WOMEN, WORK, WELFARE, AND THE PRESERVATION OF PATRIARCHY

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I. INTRODUCTION

Historically, women have been regarded as unemployable, both because they have been considered physically and morally unsuited for wagework and because law and custom limited their ability to do wage labor by demanding that they do the work of homemaking and of caring for the young and the old. Today, however, most women are in the wage labor market. The central thesis of this Article is that present federal labor and welfare policy "resolve" the conflict between the traditional assumption that women cannot and should not work outside the home and the reality that they do, in ways that are systematically injurious to women and families.

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Most of what I know about poverty, I first learned from Edward V. Sparer. Lynn Paltrow's questions pushed me to transform this Article from an analysis of the ways in which federal policy treats low income men and women differently, to an explication of how federal law systematically disfavors women. Many provided criticism and support, including: NYU's Law and Philosophy group, NYU Law School's Faculty Research Program, Nancy Davis, Sue Ross, and Stephanie Wildman. Special thanks to my family, Barry Ensminger and Benjamin Ensminger Law, a deep source of stability, energy, and insight.
The first part of the Article provides a brief history of income maintenance programs for needy children and mothers, with particular focus on sex-based differentiations and the relation between welfare and wagework. This part will note that during the period from 1935 to 1968, welfare was a discretionary gratuity conditioned on compliance with both work requirements and sexual norms. Formal federal policy regarded welfare mothers as unemployable. In the late 1960's and the 1970's, cataclysmic changes took place with regard to women's place in society and the relationship between women and wagework and welfare. First, beginning in 1968, courts started transforming welfare from a discretionary gratuity to a legal entitlement. Second, attitudes towards abortion and contraception altered radically. A social and legal climate in which access to abortion and contraception was restricted by law, and an unwanted pregnancy was regarded as an appropriate "punishment" for a woman's exploration of her sexuality, was replaced by one in which a woman's control of her reproductive capacity is constitutionally protected. Third, large and increasing numbers of women entered the wage labor market and relied on legal ideas of individual equality to claim access to traditionally male power and prerogatives. Fourth, formal federal welfare policy placed an ever-increasing emphasis on trying to force mothers receiving aid to do wagework. During the 1970's, these federal efforts failed. Work requirements did not encourage welfare recipients—in any significant numbers—to find wagework. The 1970's were, in fact, a time of rising unemployment, particularly among unskilled workers. Nonetheless, in 1981, Congress expanded the wagework requirements for women receiving Aid to Families with Dependent Children (AFDC) and yet simultaneously limited financial incentives for wagework. The first part of the Article concludes by presenting and challenging the empirical and philosophical assumptions of the 1981 legislation.

The second part of the Article discusses some of the ways in which federal welfare and labor policy impede women’s access to the wage labor market. This section begins with a discussion of the prevailing legal concept of sex-based equality. It argues that, presently, sex-based discrimination against poor women seeking wagework exists at a number of levels that not only infringe the current equal protection norm regarding gender discrimination, but also strike at its very core. Specifically, the federal law governing the nation’s primary work program for poor people explicitly demands that, in allocating scarce jobs, any man be given priority over every woman. The United States Employment Service, the organization that finds more workers for more jobs than all other employment agencies combined, daily perpetuates the sex segre-
gation of the wage labor market. Federal funding incentives, which have gone virtually unexamined and unchallenged, further reinforce these sex segregation policies. The United States Department of Labor (DOL) in its *Dictionary of Occupational Titles* (DOT), the most influential and widely used catalogue and evaluation of the work that Americans do, systematically devalues the work of women in the labor market. Finally, federal policy fails to encourage the childcare services that are needed when women engage in full-time wagework. In short, federal policy undermines the ability of women to do wagework and denies the value of their contributions to the wage labor market.

At the same time, however, that it denies women any real opportunity to enter the wage labor market, federal income maintenance policy denies the value of women's traditional nonwage work, especially childcare. Federal income maintenance programs are structured and financed to assure that the subsistence provided women and children is less adequate than that provided to recipient groups that include significant numbers of men. The justification given for the disparity in aid is that mothers are presumptively capable of supporting themselves through wage labor.

The third and final part of the Article argues that welfare policy should recognize the value and legitimacy of forms of work other than wage labor, and that the care and nurture of children is work that fulfills the social, psychological, and economic expectations of the work ethic.

The Article examines three separate theories about constitutional doctrine concerning women and welfare. First, the Article argues that the enforcement of constitutional norms has been a central component in the legalization of welfare; second, it argues that constitutional doctrine provides one basis for women's claims to equality in the wage market, and third, that constitutional concepts of privacy and family life illuminate the interests implicated by government policies denying the legitimacy of the work that women have traditionally done in the home. The purpose of analyzing the constitutional doctrine in these areas is not to suggest a stronger, more coherent theory. Rather the purpose is to demonstrate how the development of constitutional doctrine and the enforcement of constitutional rights affects the shape of public policy.

Ultimately federal welfare and labor policy, by denying the value of women's work in the wage market and in the home, can most reasonably be understood as serving to protect the dominance of men in the wage market and in the home. The controlling assumption is that marital stability, and the family itself, depend upon male economic
dominance; if women support themselves and their children through wagework, family stability will be undermined. The line of thought leads to the conclusion that to preserve the family unit and forestall the man from walking out, federal policy should ensure that the man is the dominant economic support of his family. Female dependency is, further, essential so that wagework may continue to be organized in a way that assumes each worker has a wife. This Article affirms the value of both work and family, while, at the same time arguing that the assumption that the promotion of these values requires the preservation of patriarchy is both empirically wrong and squarely inconsistent with ideals of individual equality.

This Article was undertaken for the purpose of understanding sex-based classification in federal welfare and labor programs and comes to the not-surprising conclusion that attitudes towards women and their proper social role have a profound influence on federal policy. The assertion that a primary function of federal welfare and labor policy is to preserve patriarchy, should not be taken as a denial of the existence or the importance of other factors. Race, for example, also matters. The desire to limit public expenditures is important, as is the desire to preserve incentives for wagework. The tradition of erecting "precautionary measures against the moral pestilence of paupers" runs deep, as does the presumption that the poor, irrespective of race or sex, are incompetent and irresponsible. The existence of other factors, however, in no way impairs the thesis that the desire to preserve and reinforce male dominance is central to the formation and structure of federal welfare and labor policy.

II. A BRIEF HISTORY OF WAGework AND Aid TO Families WITH DEPENDENT CHILDREN

Since its beginning with the Elizabethan Poor Laws, welfare pol-

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1 See, e.g., D. Bell, Race, Racism and American Law 589-665 (2d ed. 1980).
2 Jacobus tenBroek, in his landmark study of the roots of the poor law, states:

The seminal source of the law of the poor, pervasive and enduring, adaptive of features drawn from other practices and institutions and inventive of new ones, applicable to the destitute of all conditions—the unemployed as well as the merely unemployed—was the need to curtail public expenditures and to conserve public funds once the public undertook the burden at all.


icy has distinguished between people presumed able to work, and those presumed unable. The federal Social Security Act of 1935 incorporated this distinction and limited federally supported welfare to the "unemployable": the aged, blind, disabled, and women and children without men to support them. The aged, blind, and disabled were presumed unemployable because of personal infirmity or disability. Women with children, however, were presumed unemployable because tradition holds women to be physically and morally unsuited for wage labor, and because both law and social custom assign them the responsibility of caring for children.

The traditional distinction between employables and unemployables serves several useful functions. First, aid may be provided unemployables without undermining employable people's incentive for wagework. Second, job-related services may be targeted to the employables. Third, the number of people deemed in the labor force and available for work may be limited so that the actual rate of unemployment is masked. Fourth and most important, defining women with children as unemployable reinforces the social and legal expectation that women will work in the home, and allows wagework to be structured on the assumption that each worker has a wife to care for him and his children. This expectation forces many women out of paid employment: the most common reason given by women for leaving the wage labor force is the conflict between the demands of wagework and work in the home.

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7 Official unemployment statistics describe the proportion of people "in the labor force" who cannot find work. People not actively seeking work are not included in the labor force. Both the numbers of jobs and the numbers of people in the labor force produce changes in the official unemployment rate. See BUREAU OF LABOR STATS., U.S. DEP'T OF LABOR, HOW THE GOVERNMENT MEASURES UNEMPLOYMENT (1977). Expanding the "unemployables" limits official unemployment rates and constrains demands for wagework. Expectations of wagework are closely tied to both the availability of jobs and to whether people believe they have an obligation to do wagework. See Furstenberg & Thrall, Counting the Jobless: The Impact of Job Rationing on the Measurement of Unemployment, 418 ANNALS 45 (1975).

8 In 1979, among people who were not currently working or seeking work, 75.4 percent of the women cited responsibilities at home as the reason they were not seeking
As functional as the distinction between employables and unemployables has been in maintaining traditional attitudes and policies, it is becoming increasingly untenable. Women with children can no longer be neatly classified as "unemployable." Most of these women now do wage work. Between 1954 and 1979, the overall wage labor participation rate for women over the age of 16 increased from 34.6 percent to 51.0 percent, while the rate for men declined from 85.5 percent to 77.9 percent. The most dramatic increases in women's labor force participation occurred among women in the prime child-raising years, ages 25 to 34. These women's rate of participation increased from 34.4 percent to 63.8 percent. Between 1950 and 1978, the labor participation rates of mothers with children under age six more than tripled, rising from 14 percent to 44 percent. Yet despite these changes, childcare and homemaking remain the most common occupation of women. The core differentiation made in welfare policy between employables and unemployables is no longer tenable for another important reason as well: the economy does not provide wage work for everyone who is willing and able to do it. A person who cannot find a job is not any less hungry by virtue of being employable.

A. 1935-68: Mothers as Unemployable People and AFDC as Gratuitous Charity for Worthy Women

The AFDC program was created in 1935, and, from the start, reflected stereotyped thinking about the "appropriate" role of men and wage work, while only 1.9 percent of the men cited this reason. Among the "discouraged workers," 34.3 percent of the women and none of the men cited home responsibilities. BUREAU OF LABOR STATS., U.S. DEP'T OF LABOR, PERSPECTIVES ON WORKING WOMEN: A DATABOOK 13 (1980) [hereinafter cited as DATABOOK].


10 Data on labor force participation is presented id.


12 In 1979, 28,712,000 women cited responsibilities in the home as the reason that they were not presently seeking work, and an additional 1,239,000 women reported that they wanted work but that home responsibilities limited their ability to find it. By contrast the whole of the service sector, the sector employing the largest number of women, employed only 10,094,000 women in 1979. DATABOOK, supra note 8, at 12-13 (1980). It is important to note that most women in the wage market also do significant work in the home, particularly when they have children. See discussion infra note 331.

13 See supra note 8.

14 There are today sharply conflicting perceptions of the relationship between welfare and wage work. See infra text following note 86.

In 1968, AFDC's history was summarized in *King v. Smith*, the first Supreme Court case to consider the program. Chief Justice Warren, writing for a unanimous court, said:

The Social Security Act of 1935 was part of a broad legislative program to counteract the depression. Congress was deeply concerned with the dire straits in which all needy children in the Nation then found themselves. . . . The AFDC program, however, was not designed to aid all needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that "the work relief program and . . . the revival of private industry" would provide employment for their fathers. . . .

The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as "[o]ne clearly distinguishable group of children." H.R.Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). This group was composed of children in families without a "breadwinner," "wage earner," or "father," . . . . To describe the sort of breadwinner that it had in mind, Congress employed the word "parent." 49 Stat. 629 as amended, 42 U.S.C.A. §606 (a). A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent.

The federal statutory definition of the family eligible for AFDC is sex neutral. Congress recognized that children need two parents, one to provide daily care and one to earn money. The missing parent can be either a mother or a father. The "parent" remaining in the home may be any relative who provides the nucleus of an AFDC family.

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18 In *Califano v. Westcott*, 443 U.S. 76, 79 (1979), the Court comments:

As originally enacted in 1935, the AFDC program provided benefits to families whose dependent children were needy because of the death, absence, or incapacity of a parent. . . . This provision, which forms the core of the AFDC program today, is gender neutral: benefits are available to any family so long as one parent of either sex is dead, absent from the home, or incapacitated, and the family otherwise meets the financial requirements of eligibility.

19 A child eligible for AFDC is one who is dependent upon and living with "his
The legislative history of the 1935 Act, and the Supreme Court's 1968 summary of that history, suggest that the use of the sex-neutral term "parent" was accidental. Sex-based statutory classifications are commonly "the accidental byproduct of a traditional way of thinking about females . . ." Here the linguistic chips fell differently and produced a basic statutory structure that is sex neutral, not as a matter of conscious legislative choice, but rather as an "accidental by-product" of legislative drafting. In fact, the vast majority of AFDC families are composed of women and their children.

From 1935 until 1968, federal policy consistently reflected the view that most children need a mother at home to care for them. The 1937 Report of the Committee on Economic Security observes that prior to the enactment of AFDC, mothers were often forced "to make the attempt to be both homemaker and wage earner, with the result in such cases that the home was broken up after she had failed in her dual capacity and the children had become delinquent or seriously neglected." Even during World War II, when federal policy encouraged women to join the war-time labor force, federal welfare directives also observed that enabling "mothers to give their attention to growing children, is . . . vital to the welfare of the country. . . ." 

father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home." 42 U.S.C. § 606(a) (1976). See Miller v. Youakim, 440 U.S. 125 (1979) on the relationship between AFDC and federally-supported foster care.


