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TANF AND ITS IMPLICATIONS ON THE AUTONOMY OF INDIGENT SINGLE MOTHERS

INTRODUCTION

In 2002, *New York Times* correspondent Jason DeParle researched the effects of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)¹ on the lives of welfare recipients.² In an interview with *AdvoCasey*, the Annie E. Casey Foundation's policy magazine, DeParle commented that the theory behind the 1996 welfare reform bill was "that if we can get women into the workforce, it will benefit their kids both in economic and non-economic ways: it'll create positive role models, inject new order into family life, motivate kids to study and work hard themselves."³ DeParle's observation of three families receiving welfare benefits suggests these high expectations are not necessarily being met in the lives of actual welfare recipients.⁴ He comments:

it sure doesn't seem that way in most of the families I've gotten to know. In the three families I'm following, I would have to say that welfare reform has meant almost nothing for the kids. There may be a little bit more money, and a little bit more pride in the mothers, but there's also more stress, and there's more unsupervised time for adolescents in a neighborhood where there's lots of trouble to get into.⁵

PRWORA, welfare reform legislation that President Bill Clinton signed into law in August 1996, "changed the structure of income support for poor single-parent families. . . ."⁶ Supporters believed that passing the bill would accomplish two goals.⁷ The economic goal was to ostensibly place impoverished welfare mothers on the road

1. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

2. *The Story Behind The Welfare Story: An Interview with New York Times Correspondent Jason DeParle*, *ADVOCASEY: DOCUMENTING PROGRAMS THAT WORK FOR KIDS AND FAMILIES*, Summer 2002, at 32 [hereinafter *DeParle Interview*], available at <http://www.aecf.org/publications/advocasey/summer2002/story/>.

3. *Id.* at 37.

4. *Id.* at 35.

5. *Id.* at 37-38.

6. JANICE PETERSON, ET AL., *INST. FOR WOMEN'S POL'Y RES., LIFE AFTER WELFARE REFORM: LOW-INCOME SINGLE PARENT FAMILIES, PRE- AND POST-TANF 1* (2002), available at <http://www.iwpr.org/pdf/d446.pdf>.

7. See SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM 18-19* (2003) (arguing that there are two conflicting visions of work and family life embedded in PRWORA, which she terms the "Work Plan" and the "Family Plan").

to economic self-sufficiency by placing them in the workforce.⁸ A second, more invidious goal of PRWORA was to reduce out-of-wedlock pregnancies, promote marriage as a route off welfare, and allow children to be 'cared for at home.'⁹ Essentially, "the PR[WOR]A extends the inveterate moral prescriptivity of welfare policy, and to back up its prescriptions it provides the economic sanction of work outside the home."¹⁰

This note addresses the defects of the caseload reduction focus of PRWORA and how it actually frustrates the main goal of economic relief to impoverished families. First, the note will give background information into the policies informing the 1996 welfare reform. Second, the note will analyze the adverse cumulative effect of the welfare-to-work and the family formation components of welfare reform and how they frustrate the goal of self-sufficiency. Next, the note will explore the autonomy argument critique of the family planning prong of PRWORA and its constitutional implications. Finally, the note will argue that by adjusting the Temporary Assistance to Needy Families (TANF) program's focus to fulfill the need rather than forcefully promote a normative social goal, the program will better meet the needs of indigent women and their children. If welfare legislation were more responsive to need, the system would be better equipped to achieve the ultimate economic goal of self-sufficiency. As for the social reform rationale of the TANF legislation, the government should not interfere with a woman's ability to live free from unwarranted intrusion into the domestic sphere.¹¹ To this end, a welfare model must be created that maximizes the ability of welfare recipients to make autonomous decisions.

8. *Id.* But see MIMI ABRAMOVITZ, UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES 69 (2000) (arguing "[t]he anti-welfare rhetoric masked one of the underlying reasons for the attack on ADC: the competing demand for women's unpaid labor in the home and their low-paid labor in the market").

9. HAYS, *supra* note 7, at 19 (discussing Pub. L. No. 104-193, 110 Stat. 2110, (1996) (codified at 42 U.S.C. 601, et. seq.)); see also THE LEWIN GROUP, INC. for the ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, DEP'T OF HEALTH AND HUMAN SERVICES, STATE EXPERIENCE AND PERSPECTIVES ON REDUCING OUT-OF-WEDLOCK BIRTHS (February 2003), available at <http://aspe.hhs.gov/hsp/nonmarital-births03>.

10. GWENDOLYN MINK, WELFARE'S END 43 (1998).

11. See Jared Bernstein & Mark Greenberg, *Reforming Welfare Reform*, 12 AM. PROSPECT 10, 14 (2001) (arguing that improvement of economic well-being for poor families with children should be the goal of welfare reform). But see *Hearing on Welfare Reform Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 107th Cong. 50-84 (2001) (statement of Robert Rector, Senior Policy Analyst, Heritage Foundation) (arguing that the family formation goals of TANF are its most fundamental goals).

