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Journal

UCLA Women's Law Journal, 19(1)

Author

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Publication Date

2012

DOI

10.5070/L3191017826

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MARRYING POOR: WOMEN’S CITIZENSHIP, RACE, AND TANF POLICIES

Cristina Gallo*

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I. INTRODUCTION

In 1996, President Clinton, with the support of a Republican-controlled Congress, honored a longstanding campaign promise to end "welfare as we know it."¹ The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) terminated the entitlement welfare regime, replacing it with Temporary Aid to Needy Families (TANF).² TANF's revised agenda tackled the volatile issues of the political moment including curbing "welfare dependency" and receipt by non-U.S. citizens. These goals were reflected in the institution of a five-year lifetime ban on welfare benefits,³ stringent "welfare-to-work" mandates,⁴ and a restriction on welfare to aliens.⁵ Predictably, these reforms have reduced the welfare rolls but have arguably left many former recipients and their children in worse economic circumstances, as recipients have turned to low-wage jobs and private charity.⁶

However, PRWORA's Congressional findings indicated other motivations were at play in the legislation: Congress was

1. Bill Clinton, In Their Own Words: Transcript of Speech by Clinton Accepting Democratic Nomination, N.Y. Times, Jul. 17, 1992, at A14.

2. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 100 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. and 8 U.S.C.). PRWORA terminated Aid to Families with Dependent Children. I use "ADC" as shorthand for both AFDC and Aid to Dependent Children (ADC), AFDC's predecessor; although the name was changed in 1962, the program itself remained fundamentally unchanged. See Eileen Boris, *When Work is Slavery, in WHOSE WELFARE?* 38 (Gwendolyn Mink ed., 1999). Secondly, I use the term "welfare" to refer to either program. The conflation of ADC with the term welfare speaks to both its racialization and the denigrated status of recipients as "reliefers" or "paupers." As the term has become imbued with pejorative meaning, it is useful for the present purpose of interrogating the racial dimensions of social welfare to mothers with children. See DEBORAH E. WARD, *THE WHITE WELFARE STATE: THE RACIALIZATION OF U.S. WELFARE POLICY* 135-37 (2005).

3. 42 U.S.C. § 608(a)(1)(B).

4. 42 U.S.C. § 607.

5. 8 U.S.C. § 1601(1)-(2). PRWORA cut benefits to permanent resident aliens and other legal immigrants, though some benefits were later partially restored. See CHAD ALAN GOLDBERG, *CITIZENS AND PAUPERS: RELIEF, RIGHTS, AND RACE, FROM THE FREEDMEN'S BUREAU TO WORKFARE* 194 (2007).

6. By 2000, the number of welfare parents (not children) had been halved from four million to two million. OLIVIA A. GOLDEN, URBAN INSTITUTE, *ASSESSING THE NEW FEDERALISM: EIGHT YEARS LATER* 7 (2005), available at http://www.urban.org/UploadedPDF/311198_ANF_EightYearsLater.pdf. Including children, total recipients dropped to 5.2 million in 2002, from 12.6 million in 1996. CAMPBELL R. MCCONNELL & STANLEY L. BRUE, *ECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES* 645 (16th ed. 2005). While the number of former recipients working has increased, median wages for former recipients hovered in the twentieth percentile in 2002. GOLDEN. at 8-9.

concerned with marriage, babies, specifically, babies born to unmarried women, and the whereabouts of the fathers of those babies. The legislative findings, on the whole, are focused on marriage, its importance to a “successful society,” and the negative consequences associated with extramarital childrearing.⁷ On the basis of nothing more than an inconclusive and unsubstantiated link between a similar rate of increase between child welfare recipients and an equivalent rise in the overall number of extramarital births in roughly the same time period, Congress asserted that women’s failure to marry the fathers of their children was *the* cause of an increase in welfare receipt over the prior three decades.⁸ There is an unstated but unmistakable implication advanced by this assertion, one borne of heteronormative gender and racial politics: welfare mothers who bear children outside of marriage consign their children to not only a childhood but a lifetime of poverty as a result of their irresponsible choices.

