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The Role of the Courts in Securing Welfare Rights and Improvements in Welfare and Related Programs

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The Role of the Courts in Securing Welfare Rights

and Improvements in Welfare and Related Programs

by

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Summary

This paper discusses both the opportunities and challenges that legal advocates and low income groups will confront in considering litigation to challenge welfare reform policies and practices. While the states' exercise of their new and sweeping authority to design income support programs has presented advocates in many states with opportunities for policy advocacy before legislatures and administrative agencies, litigation remains one of the critical strategies, along with organizing, community education, and media work, for improving welfare programs and assuring their fair and lawful administration. Litigation may achieve relief for low income people that might not otherwise be achieved. It also promotes government accountability by checking agencies that may have lost sight of their legal obligations. In some situations, the mere threat of litigation may persuade an agency to adopt policies or practices (or to abandon objectionable policies or practices) to avoid a lawsuit. Litigation can also help focus public

attention on the harms that policies inflict on low income people and be part of broader efforts to remedy them.

Advocates who seek to litigate in appropriate cases face both challenges and opportunities in two key areas, and these themes are woven throughout this paper: 1) the identification of legal claims and; 2) the development of resources to conduct litigation. As to the first, the transfer of authority from the federal government to the states means that advocates have to look to new sources of law in analyzing their clients' rights. Before the 1996 federal welfare law, the federal AFDC statute had provided the legal handles for much of the significant welfare litigation. With the federal AFDC law eliminated, advocates must now turn to state welfare law, state and federal employment laws, and various federal and state civil rights laws. They will have to consider carefully whether new welfare policies violate federal and state constitutional requirements.

As to the second, funding cuts and the bar on class actions and challenges to welfare reform by federally-funded Legal Services programs have curtailed the ability of these programs to litigate. At the same time, while many states have non-LSC funded programs, their resources are limited and they face overwhelming demands to engage in policy advocacy, community education, and other activities to seek to shape state welfare programs. These demands may strain their ability to marshal resources for litigation.

These challenges also present exciting opportunities for assuring that litigation is brought to address significant problems and achieve meaningful relief . Advocates are developing expertise in new areas of the law as they consider how to protect their low income clients. This work opens up possibilities for partnerships with a wider public interest community, such as those with expertise in civil rights and employment law. At the same time, efforts to expand the involvement of the private bar in welfare litigation are increasing. The private bar has an impressive record of pro bono service, but it has not generally focused on welfare and income support. Publicity about welfare devolution and concerns about potential harms caused by certain policies have led private attorneys to join in welfare litigation. Unrestricted legal services

providers can also work creatively with federally-funded legal services programs to make sure that clients have available the full range of legal representation. Organizing by low income groups is on the rise as these groups work to address time limits, workfare, excessive sanctions, the need for adequate safety net programs, living wage employment, and supports for work, including child care, health insurance, and transportation. Advocates have the opportunity to work closely with such groups to make litigation part of broader campaigns for programs that respond to community needs.

The paper, which explores these themes in more detail, is organized into the following sections:

Section I examines the role of the courts in examining welfare program rules and administration. It includes an extensive discussion of the various sources of law that may protect welfare claimants.

Section II discusses issues arising under several key income support programs, namely Medicaid, Food Stamps, and child care, that are important for TANF recipients as well as for those entering and seeking to maintain employment.

Section III reviews, in somewhat briefer detail, several issues that are emerging in light of welfare devolution and the legal questions they present. These issues are access to welfare offices, privatization of welfare eligibility determinations, the involvement of religious groups in providing social services, and obtaining information from state agencies.

Section IV highlights the challenge of developing legal resources for welfare litigation.

I. What Role Do Courts Play in Examining Welfare Eligibility Rules and Program Administration?

A. Overview of the Role of the Courts

Courts have a limited but important role to play in securing and enforcing rights of public benefits and fair administration. On the positive side, courts can enforce existing statutory law, that is they can require compliance with existing welfare law and decide how other laws, e.g. civil rights laws and employment laws, apply to welfare recipients and welfare programs. Courts can also serve as a check on arbitrary governmental action by enforcing constitutional guarantees such as due process and equal protection guarantees, in limited situations. Courts will not assume a legislative role and create broad new welfare rights. Instead, they will generally defer policy decisions to legislatures and in some instances to administrative agencies.

Advocates and organizers can maximize the effectiveness of their work through strategic choices as to when and how to use the courts to raise key social and economic justice issues. Litigation can and has been an important part of broad-based campaigns with other allies to further such goals as assuring adequate benefits, promoting treatment of workfare workers as other workers, and assuring fair program administration. While the goal of litigation is generally to stop unfair practices or extend rights, litigation can also serve the purpose of heightening awareness of the harms of welfare policies, even if the court rules unfavorably. Recent organizing and litigation around workfare in New York City provide examples of concerted efforts to address such critical issues as allowing individuals to pursue education instead of workfare, preventing inappropriate assignments of individuals with disabilities to workfare, and securing fair treatment of workfare workers by using the prevailing rather than minimum wage to calculate workfare hours and by applying health and safety protections to workfare assignments.[1]

A campaign during the mid-1980's when Massachusetts low-income groups and their allies organized to increase AFDC benefits during a period of growing public awareness of the problems of homelessness provides another example of the complementary role of organizing and litigation. The campaign focused initially on state legislators and other opinion makers. It subsequently adopted a litigation strategy based on state law that low income groups and advocates hoped would support the effort to get the legislature to raise benefits. The case

resulted in a unanimous decision by the state Supreme Court requiring the agency to update its need standard annually and request the legislature to take appropriate action thereby creating a mechanism for regular attention by the legislature to the issue.[2]

With the 1986 elimination of federal AFDC law and the individual rights provided under that law, the legal landscape has dramatically changed. Advocates will now look to state law and state courts to define welfare rights. New litigation opportunities and challenges will arise, but it is too soon to predict how courts will respond. With welfare programs' emphasis on work activities, there will be efforts to extend the protections of employment and civil rights laws for welfare program participants. Due process questions have begun to arise, and courts will be asked to address these issues. In limited situations courts may find that policies or practices violate rights to equal protection.

The following discussion reviews issues related to the enforcement of state welfare laws, and the application of the Americans with Disabilities Act, employment laws, and other civil rights laws to welfare claimants. It then examines the role of the federal constitution, with a focus on equal protection and due process. Finally, the discussion addresses whether courts are likely to impose an affirmative duty to provide assistance and comments on the view of legal scholars who have analyzed this question in light of the provisions of state constitutions and international law.

B. Enforcement of State Welfare Statutes and Regulations

1. TANF

Before the 1996 federal welfare law[3] repealed AFDC, welfare applicants and recipients frequently went to court to challenge abusive state welfare policies and practices as contrary to the federal AFDC statute and regulations, and many important victories were won. For example, U.S. Supreme Court decisions established that states were required to provide aid to those

eligible under federal standards.[4] Federal regulations were used successfully in many cases to attack abusive eligibility verification practices and excessive applications process delays.[5] Needy families could bring court cases based on federal AFDC law because the federal statute, 42 U.S.C. 602 (a)(10), gave individuals an entitlement to aid and provided the federal matching funds to back up that entitlement. Of course, because the former AFDC program was a federal-state program, states also had their own welfare statutes. However, litigation typically focused on enforcing federal requirements, rather than state law.[6] Generally federal courts were considered a friendlier forum than state courts, and there was a body of uniform federal law on which advocates could rely.

The federal law establishing TANF, the block grant program that replaced AFDC, eliminates the federal guarantee of aid to individuals.[7] The federal law also gives states broad discretion to design welfare programs and at the same time limits that discretion in key areas, notably by requiring time limits on an individual's receipt of federal aid and imposing strict work requirements.

In light of these changes in federal welfare law, a family's rights to welfare benefits are now defined under state law and individuals must look primarily to these state welfare laws, which vary from state to state, to determine the extent of their rights. In addition, in some states which have delegated decisionmaking to localities, there may not even be state law to enforce. Advocates may have to explore local law.

There has not yet been extensive litigation seeking to enforce state TANF laws, but the litigation to date has primarily involved work program requirements and the fair hearings system (as to the latter see also the due process discussion, below). Examples of recent litigation enforcing state welfare laws (under both TANF and the former AFDC program) include the following:

TANF Litigation:

***Davila v. Hammons* (New York).**[8] This case is based on state welfare law and challenges New York City's practice of assigning recipients to unpaid workfare without doing an individual

assessment of the recipient's educational and vocational history and needs. The court has ruled for the plaintiffs so far. The Welfare Law Center is co-counsel with others.

Brukhman v. Giuliani **(New York).**[9] This case challenges New York City's practice of failing to compute workfare hours at prevailing wage rates rather than minimum wage rates. The case raises state statutory claims as well as other claims, including a state constitutional claim. After the initial successful decision, the legislature eliminated the prevailing wage provision and the appellate court accordingly reversed the favorable lower court decision. The plaintiffs are appealing. The Welfare Law Center is co-counsel with others.

Capers v. Giuliani **(New York).**[10] This case challenged New York City's failure to provide basic health and safety protections to workfare workers. Claims were based on state welfare law provisions providing for assignments to workfare positions only if health and safety standards are met (other claims were raised as well). Following an initial victory the state legislature enacted legislation providing that workfare workers are covered under the law protecting public employees. Based on this change the appellate reversed the lower court's order. The Court of Appeals subsequently declined to hear an appeal. The Welfare Law Center was co-counsel with others.

These cases are all part of a broader organizing strategy to secure worker protections.[11]

Piron v. Wing **(New York).**[12] This case seeks to enforce state law requiring hearings to be issued and implemented within 90 says of the hearing request. The court has granted preliminary relief for plaintiffs and intervenors.

State of New Mexico ex rel Taylor v. Johnson **(New Mexico).**[13] This case successfully challenged the Governor's attempts to implement his own version of welfare reform after the state legislature failed to pass new welfare legislation. The court ruled that the Governor had exceeded his authority under the state constitution and that he must comply with existing state welfare law.

Thibault v. Department of Transitional Assistance **(Massachusetts).**[14] This challenge to the process by which the state makes disability determinations for TANF and Emergency Aid

raises claims under state law, the Americans With Disabilities Act, and Title VI of the Civil Rights Act. The court has granted preliminary relief finding that denial of a disability exemption to those who did not respond to a letter from the private contractor responsible for making determinations was arbitrary and unreasonable in violation of state law requiring that welfare administration be fair and equitable. The court found that the letter was technical, confusing, and difficult to understand, complete and return and that it required an educational level higher than that of most recipients.

***Smith v. McIntire* (Massachusetts).**[15] This case challenges the denial of earnings disregards in determining eligibility for and the amount of grant extensions for families that have exhausted their state 24-month TANF time limit. The court ruled that the state regulations are in conflict with the state welfare statute which requires the disregards.

AFDC Litigation:

***Massachusetts Coalition for the Homeless v. Secretary of Human Services* (Massachusetts).**[16] This litigation was part of an extensive campaign to increase AFDC benefit levels. In this 1987 decision the Massachusetts court ruled that a state statute required that AFDC benefit levels be sufficient to maintain families in their own homes and therefore required the agency to 1) seek to prevent homelessness by providing sufficient bene fits or by other means; and 2) notify the legislature when appropriations were not sufficient to meet this duty. Although the court did not order the defendants to pay increased benefits (a decision for the legislature), it did order them to update the standards of adequacy annually and to ask the legislature to address the issues through appropriations or other means.

2. State General Assistance Statutes

General Assistance (GA) programs are established under state, not federal law, and litigation has sought to enforce these and related provisions in state law.[17] Some recent examples include:

***Correia v. Department of Public Welfare* (Massachusetts).**[18] This case challenged the large number of technical denials that resulted when the state replaced GA with an emergency aid program. The court found that the agency's practices violated a state statute requiring that aid be provided on a "fair, just, and equitable basis."

***Washington v. Board of Supervisors of San Diego Cy.* (California).**[19] A state court held that the county could not impose an eligibility condition not permitted by state law (a three month time limit for able-bodied adults) based on a claim of financial impossibility.

***Lampkin v. Lum* (California).**[20] A state court invalidated as contrary to state law a county GA policy that limited aid to employables to nine out of twelve months.

***L.T. v. New Jersey Dept of Human Services* (New Jersey).**[21] A state court invalidated as contrary to state law a regulation setting a twelve month time limit on temporary rental assistance, a program to prevent homelessness.

C. Applying Protections in Other Non-Income Support Statutes to Welfare Participants

1. Americans With Disabilities Act (ADA) and §504 of the Rehabilitation Act

Why should welfare program applicants and participants look to the federal ADA and/or Rehabilitation Act for protection? Welfare program requirements, especially work program requirements, may place extra burdens of individuals with disabilities or may exclude them from participation in programs from which they could benefit. These burdens may arise even though policies as written do not specifically discriminate against those with disabilities. For example, individuals may be assigned to work activities that they cannot perform or they may not be able to comply with complicated administrative procedures because of their disability.

The Americans With Disabilities Act (ADA)/ Rehabilitation Act may provide a legal handle to address these problems since it requires modifications that allow meaningful access to

the program. The application of the ADA to welfare programs, such as TANF, is largely untested, although some recent welfare cases have raised ADA claims.