THE 1996 WELFARE REFORM LAW AND UNDERLYING POLICY DEBATE

Ann Shola Orloff argues that the 1996 welfare reform consists of three major components.¹² First, it eliminated both the social right and caregiving as bases for presenting claims.¹³ Second, it expanded the role of the market in providing single parents with income and childcare.¹⁴ Finally, it shifted toward gender sameness because the policy expectations for mothers were the same as those for fathers, namely employment.¹⁵ The legislation replaced Aid to Families With Dependent Children (AFDC) with Temporary Assistance to Needy Families (TANF), citing as one of its primary rationales the significant reduction of the welfare caseload.¹⁶ The means chosen to achieve this end included eliminating entitlements to federal cash assistance and imposing time limits for federal aid.¹⁷ It also placed caps on extending benefits for children conceived while receiving welfare, and gave states wide latitude to create "work-based safety-nets" for poor families with children.¹⁸ In theory, all of these measures *should* have led to the increased self-sufficiency and autonomy of former welfare recipients.¹⁹ Yet, under the 1996 legislation, once a family reaches its five-year lifetime limit on benefits, there is no guarantee of a job. Even when a 'leaver' does find a job, it is likely to be a low wage job with few or no benefits.²⁰ As a result, many impoverished single mothers suffered an abrupt loss of welfare assistance without the corresponding means to self-sufficiency. This portion of the legislation garnered some of the most

12. Ann Shola Orloff, *Ending the Entitlements of Poor Single Mothers: Changing Social Policies, Women's Employment, and Caregiving in the Contemporary United States*, in *WOMEN AND WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE* 133, 134 (Nancy J. Hirschmann & Ulrike Liebert, eds., 2001).

13. *Id.*

14. *Id.*

15. *Id.*

16. PETERSON, ET AL., *supra* note 6, at 1.

17. See generally CTR. FOR LAW AND SOC. POL'Y, KEY PROVISIONS IN TANF REAUTHORIZATION BILLS PASSED BY THE SENATE FINANCE COMMITTEE AND THE HOUSE (2003), available at http://www.clasp.org/Pubs/DMS/Documents/1064343116.03/Summary_SBS.pdf (highlighting the similarities and differences among the AFDC, the Senate Finance Bill that would amend it, and the House Bill that would do the same).

18. HAYS, *supra* note 7, at 27.

19. See *The Needs of the Working Poor: Helping Working Families Make Ends Meet Before the Senate Comm. on Health, Educ., Labor and Pensions* 106th Cong. (2002) (statement of Heather Boushey) [hereinafter Boushey] available at http://www.epinet.org/printer.cfm?id=98&content_type=1.

20. INST. FOR WOMEN'S POL'Y RESEARCH, BEFORE AND AFTER WELFARE: THE WORK AND WELL-BEING OF LOW-INCOME SINGLE PARENT FAMILIES, FACT SHEET (2003), available at <http://www.iwpr.org/pdf/D459.pdf>.

heated criticism from liberal camps.²¹ A study done by the Institute for Women's Policy Research (IWPR) in September 2002, six years after the PRWORA became law, showed that "[d]espite the increased work effort of their parents and declining poverty overall, family income declined for extremely poor children between 1996 and 2000."²² Conversely, proponents of the welfare reform legislation pointed triumphantly to the decline in the number of families receiving public assistance.²³

THE FAMILY FORMATION PRONG AND ITS ENCROACHMENT ON AUTONOMY

The family formation component of PRWORA is particularly troublesome from an autonomy perspective because it aims to impose a uniform standard for proper familial behavior upon citizens.²⁴ Mink argues that PRWORA is an "unapologetic imposition of moral stipulations" and a "bold appropriation of the police power."²⁵ Such a robust exercise of police power raises equal protection issues, because only that segment of the population receiving government benefits is subjected to such intrusion on family life.²⁶ The Fourteenth Amendment of the United States

21. See AMERICAN FEDERATED STATE COUNTY MUNICIPAL EMPLOYEES, THE IMPACT OF THE NEW FEDERAL WELFARE LAW ON CHILD WELFARE SERVICES (2002), at <http://www.afscme.org/publications/child/cww98107.htm> [hereinafter FEDERATED EMPLOYEES]; see also HAYS, *supra* note 7, at 16.

But the provision of welfare reform that gives work requirements real teeth . . . is the federal time limits on benefits . . . [A]ll welfare recipients are expected to be self sufficient — and no matter how destitute they might be, they will remain ineligible to receive welfare assistance for the rest of their lives.

Id.

22. DEANNA M. LYTER, ET AL., INST. FOR WOMEN'S POL'Y RES., CHILDREN IN SINGLE-PARENT FAMILIES LIVING IN POVERTY HAVE FEWER SUPPORTS AFTER WELFARE REFORM 4-5 (2002), available at <http://www.iwpr.org/pdf/d451.pdf> (noting that for children younger than six living in extreme poverty, family income declined from \$380 to \$301 per month).

23. JANICE PETERSON, INST. FOR WOMEN'S POL'Y RES., FEMINIST PERSPECTIVES ON TANF REAUTHORIZATION: AN INTRODUCTION TO KEY ISSUES FOR THE FUTURE OF WELFARE REFORM (2002), available at <http://www.iwpr.org/pdf/e511.htm> (noting that "[b]y the time of TANF's passage in August of 1996, caseloads had declined to 4.4 million families" (from a peak of 5 million families in 1994) and, "after the passage of TANF the rate of decline in the caseload escalated, falling to 2.5 million families by June 1999 — a 50 percent decline since the peak in 1994").

24. FEDERATED EMPLOYEES, *supra* note 21; see also HAYS, *supra* note 7, at 65. ("In a parallel to the work requirements, welfare policies aimed at instilling proper familial behavior are designed to reflect a cultural image of how all people should behave with respect to childbearing, childrearing, marriage, and family.")

