

Welfare to What?

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INTRODUCTION

Ten years ago, President Clinton fulfilled his campaign pledge to end “welfare as we know it” by signing sweeping federal welfare reform legislation.¹ The replacement of Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF)² marked an important transformation in the character of the American welfare state. Work provided the core of the much-touted public policy consensus underlying this transformation, one that simultaneously restricted and expanded the availability of government transfers to low-income Americans.³ While tough new TANF work requirements cut back on welfare for those who did not work, those who *did* work but remained poor received new relief through massive expansions of the Earned Income Tax Credit (EITC)⁴ designed to “make work pay.”⁵ These two developments are not contradictory. Instead, they

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1. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange With Reporters, 2 PUB. PAPERS 1325, 1327 (Aug. 22, 1996) [hereinafter PRWORA Signing Remarks] (“Today, we are ending welfare as we know it.”).

2. 42 U.S.C. §§ 601–619 (2000).

3. See, e.g., PRWORA Signing Remarks, *supra* note 1, at 1325–26; WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 164 (1996); Ron Haskins, *Liberal and Conservative Influences on Welfare Reform Legislation of 1996*, in FOR BETTER AND FOR WORSE: WELFARE REFORM AND THE WELL-BEING OF CHILDREN AND FAMILIES 9, 17, 20 (Greg J. Duncan & P. Lindsay Chase-Lansdale eds., 2001); Hugh Hecl, *The Politics of Welfare Reform*, in THE NEW WORLD OF WELFARE 169, 196–97 (Rebecca M. Blank & Ron Haskins eds., 2001); Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1, 3 (2003). See generally MAKING WORK PAY: AMERICA AFTER WELFARE (Robert Kuttner ed., 2002).

4. I.R.C. § 32 (2000).

5. The Food Stamps program has undergone a similar combination of restrictions and

represent two sides of the single coin of work requirements: concurrent work as a condition of transfer eligibility.⁶

This story is a familiar one, and accurate so far as it goes. What leaves it incomplete is lack of specificity about the foundational category of work. Indeed, precisely what to count as work recently became a central point of controversy during Congress' struggle to reauthorize and substantially rewrite the TANF statute.⁷ Ultimately, Congress made almost no changes, but it did direct the U.S. Department of Health and Human Services (HHS) to issue regulations specifying, for the first time, what activities can meet TANF's statutory definition of work.⁸

To design and implement work-based transfer programs, policymakers and administrators at various levels of government must decide in some detail what counts as work. The content of that category determines who feels the sting of new restrictions on welfare and who receives the support of new transfers through the EITC. Moreover, the degree of continuity between TANF's and the EITC's definitions of work determines how these paired programs interact.

Surprisingly, despite this enormous weight placed on work, careful examination of precisely what does and what should count as work is virtually absent from the scholarly literature on work-based welfare reform.⁹ Instead, work often is casually equated with the production of

expansions. See David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. Rev. 1271, 1273-74 (2004).

6. Although since the New Deal *prior* work has been a mainstay of eligibility for social insurance programs like Social Security and Unemployment Insurance, means-tested "welfare" generally had not required any work history and had conditioned eligibility on a present *inability* to work. See MICHAEL J. GRAETZ & JERRY L. MASHAW, *TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE* 56-57, 61-62 (1999); Super, *supra* note 5, at 1290-91 (noting exceptional character of work-history requirement for two-parent families in AFDC). Although a number of attempts to encourage and sometimes require work from AFDC recipients had been made since the late 1960s, until TANF they were so riddled with exceptions and weak enforcement that they were largely symbolic in nature. See JOEL F. HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY AND WELFARE* 26-61 (1997).

7. The original five-year TANF program expired in September 2002 and was subject to repeated short-term extensions for several years. See TANF Emergency Response and Recovery Act of 2005, Pub. L. No. 109-68, 119 Stat. 2003; Ron Haskins & Rebecca M. Blank, *Welfare Reform: An Agenda for Reauthorization*, in *THE NEW WORLD OF WELFARE*, *supra* note 3, at 3; Carl Hulse & Sheryl Gay Stolberg, *Spending Bill in Hand, Congress Departs*, N.Y. TIMES, Nov. 21, 2004, at 26.

8. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7101(c)(1), 120 Stat. 4, 136 (2006) (codified at 42 U.S.C. § 607(i)(1)(A) (2006)).

9. The major exception is Matthew Diller's early and thorough comparison of TANF's and AFDC's work requirements and especially insightful analysis of their differing treatment of unpaid "work experience." See generally Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19 (1998). This Article builds on Diller's work by addressing state TANF law, TANF reauthorization, the EITC, and the emergence of new issues since the mid-1990s, and by emphasizing the co-existence of conflicting rationales for work requirements. Amy Wax has identified clearly and incisively the need for *critics* of welfare reform, particularly those who would treat family caregiving as work, to offer a normatively and practically coherent theory of "work." See

earned income or, even more narrowly, with full-time employment for wages.¹⁰

This Article begins to fill this gap by examining how the centerpieces of federal welfare reform, TANF and the EITC, actually implement work requirements and define “work.” Because TANF devolved substantial administrative and policymaking authority to the states,¹¹ I take this analysis beyond the level of federal law to the state-by-state implementation of TANF’s work requirements.

At a practical level, understanding the experiments already

Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL’Y & L. 477, 484 (2001); Wax, *supra* note 3, at 30–33. But her own account of work requirements takes for granted the equation of work and employment both as a normative matter and as a description of what current law requires. See Wax, *supra* note 3, at 2–3 (characterizing welfare reform as mandating that recipients “engage in part-time work and move toward full-time employment,” and reflecting a consensus that “individuals are expected to contribute to their own support through paid employment if they are able”). Similarly, feminist critics who argue for inclusion of family caregiving as work typically take for granted that the system they are criticizing requires exclusively paid employment without considering forms of work other than unpaid caregiving and paid employment. See, e.g., Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1676–77 (2001); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers’ Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1030, 1033 (2004) (characterizing TANF as “mandat[ing] that recipients find paid employment”). For comprehensive treatments of linking redistribution to paid work specifically, compare Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967 (1999) (criticizing such linkages), with Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000) (supporting such linkages). A number of other commentators have considered the merits of allowing welfare recipients to engage in particular activities. See, e.g., Nan S. Ellis, *Employer-Based Training Programs for TANF Recipients: A Public Policy Examination*, 32 FORDHAM URB. L.J. 589 (2005); Rebekah J. Smith et al., *The Miseducation of Welfare Reform: Denying the Promise of Postsecondary Education*, 55 ME. L. REV. 211 (2003). Outside of legal and policy scholarship, how to define work occasionally has received sustained consideration. See Lourdes Benería, *Conceptualizing the Labour Force: the Underestimation of Women’s Economic Activities*, in ON WORK: HISTORICAL, COMPARATIVE AND THEORETICAL APPROACHES 372 (R.E. Pahl ed., 1988); R.E. Pahl, *Epilogue to ON WORK: HISTORICAL, COMPARATIVE AND THEORETICAL APPROACHES*, *supra*, at 744; Cato Wadel, *The Hidden Work of Everyday Life*, in SOCIAL ANTHROPOLOGY OF WORK 365 (Sandra Wallman ed., 1979).

10. For instance, highly influential books such as Lawrence Mead’s *The New Politics of Poverty* and William Julius Wilson’s *When Work Disappears* explore, from sharply different perspectives, the causes and consequences of “non-work” in low-income America, and yet both treat anyone not engaged in full-time, paid, formal employment reported to government data gatherers as not “working.” LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 48, 69 (1992); WILSON, *supra* note 3, at 18–19; see also EDMUND S. PHELPS, *REWARDING WORK: HOW TO RESTORE PARTICIPATION AND SELF-SUPPORT TO FREE ENTERPRISE* 25, 108 (1997). For discussions of the importance of unreported employment in the “informal” economy, especially in low-income communities, see DANIEL DOHAN, *THE PRICE OF POVERTY: MONEY, WORK, AND CULTURE IN THE MEXICAN AMERICAN BARRIO* 26–29 (2003); KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* 167–74 (1997); Alejandro Portes, *The Informal Economy and Its Paradoxes*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 426 (Neil J. Smelser & Richard Swederg eds., 1994).

11. See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1146–47 (2000). TANF also authorizes individual Native American nations or consortia to operate TANF programs independently from the states. See 42 U.S.C. § 612 (2000).

underway in the “laboratories of democracy”¹² can help inform the upcoming clarification of federal work requirements policy. These state practices are what the new federal regulations will either support or suppress. More generally, they illustrate the tensions among, and tensions within, competing approaches to work developed over the first decade of experience with TANF. Any federal rules must grapple with these same tensions. Finally, whatever their content, the new regulations will prompt states to reconsider their existing approaches to work, and the natural place to look for new ideas and cautionary tales is this body of experience.

Immediate developments aside, analyzing existing legal definitions of work also has much broader significance. It prepares the way for more systematic examination of how work *ought* to be defined, depending on how work requirements are justified in the first place. This Article reveals the need to elaborate more precisely the implications of the normative impulses behind work requirements and to make choices between rationales for work requirements that can lead to conflicting results.¹³ Such choices are necessary because, as TANF itself reveals, “work” can be defined in myriad, conflicting ways, depending on the purposes work requirements serve. Thus, notwithstanding a consensus endorsement of the abstraction “work,” we can see in the states the cracks that lie beneath that consensus. These cracks split open once we move beyond high abstraction and into the mechanics of real-world policy design.

Based on a review of the relevant statutes and regulations of all fifty states and the District of Columbia,¹⁴ this Article demonstrates a striking level of variation in how state law permits TANF recipients to satisfy their work requirements. TANF often is said to require welfare recipients to get a job, but this statement is both literally false and generally misleading, even though it does capture a real emphasis on promoting employment.

State TANF law frequently, but not always, makes employment the ultimate goal of work requirements. Paid jobs also are the leading means by which individuals actually satisfy work requirements. Nonetheless, TANF permits states to treat a wide range of activities as work. States have seized on this discretion to develop welfare policies that take work

12. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

13. I discuss these rationales for work requirements at greater length in Noah D. Zatz, *What Welfare Requires From Work*, 54 *UCLA L. REV.* (forthcoming Dec. 2006).

14. Although my review was conducted as of August 2005, this Article cites the most recent 2006 version of certain materials where they have not been modified since my review.

in strikingly different directions by permitting TANF recipients to meet their work obligations through various unpaid activities. Sometimes these activities—such as education, or participation in medical and social services such as physical therapy or domestic violence counseling—are cast as stepping stones to eventual employment. Such a link to employment, however, is missing from other allowed activities, including unpaid community service, care for family members with disabilities or serious health conditions, and subsistence production to meet household needs. Some states, however, interpret “work” much more narrowly and disallow some or all of these unpaid activities.

The same range of possible approaches to work was also on display throughout Congress’ extended consideration of comprehensive amendments during TANF reauthorization. The leading proposals all endorsed a continued, indeed expanded, emphasis on work, and yet they differed dramatically as to what federal TANF law should recognize as work. As with state implementation to date, these debates provide insight into the range of ways that the general idea of a work mandate can be interpreted and thus suggest the directions that welfare work policy might go in the future.

An initial point, then, is simply that within TANF there is a considerable diversity of approaches to work. Not only is work irreducible to paid employment, but also there are multiple approaches to whether and under what circumstances unpaid activities are work.

These inconsistent definitions of work mirror the difficulty faced when scholars of work, across many disciplines, attempt to define their object of study.¹⁵ Work’s familiarity creates the temptation to see its meaning as just common sense. Although paid employment generally is taken as a starting point, more is at stake than simply a market transaction. Is construction “work” when done for pay, but not when—as in a barn-raising—done to fulfill a communal obligation of mutual assistance, and not when—as in a Habitat for Humanity project—done for charitable purposes without expectation of personal benefit?¹⁶

To answer these questions, many criteria other than pay have been offered up. They can be sorted roughly into three classes: (1) those related to enabling consumption or use by the worker (a trait shared by cash income, subsistence production, and non-market exchange

15. William Ronco & Lisa Peattie, *Making Work: A Perspective from Social Science*, in ON WORK: HISTORICAL, COMPARATIVE AND THEORETICAL APPROACHES, *supra* note 9, at 709, 715.

16. *Cf.* Pahl, *supra* note 9, at 744. Indeed, tying work exclusively to the historically specific institution of the labor markets in cash economies would mean that slaves, serfs, servants, apprentices, and subsistence farmers do not work. Keith Thomas, *Introduction* to THE OXFORD BOOK OF WORK xiii (Keith Thomas ed., 1999); Chris Tilly & Charles Tilly, *Capitalist Work and Labor Markets*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY, *supra* note 10, at 283, 285.

relationships);¹⁷ (2) those related to the subjective experience or purpose of work (traits such as exertion, use of skill, and being driven by necessity or some purpose beyond the act itself);¹⁸ and (3) those related to the production of something valued by others (a trait shared by activities that are paid, that are part of non-cash exchanges, or that could be part of such exchanges).¹⁹ Each approach has its appeal but also its limitations. Although many scholarly accounts have defined work with reference to one, or some combination, of these characteristics, no robust consensus has emerged. Indeed, “work” may best be understood as a category without an entirely fixed meaning, one that not only varies contextually but also remains malleable even within a given context.²⁰

Against this backdrop, the variability in anti-poverty programs’ definitions of work looks both less puzzling and more structured. The broad approaches to work just sketched resonate in the particular activities included or excluded by the formal definitions in TANF. The definitions reflect and draw out typical, but debatable, identifying characteristics of work.

This definitional diversity has substantive implications. It captures tensions among competing theories of what makes work distinctive and important in a way that justifies imposing work requirements on welfare receipt. The three main descriptive approaches to work sketched above correspond roughly to three main normative rationales for work requirements. First, arguments that work requirements promote *self-sufficiency* emphasize how working can satisfy one’s own consumption needs without relying on transfers, thereby reducing economic burdens on those otherwise taxed to fund transfers. Second, arguments that work requirements promote *self-improvement* emphasize links between the experience and practice of working and one’s access to a virtuous or fulfilling life. Third, arguments that work requirements institutionalize *reciprocity* highlight the contribution work makes to the well-being of

17. See HANNAH ARENDT, *THE HUMAN CONDITION* 9, 77, 110 (1959) (linking “labour” to consumption); Benería, *supra* note 9, at 380; Tilly & Tilly, *supra* note 16, at 286; D.A. Donahoe, *Measuring Women’s Work in Developing Countries*, 25 *POPULATION & DEV. REV.* 543, 543–45 (1999).

18. ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 6–7 (1983) (“The flight attendant does physical labor when she pushes heavy meal carts through the aisles, and she does mental work when she prepares for and actually organizes emergency landings and evacuations. . . . [S]he is also doing something more, something I define as *emotional labor*. This labor requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others”); Pahl, *supra* note 9, at 744; Thomas, *supra* note 16, at xiii–iv; Wadel, *supra* note 9, at 370; Sandra Wallman, *Introduction to SOCIAL ANTHROPOLOGY OF WORK*, *supra* note 9, at 1, 7.

19. NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMIC AND FAMILY VALUES* 66 (2001); HOCHSCHILD, *supra* note 18, at 7; Tilly & Tilly, *supra* note 16, at 285; Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 *NW. U. L. REV.* 1, 11 (1996).

20. Pahl, *supra* note 9, at 744, 747; Wadel, *supra* note 9, at 365.

others or society at large.²¹

With these competing rationales in mind, divergent TANF work definitions make sense specifically as implementations of welfare work requirements, not simply as ordinary usage of the word “work.” This point has important implications for how to evaluate state policy variation. Rather than indicating deviations from a uniform underlying national policy, or even accommodations of variable local conditions, these divergent policies could reflect different resolutions of an incoherent underlying national policy.

In addition to comparisons among TANF programs, we can also compare TANF’s approach to work with that contained in the EITC, to which TANF has been closely linked. Once we do, another set of tensions comes into view. Except in the most marginal of cases, the EITC’s approach to work is perfectly clear and can be described quickly: the only eligible households are those with earnings from employment or self-employment. Thus, when the EITC “makes work pay,” the “work” in question is never any of the unpaid activities that can count as “work” for TANF purposes.

This disjuncture provides my second major point. The easy symmetry between TANF and the EITC, reflecting their common concern with work, breaks down once we examine work in more detail. As a descriptive matter, TANF and the EITC, while clearly related in important ways, cannot be understood simply as two different administrative mechanisms for delivering poverty relief to “workers.” Instead, the character of work-based distribution shifts as we move from TANF, which directs its cash benefits to the very poorest families, to the EITC, which targets those who remain poor despite significant earnings. The divergence between TANF’s and the EITC’s definitions of work invite clarification of what differences between these programs, if any, justify the variation.

At the heart of this shifting approach to work is a well-known tension between rewarding work and alleviating poverty with a single transfer program.²² What has received less attention is how this tension is itself intertwined with definitions of work: supporting workers and targeting the poorest come into conflict only after equating work with earning. If work is broader than employment, however, then “work supports” like the EITC discriminate *among* workers in their distribution of anti-poverty benefits. This observation reflects a third general point:

21. Zatz, *supra* note 13.

22. See Rebecca M. Blank, *The Employment Strategy: Public Policies to Increase Work and Earnings*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 168, 168–69 (Sheldon H. Danziger et al. eds., 1994); Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 551–54 (1995).

definitions of work cannot be isolated from other aspects of transfer design, including means-testing, benefit levels, and time limits.

In sum, the competing formal definitions of work in TANF and the EITC provide a microcosm of the competing implications of different approaches to work and why it matters. To be clear, this Article neither seeks to explain as a historical matter why one or another approach to work has been adopted in specific programs and jurisdictions,²³ nor assumes that policy actors actually are motivated by the normative approaches to work that could justify their actions.²⁴ Instead, the availability of such justifications helps make those actions possible and defensible. Thus, this Article aims to show how legal actors range across a terrain the features of which—clear paths here, formidable barriers there—reflect broader aspects of the nature and role of work. Of course, in so doing, they may leave their own mark, creating new possibilities for how to think about work as we draw lessons from welfare work requirements and apply them to the many other contexts in which work matters.

I. WORK UNDER TANF

After vetoing previous bills, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) in August 1996.²⁵ In the eyes of its supporters and detractors, the assessments of commentators, and the content of its provisions, a thoroughgoing emphasis on promoting work was the

23. For exploration of this issue, see generally Joe Soss et al., *Setting the Terms of Relief: Explaining State Policy Choices in the Devolution Revolution*, 45 AM. J. POL. SCI. 378 (2001); Thomas Gais & R. Kent Weaver, *State Policy Choices Under Welfare Reform*, in WELFARE REFORM & BEYOND, Apr. 2002 (Brookings Inst. Policy Brief No. 21), available at <http://www.brookings.edu/es/wrb/publications/pb/pb21.pdf>.

24. For instance, a state’s definition of work can affect the proportion of its caseload counted as “working,” which in turn has financial consequences for the state. See 42 U.S.C. § 609(a)(3) (2000) (mandating a reduction in federal aid where a state fails to comply with minimum participation rates). Thus, a state might change its definition of work in order to avoid federal penalties, rather than alter what its welfare recipients do. On the connection between work definitions and formal accountability mechanisms, see U.S. GOV’T ACCOUNTABILITY OFFICE, HHS SHOULD EXERCISE OVERSIGHT TO HELP ENSURE TANF WORK PARTICIPATION IS MEASURED CONSISTENTLY ACROSS STATES, GAO-05-821 (2005), available at <http://www.gao.gov/new.items/do5821.pdf> [hereinafter HHS SHOULD EXERCISE OVERSIGHT]; Thomas Kaplan, “Whatever We Have Been Doing”: Policy Control over TANF, 22 FOCUS 35 (2002), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc221-part2.pdf>. Because supervisory authorities and the public at large may be unaware of the sensitivity of such statistics to definitional variation, such a substanceless definitional shift could also affect a state program’s political standing. On welfare bureaucracies’ responsiveness to their political environment and to quantified performance measures, see generally Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225 (1998).

25. See GERTRUDE SCHAFFNER GOLDBERG & SHEILA D. COLLINS, WASHINGTON’S NEW POOR LAW: WELFARE REFORM AND THE ROADS NOT TAKEN—1935 TO THE PRESENT 181, 194–97 (2001); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 326–30 (10th anniv. ed. 1996); Hecl, *supra* note 3, at 189–94.

centerpiece of the resulting TANF program,²⁶ which replaced the New Deal-era AFDC program but maintained AFDC's traditional mission of "provid[ing] assistance to needy families."²⁷

Members of Congress and the President offered an array of arguments for this new role for work: rejecting "dependency on public benefits"²⁸ in favor of "[the] principle that defines the market economy . . . namely, that income must be earned";²⁹ promoting "the dignity, the power and the ethic of work";³⁰ and requiring that those receiving welfare "[be] required to return [something] to society."³¹ Work requirements were clearly designed to end individual welfare receipt by "making [former recipients] independent, productive taxpayers,"³² but work also was something to be done not just after but *while* receiving TANF benefits: "Today there is a new attitude in Congress about work. . . . [A]lmost all able-bodied adults on welfare should work."³³

The many tasks set for work are reflected in how TANF defines the term, both in the federal statute and in the more specific state authorities that implement it. Consistent with a self-sufficiency approach, the remunerative aspect of paid employment is of central importance. Self-sufficiency not only makes employment itself a priority but also provides a rationale for unpaid activities that might one day lead to employment. Nonetheless, other considerations play a role both in deciding whether an activity is work at all and in assigning priority among work activities. Particularly prominent is an emphasis on an activity's wider social meaning or value, a theme that resonates with reciprocity and manifests

26. See H.R. REP. NO. 104-651, at 3 (1996); Haskins, *supra* note 3, at 9, 16. In addition, TANF eliminated AFDC's federal entitlement to assistance for all those meeting eligibility requirements and substituted an annual block grant for the previous financing mechanism of federal matching funds linked to the amount of state benefit payments. See 42 U.S.C. §§ 601(b), 603(a)(1) (2000). See generally HANDLER & HASENFELD, *supra* note 6, at 206-10.

27. 42 U.S.C. § 601(a)(1) (2000).

28. H.R. REP. NO. 104-81(I), at 18 (1995); accord H.R. REP. NO. 104-651, at 826 (stating "overall goal of moving welfare recipients from dependency to employment and self-sufficiency").