Overview of ADA

The ADA is a federal civil rights statute that protects individuals with physical and mental disabilities against discrimination in a range of public and private activities, including discrimination in programs of state and local governments (Title II), employment (Title I), public accommodations and services by private entities (Title III), and telecommunications (Title IV).[22] An earlier federal law, § 504 of the Rehabilitation Act of 1973 is generally similar to Title II and III of the ADA. (The Rehabilitation Act covers federal agencies and federally financed programs.) Lawsuits often include both ADA and Rehabilitation Act claims.[23]

Title II of ADA is relevant for TANF programs, and the federal TANF statute makes clear that the ADA and Rehabilitation Act apply to TANF programs.[24]

Key features of Title II of ADA. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."[25] The ADA requires the covered entity (e.g. state and local governments in the case of welfare programs) to make "reasonable accommodations" to assure meaningful access to programs and services. There are extensive federal regulations and case law.

To be protected under the ADA an individual must be a "qualified person with a disability." This means the individual must meet the definition of disability, which is broader than the definition of disability for SSI and Title II disability purposes (there is also an exclusion for current illegal drug use). The individual must also meet the "essential eligibility requirements of the program" with or without reasonable modifications. The question of what is an essential eligibility requirement is a likely area of dispute.

The state or local governmental entity must make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination based on disability, unless the public entity can show that making the modifications would alter fundamentally the nature of the service, program, or activity. What does this mean in the context of welfare programs? This is likely to be an area of dispute.

How can individuals raise ADA claims? Individuals can file administrative complaints and can bring court cases. They can also raise the ADA in negotiations with the agency.

In what kinds of welfare cases have ADA claims been raised?

The following examples illustrate the range of problems for which plaintiffs have sought relief under the ADA. (In some cases there may have been Rehabilitation Act claims as well.) Note that some cases do not rely exclusively on the ADA but raise other legal claims as well. In addition, in some cases the court did not reach a decision because the parties settled the case.

Eligibility criteria

AFDC program rules: There was litigation over the AFDC option to cover children up to age 19 if they were expected to graduate from secondary school by age 19. Plaintiffs challenged state decisions to deny AFDC to 18 year old high school students who were not likely to graduate from high school before their 19th birthdays because of their disabilities. ADA challenges in two cases resulted in one favorable decision and one unfavorable decision. In *Howard v. Dept. of Social Welfare*,[26] the Vermont court concluded that the requirement was not an essential eligibility requirement. It rejected arguments that federal law mandated the requirement, finding that the state could fund such benefits on its own, that there was no evidence that HHS has refused to make reasonable accommodations by providing federal matching for individual cases to avoid discrimination based on disability, and that the state could not discriminate against those with disabilities to stay within state appropriation limits. It concluded that extending plaintiffs' benefits until age 19 was a reasonable modification and mandated by the ADA. In *Aughe v. Shalala*,[27] a federal court concluded that the requirement that a student complete high school by age 19 was an essential eligibility requirement of the AFDC program and that the ADA and Rehabilitation Act did not require modification of the requirement.

General assistance (GA) rules: Time limits on GA benefits for disabled individuals were challenged in two states on ADA grounds with one favorable and one unfavorable decision. In *Weaver v. New Mexico Human Services Dept.*,[28] the court concluded that imposing a twelve month time limit on benefits for GA recipients with disabilities but not on GA benefits for

children violated the ADA. In reaching its decision the court concluded that the GA program was a single program and not two separate programs. On the other hand, in *Doe v. Chandler*,[29] a federal appeals court rejected claims that Hawaii's one year time limit on GA for disabled individuals violated the ADA or equal protection. Although GA benefits for families were not time-limited, the court said that the programs were separate and that equal benefits were not required.

Benefit levels

An AFDC waiver program approved by HHS in the early 1990's included an across-the-board California benefit AFDC level cut as "work incentive." Litigation involving various legal claims was brought in *Beno v. Shalala.*[30] The lower court ruled unfavorably on the claim that the "work incentive" benefits as applied to those who were unable to work because of a disability violated the ADA. The appellate court did not reach the ADA claim, but ruled invalidated the waiver on procedural grounds, concluding that HHS's approval process was deficient. Plaintiffs were able to obtain exemptions from the benefit cut for those with disabilities in subsequent negotiations with HHS over the renewed waiver and in reaching a subsequent court settlement.

Administrative practices

In *Lind v. Snider*,[31] plaintiffs challenged the agency's implementation of GA cutbacks and their failure to identify GA recipients who remained eligible for GA based on disability. The claims were based on due process and the ADA, and plaintiffs challenged the failure to identify those who were eligible, issue understandable notices, and administer the program in an orderly way. The court granted temporary relief, and the parties later settled the case. The settlement included provisions requiring assistance to those needing help to establish eligibility.

Oregon Human Rights Coalition v. Concannon[32] challenged Oregon's welfare verification requirements as unreasonably difficult for those with disabilities. The case raised ADA, due process and federal and state law claims. The settlement included provisions for better notices, greater worker assistance, staff training, and a grievance procedure.

Varshavsky v. Perales[33] challenged New York's elimination of home fair hearings for those with disabilities based on due process, ADA/Rehabilitation Act and other grounds. The court ruled for plaintiffs.

Henrietta D. v. Giuliani[34] challenged New York City's failure to assist HIV and AIDS welfare applicants in applying for various welfare benefits. Plaintiffs argued that a city program, Division of AIDS Services, was ineffectual in helping plaintiffs get access to the programs. In denying preliminary relief, the court concluded that the program did help them get access.

Hunsaker v.County of Contra Costa.[35] This case challenged a California substance abuse screening test for GA applicants. The Ninth Circuit Court of Appeals reversed a favorable lower court decision and ruled that the test did not deny plaintiffs meaningful access to the program. The parties reportedly later settled the case, with the county agreeing not to use the test.

Work programs

Mitchell v. Barrios-Paoli[36] challenges New York City's practice of assigning individuals who are employable with limitations to workfare assignments that they were unable to perform because of their disabilities. Plaintiffs raised ADA, state law, and due process claims. The lower court barred assignments to workfare until adequate procedures (including notices) were in place and barred sanctions for individuals who could not meet workfare requirements because of their limitations. The appellate court found that the plaintiffs raised serious questions about the fairness of workfare implementation but concluded that the individual plaintiffs should challenge their assignments in individual actions, not in a class action. The court did require that notices to individuals include information about how to challenge a workfare assignment and receive continued benefits.

Ramos v. McIntire[37] is a challenge to Massachusetts' failure to provide meaningful access to state's TANF Employment Service Programs for those with disabilities. Plaintiffs sought appropriate placements and services, screening of interested TANF recipients for disabilities, and exemptions from the time limit until services are provided. The court denied class certification and preliminary relief.

2. Applying the Protections in Employment Laws to Participants in Welfare Work Programs

Background[38]

Because the PRA greatly increased the numbers of welfare recipients whom the states are required to have in work-related activities, increased resort to legal theories arising under laws designed to protect workers are of increasing importance. At the outset, organizers and advocates may wish to argue that workfare and comparable work obligations, as coerced labor, is involuntary servitude and therefore unconstitutional. Some commentators have supported this view.[39] However, the requirement that recipients engage in work programs as a condition of continued receipt of benefits has been considered by courts that have addressed the question to be a lawful exercise of governmental authority.[40]

However, once the state or county imposes work requirements on a welfare recipient, the recipient acquires many of the protections enjoyed by regular workers. Where the recipient has acquired a regular job, there is little question that the recipient acquires all the rights of any employee. However, where the recipient is working in a workfare or community service position, the state of the law is still in flux and court challenges may be necessary to secure rights.

The View of the Federal Agencies

Two important policy statements from the federal government provide significant guidance by seeking to extend common work place protections to public assistance recipients engaged in workfare or community service. In May 1997, the U.S. Department of Labor ("DOL") issued a guide to the states setting forth the rights of workfare workers to protections under federal employment laws including: the Fair Labor Standards Act ("FLSA"), which governs

minimum wage and overtime rights; the Occupational Safety and Health Act ("OSH Act"), which governs workplace health and safety; unemployment and anti-discrimination laws. The DOL Guide advises states to consider the applicability of these laws as they design and implement work programs. As the document states, it is a "starting point" and it "cannot provide the answers to the wide variety of inquiries that could be raised regarding specific work programs."[41]

In December 1997, the Equal Employment Opportunities Commission issued a notice (Number 915.002) to provide "guidance regarding the application of anti-discrimination statutes to temporary" workers. The Notice clarifies that temporary workers are protected by anti-discrimination laws and that, under many circumstances, workfare workers are considered covered workers.[42]

Securing Worker Rights in the Courts

Courts addressing the rights of workfare workers have extended many of these worker protections to workfare workers. By extension, they would apply as well to welfare recipients working in community service placements. The key question to address in determining whether welfare recipients working off their grants enjoy the same rights as other workers is whether they will be viewed as doing work that is entitled to the protection in question. For example, in determining whether a workfare worker is entitled to minimum wage protection, a court would have to determine whether the recipient is performing work that is covered by the Federal Fair Labor Standards Act. In many instances, the answer to that question depends on whether the worker can be considered an "employee", the work is considered being in the "employ", or the work is done for an "employer." These are very technical questions that will often only be resolved through litigation. In certain situations, worker rights that the welfare recipients enjoys may come from a state or local law. Examples are given below.

· **Workers' Compensation** - Many states have incorporated workers' compensation protections directly into their workfare statutes. In addition, several important court decisions have held that workfare workers are covered by workers' compensation protections.[43]

· **Health and Safety Protections** - Some states legislatively provide that workfare workers are entitled to the exact same protections as regular workers. For example, New York State now provides that workfare workers must be provided the exact same coverage under the New York Public Employee Health and Safety Act as regular public employees. In other situations, protections may be secured under the federal Occupational Health and Safety Act (OSHA). However, one should be aware OSHA protections do not extend to persons working for public employers such as state, county, or local agencies. In most instances where there are extensive federal or state statutory health and safety protections, violations can only be pursued by making a complaint to the agencies charged with enforcement.

Resort to litigation may provide some relief to welfare recipients exposed to horrendous working conditions in other situations. Two court decisions in this area are instructive. In *Capers v. Giuliani*, a class of workfare workers assigned to street cleaning duties in New York City challenged the lack of adequate work place health and safety protections under state welfare law provisions requiring workfare placements to be made only to sites that comply with worker protection requirements. The plaintiffs claimed that they were denied access to 1) toilets, washing facilities, and drinking water; 2) personal protective equipment; 3) traffic safety equipment; and 4) training and supervision. In August 1997, the *Capers* court certified a class and entered a preliminary injunction enjoining assignment of any class member to a workfare assignment until the City provides necessary health and safety protections, including access to toilets and potable water, gloves and face masks, and training regarding potential worksite hazards. However, the order was vacated after the state passed legislation extended public employee workplace protections to workfare workers.[44]

In *Ramos v. County of Madera*,[45] the California Supreme Court held that AFDC recipients, assigned to pick crops in exchange for their benefits, could challenge the violation of

state statutes governing working conditions. For example, in *Ramos* "the complaint alleges ... the field in which Manuela Ramos worked had no toilet or place to wash one's hands, contrary to [the] Health and Safety Code .... The water can allegedly had neither a cover ..., not a faucet, but rather two or three beer cans used as common drinking cups ...."[46]

· **Minimum Wage Protections - Minimum Wage Violations.** This issue is likely to be hotly litigated as more and more states rely on workfare to meet their participation rates and as the number of hours of participation in work activities mandated by the PRA increases from 20 to 30 for single parent households by the year 2000. For example, California has stated that it will not apply minimum wage protections to its welfare-to-work programs. Welfare recipients performing work may be covered by the Federal Fair Labor Standards Act (FLSA) and/or by state minimum wage protections. FLSA actions against state-operated workfare programs may be been hindered by *Seminole Tribe of Florida v. Florida*,[47] where the U.S. Supreme Court held, in a 5-4 vote, that the immunity the Eleventh Amendment confers on states cannot be abrogated by Congress when it is acting through the Interstate Commerce Clause. Several courts have dismissed FLSA actions against states since *Seminole Tribe* based on a determination that there can be no cause of action in federal court because Congress lacked the power to abrogate states' Eleventh Amendment immunity in enacting FLSA.[48] This suggests that advocates should look to state wage and hour law when considering challenging minimum wage violations in workfare programs against state actors. However, workfare programs with counties, municipalities, not-for-profits and other private employers may still be subject to FLSA coverage.

Also at least one court, *Johns v. Stewart*,[49] has determined that workfare workers are not employees under FLSA. The *Johns* court determined that the relationship between the government and the recipient under the welfare program precluded recipients from being employees when they work off their cash grant. This decision is not consistent with the United States Department of Labor's recent guidance indicates that workfare workers are, in most instances, employees within the FLSA definition.

The authors are aware of only one post-PRA case challenging the calculation of workfare hours based on less than the minimum wage. In that case, *Cordos v. Turner*,[50] which was brought by the Welfare Law Center along with the National Employment Law Project and which has been settled,[51] the plaintiff worked for less than the minimum wage in New York City's workfare program cleaning sanitation garages. In another case in Ohio, plaintiffs persuaded the local county to calculate the hours of work based on the minimum wage by threatening to file litigation.