25. MINK, *supra* note 10, at 64.

26. *Id.* at 94.

Constitution states "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁷ If the laws governing welfare subject recipients to an undue amount of governmental control, the equal protection concerns are justified.²⁸ When an individual signs up for government assistance, it is *not* a given that she also intends to sign away her ability to act autonomously. Hays notes this overly paternalistic treatment of welfare recipients "is a notable exception to our strong cultural and constitutional prohibitions against state interference in private lives, particularly familial behavior."²⁹ It also reveals assumed biases against welfare mothers, particularly that they are socially deviant and require punitive measures to discourage their pathological predisposition to bear children in order to receive increased benefits.³⁰ Welfare recipients and the working poor lack the political platform upon which to voice their displeasure with the system that so intimately affects them. Their powerlessness makes it nearly impossible for them to refute the myth of their irresponsibility and pathological dependency upon the system. Unfortunately, unfavorable stereotypes of welfare mothers as cheating 'welfare queens' and immoral women encourage the acceptance of intrusive and punitive policies against welfare beneficiaries.³¹

THE PRWORA HISTORY

Enacted in 1996 as a result of heated political debate, the PRWORA fulfilled President Clinton's 1992 campaign promise to "end welfare as we know it."³² The bill was the culmination of extensive debate in which Republicans and Democrats put forth opposing ideas about how to reform welfare policy. Democrats tended to favor reform through welfare-to-work programs while keeping intact the basic concept of entitlement to assistance.³³ On the other side of the political aisle, most Republicans wanted to

27. U.S. CONST. amend. XIV, § 1.

28. MINK, *supra* note 10, at 92.

29. HAYS, *supra* note 7, at 66.

30. See generally RACE AND THE POLITICS OF WELFARE REFORM (Sanford F. Schram, et al. eds., 2003) (discussing the history of welfare and its impact on the politics of race).

31. See generally Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 171 (Sanford F. Schram, et al. eds. 2003).

32. Kathleen J. Casey & Susan J. Carroll, *Welfare Reform in the 104th Congress: Institutional Position and the Role of Women*, in WOMEN & WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE 111, 111 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001) (citing CONG. Q. 2,696 (Sept. 21, 1996)).

33. *Id.* at 117.

dismantle welfare, particularly AFDC, and shift the burden of providing assistance from the federal government to the states.³⁴ Conservatives wanted strict work requirements as a way of reforming the perceived deviance of poor, inner-city mothers.³⁵ Conservative policy makers and political operatives charged that welfare "encouraged perverse behavioral choices, flouted the obligations of citizenship, and undermined the voluntarism of civil society."³⁶ Ironically, the arguments for the sweeping welfare reform were buttressed by the ideals of personal freedom and privacy espoused so vigorously in the United States' legal tradition.

The 1996 welfare reform significantly altered the federal funding structure of public assistance.³⁷ Under AFDC, the federal government matched state expenditures on welfare programs, whereas TANF, AFDC's replacement, relieved the federal government of this expense.³⁸ After the 1996 reform, each state received a lump sum of federal funds, contingent upon the state's meeting a maintenance-of-effort requirement.³⁹ PRWORA also gave states increased discretion in using TANF funds and designing programs with those funds.⁴⁰ Under TANF, federal funding does not fluctuate based on caseload changes.⁴¹ Instead, the formerly open-ended grant became a block grant with a spending cap of \$16.5 billion annually.⁴² The allocation was based on 1994-95 caseload amounts, which decreased nationwide in the ensuing years.⁴³ This new setup gave state governments an incentive to reduce caseloads to yield a financial surplus they could then reallocate in any manner they deemed appropriate.⁴⁴ Federal entitlements to cash welfare were also cut by TANF.⁴⁵ Under AFDC, all families whose income

34. *Id.*

35. Michael Brown, *Gettos, Fiscal Federalism, and Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 47, 47 (Sanford F. Schram, et al. eds., 2003).

36. Sanford F. Schram & Joe Soss, *Success Stories: Welfare Reform, Policy Discourse and the Politics of Research*, ANNALS AM. ACAD. POL. & SOC. SCI. (2001) (citing generally JEAN STEFANCIC, ET AL., NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996)).

37. CTR. FOR LAW & SOC. POL'Y, *supra* note 17.

38. *See id.*

39. *See id.*

40. Brown, *supra* note 35, at 51.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 48.

fell below certain state income standards were entitled to cash assistance.⁴⁶ Under the new plan, these families must meet certain work requirements to be eligible for such assistance.⁴⁷

The goals of PRWORA and TANF are four-fold.⁴⁸ First, the overarching goal is to provide relief to families living below the poverty line.⁴⁹ Second, TANF seeks to end dependence of needy parents by promoting work and marriage.⁵⁰ Third, PRWORA is aimed at encouraging the formation and maintenance of two parent families.⁵¹ The final goal of PRWORA is to encourage the formation and maintenance of two parent families.⁵²

PRWORA aims to promote the standard two parent family model to poor mothers.⁵³ In its November 2001 letter to Health and Human Services Secretary Tommy Thompson, the ACLU vehemently criticized this social reform component, arguing that the "[v]arious requirements under the current TANF program require recipients to submit to certain family structures and relationships upon penalty of losing benefits" should be rejected in the reauthorization legislation that is still pending.⁵⁴ Some feminist scholars like Gwendolyn Mink would argue that welfare reform not only attempts to change the lifestyle of single mothers, but also punishes single mothers for those lifestyle choices.⁵⁵ This objective assumes that poor mothers make the conscious decision to deviate from the two parent model.⁵⁶ It also gives the federal government the power to prescribe a national family model, which offends traditional constitutional values of privacy in the domestic sphere. Mink observes that the work requirements blatantly reward marriage by not forcing mothers in two parent families to work outside the home, even if their families need welfare to make ends

46. *Id.*

47. *Id.* at 50.