Despite the sex neutral statutory language defining AFDC eligibility, fathers have been denied aid on sex-based grounds. For example, in Graham v. Shaffer, the Arizona Court of Appeals rejected the claim of a single father who sought AFDC to enable him to care for his nine-year-old child. The court held that the mother's absence did not establish eligibility; the words "deprived of parental support or care by reason of the . . . absence of . . . a parent" were construed to mean only the absence of the supporting parent, that is, the father. The court commented: "We believe . . . [t]he child has not been deprived of a wage-earning parent—the wage-earning parent has deprived the child." 17 Ariz. App. 497, 501, 498 P.2d 571, 575 (Ct. App. 1972), cert. denied, 410 U.S. 977 (1973).

Social Security Board, Minutes of Meeting, Jan. 29, 1943, quoted in U.S. DEP'T OF HEALTH, EDUC. & WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMIN-
Under the heading, *Considerations Regarding Employment of Mothers*, the federal AFDC guidelines in effect from 1939 to 1969, stated:

The transfer of mothers of young children from their homes into the labor market may increase the woman power in industry and domestic service, but whether the employment of such women represents an economic asset depends upon a number of factors in each case. For example, when children become ill, they are, as a rule, cared for in their own homes, and if the mother is employed she must usually either stay away from her job or neglect her sick child. The time available for domestic responsibilities is limited for an employed mother. She must either neglect her home or make inroads on her physical resources. The resulting nerve strain may affect her contribution to industry as well as to the well-being of her family. Even if, on the other hand, substitutes for the mother’s care are obtained, the children will require a considerable portion of the time of some other responsible adult. The role of the public assistance agencies is, by assistance and other services, to help the mother arrive at a decision that will best meet her own needs and those of her children.\(^{24}\)

Federal policy also discouraged the states from taking action to coerce mothers to work outside the home:

The Bureau of Public Assistance recommends against any policy of denying or withdrawing aid to dependent children as a method of bringing pressure upon women with young children to accept employment. . . . In cases of families receiving aid to dependent children, children are already, in most instances, deprived of the care of one parent, and, therefore, need the protection and personal supervision of the available parent.\(^{25}\)

Unfortunately, the federal ideal of 1935-68, that AFDC should enable poor women to care for their children, was never realized in the lives of most welfare families.\(^{26}\) Explicit local rules conditioned AFDC upon

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24 Id.
25 Id.
26 Winifred Bell, in the classic *Aid to Dependent Children* 3-19 (1965), describes the contradictory obligations imposed in the early twentieth century (pre-AFDC) Mother’s Pension Programs. These programs limited aid to “worthy” mothers,
mandatory requirements that mothers do wagework.\textsuperscript{27} Welfare case-workers exercised enormous discretion in determining who worked and what they did,\textsuperscript{28} and often did not bother to ascertain whether adequate childcare was available.\textsuperscript{29}

Further, while federal policy during 1935-68 encouraged states to allow women to choose to care for children in the home, a dominant characteristic of AFDC during this period was the control of and massive intrusion into the private lives of women receiving aid.\textsuperscript{30} The Ala-

which the programs defined as women who never left their children and, yet, at the same time, earned as much as possible. Some states limited the amount of time the mother could spend away from the home to three days a week. Grants, however, were so meager that most mothers did wagework. In Harrisburg, Pennsylvania, in 1918, a study of 116 mothers receiving such pensions found that three-quarters were employed. In 1923, fifty-two percent of the mothers studied in nine cities supplemented aid with earnings. One popular means of resolving the conflict between the need to stay home to be "worthy" and the need to earn money was to take in laundry.

\textsuperscript{27} In 1967, twenty-one states conditioned AFDC upon compliance with work requirements. New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 414 (1973). State work requirements followed two common patterns. One type simply demanded that recipients accept "appropriate" or "suitable" work. For example, New York regulations in effect before 1968 required simply that a recipient "accept referral to or offer of any employment in which he is able to engage." N.Y. ADMIN. CODE tit. 18, § 385.3(a)(2)(1962). Mothers were exempt from registration if they needed to provide full-time care for children "for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person and the social services district to obtain services or the assistance of others to provide such care." N.Y. Admin. Code tit. 18, § 385.1(7)(1962).

Another common type of regulation created presumptions that work was available and appropriate for defined classes of people in specific circumstances. In 1951, Georgia adopted a requirement that "[a]ble-bodied mothers with no children under 12 months of age are expected to find employment if work is available, and so long as work is available in the area, their families are not eligible for AFDC." Federal officials, while questioning the wisdom of this approach, did not find it illegal under federal law. See D. \textit{Bell}, supra note 1, at 82. Subsequently a presumption that field work was available for all "appropriate," that is to say black, women during cotton-chopping season was held unconstitutional in \textit{Anderson v. Burson}, 300 F. Supp. 401 (N.D. Ga. 1968).


\textsuperscript{29} See, e.g., MISS. STATE ADVISORY COMM., U.S. COMM'N ON CIVIL RIGHTS, WELFARE IN MISSISSIPPI 31 (1969) (reports case worker assertions that "[n]egro mothers always had farmed out their children to neighbors and relatives. . . . Therefore, . . . child care plans were not . . . a problem.").

\textsuperscript{30} Johnnie Tillmon, past president of the National Welfare Rights Organization, described life on welfare:

\textit{The truth is that A.F.D.C. is like a super-sexist marriage. You trade in a man for the man. But you can't divorce him if he treats you bad. He can divorce you, of course, cut you off any time he wants. But in that case, he keeps the kids, not you.}

\textit{The man runs everything. In ordinary marriage, sex is supposed to be for your husband. On A.F.D.C., you're not supposed to have any sex at all. You give up control of your own body. It's a condition of aid. . . .}

\textit{The man can break into your house any time he wants to poke into}
bama policy invalidated in *King v. Smith* denied families aid if a man visited the home for the purpose of "cohabiting" with the mother or if she cohabited with him elsewhere. Mrs. Smith, whose aid was terminated, was a widow and mother of four children who received AFDC to supplement the sixteen to twenty dollars she earned per week waitressing from 3:30 a.m. to noon. Mr. Williams, with whom she allegedly "cohabited," lived with his wife and nine children, all of whom depended upon him for support.  

"Cohabitation" sufficient to disqualify a family for aid could, according to the testimony of one welfare official, consist of having sexual relations once every six months. The Alabama regulations provided that pregnancy or a baby under six months of age constituted *prima facie* evidence of prohibited cohabitation.  

If a welfare worker suspected cohabitation, regulations demanded that a mother's claim that the relationship had been discontinued be "corroborated by at least two acceptable references in a position to know. Examples of acceptable references are: law-enforcement officials; ministers; neighbors; grocers."  

Home visits, searches for evidence of a man, were a routine fact of life on welfare in all states, including the most liberal.

Although federal policy between 1935 and 1968 formally encouraged respect for poor women's choice whether to seek wagework, federally financed jobs, training, and other services to facilitate wagework were directed towards men. Men did not become a significant group of AFDC beneficiaries until 1961, when Congress made federal matching funds available to states choosing to provide aid to families of children who were needy and dependent because of the *unemployment* of a parent.  

The AFDC-U program was initially enacted your things. You've got no right to protest. You've got no right to privacy when you go on welfare.


31 King, 392 U.S. at 315.  

32 Id. at 314.  

33 Id. at 314 n.9 (quoting Alabama Manual for Administration of Public Assistance, Pt. I, c. II, § VI).  


The 1961, AFDC-U statute, like AFDC itself, defined basic eligibility in sex neutral terms. It also gave states substantial discretion in determining how much an "unemployed" person could work. Some states defined as "unemployed" any parent working less than forty hours a week; others required that an "unemployed" parent be
on a temporary, one-year basis, in response to high levels of unemployment. The "temporary" plight of the unemployed, however, continued and, in 1968, the AFDC-U program was made permanent, as part of a comprehensive revision of the Social Security Act. The Community Work and Training Program (CWT), provided training and job opportunities primarily for unemployed men receiving AFDC-U. This training was provided because the creation of AFDC-U "introduced, for the first time, an identifiable group of employable people into the federally aided public assistance programs.

In sum, during the period 1935 to 1968, federal welfare policy was predicated on the assumption that mothers of young children were not employable. Formal federal pronouncements urged that mothers working less than thirty hours a week. See Macias v. Finch, 324 F. Supp. 1252, 1256 n.2 (N.D. Cal. 1970). In states defining "unemployment" broadly to include anyone who worked less than forty hours a week, workers with large families and substandard wages were eligible for aid even though they worked in a job that might reasonably be regarded as full-time. In these states, AFDC-U became a means of subsidizing the salaries of the working poor. A family with two parents, one of whom is "employed," is generally ineligible for federal categorical assistance no matter how low the family's income or how many mouths depend upon it. If, however, the working parent is defined as "unemployed," the large family qualifies for AFDC-U. Macias v. Finch rejected an equal protection challenge to the program by full-time workers who were nonetheless poor.

States used the discretion provided by the 1961 AFDC-U act to create sex-based variations in the definition of "unemployed parent." In the most conservative states, families could qualify for AFDC-U only when the father—after working a required number of quarters—lost his job. In other states, the family could qualify if the father was unemployed and the mother, with the requisite work history, lost her job. In the most liberal states, a needy family could qualify if one parent lost a job after working the required number of quarters, even if the other parent continued working full-time. In 1968, Congress restricted AFDC-U to families in which the father was "unemployed." Act of Jan. 2, 1968, Pub. L. No. 90-248, § 203(a), 81 Stat. 821, 882 (codified as amended at 42 U.S.C. § 607(a) (1976 & Supp. V 1981)). This provision was held unconstitutional in Califano v. Westcott, 443 U.S. 76 (1979), which required extension of AFDC-U to families in which the mother had a work history and was unemployed.

In 1981, Congress amended the definition of AFDC-U eligibility to limit aid to families in which the "principle wage earner" has worked the requisite quarters and is now unemployed. The "principle wage earner" is the parent who earned the most income in the past twenty-four months. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2313(a), 95 Stat. 357, 853-54 (codified as amended at 42 U.S.C. § 607 (1976 & Supp. V 1981)).


be allowed to decide whether their children's needs demanded their presence in the home, but work and training opportunities and the AFDC-U benefit tied to wagework were aimed primarily at men.\textsuperscript{41} Federal policy, however, did not treat AFDC as a legal entitlement that states were required to provide to all people who met the federal standards of eligibility.\textsuperscript{42} Rather welfare was considered a discretionary gratuity conditioned upon the beneficiary's compliance with wagework requirements\textsuperscript{43} and with broad restrictions on social and sexual relationships.

B. 1968-1981: The Legalization of Welfare and the Transformation of Mothers into Wageworkers

Two themes dominate the development of welfare policy during the period from 1968 to 1981: the "legalization" of welfare and the increasing focus on the enforcement of work requirements. In 1968, the Supreme Court held that the Social Security Act prohibited states from either denying eligibility for aid or reducing the amount of the grant on.

\textsuperscript{41} See supra note 37.


\textsuperscript{43} From 1968 to 1981, welfare recipients in regular jobs continued receiving aid if their income after deduction of actual work expenses and a “work incentive” of thirty dollars per month plus one third of the remaining gross was less than state defined need. Social Security Act § 402(a)(7) and (8), 42 U.S.C. § 602(a)(7) and (8) (1976 & Supp. V 1981); 29 C.F.R. §§ 56.30 & 56.32 (1982), 45 C.F.R. §§ 224.30 and 224.32 (1982).

WIN participants, see infra notes 45-67 and accompanying text, in training programs are not paid a wage but receive thirty dollars a month incentive payments and a small allowance for training related expenses. 29 C.F.R. §§ 56.32(a) & (b) (1982); 45 C.F.R. §§ 224.32(a) & (b) (1982); U.S. DEP’T OF LABOR, U.S. DEP’T OF HEALTH & HUMAN SERVS., WIN HANDBOOK No. 318, viii-44 (1979). Training may only be provided for a limited period. 29 C.F.R. § 56.35 (1982); 45 C.F.R. § 224.35 (1982).

the basis of the AFDC mother’s relationship with a man, unless the man actually contributed to the family or had a legal duty to support the family.⁴⁴ This case, King v. Smith, was the first in a series legalizing welfare by requiring that it be provided to people who met federal eligibility standards.

1. The WIN Program

The Work Incentive Program (WIN) mandates a two-step process for placing welfare recipients in jobs and training programs. First, the welfare department determines who is appropriate for referral to the Department of Labor (DOL). Second, the DOL, through the United States Employment Service, places people in jobs and training positions. Sex-based distinctions are incorporated explicitly in both the definition of who is appropriate for work and the priorities for assigning people to jobs and training and are more subtly reinforced in the operation of the system itself.