29. H.R. REP. NO. 104-81(I), at 19.

30. PRWORA Signing Remarks, *supra* note 1, at 1325; accord 142 CONG. REC. H9392-01, 9405 (daily ed. July 31, 1996) (statement of Rep. Camp) ("This proposal requires each recipient to work for their benefits, thereby instilling the pride of employment and allowing each recipient to earn a paycheck. This sense of accomplishment and independence increases the individual's self-esteem and often influences the children who can see firsthand the benefits of a strong work ethic."); 142 CONG. REC. H7745-04, 7749 (1996) (statement of Rep. Kingston) (self-esteem); 142 CONG. REC. S8493-02, 8495 (1996) (statement of Sen. D'Amato) (pride).

31. H.R. REP. NO. 104-81(I), at 18; accord H.R. REP. NO. 104-651, at 822 ("making work a requirement in exchange for cash welfare assistance"); *id.* at 2027 (endorsing "reciprocal obligations" between welfare recipients and the public).

32. H.R. REP. NO. 104-75, at 16 (1995).

33. H.R. REP. NO. 104-81(I), at page 18; accord JASON TURNER, ENGAGEMENT OF TANF RECIPIENTS: THE LESSONS OF NEW YORK CITY (2003), <http://www.heritage.org/Research/Welfare/bg1651.cfm>.

formally in the category of “community service.”

A. THE FEDERAL STRUCTURE OF TANF WORK REQUIREMENTS

The principal federal mechanism for enforcing TANF work requirements is through “participation rate” requirements applied to each state. These requirements specify a percentage of the total TANF caseload that must be “engaged in work.”³⁴ If these benchmarks are not met, the state loses a significant amount of federal funding for its TANF program.³⁵ To count toward meeting the required participation rate, currently 50%,³⁶ an adult TANF recipient must be engaged in one or more specified “work activities” for at least a certain number of hours per week.³⁷ The required amount of work ranges from twenty to thirty-five hours per week, depending on the household structure and the age of the youngest child in the household.³⁸ These participation rate requirements apply directly only to states, not to individual TANF recipients. Other aspects of TANF encourage states to meet their participation rates by requiring adult TANF recipients to work as a condition of benefit eligibility.³⁹ Exactly how states have done is described in Part I.B.

The list of federally authorized work activities has two tiers. At least twenty hours of work must come from a core set of activities consisting of:

- (1) unsubsidized employment;
- (2) subsidized private sector employment;
- (3) subsidized public sector employment;
- (4) work experience;
- (5) on-the-job training;
- (6) job search and job readiness assistance;

34. 42 U.S.C. § 607(b)(1)(A), (b)(2)(A), (c) (2000).

35. *Id.* § 609(a)(3).

36. The required rate was 25% in 1997, TANF’s first year, then rose steadily to 50% in 2002. *Id.* § 607(a)(1). These rates apply to the caseload as a whole, but TANF also includes a separate, higher participation rate for two-parent households. *Id.* § 607(a)(2).

37. *Id.* § 607(c)(1)(A); *see also* Diller, *supra* note 9, at 20–27 (comparing work requirements in TANF and its predecessor AFDC).

38. *Id.* § 607(c)(1)(A)–(B), (2)(B); *see also infra* notes 49–50 and accompanying text.

39. 42 U.S.C. § 607(e) (requiring that states impose “[p]enalties against individuals” who “refuse[] to engage in work required in accordance with [participation rate requirements]”); *id.* § 602(a)(1)(A)(ii) (mandating that states require individuals to “work,” without further definition, within two years of beginning to receive TANF assistance, but without specifying penalties for noncompliance); *id.* § 608(b)(2)(A)(i) (authorizing states to create and enforce “individual responsibility plans . . . for moving the individual immediately into private sector employment”). Another important work-related feature of TANF is its five-year cumulative time limit on any adult’s receipt of federal assistance. *Id.* § 608(a)(7). The time limit was intended to provide the ultimate work requirement, ensuring that after five years there would be no choice but to find another source of income. *See* Haskins, *supra* note 3, at 9, 17.

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- (7) community service programs;
- (8) vocational educational training; and
- (9) providing child care services to someone participating in community service.⁴⁰

Any remaining hours may come either from this core or from an additional set of activities consisting of:

- (1) job skills training directly related to employment;
- (2) education directly related to employment for non-high school graduates; and
- (3) high school or GED coursework for non-high school graduates.⁴¹

“Work” is thus a heterogeneous category under TANF, even at the federal level. Work does not mean simply an ordinary job in which an employer pays an employee for services rendered. Instead, it also includes subsidized employment, in which an employee receives a paycheck from the employer but the costs are borne all or in part by the welfare agency.⁴² Further afield, welfare recipients in so-called “work experience” or “workfare” provide services like those provided by ordinary employees (filing papers, sweeping streets, picking up trash in parks or office buildings), but instead of a paycheck the welfare recipient simply continues to receive welfare benefits.⁴³ “Community service” likewise implies provision without pay of services of value to a “community,” though not necessarily ones mirroring the tasks of paid jobs.⁴⁴ Finally, TANF recognizes work activities that neither provide any immediate benefit to others nor produce income for the recipients, but which do relate to future employment: job search and employment-related education or training.

Broad as these categories are, there are important limitations. TANF largely excludes from “work” educational activities lacking some

40. 42 U.S.C. § 607(c)(1), (d). Vocational education is subject to two limitations: it may count as a work activity only for twelve months for any one individual, and for no more than 30% of those the state counts toward its participation rate. *Id.* § 607(c)(2)(D), (d)(8). Job search may not count as a work activity for any individual for more than four consecutive weeks, or more than six weeks in total (or twelve in high unemployment areas). *Id.* § 607(c)(2)(A).

41. *Id.* § 607(c)(1), (d). For teenage parents under age twenty, work requirements may be entirely satisfied by attending high school or participating in employment-related education for at least twenty hours per week. *Id.* § 607(c)(2)(C).

42. *Id.* § 607(d)(2), (3); MAURICE EMMELM & STEVE SAVNER, *THE FISCAL AND LEGAL FRAMEWORK FOR CREATING A COMMUNITY SERVICE EMPLOYMENT PROGRAM 7* (1997), available at <http://nelp.org/docUploads/pub29%2Epdf>.

43. See 42 U.S.C. § 607(d)(4) (2000). See generally *United States v. City of New York*, 359 F.3d 83 (2d Cir. 2004); Jason A. Turner & Thomas Main, *Work Experience Under Welfare Reform*, in *THE NEW WORLD OF WELFARE*, *supra* note 3, at 291; Diller, *supra* note 9; EMMELM & SAVNER, *supra* note 42.

44. See STEVE SAVNER, *GLOSSARY OF WORK PROGRAM TERMS 3* (1997), available at http://www.clasp.org/publications/Glossary_of_Work_Program_Terms_revised_11-97.pdf.

link to employment,⁴⁵ most significantly all forms of non-vocational post-secondary education.⁴⁶ Also absent from the explicitly recognized forms of work are activities that directly benefit only other members of one's own household, such as unpaid housekeeping or care for the young or disabled.⁴⁷ Supporting such care is one of TANF's explicit purposes—"to provide assistance to needy families so that children may be cared for in their own homes"⁴⁸ Nonetheless, TANF recognizes such care only as a basis for an excuse from or a reduction in work requirements, not as a way to meet them. For single parents of children under six years old, ten fewer weekly hours of work are required relative to parents of older children,⁴⁹ and work requirements may be waived entirely for single parents of infants.⁵⁰ In contrast, taking care of other people's children, with or without pay, explicitly is included in the list above.⁵¹

Although TANF provides very loose definitions of work in some respects, in others it emphasizes employment specifically. Not only is some connection to current or future employment required for most of the specified work activities, but TANF also provides for "individual responsibility plan[s] . . . for moving the individual immediately into private sector employment."⁵² More generally, TANF has been implemented in ways that consistently prioritize employment. At both the federal and state levels, the relevant agencies place great emphasis on a pervasive, albeit informal, message that welfare recipients should be seeking a paycheck in order to avoid a welfare check.⁵³ This more symbolic aspect can be seen, for instance, in renaming "Income Maintenance Centers" as "Job Centers"⁵⁴ and in hanging banners in

45. The sole exception is high school education for individuals lacking a high school degree or a General Education Diploma (GED).

46. See generally Pamela Friedman, *TANF Reauthorization and Postsecondary Education Options for Welfare Recipients*, REAUTHORIZATION NOTES, Sept. 2001, <http://www.financeproject.org/Publications/tanfreauth-postsecedureauthorization.htm>; CTR. FOR LAW & SOC. POLICY, FORTY STATES LIKELY TO CUT ACCESS TO POSTSECONDARY TRAINING AND EDUCATION UNDER HOUSE WELFARE BILL, (2002), http://www.clasp.org/publications/doc_Postsec_survey_061902.pdf.

47. A few jurisdictions have classified caregiving for foster children or household members with disabilities as "community service." See discussion *infra* Part I.B.1.b.

48. 42 U.S.C. § 601(a)(1) (2000).

49. *Id.* § 607(c)(2)(B).

50. *Id.* § 607(b)(5). In addition, for married couples receiving TANF, one parent need not work at all so long as child-care is not being provided by someone else. See *id.* § 607(c)(1)(B) (specifying two-parent cumulative weekly work requirement of thirty-five hours, so long as the couple is not receiving federal child-care assistance and neither adult is caring for a family member with a disability).

51. *Id.* § 607(d)(12).

52. *Id.* § 602(a)(1)(A)(ii).

53. See Thomas L. Gais et al., *Implementation of the Personal Responsibility Act of 1996*, in *THE NEW WORLD OF WELFARE*, *supra* note 3, at 35, 38-48 (describing how changes in bureaucratic process and agency culture send the message "get a job quickly").

54. See Jason DeParle, *What Welfare-to-Work Really Means*, N.Y. TIMES MAG., Dec. 20, 1988, at 59; LYNNE FENDER ET AL., *THE URBAN INSTITUTE, STATE UPDATE NO. 12, RECENT CHANGES IN NEW YORK WELFARE AND WORK, CHILD CARE, AND CHILD WELFARE SYSTEMS 1*, 9 (2002), available at

welfare offices with messages like “Welcome Job Seekers!” and “You Have A Choice, Choose a Job—Work First.”⁵⁵ In this less technical sense, the ubiquitous references to work—in state programs named “CalWorks”⁵⁶ and “Wisconsin Works,”⁵⁷ in federal “Welfare-to-Work” grants,⁵⁸ and elsewhere—clearly invoke unsubsidized employment.⁵⁹

In sum, “work” cannot be encapsulated in a single definition or concept under TANF. One can be “engaged in work” without getting paid, and even without being prepared to get paid, and yet there is also an undeniable emphasis on paid employment.

B. STATE IMPLEMENTATION OF TANF WORK REQUIREMENTS

TANF confers on the states considerable flexibility in how work requirements are implemented. Most simply, nothing in TANF dictates how states choose from among the list of authorized activities. A state with 50% work participation in vocational education and community service⁶⁰ is equally compliant as one that has 50% participation in unsubsidized employment.⁶¹

Not only does federal law recognize a range of permissible work activities, but, until recently, it entrusted the states with interpretation of these categories rather than providing further regulatory definition.⁶² Congress has now directed HHS to issue such regulations,⁶³ but it is too early to know whether these new regulations will be more restrictive than current state practice, will encourage more expansive interpretations of the statute, or will focus on technical clarifications. Regardless, what states have done during TANF’s first decade remains

http://www.urban.org/UploadedPDF/310564_SU12.pdf.

55. See Gais et al., *supra* note 53, at 46.

56. See U.S. Dep’t of Health & Human Servs., State TANF Program Names, at <http://www.acf.hhs.gov/programs/ofa/tfnames.htm> (last visited Apr. 14, 2006).

57. *Id.*

58. 42 U.S.C. § 603(a)(5).

59. *Id.* § 603(a)(5)(C)(i) (defining allowable activities funded by Welfare-to-Work grants as those that “move individuals into and keep individuals in lasting unsubsidized employment”).

60. Subject to the limitation that no more than 30% of the caseload may receive credit for vocational education. *Id.* § 607(c)(2)(D).

61. In this respect, the “work first” priority on immediate placement into unsubsidized employment is more prominent in the rhetoric accompanying PRWORA than it is in the statute’s actual content. The House committee report accompanying the PRWORA, for instance, declares that the legislation rejects “education and training first—maybe work later,” mandates “work first,” and permits education or training only “in conjunction with work [referring to employment or workfare],” but this simply is not what the statute says. H.R. REP. NO. 104-651, at 825 (1996). The report goes on to note the “committee’s belief,” not written into the statute, that unsubsidized employment should be prioritized over subsidized employment, which should in turn be prioritized over work experience. *Id.* at 826.

62. Temporary Assistance for Needy Families (TANF) Final Rule, 64 Fed. Reg. 17719, 1776 (1999); see also 45 C.F.R. § 260.31 (1999).

63. See 42 U.S.C. § 607(i).

important because it provides a template from which future legislative reform efforts will draw, because it reveals the varying ways that states thought TANF's work policies could and should be carried out, and because states will continue to have significant authority to craft welfare work activities that may or may not satisfy federal requirements.

States' latitude in requiring work, and how they define it, goes beyond simply the flexibility afforded by the list of federally authorized work activities. First, because TANF requires a nominal participation rate of 50%, and often a much lower effective rate,⁶⁴ not all of a state's welfare recipients must be "working" under federal law. For the remainder of the caseload, even if a state cannot count individuals' activities toward its federal participation rate, it may require that they meet a broader state definition.⁶⁵

A second major source of flexibility is that the participation rate calculation only applies to adult recipients of federally-funded TANF benefits. This creates mechanisms by which states can provide welfare benefits with either state-specific work requirements, or with no requirements at all. They can exclude adults from the welfare "case" and nominally pay benefits only for the household's children.⁶⁶ States can also pay benefits with their own funds, rather than federal TANF dollars,⁶⁷

64. Because states receive a "caseload reduction credit" toward their participation rate based on reductions in the size of the caseload, many states could, if they so chose, comply with TANF by requiring only a very small proportion of their caseload, sometimes none at all, to work. See 42 U.S.C. § 607(b)(3); 45 C.F.R. § 261.40-44. In effect, this means that a state can meet its participation rate *either* by having a current recipient work *or* by having recipients (on net) leave welfare entirely, on the theory that these "leavers" have left due to work. As a result of the caseload reduction credit, most states' effective participation rate requirements, measured as a percentage of current caseloads, are below 10% and many are zero. See Memorandum from U.S. Dept. of Health and Human Services, Office of Family Assistance to State Agencies Administering the Temporary Assistance for Needy Families Program tbl.1A (Jan. 13, 2006), available at <http://www.acf.hhs.gov/programs/ofa/particip/indexparticip.htm> [hereinafter 2004 Participation Rates].

65. In some such cases, TANF mandates that states require "work" but gives them total discretion in how to define it. 42 U.S.C. § 602(a)(1)(A)(ii).

66. This is known as a "child-only" case, in which only the children in a household are deemed to be recipients of TANF benefits, while their adult caretakers (usually relatives but not parents) are not. These households may receive TANF benefits without being subject to federal work requirements. See *id.* §§ 607(b)(1)(B)(i), 608(7)(B). Approximately one-third of TANF cases are child-only. See U.S. GEN. ACCOUNTING OFFICE, TANF TIME LIMITS AND WORK REQUIREMENTS, GAO-02-770, 8-10 (2002) [hereinafter TANF TIME LIMITS]; U.S. DEP'T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE TO NEEDY FAMILIES, SIXTH ANNUAL REPORT TO CONGRESS I-7 (2004), available at <http://www.acf.hhs.gov/programs/ofa/annualreport6/ar6index.htm> [hereinafter SIXTH ANNUAL TANF REPORT].

67. This is known as a "separate state program," in which a state separately authorizes and funds a welfare program that operates in parallel with its TANF-funded program. See 45 C.F.R. § 260.30; U.S. DEP'T OF HEALTH & HUMAN SERVS., HELPING FAMILIES ACHIEVE SELF-SUFFICIENCY: A GUIDE ON FUNDING SERVICES FOR CHILDREN AND FAMILIES THROUGH THE TANF PROGRAM (1999), available at <http://www.acf.hhs.gov/programs/ofa/funds2.htm>; TANF TIME LIMITS, *supra* note 66, at 6-8; SIXTH ANNUAL TANF REPORT, *supra* note 66, at I-2-6; MARK H. GREENBERG, CLASP, BEYOND WELFARE: NEW OPPORTUNITIES TO USE TANF TO HELP LOW-INCOME WORKING FAMILIES 8-9 (1999),

though this will soon become more difficult.⁶⁸ Either way, adults who do not meet the federal definition of “working” do not depress participation rates because they are excluded from the denominator in the calculation.

Finally, for the entire caseload, states are free to mandate *more* work, or to define work more narrowly, than federal law requires. Many have done so.⁶⁹ Thus, for most of its caseload, a state typically can choose policies ranging from no work requirements at all, to the opposite extreme of cutting off any recipient who fails to perform a single activity (such as unsubsidized employment or work experience) for forty hours per week. Within the framework of TANF, the states thus have had the discretion to implement widely varying work requirement policies, including policies that reflect very different understandings of what conduct should satisfy work requirements.

This flexibility renders fundamentally incomplete any characterization of TANF that focuses on federal law alone. To assess where state TANF programs actually fall within this vast range of possibility, I identified and reviewed the statutes and regulations⁷⁰

http://www.clasp.org/publications/beyond_welfare_new_opportunities.pdf. An additional variant is “segregated funding.” In a program operated with segregated funds, individuals are included in participation rate calculations and are subject to work requirements but not federal time limits. This allows states to “stop the clock” for individuals who are complying with federal work requirements but still count them toward participation rates. *See, e.g.*, GREENBERG, *supra* note 67 at 8–9; JULIE STRAWN & KARIN MARTINSON, MDRC, STEADY WORK AND BETTER JOBS: HOW TO HELP LOW-INCOME PARENTS SUSTAIN EMPLOYMENT AND ADVANCE IN THE WORKFORCE 26–28 (2000) (describing an Illinois program using segregated funds for welfare recipients who are employed full-time). State expenditures for separate state and segregated fund programs count towards the state’s obligation to match federal TANF grants with what are called state “maintenance of effort” (MOE) funds. This MOE requirement prevents states from funding their welfare programs exclusively out of the federal treasury. *See* 42 U.S.C. § 609(a)(7); 45 C.F.R. § 263.1-9.

68. The Deficit Reduction Act of 2005 requires HHS to issue regulations governing the inclusion of “child-only” cases in work participation rate calculations, though it does not enunciate a policy that these regulations should implement. *See* 42 U.S.C. § 607(i). The Act also requires that participants in separate state programs be included in work participation rate calculations if states count their expenditures on such programs toward meeting their MOE requirement. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7102, 120 Stat. 4, 136 (codified at 42 U.S.C. § 607(a)(1), (a)(2), (b)(1)(B)(i), (c)(2)(A)(i), (e)(1), (e)(2)). It is too early to know whether states will respond by eliminating these programs or by simply continuing to run them and counting other expenditures toward their MOE requirements.

69. *See infra* note 76 and Part I.B.1.a.

70. A number of states do not issue separate regulations for their TANF programs but instead have general regulations incorporating by reference the state’s official manual for welfare caseworkers. *See* CAL. CODE REGS. tit. 22, div. 2, pt. 1; CONN. AGENCIES REGS. 17B-10-1; W. VA. CODE § 78-4-2. I treat these manuals like other regulatory authority. *See, e.g.*, CALIFORNIA DEP’T OF SOCIAL SERVICES, ELIGIBILITY AND ASSISTANCE STANDARDS MANUAL (2004), *available at* http://www.dss.cahwnet.gov/ord/CDSSManual_240.htm [hereinafter CAL. MANUAL]; CONNECTICUT DEP’T OF LABOR, JOBS FIRST EMPLOYMENT SERVICES PROGRAM PROCEDURES MANUAL (2004), *available at* <http://www.ctdol.state.ct.us/weltowrk/completeversion.pdf>; BUREAU FOR CHILDREN & FAMILIES, WEST VIRGINIA DEP’T OF HEALTH & HUMAN RESOURCES, INCOME MAINTENANCE MANUAL, http://www.wvdhhr.org/bcf/policy/imm/new_manual/default.asp (last visited Apr. 14, 2006)

implementing work requirements in the TANF programs of all fifty states and the District of Columbia⁷¹ as they existed in August 2005.⁷² This approach has important limitations because most states further devolve substantial discretion to local authorities, individual caseworkers, or both,⁷³ and because formal policies capture only part of what guides program implementation on the ground.⁷⁴ The authorities I studied do, however, provide a fairly comprehensive look at the formal legal constraints under which local programs operate and at the considered policies adopted by state-level decisionmakers.⁷⁵

Most importantly for my purposes here, these state laws illustrate the wide range of ways in which policymakers can implement the broad mandate for work reflected in TANF. While many have focused on promoting “self-sufficiency” through employment, they have done so in widely varying ways. Some emphasize immediate employment, while others focus on preparation for future employment through activities as varied as on-the-job training, college education, and drug rehabilitation. Often, improved employment prospects appear to be only one of many goals such activities serve. And in some cases, employment drops from the picture entirely, and the focus instead shifts to meeting some family or community need or to leaving welfare through some mechanism other than increased earnings.

[hereinafter W. VA. MANUAL]. Alabama and Indiana lack significant statutory and regulatory authority directly on point and grant broad discretion to an administrative body to implement TANF. See ALA. CODE § 38-4-1(d) (2005); IND. CODE ANN. § 12-14-28-3, -7 (2006). For Indiana, I reviewed its official welfare agency policy manual. See INDIANA FAMILY & SOCIAL SERVICES ADMIN., PROGRAM POLICY MANUAL FOR CASH ASSISTANCE, FOOD STAMPS AND HEALTH COVERAGE, available at <http://www.in.gov/fssa/families/manual.html> (last visited Apr. 14, 2006). For Alabama, I relied on what little could be gleaned from its regulations. See ALA. ADMIN. CODE r. 660-2-20-.02 (2005). All states are required to submit a TANF plan to HHS. 42 U.S.C. § 602. Some states make these plans available online, and in some cases I have supplemented my analysis with materials from such plans.

71. The legal authorities governing tribal TANF programs are not readily available, but HHS provides a summary at http://www.acf.hhs.gov/programs/dts/ttanchar_1002.htm (last visited Apr. 14, 2006).