· **Prevailing and Living Wage Violations.** Workfare workers may also be entitled to have their work hours calculated using the "prevailing wage" or "living wage" in the locality in which they work. Some municipalities, counties, states, or public authorities (such as school boards) have enacted prevailing or living wage statutes.

In *Brukhman v. Giuliani*[52] a New York court entered a class-wide preliminary injunction requiring the City defendants to calculate the hours to be worked by all workfare workers using the prevailing rate of wage for regular workers performing similar or comparable work. The Court held that using only the minimum wage to calculate workfare hours violated state constitutional and statutory prevailing wage protections. Plaintiffs also alleged that the challenged practice deprived them of due process and equal protection under law, constituted an unconstitutional taking of their property (the value of the labor) without just compensation, and unjustly enriched the City defendants. That decision was reversed when the state legislature enacted a statutory change basing the calculation of workfare hours on the minimum wage rather the prevailing wage. However, campaigns geared to tying workfare hours to prevailing or living wages are an important way to highlight the inequities of workfare programs and to generate interest from organized labor.

· **Unemployment Compensation**. Unemployment compensation is generally not available for recipients participating in work relief. The Federal Unemployment Tax Act permits states to exclude "work relief" participants from unemployment insurance coverage,[53] and most states have taken that option. However, recipients may acquire eligibility if they perform work

for a private employer under circumstances where the placement could be said to fall outside the definition of "work relief." There is no case history in this area upon which to rely and any litigation that is brought will be a very fact-specific and novel test case.

- **Discrimination.** Welfare recipients assigned to workfare or community services work are likely covered by a number of federal, state, and local statutes designed to protect against discrimination or harassment based on gender, race, national origin, age, disability,or community services work

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those who are non-English speaking, persons of color, and those with disabilities. For example, a recent study found disparate treatment of African-American and white women in awarding discretionary transportation allowances under Virginia's welfare work program. It also found that minority women received less favorable treatment from employers, such as less desirable work hours.[56] And a recent Associated Press report noted the shifting racial composition of the welfare rolls since 1994 with African-Americans, Hispanics, and/or Native Americans now representing an increasing proportion of welfare recipients in over half the states.[57] Federal, state, and local Civil Rights laws are an important tool to assure fairer treatment for these groups.

The following identifies civil rights protections, but is not an exhaustive review of the law. For each law, there is also a body of court decisions outside the welfare context which will be relevant to determining the applicability of the law to welfare programs. Generally, courts have not yet been asked to apply these civil rights protections in the welfare context.

In examining the potential applicability of any law, advocates must consider, for example, the extent of the protection offered by each statute, which individuals can claim the protection of the law, what entities are subject to the law's prohibitions on discrimination, and what remedies the law provides. There are also important questions to consider in determining how to enforce rights. For example, individuals may have to choose between seeking enforcement from an administrative agency or the courts , and where such options exist, will have to make strategic choices. In some situations, individuals will have to file a complaint with an administrative agency before they can go to court. Advocates will want to consider using civil rights protections not only affirmatively to seek changes in discriminatory policies and practices, but also defensively where an individual is threatened with a sanction and the event giving rise to the sanction involved discrimination.

Federal Civil Rights Laws

The PRA specifically provides that TANF programs are subject to Title VI of the Civil Rights, the Age Discrimination Act of 1975, the Americans With Disabilities Act, and Section 504 of the Rehabilitation Act.[58] The Balanced Budget Act which appropriated funds for Welfare-To-Work initiatives also provides that the anti-discrimination laws cited in TANF also apply to welfare-to-work programs.[59] In addition, the Clinton Administration has taken the position that the range of civil rights laws apply to welfare programs.[60] As of the fall of 1998 various federal agencies were in the process of drafting guidance on how federal civil rights laws apply to welfare programs.[61]

The following protections apply (see above for discussion of the ADA and Rehabilitation Act) :

· **Title VI of the Civil Rights Act.** This law generally prohibits direct or indirect discrimination against an individual based on race, color, or national origin by any program or activity receiving federal assistance. Thus, state, local and private agencies which directly receive TANF funding should be covered. In addition, programs which receive the benefit of work performed by TANF recipients should arguably be covered. Covered programs cannot discriminate in the provision of applications, benefits, work assignments, or any other services unless the program can advance a substantial and legitimate justification for such differential treatment. Even if there is a justification, the practice cannot continue if there is an similar effective alternative that reduces the discrimination.

There have been some attempts to use Title VI In the welfare context:

Securing multilingual procedures. Court cases and cases brought before the U.S. Department of Health and Human Services have succeeded in requiring that agencies have AFDC procedures to meet the needs of non-English speaking or limited-English proficient applicants and recipients. These include requirements for bilingual notices and forms, multilingual personnel, staff training, notices of the availability of multilingual services, and procedures to monitor compliance. This advocacy was built on U.S. Supreme Court decisions recognizing that

failure to provide multilingual services may constitute discrimination on the basis of national origin.[62]

Using Title VI to attack restrictive eligibility rules. A pending case before HHS' Office of Civil Rights[63] challenges New Jersey's policy of denying a benefit increase for a child born to a person receiving AFDC (also known as a "family cap"). In January 1995, the OCR issued a preliminary finding that no intentional discrimination had occurred, but it reserved judgment as to the claim that the policy has a disparate effect on racial and ethnic minorities until it received data following implementation of the policy. The case arose in conjunction with an attempt to overturn a waiver granted to New Jersey for this policy by the Secretary of HHS. In *C.K. v. Shalala*,[64] the federal appellate court rejected all of plaintiff's claims, including statutory and constitutional claims. A state court challenge raising state constitutional claims was subsequently filed. It is pending.

· **Employment Discrimination Laws.**

Title VII of the Civil Rights Act of 1964 protects individuals in job training, job placement and work environments from discrimination by employers and employment agencies with 15 or more employees based on race, color, religion, national origin or sex. This protection extends to sexual and racial harassment, discrimination which affects minorities or women intentionally or unintentionally, and discrimination based on pregnancy. As discussed above, a key question that will arise is whether welfare work program participants will be covered under the law, and according to experts, many courts have construed Title VII liberally to cover individuals who are not in a traditional employment relation.[65]

In the Spring of 1998, the Welfare Law Center and NOW Legal Defense and Education Fund filed a complaint with the Equal Employment Opportunity Commission on behalf of a workfare worker who was sexually harassed at her TANF-assigned work site. The ongoing harassment was so severe, the worker left her workfare assignment. The EEOC has yet to reach a determination in the case.

Other statutes. The Age Discrimination in Employment Act of 1967 protects those 40 or older from discrimination based on age by employers (with 20 or more employees) and state and local governments. The Equal Pay Act of 1963 requires equal pay for women and men do substantially similar work, unless factors other than sex justify the differences, e.g. seniority system.

· **Age Discrimination Act of 1975** bars discrimination based on age in federally-funded programs or activities.

· **Title IX of the Education Amendments of 1972** bars discrimination based on sex in federally-funded education programs or activities. This will be an important handle for those who suffer gender-based discrimination in welfare training programs, for example, programs that do not take women because the training is for stereotypically male jobs.

State and Local Laws Against Discrimination

State and local laws may offer protection against additional forms of discrimination, for example, discrimination based on sexual orientation. In addition, the agencies charged with enforcing such protections may be favorable forums for advocacy.

D. Role of Federal Constitution

The United States Constitution is the highest law in the United States. No law, regulation, policy or practice is legal if it violates the Constitution.

The Constitution secures many fundamental rights, such as free speech, freedom of religion, and freedom from unreasonable searches.

It also provides for "equal protection of the laws" and "due process of law." These two principles in particular have played an important role in protecting low income people against a variety of abuses in welfare programs. Many people have hoped that they would also provide

for a “right to life” or “right to minimum subsistence benefits,” but as we discuss later in this paper, those hopes were dashed long ago. But we turn now to the equal protection clause, where there have been some successes, notably in invalidating welfare laws denying benefits to new state residents, and discriminating against unemployed mothers, non-citizens, and families in which the parents were unmarried. There also have been disappointments.

It is important to note that state courts also have the power to interpret the federal constitution and there have been some victories. In addition, state courts can interpret their own state constitutional which generally have provisions on equal protection and due process, and some state courts will provide protections under state constitutions that go beyond the federal constitutional protections.[66]

1. Equal Protection of the Laws

The Fourteenth Amendment to the Constitution says that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Generally speaking, this means that states cannot treat similarly situated people differently without some "rational basis related to a legitimate government purpose." For example, if a state law provided that certain benefits would only go to persons related to the Governor, that different treatment would be struck down because it did not serve a legitimate governmental purpose. Or, if a state law provided that benefits would be given to needy families where both parents were the same height, that different treatment would be struck down because it is not rationally related to providing for families in need or any other legitimate government purpose.

These are extreme examples. States can almost always come up with some reason for denying benefits to some groups that will sound rational to a court. This means that almost any differential treatment gets upheld by the courts.

Fortunately, under certain circumstances states have to meet tougher tests in order to treat people differently. Lawyers always try to get the tougher tests applied, and we turn to those first.

Strict scrutiny

Under certain limited circumstances, a state must meet the "strict scrutiny" test, under which it has to show (1) that there is a "compelling government interest" for treating people differently, and (2) that its law is carefully designed to address that interest. If a court decides this test must be applied, the state almost always loses.

Durational residency requirements. Over the centuries, states and localities have denied welfare benefits to people who recently moved into the state or locality. In *Shapiro v.*

Thompson,[67] the United States Supreme Court held that this was unconstitutional because it classified people upon the basis of their exercising the fundamental constitutional right to migrate, and then penalized them for exercising that right. Because a fundamental right was involved, "strict scrutiny" was applied. The state could not come up with a legitimate reason, since the Court said the real reason, trying to keep poor people from moving into a state was an invalid purpose under the Constitution.

In recent years a number of states have adopted provisions to provide lower benefits to new state residents, and a provision of the federal welfare law approves such restrictions. A number of challenges were filed, and virtually all were successful in the lower courts.[68] On May 17, 1999 in a major victory, the Supreme Court agreed by a 7-2 vote in *Saenz v. Roe*[69] that such restrictions were unconstitutional because they violated the right to travel and resulted in unconstitutional discriminatory treatment of citizens of a state.

Different benefit levels based on race. If different treatment is based upon race, the strict scrutiny test is applied. So if a state said that African-Americans would get lower benefits than whites, that classification would be struck down.

Texas paid much lower benefits in its AFDC program than its old-age program, even though most of the AFDC recipients were minorities and most of the elderly were white. In *Jefferson v. Hackney*,[70] the Supreme Court said that this was not a denial of equal protection. The Court said that the "mere" fact that there was such a differential impact did not make the different benefits levels unconstitutional. In order for the difference to be a violation of the Constitution, there has to be a showing there was an intention to discriminate. However, where intent is shown courts have struck down the differential treatment. A welfare case involving intentional racial discrimination was *Whitfield v. Oliver*.[71]

Discrimination against legal immigrants. State welfare laws denying benefits to or imposing durational residency requirements on non-citizens residing lawfully in the country were invalidated in *Graham v. Richardson*.[72] The court applied the strict scrutiny test because classifications based on alienage are inherently suspect.

Middle level scrutiny

The Supreme Court has applied a middle level of scrutiny (the classification must be "substantially related to an important government interest" in certain areas relevant to welfare).

Discrimination on the basis of sex. Under the AFDC program at one time, benefits were provided to two-parent families that were needy because the father had become unemployed, but they would not pay benefits if the reason for their need was that the mother had become unemployed. In *Califano v. Westcott*,[73] the Supreme Court said that denying aid to unemployed mothers was based on sexual stereotypes: the father was the "breadwinner" and the mother the "homemaker." There have not been other cases in the welfare area challenging sexual discrimination, even though most caretakers are women, since the basic program rules are "gender neutral" and no intent to discriminate on the basis of sex has been shown. If circumstances are found where the rules explicitly favor one sex, or an intent to discriminate is clear, a challenge is possible.

Discrimination on the basis of birth outside of marriage. New Jersey had a state program that provided aid to certain "working poor" families where the parents were married. This was struck down by the Supreme Court in *New Jersey Welfare Rights Organization v. Cahill*.[74] The only Supreme Court Justice involved in that decision who is still on the Court is William Rehnquist. He dissented from this decision in 1973, saying that it was appropriate for New Jersey to favor families where there had been a ceremonial marriage, as opposed to families that were "communes."

The rational basis test

The Supreme Court has made it crystal clear that it will bend over backwards to accept almost any rationale that a lawyer, judge, or court clerk can dream up to justify classifications under the rational basis test. This was made clear in *Dandridge v. Williams*,[75] which challenged

Maryland's maximum family grant. In Maryland, families of 5 or fewer people were paid 100% of the state's standard of need for welfare benefits. Larger families got the flat maximum grant of $250, even though the standard of need for larger families was much higher. The court said the state had a rational basis for denying larger families full benefits: the state wanted to keep welfare benefits below what a full time worker would earn at the minimum wage. It did not matter that these families did not have any member who could be a full time worker. The Court went to great lengths in its opinion to make clear that it was unlikely to overturn any differential treatment under the rational basis test, quoting an earlier case saying "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." And the Supreme Court and lower courts have gotten much more conservative since 1970.