The 1968 Act defined people appropriate for work in general terms, requiring the welfare agency to refer to the DOL “each appropriate child and relative who has attained age sixteen and is receiving AFDC.”⁴⁵ In 1967, both the Senate Finance Committee and the House Committee on Ways and Means reported out bills requiring work registration for adults receiving AFDC, with a specific exemption for mothers or other relatives caring for pre-school children.⁴⁶ On the Senate floor, Senator Robert Kennedy introduced an amendment co-sponsored by fifteen other liberal senators⁴⁷ exempting caretakers of children under age sixteen from work that required them to be away from home when the children were not in school.⁴⁸ The amendment was

⁴⁴ King, 392 U.S. at 319, 327 (1968).
⁴⁵ Social Security Act Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821, 890 (1968) (adding § 402(a)(19)). Specific exemptions were provided for people with illness, incapacity, or advanced age; people remote from WIN work and training cites; children under age sixteen; and people needed in the home to care for others who were ill or incapacitated.
⁴⁷ The amendment was co-sponsored by Senators Brooke, Case, Clark, Hart, Javits, Kennedy, Kuchel, McGee, McGovern, Mondale, Morse, Muskie, Pell, Williams (N.J.), and Yarborough. 113 Cong. Rec. 33,540 (1967).
⁴⁸ The amendment exempted:
a mother or other relative who is actually caring for one or more children under the age of 16 who are attending school, except where participation in such work program does not necessitate the absence of such mother or relative from the home during hours when the child or children are not attending school.
subsequently adopted. The Conference committee avoided resolution of the conflicting House and Senate provisions by simply requiring state agencies to refer "appropriate" people for registration. This "compromise" resulted in a variety of state policies on registration. For example, in the late 1960's, New York mandated work registration of only seven percent of adults receiving AFDC, whereas Utah mandated registration for ninety-seven percent of adult recipients.49

Further changes in work requirements were proposed in 1970 when President Nixon submitted to Congress a major revision of federal welfare law. The Family Assistance Plan (FAP), as Nixon's proposal was known, mandated work registration for all AFDC recipients, with specific exemptions for children in school, the ill and disabled, people needed to care for the ill or disabled, people already working full-time, mothers or other caretakers of children under age six, and the mother or other female caretaker if the father or other adult male rela-

113 Cong. Rec. 33,540 (1967).

The liberals argued that "[s]chool age children will be forced to come home to an empty house, the proverbial latchkey children whose names so often are found on the rolls of the juvenile court." Id. at 33,540-41 (Remarks of Sen. Kennedy). "It may be that all of us have inherited the notion that work is holy . . . but for a mother with a 9-year-old child, there is a higher purpose, and let us make sure that the Congress does not make it more difficult for her to achieve that highest of all purposes, to be home with the child." Id. at 33,541 (remarks of Sen. Hart). "[T]his is not a question of forcing men to work; this is a question of forcing a mother to work who may have children of 7, 8, 9, 10, or 15 to take a job to clean someone's latrine, perhaps." Id. (remarks of Sen. Kennedy). "[O]ne of our great objections to the Soviet system was its practice of taking children and turning them over to the state. That is exactly what we would be doing here. . . . I cannot believe that the United States would accept that system." Id. at 33,542 (remarks of Sen. Kennedy).

Russell Long responded for the conservatives.

We will offer training to these mothers. . . . We will provide subsidized employment. We will make contracts with hospitals and universities to help them clean up the slums or grounds. We will do everything that the mind of man can conceive of to help put these people to constructive work—for the first time in their lives for many of them. . . . We provide that there must be day care for the child. . . . Having provided this, at great expense, then it is suggested that if a mother has a child of less than 16 years of age, she does not have to pay for her welfare payments, even though there is a job which she is capable of doing. . . . [T]he mother would not have to do so much as swat a mosquito off her leg as a condition for getting aid from the government. . . . [T]here are people right in this building who hire 15- and 16-year-old children as babysitters to give their wives a much deserved evening out from time to time. If these children, in that age bracket, can very constructively and usefully do work themselves, there is no reason why they should be seized upon as an excuse for their mother to do nothing.

Id. at 33,541-42.

49 Hearings on Social Security and Welfare Proposals Before the House Committee on Ways and Means, 91st Cong., 1st Sess. 303 (1970) (testimony of George P. Schultz, Sec'y of Labor) [hereinafter cited as House FAP Hearings].
tive was in the home and registered for work.\(^5\)

During the hearings on FAP, some complained that certain states were not referring enough aid recipients for work.\(^6\) Others criticized FAP's exemption for caretakers of children under age six, arguing that these mothers should also be required to work.\(^7\) In the end, FAP was not enacted.\(^8\) In 1971, however, Senator Herman Talmadge proposed and Congress enacted amendments for the "improvement of the Work Incentive Program" that incorporated the FAP requirement that all AFDC recipients be referred for work or training, unless they fell within one of the specific statutory exemptions.

Briefly then, WIN's definitions of employable people distinguish between men and women and between women who are alone or with a man. All able-bodied adult men are required to work. The single mother is to work when her youngest child reaches age six. The woman who has a man is exempt from registration, whatever the age of the children.\(^4\) Yet, common sense suggests that the single mother with sole


\(^{52}\) Congresswoman Martha Griffiths was particularly concerned about the situation of teenage mothers who dropped out of school. She recognized that these girls were sometimes expelled from school when they became pregnant but urged that AFDC be conditioned upon a requirement that pregnant teenagers and teenaged mothers continue their education. She sought to have these girls given priority in WIN placement. See House FAP Hearings, supra note 49, at 373, 381-83.

\(^{53}\) Two forces contributed to FAP's defeat. First, the National Welfare Rights Organization (NWRO) mobilized civil rights, church, and labor groups to oppose FAP on the grounds that the proposed benefit levels were intolerably low for the unemployed poor and that increasing the reach of the wagework requirements would worsen already harsh conditions in the substandard wage market. See Sparer, supra note 4. See also J. BURKE & V. BURKE, NIXON'S GOOD DEED (1974); D.P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME (1973). Conservatives opposed FAP on the grounds that it cost too much and would undermine incentives to work. See M. ANDERSON, WELFARE REFORM 83 (1978).


(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor, unless such individual is -

(i) a child who is under age 16 or attending school full time;
(ii) a person who is ill, incapacitated, or of advanced age;
(iii) a person so remote from a work incentive project that his effective participation is precluded;
(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;
(v) a mother or other relative of a child under the age of six who is
responsibility for children would have a more difficult time holding a full-time wage job than would the mother in the two-parent family in which both wagemakers could share responsibility for childcare. Why, then, did Congress require the single parent to seek wagemark, while exempting married women? Some of the justifications Administration witnesses proffered for the exemption of married women are simply problems facing all women in the unskilled wage labor market. For example, one witness argued: "[O]ur data show that characteristically among the working poor, where the wife does work, it is part-time, and intermittent." In view of the costs of childcare, "it is quite possible . . . that it would be uneconomic for [the woman] to work." When pressed, Administration witnesses invoked "fundamental philosophy" and the traditional concept of the man's role as economic head of the family to justify the disparity between the woman who lacks a man and the woman who has a man:

Where there are two [parents] present it is more like a normal family in the sense that the emphasis is on the father, the emphasis on upgrading and career development for him to get him into a better paying job, and to pull him out of the welfare program entire so he becomes entirely self-supporting. The mother role becomes one of supporting the family, caring for the children while he is trying to improve his income.

To require married women to work "really presents quite a mixed blessing and quite a mixed set of incentives for him to subject his wife to a mandatory work requirement. It muddies up the situation quite a
In short, the exemption for women with men is provided to protect male economic dominance in the home. If there is no man in the home, there is no need to protect his economic dominance. There is, however, a necessity to make plain that the single woman needs a man.

In the second step in the WIN process, the DOL, through the United States Employment Service, refers people for work or training. The 1968 Act did not address the question who was to be given priority for jobs and training. The implementing regulations did, however, mandate priorities for referral to jobs: unemployed fathers, mothers and other caretaker relatives and essential persons who volunteer or have participated in prior federal jobs, dependent children and essential people age sixteen or over who are not in school, mothers and others who volunteer, and then all others. Because WIN opportunities were limited, the priority for unemployed fathers effectively foreclosed women from jobs and training. In 1970, a group of women denied training in WIN challenged the regulatory priorities as sex discriminatory. A federal district court declared the sex-based regulatory priorities illegal, and awarded the named plaintiffs damages for the loss they suffered through the denial of job training. The Department of Health, Education, and Welfare (HEW) ignored the ruling; it neither appealed the district court decision nor revised its regulations. Meanwhile, the 1971 Talmadge Amendments codified the sex-based priorities of the regulations, and they continue unchanged to this day.

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59 Id. at 386 (testimony of Robert E. Patricelli, Dep. Assist. Sec'y of Health, Educ. and Welfare for Program Planning and Evaluation) (emphasis added).
60 Another theoretical justification for the exemption of married women is the belief that children need the role model of an employed parent but that one such model is sufficient. There is, however, no concrete evidence that this concern motivated the exemption.
64 See infra notes 147-50 and accompanying text.
66 The Act was amended to provide that the DOL, in placing appropriate people referred to it by the welfare agency,
During the FAP hearings, little attention was paid the job queue priority given to unemployed fathers. Only Congresswoman Martha Griffiths questioned HEW Undersecretary John Veneman's statement that "[t]he priorities would naturally fall to those who are most trainable—logically the easiest persons to train and get off public assistance." Why, asked Congresswoman Griffiths, are men easier to train? Veneman replied, "Because they have been in the employment market, and they do not have the problems that women are confronted with, without sufficient day care centers." There the matter ended.  

The WIN program, therefore, draws sex- and family-based distinctions by creating three groups of able-bodied adults. First, men are required to register for work and are given preferred status in the allocation of jobs and training. Second, women with men are relegated to the pedestal; they are not forced into wagework, but if they choose to do it the Act mandates that they be given second priority in the distribution of jobs and training. Finally, the women without men, the single parents who bear the greatest burden in managing dual responsibilities to work and to children, are both required to work and disfavored, relative to men, in the distribution of jobs and training.

2. The "Legalization" of Welfare

While Congress was refining the work requirements for AFDC parents, the courts were "legalizing" welfare. This legalization took many forms. First, courts allowed people denied statutory benefits to invoke the judicial process to review policies and decisions which resulted in that denial. Second, courts held that when the federal Social Security Act defined a condition of eligibility the states were not free to set more restrictive standards or to exercise ad hoc discretion to deny this title, who volunteer for participation under a work incentive program; third, other mothers, and pregnant women, registered pursuant to section 602(a)(19)(A) of this title, who are under 19 years of age; fourth, dependent children and relatives who have attained age 16 and who are not in school or engaged in work or manpower training; and fifth, all other individuals so certified to him.


67 House FAP Hearings, supra note 49, at 215-16. The Thorn decision was not mentioned in the debate preceding adoption of the Talmadge Amendments. The third priority, the priority for pregnant teenagers and mothers, is the product of Congresswoman Griffiths' special concern. Id. at 373-78, 381-82.

aid to individuals eligible under the federal standards. Third, the courts recognized that procedural due process required that eligibility be determined in accordance with standards of fundamental fairness. Government power to condition benefits upon the forfeiture of constitutionally protected liberties was also limited. Fourth, the equal protection clause was recognized as restricting state freedom to draw eligibility lines on the basis of criteria, such as sex and legitimacy.

Although the ultimate objectives of those who sought to legalize welfare were unquestionably radical—assuring a minimally adequate grant to everyone in need—the relief poor people's advocates sought from courts was limited, incremental, and process-oriented. Relying on traditional suspect-classification and fundamental-rights analysis, they sought limitations on the power of the state to condition benefits on the sacrifice of constitutional rights, or to allocate benefits along racially identifiable lines. After a few cases accepting such arguments, the Supreme Court refused to deal with these cases in the incrementalist form in which they were presented. Instead the Court was quick to cast the claims as fundamental challenges to the preeminent state interest in preserving incentives for wagework. Claims thus characterized were denied.

For example, in *Dandridge v. Williams*, the plaintiffs challenged the Maryland policy that placed a cap on the amount of aid provided to large families. The plaintiffs contended that this policy denied eligibility to the innocent youngest child and conditioned aid upon family composition. The Court refused to regard the claim as one on behalf of an individual child in a large family, but rather cast the issue as a broad challenge to grant levels. Thus characterized, the monthly family maximum was upheld as promoting the State's legitimate interest in encouraging employment and in avoid-

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75 *Id.* at 476-77.
ing discrimination between welfare families and the families of the working poor. . . . Maryland provides an incentive to gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of household receives, the state maintains some semblance of an equitable balance between families on welfare and those supported by an employed bread winner. . . . It is true that in some AFDC families there may be no person who is employable. . . . But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.\textsuperscript{76}

The Court's formulation enables it to avoid grappling with the fact that the individual families challenging the cap contained no employable adults and the fact that individuals able to work were already required to do so. To the Court, the particular situation of an individual family is irrelevant. The generalized desire to encourage wagework provides sufficient justification for denying aid.

In \textit{Jefferson v. Hackney},\textsuperscript{77} plaintiffs challenged the disparity between the relatively low grants paid to the predominantly black recipients of AFDC and the higher grants paid to the predominantly white recipients of Aid to the Aged Blind and Disabled. Had the plaintiffs prevailed, the legislature would have been forced to equalize grants by either increasing aid to the predominantly black families with children or decreasing aid to the favored white groups. From a broader perspective, judicial scrutiny of the disparate impact that the large disparities in grants have on different racial groups would have encouraged legislatures to formulate welfare policy in relation to a broader, more racially integrated constituency.\textsuperscript{78} The Court, however, held that the differential racial impact was irrelevant and the disparity in grants was justified because AFDC families are "more adaptable" and have "greater hope of improving their situation."\textsuperscript{79} AFDC mothers can get a job or find a man, and the State need not structure grants in a way which "discouraged" them from doing so.