72. Because of the magnitude of the task, I did not attempt to record all important aspects of the state programs but instead focused on what activities may satisfy TANF work requirements and what circumstances justify exemption from those requirements. A more comprehensive review of state welfare policies has been undertaken by the Urban Institute’s Assessing the New Federalism Project, and the results of that survey are available at <http://anfdata.urban.org/WRD/WRDWelcome.cfm> (last visited Apr. 14, 2006). The Urban Institute’s database, however, is based in part on caseworker manuals and state survey responses that do not have the force of law, and it reports only the results of its own categorization of state policies without providing citation to its underlying sources or the details of state policies.

73. See Diller, *supra* note 11, at 1147–48.

74. See JOEL F. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE 81–82 (2004); Diller, *supra* note 11, at 1130–34; Zasloff, *supra* note 24, at 239–50.

75. To my knowledge there are no significant local approaches to work requirements that lack either specific state authorization or state-level analogues elsewhere.

I. State Definitions of Work Activities

What, in fact, have the states done? In practice, states universally have created individual work requirements applicable to nearly all adult recipients. These work requirements are organized principally around the federally authorized work activities, and they usually have grace periods and hours expectations more stringent than the federal requirements.⁷⁶ Rather than attempting to minimize the scope of work requirements by, for instance, attempting to meet but not exceed federal participation rates,⁷⁷ states typically require most TANF recipients to work.

For individual welfare recipients, these state work policies are more significant than federal TANF requirements. Moreover, individual caseworkers or informal local policies ultimately determine precisely what work will be done. They do so by controlling the content of an “individual responsibility plan” or similar device that imposes on the recipient a specific work assignment (attending a specific training program, or performing community service at a particular time and place) and sometimes other behavioral requirements.⁷⁸ Thus, recipients must perform a work activity chosen for them from among the legally authorized work activities; they are not free to comply with work requirements simply by making their own choice from that list.⁷⁹

76. Almost all states require non-exempt welfare recipients to begin work immediately, rather than taking advantage of the twenty-four month grace period permitted by TANF; a large majority of states require thirty or more weekly hours of work from all those subject to work requirements, notwithstanding TANF’s allowance of twenty hours per week for parents of children under six years old, and a substantial minority require more than thirty hours per week. *See* GRETCHEN ROWE & JEFFREY VERSTEEG, *WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2003* 96–97 (2005). Additionally, a majority of states do not take full advantage of TANF’s option to exclude from work requirements single parents of children under one year old, often providing no exemption at all or one that lasts only three months. *See id.* at 168–69.

77. Averaged nationally, participation rates exceed those required by federal law by 28% of the total caseload as of 2004. This calculation uses the stricter figure that excludes state-specific waivers of some TANF requirements. *See* 2004 Participation Rates, *supra* note 64, at tbl.1A. All but six jurisdictions (Connecticut, the District of Columbia, Indiana, Mississippi, Nevada, and Utah) exceeded their participation rates by over 5%. *Id.* In raw terms, about 245,000 more welfare recipients are working than necessary to comply with TANF participation rates. This calculation is based on multiplying each state’s excess participation rate by its caseload. *Id.* at tbls.1A, 3A.

78. According to a survey conducted by the National Governors Association, the vast majority of TANF recipients in the vast majority of states have such a plan in place. *See* NAT’L GOVERNORS ASS’N, *WELFARE REFORM REAUTHORIZATION: STATE IMPACT OF PROPOSED CHANGES IN WORK REQUIREMENTS APRIL 2002 SURVEY RESULTS* (2002), <http://www.nga.org/cda/files/welfaresurvey0402.pdf>; *see also* HANDLER, *supra* note 74, at 248–60 (2004) (discussing the relationship between caseworker and recipient in the formation of such plans or “contracts”).

79. *See* 42 U.S.C. § 608(b)(2), (3) (permitting states to develop individual responsibility plans “in consultation with the individual,” but not necessarily with the individual’s consent, and to penalize noncompliance with such plans); *Kosmicki v. State*, 652 N.W.2d 883 (Neb. 2002) (upholding sanction for noncompliance with a “self-sufficiency contract”); *Bishop v. N.Y. State Dep’t of Soc. Servs.*, 667 N.Y.S.2d 731, 732 (App. Div. 1998) (holding that choice among allowable work activities is

The state and local flexibility provided by TANF has been used both to make work requirements more stringent, and to make them less so. In the former case, states have both increased the amount of work required and narrowed what work may be done. In the latter, states generally have broadened what counts as work rather than declining to require work at all.⁸⁰

a. Narrow State Approaches to Work

States have narrowed the scope of work in four main ways. First, Table I shows that many have eliminated federally allowable activities from state definitions of work. The majority of states⁸¹ do not include

“discretionary” with the welfare agency); *Ortiz v. Hammons*, 654 N.Y.S.2d 993 (Sup. Ct. 1997) (upholding refusal of welfare agency to permit high school attendance in lieu of work experience assignment); *Dozier v. Williams Cty. Soc. Serv. Bd.*, 603 N.W.2d 493 (N.D. 1999) (upholding sanction for non-compliance with work assignment because welfare agency controlled choice among allowable activities and signing of welfare “contract” was not a prerequisite for imposing work-related sanctions); N.Y. COMP. CODES R. & REGS. tit. 12, § 1300.9(b)(9) (2006) (granting to the local welfare agency “the right to determine, consistent with statute and regulations, the activity or activities to which an applicant or recipient is to be assigned”). Some states specifically entitle recipients to continue “self-initiated” activities, usually education or training. *See, e.g.*, CAL. MANUAL § 42-711.54 at 25 (2005); TENN. COMP. R. & REGS. 1240-1-49.03(3) (2006). Alaska does the opposite, specifically requiring recipients “to drop or modify a personal activity, such as vocational training or post-secondary education, if the department determines that pursuit of the activity interferes with the individual’s participation in an activity assigned. . . .” ALASKA ADMIN. CODE tit. 7, § 45.260(c) (2006).

80. Notwithstanding official policies of universal work, in most states the majority of adult recipients of TANF assistance are not participating in any work activity. This remains true even when using broad measures that count those participating for any amount of time (not necessarily enough hours to count toward the TANF participation rate) and in activities that meet state, but not necessarily federal TANF, definitions of work, although these broader measures do show much higher rates of work than suggested by federal participation rates alone. *See* TANF TIME LIMITS, *supra* note 66, at 29–30; SHARON PARROTT, CTR. ON BUDGET & POLICY PRIORITIES, ARE STATES REQUIRING TANF RECIPIENTS TO PARTICIPATE IN WELFARE-TO-WORK ACTIVITIES? FREQUENTLY CITED STATISTIC IS INCOMPLETE AND MISLEADING I (2002), <http://www.cbpp.org/4-25-02tanf.pdf>; 2004 Participation Rates, *supra* note 64, at tbls.IA, 6C. As discussed *infra* Part I.D, these figures also underestimate levels of work by excluding households receiving “non-assistance” TANF-funded benefits.

81. ALASKA STAT. § 47.27.900(10) (2006); ARIZ. REV. STAT. ANN. § 46-101(24) (2006); ARIZ. ADMIN. CODE § R6-10-101(43) (2005); ARK. CODE ANN. § 20-76-402(a) (2006); CAL. WELF. & INST. CODE § 11322.6 (West 2006); 305 ILL. COMP. STAT. ANN. 5/9A-9 (West 2006); IOWA CODE ANN. § 239B.8(2) (West 2005); KAN. STAT. ANN. § 39-7,105(b), (c) (2005); MD. ANN. CODE art. 88A, § 44A(i) (2006); NEB. REV. STAT. § 68-1721 (2005); N.H. REV. STAT. ANN. § 167:85(I) (2005); 62 PA. CONS. STAT. § 402 (2005); TENN. CODE ANN. § 71-3-154(g) (2005); VA. CODE ANN. § 63.2-608(D), (E) (2005); W. VA. CODE ANN. § 9-9-3(p) (West 2006); WIS. STAT. ANN. § 49.147 (West 2006); ALA. ADMIN. CODE r. 660-2-20-.02(3) (2005); ALASKA ADMIN. CODE tit. 7, § 45.260(i) (2006); 016-20-002 ARK. CODE R. § 3210 (Weil 2006); 16-5000-5100 DEL. CODE REGS. § 3006.4-5 (WEIL 2006); IDAHO ADMIN. CODE r. 16.03.08.164 (2005); ILL. ADMIN. CODE tit. 89, § 112.70, 78 (2006); IOWA ADMIN. CODE r. 441-93.109(2) (2006); KAN. ADMIN. REGS. § 30-4-64(b) (2006); 106 MASS. CODE REGS. 203.400(A)(2) (2006); MO. CODE REGS. ANN. tit. 13, § 40-2.315(1)(A) (2005); MONT. ADMIN. R. 37.78.807 (2005); 468 NEB. ADMIN. CODE § 2-020.06A-J (2005); N.H. CODE ADMIN. R. ANN. He-W 602.06(b)(6), (c)(1) (2005); OKLA. ADMIN. CODE § 340:10-2-1(2) (2005); OR. ADMIN. R. 461-190-0161(4) (2005); 55 PA. CODE § 165.31(a)(4), (c)(1) (2006); TENN. COMP. R. & REGS. 1240-1-49.03(2) (2006); UTAH ADMIN. CODE r. 986-200-210(5) (2005); 13-170-003 VT. CODE R. § 2364 (2006); 22 VA. ADMIN. CODE § 40-35-10, 100(D), (E) (2005); WASH. ADMIN. CODE § 388-310-0200(2) (2006); WIS. ADMIN. CODE DWD § 12.16 (2006);

providing child-care for other TANF recipients as a separate work activity.⁸² Few states altogether exclude other federally authorized activities, but when they do, community service is the most commonly eliminated.⁸³ What these two activities have in common is that both are unpaid *and* are not primarily designed to enhance future employability. Indeed, even states that retain “community service” in their list of authorized work activities sometimes define it narrowly by requiring that the activity provide job-related experience;⁸⁴ doing so largely eliminates any difference between “community service” and “work experience.”⁸⁵ A few states carry through this focus on paid employment by also eliminating one or more of the federally authorized educational activities.⁸⁶

CAL. MANUAL § 42-716.111 (West 2006); IND. CLIENT ELIG. SYS. PROGRAM POL'Y MAN. § 2540.10.00, <http://www.in.gov/fssa/families/manual.html> [hereinafter IND. MANUAL]; see also ME. REV. STAT. ANN. tit. 22, § 3788(6), (10) (2005) (not listing this activity). *But see* 10-144-607 ME. CODE R. § 3(IV)(A)(3) (Weil 2005) (listing it); MONT. ADMIN. R. 37.78.103(60) (2005) (incorporating federally authorized activities by reference).

82. If such care is provided for pay it could be included as a form of employment. When unpaid, it is sometimes included as a form of “community service” even if not listed as a separate work activity. See N.J. STAT. ANN. § 44:10-34, -57 (West 2006); WASH. ADMIN. CODE 388-310-1400 (2006); S.D. ADMIN. R. 67:10:06:05, 67:10:06:11 (2005); W. VA. MANUAL ch. 24.10.

83. NEB. REV. STAT. § 68-1721 (2005); N.H. REV. STAT. ANN. § 167:85(I) (2005) (including “community services and resources,” but apparently referring to *receipt* rather than performance of services); 16-5000-5100 DEL. CODE REGS. § 3006.4-5 (Weil 2005); MO. CODE REGS. ANN. tit. 13, § 40-2.315(1)(A) (2005); 468 NEB. ADMIN. CODE § 2-020.06A-J (2005); N.H. CODE ADMIN. R. ANN. HE-W 602.06(b)(6), (c)(1) (2005); OKLA. ADMIN. CODE § 340:10-2-1(2) (2005); OR. ADMIN. R. 461-190-0161(4) (2005); UTAH ADMIN. CODE r. 986-200-210(5) (2005); IND. MANUAL § 2540.10.00. In some states, activities that elsewhere might be categorized as “community service” could be categorized as “work experience” instead.

84. See *infra* note 91.

85. Compare, e.g., CAL. WELF. & INST. § 11322.6 (d) (West 2006) (defining “work experience” by statute as “public or private sector work that shall help provide basic job skills, enhance existing job skills in a position related to the participant’s experience, or provide a needed community service that will lead to employment”), with CAL. MANUAL § 42-701(c)(3) (2005) (defining “community service” by regulation as “a welfare-to-work training activity that . . . provides participants with basic job skills that can lead to employment while meeting a community need”).

86. MD. ANN. CODE art. 88A, § 44(A) (2005) (not including high school or GED preparation); VA. CODE ANN. § 63.2-608(D), (E) (2005) (same); OKLA. ADMIN. CODE § 340:10-2-1(2) (2005) (not including employment-related education or high school or GED coursework for non-high school graduates); 22 VA. ADMIN. CODE § 40-35-10, 100(D), (E) (2005) (not including any form of training or education as a “work activity,” but allowing some forms of education to supplement work).

TABLE I: EXCLUSIONS FROM STATE WORK ACTIVITIES⁸⁷

CARE FOR THE CHILDREN OF OTHER TANF RECIPIENTS ⁸⁸	COMMUNITY SERVICE ⁸⁹	EDUCATIONAL ACTIVITIES ⁹⁰
Alabama, Alaska, Arizona, Arkansas, California, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin	Delaware, Indiana, Missouri, Nebraska, New Hampshire, Oklahoma, Oregon, Utah	Maryland, Oklahoma, Virginia

Second, states may provide their own restrictive definitions of federally allowable activities. For instance, some states require that “work experience” or “community service” enhance participants’ future employability.⁹¹ Other states specifically exclude four-year college, or particular courses of study, from definitions of vocational education.⁹²

Third, statewide policies sometimes mandate assignment to particular activities, functionally eliminating the availability of other activities that formally appear in the state’s definition of work. Pennsylvania, Vermont, and Wisconsin, for instance, all permit a wider range of activities at the beginning of an individual’s period on TANF, but over time progressively narrow the available activities to paid employment and unpaid work experience.⁹³ Less mechanically, many states explicitly establish unsubsidized employment as the ultimate goal

87. States are listed as excluding a work activity if either the statute or regulation includes a comprehensive list of work activities but fails to include an activity in that list. In cases where the list of activities does not clearly track the federal list, I have resolved ambiguities in favor of inclusion of federally authorized activities.

88. *See supra* note 81.

89. *See supra* note 83.

90. *See supra* note 86.

91. *See, e.g.*, ARK. CODE ANN. § 20-76-402(a)(4) (2005) (work experience); FLA. STAT. ANN. § 445.024(1)(d) (West 2005) (community service); MINN. STAT. ANN. § 256J.67 (West 2005) (community service); 9 COLO. CODE REGS. § 9-2503-1:3.631.2(D) (2006) (work experience); CAL. MANUAL § 42-701.2(c)(3) (work experience); *Id.* § 42-701.2(c)(3) (community service). A few states specifically reject such a limitation for community service. *See infra* notes 135–36. Some states also require that “community service” take place under the supervision of an existing organization. *See, e.g.*, ARK. CODE ANN. § 20-76-402(a)(12) (2005); MINN. STAT. ANN. § 256J.56 (West 2005). These are non-exhaustive lists because many states do not provide detailed definitions of their work activities; accordingly, with regard to sub-definitions this Article does not attempt to be comprehensive and provides representative examples only.

92. *See, e.g.*, N.Y. SOC. SERV. LAW § 336-a(1) (Consol. 2005); WIS. STAT. ANN. § 49.147(5m) (West 2006); 016-20-002 ARK. CODE R. § 3252.1 (Weil 2005) (including nursing and accounting but excluding political science and sociology); MONT. ADMIN. R. 37-78.103(58) (2005).

93. 55 PA. CODE § 165.31(b), (c) (2005); 13-170-003 VT. CODE R. § 2360.2-.24 (2005); WIS. ADMIN. CODE DWD § 12.16(2)(e), 3(e), (4)(c) (2005).

of work activities,⁹⁴ making clear that unsubsidized employment is the preferred form of work when it is available.⁹⁵

Fourth, informal agency practice or an official policy not enshrined in state law may favor assignment to particular activities. In New York City in the late 1990s, for instance, welfare recipients were routinely assigned to work experience programs even when they were already participating in educational activities that could satisfy state and federal work requirements.⁹⁶

Many states have in one or more of these ways embraced even more tightly than TANF itself what is generally known as a “work first” approach. “Work first” prioritizes immediate labor force attachment over long-term employability enhancement through training or other services.⁹⁷ As a description of such a policy, the name itself conveys the idea that it is employment that is really work. Senator Phil Gramm offered a particularly vivid expression of this view during the PRWORA debates, declaring,

[W]ork does not mean sitting in a classroom. Work means work. . . . Ask any of my brothers and sisters what “work” meant on our family’s dairy farm. It didn’t mean sitting on a stool in the barn, reading a book about how to milk a cow. “Work” meant milking cows.⁹⁸

Identifying exactly *why* education is not “real work”—beyond the unhelpful tautology that “work means work”—is complicated by the fact that “work first” policies often emphasize placement into unpaid workfare positions. “Work first” proponents like former New York City welfare commissioner Jason Turner typically defend *these* positions as “real work.”⁹⁹ This suggests that lack of pay alone is not disqualifying. Senator Gramm’s invocation of the physical passivity of “sitting” on a

94. See, e.g., N.C. GEN. STAT. ANN. § 108A-27(a) (West 2005); WASH. REV. CODE ANN. § 74-08A.200 (West 2005); 16-5000-5100 DEL. CODE REGS. § 3006 (Weil 2005); MD. CODE REGS. 07.03.03.07(1)(1) (2005).

95. Most states enforce this notion by specifically requiring that TANF recipients accept employment if it is offered to them. See, e.g., N.Y. SOC. SERV. LAW. § 336-d(1) (Consol. 2005).

96. See Pete Bowles, *Victory For Workfare Students*, NEWSDAY, June 9, 1998, at A05; *Legal Aid Suit Hits Workfare Practices*, N.Y. TIMES, Dec. 20, 1996, at B7 (describing lawsuit charging a “one-size-fits-all approach” of assigning all recipients to work experience).

97. See AMY BROWN, MANPOWER DEMONSTRATION RESEARCH CORPORATION, *WORK FIRST: HOW TO IMPLEMENT AN EMPLOYMENT-FOCUSED APPROACH TO WELFARE REFORM 2* (1997), available at <http://www.mdrc.org/publications/129/full.pdf>; Karen Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where is the C in TANF?*, 61 MD. L. REV. 308, 313 (2002).

98. 141 CONG. REC. S13788 (daily ed. Sept. 19, 1995).

99. See JASON TURNER, *Effective Work Programs* (2002), available at <http://www.heritage.org/Research/Welfare/Test040902.cfm> (referring to workfare as “actual work” and “real work,” in contrast to education and training); RON HASKINS & PAUL OFFNER, BROOKINGS INST., *WELFARE REFORM & BEYOND POLICY BRIEF NO. 25, ACHIEVING COMPROMISE ON WELFARE REFORM REAUTHORIZATION 3* (2003), <http://www.brookings.edu/es/research/projects/wrb/publications/pb/pb25.htm> (referring to employment, work experience, and community service as “actual work (as opposed to education or training)”).

stool or in a classroom resonates with “work first” advocates’ common criticisms of welfare recipients for “sitting at home doing nothing” and for lacking discipline and motivation.¹⁰⁰ Another possibility, often emphasized by New York City Mayor Rudolph Giuliani, is that workfare, but not education, “gives back” to the community that provides welfare.¹⁰¹

b. Broad State Approaches to Work

The “work first” approach is hardly universal. Some states define work more expansively, especially with regard to unpaid activities besides workfare. They do so through a number of mechanisms, including simply adding types of work that do not appear in the federally authorized list,¹⁰² defining federally authorized activities to include more specific activities as examples (for instance, “self-employment” as a type of “employment”¹⁰³), and establishing “separate state programs” that provide state-funded benefits to individuals engaged in specific activities, usually post-secondary education.¹⁰⁴

100. See, e.g., TURNER, *supra* note 33. One disturbing aspect of an emphasis on discipline and structure is its resonance with racialized views of poverty. Consistent with a wide body of scholarship, sociologist Michèle Lamont’s research on working class men’s views of work and race finds that, among whites, there is a strong sense of identity built around what she terms a “disciplined self” associated with steady employment. When these men articulate claims of racial superiority, as they often do, they tend to do so by attributing to African-Americans and Latinos a lack of self-control. See MICHÈLE LAMONT, *THE DIGNITY OF WORKING MEN: MORALITY AND THE BOUNDARIES OF RACE, CLASS, AND IMMIGRATION* 24, 57, 61, 132 (2000); see also ROGER WALDINGER & MICHAEL L. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* 171 (2003) (describing consistent pattern of employer criticism of African-Americans for laziness, poor “work ethic,” and “attitude” manifested in resistance to discipline); WILSON, *supra* note 3, at 113, 118 (noting prevalence of employer doubts about the work ethic of urban African-American men). Promoting employment as a source of discipline and structure *of benefit to the worker* thus slips too easily into implying that *lack of work* is itself caused principally by the personality flaws of the poor. See, e.g., LAWRENCE M. MEAD, *BEYOND ENTITLEMENT* 18 (1986) (“[T]he main barrier to acceptance [of the poor] is no longer unfair social structures but their own difficulties in coping, particularly with work and family life.”); MEAD, *supra* note 10, at 83 (“The middle class and the poor appear to exemplify two different economic personalities. The first has responded to adversity with greater effort, the other with less.”). Research on low-income communities, and African-American ones in particular, consistently find widespread affirmation of the work ethic, see EDIN & LEIN, *supra* note 10, at 190; WILSON, *supra* note 3, at 73, and economic behavior consistent with such expressed views, see WILSON, *supra* note 3, at 139–46 (finding that jobless urban African-American men have lower reservation wages than men of other racial groups, with whites having the highest wage expectations).

101. DeParle, *supra* note 54; accord Diller, *supra* note 9, at 27.

102. See, e.g., CAL. WELF. & INST. CODE § 11322.6 (West 2006).

103. See, e.g., N.M. STAT. ANN. § 27-2B-5(A)(1) (West 2006); OHIO REV. CODE ANN. § 5107.60 (West 2006); WIS. STAT. ANN. § 49.147(1)(c) (West 2006); WY. R. & REGS. FAM. SERVS. ch. 1, § 2(f). “Vocational educational training” may be defined to include post-secondary education. See, e.g., ARK. CODE ANN. § 20-76-402(a)(7) (2005) (including four-year colleges and universities); *id.* § 20-76-443(a)(3) (including study time); CAL. WELF. & INST. CODE § 11322.6(m) (including college); R.I. GEN. LAWS § 40-5.1-9(c)(2)(1) (2006). “Community service” is especially flexible. See *infra* note 133 and accompanying text.

