedman of the University of Chicago, who served as an adviser to Presidential Candidate, Barry Goldwater, are among those who agree that the present system of cash assistance distribution is both uneconomical and degrading to recipients. See M. FRIEDMAN, CAPITALISM AND FREEDOM 191-94 (1962); Buckley, *On The Right, Mr. Nixon's Welfare Commission*, N.Y. Post, Jan. 16, 1969.

<sup>3</sup>This term refers to the federally aided but locally administered relief program, Aid to Families with Dependent Children [hereinafter cited as AFDC] 42 U.S.C. § 601

categories to personal delinquencies rather than economic circumstances.<sup>4</sup>

While only slightly over a year has elapsed since the enactment by Congress of the most controversial<sup>5</sup> amendments in the history of the public assistance titles of the Social Security Act,<sup>6</sup> the advent of a Republican Administration justifies a fresh look at the provisions which impose a work requirement, *inter alia*,<sup>7</sup> upon the mothers of small children.

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(1964) and to local assistance measures, called in most areas "General Assistance" or "Home Relief," available to needy families ineligible to participate in the federal program. AFDC (known as Aid to Dependent Children prior to the 1962 Amendments) and Old Age Assistance, 42 U.S.C. § 301 (1964), Aid to the Blind, 42 U.S.C. § 1201 and Aid to the Permanently and Totally Disabled, 42 U.S.C. § 1351 are commonly referred to as the "categorical" assistance programs.

Nationwide, the number of AFDC recipients increased almost 400,000 (5,442,000 to 5,801,000) from January to September, 1968 or only slightly less than the increase for the two-year period between January, 1964 and January, 1966. SOCIAL SECURITY BULL., Jan., 1969, at 59.

<sup>4</sup> To date, apparently no studies have attempted to link low-wage levels in any given area to the rise in costs of assistance. New York City's Human Resources Administrator, Mitchell Ginsberg, recently announced that such a study would be sponsored by his agency. N.Y. Times, Feb. 12, 1969, at 1. Fairly reliable inferences can be drawn, however, even at the present time from the available raw statistics. For example, in New York City the number of Home Relief recipients increased in 1966-1967 from 77,752 to 109,959, representing a rise in costs for assistance and care of almost thirty million dollars. N.Y. STATE BOARD OF SOCIAL WELFARE AND DEPARTMENT OF SOCIAL SERVICES, 1966-1967 ANNUAL REPORTS (1968). The disparity in average monthly payments between New York City's HR and AFDC recipients indicates that the bulk of the increase may be attributable to intact family groups receiving supplementary instead of total assistance because of inadequate incomes. N.Y. STATE DEP'T OF SOC. SERVS. 4 (Dec., 1968).

During roughly the same two-year period, almost 900,000 employees out of 2.2 million in all of New York City's industries had gross cash hourly earnings of less than \$2.25 or \$90 per week or about \$4,600 per annum. 2 N.Y. STATE DEP'T OF LABOR, STRUCTURE OF EARNINGS AND HOURS IN NEW YORK STATE INDUSTRIES 57 (Aug., 1968). In early 1967, the Bureau of Labor Statistics of the United States Department of Labor reported that the New York metropolitan area had the second highest cost of living in the nation. The Bureau did not make a "poverty level" determination but fixed at \$10,195 the income required to maintain a four-person (H-W, son-daughter) family, only the husband gainfully employed, at a "moderate living standard." U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, CITY WORKERS' FAMILY BUDGET FOR A MODERATE LIVING STANDARD 9 (Sept. 1967).

<sup>5</sup> Described by Mitchell Ginsberg, New York City's human resources administrator, "the worst welfare bill in history." New York Times, Jan. 22, 1968 at 1. See also Brager, *Up the Down Escalator with Welfare*, 13 SOCIAL WORK 121 (April, 1968).

<sup>6</sup> Social Security Amendments of 1967, Pub. L. 90-248, tit. II.

<sup>7</sup> The legislation requires that state plans for AFDC include provisions for the "prompt referral to the Secretary of Labor or his representative for participation under a work incentive program [(WIN)] . . . (i) . . . each appropriate child and relative . . ." 42 U.S.C. § 602(a) (19) (A) (i) (Supp. 1968).

In accordance with the intent of Congress the Act does not list mothers of small

We will consider whether individuals participating in the WIN (Work Incentive) program are likely to acquire "a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society;"<sup>8</sup> or whether, as Congress further intended, "the example of a working adult in these families will have beneficial effects on the children . . ."<sup>9</sup>

The experience to date, along with pertinent regulations issued nationally by HEW<sup>10</sup> and by administrators in New York<sup>11</sup> (a state with relatively high benefits levels<sup>12</sup>), tends to confirm pessimistic predictions made last year.<sup>13</sup> The prediction was that WIN could not be implemented in benign fashion because the amendments, either explicitly or because of their complexities, leave too much discretion to (economy-minded) welfare officials and caseworkers,<sup>14</sup> who would be influenced

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children per se among the categories of AFDC recipients excluded from participation in WIN. 42 U.S.C. § 602 (a) 19(A) IV-VII (Supp. 1968); see Senate Comm. on Finance, 90th Cong., 2d Sess., Brief Summary of Major Provisions and Detailed Comparison with Prior Law 2 (Comm. Print 1968). The amendments, *inter alia*, also imposed a "freeze" as of June 30, 1968 (later extended because of difficulties in implementation) on the average number of dependent children for whose assistance and care the states would receive federal reimbursement. The new maximum cannot exceed the same ratio of dependent children to total state population which prevailed on January 1, 1968. 42 U.S.C. § 603 (d), *as amended*, Pub. L. No. 90-248, § 208 (b) (Supp. 1968).

<sup>8</sup> 42 U.S.C. § 630 (Supp. 1968).

<sup>9</sup> *Id.*

<sup>10</sup> SOCIAL AND REHABILITATION SERV., HEW, 1967 AMENDMENTS TO THE SOCIAL SECURITY ACT, INTERIM POLICIES AND REQUIREMENTS (1968).

<sup>11</sup> N.Y. STATE DEP'T OF SOC. SERVS., MANUAL-BULL. TRANSMITTAL, TRANS. NO. 68-1713-47, BULL. NO. 93 (Dec., 1968).

<sup>12</sup> In September, 1968, New York had the highest average monthly payment to individual AFDC recipients (\$62.70) as compared to California (\$47.85), Virginia (\$31.50), Texas (\$18.85), Mississippi (\$8.50) and a national average of \$41.35. SOCIAL SECURITY BULL., Jan. 1969, at 60.

<sup>13</sup> Wickenden, Social Security Amendments of 1967 [Pub. L. 90-248, tit. II], 12 Welfare L. Bull. 18 (Apr., 1968); See also A Working Paper on the Work Incentive Program, Center on Social Welfare Policy and Law, Columbia University School of Law; Availability for Work—An Evaluation and Comparison of the New Social Security Amendments, Unemployment Compensation and Backpay Procedures Under the NLRA, June 1, 1968 (an unpublished paper by Alan W. Houseman on file at NYU Project on Social Welfare Law).

<sup>14</sup> In public assistance administrative practice is "almost always worse than the statute." Cloward & Elman, *Poverty, Injustice and the Welfare State*, 202 THE NATION 230, 231 (1966). "Caseworkers, as much as any other group, are apt to find in the law what they wish to find in it." A. KEITH-LUCAS, DECISIONS ABOUT PEOPLE IN NEED: A STUDY OF ADMINISTRATIVE RESPONSIVENESS IN PUBLIC ASSISTANCE 62 (1957). See also Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966); Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U. L. REV. 836 (1968).

by the repressive character of the entire legislative package.<sup>15</sup>

It is also contended here that the 1967 amendments, while not completely without merit, are no more likely<sup>16</sup> to achieve the expressed social work objectives of the AFDC<sup>17</sup> (Aid to Families with Dependent Children) program than the core provisions of the statute. Most states with low per capita incomes<sup>18</sup> pay token benefits under the AFDC program, despite the availability of federal matching funds<sup>19</sup> covering almost all of the cost. Some states, presumably will not be inclined to spend more on job training and other services for recipients by a statute which imposes a higher percentage of the assistance bill on the local departments.<sup>20</sup>

The WIN amendment, therefore, on its face<sup>21</sup> and in context of the total legislation, especially the "freeze" provisions,<sup>22</sup> appears on balance to be yet another form of social control compatible with our long history of equating poverty, vagrancy and idleness with moral turpitude.<sup>23</sup>

<sup>15</sup> Wickenden, *supra* note 13, at 18.

<sup>16</sup> Most of the rash of welfare litigation in the past three years has been financed by the War on Poverty. The Economic Opportunity Act of 1964 includes legal services among the Community Action programs focussed upon the needs of low income individuals and families. 42 U.S.C. § 2785 (a) (1964), *as amended*, (Supp. I, 1965).

<sup>17</sup> Congress provides matching funds for state AFDC plans to help needy dependent children and the parents or relatives with whom they are living to "maintain and strengthen family life" and to "help such parents or relatives to attain or retain capability for the maximum self-support and personal independence . . .". 42 U.S.C. § 601 (1964).

<sup>18</sup> The complicated formula for federal reimbursement, entirely open-ended until passage of the AFDC freeze, has the effect of paying higher sums to states with low per capita incomes. 42 U.S.C. § 603, 623 (Supp. 1968).

<sup>19</sup> In Alabama, Florida, and Georgia where AFDC payments average \$12.65, \$15.30, and \$23.60 respectively, the federal government pays more than seventy-six percent of the costs of public assistance. Ohio, a comparatively prosperous state, as indicated by the 48.4 percentage for federal reimbursement, pays \$33.15 to its AFDC recipients or less than the national average. SOCIAL SECURITY BULL., Ann. Statistical Supp. 1966, at 115, 116.

<sup>20</sup> The statute authorizes the federal government to pay no more than 80% of the costs in work training programs including costs of training, supervision, materials, administration, incentive payments, transportation, etc., but not for time spent by participants in work, training or other participation. For special work projects, however, authorized under 42 U.S.C. § 632 (b) (3), only the costs of administration are included in the reimbursement formula. 42 U.S.C. § 635 (Supp. 1968).

<sup>21</sup> The statute conjoins the objectives of self-sufficiency through employment with "preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life." 42 U.S.C. § 602(a)(15)(A) (Supp. 1968).

<sup>22</sup> See note 7 *supra*.

<sup>23</sup> See tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status* (pts. 1, 2) 16 STAN. L. REV. 257, 900 (1964); (pt. 3) 17 STAN. L. REV.

The statute imposes new obligations and penalties on adult recipients (and indirectly on children) for failure to comply.<sup>24</sup> The work requirements perpetuate irrational discrimination. On the one hand there are relief clients, the traditionally "unworthy" poor,<sup>25</sup> who qualify for cash benefits on account of need; on the other, there are those under the National Labor Relations Act<sup>26</sup> and recipients of unemployment insurance checks,<sup>27</sup> who qualify for government services or grants on other grounds.<sup>28</sup>

Finally, and perhaps most important, the WIN program will disappoint legislators who hope to cut costs and those reformers who equate work opportunities with client rehabilitation. On their face and presumably in practice, the new provisions take no cognizance of the fact that disparate benefits levels among the states,<sup>29</sup> automation on southern farms, followed by migrations to northern cities<sup>30</sup> for low-wage factory employment, have much to do with the welfare crisis in cities like New York.<sup>31</sup>

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614, 675 (1965); Rosenhein, *Vagrancy Concepts in Welfare Law*, 54 CALIF. L. REV. 511 (1966).

Vagrancy statutes are still found in almost every state: See *Ricks v. District of Columbia* — F.2d — (D.C. Cir. 1968) in which the Courts reversing a criminal conviction, declared a D.C. vagrancy statute unconstitutional on the grounds of vagueness.

<sup>24</sup> The statute, in cases of refusal without "good cause" to participate in WIN, provides for counseling and voucher payments to the delinquent for a sixty-day period followed by termination of the individual's, but not the family's, budget allowance. 42 U.S.C. § 602 (a) (19) (F) (Supp. 1968).

<sup>25</sup> See S. Webb & B. Webb, *English Local Government; English Poor Law History: Part One: The Old Poor Law (1927)* (hereinafter cited as Webb & Webb, Part One).

<sup>26</sup> National Labor Relations Act § 8, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 158 (1958). The National Labor Relations Board includes among its remedial functions restoration of backpay and other benefits lost as a consequence of unfair labor practices by unions or employers. 29 U.S.C. § 160 (c) (1958).

<sup>27</sup> The Social Security Act since 1935 has provided for a system of unemployment compensation administered by the states as agents of the federal government and providing for payroll tax contributions by employers, but not employees. 42 U.S.C. § 501 (1964).

<sup>28</sup> For a discussion in depth of the dissimilar origins and character of work requirements in public assistance, the labor statute and unemployment insurance, see Mandelker, *Refusals to Work and Union Objectives in The Administration of Taft-Hartley and Unemployment Compensation*, 44 CORNELL L.Q. 477 (1959).

<sup>29</sup> See note 12 *supra*.

<sup>30</sup> See REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 239, 240 (Bantam ed. 1968).

<sup>31</sup> See note 4 *supra*. During the period 1940 to 1963, the South lost 3.3 million non-white persons. About 1.4 million of these migrated to the Northeast. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1511, THE NEGROES IN THE UNITED STATES:

## THE "APPROPRIATENESS" OF MOTHERS FOR EMPLOYMENT

*The Statutory Purpose*

Congress in 1967 included mothers of small children among the individuals deemed "appropriate" for involuntary referral<sup>32</sup> to a local manpower agency<sup>33</sup> for participation in the WIN program. In so doing, Congress departed from a long social work tradition that had been incorporated into the legislative history of the Social Security Act<sup>34</sup> and mandated by HEW regulations.<sup>35</sup> Experts theorized then, that while in

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 THEIR ECONOMIC AND SOCIAL CONDITION 2 (1966).