In the final analysis, the legalization of welfare took a very limited form.\textsuperscript{80} Discretion to deny aid on the basis of race, sex, residence, mari-

\textsuperscript{76} Id. at 486.
\textsuperscript{77} 406 U.S. 535 (1972).
\textsuperscript{78} Plaintiff's claim was, in this sense, process-oriented. \textit{See} Ely, \textit{Toward a Representation-Reinforcing Mode of Judicial Review}, 37 Md. L. Rev. 451 (1978).
\textsuperscript{79} Jefferson, 406 U.S. at 549.
\textsuperscript{80} Some go one step further arguing that legalization has been counterproductive
tal status, or compliance with social and sexual norms was somewhat curtailed, but the racism, sexism, and contempt for the poor, which the earlier discretionary policies reflected did not disappear. These attitudes have merely been rechanneled into the enforcement of wagework requirements. Emphasis on the enforcement of work requirements enables policymakers to ignore the lack of jobs and the fact that grants do not provide minimal economic subsistence. If we assume that the woman on welfare could find a man or support herself through wagework, if only she would, there is less reason for concern about the inadequacy of subsistence grants or the lack of opportunity for wagework.

with respect to the interests of the poor. Rosenblatt, Legal Entitlement and Welfare Benefits, in The Politics of Law 262, 271 (D. Kairys ed. 1982). Marc Tushnet asserts, "Goldberg at least arguably diminished the power of welfare recipients, first by deflecting them into a fruitless struggle against a bureaucracy that readily swallowed the Court-prescribed dose of due process without any change in symptoms, and second by bolstering the idea that fairness was not far away in the American welfare states." Tushnet, Book Review, 78 Mich. L. Rev. 694, 709 (1980) (reviewing L. Tribe, American Constitutional Law (1978)).

I do not believe that the limited legalization of welfare has discouraged other forms of political action. Some manifestations of legalization, particularly the enforcement of procedural due process, are of concrete material benefit to individual poor people. Furthermore, legalization, even at its limits, illuminates the functioning of the political process in relation to the poor.


81 Congress, in adopting WIN, provided some protection for individual interests in balancing family needs against the demands of wage labor, allowed some freedom to reject the most exploitative forms of wagework, and assured a measure of procedural regularity in the administration of work requirements. See supra note 42. In New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973), the Supreme Court gutted these protections, allowing states to impose supplemental work requirements so long as such additional requirements did not present a "substantial conflict with the federal statute." 413 U.S. at 420. State work requirements are more onerous than those of WIN, and protections for workers are slight. See, e.g., Woolfolk v. Brown, 538 F.2d 598 (8th Cir. 1976).

It is uncertain whether the constitution provides any protection against work requirements imposed as a condition upon subsistence, at least so long as such requirements are not cast in explicitly racial terms. The most likely source of constitutional limit on state power is the doctrine of unconstitutional conditions. See cases cited supra note 71. The Court has not been consistent in enforcing the principle that government largess may not be conditioned upon the forfeiture of recognized constitutionally protected liberties. See, e.g., Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). Further, while personal and familial interests in rejecting particularly onerous forms of labor may be very strong, it is far from clear that these interests are constitutionally protected.

82 See infra note 87 and accompanying text.

83 See infra note 296 and accompanying text.
C. 1981 and Beyond: Conflicting Views of the Relation Between Welfare and Wagework

Today, there are two broadly shared yet sharply conflicting views of the relationship between welfare and wagework. The dominant view, reflected in the 1968 WIN amendments and reaffirmed in the 1981 revisions of the Social Security Act, is that welfare has undermined family stability and incentives for wage labor. This view posits that jobs exist for people willing to take them and that welfare promotes dependency while at the same time permitting inappropriately high opinions of self and inappropriately high standards as to what constitutes acceptable work. Welfare programs are also assumed to encourage family dissolution by guaranteeing income to a woman if her husband is absent. Those who hold this dominant view wish to sharply restrict aid and provide it only on terms that are calculated to be onerous enough to encourage wage labor and preserve the traditional family.

The second, conflicting, view focuses on the economy's failure to provide jobs for many people who are willing, able, and eager to do wagework. When considered in this light, welfare policy that is primarily based on a desire to encourage wagework is misguided. Under the second view, values other than promotion of the work ethic are also important. People who cannot find wagework, or who should not be required to do it, would still be provided decent subsistence. Those holding this view argue that although wagework requirements for welfare recipients are necessary and appropriate, they must be structured with sensitivity to diverse situations, particularly in times of high unemployment. Although this position is realistic and pragmatic, it is not the view taken by those making federal welfare policy. This is so even though both patterns of unemployment and the experiences of work incentive programs strongly challenge the empirical and intellectual foundations of the dominant view of the relation between work and welfare.

1. Patterns of Unemployment

When WIN was enacted in 1968, the official United States unemployment rate was 3.6 percent; in 1983, it rose above 10 percent as over eleven million active job seekers were unable to find work. These

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84 See supra note 42 and text accompanying notes 42-67.
85 See infra note 100 and accompanying text.
87 See Current Labor Statistics, MONTHLY LAB. REV., Apr. 1982 at 85); N.Y.
gross figures alone challenge the view that AFDC rolls can be reduced by merely giving poor women greater incentive to work. The gross figures, however, seriously understate the magnitude of the job problem for women on welfare. First, the unemployment figures exclude discouraged workers, that is people with a work history who report that they want a job but are not actively looking. In 1982, women accounted for about sixty percent of the discouraged workers, whereas they comprised only forty-three percent of the civilian labor force. The largest groups of nonretired discouraged workers are men who are in school and women who have conflicting responsibilities in the home. Second, unemployment rates for less skilled workers are consistently higher than those for workers with more skills. Third, through the 1970's, unemployment rates were consistently higher for women than for men. The economic reality of modern America is that there are not jobs for all those willing to work, and this is particularly true for women.

2. Welfare, Wagework, and WIN

Throughout its history, WIN has been wholly ineffectual in reducing welfare rolls. It failed in its early years when unemployment rates were relatively low; it fails today. The WIN program is flawed at two levels: first, only a small proportion—less than forty percent of the adults receiving AFDC—are judged appropriate for referral to WIN. Physical or mental disability and childcare responsibilities are the most common reasons adults on AFDC are not referred for work. Serious
physical and mental problems create real and obvious barriers to wagework.\(^4\)

WIN fails at a second level in that only a small proportion of those defined as appropriate for wagework are offered jobs or training.\(^5\) WIN might be said to fail at a third level as well. The jobs to which WIN enrollees eventually are referred are typically unskilled, low-wage, and often short-term. In 1977, one-quarter of the people who found jobs through WIN were again unemployed within thirty days of placement.\(^6\) In the early 1970's, about half of the individuals placed in jobs through WIN were unemployed within ninety days.\(^7\) Even people who find and retain jobs through WIN often remain dependent upon welfare because their wages are so low.\(^8\)

\(^4\) See WIN AND RELATED EXPERIENCES, supra note 93, at 6; Gupte, 65% of Relief Mothers Proving Disabled in Tests, N.Y. Times, Sept. 24, 1973, at 1, col. 1. Many of these problems, such as anemia, poor vision, gross obesity, and dental decay, are correctable. One project found that by providing medical treatment about fifteen percent of the people initially found disabled were able to work.

Welfare workers making referrals to WIN face a Hobson's Choice: on the one hand defining people as too disabled to work encourages perceptions of personal inadequacy, on the other hand no immediate good is served by forcing people to participate in the charade of seeking non-existent jobs. See supra text accompanying note 87. Also, defining large numbers of people as disabled defuses anger about the social and political policies limiting opportunities for wagework.

A psychiatric social worker, who is often asked to certify clients with serious mental problems as unable to work, described the clients' reactions when she asked them to evaluate whether they could work, rather than routinely signing forms certifying them as unfit. (Although the clients unquestionably had serious mental problems that provided a legitimate basis for certifying them as inappropriate for work, many people with serious mental problems nonetheless do productive work.) Clients asked to take responsibility for determining their own ability to work were initially angry. Subsequently, some began the difficult process of looking for work. Discussion with Ellen Zimmerman, Oct. 17, 1980. See also Schechter, Commitment to Work and the Self Perception of Disability, 44 Soc. SECURITY BULL. 22 (1981).


In 1977, only twelve percent of WIN registrants found jobs. See U.S. DEP’T OF LABOR MANPOWER REPORT TO THE PRESIDENT, 132 (1978) [hereinafter cited as 1978 DOL MANPOWER RPT.]. In 1980, seventy-one percent of WIN registrants who found work did so without any help from WIN. 1982 GAO Win Rpt., supra note 92, at 16. Only about half of those people judged appropriate for WIN actually participated in any program of training, counseling, or referral. Id. at 17.

\(^5\) In 1973, only fifty-three percent of WIN participants who were employed for ninety days actually left the welfare rolls. In 1974, this figure was down to forty-four percent. CONG. BUDGET OFFICE, PUBLIC EMPLOYMENT AND TRAINING ASSISTANCE:
studies of WIN uniformly conclude that it has not achieved its objective of forcing the poor to become economically independent.99

In 1981, President Reagan proposed and Congress adopted the most comprehensive amendments to the AFDC title of the Social Security Act since 1968.100 Forcing welfare recipients to work was the major goal of the 1981 Amendments.101 Yet, at the same time, federal funds for public service jobs and for job training were slashed102 and

ALTERNATIVE FEDERAL APPROACHES 54 (1977) [hereinafter cited as CBO STUDY]. The 1982 GAO WIN RPT., supra note 92, at 20-21, presents data from interviews held six to eighteen months after AFDC recipients found work. Sixty-four percent were still employed, and thirty-eight percent were earning enough to leave the AFDC rolls.


101 The parent of a child under age six is now exempt from registration only when "personally providing care for the child with only very brief and infrequent absences from the child." OBRA, supra note 100, § 2314(b), 42 U.S.C. § 602 (Supp. V 1981).

Congress created three new work "programs" to supplement WIN, which was also retained. First, the Community Work Experience Program, OBRA, supra note 100, § 2307(a), gives the states explicit authority to require welfare recipients to work—without pay—on community projects to be organized by state and local welfare agencies. Single parents can be required to participate in these workfare programs when their youngest child reaches age three. OBRA, supra note 100, at § 2307(a), 42 U.S.C. § 609 (Supp. V 1981). Second, the Work Supplementation Program, OBRA, supra note 100, at § 2308, 42 U.S.C. § 614 (Supp. V 1981), allows states to give employers the welfare grants to which families would otherwise be entitled, and to require work for the grant. Third, the Work Incentive Demonstration Program, OBRA, supra note 100, at § 2309, 42 U.S.C. § 645 (Supp. V 1981), allows states to apply for federal authority to run their own work program. See generally Zeitlin & Campbell, Strategies to Address the Impact of the Economic Recovery Tax Act of 1981 and the Omnibus Budget Reconciliation Act of 1981 on the Availability of Child Care for Low-Income Families, 28 WAYNE L. REV. 1601, 1650-67 (1982) [hereinafter cited as Day Care Strategies].

102 From 1973 until 1981, the Comprehensive Employment and Training Act (CETA) provided federal support for jobs and job training for a portion of those people seeking work but unable to find it. CETA, 29 U.S.C. § 801-992 (1976). CETA was not a full employment program but rather was enacted to provide job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons. CETA Congressional Statement of Purpose, 29 U.S.C. § 801 (1976).

Title VI of the CETA Amendments of 1978, 29 U.S.C. §§ 801-999, 961 (Supp. II 1978), established the Countercyclical Public Service Employment Program which was tied to the unemployment rate. Until 1981, appropriations for the cyclically unemployed were tied to the official level of unemployment and CETA job opportunities were provided to only a small portion of the unemployed. When the national unemployment rate was less than four percent, no funds were provided for public service
financial incentives for wagework were sharply curtailed. The attitude underlying these recent changes is that people deemed "employable" should be forced to work by hunger and bureaucratic sticks. States are given broad authority to force welfare recipients to work but may not look to the federal government for help. Federal financial support is considered unnecessary and inappropriate; the state, not the federal government, must bear financial and organizational responsibility.

President Reagan's approach to welfare reform derives from his experience as Governor of California. In 1972, California mandated that counties establish programs requiring welfare recipients to work, without pay, for public or private organizations. The President often tells the tale of this program. He recounts that the rolls were reduced by more than 350,000, "not by throwing people off, they just disappeared." Unfortunately, the President's tale of the California employment. If unemployment rates were between four and seven percent, appropriations were geared to provide jobs to twenty percent of the number of unemployed in excess of the acceptable four percent unemployed. If unemployment rates exceeded seven percent, the goal was to provide PSE jobs for twenty-five percent of the unemployed persons, in excess of four percent of the workforce. Hence, if eight million people were officially unemployed, the 1978 goal was to provide one million jobs.

In 1982, Congress cut CETA funding dramatically. For example, for fiscal year 1979, Congress had authorized three billion dollars for public service employment and two billion dollars for job training, both under Title II of the Act. CETA Amendments of 1978, Pub. L. No. 95-524, § 112(a)(2)(A)-(C), 92 Stat. 1909, 1932. For fiscal year 1982, only one and two-fifths billion dollars was authorized for all parts of Title II and no funds were authorized for fiscal year 1983, even though the budget for most programs was set on a three-year basis. OBRA, H. CONF. REP. No. 208, 97th Cong., 1st Sess. 769-72, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 1010, 1131-34 (1981).

103 There is little incentive to accept wagework if it results in a dollar for dollar reduction in the welfare grant. Thus, from 1968 to 1981, in calculating the need level, welfare officials disregarded the first thirty dollars earned each month, plus one third of the remaining gross income, and then deducted all actual work-related and day care costs. Social Security Act, 42 U.S.C. § 602 (1976). The 1981 Amendments limit the deduction for work expenses to seventy-five dollars and day care expenses to one hundred sixty dollars a month. After deducting these expenses, the recipient applies the thirty-dollar and one-third-of-income disregards. Since there is a maximum limit for expense deductions and the disregard applies to net rather than gross income, the financial incentives to work are reduced, especially for individuals who face high child care costs. The disregards from net income, moreover, terminate after the aid recipient has been working four months. OBRA, supra note 100, § 2301, 42 U.S.C. § 602 (Supp. V 1981).