104. For a technical explanation of separate state programs, see *supra* note 67. Maine pioneered this approach to permitting post-secondary education with its Parents as Scholars program. See ME.

Through these techniques, some state TANF programs have adopted broad meanings of work that include five major types of activity outside the “work first” duo of paid employment and unpaid workfare: (1) self-employment; (2) education and training, especially post-secondary education; (3) rehabilitative medical and social services to address physical or mental disability, domestic violence, or substance abuse; (4) unpaid care for family members in special circumstances; and (5) “community service” that extends beyond unpaid volunteering with established organizations.

Although not universally adopted, self-employment has provoked little controversy as a work activity, presumably because of broad political support for entrepreneurship and a close fit with an emphasis on generating earned income.¹⁰⁵ It does, however, raise interesting questions about how to allocate credit for hours of work, what level of state monitoring is appropriate for work activities, and how important it is that an individual’s work be subject to supervision within a larger institutional setting. If the disciplinary aspects of workfare are what justify calling it, but not college, “work,” then self-employment should be a difficult case. “Being your own boss” often appeals precisely due to a *de*emphasis on showing up on time and taking orders, demands typical of both low-wage employment and workfare.¹⁰⁶

As Table II shows, many states include post-secondary and other forms of education in their definitions of work. Doing so rejects to some extent the “work first” approach, continuing a longstanding debate over the relative value, and feasibility, of immediate employment versus enhancement of long-term job prospects.¹⁰⁷ This debate can be understood as a family argument among those committed to economic self-sufficiency through employment but divided merely over how to achieve that goal. At the margins, though, are suggestions that higher education’s value as work also derives from the effort, perseverance, and talent required to succeed (evoking self-improvement), or from facilitating effective contributions as a political participant, community

REV. STAT. ANN. tit. 22, § 3790 (2005); Friedman, *supra* note 46; REBEKAH J. SMITH ET AL., MAINE EQUAL JUSTICE PARTNERS, PARENTS AS SCHOLARS: EDUCATION WORKS 3 (2002), available at <http://www.mejp.org/PDF/pas.pdf>; Sen. Olympia J. Snowe, *Education Transitions American Families Off Welfare*, WKLY. SENATE UPDATE (Aug. 20 2004), <http://snowe.senate.gov/wsuo8-20-04.htm>. A number of other jurisdictions have since followed suit. See, e.g., D.C. CODE § 4-205.19g(a)(6) (2006); MONT. CODE ANN. § 53-4-212(2)(t) (2005); N.M. STAT. ANN. § 27-2D-4; VT. STAT. ANN. tit. 33, § 1122 (2006); WYO. STAT. ANN. § 42-2-103(b)(x) (2006).

105. See generally NISHA PATEL & MARK GREENBERG, CLASP, MICROENTERPRISE DEVELOPMENT AND SELF-EMPLOYMENT FOR TANF RECIPIENTS: STATE EXPERIENCES AND ISSUES IN TANF REAUTHORIZATION (2002), available at http://www.clasp.org/publications/microenterprise_report.pdf.

106. See WALDINGER & LICHTER, *supra* note 100, at 38–40; Turner & Main, *supra* note 43, at 299–300 (explaining that workfare forces participants to “practice organizing their lives around a realistic work schedule” and “submit to supervisory authority” in preparation for the private labor market).

107. See generally Diller, *supra* note 9; Friedman, *supra* note 46.

member, and parent (evoking reciprocity).¹⁰⁸

The last three forms of unpaid work—rehabilitation, unpaid family care, and “community service” expansively conceived—are where states have been most innovative, and they raise the biggest questions about the meaning of work under TANF.

¹⁰⁸. See Rebekah J. Smith et al., *The Miseducation Of Welfare Reform: Denying The Promise of Postsecondary Education*, 55 ME. L. REV. 211, 219 (2003); cf. Suzanna Sherry, *Responsible Republicanism: Educating For Citizenship*, 62 U. CHI. L. REV. 131, 181 (1995).

TABLE II: SELECTED STATE WORK ACTIVITIES NOT EXPLICITLY INCLUDED IN FEDERAL LAW

POST-SECONDARY EDUCATION ¹⁰⁹	ONE OR MORE REHABILITATIVE SERVICES ¹¹⁰	CARE FOR A FAMILY MEMBER ¹¹¹
Arizona, Arkansas, California, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, Wyoming	California, Delaware, Florida, Illinois, Iowa, Kentucky, Massachusetts, Minnesota, Nebraska, New Hampshire, New Mexico, Ohio, Texas, Utah, Washington, West Virginia, Wisconsin	<i>Based on medical condition:</i> New York, Texas, Washington, West Virginia <i>By a non-parent:</i> Illinois, Massachusetts, New York, Washington

109. ARIZ. REV. STAT. ANN. § 46-299(B) (2006); ARK. CODE ANN. § 20-76-402(a)(7) (2005); CAL. WELF. & INST. CODE § 11322.6(m) (West 2006); FLA. STAT. ANN. § 445.024(1)(l) (West 2005); 305 ILL. COMP. STAT. ANN. 5/9A-9(h) (West 2006); ME. REV. STAT. ANN. tit. 22, § 3790 (2005); MO. ANN. STAT. § 208.040(5)(2) (West 2005); MONT. CODE ANN. § 53-4-212(2)(t); NEB. REV. STAT. § 68-1721(2) (2005); N.H. REV. STAT. ANN. § 167:85(g) (2005); N.M. STAT. ANN. § 27-2D-4 (West 2006); N.Y. SOC. SERV. § 336-a(1) (Consol. 2005); N.C. GEN. STAT. ANN. § 108A-27.9(c)(4) (West 2005); OHIO REV. CODE ANN. § 5107.58 (West 2006); R.I. GEN. LAWS § 40-5.1-9(c)(2)(I) (2006); S.D. CODIFIED LAWS § 28-7A-22 (2006); TENN. CODE ANN. § 71-3-154(g) (2005); VT. STAT. ANN. tit. 33, § 1122; W. VA. CODE ANN. § 9-9-7(a) (West 2006); WYO. STAT. ANN. § 42-2-103(b)(x); 16-5000-5100 DEL. CODE REGS. § 3006.6 (Weil 2005); IOWA ADMIN. CODE r. 441-93.109(2)(a)(2) (2006); KAN. ADMIN. REGS. § 30-4-64(b)(3) (2006); 921 KY. ADMIN. REGS. 2:370(2)(c) (2005); MICH. ADMIN. CODE r. 400.3601(b)(ii) (2006); *see also* N.J. STAT. ANN. § 44:10-34, -57 (West 2006) (allowing post-secondary education only when combined with another work activity); WIS. STAT. ANN. § 49.147(5m) (West 2006) (same).

110. CAL. WELF. & INST. CODE § 11322.6(q); IOWA CODE ANN. § 239B.8(2)(i) (West 2005); MINN. STAT. ANN. § 256J.49(13)(g) (West 2005); NEB. REV. STAT. § 68-1721(2) (2005); N.M. STAT. ANN. § 27-2B-5(E); OHIO REV. CODE ANN. § 5107.42, .62, .64; WASH. REV. CODE ANN. § 74.08A.250(14) (West 2005); W. VA. CODE ANN. § 9-9-3(e), (p); WIS. STAT. ANN. § 49.147(5)(1)(b); 16-5000-5100 DEL. CODE REGS. § 3006.4; FLA. ADMIN. CODE ANN. r. 65A-4.206(2), (7) (2006); ILL. ADMIN. CODE tit. 89, § 112.70(a)-(c) (2006); 921 KY. ADMIN. REGS. 2:370(2)(c)(10); 106 MASS. CODE REGS. 203.400(A)(2)(e) (2006); N.H. CODE ADMIN. R. ANN. HE-W 637.18 (2005); 40 TEX. ADMIN. CODE § 811.32(a)(1)(B) (2006); UTAH ADMIN. CODE r. 986-200-210(5)(d) (2005); WASH. ADMIN. CODE § 388-310-0200(2)(l), -1400(2)(d) (2006); *see also* N.Y. SOC. SERV. § 335-b(5)(e)(i) (recipient complying with treatment plan “deemed” to satisfy work requirement); STATE OF GEORGIA, GEORGIA’S TEMPORARY ASSISTANCE FOR NEEDY FAMILIES STATE PLAN FOR FY 2003, at 10 (2002), *available at* http://dfcs.dhr.georgia.gov/DHR-DFCS/DHR-DFCS_CommonFiles/4920828TANF_Plan_FY2003.pdf [hereinafter GEORGIA TANF PLAN].

111. N.Y. SOC. SERV. § 332(1)(c); W. VA. CODE ANN. § 9-9-3(e), (p); ILL. ADMIN. CODE tit. 89, § 112.70(f); 106 MASS. CODE REGS. 203.400(A)(2)(g); N.Y. COMP. CODES R. & REGS. tit. 12, § 1300.9(7) (2006); 40 TEX. ADMIN. CODE § 811.32(a)(3); WASH. ADMIN. CODE § 388-310-1400(2)(a)-(b); W. VA. MANUAL ch. 24.10(C); *see also* OHIO REV. CODE ANN. § 5107.60 (treating as “community service” an adult caretaker’s “involve[ment] in the minor child’s education on a regular basis”); GEORGIA TANF PLAN, *supra* note 110, at 9.

A minority of states, listed in Table II, now explicitly include as work professional rehabilitative services that assist welfare recipients to overcome or mitigate the effects of poor health, domestic violence, or substance abuse. This is a new development under TANF. Predecessor programs did not include such services under the rubric of work activities,¹¹² nor were they proposed for inclusion in TANF work activities during the welfare reform debates of the 1990s.¹¹³ In this regard, they are unlike education and training, which were prominent parts of pre-TANF welfare work programs¹¹⁴ and were a major point of contention as Congress drafted TANF.¹¹⁵

At the appropriate level of abstraction, however, these rehabilitative programs look very similar to education and training. They are time-intensive activities that can improve long-term prospects for employment by changing recipients' personal characteristics. California is typical in including participation in those "[m]ental health, substance abuse, and domestic violence services . . . that are necessary to obtain and retain employment."¹¹⁶

Indeed, this common connection to employability and in turn to economic self-sufficiency is invoked by what has become the standard umbrella terminology for these programs: services designed to address "barriers to employment" or "barriers to self-sufficiency," shortened to "barrier removal activities."¹¹⁷ Policymakers' and program administrators' adoption of these terms follows the lead of researchers who coined them. The "barriers" concept refers not only to the need for

112. See 42 U.S.C. § 682(d) (1996) (listing mandatory and permissive activities for JOBS, the work program for AFDC). Some states now classify rehabilitative activities as a form of "job readiness," 468 NEB. ADMIN. CODE § 2-020.06D; HHS SHOULD EXERCISE OVERSIGHT, *supra* note 24, at 11, a category that did exist under JOBS, 42 U.S.C. § 682(d)(1)(A)(i)(III) (1996), but which then was defined more narrowly to refer to activities focused on "general workplace expectations," and "work behaviors and attitudes." 45 C.F.R. § 250.44(c) (1996).

113. They were absent, for instance, from Democratic objections to the Republican-supported bills and from the most liberal Democratic alternative. See H.R. REP. NO. 104-651, at 2027-30 (1996); 141 CONG. REC. H3742 (daily ed. Mar. 24, 1995) (substitute offered by Rep. Mink).

114. 42 U.S.C. § 682(d)(1)(A)(i) (1996) (mandating that AFDC/JOBS programs make available both "educational activities" and "job skills training").

115. See H.R. REP. NO. 104-651, at 2027-30 (1996) (asserting that "true welfare reform" requires "adequate education, training, and child care, and jobs that pay a livable wage"); *id.* at 872 (describing party-line defeat of amendment to PRWORA that would have included post-secondary education as a work activity).

116. CAL. WELF. & INST. CODE § 11322.6(q) (West 2006) (emphasis added).

117. OHIO REV. CODE ANN. § 5107.42(B) (West 2006); W. VA. CODE ANN. § 9-9-3(d), (e), (p) (West 2006) (authorizing work activities designed to address "challenges" defined as "any fact, circumstance, or situation that prevents a person from becoming self-sufficient or from seeking, obtaining, or maintaining employment of any kind, including physical or mental disabilities, lack of education, testing, training, counseling, child care arrangements, transportation, medical treatment or substance abuse treatment"); 468 NEB. ADMIN. CODE § 2-020.06; N.H. CODE ADMIN. R. ANN. HE-W 637.18 (2005).

rehabilitative services but also to weak job skills, limited English proficiency, family members' acute needs for care, and ultimately to anything that correlates with low employment rates or low earnings.¹¹⁸ At this level of abstraction, participating in professional interventions either by medical and social service providers or by educators serves the same function of improving subsequent employment prospects.

In many cases, states even have catchall categories of work activities that include anything that, in the words of a Delaware regulation, "assist[s] in obtaining or maintaining employment or improving work performance."¹¹⁹ To see how extraordinarily broad such a category might be, consider that at least four states explicitly permit a housing search by a homeless individual to count as work,¹²⁰ and that Utah includes the process of relocating out of a rural area.¹²¹ Counterintuitive as it may seem to count going to the doctor, let alone shopping for an apartment, as work, it does make sense if achieving economic self-sufficiency is the essence of work, and if that achievement includes a cumulative process, not simply an on/off decision to get a job. Because lacking a permanent home interferes with obtaining and maintaining employment,¹²² as does living in an isolated area with a weak job market, removing either limitation could be as important as obtaining a GED.

These new categories of work are subject to the same critique that "work first" proponents have long lodged against education: that they dilute the employment goal by permitting recipients to defer getting a job.¹²³ In this sense, permitting any form of barrier removal activity could

118. See Sandra K. Danziger & Kristin S. Seefeldt, *Barriers to Employment and the "Hard To Serve": Implications for Services, Sanctions, and Time Limits*, 22 FOCUS 76 (2002), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc221-part3.pdf#page=26> (defining "barriers to employment" as "personal and family challenges [that] impede welfare recipients' ability to find jobs."); THE LEWIN GROUP, ANNIE E. CASEY FOUNDATION, EMPLOYING WELFARE RECIPIENTS WITH SIGNIFICANT BARRIERS TO WORK: LESSONS FROM THE DISABILITY FIELD 3-6 (2000), available at <http://www.aecf.org/publications/welfareanddisabilities.pdf>; SHEILA R. ZEDLEWSKI, URBAN INST., SNAPSHOTS OF AMERICA'S FAMILIES NO. 3, WORK AND BARRIERS TO WORK AMONG WELFARE RECIPIENTS IN 2002, at 1 (2003), available at http://www.urban.org/uploadedpdf/310836_snapshots3_no3.pdf (defining "barriers to work" as "those shown in an earlier study to significantly reduce work activity" and including physical and mental, lack of education, lack of recent work experience, infant child, disabled child, and Spanish as primary language).

119. 16-5000-5100 DEL. CODE REGS. § 3006.1 (Weil 2005); accord CAL. WELF. & INST. CODE § 11322.6(r) (authorizing "activities necessary to assist an individual in obtaining unsubsidized employment").

120. N.M. STAT. ANN. § 27-2B-5(E)(3) (West 2006); OHIO REV. CODE ANN. § 5107.64(C); 106 MASS. CODE REGS. 203.400(A)(2)(j) (2006); WASH. ADMIN. CODE § 388-310-0200(2)(l) (2006).

121. UTAH ADMIN. CODE R. 986-200-210(5)(f) (2005).

122. See BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, A HOUSING PERSPECTIVE ON TANF REAUTHORIZATION AND SUPPORT FOR WORKING FAMILIES 1-3 (2002), available at <http://www.cbpp.org/3-12-02hous.pdf>; HEIDI GOLDBERG, CTR. ON BUDGET & POLICY PRIORITIES, IMPROVING TANF PROGRAM OUTCOMES FOR FAMILIES WITH BARRIERS TO EMPLOYMENT 9 (2002), available at <http://www.cbpp.org/1-22-02tanf3.pdf>.

123. Diller, *supra* note 9; Haskins, *supra* note 3, at 26.

be seen as weakening work requirements, if obtaining paid employment is the central goal and if transfer recipients engage in these activities instead of taking a job.

In a different way, however, a broader definition of work may actually expand the reach of work requirements and tighten their grip on the lives of transfer recipients. This expansion occurs when demands for work are no longer limited by *current* labor market prospects, but instead widen to include insistence that welfare recipients take substantial action to become employable in the future even if they genuinely cannot get a job at the moment.

This transformation is quite literally visible in the structure of state TANF work requirements. For instance, Minnesota recently abolished nearly all of its exemptions from work requirements in favor of a policy of “universal participation.”¹²⁴ Before June 30, 2004, individuals were excused from work based on age, illness, incapacity, or “the need for a person to provide assistance in the home” for medical reasons.¹²⁵ Now, these same individuals are to follow an “employment plan . . . tailored to recognize the special circumstances of caregivers and families including limitations due to illness or disability and caregiving needs.”¹²⁶ Anything specified in such a plan may be deemed a “work activity,” including “preemployment activities” such as “chemical and mental health assessments, treatment, and services; learning disabilities services; child protective services; family stabilization services,” and anything that “address[es] safety, legal, or emotional issues, and other demands on the family as a result of . . . family violence.”¹²⁷ Thus, circumstances once passively accepted as justifying *exemption from* a work obligation increasingly are recast as temporary conditions the active overcoming of which is mandatory *as part of* the obligation to work.¹²⁸

Even the most committed proponents of self-sufficiency recognize that immediate, full-time employment should not be expected of all transfer recipients because such employment may be unavailable or

124. MINN. STAT. ANN. § 256J.561 (West 2005).

125. These exemptions from work requirements had once been mandated by the AFDC/JOBS program that preceded TANF. 42 U.S.C. § 602(a)(19)(C) (1996).

126. Compare MINN. STAT. ANN. § 256J.56(b), with *id.* § 256J.561(2)(d).

127. MINN. STAT. ANN. § 256J.49(13), .521(2), (3). Similar policies have been put in place in Ohio and Wisconsin. See OHIO REV. CODE ANN. § 5107.42 (West 2006); WIS. STAT. ANN. § 49.147(5) (West 2006). A number of other states take an intermediate approach, continuing to use the language of “exemptions” but making qualification for the exemption itself contingent on participating in activities that mitigate or remove the “barrier to employment.” See 62 PA. CONS. STAT. § 405.1(a.3)(1); VT. STAT. ANN. tit. 33, § 1114(b)(3) (2006); FLA. ADMIN. CODE ANN. r. 65A-4.206(2), (7) (2006); N.M. CODE R. § 8.102.460.11(D); N.Y. COMP. CODES R. & REGS. tit. 12, § 1300.2(e) (2006); 13-170-003 VT. CODE R. § 2365.31-32 (2006); WY. R. & REGS. FAM. SERVS. ch. 1, § 8(d)(2)(A).

128. For a theoretical justification of this approach, see generally Amy L. Wax, *Disability, Reciprocity, and “Real Efficiency”*: A Unified Approach, 44 WM. MARY L. REV. 1421 (2003).

unduly burdensome. What “universal engagement” approaches such as Minnesota’s do, however, is conceptually link those who decline an appropriate job when one is available with those who decline an appropriate opportunity to increase their future employment prospects. Jason Turner, an architect of both Wisconsin’s and New York City’s 1990s welfare reforms that included universal engagement policies, characterizes such policies as an antidote to welfare recipients “staying at home doing nothing to help themselves become self-sufficient.”¹²⁹

In contrast to Turner’s advocacy of universalizing participation in employment or work experience programs, some states use the universal engagement concept to remove the “doing nothing” label from those actively engaged in daily efforts other than wage earning. Wide-ranging consequences follow from this shift in classification. On the one hand, recipients become subject to the sanctions for non-work, which could now include missing a therapist’s appointment. On the other, they may become eligible for “work supports” (such as subsidized therapy, and child-care during the session) that could enable access to services previously out of reach for financial and other reasons. The precise implications of this shift in classification will depend in part on how exclusively the characterization as work is grounded in prospects for future employment.¹³⁰ In other words, what is the relative importance of the “doing something” versus the “becoming self-sufficient” components of Turner’s formulation?

So long as employment remains the ultimate goal, there is an unavoidable tension between two different dimensions along which that goal may be pursued. For any given individual, permitting “barrier removal activities” to satisfy work requirements (and thus maintain transfer eligibility) can reduce the pressure to find employment; but for the population of transfer recipients as a whole, including these activities as a form of work makes it easier for work requirements to be a universal feature of transfer receipt. There is a tension, that is, between recognizing only a narrow conception of “real work” and positing work as a universal enterprise that binds together *all* transfer recipients and links them to the citizenry more broadly.¹³¹

Facilitating future employment, however, is not the only way in

129. TURNER, *supra* note 33.

130. Recasting day-to-day struggles to manage and overcome difficult circumstances as fields of activity and accomplishment, not simply passive excuses, resonates strongly with important strands of disability rights and family violence movements. But what are the subtle effects of articulating the significance of these struggles as achieving the status of a paid worker, and being obligated to do so? Cf. MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS* 90 (Colin Gordon ed., 1980) (analyzing power as a relation inscribed “in the bodies themselves of each and everyone of us”).

131. See HANDLER, *supra* note 74, at 4–15 (discussing arguments for work as a form of social inclusion).

which participating in therapeutic services can be cast as work. Enhancing employability is not, after all, the only or often even the primary motivation for overcoming domestic violence, treating an illness, or finding a place to call home.¹³² Instead, like an education, they may be of much broader value both to the individual and to others. Washington State illustrates this point by classifying substance abuse treatment and domestic violence services as work under the rubric of “community service” rather than “barrier removal.”¹³³

Indeed, Washington’s general definition of “community service” is startlingly broad: any “activity approved by your case manager which benefits you, your family, your community or your tribe.”¹³⁴ Connecticut’s “community service” definition—“community enhancement as opposed to improving the employability of the individual”¹³⁵—explicitly establishes this concept of conferring some benefit as a basis for work, independent of any connection to future employment.¹³⁶

The scope of “community service” is thus a key site for exploring the relationship between self-sufficiency and reciprocity accounts of work requirements. In contrast to Connecticut’s approach some states render community benefits strictly supplemental to employability goals. They do so either by eliminating community service as a category distinct from “work experience,”¹³⁷ or by requiring that community service positions enhance employability.¹³⁸ Florida law, for instance, provides that “community service” is “job training experience.”¹³⁹

Fitting rehabilitation under the “community service” rubric, without an employability link, requires a particularly broad conception of which

132. Samuel Bagenstos observes that a similar duality has become a sticking point in the interpretation of the ADA’s “reasonable accommodation” requirement, as courts have refused to require accommodations that benefit individuals with disabilities throughout their lives, even if they are also necessary to enable employment. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 *YALE L.J.* 1, 35–36 (2004).