A recent study of the New York City caseload found that approximately one-third of the AFDC mothers were born in the South and about fifty percent in small towns or on farms. L. PODELL, *FAMILIES ON WELFARE IN NEW YORK CITY* 25 (1968).

While no studies indicate that higher welfare benefits alone attract rural migrants to the northern cities, the decline in AFDC caseloads in some southern states, contrasting sharply with increases in the North, does create a strong inference that low-income, potential welfare recipients have been encouraged to migrate by the knowledge that at least poverty-level benefits will be available if employment opportunities do not materialize. For example, Alabama in December, 1964 had 77,071 AFDC recipients and 76,100 in January, 1968; South Carolina 29,591 and 28,500; North Carolina 112,019 and 107,000. Other Southern states, most notably Georgia, Louisiana and Virginia, showed significant increases, however, during this period. *Welfare in Review*, Statistical Supp. 1965, at 4; *Welfare in Review*, May-June, 1968, at 43.

The United States Riot Commission estimated that approximately one million non-white persons in 1967 were "subemployed" *i.e.*, working part time or employed at below poverty level wages and living in the poverty sections of central cities. *REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS*, *supra* note 30, at 252.

<sup>32</sup> See note 7 *supra*.

<sup>33</sup> SOCIAL AND REHABILITATION SERV., *supra* note 10, at 1. The Secretary of Labor has designated the state employment security ("manpower") agency as the WIN sponsor in each state, but if a particular agency is unwilling to serve or deemed ineffective, a non-profit organization may be designated as sponsor. *MANPOWER ADMIN., U.S. DEP'T OF LABOR, BUREAU OF WORK TRAINING PROGRAMS MANUAL, TRANS. NOTICE No. 16-68, WIN SERIES No. 7-68 § 300* (1968) [hereinafter cited as WIN HANDBOOK].

<sup>34</sup> The Committee on Economic Security, which proposed the first draft of the Social Security legislation, noted in 1937 that "the purpose of ADC . . . has been to prevent the disruption of families on the ground of poverty alone and to enable the mother to stay at home and devote herself to housekeeping and the care of her children . . ." *SOCIAL SECURITY BOARD, SOCIAL SECURITY IN AMERICA: THE FACTUAL BACKGROUND OF THE SOCIAL SECURITY ACT AS SUMMARIZED FROM STAFF REPORTS TO THE COMMITTEE ON ECONOMIC SECURITY* 233 (1937).

<sup>35</sup> Prior to the 1967 amendments, the Bureau of Public Assistance took favorable cognizance of the CES Report and said that since the role of AFDC is to "help the mother arrive at a decision" whether or not to work, the Bureau recommended against compulsory employment of ADC mothers. *HEW HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION*, pt. IV, § 3401.1 (1946).

many cases employment might be therapeutic for mothers and their children at any income level, the decision should be left to the mother herself.<sup>36</sup>

A mother is usually in the best position to decide whether at all or at what age her offspring will benefit from work activities she considers both gainful and emotionally satisfying. The past deference in these matters to the wishes of welfare mothers accorded with the American disdain for arbitrary interference by government with intimate family concerns.<sup>37</sup> It is also true that the pre-1967 work exemptions for AFDC mothers conflicted with the double standard, embodied in Anglo-American jurisprudence at the time of Queen Elizabeth<sup>38</sup> and continuing to the present time,<sup>39</sup> whereby humane parent-child concepts were deemed inapplicable to the children of paupers.<sup>40</sup>

The work compulsion feature of the 1967 amendments, like the "freeze,"<sup>41</sup> singles out the AFDC category. A sound argument can

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<sup>36</sup> See Mapes, *The Mother's Employment, Whose Decision In ADC?*, 8 PUBLIC WELFARE 74 (Apr., 1950); de Schweinitz, *to Work Or Not to Work—A Current Problem Concerning Families Receiving ADC*, 33 CHILD WELFARE 7 (Dec., 1954); Josselyn & Goldman, *Should Mothers Work?*, 23 THE FAMILY 74 (Mar., 1949); Riggs, *Individualized Employment Planning in ADC Families*, 23 THE FAMILY 297 (Dec., 1942).

In fact, a fairly recent study by two sociologists concluded that even voluntary maternal employment, though beneficial in many cases to both mother and children, if engaged in full time might be harmful, especially among lower income groups, because of the greater risks of neglect and the greater household burdens incurred by children. F. NYE & L. HOFFMAN, *THE EMPLOYED MOTHER IN AMERICA, 196-198* (1963).

<sup>37</sup> The United States Supreme Court has voided state legislation prohibiting interracial marriages, *Loving v. Virginia*, 388 U.S. 1 (1968); interfering with the right to marital privacy in birth control matters, *Griswold v. Connecticut*, 381 U.S. 479 (1965); denying AFDC to otherwise eligible children because of the extra-marital sex activities of their mother, *King v. Smith*, 392 U.S. 309 (1968).

<sup>38</sup> See WEBB & WEBB, PART ONE, *supra* note 25, at 22 n.3; B. TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* 37, 38 (1959).

<sup>39</sup> New York State does not permit an AFDC mother to establish with bequest monies or other resources available to her an irrevocable trust fund for the future education of her children. *Briggs-Hall v. Wyman*, Index No. 03412/68 (Sup. Ct. App. Div. filed Feb. 29, 1968), reported in 13 WELFARE L. BULL. 11 (June 1968). The Social Security Act, however, permits, but does not require, "all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child," 42 U.S.C. § 602 (a) (8) (B) (i) (1964).

In New Jersey and New York, welfare departments, seeking to recover costs of assistance, play an important role, often deleterious to the social welfare of clients, children and spouses, in divorce and family court proceedings. See Graham, *supra* note 14, at 887-890.

<sup>40</sup> See tenBroek, *supra* note 23, at 286, 287, 315.

<sup>41</sup> See note 7 *supra*.



be made that since the freeze provision bears no relation to need,<sup>42</sup> it deprives AFDC children of equal protection of the laws. Yet employability obviously conjoins with the need for assistance and discrimination on this score against AFDC mothers as opposed to the aged, blind and disabled recipients of categorical aid,<sup>43</sup> might not be so arbitrary, capricious or irrational as to violate the fifth amendment.<sup>44</sup> Moreover, in *Anderson v. Schaefer* a federal court has held that there is no "federally protected right of a mother to refuse employment while receiving assistance and remaining at home with her children."<sup>45</sup> This decision, when considered with the moderate penalties explicitly imposed only on recipients who refuse to cooperate in the WIN program,<sup>46</sup> may encourage the enactment of, or validate existing statutes, that make work refusal a criminal offense. New York courts in *People v. Pickett*<sup>47</sup> and *People v. La Fountain*<sup>48</sup> sustained the validity of a similar state misdemeanor statute<sup>49</sup> but qualified it with a requirement of "wilfulness," which was not satisfied by the defendants' work refusals in either case.<sup>50</sup>

In the past, few such offenses were prosecuted in the courts, probably because most states simply disqualified the entire family if the parent

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<sup>42</sup> The Alabama court struck down the state's "substitute parent" regulation as "unrelated to need . . . insofar as this or any similar regulation is based on the State's asserted interests in discouraging illicit sexual behavior and illegitimacy it plainly conflicts with federal law and policy." *King v. Smith*, 392 U.S. 309, 320 (1968).

<sup>43</sup> See note 3 *supra*.

<sup>44</sup> Cf. *Flemming v. Nestor*, 363 U.S. 603 (1960), in which the Court upheld federal legislation denying accrued benefits under the Old Age, Survivors and Disability Insurance title of the Social Security Act to an alien deported for membership in the Communist Party at a time when such membership was not illegal. *Id.* at 635 (Brennan, J., dissenting). In *Nestor* the Court also implicitly affirmed, however, the developing notion that the government may not arbitrarily deprive citizens of benefits for which they are otherwise qualified.

<sup>45</sup> *Anderson v. Schaefer*, Civil No. 10443, (N.D. Ga., Apr. 15, 1968) (per curiam).

<sup>46</sup> 42 U.S.C. § 602 (a) (19) (F) (Supp. 1968).

<sup>47</sup> 19 N.Y.2d 170, 225 N.E.2d 509, 278 N.Y.S.2d 802 (1967).

<sup>48</sup> 21 App. Div. 719, 249 N.Y.S.2d 744 (1964).

<sup>49</sup> N.Y. Soc. SERVS. LAW § 145 (McKinney 1966).

<sup>50</sup> In *Pollock v. Williams*, 322 U.S. 4 (1944), the United States Supreme Court struck down a state work requirement imposed on debtors. Said the Court, "The undoubted aim of the Thirteenth Amendment as implemented by the Federal Anti-Peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States . . ." *Id.* at 17. It is an open question, however, whether the Court will apply the *Pollock* principle to the employable mother situation when the prescribed penalty for work refusal, at least under the federal statute, is not a prison term but discontinuance of benefits. The answer may depend on whether the Court regards compulsory employment in welfare as simply a matter of economic

refused to take a job.<sup>51</sup> While this course of action presumably is foreclosed by the 1967 amendments,<sup>52</sup> the *Anderson* decision stands as a strong precedent for the constitutionality of criminal statutes intended to punish employable but recalcitrant male or female recipients. It is also naive to suppose that AFDC children will not be adversely affected by the sins of the parents whether he or she is incarcerated or causes the family budget level to be lowered by elimination of the parent's needs.<sup>53</sup>

An attempt to strike down this portion of the WIN provisions in a federal court on a supremacy clause theory, recently revitalized by *King v. Smith*,<sup>54</sup> probably would not succeed. Since 1956 the AFDC title has specified "self-support," "self-care," "independence" and a strengthening of family life as the principal purposes of this categorical program.<sup>55</sup> It is difficult to see how these objectives will be attained in these situations where mothers are forced to leave home to work at (to them) unsatisfactory employment. The alternative definition in the statute of a needy, dependent child as one deprived of parental support or care<sup>56</sup> reinforces the interpretation of the Economic Security

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regulation by the states instead of an interference with a form of liberty protected by the Due Process Clause. Cf. *Snell v. Wyman*, 281 F. Supp. 853, 873 (S.D.N.Y. 1968) (Kaufman, J., dissenting).

<sup>51</sup> This was the intended effect of the "substitute parent" and "employable mother" regulations at issue in *King v. Smith*, 392 U.S. 309 (1968) and *Anderson v. Schaefer*, Civil No. 10443 (N.D. Ga., Apr. 15, 1968).

According to one commentator, in *Pickett* the Commissioner of Welfare of St. Lawrence County admitted that he wanted a test case under N.Y. Soc. Servs. Law § 145 (McKinney 1966) for the speedy prosecution of clients who refused to cooperate in work relief measures. Mandell, *The Crime of Poverty*, 11 SOCIAL WORK 11, 12 (Jan., 1966).

<sup>52</sup> See note 46 *supra*.

<sup>53</sup> The practice in England of relieving the families of strikers but not the strikers themselves, "one of the many anomalies of Poor Law Administration," had the effect of relieving the strikers anyway. See Jennings, *Poor Relief in Industrial Disputes*, 46 L.Q. Rev. 225, 226 (1930), citing *Attorney-General v. Guardians of the Poor in the Merthyr-Tydfil Union*, 1 Ch. 516 (1900).

Other more poignant penalties may befall dependent children, spouses or parents. In work refusal cases in New York City "it is the family's obligation to take the member to court," apparently on the theory that "appropriate" mothers of small children along with fathers and grown children will now be guilty of non-support for failure to take available employment. New York City Department of Social Services, Procedure No. 68-67, § II, c. p. 4 (1968).

<sup>54</sup> See note 37 *supra*.

<sup>55</sup> See note 17 *supra*.

<sup>56</sup> 42 U.S.C. § 606(a) (1964). The statute also reads that matching funds are to be used for "the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives . . ." 42 U.S.C. § 601 (1964).

Committee<sup>57</sup> that Congress conceived the program as a means of avoiding the further disruption of broken families resulting from mothers' employment.

In litigation aimed at the supremacy clause, the views of HEW, the federal agency entrusted with on-going approval of state plans for public assistance,<sup>58</sup> will be relevant to the Supreme Court's decision.<sup>59</sup> The HEW posture is not encouraging. Apparently out of concern for the welfare of needy recipients, who would be penalized by a state's lawful refusal to continue to participate in the basic program or by HEW's decision to terminate aid to an offending state,<sup>60</sup> HEW has exercised considerable restraint over the years and tolerated a wide, and sometimes conflicting<sup>61</sup> variety of dubious local welfare practices.

Although somewhat disingenuously in the light of its past conduct,<sup>62</sup> the agency in its *amicus curiae* brief<sup>63</sup> suggested that HEW require states to avoid "unreasonable classifications unrelated to the purposes

<sup>57</sup> See note 34 *supra*. In a report to the President in 1953, the Committee on Economic Security advised that the Social Security legislation was intended "to release from the wage earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary not only to keep them from falling into social misfortune but more affirmatively to rear them into citizens capable of contributing to society . . ." See KERTH-LUCAS, *supra* note 14, at 207.

<sup>58</sup> 42 U.S.C. § 602 (1964).

<sup>59</sup> The court in *King v. Smith*, 392 U.S. 309 (1968), took cognizance of the fact that HEW had neither approved nor disapproved of the "substitute parent" regulation. *Id.* at 317 n.11.

A constitutional attack upon New York's welfare repayment statutes [N.Y. Soc. SERVS. LAW § 104, 104A, 105, 360 (McKinney 1966)] and related regulations was dismissed by a three-judge court in the Southern District of New York essentially on the grounds that the laws, despite the hardships imposed on plaintiffs, constituted a reasonable exercise of legislative discretion. *Snell v. Wyman*, No. 191, (S.D. N.Y., Jan. 13, 1969). The HEW brief, though somewhat ambiguously, agreed with the majority. Brief for the United States as *Amicus Curiae*, *Snell v. Wyman*, *supra*.

<sup>60</sup> See G. STEINER, *SOCIAL INSECURITY: THE POLITICS OF WELFARE* 85 (1966); E. WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 144 (1962).