104 A state "may not include the cost of making or acquiring materials or equipment in connection with the work performed under a [Community Work Experience Program] or the cost of supervision of work under such program" in their claims for federal financial participation. OBRA, supra note 100, § 2307, 42 U.S.C. § 609 (Supp. V 1981).

workfare experience is pure fabrication. The final official evaluation of the program found it was a failure by every possible measure: it did not facilitate regular employment, reduce applications for aid, encourage people to seek alternative sources of support, or reduce overall welfare costs. The final state evaluation characterized it as not "administratively feasible and practical." In most counties, the program was never instituted at all. Where it was implemented, there was no difference in the rates at which welfare cases were closed and no differences in average grant levels. The one statistically significant change was an unexpected increase in the number of applications for AFDC filed by two-parent families.

The President's belief that poor people will simply "disappear" from the welfare rolls if they are prodded to work is elaborated by his advisors. Martin Anderson, chief domestic advisor in the first years of the Reagan presidency, describes the California workfare program as a model for reform. George Gilder, an author whom the President has recommended highly, states that the California workfare program, in conjunction with efforts to crack down on welfare fraud and search out delinquent fathers, "halted the flood of new applications in their tracks."

Anderson and Gilder find support for the view that welfare undermines work incentives in their analysis of the experiments conducted by the federal government during the 1970's to study the impact of a guaranteed annual income on the work effort of low-income families. In

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107 Id. at 4, 9. New York has a similar program for recipients of general assistance, that is for nondisabled individuals and families without children, and has invested substantial resources to assure that the program is actually implemented. Although the program has had some impact in reducing the number of people receiving general assistance, it has not facilitated entry of the unemployed poor into the regular labor market. Legislative Comm'n on Expenditure Review and Program Audit, N. Y. State Legislature, Work Programs for Welfare Recipients, (1979). See also Zall & Betheil, supra note 99, at 276.


111 For description of the first income-maintenance experiment, which was conducted in New Jersey, see Work Incentive and Income Guarantees (J. Pechman & M. Timpane, eds. 1975). For an analysis of effects of various tax rates on labor force
these experiments, samples of low-income families, in four geographic areas, were assigned to "experimental" or "control" groups. The experimental group received guaranteed benefits and the control group did not. There were no work requirements for the people in the experimental group; they were assured an income at or above the poverty line, whether or not they worked. Earnings increased family income. Every family in the experimental group was assured a subsistence grant, at a level higher than welfare, whether or not the members of the family worked. George Gilder, in what is probably the most widely read discussion of the experiments, states:

In this HEW test, income guarantees turned out, in the view of HEW's own contractors, to be a catastrophic failure, reducing work effort by between one-third and one-half . . . . [W]ork force withdrawal would constitute between 25 and 55 percent of the real cost of a program maintaining income at a level near the poverty line . . . . The findings . . . banished all confidence in the beneficial impact of federal income supports of any sort, whether AFDC or radical reform.113

Referring to the experiments, Martin Anderson said, "[t]he institution of a guaranteed income will cause a substantial reduction—perhaps as much as 50 percent—in the work effort of low-income workers."114

The data from the income maintenance experiments, in fact, show that the husbands in the experimental group reduced their total working hours by one to eight percent. Wives reduced their wagework effort between zero and thirty-three percent. Wagework reductions of twelve to twenty-eight percent were reported for female family heads in the


Many earlier studies also examined the work-orientation of welfare recipients. The consistent conclusion has been that the work attitudes of the welfare poor and the working poor are very similar. Differences between working and welfare poor are not ones of attitude but rather of education, health, family size, and age of youngest child. L. GOODWIN, DO THE POOR WANT TO WORK? A SOCIAL-PSYCHOLOGICAL STUDY OF WORK ORIENTATIONS (1972); S. KLAUSNER, THE WORK INCENTIVE PROGRAM: MAKING ADULTS ECONOMICALLY INDEPENDENT (1972).

113 Families in the experimental groups were paid different basic grants and assigned different formulae for computing the relation between earned income and grant levels.

114 G. GILDER, supra note 110, at 120.

114 M. ANDERSON, supra note 108, at 87.
two experiments which included single-parent families.\textsuperscript{118}

There are many possible explanations for these reductions in wage labor. Women reduced wage labor substantially more than men. Does this show that women value leisure more, are lazier, or are more likely to choose work at home if allowed to do so? The data do not tell us. The data also show that, for young workers, reduction in wagework is accompanied by increases in school attendance.\textsuperscript{116} Does this tell us that young workers sensibly seize the opportunity to upgrade their skills and productivity or that they are dilettantes? Men reduced work effort by staying out of work longer between jobs, rather than by reducing hours worked.\textsuperscript{117} The data do not reveal whether they were using the opportunities to seek a better job or enjoying a vacation at government expense.

Reasonable people can disagree about the meaning of these data.\textsuperscript{118} We know little about what people did instead of wagework. More important, we might attach different values to various alternatives to wagework. I read the experiments as demonstrating that low-

\textsuperscript{118} The figures are summarized and specific sources are noted in Moffitt, supra note 111, at 24. In the New Jersey experiment, Spanish-speaking wives reported work disincentives at a substantially higher level: fifty-five percent. This figure is regarded as a statistical anomaly. \emph{Id.}

\textsuperscript{116} Moffitt, supra note 111, at 25.

\textsuperscript{117} \emph{Id.}

\textsuperscript{118} The conclusions presented by Gilder and Anderson, however, are not closely tied to the data. Gilder simply ignores the actual statistics. Anderson recognizes that his assertion of massive work disincentive is not supported by the reported results of the experiments but argues, on the basis of intuitive assumptions, that the results are affected by many biases which result in a substantial and cumulative understatement of the work reduction effects. For example, Anderson argues that the "Hawthorne effect," the phenomenon of people who are under study behaving differently simply because they know they are being studied, resulted in greater work effort by those involved in the NIT experiments. \emph{ANDERSON, supra} note 91, at 105. Why should we suppose that people on welfare, who are required to work, to search and report their efforts, would work less than people who are told that work is not demanded? Both groups are "observed." Anderson then asserts that the results of these temporary, experimental programs understate work incentives due to a number of other experimental "effects," including the Small Scale Effect, the Windfall Effect, the Substitution Effect, and the Early Retirement Effect. He assigns an arbitrary percentage value to the understate-

\textsuperscript{118} The increased demand by workers for part-time jobs would probably stimulate the business sector to provide them." \emph{Id.} at 115-16. The data, in fact, show that work reduction generally took the form of longer periods of unemployment between jobs. Moffitt, \emph{supra} note 111, at 25.

income people have a very strong commitment to wagework. Most of the people in the experiments did not reduce wagework at all even though they were guaranteed an income, without strings or hassle, considerably above current welfare levels.

In sum, there is little empirical support for the dominant view that welfare recipients could support themselves through wagework if only they were motivated to do so, or that welfare acts merely as a cushion to support those too lazy to work and that therefore work programs are necessary. On the contrary, there is substantial evidence that jobs are not available for many persons who are able and eager to work, that many welfare recipients are disabled from engaging in wagework, and that work programs do nothing to get people off welfare and into the wage economy.

The interesting question then becomes why is this “dominant” view of welfare so widely accepted? I believe that the answer to this puzzle lies, in significant part, in our changing legal and cultural attitudes towards women. Women with children, traditionally viewed as members of the “worthy poor,” make up the greatest percent of welfare recipients. Viewed as unsuited for participation in the wage economy by virtue of their role as mothers and homemakers, women had a legitimate claim to government aid in the form of welfare payments. Major changes in the legal and social status of women and their place in the economy, however, have had a drastic impact on the view of women as unsuited for work and deserving of government support.

D. Welfare Policy and the Liberation of Women

Prior to the late 1960’s women, rich and poor, confronted a range of life choices that seem, from today’s perspective, remarkably limited. For a woman, the core social expectation was that she find and keep a man. Because much wagework was closed to women, and the law denied them the ability to control reproductive capacity, the costs of not finding and keeping a man were very high.

For a man, the core social expectation was to find and keep wagework, but his range of choice, both in relation to work and family was much broader than was a woman’s. Marriage and family were supposed to, and did, limit the choices open to men. The family’s dependency provided strong incentive for stability in wagework, while

119 See supra note 21.
120 See infra note 133.
home provided him a "haven from the heartless world." Of course, not all men were able to perform the socially expected provider role. For some, particularly those not blessed with a good education or strong native skills, the wage market did not provide steady work sufficient to meet their family's economic demands. Some men perceived that the role of head of the family created economic expectations that they were never able to satisfy, whereas smaller contributions of money and concern from an absent father or from a boy friend were received by women and children with gratitude.122

Thus, traditional role allocations required men to work and support women and women to be dependent upon men for support. Women's reproductive role is a key factor in this equation because of the view that children need their mother's presence and that women with children are thus incapacitated from participating in the wage economy.

The AFDC system accepted these sex-role allocations to a great extent. Although it is true that a single parent of either sex can qualify for aid, it is also true that the majority of recipients are female-headed households,123 and that the presence of children in the household was viewed as a reason to excuse the parent from wage labor. Efforts were made to ensure that only "worthy" mothers and their children received aid by enforcing "man in the house" rules.124 These rules had the dual purpose of enforcing standards of sexual purity and ensuring that women affiliated with men would rely on the man, rather than the state, for support.

The 1970's saw monumental shifts in the significant life choices open to men and women. Women gained control of their reproductive capacity, and thereby enhanced their ability to do wagework and to be sexual without acquiring obligations to a child, which would in turn force them to depend upon a man or the state. Thus, women entered the wage labor market in unprecedented numbers. That some individual women enjoyed success in the wage market demonstrated that women are not inherently incapable of economic independence through wagework.

Although lower-class women have always worked, in the 1970's, for the first time, large numbers of upper-middle-class women chose to do wagework, even though neither family finances nor cultural norms required it and the costs of childcare and taxes minimized the financial

123 See supra note 30 and text accompanying notes 30-33.
rewards. The existence of these women gives the lie to the claim that people will not work unless compelled to do so, as well as to the notion that work is simply a means to an end, the end being to earn enough money to buy leisure and support a family in which human relations are valued as ends in themselves. 125

In a few short years, upper-middle-class women have progressed from the point where they had little realistic choice but to find and keep a man, to the point where they may choose to live and work independently or to be traditional wives and mothers or to combine both career and family. In working-class families, economic need often requires that women do wagework when it is available, even when children are young. While the choices available to upper-middle-class women have expanded significantly, the choices realistically available to men have not. Men's opportunities for wagework have declined, 126 but work in the home, caring for children, is still not perceived as a legitimate choice for men, even when the wife is able to support the family. The choices available to upper-middle-class women today represent a dramatic departure from the past, in which sex largely determined one's life work. Choice, at this fundamental level, is a new phenomenon and is extremely threatening. In addition, there is evidence that this expansion of choices for upper-middle-class women has hurt men in concrete ways. Women compete for scarce jobs. Women's greater economic and emotional independence allow them to make new demands upon men and give them greater freedom to leave relationships that they find intolerable.

AFDC policy, today, can best be understood in terms of the fundamental social changes precipitated by women's demands for equality, for opportunity, and for control of their own reproductive capacity. Despite substantial formal support for the legal ideal that women be afforded equal access to traditionally male occupations, the welfare system discriminates against poor women in allocating jobs. Such discrimination is seen as justified by the need to preserve the stability of the traditional family. Thus, the welfare system operates to preserve and reinforce patriarchy by assuming that women should be dependent on men: when, and only when, male economic support is withdrawn will the state provide aid. Yet, at the same time that the welfare system favors men in the allocation of scarce jobs, by placing a formal work requirement on poor women the system declares that childcare is not legitimate work. The demands of childcare no longer render women

126 See supra note 9 and accompanying text.
"worthy" of help. Because increasingly large numbers of women choose to engage in wagework, the law increasingly demands that all poor women engage in it.\textsuperscript{127}

At first glance, families receiving AFDC seem to be classic examples of a "discrete insular minority."\textsuperscript{128} They are disproportionately female, disproportionately black, and universally poor. Yet, families dependent upon AFDC are neither so discrete nor so insular as is commonly supposed. Roughly one third of all children born in America today will receive AFDC before they reach the age of eighteen.\textsuperscript{129} One third of American children will depend for subsistence on a program that persistently and deliberately denies the human worth of their mothers, a program that impedes the mothers' attempts to support the children financially while denigrating the value of the work the mothers perform in the home. A federal welfare and labor policy that overtly prefers low-income men to low-income women in the allocation of jobs injures all female wageworkers regardless of income. Similarly, a federal welfare and labor policy that denies the value of the homemaking and childcare functions performed by welfare mothers implicitly denigrates, and thus injures, all women who work in the home to maintain the household and care for children. The official legitimation of the attitudes reflected in current welfare policy harms all women, not just those on welfare.

III. FEDERAL WELFARE AND LABOR POLICY DENY THE VALUE OF WOMEN AS WAGEWORKERS

Federal welfare and labor policy helps preserve the second-class status of women in the wage labor market in a number of ways, both covert and overt. Most obviously, federal welfare law, through WIN, denies poor women equal access to wagework by requiring that the Employment Service,\textsuperscript{130} in administering WIN, give all eligible men priority in job allocation over any eligible woman.\textsuperscript{131} Although this

\textsuperscript{127} Despite rising levels of unemployment, particularly among unskilled workers, and despite the demonstrated failure of WIN, federal policy has increasingly assumed that mothers' failure to support their families through wagework reflects personal fault. The presumption that poor women could support their children, or find men, if only they would try, is very convenient. It deflects attention from and simultaneously diminishes need for concern about the fact that welfare grants are not sufficient to meet the minimal economic needs of children.