48. CTR. FOR LAW & SOC. POL'Y, *supra* note 17.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *See generally*, MINK, *supra* note 10 (discussing welfare reform and its effect on indigent mothers).

54. Letter from American Civil Liberties Union to Tommy Thompson, Secretary, Dep't of Health and Human Serv. (November 2001), *available at* <http://archive.aclu.org/congress/1113001a.html> (regarding TANF program).

55. MINK, *supra* note 10, at 105.

56. JANE G. MAULDON, ET AL., WELFARE REFORM AND FAMILY FORMATION PROJECT, WHAT DO THEY THINK? WELFARE RECIPIENTS' ATTITUDES TOWARD MARRIAGE AND CHILDBEARING 1 (2002), *available at* www.abtassociates.com/wrffproject.

meet.⁵⁷ Mink concludes "the PR[WOR]A's work provisions permit full-time care-giving where there are two parents, but forbid it where there is only one."⁵⁸

Mink's misgivings about PRWORA are characteristic of the general feminist critique of the 1996 welfare reform.⁵⁹ It is likely that liberal feminists would not find the work requirement so offensive if it were applied evenhandedly.⁶⁰ The disparate treatment of single mothers strongly suggests that the work requirement is merely a means of legislating morality obscured by the rhetoric of "individual responsibility."⁶¹ Mink argues "[t]he differential based on marital status in the application of work requirements is further evidence that the PR[WOR]A's primary goal is to restore the system of gender relations in which men pay for families while women raise them."⁶² Aside from the serious constitutional problems this goal raises, it also leads to policies that fail to optimally respond to the needs of the citizens PRWORA was intended to help. In an attempt to balance the day-to-day caregiving duties of parenting with the 'breadwinning' duties, the single mother is essentially forced to form a two parent family unit with a male wage earner to make ends meet *and* take care of her children.⁶³

AUTONOMY AND ECONOMIC PRIVATION

Autonomy is one of the crucial foundations of the American legal tradition.⁶⁴ Citizenship is frequently presupposed in American society, and is often defined in terms of a reciprocal relationship between a citizen and the greater society.⁶⁵ Essentially, in our capitalist society, citizenship presupposes participation in the national economy.⁶⁶ Further discussing the assumptions of citizenship, Joan C. Tronto urges us to "recall . . . the Aristotelian model of the citizen as one who participates in public life, but whose actual conditions of life presuppose a separate realm of existence in

57. MINK, *supra* note 10, at 106.

58. *Id.*

59. *Id.*

60. *Id.* at 19.

61. *Id.* at 106.

62. *Id.*

63. *Id.* at 107.

64. See generally Nancy J. Hirschmann, *A Question of Freedom, A Question of Rights? Women and Welfare*, in *WOMEN & WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE* 84, (Nancy J. Hirschmann & Ulrike Liebert eds., 2001).

65. *Id.*

66. *Id.*

which economic activity and the work of care go on.⁶⁷ In order for a socioeconomic system to have the productive citizens it requires, there must be a separate sphere — the domestic sphere — in which current and future citizens are reared and maintained.⁶⁸

Often, welfare recipients — predominantly poor women — are constructively denied autonomy and citizenship because of the unstated requirement to contribute to the national economy.⁶⁹ Part of this relates to the double-edged sword of redistributive action: “[W]hile [it] . . . can mitigate poverty, such redistribution . . . may, on the one hand, undermine a citizen’s sense of participation in community and so undermine the citizen’s sense of self-worth.”⁷⁰ Those who benefit from redistributive policy must also deal with the perception of their peers that they are somehow less important because they receive aid from the government.⁷¹ The inherent biases against those who receive government assistance are compounded when those recipients are predominantly mothers.⁷²

Yet another reason for the lack of autonomy for poor mothers involves the dismissive attitude toward the work of mothers as caregivers.⁷³ As it stands, caregiving work is not recognized as productive economic activity.⁷⁴ Martha Fineman argues that caregiving is a sort of unrecognized subsidy:

Within families there is an entrenched system of injustice, found in the important, but invisible, type of subsidy of uncompensated family labor This is the subsidy of time and energy that occurs when others sacrifice market participation in order to facilitate the endeavors and success of those for whom they care. Caretaking work is taken for granted. Labor overwhelmingly supplied by women working as mothers, wives and daughters is not considered in calculating the gross national product.⁷⁵

67. Joan C. Tronto, *Who Cares? Public and Private Caring and the Rethinking of Citizenship*, in *WOMEN & WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE* 65, 66 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001).

68. *Id.* at 68-70.

69. *See id.* at 66 (arguing the contemporary U.S. model of citizenship presumes the citizen as a worker).

70. Eva Feder Kittay, *From Welfare to Public Ethic Care*, in *WOMEN AND WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE* 36, 43 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001).

71. *Id.*

72. Mink, *supra* note 10, at 23.

73. *Id.* at 22-23.