<sup>61</sup> For example, an HEW analysis shows much inconsistency and no discernible patterns among states that recover the cost of welfare assistance. HEW, *PUB. ASSISTANCE REPORT NO. 50, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT* (1964); Graham, *Public Assistance: The Right to Receive: The Obligation to Repay*, 43 N.Y.U.L. REV. 451 (1968).

<sup>62</sup> Until the *Anderson* litigation commenced HEW had tolerated Georgia's "employable mother" regulation in all its parts for over twelve years, then prior to the final court decision disapproved the regulation in a more benign form, revised at the request of the federal court. Interview with Martin Garbus, Co-Counsel in the *Anderson*, *Snell* and *King* litigation, Dec. 12, 1967.

<sup>63</sup> Brief for the United States as *Amicus Curiae*, *supra* note 59.

of the Act.”<sup>64</sup> It is significant that HEW as a matter of policy narrows the scope of the supremacy clause argument<sup>65</sup> upheld in *King v. Smith*<sup>66</sup> to contraventions of the requirements for state AFDC plans specified in 42 U.S.C. § 602(a).<sup>67</sup> In other words, despite its prior rejection of forced employment, HEW presumably will yield to congressional wisdom in overseeing state operations and in giving the Supreme Court the benefit of its expertise in litigation aimed at overturning the WIN provisions.

### *State Administrative Interpretations*

Assuming that the legislation, as presently written, will withstand constitutional assaults, does this foreclose the possibility that local administrators will blend the humane purposes into day-to-day implementation of the WIN program? Probably, yes. It is true that the aggressive implementation of an uncomplicated but weak statute<sup>68</sup> by the recently created Equal Employment Opportunity Commission has achieved dramatic results,<sup>69</sup> generally upheld by the courts.<sup>70</sup> The perennial assaults by management groups on the National Labor Relations Board, entrusted with legislation made deliberately ambiguous by Congress,<sup>71</sup> also testifies to the ability of an agency to effectuate broad national policies<sup>72</sup> in a legislative vacuum. On the state level, the California welfare

<sup>64</sup> *Id.* at 12.

<sup>65</sup> *Id.* at 11, 12.

<sup>66</sup> 392 U.S. 309 (1968).

<sup>67</sup> In addition to the WIN provisions, the more important of the explicit requirements for state plans include income “disregards,” fair hearing requirements, statewide uniformity and a single state agency to administer the plan. 42 U.S.C. § 602(a) 1964.

<sup>68</sup> EQUAL EMPLOYMENT OPPORTUNITY ACT, 42 U.S.C. § 20003 (Supp. II, 1965-1966).

<sup>69</sup> During the fiscal year ended June 30, 1967, the Equal Employment Opportunity Commission completed 174 of 485 pending cases marked for agency conciliation efforts and was fully or partially successful in over half of those completed. 2 EEOC ANN. REP. 4 (1968).

<sup>70</sup> *Id.* at 48-50; see *Hall v. Werthan Bag Corp.*, 251 F.Supp. 184 (M.D. Tenn. 1966); *Hardy v. United States Steel Corp.*, 289 F. Supp. 200 (1967); *International Chemical Workers v. Planters Mfg. Co.*, 259 F.Supp. 365 (N.D. Miss. 1966).

<sup>71</sup> National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. 151 (1958).

For purposes of flexible administration, Congress did not specify in precise and unmistakable language what conduct it intended to proscribe as unfair labor practices. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). At the same time “the legislative history of [Taft-Hartley amendments, 1947] revealed that almost every provision reflected a compromise . . .” Ratner, *The Quasi-Judicial NLRB Revisited*, 12 LAB. L.J. 685, 686 (1961).

<sup>72</sup> The statute, ostensibly to prevent impediments to the free flow of commerce

statute<sup>73</sup> contains many progressive features,<sup>74</sup> but the California experience is atypical.

In part because of the Anglo-American tendency to equate welfare poverty with dissolute living, reinforced by the usual apprehensions of taxpayers and the traditional "less eligibility" concept<sup>75</sup> inherent in budget computations, state welfare administrators are unusually sensitive to public pressures.<sup>76</sup> Charged with the care and feeding of a politically impotent sector of the population, county and state officials can be expected to respond affirmatively to editorial demands that more and more AFDC mothers be made to earn their keep.

Congress, of course, clearly indicated its intent to abolish the three decade work exemption of AFDC mothers implicit in the Social Security Act.<sup>77</sup> Whatever the degree of collective sincerity among the Senators and Representatives about shoring up human dignity among recipients, there is no question that Congress regarded reduction in the rolls as proof of rehabilitation. The freeze provision, for example, was a financial sanction intended . . . "to get the States to act on the other provisions of the bill requiring them to do something to reduce dependency and to take people off welfare who should not be there."<sup>78</sup> Yet Congress also failed to define "adequate" child care services,<sup>79</sup> "appropriate in-

caused by industrial strife, protects the right of employees to engage in "union" *i.e.*, activities relating to collective bargaining, or to refrain from such activities. 29 U.S.C. § 157 (1959).

<sup>73</sup> CAL. WELF. & INST'NS CODE ANN. § 10000 (West 1966).

<sup>74</sup> The California Code explicitly provides prompt, humane and courteous administration, liberal construction of the statute, judicial review and payments without later reimbursement. *Id.* at § 10000, 10500, 11000, 10962, 11007.

<sup>75</sup> This refers to the practice of attempting to encourage ambition by setting relief payments at a level slightly below the earnings the recipient would receive if employed. In 1847, the Poor Law Commissioners decided that children on "outdoor relief" *i.e.*, assisted in their own homes, could not be educated at all out of the Poor Rates because to do so would bring them to the economic level of the children of working men. WEBB & WEBB, *supra* note 25, at 249.

In England the principle retains its vitality even in a welfare state in the form of a "wage stop" which restricts supplementary benefits in times of unemployment to a level below wages from regular employment. Joint Economic Comm., 90th Cong., 2d Sess., Economic Policies and Practices, Paper No. 11, Guaranteed Minimum Income Programs Used by Governments of Selected Countries 39 (Comm. Print 1968).

In the opinion of this observer, "less eligibility" also survives in this country in the practice of almost all states of including only bare "necessities" in the welfare budget.

<sup>76</sup> See KEITH-LUCAS, *supra* note 14, at 84, 91, 99, 100.

<sup>77</sup> See note 34 *supra*.

<sup>78</sup> 113 CONG. REC. 16585 (1967) (Remarks of Congressman Mills).

<sup>79</sup> 42 U.S.C. § 602(a)(15)(B)(i) (Supp. 1968); 42 U.S.C. § 622(a) (Supp. 1968).

dividuals,"<sup>80</sup> and "volunteers"<sup>81</sup> for referral, or to surround these and other key provisions of the legislation, including the concept of suitable work opportunities for mothers, with due process safeguards compatible with the rehabilitative objectives of the legislation.<sup>82</sup>

To date neither clarification nor specificity has been provided by HEW or the United States Department of Labor. In fact, the WIN provisions omit two important provisions contained in Georgia's employable mother regulation that was sustained in substance by the federal court in *Anderson v. Schaefer*,<sup>83</sup> namely, that the mother be "able-bodied" and without a child under three years of age.<sup>84</sup>

Accordingly, much will depend on local discretion. In respect to decisions vitally affecting the daily lives of recipients, as Professor Joel Handler astutely recognized, "caseworkers make the law."<sup>85</sup> One can expect a flood of state court proceedings in the nature of certiorari, prohibition or mandamus attacking field determinations by caseworkers that the welfare of certain mothers and their children will be enhanced by the mothers' employment in a factory after the babies become toddlers; or that a feeble grandmother is capable of supervising the lunchtime and after-school activities of two or three boys aged from eight to twelve; or that the personal wishes, well-being and possible rehabilitation of a grandmother or widowed aunt living in the home, best served by attendance at embroidery classes or at a part-time job, have been sacrificed to a bureaucratic determination that the mother should work and the relative stay home to baby-sit; or that a volunteer for referral who later changes her mind has irrevocably categorized herself as appropriate for participation in the WIN program.

Significantly, New York regulations state unequivocally "the preparation and motivation of recipients for participation in the WIN program are basic responsibilities of the social services caseworker."<sup>86</sup> One can assume that caseworkers, being only human, will react unfavorably to clients who add to their work burdens by refusing to be motivated towards employment.

<sup>80</sup> 42 U.S.C. § 602(a)(19)(A)(i) (Supp. 1968).

<sup>81</sup> 42 U.S.C. § 602(a)(19)(A)(iii) (Supp. 1968).

<sup>82</sup> See notes 8, 9 *supra*.

<sup>83</sup> Civil No. 10443 (N.D. Ga., Apr. 15, 1968).

<sup>84</sup> GA. PUBLIC WELFARE ADMINISTRATION MANUAL, pt. III, V-C(3)(b)(2) (1964).

<sup>85</sup> Handler, *supra* note 14, at 493. For similar criticisms of caseworker discretion in compulsory employment programs, see Mapes, *supra* note 36, at 74; Josselyn & Goldman, *supra* note 36, at 83.

<sup>86</sup> N.Y. STATE DEP'T OF SOC. SERVS., *supra* note 11, at 111 A.1, at 3.

Even with the aid of social work experts,<sup>87</sup> client attorneys can expect to encounter enormous problems of proof in overcoming the presumption in most states of administrative validity that inhere in caseworker divisions, ratified by higher level supervision. In this area, how can judges be expected to draw a clear distinction between informed administrative discretion implementing a national policy, and decisions in individual cases motivated to an uncertain degree by personal bias of several kinds? This last introduces into the discussion the unwholesome and intertwined elements of racial or ethnic discrimination and social control.

Until the Poor Law Reform of 1834, welfare administration in England made no real distinctions in respect to care and confinement between abandoned children, as a class of poor persons, and destitute vagrants and lesser criminal types.<sup>88</sup> To this day statutes in many states contain durational residence requirements for cash assistance which have their origin in the Settlements Laws of Elizabethan England.<sup>89</sup> In Mississippi, for example, a statute provides for the removal of "strolling paupers."<sup>90</sup>

Yet poverty in America, at least in this century, has had social connotations which have been accentuated in recent years by the migrations of southern negroes, Puerto Ricans and Mexicans to the northern cities, with the resulting principal focus of the War on Poverty and the welfare crisis on black and Spanish-speaking indigents. The AFDC program was enacted against a background of locally administered mother's pension laws which were designed, even in states like New York, to provide cash assistance to worthy (white) widows and their children.<sup>91</sup>

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<sup>87</sup> Both the majority and dissenting opinions in *Snell v. Wyman* took cognizance of the expert testimony of witness for the plaintiffs, Dr. Charles Grosser, then of the faculty of the New York University Graduate School of Social Work, who testified that the repayment provisions were therapeutically unsound and, in some cases, destructive of clients' morale. *Snell v. Wyman*, 281 F.Supp. 853, 859, 873 n.5 (S.D.N.Y. 1968).

<sup>88</sup> This was the principal focus of criticism of the reformer-novelist Charles Dickens, who attacked the workhouse system in *OLIVER TWIST*, *BLEAK HOUSE* and *OUR MUTUAL FRIEND*. The Poor Law Amendment Act of 1834, 4 & 5 Will. 4, sought to provide separate treatment for indigent children but in time the workhouses reverted to their former condition. H. HOUSE, *THE DICKENS WORLD* 96, 98 (2d ed. 1942).

<sup>89</sup> See WEBB & WEBB, *supra* note 25, at 308-22. The Statute of Laborers (c. 1350), which was a consequence of the labor shortages resulting from the Black Plague, arbitrarily fixed wages and hours for each category of laborers and craftsmen, forbade alms-giving, restricted travel and forced all idle persons to work at the established rates. *Id.* at 21, 397.

<sup>90</sup> MISS. CODE ANN. § 7358 (1953).

<sup>91</sup> W. BELL, *AID FOR DEPENDENT CHILDREN* 9, 14 (1965).

The "employable mother" regulations began to appear in the late forties in the southern states in response to the insistence of the federal government that negroes be accorded equal treatment in administration.<sup>92</sup> The Georgia regulation admittedly had a politico-racial origin.<sup>93</sup> The regulation did achieve the desired objective, deplored by the chief state welfare administrator,<sup>94</sup> of drastically reducing the number of black unwed mothers on the rolls.<sup>95</sup> The black complexion of the employable mother contingent in Georgia's rural counties also suggests that in practice, only non-whites were and perhaps still are, considered "suitable" for seasonal stoop labor mandated under the regulation.<sup>96</sup>

Conceivably, in the absence of meaningful protections, caseworkers will be permitted to give vent with impunity to blatant prejudices against negroes in the South and North, Indians in the Southwest, Mexicans in California and Slovaks and Russians in parts of Pennsylvania. In all areas of the country, the despised minority constituting the bulk of the client caseload ipso facto will be deemed by many caseworkers presumptively "suitable" for work of any kind. Where illegitimate children are involved, caseworkers will be able to "punish" such mothers for their immoral conduct while satisfying an explicit objective of the WIN program of "preventing or reducing the incidence of births out of wedlock."<sup>97</sup>

## THE NATURE OF THE TRAINING AND EMPLOYMENT

### *Role of the Labor Department*

Under the 1967 amendments, after the state welfare agency determines that an individual is "appropriate" for work and training, the manpower agency<sup>98</sup> assumes responsibility for supervision of the recipient. This

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<sup>92</sup> *Id.* at 35.

<sup>93</sup> *Id.* at 43, 46, 67.

<sup>94</sup> See GA. DEP'T OF FAMILY AND CHILDREN SERVS., REPORT FOR FISCAL YEAR 1964-1965, at 92 (1965).

<sup>95</sup> In 1952-53 the state expended \$10,681,016 on AFDC, a drop of over one million dollars in one year attributed in part to the new regulations. Closings increased 33.78% of which 5.6% was attributed to the compulsory work requirement alone. GA. DEP'T OF FAMILY AND CHILDREN SERVS., *supra* note 94, at 9, 16.