133. WASH. ADMIN. CODE § 388-310-1400 (2006); see also W. VA. MANUAL ch. 24.10(G). Although not reflected in its statutes or regulations, Kansas also appears to classify substance abuse treatment and mental health counseling as “community service.” See HHS SHOULD EXERCISE OVERSIGHT, *supra* note 24, at 12, 30.

134. WASH. ADMIN. CODE § 388-310-1400(1)(b).

135. CONN. DEPARTMENT OF LABOR, JOBS FIRST EMPLOYMENT SERVICES PROGRAM PROCEDURES MANUAL app. A. (2006), available at <http://www.ctdol.state.ct.us/weltowrk/allpdf/2006.pdf>.

136. See also ALASKA ADMIN. CODE tit. 7, § 45.260(i)(1) (2006) (“achieves a useful public purpose and contributes to the common good” and includes “subsistence activities”); GEORGIA TANF PLAN, *supra* note 110, at 9 (“provides a service to the community” and “may not lead to skill development or employment”); N.J. ADMIN. CODE § 10:90-4.2 (2006) (“increase the common good and/or improve the condition of the community”).

137. See *supra* notes 83–85 and accompanying text; see also Diller, *supra* note 9, at 22–27 (discussing shifting emphases on employability and reciprocity aspects of work experience).

138. See *supra* note 91.

139. FLA. STAT. ANN. § 445.024(1) (West 2005).

benefits will be considered “community” benefits. Once such “service” includes benefits concentrated on the recipient, or on other members of her family, the category becomes extremely broad.¹⁴⁰ Washington is the only state that expressly articulates such a general principle of including “benefits [to] you [or] your family” in community service, but others do so implicitly. Alaska, for instance, cites “subsistence activities” as an example of community service that “achieves a useful public purpose and contributes to the common good.”¹⁴¹ Here, “self-sufficiency” and “community service” appear to merge.

Broad conceptions of public purpose or common good can also erode the distinction between reciprocity and self-improvement approaches to work requirements. If the well-being of the individual recipient and the community are intertwined, then what makes work good for the worker and her family also makes it good for the community. Indeed, many states authorize, or even mandate, as work activities a battery of professional services that seem to have little connection either to improving employability or to benefiting anyone economically. What these “life skills” programs in parenting, financial literacy, and family planning share with employment appears to be the inculcation of comprehensive middle-class behaviors.¹⁴² In such activities, we can see the ascendancy of a self-improvement orientation in which the economic features of work are distinctly secondary.

Unpaid caregiving is perhaps the most intriguing way in which some states untether community service from widely diffused public benefits mediated by governmental or charitable organizations. Four states treat care of *other* TANF recipients’ children as “community service,”¹⁴³ and of course the federal TANF statute itself treats such care as a distinct work activity.¹⁴⁴

With regard to members of the recipient’s *own* household, however, the picture is more complicated. No state counts as work parents’ care

140. Some states require that “community service” take place within the rubric of established non-profit or charitable organizations, thereby spreading the benefits of community service work beyond oneself and one’s family. *See* ARK. CODE ANN. § 20-76-402(a)(12) (2005); CAL. MANUAL § 42-701.2(c)(3) (1999); *see also* 9 COLO. CODE REGS. § 9-2503-1:3.631.2(G) (2006) (requiring that community service “provides a service to the community at large”).

141. ALASKA ADMIN. CODE tit. 7, § 45.260(i)(1), (j)(2) (2006).

142. *See, e.g.*, IOWA CODE ANN. § 239B.8(2)(h) (West 2005); OHIO REV. CODE ANN. § 5107.64 (West 2006); IOWA ADMIN. CODE r. 441-93.109(2)(a)(1) (2006); 921 KY. ADMIN. REGS. 2:370(2)(c)(10) (2005); TENN. COMP. R. & REGS. 1240-1-49.03(2)(b) (2006). Florida exempts parents of newborn children from work requirements “except that the parent may be required to attend parenting classes or other activities to better prepare for the responsibilities of raising a child.” FLA. STAT. ANN. § 445.024(3)(d) (West 2005). Louisiana requires that “[p]articipants who are pregnant or who have a child under age one . . . be assigned to specialized work activities that include parenting education.” LA. REV. STAT. ANN. § 46:231.7(B)(1) (2006).

143. *See supra* note 82.

144. 42 U.S.C. § 607(d)(12) (2006).

for their own healthy children.¹⁴⁵ Georgia, New York, Washington, and West Virginia, however, do allow as “community service” care for family members with special needs arising from illness or disability.¹⁴⁶ Special health considerations aside, New York and Washington allow care for children in the TANF recipient’s own household to count as community service work, but only when the recipient is the child’s grandparent¹⁴⁷ or foster parent;¹⁴⁸ the same care by a parent does not qualify. Several other states allow similar family caregiving as standalone work activities, without placing them under the rubric of community service.¹⁴⁹ Although these examples are quite limited, they suggest the beginnings of a transformation similar to what we observed with rehabilitative services, one in which meeting needs for family caretaking starts to be treated as a form of work rather than as an excuse from it, and as a form of “doing something.”

Both the “barriers to self-sufficiency” and “community service” rubrics developed in many states possess striking flexibility, depending on how attenuated a link to employment or how broad a conception of community is permitted. Because most activities that are candidates for “work” have complex characteristics, they can be incorporated into different frameworks for work requirements by emphasizing different aspects of the activity.

One striking example that ties together many of these threads comes from West Virginia. Its statute classifies as work both caring for disabled family members and rehabilitative services. They are grouped together

145. Ohio, however, does include parents’ involvement in their children’s education as a work activity. OHIO REV. CODE ANN. § 5107.60. Also, a number of states have experimented with At-Home Infant Care (AHIC) programs that allow poor or near-poor parents of infants to receive payments at or near the state reimbursement level for infant child-care subsidies, although these have not been integrated into state TANF programs. See NAT’L CHILD CARE INFO. CTR., AT-HOME INFANT CARE INITIATIVES SPONSORED BY STATES I (2006).

146. N.Y. SOC. SERV. LAW § 332(1)(c) (Consol. 2006); W. VA. CODE ANN. § 9-9-3(e), (p) (West 2006); N.Y. COMP. CODES R. & REGS. tit. 12, § 1300.9(7) (2006); WASH. ADMIN. CODE § 388-310-1400(2)(a)–(b) (2006); GEORGIA TANF PLAN, *supra* note 110, at 9; W. VA. MANUAL ch. 24.10(C) (2006). In addition, a recent U.S. General Accounting Office survey of selected states found that Maryland and Wisconsin also classify care for disabled family members as “community service” for the purpose of reporting their work participation rates to the federal government. See HHS SHOULD EXERCISE OVERSIGHT, *supra* note 24, at 11.

147. WASH. ADMIN. CODE § 388-310-1400(2)(b).

148. N.Y. COMP. CODES R. & REGS. tit. 12 § 1300.9(a)(7) (2006); see also Welfare Information Network, *TANF Recipients as Caregivers for Family Members with Disabilities*, RESOURCES FOR WELFARE DECISIONS, Apr. 2002, <http://www.financeproject.org/Publications/TANFrecipientsascaregiversRN.htm>. It is unclear whether the federal government would accept such a classification for TANF participation rate purposes were it ever to be put in issue, but proposed amendments to TANF to require that community service be “supervised” appear designed to preclude such a possibility. See discussion *infra* note 178 and accompanying text.

149. Texas allows family caregiving for the care of ill or disabled family members. 40 TEX. ADMIN. CODE § 811.32(a)(3) (2006). Illinois and Massachusetts do so for child-care by non-parents. ILL. ADMIN. CODE tit. 89, § 112.70(f) (2006); 106 MASS. CODE REGS. 203.400(A)(2)(g) (2006).

under the heading of activities addressing “challenges” that interfere with “seeking, obtaining, or maintaining employment.”¹⁵⁰ In other words, where Washington treats rehabilitation as community service (like caregiving), the West Virginia statute treats caregiving as “barrier removal” (like rehabilitation).¹⁵¹ This categorization is puzzling because caretaking does not obviously enhance the caretaker’s future employability, or aim to, even though time devoted to it competes with employment and thus the need for it correlates with reduced employment and earnings.¹⁵²

At the extreme, though, just giving an activity a name, a purpose, and a place in a monitored “plan,” rather than focusing on a passive state of need—caring for a disabled child, not having a disabled child in the household—permits a connection to ideas of activity, “engagement,” and supervision associated with employment, and with work more generally. Moreover, if requiring someone to show up on time to pick up trash and follow orders about how to do so inculcates the traits necessary for employment, then perhaps so too does requiring someone to show up on time to a medical appointment and follow a doctor’s orders for treatment.¹⁵³ In these ways, a single activity can be characterized as responsive to quite different approaches to work. The persuasiveness of this categorization nonetheless may vary depending on which approach is most important. If it turned out to be false that a substance abuse treatment program increased future employment but true that it had other positive social consequences (reduced crime, improved parenting, etc.), it might matter whether “barrier removal” or “community service” was the basis for including program participation as a work activity.

2. *Work Activities in Practice: What TANF Recipients Actually Do*

Not only do states adopt varied approaches to work at the level of formal policy, but they also vary at the level of outcomes, what TANF recipients actually are doing. Establishing a causal connection between these policies and outcomes is extraordinarily difficult, and not a task I undertake here.¹⁵⁴ Nonetheless, a number of patterns suggest such a

150. W. VA. CODE ANN. § 9-9-3(e); *see also* MINN. STAT. ANN. § 256J.561(2) (West 2005).

151. At the same time, West Virginia places these activities that address “challenges to employment” into a category named “community or personal development,” and the regulations transform many of its elements back into “community service.” *See* W. VA. MANUAL ch. 24.10 (2006).

152. *See supra* note 118.

153. Washington’s very broad definition of “community service,” for instance, coexists with the requirement that the community service activity “promote a strong work ethic.” WASH. REV. CODE ANN. § 74-08A.330 (West 2005).

154. Its difficulty stems from the wide array of factors that may influence recipient behavior. For instance, a low rate of employment among current TANF recipients could reflect either state policy deemphasizing immediate employment, or a benefit structure that causes small amounts of earned income to defeat benefit eligibility. Other considerations include local labor market conditions, caseload characteristics, and other government programs that affect the costs and benefits of

connection and demonstrate that welfare programs can operate with meaningfully different mixes of activities used to satisfy work requirements. This shows at a minimum that changes in work definitions could make a difference. Eliminating activities would require significant numbers of current recipients to do something different or lose benefits. Adding activities would allow current recipients either to shift to new work activities or to be reclassified from “non-working” to “working” status. Either change would affect a state’s ability to meet federal participation rates.

As an initial matter, unsubsidized employment is by far the most common TANF work activity. Nationally, roughly 50% of TANF recipients engaged in any work activity were in unsubsidized employment.¹⁵⁵ A little over 20% were engaged in work experience or community service, and roughly the same number engaged in some form of educational activity, principally vocational education.¹⁵⁶

These national aggregates, however, mask substantial inter-state variation. In the ten states with the highest unsubsidized employment rates among participating adults, the average unsubsidized employment rate was 73%,¹⁵⁷ but in the ten lowest, that rate was 17%.¹⁵⁸

Moreover, states vary considerably in their mix of work activities *other* than unsubsidized employment. Even among states committed to employment as “work first,” this measure shows differences in their

employment, education, and other activities. For research on the causes of welfare caseload decline and increased employment among low-skilled single mothers, see generally Bruce D. Meyer & Dan T. Rosenbaum, *Welfare, the Earned Income Tax Credit, and the Labor Supply of Single Mothers*, 66 Q. J. ECON. 1063 (2001); Rebecca M. Blank, *Evaluating Welfare Reform in the United States*, 40 J. ECON. LITERATURE 1105 (2002).

155. 2004 Participation Rates, *supra* note 64, at tbl.6B.

156. *Id.* 18% engaged in job search. The numbers sum to more than 100% because individuals may engage in more than one activity. Notably, unsubsidized employment recently declined in importance, from 59% to 48% between 2002 and 2004, while participation in community service or work experience markedly increased, from 15.4% to 21.2%. Compare *id.*, with Memorandum from U.S. Dept. of Health and Human Services, Office of Family Assistance to State Agencies Administering the Temporary Assistance for Needy Families Program tbl.6B (Sep. 17, 2003), available at <http://www.acf.hhs.gov/programs/ofa/particip/indexparticip.htm> (providing participation rate data for 2002).

157. This figure represents the author’s calculation for California, Connecticut, Delaware, District of Columbia, Hawaii, Indiana, Iowa, Michigan, Rhode Island, and Virginia. See 2004 Participation Rates, *supra* note 64.

158. This figure represents the author’s calculation for Kansas, Montana, Oklahoma, Oregon, Puerto Rico, South Dakota, Virgin Islands, West Virginia, Wisconsin, and Wyoming. See *id.* In absolute terms, however, a state with a high employment rate relative to other work activities may still have a low employment rate as a percentage of the total caseload. In California, for instance, 70% of those in any work activity are in unsubsidized employment, but those so employed constitute only 25% of the total caseload. In Ohio, only 30% of those in any work activity are in unsubsidized employment, but those so employed constitute 24% of the total caseload. The discrepancy arises because a much higher proportion of all adults are in any work activity in Ohio (78%) than in California (36%). *Id.* at tbls.6B & 6C.

second choices. It is also the measure most likely to reflect deliberate policy choices among definitions of work.¹⁵⁹ In the top ten states, on average 60% of “working” recipients participate in unpaid work experience or community service.¹⁶⁰ At the opposite extreme, in the bottom ten states only 2% do.¹⁶¹ There is less, but still substantial, state-to-state variation in the importance of educational and training activities. In the top ten states, on average 45% of “working” recipients participate in some form of education or training,¹⁶² while in the bottom ten, 7% do so.¹⁶³

States appear not simply to trade off between employment and one favored class of unpaid activities. Instead, as Table III shows, some states have high levels of *both* work experience/community service *and* education/training, while others emphasize one strongly over the other or rely almost exclusively on employment.

TABLE III: COMBINATIONS OF UNPAID WORK ACTIVITIES¹⁶⁴

		WORK EXPERIENCE & COMMUNITY SERVICE	
		TOP TEN	BOTTOM TEN
TRAINING & EDUCATION	TOP TEN	West Virginia, Wisconsin	None
	BOTTOM TEN	Delaware, Kansas, Wyoming	District of Columbia, Michigan, Tennessee

Unfortunately, the existing data make it impossible to track how many TANF recipients actually are taking advantage of the more

159. In the short term, different unpaid activities have the same economic consequences for participants, so they are less sensitive to labor market conditions and the availability of employment-linked benefits. Also, unlike private sector hiring, states can control whether a placement is available in activities such as work experience or vocational education. Furthermore, the percentage of a caseload in paid employment depends on the level of earnings at which benefit eligibility is lost: employment at a given level of earnings will, in a low benefit state, result in leaving welfare altogether, but in a high benefit state, it will result in staying on welfare but counting toward meeting the participation rate. JASON TURNER, EFFECTIVE WORK PROGRAMS (2004), <http://www.heritage.org/Research/Welfare/Test040902.cfm>.

160. This figure represents the author’s calculation for Delaware, Kansas, Montana, Ohio, Puerto Rico, South Dakota, Washington, West Virginia, Wisconsin, and Wyoming. See 2004 Participation Rates, *supra* note 64, at tbl.6B.

161. This figure represents the author’s calculation for California, Connecticut, District of Columbia, Indiana, Iowa, Michigan, Missouri, Nebraska, Rhode Island, and Tennessee. See *id.*

162. This figure represents the author’s calculation for Colorado, Kentucky, Louisiana, Maine, New Jersey, North Carolina, Utah, Virgin Islands, West Virginia, and Wisconsin. See *id.* This aggregation masks variation in the type of education or training activity involved. For instance, Wisconsin relies heavily on “job skills training” and “education related to employment,” while West Virginia has very low rates in those categories but high ones in “vocational education” and “satisfactory school attendance.” *Id.*

163. This figure represents the author’s calculation for Delaware, District of Columbia, Kansas, Michigan, Nevada, New York, Tennessee, Texas, Virginia, and Wyoming. See *id.*

164. See *supra* notes 160–63.

expansive state definitions of work described above.¹⁶⁵ All we know are how many recipients each state reports as participating in each federally authorized work activity. This count excludes individuals participating in supplemental state-defined work activities, and it aggregates individuals participating in different forms of a single broad category. Thus, of the approximately 16,000 Washington recipients engaged in “community service” each month,¹⁶⁶ we do not know how many were providing unpaid care to family members, participating in rehabilitative services, or providing unpaid services to community organizations.¹⁶⁷ Nonetheless, the data do suggest significant utilization of the more expansive aspects of the “community service” definition: Washington has by far the highest number of TANF recipients working in community service¹⁶⁸ and also has the most expansive definition of community service.¹⁶⁹

C. REFINING FEDERAL WORK REQUIREMENTS IN TANF REAUTHORIZATION

The same basic patterns, and many of the particulars, that characterize state implementation of TANF were also present in leading Congressional proposals to amend and reauthorize TANF. These proposals received four years of intensive debate beginning in 2002, when the original five-year TANF program expired.¹⁷⁰ This congruity is important because it shows that the states’ most innovative and potentially controversial approaches to work do not reflect idiosyncratic quirks of ideology or geography. Instead, they have commanded majority, or near-majority, support in at least one house of the national

165. See HHS SHOULD EXERCISE OVERSIGHT, *supra* note 24, at 3–4.

166. 2004 Participation Rates, *supra* note 64, at tbl.6A.

167. See discussion *supra* notes 133–34 and accompanying text. On the difficulties of categorizing work activities, see Kaplan, *supra* note 24, at 35–36.

168. 2004 Participation Rates, *supra* note 64, at tbl.6A.

169. See discussion *supra* note 146 and accompanying text; see also HHS SHOULD EXERCISE OVERSIGHT, *supra* note 24, at 12–13 (noting how state changes in the classification of rehabilitative and caregiving activities appear to have caused substantial changes in their reported participation rates). New York also has a large number of recipients (about 6000) reported as performing community each month and an expansive community service definition. The New York figures suggest that many engaged in community service are not performing volunteer work for community organizations because the state separately lists about 5000 recipients as engaging in “work experience.” 2004 Participation Rates, *supra* note 64, at tbl.6A. The other jurisdiction with over 5000 recipients engaged in “community service” is Kansas, which does not define the term in its statute or regulations, see KAN. ADMIN. REGS. § 30-4-64(b)(6) (2006), but appears to construe it broadly in practice. See HHS SHOULD EXERCISE OVERSIGHT, *supra* note 24, at 12.

170. For several years Congress passed short-term extensions while attempting to reach agreement on a comprehensive bill to refine many of TANF’s substantive requirements. No such agreement was reached. As part of a large budget-cutting package, in early 2006 Congress passed a five-year reauthorization that kept TANF almost entirely in its original form. See *supra* note 7. It is too early to know whether Congress will continue to consider substantive changes to TANF now that a long-term reauthorization is in place.

legislature.¹⁷¹ Additionally, Congress is not constrained formally by TANF's original terms, as the states have been, and so its actions may provide a clearer view of what today is perceived as politically credible. More generally, the TANF reauthorization process provides a window into how, and how differently, serious and sophisticated policymakers translate the general terms of the welfare debate into the detailed legal terms of work requirements, and do so with the benefit of almost ten years of experience with current law.¹⁷²

In some ways, the reauthorization process validated the idea that TANF's passage reflected a durable, broad consensus about the centrality of work requirements to welfare. No proposal, not even the one put forward by left-leaning Democrats without the support of their party leadership,¹⁷³ challenged the basic structural features of TANF that

171. The Republican-controlled House three times approved a comprehensive reauthorization bill modeled on the Bush Administration's proposal. See Personal Responsibility, Work, and Family Promotion Act of 2002, H.R. 4737, 107th Cong. (2002), 148 CONG. REC. H2594 (daily ed. May 16, 2002) (as passed by House); Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. (2003), 149 CONG. REC. H552 (daily ed. Feb. 13, 2003) [hereinafter 2003 House Bill] (as passed by House); Personal Responsibility, Work, and Family Promotion Act of 2005, H.R. 240, 109th Cong. (2005) [hereinafter 2005 House Bill]; see also Deficit Reduction Act of 2005, H.R. 4241, 109th Cong. §§ 8001–8122 (2005), 151 CONG. REC. 10645 (daily ed. Nov. 17, 2005) (as passed by House) (incorporating 2005 House Bill, *supra*, into budget reconciliation bill); see also WHITE HOUSE, WORKING TOWARD INDEPENDENCE (2002), available at <http://www.whitehouse.gov/news/releases/2002/02/welfare-reform-announcement-book-all.html> [hereinafter 2002 Administration Proposal]. Two basic alternatives were offered by House Democrats, one supported by roughly half the party's House delegation, see 149 CONG. REC. H465, 513–29 (2003) [hereinafter Progressive Democratic Proposal], and the other supported by the party leadership and nearly its entire delegation. See Next Step in Reforming Welfare Act, H.R. 3625, 107th Cong. (2002) [hereinafter House Democratic Proposal]. Introduced by Rep. Cardin, amendment 2 to 2003 House Bill, *supra*, failed by vote of 197 to 225. 149 Cong. Rec. H465, 530–49. In the Senate, bills negotiated by bipartisan super-majorities of the Finance Committee, or sometimes “tripartisan” ones during the period independent Sen. Jeffords served on the Committee, were reported out of the Committee but never received a floor vote. See S. REP. NO. 109-51 at 2–3 (2005) (describing history of Senate Finance Committee TANF reauthorization deliberations); Personal Responsibility and Individual Development for Everyone (PRIDE) Act, S. 667, 109th Cong. (2005) [hereinafter 2005 Senate Finance Bill]; Personal Responsibility and Individual Development for Everyone (PRIDE) Act of 2003, H.R. 4, 108th Cong., 149 CONG. REC. D1090 (daily ed. Oct. 3, 2003) (as introduced in the Senate by Sen. Grassley pursuant to S. REP. NO. 108-162 (2003)) [hereinafter 2003 Senate Finance Bill]; Work, Opportunity and Responsibility for Kids (WORK) Act of 2002, H.R. 4737, 107th Cong., 148 CONG. REC. S7372 (daily ed. July 25, 2002) [hereinafter 2002 Senate Finance Bill] (as introduced in the Senate by Sen. Baucus pursuant to S. REP. NO. 107-221 (2002)).