\textsuperscript{128} United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

\textsuperscript{129} Moynihan, Children and Welfare Reform, 6 J. INST. FOR SOCIOECON. STUDS. 1, 8 (1981).

\textsuperscript{130} See supra text accompanying notes 42-66.

\textsuperscript{131} See supra note 66 and accompanying text.
provision is the most blatant means of keeping women in their second-class place, it is not the most significant. The sex-segregated nature of the wage labor market and its systematic devaluation of women's work are crucial elements in explaining women's inferior economic position. Federal welfare policy relies on the Employment Service to place the eligible poor in jobs or training programs and the Service, in turn, shapes its operations to conform to the discriminatory nature of the marketplace. Federal welfare law, by attempting to force poor women into the job market without taking steps to change the market's discriminatory structure, both perpetuates the discriminatory structure and subjects poor women to its abuse. Wage labor, moreover, is structured on the assumption that the workers have someone to care for their children. Women receiving AFDC are, by definition, responsible for the care of their children; AFDC mothers do not have wives. Yet, federal policy refuses to consider the needs of children whose mothers do full-time wagework.

This section will examine the nature, justifications (if any) and constitutionality of the WIN sex-based job priority, the sex-segregated nature of the wage labor market, and the failure of federal welfare policy to accommodate the childcare needs of low-income working woman.

A. The Constitutional Framework of Sex-Based Equality

Historically, a central goal of the laws relating to women and families has been to reinforce and maintain male dominance in the home and the marketplace. Through most of this century, women's power was tamed and patriarchy preserved by relegating women to a separate world, by denying them the opportunity to do wagework or participate in public life, and by preventing them from controlling their reproductive capacity. The law operated to reinforce social and religious demands that women devote themselves exclusively to the care of men and children. Yet, the law did little to ensure that women received the protection and financial support that was their ostensible reward for submitting to a life of restriction and self-sacrifice. For example, the husband's duty to support the wife was not enforceable—even in the-

135 See supra note 121.
ory—during marriage and not enforceable in practice when the marriage ended.

The legal structure’s support of male dominance in the home and the wage market is fundamentally inconsistent with legal ideals of individual worth and equal opportunity. Accordingly, during the 1970’s, individual women invoked these legal ideals to seek access to traditionally male power. To deny a woman as talented and eager as any competing man an opportunity, simply because she is a woman, violates our fundamental public commitment to individual equality. Denying women opportunities for work not only hurts the individual but also damages socially important enterprises by restricting the pool of talent and insight from which those enterprises can draw. Women, precisely because they are women, sometimes have different and valuable perspectives. The talented and hard-working woman who seeks access to traditionally male opportunities and prerogatives appeals to meritocratic values which, however overrated and misused, are largely shared.

Thus, in response to these equality claims, the law has changed in profound ways. Since 1971, when the Supreme Court first struck down a law discriminating on the basis of sex, the Court has decided many cases involving equal protection challenges to sex-based classifications. The constitutional standard adopted by the Court requires that

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135 Crozier, Marital Support, 15 B.U.L. Rev. 28, 33 (1935); see B.A. Babcock, supra note 6, at 619-31.
138 See, e.g., S. Gould, The Mismeasure of Man (1981) (tying various meritocratic systems to theories of biological determinism and demonstrating the scientific weakness and political contexts of such deterministic arguments).
139 Reed v. Reed, 404 U.S. 71 (1971).
"[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."\textsuperscript{141}

The Court has fleshed out this standard with two important pronouncements. First, the Court has condemned sex-based stereotypes both because they deny opportunities to individuals who do not fit them and because they constitute self-fulfilling prophecies.\textsuperscript{142} Second, the Court has held that where a sex-based classification is simply the product of accident or habit that does not reflect a recent, considered legislative judgment, it is presumptively invalid.\textsuperscript{143}

Nevertheless, despite profound changes in constitutional doctrine and general consciousness, the overall economic situation of women, relative to men, has not improved in recent years, and indeed may have worsened. The disparity in wages of men and women who work full-time has increased. In 1956, women earned 63.3 cents for every dollar earned by men; by 1975, women who worked full-time earned 58.8 cents for every dollar earned by men.\textsuperscript{144} Families headed by women, the population that AFDC policy touches most directly, have been most seriously affected by the deterioration of the wage labor status of women. Between 1969 and 1979, the median income of families in which a woman was the sole wage earner fell from fifty-one percent to forty-seven percent of the median income of all families.\textsuperscript{145}

One factor explaining the persistence of women's economic inferiority is that the emerging legal standards of equality simply have not been applied to most women, particularly to those who are poor or working class. Another factor is that the legal concept of sex-based equality is extremely limited.\textsuperscript{146} The concept allows individual women

\textsuperscript{141} Craig v. Boren, 429 U.S. 190, 197 (1976).
\textsuperscript{143} See, e.g., Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring). See also Califano v. Webster, 430 U.S. 313 (1977); Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981); Rostker v. Goldberg, 453 U.S. 57 (1981) (Court upholds sex-based classifications, relying, in part, on the fact that they were not adopted "unthinkingly" or "reflectively" but rather represented a considered legislative choice to differentiate on the basis of sex). But see Kahn v. Shevin, 416 U.S. 351 (1974) (sex-based classification was upheld even though it was not recent).
\textsuperscript{146} Critique of prevailing concepts of sex-based equality is a subject for another day. However, two problems are central. First, we lack a coherent vision of a society that takes sex-based equality seriously. The assimilationist ideal which dominates our concept of race-based equality does not provide a plausible vision of sexual equality
access to male power and prerogatives if they can perform as honorary men, but leaves untouched the wage market's assumption that every worker has the advantage of a full-time homemaker. The Court's concept of sex-based equality also permits the continued undervaluation of work traditionally done by women. Most distressingly, the prevailing concept of equality totally ignores children.

B. Federal Welfare Policy Explicitly Discriminates Against Women in the Distribution of Scarce Jobs

Federal law requires that the Employment Service give men priority over women for placement in jobs and training positions. The priority has a significant impact. In recent years, about one quarter of WIN registrants have been unemployed fathers. Male WIN registrants exceed the number of jobs available through WIN. If the aggregate

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because men and women are biologically different in significant ways, while blacks and whites are not. See Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581 (1977). The Supreme Court simply denies the reality of the central biological differences between men and women; for example, the Court has held that discrimination against pregnant people is not "based on gender as such." Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974). It is obviously difficult to reconcile ideals of equality and individual worth with a reality of biological difference, but the difficulty is not overcome through denial. The lack of a sharp and coherent vision of equality that acknowledges biological differences also makes it easier to mistake culturally imposed stereotypes for inherent biological differences. See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981).

A second core problem is that the law does not regulate many of the factors that are the most significant causes of women's second-class status. As Professor Kathryn Powers explains:

By maintaining a world split into public and private spheres, by denying women the right to participate in the public sphere and then refusing to regulate the private sphere or deferring to custom when compelled to regulate that sphere, the legal order effectively excluded women from its operations and constrained women to exist in a pre-modern world of customary law, a world where personal conduct was determined by patterns of custom and reciprocal expectations and where the distinction between habit and duty became blurred and ill-defined.

Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 Wis. L. Rev. 55, 78 (footnotes omitted). Despite the importance of the public/private split, the focus of this article is on government policy, not private behavior.


147 See supra note 66.

148 U.S. DEP'T OF LABOR, WIN: 1968-1978, A REPORT AT 10 YEARS, *THE WORK INCENTIVE PROGRAM, NINTH ANNUAL REPORT TO THE CONGRESS* (1979) [hereinafter cited as WIN REPORT]. The figures on new registrants, registrants on board, and individuals placed in unsubsidized employment can be found on the first
figures told the whole story, no woman would ever get a job through WIN. Some women do, however, obtain work through WIN. Some no doubt receive job placements because of the need to place women in "women's jobs." Others obtain WIN jobs because states that do not participate in the AFDC-U program have few unemployed fathers to be given priority. Nonetheless, in recent years a greater proportion of the unemployed fathers registered for WIN have been referred to jobs than have women. The negative impact of the priority is not limited to the denial to women of specific job opportunities. Women who cannot obtain real jobs through WIN are subject to workfare and other more stringent state work requirements. The explicit nature of the priority's sex-based discrimination and its negative impact on women obviously invite consideration of its constitutionality.

For WIN's sex-based priority to survive a constitutional challenge, it must serve "important governmental objectives" and be "substantially related to the achievement of those objectives," we first must determine what purpose the priority serves. There are a number of pos-
sibilities. For example, the priority can be justified as evincing a necessary sensitivity to the characteristics and preferences of the job market. The priority may be said to allocate wagework to those people who best meet the needs of employers rather than to those who, by reason of being encumbered by children, are less desirable as employees. Alternatively, the priority may be justified by reference to its allegedly positive effects on the family. Under this second justification, the priority may be seen as furthering the important state interest of promoting marital stability by preferring the primary wage earner in a two-parent family over single parents or secondary wage earners. Neither of these justifications provides sufficient support to allow the priority to pass constitutional muster.

At the time that Congress created the priority, proponents were quite overt in justifying it by reference to the asserted superiority of men as wageworkers and the claimed necessity for women to stay home with their children. Neither of these explanations can, as a constitutional matter, justify the priority because neither is anything more than a stereotype. The priority is both overinclusive and underinclusive. It is underinclusive because women who are more qualified and eager for wagework than any available man are denied the opportunity solely on the basis of an irrational sex-based classification. On the other hand, it is overinclusive because not all men are qualified, able, or willing to do wagework. In short, the gender-based priority is not closely related to do the purported governmental interest in preferring those people best able to wagework. Moreover, the gender line is invidiously self-fulfilling. For fourteen years, federal law has given priority to unem-

by striking out ‘mother or other female caretaker of a child, if the father or another adult male relative’ in clause (vi) and inserting in lieu thereof ‘parent or other caretaker of a child who is deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, if another adult relative . . .’

OBRA, supra note 100, § 2313(b)(2), 42 U.S.C. § 602(a)(19)(A)(iv) (Supp. V 1981) (amending Social Security Act § 402(a)(19)); see supra note 54. The mandatory job priority for fathers was left unchanged. Thus insofar as it is possible to say that the chaotic process leading to the adoption of the Omnibus Budget Reconciliation Act of 1981 reflects any Congressional intent, it seems that Congress’s retention of priority for unemployed fathers was deliberate. See Tolchin, House Gives Reagan Victory on Budget By Approving Cuts, N.Y. Times, June 27, 1981, at 1, col. 6.

Further, the priority disfavors the women who find full-time childcare an unrewarding form of work, as well as the unemployed fathers who would prefer such work. The assumption that children disable women as wageworkers arbitrarily discriminates against those women whose children are self-sufficient or who are able to make private childcare arrangements. It ignores the fact that fathers would need help with childcare if the culture and the law did not assign this responsibility to women.

ployed fathers. The government's observation that men have more experience and are better-trained becomes more true all the time, at least in part because of the government's policy expressly preferring men.

Another, more complex, justification for the priority is that it promotes the stability of two-parent families. This justification derives from the fact that the purpose of AFDC is to care for needy children and that children need the love and support of two parents. Therefore, this line of reasoning goes, children need their fathers. Fathers, however, labor under a heavy burden of social expectation that they will support their families, and the popular belief is that if they are unable to fulfill this expectation they will leave. The priority for "unemployed fathers," therefore, simply prevents the breakup of families by preferring the primary wage earner in a two-parent family. The groups disfavored are not women, but rather single parents and the secondary wage earners in two-parent families. The net effect of the priority, under this justification, is to preserve the stability of families.

190, 202 n.14 (1976), the Court commented "[t]he very social stereotypes that find reflection in age-differential laws . . . are likely substantially to distort the accuracy of these comparative statistics."

187 Administration discussion of the provision exempting wives in two-parent families from work registration suggests an emphasis on providing jobs to the "normal family in the sense that the emphasis is on the father, emphasis on upgrading and career development. . . ." House FAP Hearings, supra note 41, at 384 (testimony of Jerome M. Rosow, Asst. Sec'y of Labor for Policy, Evaluation, and Research).

188 George Gilder in WEALTH AND POVERTY, supra note 110, presents the case for family stability through male dominance. "Because of the long evolutionary experience of the race in hunting societies, the provider role accords with the deepest instincts of men. When they are providing for women and protecting them, men feel masculine and sexual; when they cannot perform these roles as in the welfare culture, they often prefer the company of the all-male groups at the bar or on the street. G. GILDER, supra note 110, at 136.

189 The practical effect of a priority for the primary wage earner in two-parent families is virtually indistinguishable from that of a priority for unemployed fathers. Over ninety percent of single-parent families are headed by women. DATABOOK, supra note 8, at 31. In 1980, 1.6 percent of all children lived in a family with a single male parent while 17 percent of all children lived in a family with a single female parent. Grossman, Working Mothers and Their Children, MONTHLY LAB. REV., May 1981, at 49, 51. In two-parent families, in which the woman worked full-time fifty or more weeks a year, the median percent of family income contributed by the woman was 37.6 percent. DATABOOK, supra note 8, at 57.