<sup>96</sup> During the *Anderson v. Schaefer* litigation, co-counsel for the plaintiffs was advised by his clients, who resided in two Georgia counties, that they knew of no white women working in the fields at stoop labor. S. Wizner, Memorandum Summarizing Depositions, June 10, 1967, on file at the Center on Social Welfare Policy and Law, Columbia University School of Law.

<sup>97</sup> 42 U.S.C. § 602(a)(15)(A)(ii) (Supp. 1968).

<sup>98</sup> See note 33 *supra*.



includes determinations at fair hearings as to whether the individual refused for "good cause"<sup>99</sup> to participate in the WIN program.<sup>100</sup> The welfare agency, of course, continues to compute and distribute the basic assistance payment.<sup>101</sup> This worthwhile departure from past practice holds much potential for administrative reform.

The introduction of Labor Department personnel into the welfare sector has both practical and philosophical advantages. The former jurisdiction by state welfare units over the income maintenance of all recipients, whether or not employable, was a Poor Law anachronism. Congress and President Franklin D. Roosevelt, perhaps because of the "radical" image projected by Secretary Frances Perkins and her associates,<sup>102</sup> refused to concur in the recommendation of the Economic Security Committee, that Aid to Dependent Children be administered by the Department of Labor instead of the Social Security Administration.<sup>103</sup> This decision was deplored by the Senate Finance Committee as being out of step with labor-welfare policy in the rest of the industrialized world.<sup>104</sup>

The Department of Labor enjoys a reputation among legal practitioners, unionists and employers as being an aggressive yet efficient and non-partisan unit of the executive branch.<sup>105</sup> The experience of its per-

<sup>99</sup> 42 U.S.C. § 602(a)(19)(F) (Supp. 1968); WIN HANDBOOK § 412(H).

<sup>100</sup> In New York, and presumably elsewhere, the recipient also has the right to contest preliminarily her "appropriateness" for referral at the usual welfare department fair hearing. N.Y. STATE DEP'T OF SOC. SERVS., *supra* note 11, at § 111 I, at 11. In addition, prior to the manpower agency hearing, the circumstances of the refusal to participate will be assayed by a Determination Review Committee vested with broad powers. WIN HANDBOOK § 412(G).

<sup>101</sup> SOCIAL AND REHABILITATION SERV., *supra* note 10, at 8.

<sup>102</sup> See A. ALTMAYER, THE FORMATIVE YEARS OF SOCIAL SECURITY, 35 (1966); P. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES: AN ANALYSIS AND APPRAISAL OF THE FEDERAL SOCIAL SECURITY ACT 85 (1936).

<sup>103</sup> CES included Secretary of Labor Perkins, and the Secretary of the Treasury Henry Morgenthau, Jr., Attorney-General Homer S. Cummings, Secretary of Agriculture Henry A. Wallace and Federal Emergency Relief Administrator Harry C. Hopkins. COMM. ON ECONOMIC SECURITY REPORT, *supra* note 34, at Introduction; see Steiner, *supra* note 60, at 19.

<sup>104</sup> SENATE FINANCE COMM. REPORT No. 628, 74th Cong., 1st. Sess. § 5 (1935). The decision to deny jurisdiction to the Department of Labor was particularly ironic and unfortunate because the American social security package derived more from our labor legislation than public assistance, whereas in Great Britain "development of social security was influenced largely by dissatisfaction with the Poor Law." ALTMAYER, *supra* note 102, at VII.

<sup>105</sup> This comment stems from the author's prior experience as a labor law specialist, including representation during 1963-1966 of an industrial union for the most part in the deep South.

sonnel in implementing national policy regarding unemployment compensation, migrants, child-labor, minimum wage laws, union elections and labor-managing reporting will add a refreshing new dimension to the highly specialized world of welfare administrators. As a group, these administrators tend to remain isolated from the economic and political mainstream.<sup>106</sup> It is relevant on this point that fair hearings on work refusals will be conducted by unemployment insurance examiners<sup>107</sup> or comparable officials in accordance with the usual Unemployment Insurance rules, regulations and procedures.

This familiarity with the rights, obligations, income and educational problems of workers should on balance overcome the agency's lack of social work expertise. In fact, in the context of poverty level budgets and widespread repressive welfare requirements, innocence of social work principles may be an advantage in public assistance administration. At the same time, the continued involvement of the Labor Department in this sector may help create a new psychological climate in labor circles, whereby trade union leaders will be encouraged to assume a share of the responsibility for individuals in the work force and their dependents.<sup>108</sup> While it is true that AFL-CIO lobbyists in Washington generally support most "liberal" legislation, and the Federation did actively oppose the 1967 amendments,<sup>109</sup> as of this writing it is fair to say that few local units have made significant contributions to the War on Poverty or to public assistance reform. In this as well as other matters the modern American labor experience contrasts sharply with patterns established across the Atlantic.

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<sup>106</sup> See KEITH-LUCAS, *supra* note 14, at 84, 91; STEINER, *supra* note 60, at 193.

<sup>107</sup> WIN HANDBOOK § 412 (I) (1).

<sup>108</sup> One commentator attributed the history of antagonism of labor towards social welfare in part to the fact that public and private relief agencies developed "out of the womb of feudal charity." Deutsch, *Get Together Labor and Social Welfare*, 9 SOCIAL WORK TODAY 13 (April, 1942).

Representatives of organized labor gave restrained support to the legislative package in 1935 and had almost no role in its formulation. See WITTE, *supra* note 60, at 87; DOUGLAS, *supra* note 102, at 4.

<sup>109</sup> Federation representatives reportedly were prepared to sacrifice increases in OASDI benefits if this would have sufficed to defeat the freeze and compulsory employment measures. *Keeping the Record Straight, Letter from Jean Rubin, Child Welfare League of America*, 13 SOCIAL WORK 125 (July, 1968). Cf. Dunlop, *Unemployment and the Unions*, 2 HARV. REC. 29 (1964). Prof. Dunlop, taking a minority point of view, argues that in recent years many labor unions have increased their activities "in the role of counselor and advisor to their members aiding them in securing . . . public assistance." *Id.* at 32.

In England, the Radical journalist William Cobbett, writing about 1833, provided the ideology for an alliance at the turn of the century between organized labor and intellectuals, including the Fabian Socialists Sidney and Beatrice Webb.<sup>110</sup> Medieval lands, according to Cobbett, had been held in trust by the church for the poor.<sup>111</sup> Although later confiscated by the state, the English peasant or worker class could still assert its land claims in the form of Poor Law assistance.<sup>112</sup> English unionists in this century came to recognize their responsibility for the care of the "once employed." They played a major role, after successive extensions of the unemployment insurance concept, to cover more and more of the relief population<sup>113</sup> in establishing a universal assistance program in that country. By contrast, in the United States the lack of "class consciousness" coupled with greater opportunities than in Europe for poor children to rise from "rags-to-riches" fostered a union movement oriented almost exclusively towards increased benefits for current members and eschewing, at least on the local level, socio-political involvement. The process has been most evident in the South where a lack of "working-class" consciousness has hampered union organizing.<sup>114</sup> However, when southern workers do vote for collective representation, it has been my experience that they tend to be more active than their brothers in the northern cities in union affairs and more likely to regard the union as part of the life of the community.

### *The Placement Process*

The rules laid down by the Department of Labor for the guidance of local manpower agencies accurately reflect the inherent difficulties of attempting to implement harsh legislative policy in humane fashion. The WIN Handbook contains a mixture of well meaning, but jaded, social work concepts together with policies or procedures civil libertarian in origin or apparently borrowed from the Economic Opportunity Act.<sup>115</sup> The resulting conflicts derive from the unspoken necessity of acquiescing

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<sup>110</sup> See K. DESCHWEINITZ, *ENGLAND'S ROAD TO SOCIAL SECURITY* 173 (1943); E. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 518, 592 (1963).

<sup>111</sup> Thompson, *supra* note 110, at 222, 761.

<sup>112</sup> *Id.*

<sup>113</sup> See DESCHWEINITZ, *supra* note 110, at 197-222; J. MILLETT, *THE BRITISH UNEMPLOYMENT ASSISTANCE BOARD: A CASE STUDY IN ADMINISTRATIVE AUTONOMY* 17-22 (1940).

<sup>114</sup> W. CASH, *THE MIND OF THE SOUTH* 252-56 (1941).

<sup>115</sup> The Economic Opportunity Act stresses self-help measures including "maximum feasible participation" of the poor in Community Action programs. 42 U.S.C. § 2782(a) (3) (Supp. II, 1965-1966).

in the general intent of Congress to cut welfare costs and the explicit directive to include mothers among the referrals to jobs and training.<sup>116</sup>

For example, the Handbook recommends<sup>117</sup> that the "first level staff (those who actually deal with enrollees)" should be organized on a five-man team basis consisting of a counselor, manpower specialist, work and training specialist, coach and clerk stenographer.<sup>118</sup> The local sponsor is encouraged to train enrollees who have demonstrated "leadership and interest" to work on the WIN staff.<sup>119</sup> A representative of the poor "preferably recommended by an appropriate community action agency" should be one of the three members of the Determination Review Committee.<sup>120</sup> This committee is but one element in the comprehensive schema for initial determinations, review and fair hearings on refusals of enrollees to participate.

Included in the WIN Handbook, however, are numerous provisions for rehabilitative "services" first introduced, with great but unfulfilled expectations,<sup>121</sup> into the Social Security Act of 1962. The team counselor is charged with providing "the full array of professional, vocational and personal counseling services."<sup>122</sup> "Supplemental supportive services," not provided by the local welfare agency, may be obtained by the sponsor or a consultant on a contractual basis; these may encompass services from "clinical psychologists, psychiatrists, rehabilitation centers, evaluation and appraisal clinics, etc."<sup>123</sup> When enrollees refuse to cooperate, the counselor should make exhaustive efforts to explain the "benefit of participation and the consequences of refusal."<sup>124</sup>

The layman may rightly inquire how a social worker or clinical psychologist, especially in the face of contrary social work teaching,<sup>125</sup> can deliver therapeutic services to the mother who went on welfare

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<sup>116</sup> The WIN program has application to "mothers who do not volunteer whether or not they have pre-school children." WIN HANDBOOK § 407.

<sup>117</sup> While some of the provisions are clearly mandatory in nature, much of the language in the WIN HANDBOOK has a hortatory tone.

<sup>118</sup> WIN HANDBOOK § 301 (E) (2).

<sup>119</sup> *Id.* at § 303.

<sup>120</sup> *Id.* at § 412 (G). One of the other committee members "shall be familiar with jobs and skills requirements and one shall be familiar with the social and economic problems of WIN enrollees." *Id.* An on-the-job grievance procedure also is provided which apparently does not include a fair hearing. *Id.* at § 416.

<sup>121</sup> See STEINER, *supra* note 60, at 19, 42-46; see, e.g., 42 U.S.C. § 603(c) (1) (1964).

<sup>122</sup> WIN HANDBOOK § 301.

<sup>123</sup> *Id.* at § 301 (F).

<sup>124</sup> *Id.*

<sup>125</sup> See note 36 *supra*.

after her husband left home because he could not support his family,<sup>126</sup> and who now insists that her children need her during the day. The answer seems to be that the WIN professional, ignoring economic data and other evidence, must proceed on the assumption that his clients are somehow socially inadequate or morally deficient. The Department of Labor advises its personnel that WIN is designed to deal with persons who are not employed steadily and may not accept ordinary appeals for proper discipline.<sup>127</sup>

Moreover, owing to the prevalent economy base of most welfare policies, the services described by the Handbook were often transformed in the past into services beneficial only to the local department<sup>128</sup> or, in any event, were regarded with antagonism by clients principally desirous of higher budget levels.<sup>129</sup> It would seem that the emphasis on services, together with the publicized, even if never fully implemented,<sup>130</sup> policy of placing mothers with pre-school children in jobs or training, will create a permanent psychological block to successful rehabilitation for individuals or groups of recipients<sup>131</sup> under the WIN program.

Finally, the WIN program proceeds on the implicit assumption, derived from the economy base of the legislation, that work or training

<sup>126</sup> On the basis of substantial evidence that lack of welfare assistance to intact families is a factor in family dislocations, the Kerner Commission recommended that the program of temporary AFDC to families with unemployed breadwinners be made permanent and mandatory on all states. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 30, at 463. Instead, Congress further restricted coverage of T-AFDC (also called "AFDC-U") to unemployed fathers with substantial attachment to the work force. 42 U.S.C. § 607 (Supp. 1968).

<sup>127</sup> WIN HANDBOOK § 413 (A).

<sup>128</sup> See Graham, *supra* note 14, at 885.

<sup>129</sup> *Id.*

<sup>130</sup> On this score, the solicitous language in the New York regulations, for example, called for special consideration for mothers of several children, may be somewhat misleading on the question of implementation. N.Y. STATE DEP'T OF SOC. SERVS., *supra* note 11, at § 111F. One clients' group representative reported that in one week in January, 1969, she counted about 45 AFDC mothers in a Brooklyn welfare center waiting for WIN counseling. Brooklyn Welfare Action Council Newsletter, February 7, 1969, at 1.

The New York City Department, as of the end of 1968, admittedly for administrative reasons, had lagged behind the rest of the State in WIN referrals but expected soon to fulfill its allotted quota of 8,400 "job training slots." New York Times, February 14, 1969.