74. *Id.*

75. Martha Fineman, *The Nature of Dependencies and Welfare “Reform”* at <http://www.scu.edu/ethics/publications/other/lawreview/dependencies.html> (last visited October 24, 2004).

This is a critical issue, since assumptions regarding the merits of certain activities carry a lot of weight in shaping policy:

By offering protection against specified income risks, the welfare state operates to valorize certain activities and to integrate some into the economic order, while excluding others. For example, protection against the income risks associated with employment both socializes and normalizes the experience of wage earners [F]ailure to provide income security for carers results in marginalization from the economic order.⁷⁶

This marginalization is further proof that caregiving labor is not recognized as essential to the functioning of businesses and governments.⁷⁷ Mink argues that "[o]nce we establish that *all* caregiving is work, whatever the racial, marital, or class status of the caregiver, we can build a case for economic arrangements that enable poor single mothers to do their jobs."⁷⁸ As many feminist theorists argue, caregiving is recognized as an economic activity when wage-earning mothers pay for childcare.⁷⁹ By recognizing caregiving as a valid economic activity, there would be no need to condition benefits on working outside the home, because caregiving *would* count as a 'work activity' for the purpose of receiving benefits. Mink argues "[w]e need to redefine welfare in this way to enable equality Income support for all caregivers who are going it alone would permit them to decide how best to manage their responsibilities to children."⁸⁰ If women are paid when they work as nannies and babysitters, then no stigma should be attached to poor caregiving mothers for receiving welfare benefits when they do the same work for their own children.⁸¹ Mink states "[r]emuneration for mothers' caregiving work ought not to be too difficult to calculate, for much of the work done by mothers already has a market price if performed for someone else's family."⁸²

This reconceptualization of welfare's focus would reduce the

76. MARY DALY & KATHERINE RAKE, *GENDER AND THE WELFARE STATE* 94 (2003).

77. See Martha Albertson Fineman, *Dependencies*, in *WOMEN & WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE* 23, 27 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001) [hereinafter Fineman, *Dependencies*] (arguing that "[a]ll of us benefit directly and indirectly from the reproduction of our society that occurs in the home").

78. MINK, *supra* note 10, at 134 (emphasis in original).

79. *Id.*

80. *Id.* at 137.

81. *Id.* at 135.

82. *Id.* at 29. Mink also argues, however, that the value legislators choose to assign to caregiving as an economic activity may also be dependent upon the race and class of the caregiver. *Id.* at 28.

invasive nature of PRWORA on poor women's lives. Rather than setting the achievement of certain social norms as the program's goal, "the only condition government could reasonably impose on a care-giver's income is whether the labor is, in fact, done. A caregiving mother's income would not depend on her private moral choices or on her cultural practices"⁸³ The concept of economic remuneration for caregiving work by mothers is not new; in fact, welfare was originally designed "more than eighty years ago as an income alternative to a market wage for solo mothers, so that they could work in the home raising their own children."⁸⁴ The so-called 'mother's pension' of the early twentieth century also subjected needy mothers to moral worthiness and cultural assimilation requirements.⁸⁵ A return to the concept of subsidizing a mother's caregiving responsibilities without such requirements could actually give impoverished women a choice in how to conduct their households.

WELFARE AND POSITIVE LIBERTY

One way to make welfare more responsive to the needs of indigent mothers is to conceive it in terms of positive liberty.⁸⁶ The distinction between positive and negative liberty goes back to the great German philosopher Immanuel Kant.⁸⁷ Negative liberty is defined as the absence of external constraints on action.⁸⁸ Positive liberty, on the other hand, is the possibility of acting in such a way as to take control of one's life and realize one's fundamental purposes.⁸⁹ Currently, PRWORA conveys a negative liberty in response to the plight of indigent women.⁹⁰ This implies that moving women into the workforce will free them from the external constraints of poverty that act upon them. Conversely, positive liberty posits the provision of "conditions necessary to take advantage of negative liberties"⁹¹ Hirschmann argues that welfare reform policy frustrates the requirements of positive liberty:

83. *Id.* at 137.

84. *Id.* at 44.

85. *Id.* at 45.

86. Hirschmann, *supra* note 64, at 85.

87. Ian Carter, *Positive and Negative Liberty*, STANFORD ENCYCLOPEDIA OF PHIL. (2003) available at <http://plato.stanford.edu/entries/liberty-positive-negative/> (last visited October 24, 2004).

88. Hirschmann, *supra* note 64, at 86.

89. Carter, *supra* note 87.

90. Hirschmann, *supra* note 64, at 84.

91. *Id.* at 86.

It may be for this reason that programs such as workfare — where, in the supposed interest of making welfare recipients independent . . . taxpaying citizens, recipients are forced to take low-wage, dead-end jobs that provide little if any training in skills . . . which could lead to economic independence . . . — do not actually fulfill the criteria of positive liberty; can anyone honestly believe that my true will is to perform mindless minimum wage labor rather than pursue a college degree which would enable me to obtain a much higher-paying and intellectually stimulating job . . . ?⁹²

Rather than pushing women into a workfare system, women can achieve more positive liberty if welfare policy is restructured to center around care rather than work.⁹³ Refocusing welfare in this manner would not subvert the current policy goal of reducing the welfare caseload since the idea of self-sufficiency and entering the workforce is embodied within the idea of enabling women to care for their families. Mink similarly suggests:

[w]e should not think of welfare as a subsidy for dependence; nor should we think of it as an income substitute for the wage earned by breadwinners — fathers — in the labor market. Rather, we should reconceive welfare as the income *owed* to persons who work inside the home caring for, nurturing, and protecting children.⁹⁴

Rather than the superficial goal of just reducing the caseload — which alleviates the symptom rather than cures the illness — shifting the focus to care would actually enable poor women's autonomy.⁹⁵ Such an approach appreciates the fact that poor women will never exercise their autonomy without first having substantial enabling policies, such as access to childcare, to assist them in their effort to become self-sufficient, productive members of society.