This contention was not invented by Congress. Nor was it solely a product of the academic arena, whose conservative theorists did much to hasten the drastic reform embodied in PRWORA.⁹ Rather, the master narrative embodied in PRWORA’s findings not only neglects salient institutional, social, and historical trends accounting for the rise in the number of

7. PRWORA findings include the following:

(1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children. (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children. . . (5) The number of individuals receiving aid to families with dependent children (in this section referred to as “AFDC”) has more than tripled since 1965. More than two-thirds of these recipients are children. Eighty-nine percent of children receiving AFDC benefits now live in homes in which no father is present. . . (6) The increase of out-of-wedlock pregnancies and births is well documented”

42 U.S.C. § 601.

8. In PRWORA, Congress notes in § 601(5) that the number of child welfare recipients has tripled since 1965, § 601(5)(C) then draws a link between that figure and an equivalent rise in extramarital births. Sect. 601(5)(C) states, “The increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women. Between 1970 and 1991, the percentage of live births to unmarried women increased nearly threefold, from 10.7 percent to 29.5 percent.” There is no explicit causal link asserted in the findings.

9. See generally LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986). In the mid-eighties, Mead argued that welfare and other programs for the “needy and disadvantaged” have “shielded dependent groups from the pressures to function well” in American society and need to be reformed to “encourage functioning” and impose “obligations” on the poor. *Id.* at 2-3.

means-tested welfare recipients,¹⁰ but also fails to capture the socio-political context of TANF's marriage promotion and child support policies: the persistent legacy of the family wage ideology in the U.S. welfare state. The family wage is the heteronormative ideological nexus where the "fit parent" and the "fit citizen" of the social welfare state inexorably meet. A family wage is one that pays a married male breadwinner a sufficient income to provide for himself and his dependents—his homemaker wife and their children. Emerging in the Civil War era and intertwined with the legacy of racialized chattel slavery, the family wage was predicated on husbands' exclusive participation in the free (as opposed to slave) wage labor market and wives' fulfillment of concomitant domestic responsibilities, including childbearing and rearing.¹¹ While the halcyon days of the homemaker wife may seem hopelessly antiquated, I show that the family wage ideology remains embedded in contemporary social welfare, family, and labor policy, all three of which shape one another.

With TANF, Congress positioned the promotion of heterosexual marriage as a building block of antipoverty policy. The solution to female-headed household poverty embodied in PRWORA is for women recipients to embrace the family wage by finding bread-winner husbands, or in lieu thereof, ensure their children's fathers provide child support. Marriage and child support are privatized responses to the legitimate need for public assistance which rely on assumptions about conventional family formation and work in and outside of the home. In this article, I argue that the family wage ideology and its gendered and racialized assumptions, plainly reflected in TANF's marriage promotion provisions, improperly permeate America's welfare policy. In order to envision a more just welfare system, we must first understand how these assumptions operate to create the inequitable one currently in effect.

The money Congress allocated to marriage promotion was, and continues to be, rather insubstantial compared to the costs of means-tested welfare¹² or even the sums expended under

10. Demographic, political, and legal explanations for the rise in the numbers of recipients between the 1960s and the 1990s are discussed in Part IV, "The ADC Era: Dignifying Welfare."

11. See generally Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Emancipation* (1998).

12. In 1993, Aid to Dependent Families with Children cost \$22 billion annually, which was one percent of the federal budget and only one tenth the cost of Social

PRWORA for child support enforcement.¹³ From the outset, PRWORA incentivized states and certain non-governmental and faith-based actors to compete for a minimum \$150 million and up to \$300 million per year for programmatic efforts.¹⁴ Nonetheless, what once was a series of Congressional findings is now a program, the Healthy Marriage Initiative, of the federal government's Administration for Children and Families, which funds a network of organizations doing marriage promotion work.¹⁵

Here, I examine the development and perpetuation of the family wage ideology in welfare policy from the Freedmen's Bureau in the Civil War to today's TANF. I consider how the family wage has mediated the citizenship status, or standing, of men and women, white and black, in U.S. society and how the ideology continues to shape commonsense notions of what it means to be "on welfare." In light of the wholesale racialization of the "welfare mother" as black in political discourse, I pay close attention to the critical role of racial politics, in both the development of the modern U.S. social welfare state and in the specific family formation, marriage, and childbearing policies of various iterations of means-tested welfare.