<sup>131</sup> "Whip the WIN Program. The Department of Social Services calls it WIN but the welfare rights movement calls it WIP. If you are a client you better join a welfare rights group, because WIP has something in store for you. . . . Are you going to let the Department tell you where and when to work and who to leave your children with?" Brooklyn Welfare Action Council Newsletter, January 24, 1969, at 1.

will either be actually available<sup>132</sup> or will be made available by the manpower agency. The state welfare plan must provide for "prompt" referral.<sup>133</sup> The Secretary of Labor "shall" establish a WIN program wherever a "significant" number of individuals over age 16 are on the AFDC rolls.<sup>134</sup> Congress left almost no room for avoidance of its overriding legislative purpose. Such programs must place as many individuals "as is possible" in employment; on-the-job training will be utilized for "others." Institutional and work experience training and special work projects encompass the remainder.<sup>135</sup>

The broad criteria specified by the Congress for placements are clearly not the number of recipients employable in the sense of past federal policy, or the number of available jobs of any kind, but instead, the size and consequent expense, of the welfare caseload. It follows, therefore, that in many parts of the country the manpower agency, with the acquiescence of the Department of Labor, will have no choice but to effectuate the statutory intent by first placing employable mothers in low-wage factory jobs<sup>136</sup> or, more likely,<sup>137</sup> as domestics. Both placements will add to the indirect subsidies already provided by local governments to these industries in the form of welfare supplementation to employees. Employment on a large scale of AFDC mothers as maids will have the

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<sup>132</sup> See SENATE COMM. ON FINANCE, *supra* note 7, at 3. The statutory priorities for referral [42 U.S.C. § 602 (a) (19) (A) (Supp. 1968)] will have little meaning in the approximately 28 states, including New Jersey and Virginia, that do not participate in the unemployed parent segment of the AFDC program. See WELFARE IN REVIEW, Nov.-Dec., 1968, at 42.

<sup>133</sup> 42 U.S.C. § 602 (a) (19) (A) (Supp. 1968).

<sup>134</sup> 42 U.S.C. § 632 (a) (Supp. 1968).

<sup>135</sup> 42 U.S.C. § 632 (b) (Supp. 1968).

<sup>136</sup> I have been advised, however, by the Director of the Department of Welfare of Richmond, Virginia, Mr. Herbert G. Ross, that the employment service in his community follows a policy of placing employable AFDC clients in jobs with potential for "upward mobility." While Mr. Ross agrees with the rehabilitative objectives of the manpower agency, he feels that the success or failure of this approach will depend upon whether Congress will support sound, long-range employment planning or, instead, will insist on quick and probably temporary placements. Interview with Herbert G. Ross, Director of the Dep't of Welfare of Richmond, Virginia, by telephone, Jan. 29, 1969.

In another connection, Mr. Ross has advocated closer cooperation between federal, state and local agencies and university and other groups seeking progressive reforms in "social welfare law." H. Ross, Disclosure of Information in Public Assistance, the Concept of Direct Connection with Administration 135 (1968) (unpublished treatise for M.S.W. degree, School of Social Work, Richmond Professional Institute).

<sup>137</sup> Winifred Bell contends that employable mother policies were encouraged, at least in part, by the need and desire for housemaids. BELL, *supra* note 91, at 64. See also Brager, *supra* note 5, at 121.

additional social disadvantages of adding to the low-income work force and thus aggravating the problem of negro family dislocation<sup>138</sup> by further depressing male factory and service wages generally.<sup>139</sup>

In the alternative, the manpower agency must resort to work experience and training or special work projects. Absent a significant increase in decent job opportunities or a rise in unskilled or semi-skilled wages to realistic levels, these projects in some areas will degenerate into make-work. Make-work will fail to satisfy the expectations of Congress while frustrating the affected recipients.

While the statute requires the Secretary to enter into agreements according him the right *inter alia* to have necessary access to the employer's premises to supervise compliance by the employer with the project agreement,<sup>140</sup> the only firm standard imposed for such projects is conformity to the applicable minimum wage for the particular work.<sup>141</sup> Instead, Congress simply directed in relevant part that the Secretary have "reasonable assurances" that "appropriate" standards for health safety, etc., be established and maintained and that the conditions of work, training, etc., be "reasonable" in the light of such (locally determined) factors as the type of work, geographical region, and proficiency of the participant.<sup>142</sup> Clearly, Congress did not intend to disturb regional, sometimes ethnically or racially oriented, work patterns probably not cognizable under the Equal Employment Opportunity Act.<sup>143</sup>

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<sup>138</sup> See U.S. OFFICE OF POLICY PLANNING AND RESEARCH, *supra* note 1, at 21. One critic of the Report argues that too much stress was placed on the heritage of slavery and not enough on post-slavery economic deprivations as factors in Negro family instability. "What these families need most is jobs for Negro men—jobs with status, with stability, with future, and with fair wages." Herzog, *Is There A Breakdown of the Negro Family?* 11 SOCIAL WORK 319 (Jan. 1966).

Statistically, a strong case can be made for the theory that the disproportionately high rates of Negro divorce, abandonment and illegitimacy and consequent AFDC dependency relate directly to male employment at low wages. While 6 out of 100 white families with male heads are likely to become poor, the comparable figure for non-whites is 24 out of 100, only 7 units below the estimate for white families with female heads. SENATE SUBCOMM. ON EMPLOYMENT, MANPOWER, AND POVERTY, 90th Cong., 2d Sess., TOWARD ECONOMIC SECURITY FOR THE POOR 10 (1968).

In 1966, Negro high school graduates nationwide earned on the average approximately \$230 per annum less than white men who never entered high school. WELFARE IN REVIEW, Mar.-Apr., 1968, at 20, citing U.S. Bureau of the Census, Current Population Reports, Series P.-60, No. 53, Income in 1966 of Families and Persons in the United States, tables 7, 21 (1967).

<sup>139</sup> See Mandell, *supra* note 51, at 14, 15.

<sup>140</sup> 42 U.S.C. § 633(e)(2)(C) (Supp. 1968).

<sup>141</sup> 42 U.S.C. § 633(e)(4) (Supp. 1968).

<sup>142</sup> 42 U.S.C. § 633(f) (Supp. 1968).

<sup>143</sup> In enforcement litigation under Title VII of the Civil Rights Act of 1964, the

Large scale experiments in work relief as a form of compulsory employment were tried unsuccessfully by England<sup>144</sup> and the United States<sup>145</sup> prior to this century. A study made by the Bureau of Family Services (HEW) in 1961 concluded that work relief could only reduce the assistance rolls appreciably if the economy produced additional regular jobs for the truly employable, *i.e.*, those with "constructive work relief experience."<sup>146</sup> This is so, said the Bureau, because "projects useful to the community are more likely to interfere with regular employment."<sup>147</sup>

### *Justifications for Refusals*

Determinations by the Secretary of Labor after a fair hearing, that a recipient has refused without good cause a bona fide offer of employment, are binding on the welfare agency.<sup>148</sup> This separation of authority would probably work well for most recipients if mothers of small children were not involved. The focus of the expertise of the delegate manpower or underemployed<sup>149</sup> males will be clouded and the labor-management-

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district courts generally have found no violations of the Act, absent a present intent to discriminate where current disparities, for example, in requisite skills, result from invidious discrimination in the past. *Quarles v. Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968).

<sup>144</sup> See WEBB & WEBB, Part One, *supra* note 25, at 212, 223. The Poor Law Reformers of 1834 intended to "enoble" the poor by discouraging them from applying for relief. Despite the reforms which included bare subsistence budget levels and residence in the workhouse, the English welfare rolls increased disproportionately during the next several decades. HOUSE, *supra* note 88, at 96; S. WEBB & B. WEBB, ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY, PART TWO, THE LAST HUNDRED YEARS 247 (1929).

<sup>145</sup> In an 1881 decision, Judge David Brewer of the Kansas Supreme Court (later a Justice of the United States Supreme Court) denied a petition for a writ of habeas corpus brought by a farmer for the release of his son from a "poor farm." The son, aged 8, had been "bound out" until the age of 18 by the superintendent of the farm without the knowledge or consent of his parents after the father, during a drought and while ill, had sought aid for his family. Judge Brewer was sympathetic but held that Kansas law permitted such administrative measures even in cases of temporary assistance and contained no requirement for notice to or consent of the parents. *Ackley v. Tinker*, 26 Kan. 485 (1881).

<sup>146</sup> Cited in Houseman, *supra* note 13, at 7.

<sup>147</sup> *Id.*

<sup>148</sup> 42 U.S.C. § 602(a)(19)(F), 633(g) (Supp. 1968); SOCIAL AND REHABILITATION SERV., *supra* note 10, § 3(A)(17) at 9.

<sup>149</sup> This term has been used to describe the condition of ten million American non-white persons, "about 6.5 million of whom work full-time and earn less than the annual wage." REPORT OF THE JOINT ECONOMIC COMMITTEE, *supra* note 75, at 7. "The concentration of male Negro employment at the lowest end of the occupational scale is greatly depressing the incomes of United States Negroes in general. In fact, this is the single



male-worker orientation of its personnel set somewhat askew to the extent that large numbers of AFDC mothers appear among the agency's clients. In other words, day-to-day concern with the employable mother component of the WIN program, potentially the largest group of referrals from the welfare department,<sup>150</sup> may impress the damp moss of Poor Law paternalism on an otherwise vital manpower organization.

For example, ascertaining the merits of job rejections, harmful from the recipient's point of view to his or her "economic welfare,"<sup>151</sup> would seem to fall within the exclusive purview of the manpower agency. Yet the criterion of "health and safety of the individual or family members"<sup>152</sup> suggests the need for social work expertise. Clearly, a determination as to whether "acceptance of the assignment would be detrimental to the family life of the individual"<sup>153</sup> invades the on-going jurisdiction of the welfare department over the employable mother.

Also included among the criteria for good cause refusals in the WIN Handbook is a determination that "a mother's child care plan has broken down and alternative child care cannot be arranged and she can no longer participate in the program."<sup>154</sup> To begin with, child care arrangements will have been made or approved by the welfare unit, so that work refusals relating to this factor will require consultations between the two agencies. The nature of baby-sitting would indicate that, instead of a permanent disruption of the child care plan, manpower personnel will find themselves confronted by recurring complaints from mothers and employers that the baby sitter inexplicably failed to appear and cannot be located.

The psychic, as well as economic, harm<sup>155</sup> befalling the mother and

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most important source of poverty among Negroes." REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 30, at 255.

<sup>150</sup> In September, 1968, AFDC mothers constituted almost 40 percent (approx. 1,500,000) of the total number of adults enrolled nationwide in the categorical assistance programs. SOCIAL SECURITY BULL., Jan., 1969, at 60.

<sup>151</sup> WIN HANDBOOK § 412(E) (1) (m).

<sup>152</sup> *Id.* at § 412(E) (1) (o).

<sup>153</sup> *Id.* at § 412(E) (1) (n).

<sup>154</sup> *Id.* at § 412(E) (1) (g).

HEW agrees that the statute leaves "considerable latitude" to the states to define what constitutes good cause for refusal to accept employment, and to decide whether a bona fide, reasonable offer of employment has been made. HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION pt. IV, § 3424.23 (1963).

<sup>155</sup> Presumably, either in a special work project or regular employment, the lost time will be deducted from the mother's paycheck. While most of this substantial

her children from these interruptions in her daily schedule and flow of income, will be added to the usual tensions between client and case-worker over special allowances and recurring budget computations.<sup>156</sup> As for the agencies, in such situations the welfare worker must resolve the child-care difficulties, but the placement official is responsible to all concerned parties for satisfaction of the employment obligation. It is fair to assume, therefore, that in most cases the manpower agency, already under pressure from the tax paying public and elements in the business community, will resolve conundrums of this kind by placing mothers with small children in casual, low-paying jobs as domestics, hotel service employees, or even as farm laborers.<sup>157</sup>

This practical consequence will also be hastened by the failure of the statute not only to describe "appropriate" jobs or work standards for the mass of employable recipients<sup>158</sup> but also to specify criteria catering to the desires, maximum skills or past employment of the *individuals* referred for training or employment.<sup>159</sup> What happens to the AFDC mother who worked for good wages as a skilled stitcher in a New Orleans garment shop, but comes to the WIN program unemployed and on welfare because of a strike at her shop?<sup>160</sup> In the light of the "good cause" provisions of the statute, the WIN Handbook and the social control<sup>161</sup> and economy<sup>162</sup> purposes of the 1967 amendment, one may anticipate (despite the rehabilitative objectives also specified for the WIN program<sup>163</sup>) that manpower agency personnel at the field and fair hearing levels will not deem themselves empowered to permit the New Orleans stitcher to wait perhaps two or three months for retraining and

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(to her) loss of income will be compensated by an adjustment in the budget, this procedure, calling for special efforts on the part of the caseworker, might consume four or five days on each occasion, an intolerably long period of time for a family subsisting on little more than a "bare survival allowance."

<sup>156</sup> See Graham, *supra* note 14, at 890-92.

<sup>157</sup> But see note 136 *supra*.

<sup>158</sup> 42 U.S.C. § 633(f) (Supp. 1968).

<sup>159</sup> The statute specifies that the conditions of work training, education and employment must be "reasonable in the light of such factors as the type of work, geographical region, and proficiency of the participant." 42 U.S.C. § 633(f)(3) (Supp. 1968). Past experience is an important, and presumably deliberate, omission from the recital.

<sup>160</sup> Women fitting this description were probably typical of the approximately 170 discriminatees who were awarded, but have not yet received, backpay in NLRB litigation that commenced in 1955 and is still pending in the federal courts. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 399 F.2d 356 (5th Cir. 1968).

<sup>161</sup> 42 U.S.C. § 602(a)(15)(A)(ii) (Supp. 1968); see note 21 *supra*.

<sup>162</sup> See text, *supra* note 78.

<sup>163</sup> 42 U.S.C. § 630 (Supp. 1968).

placement in her usual line of work while laundries, hospitals and housewives are demanding her services at wages of less than one dollar an hour.<sup>164</sup>

### *Arbitrary Discrimination Against WIN Recipients*

A narrow administrative interpretation of "good cause" for WIN work or training refusals will undoubtedly concur with congressional intent. The WIN criteria conflict, however, with the more liberal tests utilized to evaluate searches for employment by workers idled by their employer's unfair labor practices<sup>165</sup> or business circumstances.<sup>166</sup>

In backpay proceedings, the National Labor Relations Board charges a delinquent employer with actual losses suffered by employees discharged or otherwise discriminated against in violation of the statute.<sup>167</sup> In such cases, the employer (or offending labor organization) is entitled to a deduction from gross backpay "for actual [interim] earnings by the worker and also for losses which he willfully incurred."<sup>168</sup> This rule, which derives from the common law obligation of an employee to mitigate damages in a wage contract dispute with his employer,<sup>169</sup> applies most commonly, in situations where the individual discriminatee has no contract of employment and has been penalized for his "union" (*i.e.*, protected concerted activities<sup>170</sup>) prior to the commencement of the collective bargaining relationship.