PRWORA, and welfare in general, was supposed to be the great leap to self-sufficiency for millions of poor mothers.⁹⁶ Couched in these terms, welfare reform could be construed as the government's attempt to encourage the autonomy and personal freedom of poor

92. *Id.* at 102.

93. *Id.* at 104.

94. MINK, *supra* note 10, at 19.

95. *Id.* at 137.

96. Hirschmann, *supra* note 64, at 84 ("[W]elfare can, at least in theory, be seen as a series of programs developed as a resource to empower citizens, to enable them to liberate themselves from certain restrictive conditions such as poverty, unemployment, old age, poor health.").

mothers currently dependent on the system.⁹⁷ Commentators charge “[t]he 1996 welfare reform emphasized the ‘work first’ approach, and most states gave priority to helping welfare recipients find a job, but placed little emphasis on education and job training.”⁹⁸ Though empowering in theory, welfare in practice has fallen short of these high-flying notions of autonomy:

In practice, welfare often seems more about institutionalizing social control over women than liberating them from economic destitution or empowering them to be economically independent. Feminists agree that “being on welfare” (in U.S. parlance) involves strict and intrusive scrutiny by the state over women’s sexuality and mothering, as well as their participation in wage labor.⁹⁹

The failure of PRWORA to achieve its stated goals is attributable to two faulty assumptions that buttressed the new programs.¹⁰⁰ The first mistaken assumption was that single mothers who are primary caretakers can work outside the home.¹⁰¹ The second assumption is that single mothers will find work that pays enough to enable them to support themselves and their children.¹⁰² Unfortunately, both premises have been disproven by the misfortune indigent single mothers have experienced in their attempts to become self-sufficient.¹⁰³ Without a job that pays sufficient wages, welfare mothers are never really free from the external constraints of poverty: “the TANF program does not offer benefits sufficient to lift recipients out of poverty, and (despite a strong economy) the majority of families who have moved off the TANF rolls have remained in poverty.”¹⁰⁴ Fineman attributes this deficiency of TANF to antiquated ideologies of the traditional family.¹⁰⁵

97. *Id.* (noting “[T]he question of freedom has lain at the heart of the debates over welfare reform in recent years particularly in the United States”).

98. Xue Song, *American Poverty and Welfare Reform*, 2 PERSPECTIVES, No. 6, available at http://www.oycf.org/Perspectives/12_063001/American_poverty_reform.htm.

99. Hirschmann, *supra* note 64, at 84-85.

100. *See generally* MINK, *supra* note 10.

101. Heidi Hartmann & Hsiao-ye Yi, *The Rhetoric and Reality of Welfare Reform*, in *WOMEN & WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE* 160, 161 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001).

102. *Id.*

103. *Id.* at 162.

104. Schram & Soss, *supra* note 36, at 56.

105. Fineman, *supra* note 75.

The more significant difficulty with maternal work, however, is that it is imposed within the ideological confines of the old order.¹⁰⁶ Today we may expect that women work even if they are mothers, but we do so in the context of unchanged, largely unchallenged, institutions which operate as though workers are free of domestic responsibilities.¹⁰⁷ There may be new expectations about mothers and market work, but there is no accommodation in the market for the demands of mothering on workers.¹⁰⁸ Childcare, meaningful (paid) parental leave, and flexible schedules necessary to respond to caregiving contingencies are not the workplace reality for most mothers.¹⁰⁹

Another reason for the failure of TANF involves the misplaced focus on caseload reduction rather than poverty reduction. Many policymakers conceive welfare benefits as an either/or proposition: either poor women are on welfare, or they are making affirmative steps to work and become financially independent.¹¹⁰ As a result of this dichotomy put forth in the popular rhetoric surrounding welfare, the myth of the unemployed welfare mother overshadows the reality that "half of all single mothers who spend any time on welfare also work in the labor market"¹¹¹ Encouraging statistics, such as the decrease in national welfare caseload and the increase in employment rate for single mothers, obscure the fact that when former welfare recipients move into the workforce, they enter jobs with low wages and do not receive work benefits such as health insurance, paid sick leave, or vacation.¹¹²

Heather Boushey, an economist for the Economic Policy Institute, regards the 1996 welfare reform as a "*de facto* contract" with indigent Americans who do not have jobs.¹¹³ "That contract held that if the jobless poor would go to work, we would strengthen work supports to ensure that they and their families would not be left in privation."¹¹⁴ As part of the welfare reform plan, social assistance for indigent mothers is conditional on work-gearred education and employment as well as provisions intended to discourage out-of-wedlock childbearing.¹¹⁵ While increasing independence and self-

106. Orloff, *supra* note 12, at 138.

107. *Id.*

108. *Id.*

109. Fineman, *supra* note 75.

110. Hartmann & Yi, *supra* note 101, at 161.

111. *Id.* at 163.