In Part II, I cover the historical emergence of the family wage ideology, including how it structures access to a gendered conception of citizenship through work, with a focus on the leg-

Security. Michael B. Katz, *The Price of Citizenship: Redefining the American Welfare State* 318 (2002). When Congress reauthorized TANF in 2006, it capped total funding at \$16.5 billion annually. Janet M. Ruane & Karen A. Cerulo, *Second Thoughts: Seeing Conventional Wisdom Through the Sociological Eye* 238 (2008).

13. Anna Marie Smith estimates that the net public costs—the difference between total federal and state government spending and the funds retained from collection—of child support enforcement have increased 119%, when adjusted for inflation, from 1994, prior to PRWORA, to 2001. Anna Marie Smith, *Welfare Reform and Sexual Regulation* 272 (2007).

14. Since the Deficit Reduction Act of 2005, the funds are disbursed through the Administration for Children and Families, under the auspices of the Healthy Marriage Initiative. See Administration for Children and Families, "The Healthy Marriage Initiative: Background," <http://www.acf.hhs.gov/healthymarriage/about/mission.html#background> (last visited Aug. 5, 2010). Approximately one third of the money is used to promote "responsible fatherhood" as well. Administration for Children and Families, "The Healthy Marriage Initiative: General Information," <http://www.acf.hhs.gov/healthymarriage/about/mission.html#ms> (last visited Aug. 5, 2010); Jean Hardisty, "Marriage as a Bogus Cure for Poverty: Keeping Low-Income Women Safe is in Our Hands," Wellesley Centers for Women, <http://www.wcwonline.org/content/view/608/208/> (last visited Mar. 10, 2009).

15. Administration for Children and Families, *Healthy Marriage Initiative 2002-2009 2-6* (2010), available at <http://www.healthymarriageinfo.org/docs/ACFGuideto09.pdf> (last visited Apr. 3, 2011).

acy of chattel slavery. An understanding of this emergence is necessary to appreciate the degree to which U.S. social welfare policies incorporate and reify gendered and racialized paradigms of work and citizenship. In Part III, through the lens of these paradigms, I discuss the advent of "women's welfare" with "mother's pensions," the progenitor of modern means-tested welfare, and Aid to Dependent Children ("ADC"). In contrast to Social Security, the mainstay of the New Deal social welfare state, I argue that the creation of a racially exclusionary, feminized tier of the welfare state, one based on marital status and motherhood as opposed to work, has had longstanding implications for the citizenship status of recipients of means-tested welfare. In Part IV, I provide a historical synopsis of ADC, colloquially known as welfare, from 1935 until 1996, in order to underscore the ubiquity of the family wage ideology in ADC's discriminatory practices. I subsequently review factors, including the welfare rights movement, which broadened access to welfare and increased the number of recipients generally and recipients of color specifically, which I argue precipitated reformers' cries of a "welfare crisis," thereby leading to welfare reform.