Moreover, the requirement of "willfulness" has been strictly interpreted. The Supreme Court clarified the concept to mean "a clearly unjustifiable refusal to take desirable new employment."<sup>171</sup> Since that

<sup>164</sup> The current statutory minimum of \$1.60 per hour (and considerably less for agricultural and laundry employees) applies only to industries "engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 206(a)(1) (5), (b) (1966).

<sup>165</sup> National Labor Relations Act, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. § 158 (1958).

<sup>166</sup> Social Security Act, 42 U.S.C. § 501 (1935).

<sup>167</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1940).

<sup>168</sup> *Id.* at 197, 198.

<sup>169</sup> See Mandelker, *supra* note 28, at 478.

<sup>170</sup> Early in its administration, the Board reasoned that the statute protects concerted activity although not specifically union activity since such discrimination discourages formation of and membership in a labor organization. *Stehli & Co.*, 11 N.L.R.B. 1397 (1939). In one case, the successful charging parties had been terminated for collaborating with other nonunion employees in preparing a petition protesting the frequent hiring of outsiders to fill a desirable company position. *Phoenix Mutual Ins. Co.*, 73 N.L.R.B. 1463 (1947), *enfd.*, 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948).

<sup>171</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199, 200 (1940).

decision, the NLRB, but not all of the circuit courts,<sup>172</sup> has never required the discriminatee to lower his sights in searching for work. Instead the Board in 1956 laid down the principle generally accepted by the courts<sup>173</sup> that the employee must at least make "reasonable efforts to find new employment . . . suitable to a person of his background and experience."<sup>174</sup> "Reasonable" means an "honest and good faith effort"<sup>175</sup> which need not, however, be successful,<sup>176</sup> and in broad terms may be described as "conduct consistent with an inclination to work and to be self-supporting."<sup>177</sup>

Such concepts, most notably the emphasis on prior experience, are not included among the WIN criteria for good cause refusals to accept training or employment.<sup>178</sup> In many cases the status accruing from a former trade of both female and male recipients (a displaced coal miner, for example) may be a paramount feature of the client's self-image. It would also seem relevant for therapeutic reasons for a placement official to consider whether a client truly wants to enter the work force, provided children can be cared for either by responsible and willing relatives or by professionals.

In still other respects the Board's search-for-work obligation imposed upon its clients bears no relation to its Poor Law or AFDC statutory counterpart. Although not required to do so, discriminatees, who out of necessity do take lower paying jobs in other industries, are entitled to be reimbursed for the difference in their earnings and are not thereby deemed to have "abandoned" the labor market so as to create the presumption that they would have refused reinstatement if offered.<sup>179</sup> In

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<sup>172</sup> See *Florence Printing Co. v. NLRB*, 354 F.2d (2d Cir. 1965) in which the court reversed a Board finding that a backpay claimant was not required to take similar employment during the interim period at a lower wage scale.

The statute requires the Board to petition for enforcement of its orders in the circuit courts of appeal, by-passing the district courts. 29 U.S.C. § 160(e) (f) (1958). "Aggrieved parties" also may petition for review of Board orders. *Id.*

<sup>173</sup> See, e.g., *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 669 (5th Cir. 1966).

<sup>174</sup> *Southern Silk Mills Inc.*, 116 N.L.R.B. 769, 773 (1956).

<sup>175</sup> *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955).

<sup>176</sup> *Mastro Plastics Corp.*, 136 N.L.R.B. 1342, 1344 (1962), *enf'd*, 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

<sup>177</sup> *Mastro Plastics Corp.*, 136 N.L.R.B. 1342, 1359 (1962).

<sup>178</sup> WIN HANDBOOK § 412 E(1).

<sup>179</sup> See, e.g., *East Texas Steel Castings Co.*, 116 N.L.R.B. 1336, 1344, 1345 (1956), *enf'd*, 255 F.2d 284 (5th Cir. 1958) (The claimant, a welder, had accepted interim employment as a cab driver); *NLRB v. Moss Planing Mill*, 224 F.2d 702, 704, 705 (4th Cir. 1955) (A fireman chose agricultural work as a permissible, but not a mandatory alternative during the backpay period).

one case,<sup>180</sup> the Board took cognizance of the plight of negro backpay claimants, who were denied reinstatement after a strike in a clothing factory, and took jobs as domestics because more suitable job opportunities for such women in New Orleans (circa 1955) were severely limited.

While state unemployment insurance (UI) statutes, most of which require the idle worker to lower his sights after a reasonable time,<sup>181</sup> should be brought into line with federal labor policy,<sup>182</sup> it is nevertheless true that the system of unemployment compensation, both in England<sup>183</sup> and in the United States,<sup>184</sup> has been far less degrading to the worker than public assistance. Eligibility and disqualification requirements in most states contain the "good cause" element of the 1968 welfare amendments as well as the implicit notion that work will be "available"<sup>185</sup> but add the *Anderson v. Schaefer*<sup>186</sup> concept of "suitable."<sup>187</sup>

The ultimate concern in unemployment insurance, which also accounts for the admittedly inadequate<sup>188</sup> benefits levels,<sup>189</sup> seems to derive from the insurance concept itself (especially since only the employer contributes).<sup>190</sup> Inherent in this concept is whether the claimant seeks

<sup>180</sup> J.H. Rutter-Rex Mfg. Co., 158 N.L.R.B. 1414, 1447 (1966).

<sup>181</sup> Mandelker, *supra* note 28, at 501.

<sup>182</sup> *Id.* at 514.

<sup>183</sup> In England, unemployment assistance, based roughly on the insurance concept, became the major vehicle in this century (considerably more satisfactory to the English than Poor Law administration) for income maintenance in bad times. DE SCHWEINITZ, *supra* note 110, at 197-222.

<sup>184</sup> See E. BURNS, THE AMERICAN SOCIAL SECURITY SYSTEM 33, 36 (1949).

<sup>185</sup> According to Mandelker, all states require that a UI claimant must be available for suitable work for which he does not have good cause to reject. Mandelker, *supra* note 28, at 487. All states also impose eligibility requirements that focus on a state of unemployment due to economic conditions, and disqualification criteria, including refusal of suitable work and misconduct discharges, designed to deny benefits to those "voluntarily" unemployed. See U.S. BUREAU OF EMPLOYMENT SECURITY, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS E-3 (1967).

<sup>186</sup> See note 45 *supra*.

<sup>187</sup> See Mandelker, *supra* note 28, at 481; see, e.g., N.Y. LABOR LAW § 593(2) (McKinney 1965). Typically, a claimant must be "able and available" for "suitable" work without attaching conditions or restrictions not usual and customary in that occupation. Unemployment Comm'n v. Tomko, 192 Va. 463, 65 S.E.2d 524 (1951).

<sup>188</sup> See note 190 *infra*.

<sup>189</sup> The average weekly UI benefit nationwide in September, 1968, was \$43.78, ranging from a low of \$27.54 in Mississippi to \$52.05 in New Jersey. SOCIAL SECURITY BULL. Jan., 1969, at 58. The enormous disparity in most states between average UI and public assistance benefits dramatizes the current vitality of the traditional discrimination against the "unworthy" poor. *Id.* at 60.

<sup>190</sup> One official who played an important role in the formulation of the social security

to qualify initially or later because of idleness resulting from his own conduct.<sup>191</sup> Accordingly, most states impose varying periods of disqualification in instances of unemployment due to a labor dispute, regardless of where the merits<sup>192</sup> lie. This imposition proceeds on the theory that the claimant, having united for collective bargaining with his fellows, somehow triggered his own unemployment.<sup>192A</sup> On the other hand, such claimants may be eligible at least for temporary cash assistance if in need during the strike or lockout. Yet for practical reasons,<sup>193</sup> few such cases appear in the law books, and, where they do, welfare claimants who are strikers have been successful in this country<sup>194</sup> but not in England.<sup>195</sup>

Can the sharp distinctions relating to work requirements among the three government programs be justified? I think not. To begin with, UI and to a lesser extent the federal law of labor-management relations, like the AFDC program, pay or cause to be paid cash assistance to claimants who are *actually* (AFDC) or *presumably* (UI and NLRA) in need.<sup>196</sup> Cash assistance differs in practical effect from the two other forms of monetary aid only in regard to the requirement of proof of economic hardship.<sup>197</sup>

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program believes that UI benefits levels today would probably be significantly higher and state laws would not have adopted their current adversary character if the statute had also provided for employee contributions. ALTMAYER, *supra* note 101, at 258.

<sup>191</sup> E. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 *YALE L.J.* 1 (1945). See *Ford Motor Co. v. Unemployment Compensation Comm'n*, 191 Va. 812, 63 S.E. 2d 28 (1951).

<sup>192</sup> CCH 1967 *Unemployment Ins. Rep.* ¶1980. Alabama, however, determines the "reasonableness" of the dispute. *Id.* at ¶1980.197. A Virginia claimant, in a strike situation, may not be disqualified if he shows he is not "participating in or financing or directly interested in the labor dispute which caused the stoppage of work." VA. CODE ANN. § 60.1-52(b) (1) (Repl. Vol. 1968).

<sup>192A</sup> In an Ohio case, however, a state court upheld the right to UI benefits of a worker who was laid off during a two-week period where the collective bargaining agreement provided for a plant shutdown for other employees to take their vacations. *Dudley v. Morris*, 6 Ohio App. 2d 187, 217 N.E. 2d 226 (1966).

<sup>193</sup> The typical striker probably has resources sufficient to sustain him at least during a brief stoppage. Employment elsewhere and union strike benefits may also be available to him during prolonged stoppages or the worker, absent the encouragement of union officials, simply may be reluctant to apply for cash assistance.

<sup>194</sup> See *Strat-o-Seal Mfg. Co. v. Scott*, 218 N.E. 2d 227 (Ill. App. Ct. 1966).

<sup>195</sup> See note 53 *supra*.

<sup>196</sup> Burns, *supra* note 191, at 36.

<sup>197</sup> See Riesenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies of Protection Against Wage Loss*, 8 *VAND. L. REV.* 181, 217 (1955). Cf. *Dudley v. Morris*, 6 Ohio App. 2d 187, 217 N.E.2d 226 (1966). The Court, taking a somewhat different view, upheld relief payments to strikers on the theory that . . . "[UI] compensation is generated through lack of work with economic need purely incidental there-

Arthur Larson and other authorities in the UI field have argued against the notion of permanent disqualification<sup>198</sup> on the theory that UI is "primarily a public program whereby the government is systematically dealing with the *social* problem of unemployment"<sup>199</sup> (emphasis added). After the varying periods of initial disqualification because of discharge for misconduct or voluntary quit, most states reinstate such claimants who are still idle, but actively seeking work, on the assumption that economic conditions have created the evident hardship<sup>200</sup> suffered by men and women who "ordinarily depend upon wages for their livelihood."<sup>201</sup> Even in the NLRA sector, where public policy considerations predominate,<sup>202</sup> it is not far-fetched to suppose that the five-man Board in evolving its backpay doctrines has not *sub rosa* been influenced most of all by humane considerations, or at least by the realization that an employer most effectively frustrates the purposes of the Act by discriminatorily depriving employees seeking collective representation of their livelihood.

In addition, strict adherence to the insurance concept for income maintenance, with its concomitant invidious comparison to public assistance, was gradually abandoned in England<sup>203</sup> and was attacked as irrational in this country as early as 1938.<sup>204</sup> Over the past three decades, subsequent amendments to the UI, OASDI and AFDC titles of the Social Security Act have further eroded the distinguishing characteristics between social insurance and public assistance,<sup>205</sup> which, in the light of the legislative history, had dubious validity to begin with.<sup>206</sup> The lines

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to. Assistance is triggered by economic need with lack of suitable work purely incidental thereto." 217 N.E.2d at 229.

<sup>198</sup> Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 217 (1955).

<sup>199</sup> *Id.* at 216. UI is primarily a "public welfare measure"; the tendency is to extend and not restrict coverage. *Ford Motor Co. v. Unemployment Compensation Comm'n*, 191 Va. 812, 823, 63 S.E. 2d 28, 33 (1951).

<sup>200</sup> Larson & Murray, *supra* note 198, at 216.

<sup>201</sup> *Id.* at 215.

<sup>202</sup> Proceedings under the NLRA do not contemplate the adjudication of private rights as such. The Board acts in a public capacity to give effect to a public policy statute. *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940).

<sup>203</sup> E. Burns, *British Unemployment Programs 1920-1938*, at 313-16 (1941). (A Report Prepared for the Committee on Social Security); MILLETT, *supra* note 113, at 22.

<sup>204</sup> Simpson, *Should Unemployment Compensation be Based on Earnings or Need?*, 28 AM. LAB. LEG. REV. 136 (1938).

<sup>205</sup> See STEINER, *supra* note 60, at 249; Note, *Charity Versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L.J. 357, 365, 366 (1963).

<sup>206</sup> See A. ALTMAYER, *SOME ASSUMPTIONS AND OBJECTIVES IN SOCIAL SECURITY*, IN

have become even more "blurred and meandering."<sup>207</sup> Previously excluded groups have been brought within the UI umbrella and a diminishing level of participation in the work force has been required for eligibility.<sup>208</sup> The inclusion of unemployed fathers in the AFDC grant<sup>209</sup> makes a mockery of the classic distinction between "worthy," but unemployed, workers and the idle poor. In fact, the cycle may have made a full turn with the contradictory provisos in the 1967 amendments, possibly invalid on equal protection grounds. For eligibility purposes the AFC-U claimant either had substantial recent employment or received or qualified for UI, but does not now and cannot be permitted to receive UI benefits.<sup>210</sup>

As for the NLRB, it would seem that in backpay proceedings, where for all practical purposes the Board and not the employer determines which "benefits" will be paid to citizens utilizing the Board's processes, the NLRB should be subject to the same obligation to act "reasonably."<sup>211</sup> Even early in its career the Board seemed to place equal stress

SOCIAL SECURITY PROGRAMS, PROBLEMS AND POLICIES 2 (Haber & Cohen ed. 1960); Burns, *supra* note 191, at 29-31.