In Califano v. Westcott, 443 U.S. 76 (1979), the Court struck down the AFDC-U rule that two-parent families could qualify for aid only when the father, not the mother, had a history of work and was now unemployed. The government defended the distinction as one between two types of families rather than one based on sex. The government further argued that it was unnecessary to provide aid to families of unemployed women because women would not desert their families. The Supreme Court rejected these arguments, finding that the statute "discriminates against one particular category of family—that in which the female spouse is a wage earner." 443 U.S. at 84 (quoting Califano v. Goldfarb, 430 U.S. 199, 209 (1977)).
by giving priority to those most apt to leave when jobless. The preference considered as either a priority for unemployed fathers or as a priority for the primary wage earner does not meet constitutional standards. It fails because the classification is only tenuously related to promotion of marital stability.

The marital stability justification for giving a job priority to men is troubling for several reasons. On the one hand, states do have a strong and legitimate interest in promoting marital stability, but, in the nature of things, state action can only encourage or discourage in a rough sort of way a relationship so dependent upon individual volition and commitment. In addition, although the state's interest in promoting marriage is strong, the interest cannot be pursued at all costs. For example, the constitution has been held to bar state efforts to promote marriage by imposing burdens on the innocent children of parents who failed to legalize their relationship. Thus, although the interest is strong, it may not be strong enough to justify the job priority.

Another reason that the marital stability justification is disturbing is that it is predicated on a series of stereotypes. It posits a stereotypical nuclear family in which the father works and the mother stays home. It then posits that the father loses his job and reacts according to stereotype by abandoning his family. There is simply no denying that this man needs a job, but it is not clear why he deserves to receive one at the expense of someone else. It is also not clear why so much deference should be paid to stereotyped visions of family life and behavior. These observations lead us to perhaps the most important reason that the marital stability justification is disturbing: it simply makes no sense. Welfare programs are, theoretically, intended primarily to help children, and there appears to be no logical basis upon which to conclude that because children have been unfortunate enough to lose their father through divorce, desertion, or death, they should be further disadvantaged by the denial of employment opportunities to their remaining

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161 Since Levy v. Louisiana, 391 U.S. 68 (1967), no law disfavoring the children of unmarried parents has ever been upheld on the grounds that it promotes marriage. Where classifications based on illegitimacy have been approved, it has been because they served some other interest, such as the elimination of fraudulent claims or the interest in the reliable settlement of estates. Most recently, the Supreme Court rejected an effort to invoke the state interest in promoting marriage to justify a one-year statute of limitations on children's claims for support against their natural fathers: "Important as such a state interest might be, we have repeatedly held that 'imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing.'" Mills v. Habluetzel, 456 U.S. 91, 101 n.8 (1982).
parent.

The stereotype is, moreover, inaccurate because most men do not abandon their families if they are unable to fulfill their provider role. Because it is inaccurate, any attempt to justify the priority by reference to its ability to promote marital stability has to fail. The relationship between the priority and the state interest in promoting marital stability is simply too tenuous. Although there is a correlation between poverty and marital instability, rising levels of divorce and separation are not confined to the unemployed but rather reflect broad, cross-cultural patterns. Most men who lose their jobs do not then abandon their families. The priority is premised, then, on a stereotypical assumption about families which describes only a small portion of American families today. The priority, in addition, seriously disadvantages those women who, for a variety of reasons, have sole responsibility for children and need jobs.162 Ironically, the priority may actually undermine marital stability by promoting the idea that a man who cannot find a job has failed and is of no further use to his family.163

Equally disturbing is the fact that if the AFDC job priority for unemployed fathers is constitutional because some believe it promotes marital stability, other priorities for men, and penalties for women, would seem to be defensible on similar theories. If we take seriously the vision of family stability through male economic dominance, it is surely not sufficient to give priority to unemployed fathers at a point when the family has already qualified for AFDC. Young boys should be given priority in jobs, training, and education from their earliest years so that

162 Furthermore, the priority cannot be justified as improving the lot of children by ensuring that they will be raised in a two-parent family. Extensive investigation has produced little real evidence that children raised in a single-parent family are thereby disadvantaged. The classic study summarizing and analyzing data is H. Ross & I. SAWHILL, TIME OF TRANSITION: THE GROWTH OF FAMILIES HEADED BY WOMEN (1975). Evidence that the father's absence does not, by itself, produce an adverse effect on children's school performance, lead them to delinquency, or impair their socioeconomic status and emotional stability as adults, is particularly striking in light of the social opprobrium that attaches to the single-parent family, the significance conventional psychological theory attaches to having both parents, and the obvious economic disadvantages of growing up in a single-parent family.

Recent psychological and sociological analysis present a compelling case for greater male involvement in childcare. Promoting marital stability by enforcing the stereotypical assumption of male economic dominance is plainly antithetical to this goal. See N. CHODOROW, supra note 137; D. DINNERSTEIN, supra note 137; C. HEILBRUN, REINVENTING WOMANHOOD (1979).

163 The stereotype is also destructively self-fulfilling. No doubt there are men who leave their families because they are unable to "fulfill their provider role." Sometimes, however, the woman supports the family. When, partly as a result of cultural stereotypes, reinforced by the WIN priority, the unemployed father judges himself a failure and leaves, the whole family may suffer.
they can grow to dominate the family. Even if resources, jobs, and educational opportunities were infinite, they would have to be denied to girls so that girls could grow to become appropriately dependent women. The costs for women are obvious. The result may not be altogether cost-free for men either. What happens to the man who, having been given all these advantages so that he may dominate, ultimately finds himself unable to get a job or to earn a wage sufficient to support his family?\(^{164}\)

\(^{164}\) The cost of promoting marital stability through male economic dominance is further illuminated by evidence about the effects of AFDC on marital stability and by data generated in the four Negative Income Tax (NIT) experiments. According to economic theory and oft-heard political rhetoric, when aid is provided single parents and denied two-parent families, some couples will separate to qualify. Despite extensive study, there is no evidence that poor families separate to qualify for aid. See H. Ross & I. Sawhill, supra note 163, at 42-51. A more recent review concludes, "[w]hile it continues to seem logical (at least to economists) that a more generous AFDC program will increase the number of disrupted marriages, much more work (using new data sets) will have to be done before the proposition is proved." Bishop, Jobs, Cash Transfers and Marital Instability: A Review and Synthesis of the Evidence, J. Hum. Resources 301, 310 (1980). The ties that bind families are not simply economic. Just as most upper income dual worker couples do not divorce to reap the tax advantages of filing as single taxpayers, so poor people do not separate to qualify for aid.

The NIT experiments produced three important findings about the relationship between welfare and marital stability. First, families receiving more generous payments were less likely to break up than families receiving smaller payments. This confirms other data showing a correlation between poverty and marital instability. See H. Ross & I. Sawhill, supra note 163, at 42-51; Bishop, supra, at 301-08. Second, the NIT experiments showed that, in three of the four studies, families receiving NIT experienced higher levels of separation than low income families in the control groups. See Bishop, supra, at 313. This was true even though control group families could receive welfare only if the family separated, or the father lost his job, while the NIT families were guaranteed payments whether or not the family stayed together.

Why would families be more inclined to split up when provided a guaranteed subsistence payment than they were when aid was available only if the father was unemployed or absent? A review of the NIT data leads to the conclusion that the explanation must be either that "because of differences in information, stigma, or transaction costs, the experiments produced more powerful independence effects than an equivalent amount of AFDC, or that receiving NIT payments somehow reduced the attractiveness of the married state by calling into question the success of the husband as provider." Bishop, supra at 301 (quotation is from abstract of article).

It does not seem that these are really two alternative explanations. The availability of AFDC might also "call into question" the "success" of the husband as provider. Another way to characterize the "information, stigma, or transaction costs" of AFDC is to say that welfare is humiliating and uncertain. A deep desire to avoid the degradation of AFDC does not necessarily affirm the "attractiveness" of marriage. It may merely reflect a judgment that dependence upon an unpredictable, unfaithful, or physically abusive husband is preferable to dependence on AFDC. The NIT experiments hence suggest that to encourage marital stability, welfare policy must maximize stigma and uncertainty. Unfortunately, stigma and uncertainty have other adverse effects, particularly on children. Promoting marital stability by increasing the nonfunctional stigma associated with aid requires that we destroy the family in order to save it.

A third finding of the NIT experiments derives from the study done in Gary, Indiana, where there were no significant differences in the separation rates of families
Obviously, welfare policy should avoid encouraging couples to separate. Nevertheless, when we favor the father, or the head of the two-parent family, at the expense of the single mother and her children, we necessarily disadvantage women. We also disfavor men who would choose to play a larger role in childcare. Although we give priority to men who do not leave their families and who continue to work to support them we also prefer men who will take the job and nonetheless fail to support their children. Thus, the priority cannot be justified as a means of promoting family stability. The state interest is not strong enough to justify the disadvantage visited upon women by the priority. Even assuming arguendo, that the state interest was sufficiently strong, the priority would still fail to pass constitutional muster by virtue of the fact that it is not adequately connected to the attainment of the proffered state purpose.

That the statutory priority for unemployed fathers has gone unchallenged for over a decade is interesting. The priority is not some obscure, rarely invoked rule but rather a central organizing principle of the country’s major work program for the poor. Further, although Congress in 1981 made the other sex-based AFDC provisions sex neutral, it retained the sex-based priority for unemployed fathers. Individual poor women might not become aware of the operation of the priority in the ordinary course of their dealings with the Employment Service, but there are, after all, women’s rights and poverty lawyers concerned with these issues. Part of the reason the sex-based priority has not been challenged is that both women’s rights and poverty lawyers are in short supply relative to legal needs. Given the complexity of the laws relating the AFDC, it is understandable that women’s rights receiving NIT payments and the control group. Bishop, supra, at 320-21. In Gary, checks and information were sent only to the man, while in the other programs they were sent to both spouses. Further, in all experiments except the one conducted in Gary, participating families were explicitly told that NIT payments would continue even if they were to separate.

Thus, defending the job priority for fathers on the basis of a desire to promote marital stability by allowing men and women to fulfill their “natural” roles requires defense of more than the job priority. Because the job stabilizing effect of the man’s job is allegedly negated if the woman can survive on her own either through waged work or through welfare supplied on predictable and decent terms, the maintenance of family stability requires that we keep the woman dependent, deny her job opportunities, make sure that welfare is degrading, and keep her ignorant. Family stability, in short, requires male supremacy. The NIT experiments suggest that, unless all the above steps are taken, simply providing the man with a job is not likely to promote marital stability.

See D. CHAMBERS, supra note 136.

166 The priority was challenged in Thorn v. Richardson, 4 Fair Empl. Proc. Cas. (BNA) 299 (W.D. Wash. 1971).

167 See supra note 153.
groups would leave this area of the law to the poverty lawyers who specialize in it.\textsuperscript{168} This is especially true as poor women have not been a major constituency of the women’s rights movement. Why poverty lawyers have been so lax is less clear.

In the final analysis, eliminating the explicit sex-based priority would not assure women equal treatment in WIN, but eliminating explicit bias is an essential prerequisite to addressing other less overt forms of sex-based discrimination.\textsuperscript{169} It must be admitted that eliminating sex discrimination does not create new jobs, nor does it necessarily improve working conditions. It is, however, an important step. Under present circumstances, policymakers undoubtedly find it easier to ignore unemployment when a large percentage of those who cannot find jobs are women. Women, presumably, will move from the ranks of the “unemployed” to the ranks of the “not in the labor force” because of responsibilities at home. Thus, bad-looking statistics may be avoided. Unfortunately, good-looking statistics cannot console women who, because of sex discrimination, are unemployed. Nor can such statistics console these women’s needy families.

C. Federal Policy Perpetuates the Status Quo in Which Work is Segregated by Sex and Women’s Work is Systematically Devalued

Two main factors explain the second-class wage labor status of women: the sex segregation of the wage market and the systematic devaluation of women’s work within the sex-segregated market. During

\textsuperscript{168} Legal Services’ leadership regards the sex-based priority as harmless, or even beneficial in that it allows some mothers to avoid wagework. Conversations with Henry Friedman and Adele Blong, Director and Senior Attorney of the Center on Social Welfare Policy and Law (the Legal Services backup center in the welfare area); see also Wexler, \textit{Practicing Law for Poor People}, 79 \textit{Yale L.J.} 1049 (1970) (early comment criticizing legal services for failing to help poor women seeking wagework). More recently the \textit{Clearinghouse Review} put out special issues on “Women and Poverty,” 14 \textit{Clearinghouse Rev.} 1035 (1981); 15 \textit{Clearinghouse Rev.} 925 (1982) (issues include articles on both welfare and employment but nowhere discuss WIN’s sex-based priority).

Women’s issues, in general, have not been given a high priority by Legal Services. Many women’s issues primarily concern middle-class women not eligible for Legal Services representation. Although it is certainly true that the limited legal resources available to the poor should not be used in a way that divides poor people from one another, the low priority given women’s issues may also reflect some sexism on the part of the male professionals who dominate Legal Services.