There has been one victory in a rational basis welfare case in the Supreme Court since *Dandridge*. In 1971 Congress voted to deny food stamps to households where not everyone was related. They did this so "communes" could not get food stamps. In fact, desperately poor households where different families were living together, or where a family had taken in a child from another family, were cut off. The Supreme Court held in *United States Department of Agriculture v. Moreno*[76] that this discrimination violated the Equal Protection Clause under the rational basis test. It is clear from the opinion that the Court was influenced by the fact that Congress adopted the provision without any careful consideration, the provision did not hurt its target since communes could get around it. Instead, totally "innocent" and "deserving" people were hurt. Even so, Justice Rehnquist, now the Chief Justice of the Supreme Court, dissented from the decision. It is hard to be optimistic about the Court applying this decision to strike down a federal or state law today.

There have also been instances in which a case is settled. For example, a California county time-limited general relief benefits to disabled persons. After a case was filed raising claims under the Americans with Disabilities Act, the Equal Protection and Due Process clauses, as well as state law, the County settled.[77]

Here are some of the defeats:

Family caps. New Jersey was allowed to deny benefits for children born into a family after the family began receiving aid.[78] The New Jersey family cap policy is now being challenged under the state constitution in *Sojourner A. et al. v. New Jersey Dept. of Human Services.*[79] An Indiana state court has recently rejected equal protection and due process challenges to that state's family cap policy.[80]

Different rules for persons under and over age 45. Pennsylvania provided more limited general assistance benefits to person over 45 than to those under 45. The Court of Appeals for the Third Circuit said this might mean that pregnant women would become homeless, but the policy was constitutional under the Equal Protection clause.[81]

Payment levels in different counties that no longer reflect differences in the cost of living. Virginia divided its counties into three groups, and paid welfare benefits based on the cost of living. After 20 years, one county near Washington had become far more expensive. The Court of Appeals for the Fourth Circuit said it was not a violation of the Equal Protection Clause for the payments in that county to be out of line with the cost of living.[82]

Different payment levels in different welfare programs that do not reflect any difference in need. New Hampshire had a crazy-quilt of programs with different benefit levels and different funding sources (towns, counties, state). The Court of Appeals for the First Circuit said that the different treatment of the disabled and other groups was justified because of the difference in funding sources.[83]

2. Due Process and Fair Procedures

Courts continue to play a key role in insuring that applicants for and recipients of public assistance are treated fairly. Frequently, advocates have had to resort to litigation to compel state and local officials to administer welfare programs fairly and to provide adequate notice and

an opportunity to be heard. Lawlessness, arbitrariness, and indeed vindictiveness have too often marred welfare administration and, following the adoption of the PRA, are likely to increase.

Many of the more arbitrary practices by state and local entities are likely to run afoul of the due process clauses of the federal and state constitution. For a court to find that a due process violation has occurred, the court must be satisfied that the aggrieved person has a property right to the benefit at risk.

In its landmark decision in *Goldberg v. Kelly,*[84] an early Welfare Law Center case, the U.S. Supreme Court held that advance notice and opportunity for a hearing had to be provided before welfare benefits could be terminated. The Court found that state law defining who was eligible for the benefits created a statutory entitlement for eligible claimants, and that this entitlement was a "property interest" protected by the Fourteenth Amendment. This decision led to significant improvements in welfare administration.

Both the federal welfare reform statute and many state implementing plans provide that there is no longer an entitlement to public assistance. Because the issue of whether there is an entitlement is crucial to determining whether due process rights still exist, courts will first have to determine whether there is a property right to the benefits at issue. Arguments that states cannot strip recipients of due process rights by merely stating that there is "no entitlement" will rely on *Cleveland Bd. of Education v. Loudermill,*[85] which held that if a statute creates a property interest, the due process clause, not the statute, determines what process is due when that property interest is compromised.

Once a right to due process has been established, much of the litigation will focus on what the state or locality must do to protect the rights of the welfare recipient or applicant. There has been relatively little litigation filed. However, patterns have emerged that lead us to believe that the following represent the types of issues over which litigation will most likely arise.

Standardless decision making and inconsistent administration. The greatest erosion in fairness has occurred in the administration of TANF programs. Far too many states are operating their TANF programs with insufficient standards and inadequate oversight of the work

of the staff charged with implementing welfare reform. These problems are compounded in some states by the de-linking of administration of cash assistance programs from food stamps and medicaid, resulting in multiple eligibility rules and eligibility requirements.

Examples of harm exist throughout virtually every region of the country. Under W-2, Wisconsin's all encompassing work program substitute for cash assistance, responsibility for determining eligibility and administering assistance has devolved from state administration to administration by private not-for-profit and for- profit local contractors. In Milwaukee, five different groups, including a private corporation, administer W-2 in six regions. Applicants and recipients appear to be treated very differently depending on the region in which they live. An applicant in one region may find the application process considerably different from a like applicant in another region. Regional differences as well as differences in the worker assigned also appear to factor into the nature of the work assignment given, the leniency shown when rules are thought to be violated, and level of supportive services provided.

The W-2 experience is being replicated in New York City, where Jason Turner, one of the architects of W-2, has been hired as Commissioner of the New York City Department of Social Services. In New York City, instead of applying for TANF assistance at welfare offices, applicants are now being required to apply at Job Centers, where the opportunity to apply for cash assistance, food stamps, and medical assistance was frequently deferred while the applicant is assigned to job search, simulated work, and other deterrence activities. Inconsistent administration by workers unfamiliar with program rules coupled with intense pressure to reduce caseloads has resulted in dramatic decreases in applications approved and has forced thousands of needy families to reapply many times in order to secure assistance. In January 1999 a federal court found that this deterrence was illegal, barred the City from converting any more Centers to Job Centers, and ordered it to develop a corrective action plan and comply with the law.[86]

Similar experiences are reported from Alabama.[87] In one county, applicants report no problem in receiving applications. Yet, in another county, surveyors found applications were routinely being denied as the result pre-screening obstacles and other barriers. A recent report

from Virginia notes the great disparity between neighboring counties in the number of sanctions imposed and suggests worker discretion as the reason.[88]

In Florida, extensive delays and inconsistent administration have occurred in the creation and implementation of the private and quasi-public coalitions charged with implementing the work program components of that state's TANF program. As a consequence, thousands of recipients have not received services designed to assist them in securing unsubsidized employment prior to the expiration of the time limits. In Massachusetts proposed regulations regarding extensions of time limits do not contain adequate standards defining which families will qualify for an extension.

In other states, standardless administration has also pumped up the rate of erroneous sanctions. In Utah, a welfare administrator found that half of the sanctions ordered under a pilot program were done in error, often when a caseworker didn't detect that a recipient suffered from mental illness or some other problem.[89] In Montana, a family was sanctioned for submitting a pay stub one day late, in violation of an unwritten rule developed by the caseworker.[90]

In many of the situations described above, litigation is being contemplated to deal with the enormous harm that results from unfairness in treatment. In New York State, the Welfare Law Center and the local legal aid program have filed a class action in federal district court in one of the few cases post-PRA due process cases to be filed.[91] In this case, plaintiffs challenge illegal terminations of medical assistance, often without notice, whenever the public assistance program benefits are terminated for allegedly failing to comply with public assistance program rules. The parties are in settlement discussions.

Adequacy of Notice. While the notices provided to applicants and recipients under AFDC were often far from ideal, we have observed, and advocates across the country report, a general decline in the adequacy and timeliness of notices. Notice is clearly crucial for poor persons seeking to navigate increasingly complex welfare bureaucracies with numerous new requirements, including tight time limits on aid. Thus, litigation will likely be filed to improve the adequacy and timeliness of notice provided applicants and recipients of public assistance. It is

worth noting that notice rights under food stamp and Medicaid law have not changed and challenges to inadequate notices that purport to terminate those benefits as well as cash assistance will find support in federal statute and regulation.

Examples of inadequate notices abound. Some Colorado counties rely on the shotgun approach to give notice; recipients have received notices that inform them that:

> Your family's cash assistance will be decreased because you have failed to cooperate with the work requirement, child support requirement or immunization requirement of the Colorado Works Program.

A class action challenge to these inadequate notices has been filed,[92] following a hearing decision in which a Colorado state administrative law judge reversed a sanction because the county's notice was inadequate under state regulations. The administrative law judge observed that the notice provides the appellant with a litany of possible reasons for the sanction's imposition and leaves the recipient to determine which of the reasons is the cause for the sanction.[93] News reports indicate that over 1,000 individuals received such defective notices.

Advocates seeking to improve agency notices may also want to consider the recent experience in Tennessee where the state agency contracted with legal services providers to revise all of the state's notices which were uninformative and confusing to recipients.[94]

In other states clients are not advised adequately that they are rapidly approaching time limits or are not given full information of the steps that might be taken to fully utilize education and training programs designed to move from welfare to work. In Indiana after litigation was filed, the welfare agency has agreed to improve its notices relating to exemptions to work-related requirements.[95]

Fair hearings. At the passage of the PRA, several states suggested that they might seek to avoid notice and hearing requirements by arguing that the elimination of the entitlement to aid also eliminated the right to notice and fair hearing. While that position is of questionable legal

validity, the good news is that with very limited exceptions, the states appear not to have acted on their initial sentiments.

A review of the statutes and regulations that remain post-TANF indicates that virtually all the states have retained a fair hearing mechanism that is similar to the one in place under AFDC. For example, while sweeping changes were rendered in New York's public assistance programs, not a word was changed in the statutory provision establishing the right to an administrative hearing to challenge adverse actions or failures to act. Similarly, despite a massive conversion of the welfare program to a work program, Ohio retains the requirement that "an appellant who appeals under federal or state law a decision or order of an agency administering a human services program shall, at the appellant's request, be granted a state hearing by the department of human services." Even in Wisconsin, where the W-2 program appears, on paper, to eliminate or severely curtail fair hearing rights, reports from advocates indicate that fair hearings are still being conducted and that appellants are winning.

On the other hand, limitations on procedural due process in the fair hearing process are arising. Michigan plans to limit the extent to which it will automatically provide assistance unchanged pending an administrative hearing and the issuance of a hearing decision. The Michigan scheme would terminate aid without advance notice and then, supposedly, reinstate aid if the hearing is requested within 10 days.

In another example, New York's newly enacted Welfare Reform Act now requires recipients determined to be able bodied enough to engage in a workfare assignment or other welfare-to-work activity to request a fair hearing challenging the determination within 10 days from the date the determination was made.

Although fair hearings continue, there are deficiencies in those proceedings. For example, Illinois and New York advocates report delays in scheduling hearings and issuing decisions, scheduling prehearing conferences and providing aid pending appeal. There is a rich history of litigation to insure compliance with hearing mandates. Much of that litigation in the AFDC era was intended to enforce federal regulatory guidelines governing the operation of the fair hearing

process. Litigation brought post-PRA will rely more on the due process clause and state statutes setting forth hearing obligations. In addition, to the extent that multiple benefits are involved, hearing rights under federal food stamp and Medicaid laws will play a more significant role.

There are several post-PRA challenges to hearing deficiencies in the courts. For example, in New York, the Welfare Law Center, in *Piron v. Wing*, a state court class action, has joined with local advocates to challenge delays in the holding of hearings, the rendering of decisions after fair hearing, and the timely compliance with favorable decisions in TANF and state-funded cash assistance programs. This action is part of a concerted effort to challenge delays in other benefit programs including food stamps (*Moore v. Perales*), fostercare benefits and services (*Freeman v. Scoppetta*), and medical assistance (*Cutler v. Bane*). The Welfare Law Center is counsel with local advocates in the first two cases. In another New York case, *Morel v. Giuliani*, a four year old class-wide preliminary injunction requiring the State and City welfare agencies to provide aid continuing pending the fair hearing and the issuance of a decision for cash assistance recipients who timely request a hearing is based on due process claims and has survived the repeal of AFDC. The preliminary injunction also extends to the food stamp program.[96]

3. Right to Privacy in the Home Does Not Block All Home Visits

Many welfare departments seek to have their employees or private investigators they have hired visit applicants or recipients in their homes. The Fourth Amendment to the U. S. Constitution protects all persons against unreasonable searches and seizures. The courts have said that this usually means that the police or other government agents cannot enter the homes unless they have gotten a warrant from a court, based upon probable cause to believe there is evidence of a crime. This would apply when a welfare fraud squad is seeking entrance to a home.

The U. S. Supreme Court has allowed welfare agencies to require home visits as a condition of getting aid without any requirement of a warrant from a court. In *Wyman v. James*,[97] the Court said the welfare home visit in that case was not a search since the welfare

department was both seeking to determine whether services can be provided while it is also seeking to verify eligibility. It made clear that this ruling would not apply to all home visits and that many factors would have to be taken into account. For example, in this case New York City gave advance notice of the visit, scheduled it during regular business hours, and did not engage in a search of closets and medicine chests. Since the Court has become more tolerant of searches since 1971, it is not clear just what kinds of home visits would be considered unconstitutional today.