<sup>207</sup> Riesenfeld, *supra* note 197, at 222, citing tenBroek & Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 U.C.L.A. L. Rev. 237, 245-51 (1954).

<sup>208</sup> For an excellent chronology and summation of amendments to the Act see ALTMAYER, *supra* note 101, at 277-87.

<sup>209</sup> 42 U.S.C. § 607 (1964), *as amended*, (Supp. 1968).

<sup>210</sup> 42 U.S.C. §§ 607(b)(1)(C)-2(C) (Supp. 1968). This conflicts with prevailing social insurance principles. Under New York law, for example, a worker's retirement and consequent receipt of OASDI benefits does not automatically render him ineligible for UI on the grounds that he is no longer "available for employment" or has effectively limited his earnings. In re Stringham, 29 A.D. 2d 582 (N.Y.S. Ct. App. Div. 3rd Dept. 1969); In re Gutterson, A.D.2d Index No. 12667 (N.Y.S. Ct. App. Div. 3rd Dept., Dec. 20, 1968) [interpreting N.Y. LABOR LAW § 600 (McKinney 1966)].

<sup>211</sup> King v. Smith, 392 U.S. 309 (1968); Green v. Department of Public Welfare, 270 F. Supp. 173 (D. Del. 1967); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), *prob. juris. noted*, 389 U.S. 1032, *rehearing granted*, 392 U.S. 920 (1968). In *Green and Thompson*, the Courts declared unconstitutional state durational residency requirements for public assistance. Green v. Department of Public Welfare, *supra*; Thompson v. Shapiro, *supra*.

It is perhaps significant on the question of intertwined concepts between SI and PA that in a recent appeal in Illinois state court from a lower court decision dismissing a complaint attacking as unconstitutional ILL. UNEMPLOYMENT COMPENSATION ACT § 500(c)(3) (1951), the appellants, *inter alia*, cite *Thompson* in support of their principal argument that the statute, disqualifying an unemployed worker who moves to a locality with substantially less favorable work opportunities, unlawfully restricts his right to travel. Brief for Appellant at 26, Wadlington v. Mindes, Gen. No. 41820, (S. Ct. Ill. Sept. 27, 1968).



upon the collective right of employees to protest work conditions as upon collective representation designed to avoid industrial strife.<sup>211A</sup>

In the past few years the Board also has shown greater regard for the *individual* rights of employees victimized by employer-union discrimination<sup>212</sup> and has refused as a matter of public policy to permit its governmental processes to perpetuate racially segregated bargaining units.<sup>213</sup> Board law has been relied upon heavily in litigation brought under the Equal Employment Opportunity Act<sup>214</sup> and state fair employment statutes.<sup>215</sup> In "fair representation" litigation commenced in state or federal courts by an individual employee against his employer and/or union, the Supreme Court has directed the federal and state judiciary to fashion a body of federal labor law in all its parts. The Court presumably relied upon principles evolved by the National Labor Relations Board.<sup>216</sup> In fact, it is ironic that a government agency, created to protect the collective rights of workers under a statute ostensibly designed to facilitate the "free flow of commerce,"<sup>217</sup> should evidence greater concern for human dignity in work refusal situations, than agencies charged with alleviating economic hardship among unemployed individuals or welfare and manpower agencies explicitly entrusted under the WIN program with the rehabilitation of employable mothers.

#### FINANCIAL INCENTIVES UNDER THE WIN PROGRAM

President Lyndon B. Johnson gave official recognition to the widely held notion that any comprehensive formula for reform of the public assistance system must include financial work incentives.<sup>218</sup> Except for a few local demonstration projects permitted by the Social Security

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<sup>211A</sup> See note 170 *supra*.

<sup>212</sup> See *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966).

<sup>213</sup> *Pioneer Bus Co.*, 140 N.L.R.B. 54 (1962).

<sup>214</sup> See, e.g., *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

<sup>215</sup> See *Holland v. Edwards*, 307 N.Y. 38, 45, 119 N.E.2d 581 (1954).

<sup>216</sup> *Vaca v. Sipes*, 386 U.S. 171 (1967).

<sup>217</sup> National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

<sup>218</sup> Economic Report of the President 17 (Jan. 1967).

With minor exceptions, payments under public assistance are reduced dollar for dollar of earnings by the recipient, removing any incentive to accept part-time work. We should encourage self-help, not penalize it. It is time to put an end to this 100 percent tax on the earnings of those on public assistance. I shall therefore ask Congress to enact payment formulas which will permit those on assistance to keep some part of what they may earn, without loss of payments . . .

*Id.*

Act,<sup>219</sup> and work performed on anti-poverty projects funded by the Economic Opportunity Act,<sup>220</sup> Congress, until the 1967 amendments, perpetuated "disincentives" for welfare recipients to seek employment by requiring the states to deduct from the welfare grant every dollar earned.<sup>221</sup>

The income exemptions provided by the current legislation do represent progress of a sort. But, again, since these provisions also reflect the overriding purpose of Congress to rehabilitate while cutting costs, the incentive features may encourage an insignificant number of recipients to seek or willingly accept training or employment, and may result at best in a token reduction in welfare expenditures. The incentives are too low. Ambiguities in the legislation may also permit local aberrations, but most important, the incentive provisions discriminate against the low-income (male) worker and in other ways ignore the total economic context in which the employable mother finds herself.

The statute provides for three forms of incentive payments depending on the "sub-program." The recipient engaged in regular employment (priority one) is entitled to a "disregard"<sup>222</sup> of the first thirty dollars of monthly earnings plus one third of the balance. If the individual is placed in a job training program (priority two) she receives, instead of a regular salary, a flat-sum training incentive in the amount of thirty dollars per month in addition to her usual welfare grant.<sup>223</sup> Finally, participation in special work projects (priority three) permits the recipient to receive a combined payment equal to the assistance payment plus twenty percent of her earnings from the project.<sup>224</sup>

It is true that the statute explicitly exempts *all* income from special work projects as well as work training from consideration in budget computations,<sup>225</sup> but this seems to conflict with the subsequent twenty

<sup>219</sup> 42 U.S.C. § 1310, 1315 (1964), *as amended*, (Supp. 1968). New York City had a work incentive program available about one year prior to the 1967 amendments. N.Y.C. Dep't of Soc. Servs., Pro. No. 67-38, Employment Incentive Program 5, 13 (1967).

<sup>220</sup> 42 U.S.C. § 2732 (1964), *as amended*, § 2785, 2921, 2981 (Supp. II, 1965-1966). All work incentives for welfare recipients are now governed by the less generous provisions of 42 U.S.C. § 602(a)(8), 630 (1968). See HOUSE COMM. ON WAYS AND MEANS, SOCIAL SECURITY AMENDMENT OF 1967, H.R. DOC. NO. 544, 90th Cong., 1st Sess. 107 (1967).

<sup>221</sup> This rule apparently derived from the Common Law of the states reinforced by the Social Security Act requirement that state agencies "shall, in determining need, take into consideration any other income or resources of any child or relative . . ." 42 U.S.C. § 602(a)(7) (1964), *as amended*, (Supp. 1968).

<sup>222</sup> 42 U.S.C. § 602(a)(8)(A)(ii) (Supp. 1968).

<sup>223</sup> 42 U.S.C. § 634 (Supp. 1968).

<sup>224</sup> 42 U.S.C. § 602(a)(19)(E)(ii) (Supp. 1968).

<sup>225</sup> 42 U.S.C. § 602(a)(19)(D) (Supp. 1968). One possible interpretation of Section D

percent payment language. On the one hand, it is realistic to assume that the language cannot be read literally;<sup>226</sup> that at some hypothetical point, perhaps when earnings reach the needs level,<sup>227</sup> the recipient enrolled in a special work project will be disqualified for AFDC assistance. It is also practical to assume that such cases will be extremely rare.<sup>228</sup>

More to the point is the expressed congressional intent that the statutory minimum wage levels be observed for the applicable work,<sup>229</sup> but not the prevailing wages in the particular locale.<sup>230</sup> In other words, municipalities will be furnished a cheap source of labor for cleaning schools, mowing courthouse lawns, or other "extra" work<sup>231</sup> that will have the effect of depressing wages generally to the detriment of organized industries.<sup>232</sup>

Will the cash incentives orient recipients towards employment? In many cases the answer undoubtedly will be yes, provided the job has some human appeal. Even two or three dollars added to a budget cut to the level of bare necessities will enhance the life of the recipient.

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would disregard income from special work projects in determining *eligibility* but not the amount of the cash grant. Columbia Center Working Paper, *supra* note 13, at 32.

<sup>226</sup> California, however, rescinded its "seasonal work" policy effective January 1, 1968, in large part because the 1967 amendments required that "an open-ended" portion of earned income be disregarded in determining the amount of aid to be paid an AFDC family. Cal. State Dep't of Social Welfare, Director's Newsletter, November-December 1968, at 18. The policy had the effect of granting supplemental assistance to seasonal crop workers when their earnings were below established need and permitting them to retain welfare eligibility for medical and educational but not financial benefits for their children. *Id.* at 1, 18.

New York regulations do not regard special work project income as open-ended. The "maximum permissible allowance" consists of the total of ordinary budget deficit plus 20% of adjusted gross earnings less expenses incident to employment. This total when deducted from the MPA yields the assistance payment for a WIN participant. The New York formula clearly indicates that an individual will no longer qualify when her employment income less the "disregards" equals the normal budget allowance. N.Y. DEP'T OF SOC. SERVS., *supra* note 11, at 13; *see* note 228 *infra*.

<sup>227</sup> *See* 13 WELFARE L. BULL. 5 (June 1968).

<sup>228</sup> Presumably, however, under priority one the WIN participant engaged in ordinary employment will no longer be eligible for welfare assistance when the employment income charged against her needs, *i.e.*, less the disregarded incentives, reaches the budget level. In other words at that point the "budget deficit" would be reduced to zero. *See* Columbia Working Paper, *supra* note 13, at 27.

<sup>229</sup> 42 U.S.C. § 633(e) (4) (Supp. 1968).

<sup>230</sup> SENATE COMM. ON FINANCE, *supra* note 7, at 16. The original draft, however, contained a proviso that wages prevailing in the locality as well as the statutory minimums be paid to WIN enrollees. HOUSE COMM. ON WAYS AND MEANS, *supra* note 220, at 105.

<sup>231</sup> The project must not result in the displacement of employed workers. 42 U.S.C. § 633(f) (2) (Supp. 1968).

<sup>232</sup> *See* Mandell, *supra* note 51, at 13.

Yet the comfort of a few additional dollars may be dissipated by the physical and spiritual wear-and-tear of travel to and from a boring job, aggravated by the not infrequent upset in schedule and possible loss of earnings<sup>233</sup> caused by sibling illnesses or delinquent baby-sitters. The training under priority two obviously must be particularly promising to compensate for a \$7.50 weekly allowance. For priority three, the make-work character of this provision suggests dull employment at low wages, which, coupled with the modest twenty percent bonus, may create a new class of shiftless day laborer.<sup>233A</sup>

The incentives provided under priority one for employment in the regular work force, although more conservative than exemptions formerly available to recipients under the Economic Opportunity Act,<sup>234</sup> theoretically contain a fair measure of inducement towards employment. In practice, however, unfilled jobs in the economy suited to the capabilities of recipients will inevitably be marginal. Congress laid down few guidelines likely to deter administrators from referring clients to such job vacancies and indicated a clear intent that priority in referrals be accorded to ordinary employment.<sup>235</sup> Even assuming the best, however, in terms of adequate incentives and stimulating employment, the success of priority one referrals under the WIN program in all parts of the country will benefit only the AFDC mother. The discriminations built into the WIN program have the potential effect of elevating the low-income (negro) female while further degrading the father of her children.<sup>236</sup>

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<sup>233</sup> A number of commentators have emphasized the importance of a "stable income" to welfare recipients. See E. Wickenden, *Welfare Services*, in J. BECKER, IN AID OF THE UNEMPLOYED 263 (1965). In a study reported by the economist, Professor Leonard J. Hausman of North Carolina State University, many recipients interviewed said, "Welfare is better than a husband," because they could depend on welfare. L. Hausman, *The 100% Welfare Tax Rate: Its Incidence and Effects* 6, 1967 (unpublished Ph.D. thesis, Univ. of Wis.).

<sup>233A</sup> An AFDC-U recipient and a taxpayer attacked a county WIN program in California in state court alleging, *inter alia*, that program funds were being misused because participants were not being trained for gainful employment. The recipients, most of them Spanish-speaking farm workers, received no language training. Instead they were employed at tasks, general maintenance on public grounds and buildings, for which they already were qualified. *Baserra v. Bond*, 2 CCH Poverty Law Rep. ¶ 1210.022.

<sup>234</sup> The first \$85 of employment income plus one-half of the excess over \$85 each month was disregarded. 42 U.S.C. § 2981 (1964).

<sup>235</sup> SENATE COMM. ON FINANCE, *supra* note 7, at 2; see 42 U.S.C. § 632(b) (1964).

<sup>236</sup> See notes 138, 149 *supra*.