In Part V, I provide an overview of TANF's marriage promotion and child support provisions. I examine how the family wage ideology has been successfully employed in service of passing both provisions and how they complement one another. I also take up the contemporary debate among feminists and other reform commentators about the significance of TANF's work promotion policies and situate PRWORA's agenda in the context of social welfare reforms in the nineties that promised to "make work pay." TANF's workfare provisions further buttress my argument that PRWORA champions normative assumptions about gender, race, work, and family consistent with the family wage, in an era in which those assumptions are increasingly questioned, especially as they apply to poor women and poor women of color. I contend that PRWORA's prioritization of marriage, child support, and workfare reflects the social control or disciplinary function of welfare policy which trades on tropes of racial inferiority and is enabled by recipients' degraded citizenship status. This, in turn, has worrisome consequences for women's autonomy, as well as reproductive freedom, and suggests that there are formidable obstacles to achieving greater gender and racial equity through further policy interventions in what may be an inherently corrupt system.

II. THE LEGACY OF THE FAMILY WAGE

A. *Work and Citizenship in the Civil War Era*

In order to situate the emergence of the family wage ideology in the postbellum era, one must first recognize the critical importance of work to full citizenship in the U.S. and its roots in the free labor movement of the Civil War era.

In the contemporary U.S. welfare state, citizenship, in the sense of “full membership of a community,”¹⁶ is earned through remunerated work. “[I]t is in the . . . world of work and all its forms, that the American citizen finds his social place, his standing.”¹⁷ “To be a recognized and active citizen at all,” one “must be independent, which has all along meant that he must be an ‘earner.’”¹⁸ Historically, those not working for wages were relegated to the status of paupers who “forfeited their civil and political rights in exchange for [poor] relief”¹⁹ from the state, “ceas[ing] to be citizens in any true sense of the word.”²⁰ If a pauper was a ward of the state, then a citizen was one who, in the true mode of *Lochner*,²¹ guaranteed his rights through “voluntary”²² marketplace exchange and free negotiation of contract, independent of state interference, including protective labor laws.²³

Moreover, the citizen-worker was not a slave. The slave, who did not own his labor, was both the quintessential non-citi-

16. T.H. Marshall, *Citizenship and Social Class and Other Essays* 8 (1950).

17. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 2, 63 (1991) (referring to “standing” as an incarnation of citizenship based on one’s “sense of one’s place in a hierarchical society.”).

18. *Id.* at 64.

19. GOLDBERG, *supra* note 5, at 2.

20. *Id.* (citing T.H. Marshall, *Class, Citizenship, and Social Development* 80 (Doubleday ed., 1964)).

21. Holding a law limiting bakers’ hours to sixty per week to interfere with the right to contract, the *Lochner* court wrote, “There is no contention that bakers as a class . . . are not able to assert their rights and care for themselves without the protecting arm of the state They are in no sense wards of the state.” *Lochner v. New York*, 198 U.S. 45, 57 (1905).

22. DRU STANLEY, *supra* note 11, at x. Voluntarism was the labor movement’s rallying cry in the late 1800s. Some argue the genesis of the movement’s commitment to voluntarism was a pragmatic response to a judiciary hostile to protective legislation whereby contract was the only mechanism through which to achieve better working conditions and wages. See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991) and William E. Forbath, *The New Deal Constitution in Exile* 51 *DUKE LAW JOURNAL* 165, 183-201 (2001).

23. GOLDBERG, *supra* note 5, at 2.

zen and the archetypal non-worker, despite the hyper-exploitation of his labor. Free citizens could distance themselves from the abnegation of bondage—the “buying, selling, and owning” of human beings—by selling their labor through contract.²⁴ In this vein, the Civil War-era “free labor” platform of the Republican Party sought the redemption of free white male labor in a quest “to make labor honorable”²⁵ by denouncing slavery.²⁶

However, Amy Dru Stanley argues that the leap from slavery to the free labor contract, characterized by consent between individuals of equal bargaining power, was partial. In the postbellum decades, uncertainty over the contractual “sale of the self” on the market grew due to competition and the reality that workers’ bargaining power vis à vis employers proved feeble.²⁷ Amidst class and labor strife, workers and their advocates argued “contract” itself was slavery—wage slavery—that rendered labor a mere market commodity.²⁸

B. *The Emergence of the Family Wage*

Though the boundary between slavery and free labor was a contested one, the home was viewed as an ideological space where a free white man could definitively reign as “master of a