E. Are Courts Likely to Find that Government Has an Affirmative Duty to Provide Welfare?

The federal welfare law bars the use of federal TANF funds to provide assistance to families for more than 60 months (with the exception of a small number who can continue to receive aid in hardship cases, at state option), and states now have varying time limits in their TANF programs. (State GA programs also may include time limits.) The grim prospect of needy families with children losing subsistence aid is likely to heighten interest in the question of whether federal or state constitutions or international law impose a legal obligation on governments to provide assistance to families. Note that states have traditionally excluded various categories of people from welfare programs, typically single adults and childless couples, but exclusion of children presents special concerns.[98] Unfortunately, in the absence of state statutes providing for assistance, courts are unlikely to impose an affirmative obligation unless there is a strong state constitutional basis. For a thoughtful and extensive treatment of this question, see Ramsey and Braveman's discussion, *"Let Them Starve": Government's Obligation To Children in Poverty*,[99] from which the following points are drawn.

Does the federal constitution require the federal or state governments to provide assistance?

There is no explicit provision in the Constitution requiring assistance, and unfortunately the Supreme Court has rejected the notion that there is such a duty: "Welfare benefits are not a fundamental right, and neither the State nor the Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support."[100]

Generally the courts have viewed the Constitution as imposing a limit on governmental action rather than affirmative obligations. For example, in *DeShaney v. Winnebago County Dept of Social Services*,[101] the United States Supreme Court rejected arguments that the state violated Due Process when it failed to take adequate steps to protect a child from serious physical abuse by his father.

Some scholars have developed arguments supporting an affirmative constitutional obligation,[102] but they acknowledge that under past precedent and current trends, courts are not likely to accept such arguments. These arguments may be used to educate the public and legislators about the importance of recognizing a duty to assist the poor.

Do state constitutions require that assistance be provided?

State constitutions have the potential to offer some greater protections and impose greater obligations, although with the notable exception of New York and a court victory in Montana that subsequently resulted in a constitutional amendment to undo the result, there have not been favorable decisions. According to Ramsey and Braveman, state constitutions may appear more promising than the federal constitution as a source of law for several reasons:

First, many contain affirmative language regarding the importance of aiding the needy, authorizing care of the needy, or requiring or authorizing aid to the needy. New York stands as a unique example of how its explicit constitutional provision, Article XVII, which imposes an obligation to aid the poor, has been invoked by New York courts to protect the needy.[103] A recent Welfare Law Center case, *Alvarino v. Wing*,[104] challenges the denial of state-funded food stamps to certain lawful immigrants as contrary to Article XVII. The court granted a TRO for

the named plaintiffs, but later ruled against plaintiffs on the ground that the policy does not violate equal protection. The court did not address the Article XVII claim. An appeal is pending.

The existence of the constitutional provision was a significant factor in the New York State legislature's 1997 enactment of welfare reform provisions which do not terminate aid at the end of the relevant time limit, but instead provide primarily voucher payments. Whether this is sufficient is an open question. This is a good example of how constitutional norms can play an important role in influencing state legislative decisions.

In Montana a state equal protection challenge to a limited program for able-bodied individuals without children succeeded based on state constitutional language requiring the legislature to provide for the needy. However, voters subsequently amended the constitution to remove the provision on which the court had relied.[105]

Unfavorable decisions include *Moore v. Ganim*,[106] which rejected by a 4-3 vote a challenge to a Connecticut law which allowed localities to limit GA to "employables" to 9 out of 12 months; *Bullock v. Whitman*,[107] an unsuccessful challenge to Kansas restrictions in General Assistance eligibility, in which the court nonetheless acknowledged the possibility that at some point restrictions could violate the constitution; and *Daugherty v. Wallace*,[108] which rejected a claim that a six-month time limit on GA for those not qualifying for Disability Assistance violated the state constitution.

Second, state traditions may support claims of a duty to provide assistance. These include the following:

State tradition of caring for the poor. An extensive argument based on longstanding state traditions of assisting the poor was made and rejected in *Moore v. Ganim*.

Special protection for children embodied in the *parens patraie* doctrine. This doctrine refers to the state's authority to protect those unable to protect themselves. This is an untested theory as a basis for a constitutional duty.

Third, state courts have fewer constraints than federal courts in addressing social policy issues. Ramsey and Braveman suggest that state courts are more comfortable dealing with public

policy arguments and, as state courts, do not face the same constraints as federal courts in imposing a duty of the state. These factors might tend to make it easier, in theory, for state courts to look to state constitutional law, but as the cases cited above suggest, the experience to date in the courts is mixed, at best.

Does international law provide a basis for imposing an obligation to provide assistance?

Some have asked whether international law might provide a basis for arguing that government has an obligation to provide minimum subsistence benefits, especially for children. In particular, some cite the Universal Declaration of Human Rights, adopted in 1948 by the United Nations General Assembly, which states that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family..." Although current trends suggest that courts will not base welfare decisions on international law, some low-income groups are using international law principles to call attention to serious shortcomings in welfare policy.

Most recently, the Kensington Welfare Rights Union (KWRU) launched its Economic Human Rights Campaign to mark the fiftieth anniversary of the Universal Declaration of Human Rights and to call attention to and fight harsh welfare policies as violations of human rights. KWRU organized a bus tour and made stops in local communities to hold rallies at which individuals were invited to testify to the harms they suffered as a result of welfare reform. The bus tour ended with a rally at the United Nations. Campaign activities are continuing.[109]

As to using international law as the basis for litigation, Ramsey and Braveman[110] address (1) enforcing international law against the federal or state governments and (2) using international law as a standard for interpreting federal and state Constitutional and statutory law. While they agree that international law norms should be used to help frame the public debate, they are not optimistic about the prospects for these arguments actually prevailing in litigation. Their analysis suggests the many hurdles that such arguments face and notes the failure of these arguments in non-welfare contexts. Indeed, in an address on affirmative action United States Supreme Court Justice Ruth Bader Ginsburg recently noted the reluctance of the Supreme Court to look to international law or court precedents from other nations (and her disagreement with that position).[111]

In the welfare context, the Universal Declaration of Human Rights has been raised or cited in at least several cases. A 1986 decision enjoining a General Assistance benefit reduction and

ordering the county to conduct a new study of minimum needs, cited the Declaration in its discussion of what constitutes minimum subsistence. The state court concluded that the county's decision was arbitrary and capricious because it considered only food and shelter needs and not other needs, including clothing, transportation, and medical care which the state recognized as necessities for low income families in other contexts.[112] Justice Marshall's dissent in *Dandridge v. Williams,*[113] in which the majority rejected an equal protection challenge to Maryland's maximum family grant policy, cited the Declaration along with a number of other sources in a footnote . In *Daugherty v .Wallace,*[114] in which the Ohio court rejected a challenge to a GA time limit, the court's decision ignored arguments based on international law that had been presented in an amicus brief.

II. Assuring that Low-Income Individuals Get Access to Benefits from Related Income Support Programs

Food Stamps, Medicaid, and child care assistance are critical benefits for TANF families preparing for employment, for families moving from cash assistance into employment, and for low income families seeking to meet their families' needs through low wage work. Yet emerging reports from various sources indicate that many families do not actually receive these important benefits. Legal advocates and community and grassroots groups have an important role to play in assuring that low income families know about these benefits and that welfare agencies administer these programs correctly and fairly. Administrative and legislative advocacy, individual representation, community education, and litigation are among the strategies that advocates will need to consider. The following discussion highlights some of the issues with a focus on litigation issues.

A. Food Stamps and Medicaid

Surprising declines in the Medicaid and Food Stamp caseloads are one of the distressing side-effects of TANF implementation. TANF caseloads have also declined dramatically, and these are generally attributed to both a strong economy as well as major changes in state policies that discourage or prevent people from seeking or remaining on assistance. However, the Food Stamp and Medicaid declines have caused alarm because these programs which, unlike TANF, are generally governed by federal rules, provide broader eligibility than TANF. They are widely regarded as important income supplements for low income households regardless of whether they receive cash assistance. For example, Food Stamps and Medicaid financial eligibility limits are higher; conduct-related requirements, including work rules, and sanction rules are not as onerous as many states' TANF policies; and strong federal rules protect the right to apply and receive prompt eligibility determinations. In addition, recent changes in federal Medicaid law, including the elimination of the general requirement that linked Medicaid eligibility to AFDC eligibility and expansion of eligibility for children suggest that Medicaid eligibility should be expanding.

The state welfare agencies that administer cash assistance generally also administer Medicaid and Food Stamps, and there is growing recognition that strict new TANF policies and practices and the philosophy of discouraging public assistance receipt have spilled over to the agencies' administration of Food Stamps and Medicaid. As a result, many families are being improperly denied or terminated from Food Stamps or Medicaid when they are denied or terminated from TANF.[115]

These issues and the important role of litigation on behalf of needy families are best illustrated by recent litigation to protect needy individuals' rights under federal law to apply for Medicaid and Food Stamps and two cases challenging Food Stamp and Medicaid sanctions.

Welfare Law Center

Securing Application Process Rights

Federal Food Stamp and Medicaid laws protect individuals' right to apply without delay and receive prompt eligibility determinations, to receive expedited Food Stamps and emergency Medicaid, and to have Food Stamps and Medicaid eligibility determinations made separately from cash assistance eligibility determinations. There are growing indications that state policies to divert people from cash assistance are interfering with these rights.

In New York City, which has implemented a diversion program, it has taken a federal class action, brought by the Welfare Law Center, the Legal Aid Society and other legal services providers, to force New York City to address its systematic violations of individuals' applications process rights.

The case, *Reynolds v. Giuliani*, arose from the Mayor's conversion of Income Support Centers where needy individuals apply for Food Stamps, Medicaid, and cash assistance, to Job Centers. Job Centers do not provide needy individuals with jobs. Instead they subject prospective applicants to a series of hurdles designed to discourage them for applying for public assistance. The process requires an individual to survive several steps in addition to the usual application process, including interviews with a Financial Planner and an Employment Planner; to make at least one repeat visit to the Job Center before they can get an application; and to do an extensive job search during the application process. During this process agency workers have told individuals to seek assistance from other sources, such as food pantries, and have repeatedly misinformed individuals about the process. Early data showed that the diversion process succeeded in discouraging applications, with most leaving the Center without filing an application and a dramatic drop in the application approval rate for those who did file.

As the conversion moved ahead, reports of abusive practices and the desperate plight of needy families received media attention and the scrutiny of the U.S. Department of Agriculture, which launched an investigation. The Mayor and City officials staunchly defended their program

as consistent with the philosophy of encouraging self-sufficiency rather than dependency and the federal TANF laws emphasis on moving recipients into employment. The litigation followed.

The *Reynolds* plaintiffs raised claims based on the federal Food Stamp and Medicaid laws described above, state law regarding the right to apply for cash assistance and receive a prompt determination and due process. Since the plaintiffs sought to enforce compliance with explicit federal law requirements, they had to persuade the court that the City was engaged in a pattern of illegal practices that amounted to a violation of federal law. Following a three day hearing in which it received extensive evidence, the court issued a lengthy opinion concluding that agency workers illegally denied needy individuals their rights to apply for benefits and rejecting the City's arguments that the problems presented to the court were only isolated incidents. The court barred the City from converting any more welfare offices to Job Centers and ordered the City to comply with the law and develop a corrective action plan.

The City has since made major changes in the manner in which it processes applications, although plaintiffs claim that the City has not fully corrected the violations and that its staff training and monitoring programs are inadequate . The court is now considering the adequacy of the City's corrective action.[116]

As the first decision to address the interaction between cash assistance and Medicaid and Food Stamps, *Reynolds* is strong precedent for other states where careless or overzealous welfare administrators' efforts to reduce cash assistance rolls are causing improper Medicaid and Food Stamp denials. (The Welfare Law Center is working to address this issue in other states.) The case is also a reminder of the important role that litigation plays in assuring that welfare officials abide by federal law when informal advocacy fails and agency self-scrutiny is absent. The court's ruling means that the power of the court is being used to compel and oversee the City's corrective action efforts on a timetable set by the court.

Challenges to Inappropriate Food Stamps and Medicaid Sanctions

As suggested above and discussed in the CBPP analysis, when families are terminated from TANF because of a sanction, some or all members are likely to remain eligible for Food Stamps and/or Medicaid. However, litigation may be necessary to assure continuing Medicaid and Food Stamp eligibility. For example, Michigan's imposition of a full family Food Stamp sanction for non-cooperation with a TANF program child support cooperation requirement has been found illegal by a federal court.[117] In New York, even though state law protects a person's Medicaid eligibility when s/he incurs a work program sanction, litigation has been necessary to enforce that right.[118]

B. Assuring Access to Child Care[119]

There is widespread recognition that child care is critical to for TANF recipients who are seeking employment, trying to maintain employment, or those transitioning from TANF to work. In addition, other low income parents need child care assistance to avoid have to seek or return to public assistance. Parents must know their children are safe and in developmentally-appropriate environments to focus on accomplishing the tasks their work demands of them. Yet, the federal TANF statute does not guarantee child care to families - even those families participating in education, training, job search and work activities. Rather, federal law leaves much discretion to states to determine how to administer federal child care funds, allowing states to choose (within certain parameters) who will receive subsidies, how much they will receive, and how they will receive them. Given the many decisions involved and the great discretion states wield in developing their child care systems, advocates have an enormous opportunity to influence state planning and policy making to create a system which benefits low income families.