172. Reauthorization proceeded in an environment where, in addition to members of Congress and their staffs, the topic received extensive attention from scholars, think tanks, and advocacy organizations. See, e.g., THE NEW WORLD OF WELFARE, *supra* note 3; WELFARE REFORM AND BEYOND: THE FUTURE OF THE SAFETY NET (Isabel V. Sawhill et al. eds., 2002); Ctr. on Budget & Policy Priorities, TANF Federal Reauthorization, <http://www.cbpp.org/pubs/welfare.htm> (last visited Apr. 14, 2006) (web page collecting reports); Joint Center for Poverty Research, Welfare Reform Reauthorization Information Clearinghouse, http://www.jcpr.org/welfarereform_info.html (last visited Apr. 14, 2006) (same); National Center for Children in Poverty Research Forum, Reauthorization, http://www.researchforum.org/subtopic_summary_3.html (last visited Apr. 14, 2006) (same).

173. At the outset of the reauthorization process, Rep. Patsy Mink introduced a bill with broad

provoked serious opposition in the early 1990s, including the five-year time limit,¹⁷⁴ state participation rates, and individual work requirements. Indeed, the general terms of work requirements—the levels of participation required in each state, the weekly hours of work, and the firmness of the mandate that individual recipients work—all would have been strengthened by the leading proposals from both parties.¹⁷⁵

Underneath this consensus, however, are substantial disagreements over whether and how TANF's definition of work should be clarified or changed.¹⁷⁶ While everyone pledges allegiance to "work," they mean by it different things. The approach favored by House Republicans and the Bush Administration essentially would require that TANF recipients either find employment or participate in unpaid workfare programs. This view mirrors the "work first" approach taken by influential jurisdictions such as Wisconsin and New York City.¹⁷⁷ This further shift toward "work first" would occur by eliminating from the "core" work activities both vocational education and providing child-care for others, and by adding the requirement that both work experience and community service be

support from progressive advocates. See TANF Reauthorization Act of 2001, H.R. 3113, 107th Cong. (2001); see also Coalition on Human Needs, *Representative Mink Introduces TANF Reauthorization Bill*, HUMAN NEEDS REPORT, Oct. 26, 2001, available at <http://www.chn.org/humanneeds/011026c.html>. After Rep. Mink passed away, Rep. Kucinich offered a very similar bill as a substitute for the bill backed by the House Republican leadership. Progressive Democratic Proposal, *supra* note 171. Amendment 1 to 2003 House Bill, *supra* note 171, failed by a vote of 124 to 300.

174. There have been a number of proposals to retain the five-year time limit but expand exceptions to it under the banner of "work stops the clock," an approach that would have time limits run only during periods when an individual is not working. See KATHERINE ROSS PHILLIPS, URBAN INSTITUTE, *EARNING BACK TIME: WHO WOULD BENEFIT FROM WORK-RELATED TIME LIMIT EXEMPTIONS?* (2002), <http://www.urban.org/urlprint.cfm?ID=7961>; SHAWN FREMSTAD & ZOË NEUBERGER, CTR. ON BUDGET & POLICY PRIORITIES, *SIDE-BY-SIDE COMPARISONS OF TIME LIMIT PROVISIONS IN TANF REAUTHORIZATION LEGISLATION* (2002), <http://www.centeronbudget.org/5-3-02tanf2.pdf>.

175. At the time they were announced, the Administration's proposals for increases in state participation rates and weekly hours requirements surprised experts in TANF policy and politics and were fiercely opposed by liberal advocacy organizations. See Haskins & Blank, *supra* note 3, at 17-31 (summarizing major issues for TANF reauthorization and listing the definition of work activities, but not participation rates or hours requirements); Mark Greenberg, *Bush's Blunder*, THE AMERICAN PROSPECT, July 15, 2002, at A2, available at <http://www.prospect.org/print/V13/13/Greenberg-m.html>; MARK GREENBERG, CTR. FOR LAW & SOC. POLICY, *MOST STATES FAR SHORT OF MEETING H.R. 4 PARTICIPATION REQUIREMENTS* (2003), http://clasp.org/publications/CRS_participation.pdf; MARK GREENBERG & HEDIEH RAHMANOU, CTR. FOR LAW & SOC. POLICY, *IMPOSING A 40-HOUR REQUIREMENT WOULD HURT STATE WELFARE REFORM EFFORTS 1-5* (2003), http://clasp.org/publications/40_hours.pdf. Nonetheless, similar proposals were soon endorsed by leading Democrats and moderate Republicans. See HASKINS & OFFNER, *supra* note 99, at 1.

176. Other areas of dispute were the magnitude of increases in the state participation rate and weekly hours requirements, funding levels (especially for child-care), and incorporation of funding streams and programmatic requirements to promote marriage.

177. Not coincidentally, former Wisconsin governor Tommy Thompson was Secretary of HHS when the Bush Administration proposal was formulated, and a number of other administrators who had brought Wisconsin's approach to New York City took up positions at HHS or influential conservative think tanks. See Margy Waller, *New York Program Wrong Model for U.S.*, L.A. TIMES, Apr. 21, 2002, at M2.

“supervised.”¹⁷⁸ Nonetheless, these conservative proposals would also permit brief stints in other activities defined by being “directed at enabling the family member to work.”¹⁷⁹ Grouped together in this category are rehabilitative services, education and training, and job search, consistent with the “barriers to employment” framework discussed above.¹⁸⁰

The competing, politically centrist bills¹⁸¹ give a more extensive role to these “barrier removal” activities. In particular, they permit states to give education and training, including post-secondary education, nearly equal standing to employment and unpaid work experience.¹⁸² In these ways, the centrist bills explicitly embrace the more expansive approaches to work that some states first developed under the original TANF.¹⁸³

As we saw above, however, increasing future employability is not the only basis on which activities such as education and rehabilitation could be interpreted as forms of work. While the House bills explicitly make such a connection to employment a condition of work status, the centrist bills are ambivalent and varied. With regard to rehabilitation, the general definitions of qualifying services omit employment-related

178. 2005 House Bill, *supra* note 171, § 110(e). The exact significance of this supervision requirement is unclear. The Administration proposal does not explain it, and there are neither any House committee reports on any of the bills nor floor colloquies on these provisions. Nonetheless, the supervision requirement would cast doubt on some of the more expansive state interpretations of “community service,” especially its application to various forms of family caregiving. According to a leading proponent, the various new restrictions would ensure the TANF recipients perform “real work,” as distinguished from other activities, especially education and training. 149 CONG. REC. E188 (daily ed. Feb. 12, 2003) (statement of Rep. McKeon).

179. 2005 House Bill, *supra* note 171, § 110(e). In addition, beyond the twenty-four core hours of “direct work activities,” the remaining hours of the work requirement could be satisfied by any “other activities specified by the State.” *Id.* The Administration proposal describes these at various times as “productive,” “constructive,” or “leading to self-sufficiency,” but the only limitation found in the House bills is that these “other activities” address one of TANF’s specified statutory purposes. *Id.*

180. *Id.*

181. Namely, the bills endorsed by the House Democratic leadership and by the Senate Finance Committee. *See supra* note 171.

182. “Vocational educational training” or “vocational education” is retained as a core work activity. *See* 2005 Senate Finance Bill, *supra* note 171, § 109 (leaving intact existing list of work activities); 2003 Senate Finance Bill, *supra* note 171, § 109 (same); House Democratic Proposal, *supra* note 171, § 404 (explicitly including post-secondary education); 2002 Senate Finance Bill, *supra* note 171, § 202 (same). Moreover, each bill contains mechanisms that allow vocational education to count as a core activity for longer than the twelve months permitted under current law, including authorization in each of the Senate Finance bills for states to operate programs modeled on Maine’s Parents-as-Scholars program. *See* 2005 Senate Finance Bill, *supra* note 171, §§ 107(d), 109(f) (Parents-as-Scholars); 2003 Senate Finance Bill, *supra* note 171, §§ 107(d), 109(f) (same); House Democratic Proposal, *supra* note 171, § 404 (extending time limit to twenty-four months); 2002 Senate Finance Bill, *supra* note 171, § 202 (extending time limit to twenty-four months). Each bill also allows substantially longer time periods to be spent in rehabilitative services. *See* 2005 Senate Finance Bill, *supra* note 171, §§ 109(f), 110; 2003 Senate Finance Bill, *supra* note 171, §§ 109(f), 110; House Democratic Proposal, *supra* note 171, § 405; 2002 Senate Finance Bill, *supra* note 171, § 202.

183. *E.g.*, S. REP. NO. 109-51, at 19, 24 (2005).

restrictions that the House bills include,¹⁸⁴ and the most recently proposed list of qualifying activities includes parenting skills and financial literacy training.¹⁸⁵ These activities appear at most tangentially related to employment. The basis for including them as work would seem to rest on some combination of their structured character and anticipated benefits from participation apart from increasing earnings.

With regard to education, some of the centrist bills make the inability to obtain adequate employment a prerequisite to allowing post-secondary education and also require that the course of study enhance earnings potential.¹⁸⁶ Other bills omit one or both restrictions.¹⁸⁷ Again, at stake here is whether education's significance is entirely derivative of the financial aspects of employment, or whether its status as work can either stand entirely apart from subsequent employment, or can rest on non-financial aspects of employment, such as occupational choice between equally remunerative jobs.¹⁸⁸

The cleanest break between work and employment comes in two new work activities included in the most recent Senate Finance bill. First, mirroring several state provisions, "providing substantial ongoing care"

184. See 2005 Senate Finance Bill, *supra* note 171, § 109(f) (proposed 42 U.S.C. § 607(c)(1)(C)(i)); 2002 Senate Finance Bill, *supra* note 171, § 202. The most recent Senate Finance bill does require that any such activities be part of a state-approved "self-sufficiency plan," but these plans themselves may address both "self-sufficiency" and "the issue of child well-being." 2005 Senate Finance Bill, *supra* note 171, § 110(a). Employment connections also appear in some aspects related to rehabilitative services. *Id.* §§ 109(f) (allowing reduced hours of participation when such a program's "effectiveness in moving families to self-sufficiency is superior to any alternative activities"), 110 (permitting long-term participation in rehabilitative services that are needed "in order to engage in direct work activities").

185. 2005 Senate Finance Bill, *supra* note 171, § 109(f) (proposed 42 U.S.C. § 607(c)(1)(C)(i)(II)); see also discussion of analogous state work activities, *supra* note 142 and accompanying text.

186. See 2005 Senate Finance Bill, *supra* note 171, § 107(d) (restricting eligibility for Parents-as-Scholars to recipients who "cannot qualify for employment that pays enough to allow them to obtain self-sufficiency" and requiring a course of study preparing them for "higher-paying occupations that are in demand in the State"). Whether these restrictions have significance beyond the rhetorical is less clear. The earnings level constituting "self-sufficiency" is left to the state to define, so it might be substantially higher than the level that would disqualify one for TANF benefits, and it is difficult to imagine any course of study leading to a bachelor's degree that would not leave the degree recipient with access to employment at higher earnings than at program entry.

187. The House Democratic leadership bill would require that post-secondary education "lead[] to a credential . . . related to employment or a job skill," but without restriction to individuals currently unable to achieve "self-sufficiency." House Democratic Proposal, *supra* note 171, § 404. The bill approved by the Senate Finance Committee in the 107th Congress, under Democratic control but with substantial Republican support, contained neither restriction. See 2002 Senate Finance Bill, *supra* note 171. Finally, the bill supported by the liberal wing of the Democratic party explicitly rejected restrictions on recipients' course of study. See Progressive Democratic Proposal, *supra* note 171, § 203 (permitting "higher education" as a work activity "regardless of the content of the course of study").

188. Most advocacy for expanded access to education in TANF is framed in terms of employment outcomes. See, e.g., Julie Strawn et al., *Improving Employment Outcomes Under TANF*, in *THE NEW WORLD OF WELFARE*, *supra* note 3, at 223; Sheila R. Zedlowski & Pamela Loprest, *Will TANF Work for the Most Disadvantaged Families?*, in *THE NEW WORLD OF WELFARE*, *supra* note 3, at 311; Peter Edelman, *The True Purpose of Welfare Reform*, N.Y. TIMES, May 29, 2002, at 21.

to a family member “with a physical or mental impairment” counts as work.¹⁸⁹ This provision would, for the first time in federal law, explicitly treat welfare recipients’ unpaid family caretaking as a means to satisfy work requirements. Currently, federal law explicitly recognizes such caretaking only as the basis for an *exception* to or a reduction in work requirements.¹⁹⁰ The accompanying committee report explains that the bill “recognizes that parents who must engage in substantial, continuous care of a disabled child or family member are engaged in meaningful activity.”¹⁹¹ Here, care is incorporated as work through a concept of active, “meaningful” engagement, without reference either to enhancing employability or self-sufficiency, or to the public good, except insofar as “meaningful” implicitly references some social value.¹⁹²

The second new work activity that is disconnected from employment is also the bill’s most novel contribution. It includes as work “participation in programs that promote marriage,” such as “marriage education, marriage skills training, [and] conflict resolution counseling in the context of marriage.”¹⁹³ Although promoting marriage has long been an important theme in welfare policy,¹⁹⁴ this provision would move

189. 2005 Senate Finance Bill, *supra* note 171, § 109(f); *see also* 2003 Senate Finance Bill, *supra* note 171, § 109.

190. *See supra* notes 49–50 and accompanying text.

191. S. REP. NO. 109-51, at 26 (2005). This presents a striking example of the transformation of work exemptions into work activities. When the Senate Finance Committee, then under Democratic control, addressed care for disabled family members in 2002, its bill provided a work “exemption” when the “demands of caregiving do not allow the recipient to obtain or retain employment.” 2002 Senate Finance Bill, *supra* note 171, § 202. The more politically marginal House Progressive Democratic Bill takes this further and treats as a work activity care for *either* family members with disabilities *or* children under age six. *Supra* note 171, § 203. Treating care as work in this way has not been a high priority of most liberal advocacy groups, but it does appear in the agenda of some feminist organizations. *See, e.g.*, Domestic Priorities Task Force, Nat’l Council of Women’s Orgs., Recommendations for TANF Reauthorization, (Apr. 5, 2002), <http://www.now.org/issues/economic/welfare/principles.html>.

192. This shift would not, however, create a federal right to provide such care. Instead, whether unpaid family caretaking may satisfy work requirements is subject to the state’s determination that it is the “most appropriate means . . . by which such care can be provided to the child or adult dependent for care.” 2005 Senate Finance Bill, *supra* note 171, § 109(f). For a contrary approach under existing state law, *see Care v. Wing*, 747 N.Y.S.2d 519 (App. Div. 2002) (reversing sanction for non-compliance with work assignment where recipient was entitled to an exemption as a caretaker for her incapacitated mother and was entitled to reject welfare agency’s offer to supply a home health aide).

193. 2005 Senate Finance Bill, *supra* note 171, § 109(g). These marriage-related services, however, could not count toward the core work requirement. *Id.* Although marriage is not mentioned explicitly, the House bills would produce a similar result through a catchall provision permitting any activity that furthered one of TANF’s statutory purposes to count as work but only outside the core requirement. *See, e.g.*, 2005 House Bill, *supra* note 171, § 110(e). Promoting marriage is one of those purposes. 42 U.S.C. § 601(a) (2000).

194. *See* Ron Haskins & Isabel V. Sawhill, *Work and Marriage: The Way to End Poverty and Welfare*, WELFARE REFORM & BEYOND, Sept. 2003, at 1–4, 6–8, *available at* <http://www.brookings.edu/es/wrb/publications/pb/pb28.pdf>; ROBERT E. RECTOR ET AL., THE HERITAGE FOUND., INCREASING MARRIAGE WILL DRAMATICALLY REDUCE CHILD POVERTY 11–12 (2003), *available at*

toward merging it into the world of work. While in some ways this provision is startlingly discordant, in other ways this represents only an incremental step beyond labeling professionalized interventions in domestic violence or substance abuse as “work.”¹⁹⁵ The key distinction is that no link to employment is invoked. If, however, one conceives of marriage, as many do, as good for spouses, their children, and society as a whole,¹⁹⁶ then active engagement in pursuit of that good could fit within broad conceptions of “community service” that evoke reciprocity rationales. Similarly, marriage promotion is continuous with self-improvement rationales that advance various forms of cultural conformity.¹⁹⁷ Additionally, if one conceives of “self-sufficiency” strictly in terms of avoiding *government* transfer payments, encouraging marriage could, like enforcing child support obligations, promote “self-sufficiency” among welfare recipients by encouraging them to substitute spousal support for government benefits.¹⁹⁸

<http://www.heritage.org/Research/Family/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=42509>; PAULA ROBERTS, CTR. FOR LAW & SOC. POLICY, A BRIEF COMPARISON OF THE MARRIAGE-RELATED PROVISIONS IN WELFARE REAUTHORIZATION BILLS PASSED BY THE SENATE FINANCE COMMITTEE AND THE HOUSE HUMAN RESOURCES SUBCOMMITTEE (2005), available at http://www.clasp.org/publications/sbs_marriage_060805.pdf; Danielle White & Jan Kaplan, Welfare Information Network, *The State's Role in Supporting Marriage and Family Formation*, ISSUE NOTES, June 2003, <http://www.financeproject.org/Publications/supportingmarriageandfamilyformationIN.htm>; 2002 Administration Proposal, *supra* note 171 at 1–2, 6–11; see also Haskins, *supra* note 3, at 9, 29 (describing internal Republican disputes during design of TANF over the degree of emphasis to place on non-marital births).

195. There remains the practical question of whether marriage-promotion programs can actually affect marital behavior, a question that is only now beginning to be studied through HHS' “Building Strong Families” project. See Theodora Ooms, *The New Kid on the Block: What is Marriage Education and Does It Work?*, POLICY BRIEF: COUPLES & MARRIAGE SERIES, July 2005, at 6–7, available at http://www.clasp.org/publications/marriage_brief7.pdf (reviewing research on marriage education programs and noting that existing research focuses on middle- and upper-class white couples and reports effects on relationship dynamics and satisfaction, not marital formation or stability); White & Kaplan, *supra* note 194.

196. There are, however, many reasons to be skeptical of or hostile to efforts to promote marriage as an anti-poverty device. Objections include discrimination in access to the marriage institution, critiques of its internal power dynamics, unavailability of suitable partners, risks of psychological or physical abuse within particular relationships, infringement on control over basic elements of one's identity and social position, and imposition of particularistic moral values. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 104–08 (1995); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1251–52, 1338 (1983) (criticizing welfare policies that promote women's economic dependence on men within marriage); Linda C. McClain, “Irresponsible” *Reproduction*, 47 HASTINGS L.J. 339, 393 (1996); MARTHA FINEMAN ET AL., *NO PROMOTION OF MARRIAGE IN TANF!*, <http://falcon.arts.cornell.edu/ams3/npmposition.html> (last visited Apr. 14, 2006); NOW LEGAL DEFENSE & EDUCATION FUND, *LOOKING FOR LOVE IN ALL THE WRONG PLACES: THE CASE AGAINST GOVERNMENT MARRIAGE PROMOTION 1–3*, <http://www.legalmomentum.org/issues/wel/lookingforlove.pdf> (last visited Apr. 14, 2006).

197. See *supra* notes 142, 185 and accompanying text.

198. See Zatz, *supra* note 13. Until recently, promoters of marriage as an anti-poverty and anti-welfare strategy have made a different link to work, one based on the notion that raising the earnings

In sum, the treatment of work in Congressional TANF reauthorization proposals reflects, and sometimes expands, the range of variation among states in how TANF has been implemented to date. This in turn reflects unresolved tensions between different approaches to the role and content of TANF's work requirements. All the leading bills emphasize self-sufficiency through employment and yet none make it the exclusive touchstone for work.¹⁹⁹ Work can be a big tent indeed.

D. HOW WORK DEFINES "WELFARE": TANF'S HIDDEN CASELOAD

Thus far, I have focused on what kinds of work recipients of means-tested TANF welfare must perform in order for them to continue receiving benefits and for states to continue receiving federal TANF funds. There is, however, another more subtle and little-noticed type of work requirement created by TANF, one that connects work under TANF to work in the EITC. This work requirement focuses exclusively on paid employment and attaches to a type of benefit known as a "work support."²⁰⁰ Work supports often are portrayed as fundamentally different from work-conditioned welfare because they provide extra benefits to low-income employed people, rather than eliminating benefits to low-income non-workers. This distinction, however, relies entirely on the contestable location of an income baseline above which

of men will enable more women to depend on them rather than on welfare. See PHELPS, *supra* note 10, at 4, 96, 129; WILSON, *supra* note 3, at 87–110. *But see* FINEMAN, *supra* note 196, at 106 (criticizing paternity establishment and child-support enforcement as part of pattern of eliminating welfare spending through emphasis on two-parent families). As a descriptive matter, changes in household structure and access to child-support have always been important determinants of transitions onto and off of welfare. See MARY JO BANE & DAVID T. ELLWOOD, *WELFARE REALITIES: FROM RHETORIC TO REFORM* 28–66 (1994); Johanne Boisjoly et al., *Trends, Events, and Duration of Initial Welfare Spells*, 72 *SOC. SERV. REV.* 466, 478 (1998); Sandra L. Hofferth et al., *Exiting Welfare in the 1990s: Did Public Policy Influence Recipients' Behavior?*, 21 *POP. RES. & POL'Y REV.* 433, 440–41, 451–60 (2002); PAMELA LOPREST, *URBAN INST., HOW FAMILIES THAT LEFT WELFARE ARE DOING: A NATIONAL PICTURE 2* (1999), available at http://www.urban.org/UploadedPDF/anf_b1.pdf; DEANNA T. SCHEXNAYDER ET AL., *CTR. FOR THE STUDY OF HUMAN RES., THE ROLE OF CHILD SUPPORT IN TEXAS WELFARE DYNAMICS* 5 (1998), available at <http://fatherhood.hhs.gov/TX-Dynamics98/execsum.pdf>.