The statute provides incentives only to those unemployed while on assistance. Low-income workers, who qualify in the future for grants, are ineligible for WIN, as well as those presently receiving supplementary assistance while employed.<sup>237</sup> Aside from the gross inequities that might result among recipients in close proximity to each other, the denial of the incentive to the already-employed has the effect of raising the budget level of only one class of recipient. This would seem to conflict with the basic statutory purpose of gearing assistance to need and raises an equal protection issue. The justification for the discrimination type of inducement to employment is grounded in economy considerations alone, since financial incentives would presumably also encourage the worker to stay on the job and advance his work situation. Even more unreasonably, the discrimination has the foreseeable consequence of demeaning the male worker and discouraging his ambitions.

What satisfaction can the low-income worker on supplementary assistance derive from his employment when he sees his neighbor, an AFDC mother, formerly idle, now boasting a combined employment-grant income perhaps fifteen dollars per week higher than his own? In states like New York that participate in the unemployed parent segment of AFDC and pay supplementary assistance to intact working families at relatively generous levels,<sup>238</sup> the restricted incentive will offer a power-

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<sup>237</sup> At the present writing, there is some confusion on this point, which has not been dispelled by the language of the statute, the legislative history, or the HEW regulations. Elizabeth Wickenden argues that the statute discriminates against new applicants and, in effect, establishes a higher standard of need for AFDC children with working parents, over the level of benefits provided to those whose mothers stay at home. Wickenden, *supra* note 13, at 22.

The Ways and Means Committee Report does not discuss this point, but the emphasis on referrals to employment suggests that Congress must have intended to exclude from receipt of the WIN cash incentives recipients already employed. Moreover, in explaining why non-recipients with needs slightly above the needs level (and perhaps below the combined welfare-employment income of the WIN enrollee) the Committee report lays stress on the huge cost of adding these workers to the rolls as WIN participants. HOUSE COMM. ON WAYS AND MEANS, *supra* note 220, at 107. Inclusion of employed recipients or applicants eligible for supplementary assistance would add to the costs of public assistance income previously considered the cash grant. HEW, however, apparently takes the position that the WIN incentives are available to all employed recipients. Letter from Joseph A. Meyer, Deputy Administrator, Social and Rehabilitation Services, HEW, to Director, Center on Social Welfare Policy and Law, Feb. 13, 1969.

Whatever the WIN policy may be among AFDC recipients, there is no question that the cash incentives are not available to the rapidly expanding number of intact families headed by a male worker receiving supplementary assistance in cities like New York under the non-federal Home Relief program. See note 4 *supra*.

<sup>238</sup> See note 12 *supra*.

ful inducement for a breadwinner to "lose" <sup>239</sup> his job with impunity.<sup>240</sup> In New Jersey, a state which does not participate in AFDC-U and pays non-categorical assistance at lower benefit levels,<sup>241</sup> the WIN incentives will add to the existing economic pressures on a low-income worker "to do the right thing" by leaving his family.

### CONCLUSION

Perhaps the most dispassionate comment that can be made about the "employable mother" amendment to the Social Security Act is as follows. Congress in 1967, motivated to an uncertain extent by the increasingly negro complexion of the welfare caseload in the south and the large northern cities, nevertheless did no more than revert to an Anglo-American tradition of total repression of the welfare poor that began in feudal England with the breakup of the manor lands.

Local customs will permit utilization of the 1967 legislation to provide a supply of cheap labor for farmers, housewives, hotels and northern sweatshops. Our regretful history of denying opportunities to black men while asserting their lack of ambition,<sup>242</sup> simply adds another chapter to a long history that condemned as dissolute, immigrant Jews on New York's lower east side,<sup>243</sup> Irish Catholics who sought refuge from hunger in Victorian England,<sup>244</sup> and before them, native-born, white

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<sup>239</sup> In an interview at my home (Brooklyn) on February 2, 1969, with two caseworkers employed by the New York City Department of Social Services at a Brooklyn Welfare Center, they advised me that they and their fellows had encountered a phenomenal increase in the number of employed recipients who, after the work incentive plan went into effect, reported the loss of their jobs, received full-time assistance for a few months, then resumed employment, often at their former jobs, and qualified for the WIN incentives. So much for economy.

<sup>240</sup> The statute does deny the WIN incentives to recipients who *inter alia* terminate their employment "without good cause" within a period of not less than 30 days preceding the "disregard" month. 42 U.S.C. § 602(a)(8)(C)(i) (Supp. 1968). Proof of such conduct probably will be difficult to obtain in many cases, however, and impossible when employers cooperate in the plan by ostensibly laying-off the employees for lack of work.

<sup>241</sup> See Graham, *supra* note 14, at 895.

<sup>242</sup> See note 138 *supra*; George Washington Cable, a confederate war veteran, native of Louisiana and one of the most popular writers of his day, made this still vital comment in 1884: "[the racist] forbids the Freedman to go into the water until *he* is satisfied that [the Freedman] knows how to swim and for fear he should learn, hangs millstones around his neck." G. CABLE, *THE NEGRO QUESTION* 69 (A. Turner ed. 1958).

<sup>243</sup> N.Y. Times, Jan. 27, 1969.

<sup>244</sup> See Thompson, *supra* note 110, at 437. During the famines young Irishmen committed crimes in order to be transported from Ireland. As a result of the British policy of encouraging self-reliance by abandoning starving Ireland to laissez-faire and the

Protestant indigents on both sides of the Atlantic.<sup>245</sup>

In this country, intellectual sustenance for the myth that poor people are themselves responsible for their plight, was provided before 1935 by three decades of "laissez-faire" jurisprudence,<sup>246</sup> influenced in large part by the Yale sociologist William Graham Sumner.<sup>247</sup> Sumner was a disciple of the Englishman Herbert Spencer,<sup>248</sup> who found in America's free enterprise economy a more fertile soil for his brutal interpretations of the thoughts of that crusty humanist Adam Smith.<sup>249</sup>

This does not, however, begin to explain the modern welfare system. The Calvinism of Spencer, *et al*, exerts little influence on our welfare politics. In fact, the 1967 amendments were enacted in the face of a torrent of informed opinion, advocating humane reforms from the Left and Right. Recently William F. Buckley, Jr. argued that the human degradations inherent in the present system justifies an about face by conservatives to support a negative income tax arrangement financed by the central government.<sup>250</sup> To be consistent with his new views, Buckley should condemn the employable mother rule. Yet it is a fair guess that Buckley's writings will have even less impact today than did the enormously popular novels of Charles Dickens on reform of the English Poor Law.<sup>251</sup>

It is, instead, an almost mystical element in the Anglo-American character that insists, at great cost to both taxpayers and the poor, that an

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operation of natural causes, "a bitterness without parallel took possession of the Irish mind." C. WOODHAM-SMITH, *THE GREAT HUNGER: IRELAND, 1845-1849* at 382, 407 (1962).

<sup>245</sup> In England, during the winter of 1591, seventy-one poor and unemployed laborers were whipped and burned "through the gristle of the right ear." WEBB & WEBB, *PART ONE*, *supra* note 25, at 58. However, a report by the politician-philosopher John Locke in 1696, which otherwise called for a system of slave labor for paupers, recommended only partial employment for mothers of small children. *Id.* at 111.

<sup>246</sup> See Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 *VAND. L. REV.* 615 (1967); R. GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* 292 (1956).

<sup>247</sup> "There are no rights, The World owes nobody a living." R. HOFSTADER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 51 (1955) (quoting Sumner).

<sup>248</sup> Henry George said of Spencer that he insists "each should swim for himself in crossing a river, ignoring the fact that some have been artificially provided with corks and others artificially loaded with lead." *Id.* at 113.

<sup>249</sup> Smith, whose laissez-faire doctrines included protection by the state of the right of laborers to organize and use the strike weapon, also condemned Settlement and Removal legislation as an "evident violation of natural liberty and justice." A. SMITH, *THE WEALTH OF NATIONS* 141, 142 (1937).

<sup>250</sup> Buckley, *supra* note 2, at 2.

<sup>251</sup> No genuine attempt was made to meet Dickens' objections to the Poor Law until the appointment of a Royal Commission in 1905. House, *supra* note 88, at 223.

expression of sympathy by legislators for those on the public dole constitutes a repudiation of our socio-economic system.<sup>252</sup> The WIN legislation and related administrative regulations speak of client rehabilitation but patronize recipients by offering them "counseling" services. This assumes that laziness (perhaps psychic in nature) is the key client problem, and that satisfying jobs are available albeit at near-poverty wage levels. In so doing, Congress ignored ample evidence accumulated by its own committee that racial bias, automation, and harsh welfare regulations have combined to aggravate the current incidence of poverty. The 1967 amendments seek to achieve economic savings, but they will prove as expensive in human as well as financial terms as the early settlement litigation. This litigation shocked the pioneer social worker, Edith Abbott,<sup>253</sup> and until a few years ago prejudiced her profession against the involvement of lawyers and judges in the public assistance sector.<sup>254</sup>

Congress has confounded the social workers by threatening mothers of small children (in the name of rehabilitation) with a stick in the form of denial of assistance benefits, that can only hurt most the children of the delinquent who refuses employment. Congress in 1967 also offered a carrot draped in cash incentives which, while helpful, provides disregards too low to motivate any except those already work-oriented.

The psychological impetus towards employment, resulting from moderately increased income, will be offset by the hardships suffered by the working mother who must lose an occasional day's pay. One can visualize the conscientious caseworker-investigator phoning a client's home to say: "Johnny, your mother didn't show up for work this morning. You say she took your brother to the hospital? Well, I have to talk to her because the factory foreman wants to know when she'll return. I won't begin to process a supplementary payment until she calls me." Unlike Congressmen, caseworkers and law professors, it is the rare blue-collar worker who is paid for time off the job necessitated by the same family emergencies that afflict the poor and affluent alike. Regulating the income patterns of working women with pre-school children would challenge the efficiency of any public agency. Yet Congress decided to entrust enormous additional responsibilities over the daily lives of poor women to caseworkers, employed in a bureaucracy that in many areas shares in the contempt that society heaps on their clients.

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<sup>252</sup> See DOUGLAS, *supra* note 101, at 4.

<sup>253</sup> E. ABBOTT, PUBLIC ASSISTANCE 145 (1940).

<sup>254</sup> *Id.*; see KEITH-LUCAS, *supra* note 14, at 77.



Ironically, the current statute at first glance clearly follows the tradition of discriminating in the mass against the "unworthy" poor as opposed to "workers," favored by the labor and unemployment insurance laws. Yet the 1967 amendments unfairly discriminate against recipients in the work force by narrowing eligibility for AFDC-U and denying cash incentives to those already employed. The refusal of Congress to insist that WIN enrollees be paid wages prevailing in the area will also help depress wage levels generally.

In short, the contradictions between humane rhetoric and crude policies written into the statute, HEW and Department of Labor regulations will only perpetuate petty demoralizing cheating. Yet this cheating is necessary to a client's survival and is encouraged by the present welfare system.<sup>255</sup> The "compulsory-work-at-any-price-regardless-of-prior-experience" tone of the 1967 legislation will also dilute the beneficial effects of participation by Department of Labor personnel in the welfare sector.

Rehabilitation of clients and reduction of the welfare rolls will not flow from more repressive legislation. It would seem that affluent Americans must first accept, without bitterness, the advice of Michael Harrington and others that hard core welfare dependency is here to stay. This realization will permit the enactment of specific reforms, designed to reduce dependency among the truly employable and the level of apathy among the women presently compelled to spend most of their lives on the rolls. These include: family allowances, national minimum standards at decent living levels, a "negative income tax" or similar devices for a more impersonal cash assistance distribution, the abolition of extensive welfare investigations and the more subtle varieties of "substitute parent" regulations.<sup>256</sup>

Business measures include greater utilization of the employment potential of the young negro male, absent artificial racial barriers, encouraged by job training programs<sup>257</sup> with understanding teachers and adequate cash allowances. The argument also has been made that increased productivity in the service industries would permit higher wage levels for unskilled or semiskilled employment accompanied by a measure

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<sup>255</sup> See Graham, *supra* note 14, at 890-96.

<sup>256</sup> See King v. Smith, 392 U.S. 309 (1968).

<sup>257</sup> See *Cram Course for Negro Apprentices*, BUSINESS WEEK, Nov. 25, 1967; Brooks, *A Job Program That Works*, THE REPORTER, November 16, 1967. Both articles describe the successful cooperation of employers in work training efforts with the Joint Apprenticeship Program of the Workers' Defense League and A. Philip Randolph Educational Fund.

of upward mobility and increased social status.<sup>258</sup> Political economists must devise for the urban metropolises a comprehensive scheme for reconciling the need to increase the tax base and attract new industries, while insisting on wage levels high enough to avoid subsidizations of marginal employers by payment of supplementary assistance to his employees.<sup>259</sup>

Finally, it may be that any total solution to the welfare crisis must bring the AFDC mothers and their men back into the socio-economic mainstream. The community action component of the War on Poverty by ordinary criteria has not been a success.<sup>260</sup> Agitation by the welfare rights movement probably helped provoke Congress into enacting the 1967 amendments; but, in terms of morale, community action has produced a generation of political activists out of welfare recipients and other poor persons who never in their lives had attended civic meetings. If the dynamics of poverty persuade even a handful of local labor unions in our large cities to make common cause with the rights movement, the mythical gulf between the "worthy," *i.e.*, working poor and abandoned mothers with small children will narrow considerably.

The alternative to such measures, leading to a total transformation of the current archaic modes of aiding indigents, is, for the wealthiest nation in the world, to continue punishing innocent siblings for the supposed sins of their mothers. In the process, with the enactment of each new retrogressive statute or regulation, like Dickens' parish overseers, we will take pains to inquire whether our black Oliver Twist has said his bedtime prayers when our only real concern is the cost of feeding him.

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<sup>258</sup> N.Y. STATE DEP'T OF SOC. SERVS., *THE FORGOTTEN JOBS, THE URBAN COALITION, SOCIAL SERVICE OUTLOOK* 21 (1969).

<sup>259</sup> The New York City Planning Commission has devised such a "Plan for New York City." The first of six volumes, containing a 75,000 word summary of the Plan, will be published soon. N.Y. Times, Feb. 3, 1969, at 38, col. 5.

<sup>260</sup> See MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* (1969).