24. See DRU STANLEY, *supra* note 11, at xi. Eric Foner notes the anti-slavery position was not only “an attack on southern slavery and the society built upon it” but also “an affirmation of the superiority . . . of the North—a dynamic, expanding capitalist society” ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 11 (1970). Restructuring the labor market to one of contract was also a means of “disclaiming blackness.” With formal equality between the races after the war, there was a push to reinscribe racial subordination, socially and legally. In backing the centrality of contract, free whites placed a “bright line” between themselves and blacks who, for all intents in purposes, were ensnared in the vestiges of the plantation economy where official state action (Black Codes) and economic coercion kept former slaves, both men and women, tied to the land. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993). Contract freedom for blacks, as well as whites, was officially codified in the Civil Rights Act of 1866, 14 Stat. 27-30.

25. FONER (1970), *supra* note 24, at 11 (quoting Richard Yates, an 1860 Illinois gubernatorial candidate on the Republican ticket).

26. To present the Republican position as uniform understates the ideological divisions within the party. Radicals like Thaddeus Stevens recognized the shortcomings of agitating for “free labor” when all laborers, black and white, would become “wage slaves” in the absence of ownership of the means of production—land. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* 236 (2002).

27. See DRU STANLEY, *supra* note 11, Chapter 2, “The Labor Question and the Sale of Self,” 60-97.

28. See *id.* at 84-97.

family.”²⁹ Therefore, the husband’s consolation prize for his precarious market circumstances was property in a wife and her labor. In contrast to a labor contract, ostensibly “bargained” by equals, the marriage contract was a “relation of authority and subordination” whereby the wife consented to “serve and obey her husband [and their children] in return for his protection.”³⁰ The marriage contract required women to sacrifice legal personhood in exchange for wifely dependency.³¹ Without a property interest in herself, a married white woman was barred from selling her labor, just as servitude had proscribed the rights of black people to sell theirs, rousing feminists to declare marriage slavery.³² The “marital rule of coverture” and the “legal disabilities” it imposed on married women³³ necessitated that husbands’ income suffice to meet household expenses—workingmen were obligated to earn a “family wage.” The family wage became the refrain of labor reformers and others who advocated pay raises so men could feed, clothe, and care for their wives and children on one salary alone.³⁴

The family wage “ideal” became the “benchmark of freedom, independence, and citizenship.”³⁵ A husband’s ability to provide was evidence not that he was a loving partner or parent but a “good citizen” who, through his work, kept his family off the dole, off the streets, and his wife—the “good parent”—off the labor market. Ultimately, the “fundamental difference” between “freedom and slavery,” between men black and white, lay

29. *Id.* at 8.

30. *Id.* at 10.

31. *See id.* at 175.

32. *See id.* at 175-76; *see also* FONER (2002), *supra* note 26, at 255-56 (arguing the Republicans’ failure to guarantee women’s rights ruptured the ideological and political alliance between the antislavery and feminist movements).

33. DRU STANLEY, *supra* note 11, at 11 (Under coverture, “the marriage contract incorporated the wife’s person into that of her husband, making them one at law, suspending her legal existence . . . [T]he wife was not only bound to serve and obey the master of the household, she was also obliged to yield all she owned—her person, her body, her ‘being.’ . . . [T]he marriage contract ordained male proprietorship and absolute female dispossession, establishing self-ownership as the fundamental right of men alone.”).

34. *See* Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* 7 (2001) (“Unattached men felt entitled to [a family wage] even when they were not supporting anyone else.”); *see also* Linda K. Kerber, *No Constitutional Right to be Ladies: Women and Obligations of Citizenship* 71 (1998) (“In the hands of organized labor, the concept of a family wage offered a language of unselfishness that could be useful in gathering popular support for union mobilization.”).