Changes in Child Care Law Under Welfare Reform

Before the 1996 federal welfare legislation and the implementation of TANF, parents receiving AFDC or transitioning from AFDC to work were guaranteed child care subsidies. In 1996, Congress eliminated this guarantee while at the same time implementing mandatory work requirements for most TANF recipients. Now, federal child care funding and guidance come from the Child Care Development Fund (CCDF) legislation and TANF legislation itself.

Under the CCDF, states must submit plans to the U.S. Department of Health and Human Services (HHS) to receive child care assistance funding. HHS prescribes certain parameters each state's child care plan must meet, including minimum eligibility requirements for individuals seeking assistance, health and safety certification and consumer information requirements, and requires certain information to be included within each state's plan. Yet, within these strictures, states are free to develop and implement any type of child care system they wish.

Potential Issues Arising in States

Perhaps the most critical work for advocates is to influence state policy choices and monitor the implementation of state child care systems to assure they comply with federal law. Whether the CCDF, since it contains no explicit entitlement to child care, will provide a significant basis for litigation in the child care context is an open question. In any event, lawyers will want to look to state law and regulations in considering litigation to reform child care systems. Since at this time no such litigation has been filed, it is difficult to determine if the courts will look favorably upon such claims. But several important issues are emerging as critical to quality child care provision for low income families.

· **Potential Litigation.** Some states guarantee child care subsidies for all low income families who need child care to participate in workfare programs or to avoid reliance on TANF. Other states provide them for low income families who meet certain criteria, while still others provide such subsidies, but do not guarantee them to all who may need them. Even though a state's laws may guarantee child care, the state's implementation may not provide all those

eligible with child care. In such a circumstance, litigation to force the state to follow its own laws could be appropriate. In addition, individual representation in administrative hearings (if such hearings are available under state law) could be an effective way to assure the state follows its own laws.

TANF also provides one very important protection for TANF recipients who cannot find child care. While states can require most adults receiving TANF assistance to participate in welfare to work activities, states cannot reduce or terminate assistance to single custodial parents of children under six if the parent proves that he or she cannot obtain needed child care. Acceptable reasons for being unable to obtain child care are:

(A) Unavailability of appropriate child care within a reasonable distance from the individual's home or work site;

(B) Unavailability or unsuitability of informal child care by a relative or under other arrangements;

(C) Unavailability of appropriate and affordable formal child care arrangements.[120]

The federal law allows states to define the terms above, so advocates should consult their state law to determine how families can prove they cannot find appropriate child care. The federal Child Care Development Fund rules require states to inform families of these definitions. Recent final federal TANF regulations also require state TANF agencies to provide notice to parents.[121] Also, some states extend this protection to even more families, such as those with older children or children with special needs.

Advocates should remember that this protection is only a protection from sanctions. It does not guarantee child care funding or stop the family's 60 month time limit from running. If a state sanctions a family which cannot find child care, advocates should encourage that family to avail itself of the state's TANF appeal system, and should help the family obtain representation for the hearing. If state law incorporates the protection, there could be litigation to enforce the provision if agencies disregard it in practice. Whether an individual or class of individuals could

sue to enforce the federal law protection in federal court if a state consistently sanctions families who cannot access appropriate child care is an open question.

TANF also allows, but does not require, states to exempt single custodial parents caring for an infant up to one year old from TANF work requirements. More than half of the states have taken this option. Four states are even more generous by extending the exemption to parents of older children as well (Massachusetts, New Hampshire, Vermont and Texas). However, as is the case when child care is unavailable, exempted individuals are still subject to TANF time limits. If a state has opted to exempt these families, fair hearings may be appropriate for families who are sanctioned, yet meet the state's exemption eligibility guidelines.

· **Policy Issues Advocates Should Address.** Federal child care law also imposes some requirements on states which benefit parents. Parental choice is a key factor in the federal law. For instance, states must let parents choose between a provider who has contracted with the state or a child care certificate which parents can spend on child care they choose themselves. The CCDF requires that states allow parents to use their child care subsidy to purchase any kind of legal child care the parent chooses, such as care at a day care center, family child care, or in-home care. Although states can regulate child care provision, they cannot impose any requirements which directly or indirectly prevent parents from choosing a particular type of care or provider.

Parental choice is also furthered by federal requirements that states must set payment rates at a level which allows children receiving subsidies access to child care comparable to that available to children not receiving child care subsidies. States are required to charge most families a co-payment fee for child care, but the fees cannot be so high as to make child care unaffordable. Advocates can monitor their state's compliance, working to shape the state's policies and to publicize those policies unfriendly to families.

Opportunities for Coalition Building to Address Child Care Issues

Child care issues present a unique opportunity for coalition building. Groups traditionally not involved in low income issue advocacy have a stake in child care provision. Advocates should look to associations of child care providers, preschool teachers and workers, health care providers and school administrations, all of whom have a great interest in children receiving appropriate child care. In addition, women's groups, including charitable groups, relate to the need for child care and understand its importance. Groups can work with each other on a variety of levels. First, as states are still developing regulations to govern their child care systems and are resubmitting state plans to HHS, advocates should work with state officials to create systems which are beneficial to families. Second, prior to submitting its plan, each state must hold public hearings on the contents of the plan. Advocates can and should testify at these hearings and assist others in preparing to testify. Advocates can also inform families and child care providers of the rights of low income workers in the child care context, and should monitor to assure the state respects those rights.

III. Other Emerging Issues

A. Welfare Organizers' Rights to Access to Welfare Offices

Welfare organizers frequently seek access to welfare offices to 1) organize, 2) provide assistance to and share information with applicants for and recipients of assistance, and 3) obtain knowledge of how welfare reform is being implemented by the welfare offices. However, some welfare agencies have recently begun to bar access to advocates and organizers to welfare offices.

Barring access may violate agency rules and raises significant First Amendment issues. Organizers and advocates will first want to look to agency rules and past practices to argue that they should be provided access. In some localities, organizers have been able to negotiate access

by meeting with welfare officials. However, if this is not successful, resort to the courts may be necessary.

Early cases permitted access to welfare centers for organizing. Two earlier cases from the Second Circuit in New York are instructive. In *Albany Welfare Rights Org. v. Wyman*,[122] plaintiffs alleged that their right to organize and to associate was being impinged by the refusal of the Albany County Department of Social Services to permit them to peaceably distribute literature and information in the welfare centers. The Circuit agreed. The case is instructive for two reasons.

First, the Circuit found that the member organization had standing. The Court observed "We think that AWRO had standing to bring this complaint because the refusal of access alleged involved an abridgement of the constitutional right of association."[123] The observation was based on the finding "there was sufficient evidence in the record to permit the conclusion that AWRO's efforts to increase its membership were adversely affected by its exclusion from the premises of the Albany County Welfare Department."[124]

Second, the Circuit found that a complete and outright ban of AWRO from the facilities of the County Department would violate the plaintiffs' First Amendment right of political expression. The court went on to hold that AWRO's activities could be limited only by regulations "narrowly drawn to serve legitimate interests of the general public who use the [County Welfare Center]."[125] The types of activity found to be protected included peaceful distribution of leaflets and talking with people waiting to be served.

The decision appears to turn on the nature of the activity. The Circuit was persuaded that AWRO was not seeking to demonstrate at the welfare office or to otherwise interfere in the regular operation of the welfare offices, but merely to share information.[126] The court noted that "[p]rospective members of the AWRO and persons who need information about public assistance are best found in the waiting rooms of the County Welfare Centers."[127]

Eight years later, the Second Circuit reaffirmed the right of organizers to enter welfare centers for organizing. However, the Circuit further held that 1) the welfare rights organization

could be required to give advance notice to the welfare agency of its intent to distribute literature at a particular site; 2) the welfare rights organization could be limited to only designated areas in the waiting room; and 3) the organization could be barred from soliciting membership fees in the waiting rooms.[128] The Court went on to explain:

> the first floor waiting rooms of welfare centers, although not characterizable as traditional public forums, are nevertheless public spaces open to all, and are therefore areas in which First Amendment rights with regard to welfare issues may not be banned. However, expressive activities inside the centers may be restricted by reasonable time, place, and manner regulations, narrowly drawn and designed to ensure the proper functioning of the center's primary activities.[129]

The Circuit further noted that "the advance notice that is required may be given by telephone on the day before attendance is desired," thus enabling the defendant to coordinate the attendance of the many groups using welfare center waiting rooms.[130]

The next case to address the issue arose from organizing activities in Nebraska fifteen years later. In that case, the Eighth Circuit came to a different conclusion and upheld a bar on access. In *Families Achieving Independence & Respect (FAIR) v. Nebraska Department of Social Services*,[131] the Eighth Circuit initially overturned a restriction on the use of welfare center waiting rooms by advocacy groups. The Circuit rejected the defendant's argument that it could permissibly limit the use of the waiting room to only groups that provide aid to recipients. The court observed "FAIR is a grass-roots organization designed to empower welfare recipients and facilitate their involvement in welfare reform. To that end, FAIR wants to provide information to welfare recipients about the current welfare-reform debate and about the possible impacts of proposed legislative changes."[132] The court held that this purpose provided a valuable service to recipients and applicants and could be subject only to reasonable time, place, and manner restrictions - but not to content-based restrictions no matter how neutral.

In 1997, the Eighth Circuit reexamined its holding in the *FAIR* case.[133] On review, it held that the welfare center waiting room was not a public forum and that plaintiffs, as an advocacy group, were not entitled to the same access as other groups - such as head start.

The most recent FAIR decision is consistent with recent legal trends concerning access in non-welfare contexts. Basically, courts distinguish the right to access for speech and/or assembly based on whether the forum is public, quasi-public, or private. In a public forum, such as a park or street corner, the government can place reasonable time and place limits. For example, the government can restrict access to a street corner for purposes of making a speech if such use would impede the flow of traffic.

Welfare centers can be thought of as quasi- or limited public fora. (The public has access to welfare centers for a limited purpose.) The Circuit Courts will approve rules limiting expressive activity in limited public fora so long as the rule is "reasonable." Reasonableness is found to exist more often than not. The Circuits are generally becoming more restrictive and several recent decisions have found outright bans on access to be reasonable. On the other hand, in *Washington Legal Clinic for the Homeless v. Barry*,[134] the Circuit Court for the District of Columbia affirmed a lower court ruling which found a policy that limited advocates' access to a homeless shelter to only during certain hours of the week to be unreasonable.

It is impossible to suggest any particular result in any particular case challenging access. The outcome of litigation in any given case will depend upon a mix of several different factors. The factors that will need to be weighed in each instance where access is barred include, but are not limited to, whether (1) there is a blanket ban on access (are only individual advocates permitted with their clients?); (2) the ban is on just organizing (do other groups have free access for other purposes?) ; (3) the ban is limited to just certain days and times; (4) there is only a ban on distribution of literature (is access permitted to quietly observe and speak with clients or workers?), and (4) the organizers have other means of reaching the populations they seek to organize. In addition, in each situation, courts will need to assess whether the organizers are seeking access to the general waiting room or to a location where case work is taking place.

Finally, the court should consider the nature of the disruption, if any, that access is likely to cause. For example, if the waiting area is large and sparsely populated and only one organizer is entering to speak softly with waiting clients, the court will be more likely to find restrictions on access to be unreasonable.

B. Privatization of Welfare Eligibility Determinations through Contracting with Non-Profits, Private Companies and Religious Institutions

The Personal Responsibility Act gives states a new freedom to contract out all or parts of the administration of welfare programs for families. Privatization of welfare administration raises serious policy concerns and is likely to raise legal issues.

Welfare Law Center

Background

For years many private companies have provided job training, child support collection, and other services under contract with states or localities. But there has never been any involvement of private companies on the scale now moving ahead in Wisconsin, Florida, and elsewhere.

Wisconsin has contracted out the entire welfare program to contractors, including counties, not-for-profits, and two for-profit companies. Some Florida localities are contracting out a whole range of services including eligibility determination.

Recently Lockheed Martin Marietta, IBM, Andersen Consulting, and EDS (formerly Ross Perot's company) engaged in a fierce bidding war for a $2 billion contract to determine eligibility for cash assistance, medicaid, food stamps, and many other benefits for all low income people in the Texas. That effort was blocked by a combination of astute organizing in Texas and lobbying in Washington, with public employee unions playing a major role.

The question of the proper role of government, and how corporate involvement may distort the public decision-making process and dilute the power of program beneficiaries, is critical. The Welfare Law Center has taken the position that major issues concerning the treatment of the powerless in our society should be debated in public forums, and that policies should be made through the democratic process and subjected to judicial review to determine whether statutory and constitutional rights have been abridged. In particular, we believe that the low income people whose lives are most affected by public policies should be fully involved in proposing, discussing, and deciding upon those policies. This process, we believe, will promote and encourage innovation and policies that serve the long range interests of low income persons and the larger society.