112. Song, *supra* note 98.

113. Boushey, *supra* note 19.

114. *Id.*

115. Orloff, *supra* note 12, at 149.

sufficiency is a noble goal, it is difficult to contemplate how prematurely removing the safety net for poor women advances these goals when "[t]he jobs available to . . . many former welfare recipients, do not pay wages high enough to afford a safe and decent standard of living."¹¹⁶ Statistical data supporting this finding is abundant. For instance, the National Governor's Association reported in 1998 that those people who left welfare to find jobs earned between \$5.50 and \$7.00 an hour, placing the families far below the federal poverty line.¹¹⁷

Building upon Boushey's contract theme, seven years after the passage of PRWORA, the government has not lived up to its end of the bargain.¹¹⁸ Although nearly two-thirds of former welfare recipients left the welfare rolls and entered the labor force, they found that low wage jobs did not alleviate their impoverished conditions.¹¹⁹ Considering the "often inadequate wages and intermittent work that characterize the low-wage labor market . . . it is unlikely that single mothers can achieve above-poverty incomes based on their earnings alone."¹²⁰ If indigent women are forced into low-income jobs in order for their families to subsist, they are precluded from the possibility of gaining the skills necessary to remove themselves from the cycle of poverty and dependence.

Quite often, the work available to indigent single mothers is itinerant at best.¹²¹ Those times when steady work is not available or when circumstances preclude a mother on welfare from working require some sort of income to "fill the gaps" between jobs.¹²² Without a reliable income gap filler there is no incentive for a welfare mother to seek permanent employment.¹²³ The chances of actually moving out of poverty through low-wage employment are minute.¹²⁴ Receiving a steady subsidized income is a more attractive option than being left in the cold when the economy does not

116. Boushey, *supra* note 19.

117. Lisa Dodson, *At the Kitchen Table: Poor Women Making Public Policy*, in *WOMEN & WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE* 177, 180 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001).

118. Boushey, *supra* note 19.

119. *Id.*

120. Hartmann & Yi, *supra* note 101, at 165.

121. *See generally* MINK, *supra* note 10.

122. Hartmann & Yi, *supra* note 101, at 174.

123. *Id.* at 175.

124. *See generally id.*

produce jobs. The five year lifetime limit on benefits further attenuates the relationship between welfare reform and its purported goal of self-sufficiency.¹²⁵

It appears the adverse socioeconomic position that welfare mothers experience when they leave the welfare program discourages their autonomy precisely because they lack any safety net. Some subsidy provisions are necessary to encourage the goal of giving indigent mothers the incentive to move from dependency to self-sufficiency.¹²⁶ Hartmann and Yi discuss this point at great length.¹²⁷ They describe the factors related to the higher incidence of poverty among single mothers: their lack of access to the "income stabilizing effect" of an additional wage-earner that married couples enjoy, the generally inadequate amounts of child support from absentee fathers, and the continued income disparities between male and female heads of household.¹²⁸ All of these factors could be alleviated if the government would be more amenable to allowing poor mothers to concurrently work and receive welfare benefits. At this point, it appears the various PRWORA provisions have not achieved this end, or in Boushey's terms, the contract with indigent Americans has not been fulfilled.

CONSTITUTIONALITY OF THE TANF

It is a recognized constitutional principle that family life occupies a space in the zone of privacy respected in the American legal tradition.¹²⁹ The United States Supreme Court has accorded special constitutional protection to choices affecting family living and custodial arrangements, relational rights of parents and children, and to parents' child-rearing decisions.¹³⁰ The stated family formation goals of PRWORA expose indigent women to unconstitutional intrusion into the zone of privacy. Indeed,

125. *Id.* at 174 ("The five-year lifetime limit on benefit receipt will work against enabling women to complete high school or enter college, education they sorely need to increase their earnings capacity. Time limits may also make it difficult for these women to use welfare as unemployment insurance . . .").

126. *Id.*

127. *See generally id.*

128. *Id.* at 161.

129. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (discussing marriage and procreation as fundamental rights, integral to human existence, in the context of a substantive due process challenge to forced sterilization).

130. *MINK*, *supra* note 10, at 93 (citing *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

PRWORA has been described as "a moral straightjacket, conceived and enacted to disjoin rights from welfare and . . . intensify the disciplinary function of social policies affecting poor women."¹³¹ One of the purposes of the 1996 welfare reform was to reduce nonmarital births and promote marriage and two parent families.¹³² Opponents of the family formation prong of PRWORA argue that "government involvement in marriage is not appropriate . . ."¹³³ Indeed, the United States Supreme Court has ardently defended the right against unwarranted government intrusion into the family sphere.¹³⁴ By singling out poor single mothers for subpar constitutional protection, welfare law invades fundamental rights like "procreative liberty, marital freedom, and the right to the care and custody of one's own children."¹³⁵

Mink notes:

Three of the four statutory purposes of welfare policy . . . involve promoting marriage rather than mitigating need . . . tie a single mother's economic security to her relationship with her child's father . . . [and] call upon states to infringe or withhold such rights as marital privacy, associational liberty, reproductive choice, and vocational freedom from poor women who are parenting alone.¹³⁶

If the government's goal is to decrease out-of-wedlock parenting and promote two parent families, then aiming programs at poor mothers unfairly places the onus of family formation responsibilities on women (poor women in particular), even though single motherhood occurs almost as frequently among women in higher economic brackets.¹³⁷ It leaves poor women subject to government intrusion in a way that their wealthier counterparts are not.¹³⁸ Subsequently, TANF should be subject to intermediate constitutional scrutiny. In *King v. Smith*,¹³⁹ the Supreme Court found that moralistic state eligibility criteria interfered with the

131. *Id.* at 66.