35. GOLDBERG, *supra* note 5, at 43.

in “women’s place at home” as a subordinate to her husband’s “domestic rule.”³⁶ Family wage proponents had the “explicit goal” that “white men earn enough to keep their wives and daughters out of the waged workforce.”³⁷ With abolition, the family wage maintained white male patriarchal hegemony in a moment when all men had become equal “wage slaves,” at least in theory. Though a white man could, at the very least, “provide,” a slave could provide to his family “no security, no status, no name, no identity.”³⁸ A white man’s ability to provide augmented his citizenship status and white racial identity; a black man’s intrinsic inability to shield his partner and children from the “workplace,” or from the violence of slavery, solidified his inferior status.³⁹

The married white woman’s exclusion from the world of work meant that she earned citizenship, or standing, derivatively. Rather than through her (domestic) labor, which was not “work,”⁴⁰ her citizenship derived from her contractual relationship with her husband. Under the law of “coverture,” his status as a wage worker and citizen who enjoyed civil, political, and social citizenship⁴¹ was assumed to “cover” her.⁴² Her husband’s economic citizenship originated in both civil and social spheres: “the civil protected the opportunity to work; the social protected the right to economic security (not to starve).”⁴³ However, a white wife’s access to citizenship was sharply curtailed. Her citizenship was not economic because she did not work; it was not

36. DRU STANLEY, *supra* note 11, at 148, 8 (citations and internal quotation marks omitted).

37. KERBER, *supra* note 34, at 71.

38. JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 116 (2002) (citing ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES* 32-35 (1998)).

39. *See* WILSON, *supra* note 38, at 127; *see also* KERBER, *supra* note 34, at 71 (“[S]ociologists find that when white men call themselves ‘workingmen,’ they mean to convey not only a gendered identity . . . but also a racial identity, ‘an identification of whiteness and work so strong that it need not even be spoken.’”).

40. *See* Part V(C), “Finding the Family Wage in Workfare,” for a discussion of the contested terrain of work.

41. *See* ALICE KESSLER-HARRIS, *GENDERING LABOR HISTORY* 257 (2006); *see generally* DRU STANLEY, *supra* note 11, Chapter 5, “Wage Labor and Marriage Bonds,” 175-217.

42. *See* KERBER, *supra* note 34, at xxii. Kerber argues that the “shelter from state power” executed by coverture—the “right to be ladies” who cannot be drafted into the military, as one example—“camouflage[d] practices that made them more vulnerable to other forms of public and private power.” *Id.* at xxiv.

43. KESSLER-HARRIS (2006), *supra* note 41, at 257; *see also* MARSHALL, *supra* note 16, at 11, 12.

civil because she surrendered the “opportunity to work” upon marriage; nor was it political in scope, because she was precluded from exercise of the franchise. Rather, a married white woman’s citizenship was merely “social,” in that she was assured of the “right . . . not to starve.”⁴⁴

A married white woman’s limited standing circumscribed her ability to make any sort of citizenship-based claims upon the state independent of her status as a wife and mother. In contrast, a husband could capitalize on his wife’s subsidiary status: “[m]en’s right to familial authority and the governance of . . . households accompanied and justified male political participation” as citizen-earners outside the house, in the market.⁴⁵ The “male sense of entitlement” perpetuated by the family wage

participated in configuring and sustaining crucial systems of cultural representation such as individual liberty, self-reliance, and the ethic of success For example, individual liberty, conceded to be a fundamental value for men . . . has not always or necessarily been the highest good for women. Ideals of service and sacrifice to our children, parents, and spouse have often been thought to render liberty for women irrelevant and women’s search for . . . rights “selfish.”⁴⁶

The family wage subordinated the exercise of rights enjoyed by men to the expectation women be mothers first, citizens second. “In this way of thinking,” writes Linda Kerber, “white women have an obligation to *support* the work of their husbands . . . but neither a right nor an obligation to claim work for their own self-support.”⁴⁷ Rather than citizen-earners, women were “mother-citizens.”⁴⁸