It is theoretically possible for a robust democratic process to take place, and at the end of the day, for decisions to be made to contract out vital public services. In the real world, however, once the possibility of large profits looms, the process is distorted and money and influence

become critical. Surely that is why much of the current debate over welfare privatization addresses the morality of shareholders and owners of private companies profiting from funds appropriated to provide for the poor, the image of battalions of influential lobbyists pursuing state officials to secure lucrative contracts for their companies, and the record of corruption many of the companies involved have in obtaining past government contracts.

Policy concerns

There are many policy concerns, such as:

· Given fixed federal funding for welfare programs and huge unmet needs for improvements in benefits and services, will administration of welfare programs by for-profit companies ultimately siphon off money from welfare programs for the benefit of corporations? (Wisconsin is giving contractors incentives by allowing them to keep much of the money they "save.")

· What evidence is there that for-profit companies can administer welfare programs better than government agencies, now that states enjoy unprecedented control over the design and operation of welfare programs?

· Can for-profit companies satisfy the demands of shareholders for profits and fulfill the fundamental governmental mission to provide for the most vulnerable in society?

· If powerful corporations have a large financial stake in government decisions involving welfare programs, will program beneficiaries be even less able to be heard in the welfare decision-making process?

· Will public displeasure in having corporations with a business world culture of high salaries responsible for administering programs that provide sub-poverty level benefits to families lead to even greater public disillusionment with welfare programs?

For information generally about privatization, see that section on the Welfare Information Network web site: www.welfareinfo.org.

Potential legal issues

There are many areas where law can be involved, but there has been little activity by advocates to date. Possible areas include:

· Challenging decisions made by a contractor in an individual case: If a contractor decides that a participant is ineligible, or should be sanctioned, or will not be provided the training or services that she seeks, there should be a right to review of that decision by an independent source. This has not reached the courts in welfare yet. We thought there would be major problem in Wisconsin, since the law says the private agency can have the final say, but in fact the State has been providing fair hearings and advocates report frequent success there. There has been a major victory in a Medicare case, *Grijalva v. Shalala*.[135] The Supreme Court has been asked to review the case. An HMO which was administering Medicare benefits tried to limit the hearing it would provide, and the United States Government backed it up in court. But a federal court of appeals said full due process requirements apply.

· Challenging the government's contracting process: Each state has many requirements concerning the bidding process and the protections to the state that must be build into the contract. Advocates can try to get involved as requests for bids are prepared and negotiated. There are many things to watch out for. Since private companies seek to assure they will make a profit, they will ask for arrangements that promote that result. If large purchases of equipment are required, they will want a long term contract to make that worthwhile. But this may require a longer commitment than is wise when such profound changes are being tried. Companies may also try to limit their liability for their errors, shifting the costs to the state or the individual, but that just increases the cost to the state or to the needy family and reduces or eliminates state "savings." One way in which both efficiency and good results are promoted in some privatization schemes is to provide incentives for good performance, and there is now much literature on that subject.

Advocates might be able to challenge the legality of a contract after it has been entered into. This is a complex area of the law unfamiliar to most legal services lawyers, but there might be other lawyers knowledgeable about government contracting who would be willing to help.

C. Involvement of Religious Institutions in Providing Social Services

Under the PRA, states that contract with private entities to provide benefits or services may not discriminate against religious organizations. We are beginning to hear about some counties entering into such contracts, and there are national organizations pushing such developments. See, for example, the publication *A Guide to Charitable Choice* published by The Center for Public Justice and the Center for Law and Religious Freedom of the Christian Legal Society at www.cpjustice.org/~cpjustice/CGuide/Guide.html.

Such arrangements are likely to be challenged on First Amendment grounds that government and religion have become improperly entangled, and perhaps on grounds of discrimination against persons seeking services who have different religious beliefs. Note that the PRA sets out some appeal mechanisms by individuals objecting to being served in a religious setting, but it is likely that they will not really be available to affected persons, or that they may not know about them.

Information and resources on the Charitable Choice provisions are available on the Welfare Information Network website: www.welfareinfo.org/faithbase.htm.[136]

For more information about the religious freedom issues presented by the PRA, contact Dan Katz of the American Civil Liberties Union, 122 Maryland Avenue, N.E., Washington, DC 20002, (202) 675-2306.

Entanglement Issues

Contracts with "pervasively sectarian" institutions to provide social services with taxpayer funds would violate Establishment Clause doctrine.[137] The receipt of federal funds by religious institutions is exacerbated by the audits and financial regulations that typically accompany such funding.[138]

Another entanglement problem will arise if religious social service providers act in the place of government, such as if they are permitted to make benefits eligibility determinations. Even the appearance of joint authority between the government and religious institutions is constitutionally prohibited.[139]

Religious Liberty Issues

Another problem is that the law does not contain adequate protections for the religious liberties of recipients. For instance, a state could contract with a single religious institution to provide the services for a geographic area, despite the differing religious beliefs of the recipients who need services from that program.

Employment Discrimination Issues

Title VII of the Civil Rights Act of 1964 exempts religious organizations from that statute's prohibition of religious discrimination. However, the PRA would go well beyond that exemption by permitting religious discrimination by religious organizations *paid with taxpayer funds*. Such actions would violate both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

D. Obtaining information from state agencies

Welfare Law Center

Advocates and the public need basic information about welfare program administration to understand how and whether welfare programs are working. There are two basic problems in getting information:

· states do not collect key information on welfare programs that would allow a full and fair understanding and assessment of these programs. Federal TANF data collection requirements are limited.

· welfare agencies may not readily publish or release information and data that they do collect. Advocates can use state Freedom of Information Laws to obtain this information. Depending on state law, they may go to court to challenge refusals to release information.

IV. Identifying Legal Resources for Welfare Litigation

Identifying the legal resources to bring appropriate court challenges to abusive welfare policies and practices is a major challenge in light of cuts and restrictions on local legal services programs funded by the Legal Services Corporation. Fortunately in the past couple of years new partnerships have been developed and existing ones strengthened to assure that legal representation is available. The Welfare Law Center is working to identify and secure the participation of other providers in major welfare litigation.

Local LSC-funded programs. Legal services offices funded by the federal Legal Services Corporation are located throughout every state. They provide individual legal representation on a range of civil legal matters to those who meet their income guidelines and they are a critical resource for the low-income community. Fortunately, these programs can still provide much representation on welfare and related issues. For example, they can enforce statutes and regulations and challenge informal policies that were not adopted after full notice and comment proceedings. They can represent welfare recipients in administrative hearings to get relief from the application of welfare laws and seek judicial review as long as they do not challenge a welfare reform statute or formal regulation.[140]

Federal restrictions prevent those programs from challenging welfare reform statutes or formally-promulgated regulations and from class actions to stop an unlawful practice. However, the Second Circuit has recently held unconstitutional the restriction that bars representation in a case that seeks to amend or challenge existing law.[141]

Despite the restrictions, LSC-funded programs play a critical role in safeguarding low income individuals rights to welfare and related programs. Through their representation of individual clients, staff in these programs are in a position to identify potential legal issues that may be appropriate for litigation and to make appropriate referrals to non-LSC funded legal services providers that can handle the matter.

Non- LSC funded local providers. In some states there are local providers who do not receive LSC funding who are available to do the work that LSC-funded programs cannot do. Some are former Legal Services programs. In other states these resources do not exist.[142]

Other public interest law offices. Other public interest law offices have participated in welfare litigation, at least with respect to certain issues. For example, the ACLU has been involved in challenges to durational residency requirements, and the NOW Legal Defense and Education Fund has been involved in family cap litigation. Disability and immigrants rights groups are also interested and involved.

Private Bar. The WLC has reached out to educate the private bar about the need for their involvement in welfare litigation and the bar has responded well. We are working to increase their role in litigation in which we are involved and to encourage and assist public interest providers in other states to work with the private bar. In addition, the WLC has reached out to educate the private bar through presentations at ABA Pro Bono Conferences and meetings of the American College of Trial Lawyers.

Private law firms are and have been involved in a number of recent cases, including a number of major WLC center cases challenging aspects of New York City's workfare program.[143]

To encourage large firms to get involved in important cases, the American Bar Association established the Legal Assistance Partnership Project (LAPP) to work to bring

together major firms and public interest and legal services offices. For more information, see http://www.abanet.org/litigation/public/project.html.

Law school professors and law school clinics. Many former legal services lawyers are now directing law school clinics. Students in those clinics often provide representation in individual welfare cases, and provide many other legal services to community groups. Sometimes they will get involved in major litigation. Contact nearby law schools to see if there is someone there interested in learning about your organization and willing to discuss providing legal representation.

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1. See, e.g., *Organizing and Litigation: Joint Strategies to Secure Protection for Workfare Workers*, **Welfare News**, p. 1, Nov. 5, 1998 (Welfare Law Center).

2. For an account of the campaign see Barbara Sard, *The Role of the Courts in Welfare Reform*, 22 **Clearinghouse Rev**. 367 (Aug./Sept. 1988). For background on welfare rights organizing see, e.g. Martha Davis, **Brutal Need** (1993); Richard Cloward and Frances Fox Piven, **Regulating the Poor: The Functions of Public Welfare** (1971) and **Poor People's Movements: Why They Succeed, How They Fail** (1977); N. Kotz and M. Kotz, **Passion for Equality: George Wiley and The Movement** (1977).

3. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, (herein called the PRA) included the Temporary Assistance for Needy Families (TANF) block grant.

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

5. See, e.g., Sherry Leiwant and John Hasen, *Caselaw on Verification Problems*, 21 **Clearinghouse Rev.** 215 (July 1987); *AFDC Verification Packet* (Welfare Law Center 1990 with update as of June 1994).

6. See, e.g., Sard, *supra,* n. 62.

7. Sec. 401 (b) of Social Security Act, as added by sec. 103 (a) of Pub. Law 104-193. The federal TANF statute also bars states from sanctioning a family where the single custodial parent of a child under 6 refuses to work because child care is unavailable. Whether individuals can sue to enforce this provision is an open question.

8. Index No. 407163/96 (Supt. Ct., N.Y. County, April 9, 1999).

9. 1998 WL 635655 (N.Y. App. Div. 1st Dept. 1998).

10. 1998 WL 596625 (N.Y. App. Div. 1st Dept. 1998).

11. See, e.g., *Organizing and Litigation: Joint Strategies to Secure Protections for Workfare Workers*, *supra*.

12. Index No. 4011310/97 (N.Y. Sup. Ct., N.Y. Cy., June 24, 1997).

13. Docket No. 24, 547 (N.M. Sup. Ct., May 29, 1998).

14. Civil Action No. SUCV97-04740C (Mass. Superior Ct., Suffolk Cy., Dec. 29, 1998).

15. No. 99-1044 (Mass. Superior Ct., Suffolk Cy., April 20, 1999).

16. 400 Mass. 806 (1987). For a detailed discussion of the organizing campaign related to this litigation, see Sard, *supra*.

17. See, e.g. *Welfare Cutback Litigation, 1991-1994* (Welfare Law Center, Pub. No. 166).

18. 414 Mass. 157 (1993).

19. 18 Cal. App. 4th 981, 22 Cal. Rptr 2d 852 (Cal. App. 4 Dist. 1993), review denied Dec. 16, 1993).

20. Case No. 709166-1 Cal. Super. Ct., Alameda Cy. Oct. 7, 1993 and Oct. 13, 1993).

21. 134 N.J. 304, 633 A. 2d 964 (1993).

22. See 42 U.S.C. §12101 et seq.

23. See H. Semmel and C. LaChen, *Temporary Assistance for Needy Families and the Americans With Disabilities Act*, 31 **Clearinghouse Rev.** 475 and n. 9 (Jan.-Feb. 1998).

24. 42 U.S.C. § 608 (c).

25. 42 U.S.C. § 12131.

26. 655 A. 2d 1102 (Vt. 1994).

27. 885 F. Supp. 1428 (W.D. Wash. 1995).

28. 945 P. 2d 70 (N.M. Sup. Ct. 1997).

29. 83 F. 3d 1150 (9th Cir. 1996).

30. 30 F. 3d 1057 (9th Cir. 1994).

31. Civil Action No. 94-4840 (E.D. Pa., Sept. 21, 1994)(Stipulation of Settlement).

32. Civil No. 93-159 JO (D. Or., complaint filed Sept. 1993).

33. 202 A.D. 2d 155, 608 N.Y.S. 2d 184 (App. Div. 1st Dept. 1994).

34. 95 Civ. 0641 (E.D.N.Y., Oct. 25, 1996).

35. 1998 WL 401139 (9th Cir., July 20, 1998).

36. N.Y. Sup. Ct., App. Div. 1st Dept., Mar. 23, 1999).

37. Civil Action No. 98-2154E (Mass. Superior Ct., Suffolk Cty., Aug. 25, 1998).

38. See Mary R. Mannix, Marc Cohan, Henry Freedman, Christopher Lamb and Jim Williams, *Welfare Litigation Developments Since the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,* 31 **Clearinghouse Rev.** 435 (Jan.-Feb. 1998) and *Employment Rights of Workfare Participants and Displaced Workers* by National Employment Law Project (April, 1996) on which the following discussion is based.