132. *Id.*

133. Song, *supra* note 98.

134. See *Skinner*, 316 U.S. at 541 (holding that "[m]arriage and procreation are fundamental to the very existence and survival of the race"); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

135. MINK, *supra* note 10, at 76.

136. *Id.* at 67.

137. Mauldon, *supra* note 56, at 1.

138. MINK, *supra* note 10, at 23.

139. *King v. Smith*, 392 U.S. 309 (1968).

statutory purpose of AFDC.¹⁴⁰ The statutory purpose of PRWORA, however, has a strong social prescription purpose, and intrusive governmental intervention in the lives of poor women actually comports with this purpose. The statutory purpose of PRWORA is itself unconstitutional.

The family formation goal also presupposes that welfare recipients have family values and attitudes falling outside the accepted norm.¹⁴¹ On the contrary, a study conducted by The Welfare Reform and Family Formation Project (WRFFP) shows that most unwed mothers on welfare want to marry, just like their middle class counterparts.¹⁴² As a result of the findings of this study, the WRFFP suggests policies encouraging marriage should be refocused with an eye toward "improving marriage prospects and increasing family planning access and education for both low-income women and men."¹⁴³

THE CLASH BETWEEN THE ECONOMIC AND FAMILY FORMATION GOALS OF PRWORA

In addition to frustrating poor women's exercise of autonomy, PRWORA is also counterproductive because its provisions actually force welfare recipients to choose between working and taking care of their children at home. By enacting PRWORA, policymakers failed to "remember when considering maternal work as a solution for poverty that the demands of mothering do not disappear when women enter the work market."¹⁴⁴ While the responsibility for childcare remains with women of all socioeconomic levels, presupposing the two parent paradigm, poor women in TANF programs are compelled to work.¹⁴⁵ If they do not work, they are considered lazy, although their wealthier counterparts are not subjected to such stigmatization.¹⁴⁶

Rather than a prescriptive welfare law that seeks to alter the behavior of welfare recipients, a welfare system that recognizes the harsh realities of postmodern American life is in order. For a welfare

140. MINK, *supra* note 10, at 50.

141. Mauldon, *supra* note 56, at 3.

142. *Id.* at 7 (explaining the results of the study, "[t]he reasons for low rates of marriage and high rates of out-of-wedlock childbearing in this population appear not to be linked to fundamental desires for these outcomes: our findings show that welfare recipients' family values and aspirations closely resemble those of other women").

143. *Id.*

144. Fineman, *supra* note 75, at 36.

145. See Orloff, *supra* note 12, at 138.

146. See generally Hartmann & Yi, *supra* note 101.

program to be viable and encourage women's autonomy, policymakers must acknowledge the facts: "families have disintegrated. Divorce rates are high. More children are being born outside of wedlock. Fewer people are marrying, and fewer women are having children. People are living longer . . . and the traditional system of care and support provided by the heterosexual child-raising family unit is no longer sufficient."¹⁴⁷

It is not *inherently* objectionable for the government to take steps to encourage a particular form of family formation it deems efficacious for economic reasons. It is quite dubious, however, to use family formation goals as a criterion for poor women to receive benefits for work that actually serves a purpose, though it goes unrecognized. Welfare policy should merely recognize and alleviate the need it seeks to address, namely the economic viability of poor families. To predicate assistance on conforming to the government's family structure prescriptions would turn impoverished mothers into wards of the federal government. Programs encouraging marriage and decreasing out-of-wedlock childbearing may be instituted, but they should be disaggregated from the benefits indigent women receive. Disaggregating the economic and the social goals would satisfy both goals without offending traditional notions of privacy and the relationship between citizens and the government. A welfare model that may achieve this goal is one with minimal requirements and constraints imposed on recipients. In order to receive benefits, women should be required to show that they are engaging in *either* caregiving work or traditional, outside-the-home work.

CONCLUSION

PRWORA made poor single mothers' attempts to make ends meet more difficult by forcing them to decide between caregiving and breadwinning, without providing adequate safety nets to balance the two duties. Caregiving is not a job that society values as a legitimate economic activity.¹⁴⁸ PRWORA reflected this ethic by forcing caregiving mothers into work with grossly inadequate career skills.¹⁴⁹ Because of this skill deficiency, the jobs welfare mothers are forced to take typically do not cover the cost of childcare necessary to make the decision to work a viable one. The negative effects of welfare

147. MINK, *supra* note 10, at 10.

148. See generally Hartmann & Yi, *supra* note 101.

149. *Id.*

reform are largely attributable to the overemphasis of the moral objective, which resulted in policy that aimed to reduce the caseload rather than *truly* assist welfare recipients. While self-sufficiency is a noble goal, one that improves a citizen's ability to participate in the American democracy, it is a goal that requires more robust safety nets than those provided for by TANF. As the Congressional debate over reauthorizing PRWORA rages on, largely without the participation of welfare recipients, one can only hope that the welfare reform debate undergoes a serious change in focus, resulting in a welfare policy capable of securing economic viability and personal autonomy for indigent single mothers.

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