199. Even the House/Administration approach, which most heavily and consistently emphasizes employment, does not apply to "work experience" or "community service" the requirement (to which education, training, and rehabilitation are subject) that they promote future employability, nor does it apply any "self-sufficiency" test to the activities required to satisfy the difference between the total work requirement and the twenty-four hours of core work. See 2005 House Bill, *supra* note 171; 2002 Administration Proposal, *supra* note 171. All the Senate Finance bills, which allow a variety of activities relatively unconnected to employment, nonetheless require that TANF households have in place a "family self-sufficiency plan" specifying required "work or alternative self-sufficiency activities," and they would establish participation rate credits linked to the number of recipients who are employed after they stop receiving TANF benefits. See 2005 Senate Finance Bill, *supra* note 171, §§ 109(d), 110; 2003 Senate Finance Bill, *supra* note 171, §§ 109(d), 110; 2002 Senate Finance Bill, *supra* note 171, §§ 201–202.

200. See, e.g., ROBERT ANSELMi & DEBBIE GREENBERGER, MDRC, *MAKING WORK PAY: HOW TO DESIGN AND IMPLEMENT FINANCIAL WORK SUPPORTS TO IMPROVE FAMILY AND CHILD WELL-BEING AND REDUCE POVERTY* (2003), available at <http://www.mdrc.org/publications/342/overview.html>.

the goal is to reward work and below which the goal is to relieve poverty.

Most treatments of TANF rely on two distinct categories: those who are “on” welfare and those who are not, especially those who have “left,” or “leavers.”²⁰¹ TANF is consistently assessed by reference to the size of its caseloads, the number “on welfare,”²⁰² a number that nationally has been cut in half since TANF was implemented.²⁰³ This caseload is also the basis for analyzing how, and in what fashion, welfare recipients are “working.”²⁰⁴

This population of people “on” welfare, however, is only a subset of the people receiving TANF-funded benefits.²⁰⁵ This subset is defined by what the TANF regulations call “assistance,”²⁰⁶ which roughly corresponds to means-tested cash payments or in-kind benefits of the sort formerly provided by AFDC.²⁰⁷ In addition, however, are many benefits, both cash and in-kind, that are provided through TANF programs but are deemed “non-assistance” to individuals who are not counted in the TANF caseload.²⁰⁸

201. See, e.g., GREGORY ACS & PAMELA LOPREST, URBAN INST., FINAL SYNTHESIS REPORT OF FINDINGS FROM ASPE'S “LEAVERS” GRANTS (2001), <http://www.urban.org/url.cfm?ID=410809>.

202. See, e.g., Marc Lacey, *The State of the Union: The Overview; Clinton Stakes Claim to U.S. Prosperity*, N.Y. TIMES, Jan. 28, 2000, at A1, which reported that President Clinton's State of the Union speech summed up his administration's economic accomplishments with the words:

Crime down by 20 percent, to its lowest level in 25 years. Teen births down seven years in a row. adoptions up by 30 percent. Welfare rolls cut in half to their lowest levels in 30 years. My fellow Americans, the state of our union is the strongest it has ever been.

See also U.S. Dep't of Health & Human Servs., *Welfare Caseloads Continue Downward Trend*, HHS NEWS, Nov. 1, 2002, at http://www.acf.hhs.gov/news/press/2002/release_110102.html. (quoting HHS Secretary Tommy Thompson's comments on a report of continued caseload declines: “This latest report simply reaffirms that welfare reform in America is working.”).

203. Some states have had far more dramatic reductions. See SIXTH ANNUAL TANF REPORT, *supra* note 66, at I-5 tbl.A (listing declines over 70% in Florida, Idaho, Illinois, and Wyoming).

204. See, e.g., COMM. ON WAYS & MEANS, U.S. HOUSE OF REP., 108TH CONG., 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 7-73 to 7-85 (2004) [hereinafter 2004 GREEN BOOK].

205. See SHAWN FREMSTAD & ZOË NEUBERGER, CTR. ON BUDGET & POLICY PRIORITIES, TANF'S “UNCOUNTED” CASES: MORE THAN ONE MILLION WORKING FAMILIES RECEIVING TANF-FUNDED SERVICES NOT COUNTED IN TANF CASELOAD 1, 3-7, 9 (2002), <http://www.cbpp.org/4-24-02tanf.pdf>.

206. See 45 C.F.R. § 265.3(b) (2006) (describing detailed state reporting requirements for families receiving “assistance”); see also *id.* § 261.10(a)(1) (describing individual work requirements applicable to “a parent or caretaker receiving assistance”); *id.* § 261.22(b) (describing calculation of state participation rates based on the “number of families receiving TANF assistance”); *id.* § 264.1 (describing time limits on providing “assistance”). None of these requirements apply to individuals or households receiving TANF-funded benefits or services that are not “assistance.”

207. See 45 C.F.R. § 260.31(a)(1) (defining “assistance” as “cash, payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs”). See generally HELPING FAMILIES ACHIEVE SELF-SUFFICIENCY, *supra* note 67.

208. See 45 C.F.R. § 260.31(b). In addition, non-assistance includes certain services to those who may not be employed but are receiving cash assistance, such as counseling, job placement, and training, *id.*; unlike child-care and transportation, these would not ordinarily be part of routine living expenses.

For the most part, what renders these benefits “non-assistance” and thus “not welfare” is the fact that they are delivered to employed individuals and that they are administratively distinct from traditional means-tested cash benefits.²⁰⁹ Means-tested, TANF-funded child-care and transportation subsidies are “non-assistance” if the recipient is employed, but they are “assistance” if the recipient is engaged in community service or vocational education.²¹⁰ Similarly, it is “non-assistance” when one receives wages from a subsidized employer who in turn is reimbursed 100% from TANF funds, but it is “assistance” if the same work is done in a “work experience” position and the same payment is received in the form of a welfare check.²¹¹

Because these “non-assistance” benefits require that the recipient be employed, they are functionally equivalent to benefits subject to a work requirement in which only employment counts as work. This is not merely a formalistic question of the label applied to the benefits.²¹² Recipients of “non-assistance” benefits are not subject to TANF time limits, work requirements,²¹³ or other conditions such as child-support cooperation and assignment.²¹⁴ Moreover, many benefits are available

209. Cf. Lawrence Zelenak, *Tax Or Welfare? The Administration Of The Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1900–06 (2005) (discussing the significance of the EITC’s location within the tax code).

210. Cf. *Garrett v. Lyng*, 877 F.2d 472, 473–76 (6th Cir. 1989) (upholding treatment of workfare under Food Stamps regulation, which reversed prior regulation treating as earned income public assistance conditioned on work); 7 C.F.R. § 273.9(b)(2)(i) (excluding from “earned income” for Food Stamps purposes “[a]ssistance payments from programs which require, as a condition of eligibility, the actual performance of work without compensation”). Compare 45 C.F.R. § 260.31(b)(3), with *id.* § 260.31(a)(3).

211. Compare 45 C.F.R. § 260.31(b)(2), with *id.* § 260.31(a)(2). See generally CLIFFORD M. JOHNSON & STEVE SAVNER, CTR. FOR LAW & SOC. POLICY & CTR. FOR BUDGET & POLICY PRIORITIES, FEDERAL FUNDING SOURCES FOR PUBLIC JOB CREATION INITIATIVES (1999), http://www.clasp.org/publications/federal_funding_sources.pdf. Similarly, a TANF-funded refundable state Earned Income Credit is not deemed to be “welfare,” even though the same payment based on the same income threshold is “assistance” if it is delivered through the state “welfare” system. See 45 C.F.R. § 260.31(b)(4); NICHOLAS JOHNSON, CTR. FOR BUDGET & POLICY PRIORITIES, A HAND UP: HOW STATE EARNED INCOME TAX CREDITS HELP WORKING FAMILIES ESCAPE POVERTY IN 2001, at 29–31 (2001), <http://www.cbpp.org/10-18-01sfsp.htm>. The equivalent payment through the welfare system could be achieved through the use of what are known as “earned income disregards,” which prevent benefits from being reduced when income rises from earnings. See generally Marie Cohen, Welfare Information Network, *Earned Income Disregards*, ISSUE NOTES, Apr. 1997, <http://www.financeproject.org/Publications/income.htm>; ROWE & VERSTEEG, *supra* note 76, at 28–29.

212. See generally David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 961–64 (2004) (discussing interchangeability of tax and spending programs).

213. This matters because even though employed recipients of non-assistance benefits are obviously “working,” they would not satisfy TANF work requirements if a part-time work schedule brought them below the minimum required weekly hours of work.

214. See, e.g., 42 U.S.C. § 604(i) (authorizing states to sanction adult recipients of “assistance” who fail to ensure that their minor children attend school); *id.* § 608(a)(2), (3) (requiring that states penalize recipients of “assistance” who do not cooperate in establishing paternity and child support

only in non-assistance form because they have maximum income thresholds much higher than those for TANF assistance.²¹⁵ Thus, a child-care subsidy may be available to a full-time employee with a household income of \$15,000 but not to a full-time college student with the same household income.²¹⁶ Non-assistance benefits also are quite significant in sheer magnitude, accounting for roughly half the expenditures on TANF programs and between a third and a half of all households receiving TANF-funded benefits.²¹⁷

Taking a larger view, then, TANF actually has created a two-tiered structure of work requirements. The bottom tier includes those receiving traditional welfare “assistance” subject to work requirements that emphasize employment but that also include substantial unpaid activities as “work.” The top tier includes those receiving means-tested benefits conditioned on employment alone, but which carry neither the “welfare” label nor the various consequences that come with that label. This two-tiered system within TANF is a microcosm of the broader relationship between TANF and the EITC, the site of the other major recent change in work-based anti-poverty policy and to which I now turn.²¹⁸

orders or who do not assign to the state rights to child support); SIXTH ANNUAL TANF REPORT, *supra* note 66, at XII-28–31 (compiling state “family cap” or “child exclusion” policies that decrease welfare payments when one or more children within the household was born or conceived while the adult was receiving welfare).

215. The income ceiling for non-assistance programs often is 200% of the federal poverty line, or about \$32,000 per year for a family of three in 2005. *See* Annual Update of the HHS Poverty Guidelines, 70 Fed. Reg. 8373, 8374 (Feb. 18, 2005).

216. The college student, might, however, be eligible for a child-care subsidy funded by the Child Care and Development Fund, which permits subsidies to parents in jobs or training, but not community service. *See* 42 U.S.C. § 9858n(4)(c) (2000).

217. Precise data is not available because states are not required to compile and report data on non-assistance recipients as they are on assistance, *see* 45 C.F.R. § 265.3(b), but a 2002 Government Accounting Office survey found over 800,000 non-assistance recipients in twenty-five states using a method that likely resulted in a substantial undercount. *See* CYNTHIA M. FAGNONI, U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: STATES PROVIDE TANF-FUNDED SERVICES TO MANY LOW-INCOME FAMILIES WHO DO NOT RECEIVE CASH ASSISTANCE 9-11, GAO-02-615T (2002), *available at* <http://www.gao.gov/new.items/d02615t.pdf>; FREMSTAD & NEUBERGER, *supra* note 205, at 5–7 (discussing methodological issues in counting non-assistance recipients). Nationally, there are about two million households receiving “assistance.” *See* SIXTH ANNUAL TANF REPORT, *supra* note 66, at I-5 (tbl.A); *see also* Office of Family Assistance, U.S. Dep’t of Health & Human Servs., Caseload Data Index (2006), <http://www.acf.hhs.gov/programs/ofa/caseload/caseloadindex.htm> [hereinafter HHS Caseload Data]. In the two states where complete data were available, there were more recipients of “non-assistance” than “assistance.” *See* FAGNONI, *supra*, at 11-12. Between federal TANF and state matching funds, about \$11.6 billion was spent on non-assistance work supports in 2002, compared to about \$10.4 billion on cash assistance. *See* SIXTH ANNUAL TANF REPORT, *supra* note 66, at II-1–5. This figures excludes administrative expenses, but it includes non-assistance spent on services to recipients of assistance.

218. It also reflects the increasing difficulty of distinguishing cleanly between “welfare” policy oriented toward alleviating the burdens of poverty and “employment” policy oriented toward structuring labor markets. *See, e.g.*, HANDLER & HASENFELD, *supra* note 6, at 11, 15; Alstott, *supra* note 22, at 569; SHARON DIETRICH ET AL., NATIONAL EMPLOYMENT LAW PROJECT, WELFARE REFORMING THE WORKPLACE: PROTECTING THE EMPLOYMENT RIGHTS OF WELFARE RECIPIENTS, IMMIGRANTS, AND

II. WORK IN THE EITC

The Earned Income Tax Credit is legally and administratively distinct from TANF, but its history, structure, and purpose always have been intertwined tightly with the relationship between work and welfare.²¹⁹ Its basic purposes—rewarding and thereby encouraging work, and relieving poverty for families containing a working adult²²⁰—echo those typically attributed to TANF, and President Clinton consistently linked EITC expansion and welfare reform.²²¹ Commentators across the political spectrum have continued this pattern, often treating the EITC as a model for a “work support” approach to anti-poverty policy, one in which work is demanded as a condition of relief while also being affirmatively supported so as to make work possible.²²² As a practical matter, the EITC now dwarfs TANF as a program transferring resources to low-income Americans, both as a matter of costs—about \$30 billion versus \$12 billion in 2003²²³—and households served—about 19 million versus 2 million in 2003.²²⁴ For all these reasons, any discussion of welfare work requirements must incorporate the EITC into the analysis.²²⁵

Nonetheless, the easy continuity between these two elements of work-based antipoverty policy becomes far more complicated once one focuses on how the programs define work. The EITC’s work-based benefits are available exclusively to people in paid activities. Thus, individuals in unpaid activities may be “working” for TANF purposes

DISPLACED WORKERS (1997). This merger of public policies itself mirrors the actual experience of low-income people, who even before the welfare reform of the mid-1990s moved regularly between welfare receipt, low-wage employment, and combinations of the two. See EDIN & LEIN, *supra* note 10, at 6, 220.

219. See V. Joseph Hotz & John Karl Scholz, *The Earned Income Tax Credit*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 141, 143–45 (Robert A. Moffitt ed., 2003) (describing history of the EITC and its origins in the early 1970s debates over alternatives to AFDC); Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969–99*, 53 NAT’L TAX J. 983 (2000).

220. A typical formulation from President Clinton’s first State of the Union address characterizes the program as one that “reward[s] the work of millions of working poor Americans by realizing the principle that if you work forty hours a week and you’ve got a child in the house, you will no longer be in poverty.” Hotz & Scholz, *supra* note 219, at 146.

221. Alstott, *supra* note 22, at 539.

222. See Isabel Sawhill & Ron Haskins, *Welfare Reform and the Work Support System*, in WELFARE REFORM AND BEYOND: THE FUTURE OF THE SAFETY NET 107 (Isabel V. Sawhill et al., eds. 2002).

223. See 2004 GREEN BOOK, *supra* note 204, at 13–41. (EITC figure based on refunded credit, with an additional \$4 billion in unrefunded credits that offset tax liability); Administration for Children & Families, U.S. Dep’t of Health & Human Servs., Fiscal Year 2003 TANF Financial Data tbl.F, http://www.acf.hhs.gov/programs/ofs/data/tanf_2003.html (TANF figure based on combined state and federal expenditures on cash assistance, with total combined expenditures equalling \$26 billion).

224. See 2004 GREEN BOOK, *supra* note 204, at 13–41; HHS Caseload Data, *supra* note 217. The number of EITC recipient households dwarfs TANF even when limited to those with incomes below \$10,000 annually (5.6 million households) or \$20,000 annually (11 million).

225. For more general treatments of the EITC, see Alstott, *supra* note 22 and Hotz & Scholz, *supra* note 219.

but ineligible for the EITC's "work support."²²⁶ Seeing this little-noticed fact raises important questions about the role of work in these two programs, about whether it really is or should be the same. Answering these questions requires confronting a deep tension between paying benefits based on the extent of work (tending to increase benefits as employment increases) and paying them based on lack of income (tending to decrease benefits as employment increases).²²⁷

A. HOW THE EITC IDENTIFIES WORK

Although the EITC is a program universally understood to address work and poverty,²²⁸ the term "work" does not appear in its authorizing statute. Instead, the EITC responds to work by conditioning eligibility on the presence of "earned income."²²⁹ This is a subset of taxable income, defined specifically for EITC purposes as earnings from wages and salaries, or from self-employment income.

In marked contrast to TANF's definition of allowable work activities, the EITC's earnings-based approach to work is both simple and uncontroversial. Disputes over the EITC have focused on its cost, administration, and redistributive character.²³⁰ No one, however, has questioned whether *non*-earners could "play by the rules" by getting training or performing community service and thereby claim the mantle of the "working poor" that triggers relief through the EITC.²³¹

226. The reverse can also be true. EITC eligibility does not require any particular number of hours of work, so a low-wage worker with a twenty-five hour per week schedule could qualify for the maximum EITC benefit but be disqualified from TANF. See Lawrence M. Mead, *Rebuilding Welfare into a Work-Based System*, POVERTY RESEARCH NEWS, Nov.–Dec. 2001, at 9, available at http://www.jcpr.org/newsletters/vol5_no6/vol5_6.pdf (criticizing this aspect of the EITC). More generally, a variety of non-work-related restrictions preclude TANF but not EITC eligibility, including those relating to immigration status and household structure. See *supra* note 214. Finally, EITC receipt, unlike TANF, has no time limit.

227. See Alstott, *supra* note 22, at 557–58.

228. See *id.* at 539–40; Hotz & Scholz, *supra* note 219, at 146.

229. See I.R.C. § 32(c)(2)(A) (2006).

230. See Ventry, *supra* note 219, at 999.

231. *But cf.* Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1618–19, 1636–40 (1996) (suggesting a *non*refundable credit analogous to the EITC and designed solely to offset the increased tax liability of cash-strapped low-income households that would result from her proposed taxation of imputed income from unpaid housework). As a matter of historical explanation, this likely has much to do with the EITC's position within the tax code and its historical association with offsetting payroll taxes on earnings. See generally Ventry, *supra* note 219. Nonetheless, because the EITC has its own definition of earned income, including refinements noted below, rather than simply relying on preexisting tax categories, it cannot be said that its approach to work simply follows from the choice to administer the program through the tax code. Indeed, if one thought the current "earned income" definition failed to capture the relevant universe of work, it would be possible to modify the EITC within the tax code to respond to non-income-generating forms of work, just as special information for EITC purposes already is collected with regard to the number, age, and residency of "qualifying children." See Schedule EIC, Earned Income Credit Qualifying Child Information, OMB No. 1545-0074 (2005), available at <http://www.irs.gov/pub/irs-pdf/f1040sei.pdf>; see also Weisbach & Nussim,

At most, the EITC's approach to work can occasionally raise subtle questions about which payments are earnings when they are triggered by an activity other than conventional employment.²³² Most notably for present purposes, the statute explicitly excludes from "earned income" payments made to TANF recipients on condition that they perform "work experience" or "community service."²³³ Thus, these activities do not receive EITC work support even though they are work for TANF purposes, and even though workfare programs are treated as employment for some labor law purposes.²³⁴

More generally, the EITC's and TANF's work-related eligibility requirements will yield opposite results for any unpaid activity²³⁵ that TANF treats as work.²³⁶ Someone "working" in paid employment will be eligible for the EITC while someone with the same income (from non-employment sources) "working" in education or community service will not.

B. THE EITC AND THE RELATIONSHIP BETWEEN WORK AND NEED

The distinction between the EITC's employment-based eligibility and TANF's broader approach to work mirrors the distinction made within TANF between employment-conditioned non-assistance benefits and the more prominent assistance conditioned on specified work activities. As with the non-assistance/assistance divide, the EITC/TANF differences in work would be of limited consequence if they simply resulted in functionally equivalent benefits arriving with different labels attached.

Thus, one might imagine that shifts between unpaid community

supra note 212 (discussing how any program currently configured as a spending program could be reconfigured for administration through the tax code with the same substantive requirements); cf. James Tobin et al., *Is a Negative Income Tax Practical?*, 77 *YALE L.J.* 1, 11-14 (1967) (arguing that the tax code's definition of "income" should vary between calculation of negative and positive income taxes).

232. See Kirk J. Stark, *Should California Adopt an Earned Income Tax Credit?*, *CAL POL'Y OPTIONS* 2006 93, 103-05.

233. I.R.C. § 32(c)(2)(B)(v); I.R.S. Notice 99-3, 1999-1 C.B. 271; Stark, *supra* note 232, at 103-04.

234. See *United States v. City of New York*, 359 F.3d 83, 96-97 (2d Cir. 2004). Payments made to inmates engaged in prison labor are also excluded. I.R.C. § 32(c)(2)(B)(iv).

235. As the workfare example illustrates, such TANF recipients are both getting paid and engaging in a work activity, so the real question is whether that pay is attributed to the specific work activity as "earned" or instead is attributed to a general state of need for which the state is providing assistance. EITC aside, unearned assistance generally is not taxed even though in an economic sense it obviously is income. See Stark, *supra* note 232, at 103-04.

236. Additionally, for the EITC the complete absence of earnings is automatically disqualifying, whereas TANF programs allow exemptions for those who fail to work for good cause, see 42 U.S.C. § 607(e)(1) (2006) (mandating sanctions for noncompliance with TANF work requirements "subject to such good cause and other exceptions as the State may establish"). Even when no good cause exists, some states reduce but do not eliminate benefits. See 42 U.S.C. § 607(e)(1) (permitting either a pro rata reduction in benefits or benefit termination); ROWE & VERSTEEG, *supra* note 76, at 100-03.

service and paid employment would simply mean switching between TANF and the EITC. Were that so, the two programs would be functionally equivalent to a single program that permitted qualification as work under either program's definition. The two programs routinely are portrayed in roughly this fashion, two components of an integrated policy that delivers poverty relief while encouraging work through the combined operation of TANF's "stick" of work requirements and EITC's "carrot" of work incentives.

In some ways, shifts from unpaid to paid activities do simply result in transitions between the two programs, but in others ways they do not. In particular, from the perspective of poverty relief, the EITC systematically favors paid work, in the sense that as between two "workers" with equal incomes, the EITC supplements the income of the paid but not the unpaid worker. To see how this happens, some additional comparative detail about the EITC and TANF is necessary first.