\textsuperscript{169} In practice, the priority encourages discrimination in assigning people to particular jobs. The \textit{WIN Report}, supra note 148, at 19, after noting that unemployed fathers are given priority by statute, says, “[o]ver a third of the unemployed fathers were employed in the generally higher-paid structural work and machine trades.” Although, theoretically, the priority for unemployed fathers does not demand that they be given better jobs, it is likely that the priority has this effect in practice.
the last twenty years, the workforce has become more markedly segregated and today most women work in traditionally female jobs.\textsuperscript{170}

The United States Employment Service, a federally funded system of State Employment Security Agencies, is in the perfect position to address this problem of sex segregation.\textsuperscript{171} The Employment Service places more workers than all other employment agencies, public and private combined, in the United States. In fiscal year 1978, the Service listed more than eight million nonagricultural jobs, and more than fifteen million people sought its assistance in finding work.\textsuperscript{172} A large proportion of the jobs listed by the Service are entry-level, low-wage, and unskilled.\textsuperscript{173} The Service does not release lists of jobs available, rather, it interviews and tests people and then refers them for particular jobs.\textsuperscript{174} The Service is required to make “[e]very attempt . . . to refer applicants to jobs which utilize the applicant’s highest skills, knowledge, and abilities,”\textsuperscript{175} and “to promote the equal employment opportunity of all applicants on the basis of their skills, knowledge, and
ment than to formulate a new definition.\textsuperscript{334} Most of the social expectations embodied in the work ethic can be met by a two-part definition of work as disciplined activity that contributes to a general social good. The social good criterion is easy enough to understand, though if it is to encompass all that is now included in paid employment, it must take a broad view of social good. The second criterion, disciplined activity, reflects the notion that work is something one must do whether or not it seems pleasurable or individually desirable on any particular occasion. People with primary responsibility for the care of children plainly perform beneficial social activities, and, because most children make very regular demands on their parents' attention and energy, the task of childrearing is one requiring a high level of disciplined activity.\textsuperscript{335}

This concept of work, while capturing the substance of the expectations embodied in the work ethic, differs from the traditional concept in two critical respects. First, in the traditional concept, work is an exchange relationship in which the employer defines the job and the worker provides effort in exchange for money. Second, the traditional concept often regards the worker's effort as a means to a personal end quite separate from the work process; that is, as a means for earning enough money to enable the worker to subsist and find satisfaction in something other than work. In homemaking and childcare, there is no employer to define the job that the parents must perform. Although much of the work of a child serves the goal of producing a strong adult, much of nurturing, caring for, and loving a child is an end in itself.

Work serves essential functions in human life beyond meeting the social expectation of the work ethic. Freud observed, "[n]o other technique for the conduct of life attaches the individual so firmly to reality as laying emphasis on work; for his work at least gives him a secure

\textsuperscript{334} Work in America, supra note 333, at 3, defines work as "an activity that produces something of value for other people." The definition is useful in rejecting the equation between work and compensation, though problematic in other respects. For example, is disciplined physical or intellectual activity not work when it is done for oneself? Must activities produce things in order to constitute work?

\textsuperscript{335} Much has been written in the Marxist tradition on the question whether household work, or the "maintenance and reproduction of the working class," is productive labor in the Marxist sense. See, e.g., Malos, Introduction in The Politics of House-work 15-16 (E. Malos ed. 1980). I would suggest that it is not. The concept of "productive labor," however, is a technical one, and much socially useful and valued work, such as the work of lawyers, doctors, and teachers, is not productive. Id. at 25. The more interesting questions may be first, what are the limits on the proportion of a society's capital and human resources that can be devoted to the providing of services to one another, and, second, what are the effects of transferring the provision of human services from the non-money to the money economy?

\textsuperscript{335} The evidence is that homemakers by necessity hold themselves to a disciplined schedule. A. Oakley, supra note 328, at 100-12.
place in a portion of reality, in the human community. Work contributes to an individual’s self-esteem by providing a sense of efficacy and competence in dealing with the tasks that comprise the work, a sense which in turn provides a feeling of being in control of environment and self. Work gives an individual “a continuous account of his correspondence between outside reality and the inner perception of that reality, as well as an account of the accuracy of his appraisal of himself. . . . In a very deep sense, it gives him a measure of his sanity. . . .” Do homemaking and childcare provide opportunities for proving one’s efficacy and competence? Do these activities provide the sort of connection with reality that forms the basis of individual self-esteem and sanity? Surely they may. Children’s needs and demands are very concrete manifestations of reality that require response. In the normal course of things, caring for children provides opportunities for testing reality, setting tasks and objectives, and gaining feedback on the degree of one’s success in accomplishing those tasks.

A second way in which work may contribute to an individual’s sense of self-esteem is through external social valuation. The HEW Task Force found that “most, if not all, working people tend to describe themselves in terms of the work groups or organizations to which they belong.” Apart from the social status attached to work identification, the day-to-day reality of the job provides external confirmation of individual worth and competence. Because homemaking and childcare provide little external confirmation of individual value, the person who does unpaid work in the home must have a very well-developed ability to create and draw strength from internal evaluations of worth and mastery. This is difficult for many people.

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339 Whether the homemaker whose children have grown has day-to-day opportunities for reality testing is less clear. Where there are children in the home their needs demand response. When the children are able to take of themselves, the homemaker may impose routinized demands on herself, the husband may impose regular demands, or the homemaker may be involved in voluntary community and civic activities, but routine demands are not necessarily present to the same degree as when the homemaker has primary responsibility for the care of young children.
340 Work in America, supra note 333, at 6.
342 The data on how homemakers feel about their own lives is mixed. On the one hand, A. Oakley, supra note 328, at 87-88, reports that homemakers experience their
A third significant function of work in human life is to provide opportunities for people to meet, converse, form friendships, and establish community. Given the primacy of work in the formulation of identity, the personal relationships built up through work can be very important.\textsuperscript{348} By contrast, the homemaker generally works apart from other adults, without the opportunity to form a community in the workplace. Homemakers can, however, find community, through churches and parent-teacher associations, through neighborhood, ethnic, and political organizations, and through issue organizations, such as tenants', women's, and welfare rights groups.

To summarize, the activities of women who devote themselves to the care of young children meet the social expectations embodied in the work ethic and provide concrete, day-to-day opportunities to promote the internal sense of mastery, of self-esteem, and of being in touch with reality that are traditionally associated with wagework. Childcare does seem to provide fewer opportunities for social interaction or external confirmation of self worth than does wagework. The worst aspect of childrearing as a job may be that it ends many years before most women are ready for retirement, thus leaving women to the wage market where their experience is not valued. Homemaking is not accorded respect commensurate either with its social utility or with the actual skills required.

\textsuperscript{348} See generally WORK IN AMERICA, supra note 333. In Marxist terms, the importance of the workplace community rests not simply on the psychological function that work plays in human life, but also on the central importance of the individual's relationship to the means of production. See, e.g., Benston, The Political Economy of Women's Liberation in THE POLITICS OF HOUSEWORK 119-20 (E. Malos ed. 1980). People's responsibilities in the home have a pervasive effect on work outside the home and their relationship to the means of production. Sex-based disparity in home responsibilities necessarily implies sex-based differences in people's relationship to the means of production. See id.; Hartman, supra note 331.
D. The Primary Function of the Wage Labor Requirements for Caretakers of Young Children is the Preservation of Patriarchy

In 1978, 268,670 people exempt from mandatory registration volunteered for participation in WIN. The volunteers were people with children under age six or with physical or mental disabilities so severe that they were not required to work. Even though they were not required to register for wagework, these people, influenced by economic need or the desire to improve their situation, voluntarily sought jobs. In 1979, however, WIN placed only 286,404 people in full- or part-time jobs expected to last at least thirty days. The number of volunteers was therefore about equal to the total number of people actually placed in jobs. If the number of people subject to the mandate were decreased, the number of volunteers would probably soon exceed the number of jobs available.

Given these figures, what is the purpose of imposing a mandatory work requirement on mothers of young children? It is not simply our general commitment to the work ethic because, as we have seen, there are ample economic incentives to encourage women to work; even women exempt from the work requirement volunteer for work; and the economy simply cannot supply jobs for all those who are seeking work. Enforcing the work requirement on people with responsibility for young children is costly. The GAO estimates that the direct federal costs of operating WIN exceeded the savings effected through the reduction of AFDC grants to WIN participants who find wagework, and

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344 In fiscal 1978, there were 1,553,010 WIN registrants. WIN REPORT, supra note 127, at 69. Over seventeen percent of the WIN registrants in that year were volunteers. Id. at 20.

345 This assumes that the people newly exempt would behave in ways similar to those who are now exempt. This seems a credible assumption, and indeed we might expect to see a higher proportion of volunteers from among the mothers of grade-school aged children than we now observe among the mothers of children under age six.

Robert Anderson, Administrator, of the Office of Comprehensive Employment Development of the DOL and author of the Ninth Annual WIN Report, describes the following relation between mandatory registration and volunteer rates:

The scope of mandatory registration requirements—or better, of the exemption criteria—has no discernible impact on volunteer rates. The critical factors for volunteers are two-fold. The first is the availability of funds and staff for services and training. The second, generally applicable only in States with relatively low AFDC payment standards, is the size of the grant. Thus in high grant States, increased services and training would sharply increase volunteer rates. In low grant States, such an increase would lead to initial “soaking up” of existing AFDC recipients as volunteers, plus an influx of technically eligible persons onto AFDC, so they could become eligible for the services and training.

Letter from Robert Anderson to author (Jan. 23, 1981) (discussing the role of volunteers in the WIN program) [hereinafter cited as Anderson letter].
most WIN registrants who found work did so without any help from WIN. The greatest cost of enforcing the WIN requirements are not those reflected in federal balance sheets. The greatest cost is the cost to the nation's low-income children. The wage labor requirement necessarily denigrates childcare. That requirement combined with the lack of adequate day care imposes high costs on children left to fend for themselves. Moreover, Employment Service workers forced to police the work requirement have fewer resources to devote to job development, to making the most appropriate match between worker and job, or to overcoming the institutional sexism that now operates within the Employment Service.

The purpose of the mandatory work requirement is not, in truth, to move people from AFDC to wage labor. According to a DOL official questioned about the ratio of volunteers to jobs, "[t]he principal effect of the mandatory work registration requirement is to suggest to employable persons that they not apply for AFDC to begin with, unless the need is truly urgent." The question is then, precisely what alternatives are available to poor women? Given the reality of unemployment, it is unlikely that many AFDC recipients, or potential recipients, know of wage jobs that are not listed with the Employment Service. The work requirement may be intended to suggest that the potential recipient take up some form of entrepreneurial activity outside the formal job market in which the Employment Service operates. Unfortunately, few entrepreneurial activities are accessible to individual poor women. The many forms of entrepreneurial activities that could usefully be expanded in poor communities—day care, home health services, housing rehabilitation, food and housekeeping services for elderly people—require substantial amounts of organizational skill and capital. An individual poor person is simply not in a position to create

346 1982 GAO WIN RPT., supra note 92. In fiscal 1978-81, yearly federal appropriations for WIN were $365 million. Id. at 2. In fiscal 1980, AFDC grant reductions for WIN registrants who found jobs equaled $313 million, $222 million of which were grant reductions for WIN participants who found jobs on their own. Id. at 39.

347 Anderson letter, supra note 345.

348 Most unemployed people use a variety of methods of searching for jobs, including the public employment service, private employment services, direct application to employers, friends, or relatives, and placing and answering newspaper ads. Among all classes of workers, direct application to an employer is the most common form of job search, with the public employment service or newspaper ads the second most common method. Blacks are more likely to use the public employment service than are whites. Men are more likely to use references from friends and relatives than are women. Whites are more likely than blacks to be employed directly by the employer. Women are more likely to use newspaper ads than are men. 1980 EMPLOYMENT REPORT, supra note 9, at 262.

349 See Duke, Pomeranz, & Rosenberg, Practical Issues for CBOs as Long-Term
this sort of an enterprise by herself. The areas of private enterprise most available to the poor are marginal or illegal activities: private domestic service or sweat-shop garment work at wages below the mandatory federal minimum, prostitution, drug dealing, and theft.\footnote{At least in the case of drug dealing, this enterprise is accessible to the poor precisely because it is illegal and hence less attractive to people who have other options. If drugs that are now illegal were to be legalized, dealing in them would no longer be a private entrepreneurial activity open to the poor; distribution and sales would be institutionalized as the sale of alcohol and tobacco are today.}

The function of the work requirement for the mothers of young children is, then, largely symbolic. Its effect is to say, "if you really tried, you would not need aid: there is something wrong with you." What have these women done to incur our wrath? The answer I believe lies in reasons that have little to do with willingness to work or the ability to find jobs.

The primary function of the wage labor requirement for single mothers of young children is to enforce the patriarchal requirement of female dependence upon men. Thus, for example, we do not require wagework of women in the two-parent AFDC family because they conform to the norm of dependency.\footnote{Supra notes 57-59 and accompanying text.} We do not allow poor women access to wagework on equal terms with men, we promote the sex segregation of wagework, we devalue women's work in the sex-segregated wage market, and we do not make the accommodations necessary to enable women with primary responsibility for the care of children to succeed at wagework. At the same time, we deny the value of the work that women have traditionally done in the home, even though allowing exemptions from wagework requirements would cost little and would produce important social benefits for both children and the women who care for them.

The need to preserve the power of patriarchy prevents us from recognizing either the legitimacy of women's work in the wage market or of women's work in the home. Our welfare policy neither provides jobs for those who seek them, nor affords women from performing the socially beneficial tasks of childrearing with the dignity and respect such work deserves. Instead our welfare laws place women in an impossible position. Women are denied adequate subsistence to raise their children. At the same time, they are required to seek wagework without the benefit of reasonably accessible childcare and under conditions of discrimination in a marketplace already glutted with the unemployed. The situation can only be alleviated by a radical change in our perception of the value of homemaking and childrearing and by a reassess-
ment of the goals of our welfare policy and the means used to achieve those goals. We must recognize that welfare neither destroys families nor dulls the incentive for meaningful work. Men and women will work because we seek to be of use, to be connected to a world beyond ourselves and our immediate families. Men and women will form and struggle to maintain families because we all need and seek love, companionship, commitment, and connectedness.