39. Julie Nice, "Welfare Servitude," 1 *Geo. J. on Fighting Poverty* 340 (1994); Cynthia A. Bailey, "Workfare and Involuntary Servitude - What You Wanted to Know but Were Afraid to Ask," 15 *Boston College Third World Law Journal* 285 (1995).

40. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 415, 430 (1973). See also *Barie v. Laine,* 388 N.Y.S. 2d 878 (N.Y. 1976).

41. U.S. Dep't of Labor Guidance: How Workplace Laws Apply to Welfare Recipients, Daily Lab. Rep. (BNA), No. 103 at E-3 (May 29, 1997) available on the web at www.dol.gov/dol/asp/public/w2w/welfare.htm.

42. *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEO Notice, No. 915.002 (Dec. 3, 1997) available on the web at www.eeoc.gov/docs/conting.txt.

43. *State ex rel. Patterson v. Industrial Comm. Of Ohio*, 77 Ohio St. 201, 672 N.E. 2d 1008 (1996) (workfare workers entitled to same coverage as regular workers); *Arntz v. Southwestern Wilbert Corp*., 156 Mich. App. 309 (1986)(Both state and municipal entity were the employer for determining coverage of workers' compensation); *County of Los Angeles v. Workers' Compensation Appeals Board,* 30 Cal. 3d 391, 179 Cal. Rptr. 214, 637 P. 2d 681 (1981) (work relief is employment for workers' compensation purposes).

44. 1998 WL 596625 (N.Y. App. Div. 1st Dept. 1998).

45. 4 Cal. 3d 685, 94 Cal. Rptr. 421, 484 P.2d 93 (1971).

46. 484 P.2d at 101, fn. 13.

47. 116 S.C. 1114 (1996).

48. See, e.g., *Wilson-Jones v. Caviness*, 107 F.3d 358 (6th Cir. 1996); *Rehberg v. Dep't of Public Safety*, 946 F. Supp. 741 (S.D. Iowa 1996).

49. 57 F.3d 1545 (10th Cir. 1995).

50. 98 CIV ____ (S.D.N.Y. 1998).

51. Settlement of cases of this kind frequently result in payment of lost wages or their equivalent to the worker.

52. 1998 WL 635655 (N.Y. App. Div. 1st Dept. 1998).

53. 26 U.S.C. § 3309(b)(5).

54. 42 U.S.C. § 607(f)(2).

55. (Sup. Ct, N.Y. County, complaint filed May 1997).

56. See *GRIPP News & Notes*, vol. 1, p. 1, Spring 1999. See the GRIPP website: www.arc.org/gripp.

57. http://www.nytimes.com/aponline/a/AP-welfare-List.html.

58. 42 U.S.C. § 608 (c).

59. 42 U.S.C. § 603 (a)(5)(J)(iii).

60. See, e.g., 45 C.F.R. § 260.35 (64 Fed. Reg. 17881, Apr. 12, 1999); Department of Labor Guidance and EEOC Notice (cited above in the discussion of employment law).

61. For an extensive review of the application of federal civil rights protections to welfare employment programs, see Sherry Leiwant and Yolanda Wu, *Civil Rights Protections and Welfare Employment Programs*, 3 **Clearinghouse Review** 454, January-February 1998, and *Employment Rights of Workfare Participants and Displaced Workers*, by the National Employment Law Project, April, 1996.

62. For a discussion see *Securing Access to Multilingual AFDC Procedures, Personnel, and Notices* (Welfare Law Center, June 1995).

63. *NAACP Legal Defense and Education Fund v. New Jersey*, Docket No. 02-92-3111 (U.S. Dep't of Health and Human Services, Office of Civil Rights, Jan. 13, 1995).

64. 92 F. 2d 171 (3rd Cir. 1996).

65. See Leiwant and Wu, p. 459.

66. Sarah Ramsey and Daan Braveman, *"Let Them Starve": Government's Obligation to Children in Poverty*, 68 **Temple Law Rev.** 1607 (Winter, 1998).

67. 394 U.S. 618 (1969).

68. For information see the Welfare Law Center's website: www.welfarelaw.org.

69. __ U.S.__ (1999).

70. 406 U.S. 535, 92 S.Ct. 1724 (1972), rehearing denied, 409 U.S. 898, 93 S.Ct. 178 (1972).

71. 399 F. Supp. 348 (M.D.Ala. 1975).

72. 403 U.S. 344 (1971).

73. 443 U.S. 76 (1979).

74. 411 U.S. 619 (1973).

75. 397 U.S. 471 (1970).

76. 413 U.S. 528 (1973).

77. *Bradford v. County of San Diego,* No. 97-CV-1024-JM (S.D. Cal., July 29, 1997).

78. *C. K. v. New Jersey Department of Health and Human Services*, 92 F. 3d 171 (3rd Cir. 1996).

79. (N. J. Superior Ct., Chancery Div., Essex County).

80. *N.B. v. Davis*, Cause No. 49D11-9706-CP-926 (Superior Ct., Marion Cty., Indiana, Apr. 16, 1999) Plaintiffs report that they are appealing.

81. *Price v. Cohen,* 715 F.2d 87 (3rd Cir. 1983).

82. *Guidice v. Lukard*, 726 F. 632 (E. D. Va. 1989).

83. *Baker v. Concord*, 916 F.2d 744 (1st Cir. 1990).

84. 397 U.S. 254 (1970).

85. 470 U.S. 532 (1985).

86. *Reynolds v. Giuliani*, No. 98 Civ. 8877 (WHP) (S.D.N.Y. Jan. 25, 1999). For selected papers and the decision, see the Welfare Law Center website: www.welfarelaw.org. See also the discussion at pp. -----.

87. *Report Reveals TANF Application Barriers in Alabama Welfare Offices,* **Welfare News** (June 30, 1998), p.5. (Welfare Law Center).

88. Steven L. Meyers, *Welfare Reform in Virginia: Observations on the First Two Years,* Virginia Poverty Law Center, February 1998.

89. Bill Boggs, *Sanctions Revisited* (1997). www.welfareinfo.org/sanction.htm.

90. *Montana Sanctions Family for One Day Late Filing*, **Welfare News (Mar. 2, 1998)**, p. 5 (Welfare Law Center).

91. *Mangracina v. Turner*, 98 Civ. 5585 (JSR) (S.D.N.Y. complaint filed August 1998).

92. *Weston v. Hammons*, Case No. 99CV 0412 (Co. Dist. Ct. Denver, Jan. 21, 1999).

93. In Delaware a hearing officer reversed a sanction based on inadequate notice and chided the agency for not following longstanding due process requirements embodied in regulation. *In re T.O.*, DCIS No. 166360 (Del. Dept. of Health & Social Services, Feb. 13, 1998).

94. See Adinah Robertson and Russ Overby, *Making Written Notices Understandable: A Collaborative Approach*, **Welfare News**, p. 1 (Welfare Law Center, April 1999); also available on the Center's website: www.welfarelaw.org.

95. *Bowling v. Davis*, Civil Action No. IP 98-497-C H/G (S.D. Ind. Mar. 19, 1999).

96. For information on the Welfare Law Center cases discussed in this section see the Welfare Law Center's website: www.welfarelaw.org.

97. 400 U.S. 309 (1971).

98. For information on General Assistance programs, see Heather McCallum and Jerome Gallagher, *State General Assistance Programs 1996*, (The Urban Institute, Oct. 1996).

99. 68 **Temple L. Rev.** 1607 (Winter, 1995).

100. *Lavine v. Milne*, 424 U.S. 577, 584, n.9 (1976) citing *Dandridge v. Williams*, 397 U.S. 471 (1970).

101. 489 U.S. 189 (1989).

102. See, e.g., Charles Black, *Beyond the New Property: Redefining the Individual*, 56 **Brooklyn Law Rev.** 731 (1990) ; Peter Edelman, "The Next Century of Our Constitution: Rethinking Our Duty to the Poor," 39 **Hastings L.J**. 1 (1987).

103. See, e.g., *Tucker v. Toia*, 337 N.E. 2d 449 (1977) (invalidating denial of aid to those under 21 not living with parent or responsible relative unless person began support proceeding); *Bernstein v. Toia*, 373 N.E. 2d 238 (N.Y. 1977) (rejecting constitutional challenge to maximum shelter grant regulation on ground that while constitution bars exclusion of needy individuals, legislature and agency have discretion to determine levels of aid).

104. Index No. 402791/98 (N.Y. Sup. Ct., N.Y. Cty., Dec. 21, 1998).

105. *Butte Community Union v. Lewis*, 745 P. 2d 1128 (Montana 1987).

106. 233 Conn. 557 (1995).

107. 865 P. 2d 197 (Kansas 1993).

108. 621 N.E. 2d 1374 (Ohio Ct. App. 1993).

109. See Alyssa Katz, *Human Rights on Wheels*, **The Nation**, p. 19 (Dec. 28, 1998) and KWRU's website: www.libertynet.org/~kwru.

110. See their article *supra* at note 66.

111. Ruth Bader Ginsburg and Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue* (Benjamin N. Cardozo Lecture delivered by Justice Ginsburg on Feb. 11, 1999 to the Association of the Bar of the City of New York).

112. *Boehm v. Superior Court*, 233 Cal. Rptr. 716 (1986).

113. 90 S.Ct. 1153, 1180 at n.14 (1970).

114. 621 N.E. 2d 1373 (Ohio Ct. App. 1993).

115. The differences in program rules are too complicated for extensive discussion in this paper. These rules and the general issue of assuring that families retain eligibility for Medicaid and Food Stamps have been thoroughly analyzed by the Center on Budget and Policy Priorities. Liz Schott and Cindy Mann, *Assuring That Eligible Families Receive Medicaid When TANF Assistance is Denied or Terminated* (Center on Budget and Policy Priorities, Nov. 5, 1998)(www.cbpp.org/11-5-98mcaid.htm); Liz Schott, *Assuring That Families Receive Food Stamp and Medicaid Benefits For Which They Qualify When TANF Assistance is Denied or Terminated* (Center on Budget and Policy Priorities, Aug. 27, 1998).

116. *Reynolds v. Giuliani*, 98 Civ. 8877 (WHP) (S.D.N.Y., Jan. 25, 1999). For extensive information about the case, including the complaint, decision, and Welfare Law Center articles, see the Center's website: www.welfarelaw.org.

117. *Walton v. Hammons*, No. 97-75893. (E.D. Mich. Mar. 20, 1998).

118. *Mangracina v. Turner*, 98 Civ. 9585 (S.D.N.Y. complaint filed August 1998) (pending).

119. The discussion in this section is taken from an article by the Welfare Law Center and others: Jo Ann Gong, Alice Bussiere, Jennifer Light, et al., *Child Care in the Post-Welfare Reform Era: Analysis and Strategies for Advocates*, 32 **Clearinghouse Rev.** 373 (Jan./Feb. 1999).

120. 42 U.S.C. § 607 (e)(2).

121. 45 C.F.R. § 261.51 (c), 64 Fed. Reg. 17720-19931 (Apr. 12, 1999).

122. 493 F.2d 1319 (2nd Cir. 1974).

123. 493 F.2d at 1322.

124. 493 F.2d 1322.

125. 493 F.2d at 1322.

126. 493 F.2d at 1323, 1325.

127. 493 F.2d at 1323. See also, *Unemployed Workers v. Hackett*, 332 F.Supp 1372 (D.RI 1971); *Doyle v. O'Brien*, 304 F. Supp 704 (dictum)(D. Mass. 1969), *aff'd*, 90 S.Ct. 603 (1970).

128. *New York City Unemployed and Welfare Council v. Brezenoff*, 677 F.2d 232 (1982).

129. 677 F.2d at 238.

130. 677 F.2d at 238.

131. 91 F.3rd 1076 (8th Cir. 1996).

132. 91 F.3d at 1080-81.

133. *Families Achieving Independence & Respect (FAIR) v. Nebraska Department of Social Services*, 111 F.3rd 1408 (8th Cir. 1997)(*en banc*), *aff'g*, 890 F. Supp. 860 (D. Neb. 1995), *vacating*, 91 F.3d 1076 (8th Cir. 1996).

134. 107 F.3d 32 (D.C.Cir.1997).

135. — F.3d ---- (9th Cir. 1998).

136. See, e.g., *Q & A on "Charitable Choice" in Welfare Reform* (Section 104 of P.L. 104-193) by J. Hareysi, Office of Family Assistance, ACF, DHHS; this piece also summarizes faith-based initiatives.

137. See *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

138. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

139. *Larkin v. Grendel's Den*, 459 U.S. 119 (1982).

140. See Alan Houseman, *Permissible Work on Welfare Reform By LSC Recipients*, Center for Law and Social Policy (April, 1998).

141. *Velazquez v. Legal Services Corp.* (2d Cir., Jan. 7, 1999). The decision is limited to the Second Circuit and the defendant is seeking further review.

142. For a listing of LSC and non-LSC funded programs, see *The 1998/1999 Directory of Legal Aid and Defender Offices in the United States and Territories* (NLADA 1998).

143. See, e.g., *Law Firms Provide Invaluable Assistance in Welfare Law Center Cases*, **Welfare News**, June 30, 1998.