Analysts typically divide the EITC into three stages associated with progressively higher earned incomes: phase-in, plateau, and phase-out.²³⁷ During the phase-in period the value of the credit begins at \$0 for households with zero earnings and, for a household with two children, the credit then *increases* at a rate of \$40 for every additional \$100 in earnings, up to the maximum benefit of \$4204. At earnings between \$10,510 and \$13,730, the amount of the credit plateaus at \$4204. Above \$13,730 in income, the credit phases out at a rate of \$21 for every \$100 in additional income, until it reaches zero at \$33,692 in income.²³⁸

Now compare TANF assistance. Although state programs differ in important respects, they are more similar to one another than to the EITC, and they share a consistent general structure. Thus, it is possible to identify broad similarities and differences between TANF and the EITC.

One point of TANF-EITC similarity is in benefit levels. The EITC's roughly \$4200 annual maximum benefit falls in the middle range of equivalent TANF benefits, which vary by state but are roughly \$4500 at the median.²³⁹ The fundamental difference comes in how eligibility for this benefit relates to household income. TANF programs always pay

237. See Alstott, *supra* note 22, at 541, 548-49; Hotz & Scholz, *supra* note 219, at 145-50.

238. 2004 GREEN BOOK, *supra* note 204, at 13-36-13-39. Each of these variables is affected by the number of children and whether it is a joint return. See *id.* Reductions in benefits during the phase-out period are determined by the greater of earnings or adjusted gross income. See I.R.C. § 32(a)(2)(B). Even during the phase-out period, however, adjusted gross income affects only the amount by which the credit is reduced; the base amount of the credit continues to be determined exclusively by earned income. *Id.* § 32(a).

239. See SIXTH ANNUAL TANF REPORT, *supra* note 66, at XII-4-5. Seven states pay annual benefits below \$3000, and seven pay above \$7000. *Id.*

their maximum cash benefit to households with zero outside income, whereas the EITC pays these households nothing at all. As income rises, TANF benefits drop²⁴⁰ while EITC benefits increase (if the income is earned). In other words, TANF lacks any phase-in period; it begins at the maximum benefit and then phases out.²⁴¹ This feature of TANF is compatible with its work requirements only because work is not limited to employment; if it were so limited, then the same condition that maximized benefit size (zero income) would also eliminate benefit eligibility (no work).²⁴²

Maximizing benefits at zero income reflects the standard conception of anti-poverty programs as closing a gap between a level of resources a household needs—in welfare administration terminology the “standard of need”²⁴³—and the level of resources (“means”) actually available to meet those needs. Hence, one is eligible for transfers if needs exceed means, and the difference determines the magnitude of the transfer.²⁴⁴

Strict application of this need-minus-resources approach would lead to dollar-for-dollar reductions in benefits as income rises. To mitigate the resulting earnings disincentive,²⁴⁵ TANF programs typically employ a “benefit reduction rate” (BRR) below 100%, so that for each new dollar earned, benefits are reduced by less than one dollar.²⁴⁶ Thus, the entire benefit structure of most TANF programs looks roughly like the phase-out period of the EITC: benefits drop as income increases, but at a slower rate.²⁴⁷ The difference is that TANF begins to phase out more or

240. Typically, benefits drop by \$1 for each new dollar of unearned outside income, and at a lower rate, though usually at least 50%, for earned income. See ROWE & VERSTEEG, *supra* note 76, at 69–70, 74–75. Also, when income is earned, most programs have a modest plateau (that is, a period of 0% reduction) before benefits begin to drop. See *id.* at 74–75. Many programs similarly disregard a small amount (usually \$50 per month) of child support payments. See *id.* at 118–19.

241. See Alstott, *supra* note 22, at 540–41; Hotz & Scholz, *supra* note 219, at 141–42.

242. For this reason, the EITC phase-in period also can be recharacterized as the combination of two components: a traditional means-tested benefit with a maximum benefit level at zero income and a separate financial penalty for non-work that reduces the benefit amount. This penalty starts at 100% at zero earnings (thus eliminating the entire benefit) and then phases out as work increases (measured by earnings magnitude). If, as earnings rise, the decrease in the penalty for non-work is larger than the decrease in benefits due to means-testing, then the net value of the benefit will rise, duplicating the EITC’s phase-in period.

243. See STAFF OF THE HOUSE COMM. ON WAYS & MEANS, 104TH CONG., 1996 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 384, 390, 411, 454 (1996).

244. See generally PANEL ON POVERTY AND FAMILY ASSISTANCE, NAT’L RES. COUNCIL, MEASURING POVERTY: A NEW APPROACH 317–81 (Constance F. Citro & Robert T. Michael eds., 1995); Alstott, *supra* note 22, at 540–41.

245. See Robert Moffitt, *The Negative Income Tax and the Evolution of U.S. Welfare Policy*, 17 J. ECON. PERSPS. 119, 119 (2003).

246. See Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. ECON. LIT. 1, 8, 15 (1992).

247. In its phase-out stage, the EITC applies the same BRR to earned and other taxable income, see 32 U.S.C. § 32(a)(2)(B) (2006); TANF programs, in contrast, typically reduce benefits more

less immediately, but the EITC does not begin to phase out until almost \$14,000 in income. Indeed, by the roughly \$10,000 earnings level at which EITC benefits first reach their peak value, TANF benefits have almost always diminished to zero or become relatively insignificant.²⁴⁸ In other words, over the same \$0–10,000 range in which the EITC starts at zero and phases in to its maximum, TANF starts at its maximum and phases out to zero.

Now we can return to the significance of the two programs' different definitions of work. Consider a TANF recipient who is satisfying work requirements in a full-time unpaid activity like community service or job training. She is eligible for TANF's maximum benefit and ineligible for any EITC. What happens if she substitutes full-time low-wage employment? Her earnings now jump to \$10,000-plus, her TANF benefit drops to near zero, and her EITC benefit jumps to over \$4000. From one perspective, this is just the sort of inconsequential swap that makes the different work definitions look complementary: moving from TANF work to EITC work just means moving between TANF benefits and EITC benefits of comparable sizes. Indeed, in one sense this permits different forms of work to be treated equally by not penalizing paid work (which necessarily increases income) with benefit reductions from which unpaid work is immune. Counteracting this work (meaning employment) disincentive of means-tested welfare is a standard argument for the EITC.²⁴⁹

Seeing the TANF/EITC relationship in this way, however, places the emphasis on treating these programs as “work supports” (paying people to reward or encourage their work). It provides little account of their anti-poverty function because it is unresponsive to differences in total income. If \$4000 total income is sufficient to meet someone's household needs while doing unpaid work, then it looks like quite a windfall when she gets a job that pays \$10,000 but still receives a \$4000 anti-poverty transfer.²⁵⁰ Or, if an additional \$4000 *is* needed to meet the household

quickly when unearned, rather than earned, income increases, *see* ROWE & VERSTEEG, *supra* note 76, at 69–75.

248. In thirty-four states, an unmarried TANF recipient employed full-time at the minimum wage with two children loses all TANF benefits, and in another seven the available benefits are less than \$1000 annually. *See* 2004 GREEN BOOK, *supra* note 204, at 7-49–50 tbl.7-15. In some States that do provide TANF benefits at these income levels, those benefits are restricted to current recipients because new applicants are ineligible for reduced BRRs. *Compare* ROWE & VERSTEEG, *supra* note 76, at 64–65 tbl.I.E.4 (maximum income for initial eligibility), *with id.* at 126–27 tbl.IV.A.5 (maximum income for ongoing eligibility).

249. The employment incentives created by the EITC are actually quite complex, both because they shift in character over its different periods and because tracing their effects on an individual whose earnings begin at zero and then increase over time fails to account for the effects on individuals who, without the EITC, already have earnings within or just above the transfer eligibility range. *See* Alstott, *supra* note 22; Hotz & Scholz, *supra* note 225.

250. For this reason, conservatives have often opposed constructing work incentives with “carrots”

needs of a low-wage worker already earning \$10,000, then it looks like an abandonment to hardship when an unpaid worker with \$10,000 *less* income receives no compensating increase in the anti-poverty transfer.²⁵¹

If the theory is one of parity between TANF-defined and EITC-defined work, and the purpose of the transfers is to fight worker *poverty*, then leaving the unpaid “worker” up to \$10,000 deeper in poverty than the paid worker looks like a dramatic difference in treatment between forms of work. It is no answer at this point to say simply that the EITC aims to relieve poverty only for those who demonstrate their desert through work. The same can be said for TANF. The scenario at issue is one in which the recipient, rather than “doing nothing,” is “doing something” that TANF accepts as work—for instance, training or community service—but that the EITC does not because it is unpaid. If both workers are equally deserving, then it is hard to see—from an anti-poverty perspective—why one would be left at \$4000 total income while transfers would be devoted to raising the other up to \$14,000 total income.²⁵²

The same point can be put another way by comparing directly two workers with the same pre-transfer income. One earns \$10,000 at a low-wage job. The other is a full-time student or a volunteer who receives \$10,000 in some combination of child support, alimony, survivor’s benefits, or payments on behalf of a child.²⁵³ The low-paid employee is

(like gradual phase-outs of benefits as earnings increase) rather than “sticks” (reductions in benefits for non-work). See Blank, *supra* note 154, at 1110 (discussing Reagan-era reductions in AFDC earned income disregards); see also GORDON L. BERLIN, MDRC, ENCOURAGING WORK, REDUCING POVERTY: THE IMPACT OF WORK INCENTIVE PROGRAMS 20 & n.9 (2000).

251. I have greatly simplified this analysis in a number of respects that do not affect the ultimate point. Increased child-care costs may be associated with employment, but the EITC is available even if (as is often the case) there are no such costs; when there are, additional programs, including TANF non-assistance, may cover them. I also have not taken account of payroll taxes, which reduce the net pay of low-wage workers but which are dwarfed by the EITC in the plateau stage for workers with children; not until well into the phase-out stage do payroll taxes exceed the EITC. Moreover, the common notion that payroll taxes unfairly burden low-income workers implicitly relies on the idea that someone with a \$10,000 income is poor and therefore cannot afford to pay the same taxes as other earners.

252. My discussion of the EITC focuses on its phase-in and plateau stages. These stages are where the EITC delivers its primary work-promotion and poverty-reduction effects and where it interacts most strongly with welfare policy. Nonetheless, a full treatment of the EITC must take account of its extended phase-out stage, where a majority of recipients lie. See Adam Carasso & C. Eugene Steuerle, Tax Policy Center, *Projected Distribution of EITC Claims in 2003*, TAX NOTES, July 19, 2004, at 301, available at http://www.urban.org/UploadedPDF/1000669_TaxFacts_071904.pdf. The phase-out stage’s inclusion of large numbers of relatively small beneficiaries can be understood as simply a by-product of the tradeoff between targeting poorer workers and avoiding disincentives for those workers to increase their earnings. See Alstott, *supra* note 22, at 551. But see Daniel Shaviro, *The Minimum Wage, the Earned Income Credit and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 408–09 (1997) (criticizing analyses of the EITC phase-out stage for treating EITC reductions separately from taxes on income).

253. This is a perfectly realistic scenario. According to the Census Bureau’s 2004 American

considered both deserving and poor, and so she receives roughly \$4000 from the EITC; moreover, her income is thousands of dollars below where the EITC begins phasing out. The equally poor student or volunteer, however, receives no poverty relief from the EITC because her income is unearned. Although she could satisfy TANF's work requirements, almost all state TANF programs will consider her insufficiently needy to receive welfare.²⁵⁴ She receives no transfer and is left to make do with \$10,000.

Again, this inconsistency cannot simply be dismissed as the byproduct of restricting transfers to workers. True, one could decide that the appropriate definition of work for EITC purposes is paid employment; this would justify treating the student or volunteer like the person "doing nothing" and thus undeserving of transfers even if genuinely poor. The problem, though, is that TANF adopts a different definition of work. The question, then, is why an activity should qualify as work for one means-tested transfer (TANF) but not for another (EITC).

Ultimately, there simply is no way to treat paid and unpaid work the same both with regard to transfer size and with regard to the net income post-transfer. This is because earnings are relevant in two different ways: as a characteristic of work and as a component of income.²⁵⁵ Either transfers decrease as earnings rise (in which case paid workers receive smaller transfers than unpaid workers) or they do not (in which case transfer programs leave paid workers better off than unpaid workers).

These tensions could be relieved somewhat by introducing a hierarchy of work: employment is first-class work and unpaid activities are at best second-class work.²⁵⁶ Either type of worker is protected against utter destitution (by TANF), but only first-class workers are protected against ordinary poverty (by the EITC). Indeed, this seems like a fair description of our current system, but it demands a more complex account of what, on the one hand, distinguishes both forms of work from non-work and, on the other, what differentiates first- from

Community Survey, among households headed by an unmarried parent with at least two children and with total income between \$5000 and \$10,000, roughly one-third got their income entirely from unearned sources such as those listed above, roughly one-third got their income entirely from earnings, and the remainder combined the two in varying degrees. See Tabulation Provided to Author by the UCLA School of Law Empirical Research Group (Mar. 23, 2006) (on file with author).

254. See ROWE & VERSTEEG, *supra* note 76, at 78–79. In the few remaining states, benefits would be very low.

255. This analysis relies on using cash as the measure of income for means-testing purposes. It is possible to loosen this double-bind by incorporating into poverty measurement both the costs of childcare and the non-cash "imputed income" generated by non-market care. See Zatz, *supra* note 13.

256. For an exploration of a similar idea specifically with regard to workfare, see Diller, *supra* note 9, at 27–28.

second-class work.²⁵⁷

The obvious basis for favoring paid over unpaid work, even if the latter is favored over “doing nothing,” is that paid work makes a greater immediate contribution to self-sufficiency. But this rationale provides a particularly awkward account of the transition between TANF and the EITC. The same level of earnings that *minimizes* TANF benefits (in roughly the \$10,000–\$13,000 range) also *maximizes* EITC benefits. Thus, shifting from unpaid activities to employment does not necessarily promote self-sufficiency in the sense of reducing transfers.²⁵⁸ Indeed, one could say that *unpaid* activities actually *minimize* EITC benefits, though they also maximize TANF benefits.

This point not only affects the shifting in work definitions between TANF and the EITC, but also further illuminates how TANF itself defines work. Viewing TANF in isolation, an emphasis on employment, either in the short- or long-term, appears to offer a tight fit with a self-sufficiency rationale for work requirements: an increase in employment income (the consequence of fulfilling work requirements) leads to a decrease in transfer levels (because a means-tested transfer falls in value as income rises). Once TANF and the EITC are viewed as two parts of one larger system of work-conditioned transfers, however, this analysis begins to break down because decreasing TANF transfers are coupled with increasing EITC transfers.

The foregoing points show that a full understanding of how work is defined, and of the consequences of particular definitions, requires understanding how those particular definitions interact with other aspects of program design. This is particularly true in the context of welfare work requirements where earnings are relevant to transfer eligibility through both the mechanism of means-testing and the mechanism of work requirements.

CONCLUSION

Both the equation of work with paid employment and the integration of work requirements into anti-poverty programs strike many as just common sense. I have shown how complicated, and contested, work becomes once one pays attention to how real-world programs go about sorting transfer recipients into workers and non-workers. State legislatures and administrators—hardly where one would look first for radical ideas or theoretical flights of fancy—in fact are defining work in

257. Defenses of linking work and redistribution often posit work as an institutional locus of universal citizenship and social inclusion, *see generally* Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT'L L. & COM. REG. 497 (2002), but the appeal of such a conception may diminish considerably if second-class workers get only second-class citizenship.

258. In a forthcoming paper, I develop this point in greater depth and address whether a longer-term perspective requires that it be qualified. *See* Zatz, *supra* note 13.

ways that confound an easy conflation of work and employment.

All of the activities states have allowed as work are consistent with at least one plausible rationale for work requirements, but some activities seem doubtful under other rationales. The creativity within and inconsistency between state work policies reflect the diversity latent within and the contradictions between distinct theoretical accounts of work.

These observations recommend great caution as new federal regulations are drafted to clarify TANF's work activity definitions. The temptation will be great to impose some consistent approach or set of criteria to guide these definitions. Although this might be desirable in the design of welfare policy in the first instance, in this case it could not help but distort the elusive character of work that has bedeviled so many would-be rationalizers and that Congress wrote into TANF itself.

This cautionary note is particularly apt because of the way that defining work interacts with other dimensions of welfare policy design, most of which TANF clearly entrusts to individual states' discretion. I offer the following concrete example by way of illustration.

Everyone agrees that there are circumstances in which the goal of self-sufficiency through work would be better served by spending time in an unpaid activity that enhanced future employability than by spending time in a fruitless job search. There is, however, serious disagreement about what those circumstances are and about the nature of appropriate unpaid activities. Two obviously relevant considerations are the amount of time the activity will require and the nature of the employment that could be obtained if the activity succeeds. Not even the most vigorous proponents of education propose sending a welfare recipient with a high school degree to four years of college and four more years of medical school just because she cannot currently find full-time work at \$10 per hour.

But now consider an actual case closer to the line. In *Kosmicki v. Nebraska*, the Nebraska Supreme Court rejected a welfare recipient's claim that she should be allowed to satisfy her work requirement by completing a four-year college degree toward which she already had significant credits.²⁵⁹ The court reasoned that the primary purpose of work requirements was to promote "self-sufficiency" and that whether a given activity advanced this purpose had to be analyzed against the backdrop of Nebraska's two-year time limit on TANF assistance. Nebraska's work requirements aimed for self-sufficiency by the end of a stint on welfare, the court held. Therefore, the proposed course of study was impermissible because the recipient could not complete it before her

259. See 652 N.W.2d 883, 896 (Neb. 2002).

benefits terminated due to the time limit.²⁶⁰

The significance of the *Kosmicki* court's reasoning lies in the interaction between the definition of work and the seemingly distinct matter of the time limit. If Nebraska's time limit had been substantially longer, as permitted by federal law, then application of the same abstract criteria for work would have yielded a different result because the degree *could* have been completed before time ran out. The same activity—completing a college degree—could be classified as “work,” or not, depending on other policy variables.

A similar dynamic can arise from the amount rather than the duration of benefits. Whether available employment enables “self-sufficiency” in the sense of leaving welfare depends not only on the wage paid but also on the income level at which benefits drop to zero. In many states, annual earnings under \$8000 are enough to “earn out” of TANF, but, in many others, workers making over \$12,000 remain eligible for transfers.²⁶¹ In the latter states, a self-sufficiency standard might permit a sequence of unpaid activities designed eventually to enable annual earnings above \$12,000, which requires placement in a job paying well over the federal minimum wage.²⁶² In the former states, however, such activities might be less appropriate, even if they share the same abstract self-sufficiency goals for work.

Thus, we should resist the temptation to see starkly different approaches to work as evidence that one or another program, in one or another state, is betraying the public policy underlying work requirements. During the TANF reauthorization debate, conservative advocates of a stronger emphasis on employment and workfare lodged just this accusation at approaches that embrace a broader conception of work; they claimed that this breadth undermines the fundamental drive toward employment and the obligation to give back to the community.²⁶³ And liberal advocates of training, rehabilitation, and perhaps even treating some caregiving as work, returned fire in kind, criticizing “work first” strategies for elevating caseload reduction through employment

260. *Id.* at 890–92.

261. ROWE & VERSTEEG, *supra* note 76, at 126–27.

262. Using the standard thresholds for full-time, full-year employment of thirty five hours per week and fifty weeks per year, earning \$12,000 requires an hourly wage of \$6.86. See U.S. Census Bureau, Current Population Survey (CPS) Definitions and Explanations (2004), <http://www.census.gov/population/www/cps/cpsdef.html> (defining “work experience”).

263. See 149 CONG. REC. H465, 526 (daily ed. Feb. 13, 2003) (statement of Rep. Souder) (criticizing proposals to expand availability of education under TANF as “a masquerade to go back to the days of old when you could stay in school forever”); Haskins & Blank, *supra* note 3, at 26 (characterizing education and training as “diluting the work requirement”); BRIAN M. RIEDL & ROBERT E. RECTOR, HERITAGE FOUND., BACKGROUNDER #1568, MYTHS AND FACTS: WHY SUCCESSFUL WELFARE REFORM MUST STRENGTHEN WORK REQUIREMENTS (2002), <http://www.heritage.org/Research/Welfare/BG1568.cfm>.

over important goals of poverty reduction, personal growth, and family well-being.²⁶⁴

My contention is that the competing approaches to defining work reflect the incoherence of the “consensus” in favor of work requirements, not a subversion of that consensus. I develop this argument more systematically in a companion paper that traces out the different ways in which a policy of welfare work requirements would define work, depending on the underlying theory justifying those requirements.²⁶⁵

The potential for conflict between these approaches to work is, however, already visible in the different directions that work has gone under TANF and the EITC. The TANF statute itself reflects this fractured character. In one moment it emphasizes working toward a goal of unsubsidized employment but in another it embraces as work both “community service” and unpaid care for others’ children. Looking at TANF and the EITC as a unit only deepens these tensions.

For policymakers and commentators considering how an individual state should design its welfare work policy, this incoherence ought to be both frustrating and liberating. Coming up with a principled policy requires sorting through some difficult normative questions, and resolving some deep tensions, that have yet to be analyzed in any detail. And yet the very fact that TANF itself failed to resolve those questions provides substantial latitude, latitude that a number of states have utilized with great creativity. Any particular design of welfare work requirements can be criticized for failing to implement fully one or more important policies underlying TANF. The same is true for any future federal redesign of TANF, or of work-based transfer programs more generally. Such criticism, however, cannot be avoided, and so the real question is only in which way should the contradictions of work be embraced.

Despite its familiarity, work is rich in complexities, and in surprises. We have much to learn from how legislators and administrators have sorted through these complexities as they translate abstract endorsements of work into concrete rules that can decide individual cases. In order to make use of those lessons to design better policies, we have much more work to do.

264. Strawn et al., *supra* note 188, at 235–36; Peter Edelman, Editorial, *The True Purpose of Welfare Reform*, N.Y. TIMES, May 29, 2002, at A21; Kelley O’Dell, *Child Well-Being and the Reauthorization of Welfare Reform*, REAUTHORIZATION NOTES, Feb. 2002, http://www.financeproject.org/Publications/childwellbeing_trn.htm.

265. Zatz, *supra* note 13.