The family wage ideology dictated that women could not be both married and employed in wage work. While an unmarried, single woman could respectably sell her labor throughout much of the twentieth century,⁴⁹ entrance into a marriage contract necessitated “removal” from the labor market—not only did she no longer have an obligation to support herself, but by continuing to

44. KESSLER-HARRIS (2006), *supra* note 41, at 257.

45. KESSLER-HARRIS (2001), *supra* note 34, at 7.

46. *Id.*

47. KERBER, *supra* note 34, at 71 (emphasis original).

48. KESSLER-HARRIS (2001), *supra* note 34, at 15; *see also* Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding a ten-hour workday law for women given that “healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”).

49. *See* KERBER, *supra* note 34, at 71.

work, she deprived a man of his right to support a family.⁵⁰ Even high workforce participation by married women during World War II did little to shift normative values governing work by married women. A survey conducted just after the war in 1946 found that three quarters of employed men *and* women “believed that an employer should discharge an efficient woman whose husband [could] support her, in preference to an inefficient man who had a family to maintain.”⁵¹ This belief, also shared by employers and worker advocates, including unions, was predicated on the conviction that a woman’s workplace loyalty was secondary to her loyalty to her husband and family.⁵²

While the family wage has enjoyed ideological traction, it does not represent the true extent of women’s labor market participation, either historically or contemporarily. This is particularly true for African American women who, since abolition, have disproportionately worked outside their own homes, whether married or unmarried.⁵³ Although, presently a majority of all women work in the labor market, the persistence of the family wage ensures that marital status continues to mediate women’s relationship to work, and, in turn, to standing in the polity. This is true not only with regard to the household division of labor but in the gendered allocation of jobs and of pay, in society’s cultural attitudes about the acceptable roles of women both inside and outside the home, and, most saliently here, in the benefits afforded by the welfare state.

C. *Freedom, Citizenship, and the Family Wage in the Postbellum Era*

While the modern U.S. welfare state is associated with the New Deal and the Social Security Act, social theorists trace its beginnings to the advent of the industrial era and attendant urbanization of the country in the 1850s.⁵⁴ The Civil War and abolition occurred amidst these major economic and demographic shifts and the nation’s first federal welfare agency emerged from the aftermath. In 1865, Congress created the Freedmen’s Bu-

50. See KESSLER-HARRIS (2001), *supra* note 34, at 57.

51. *Id.* at 211 (citing NATIONAL MANPOWER COUNCIL, WOMANPOWER vii, 328-29 (1946)).

52. See KESSLER-HARRIS (2001), *supra* note 34, at 7, 206-12.

53. See KERBER, *supra* note 34, at 72.

54. See ELIZABETH A. SEGAL, SOCIAL WELFARE POLICY AND SOCIAL PROGRAMS: A VALUES PERSPECTIVE 59 (2009).

reau, as it was known popularly, to provide relief for freed slaves and white war refugees.⁵⁵ From the outset, the Freedmen's Bureau institutionalized a racialized vision of social welfare policy, one that preserved the family wage ideal for white working men and their wives, and carried with it implications for the citizenship capacity of freedmen and women. For former slavewomen, Freedmen's Bureau policy exemplified the degree to which black women were expected to embody male, work, and female, home-making, norms of free (read: white) citizenship. Current TANF recipients still face these contradictions: TANF juxtaposes marriage promotion and its punitive cousin, paternafare, both of which reinforce racially-loaded family wage values, with workfare, which invokes similarly loaded tropes of "personal responsibility" and self-sufficiency. To fully appreciate where today's policies hail from, and why the norms to which they appeal are so profoundly problematic, one must start with social welfare policy as it began.

Freedmen's Bureau policy was two-faced: on one hand, the agency issued "affirmation[s] of former slaves' right to liberty," and on the other, "a warning that freedom barred dependence" on the state.⁵⁶ Thus, Bureau welfare was simultaneously means-tested, like ADC and unlike Social Security and unemployment insurance, and "work-tested": "the Bureau was generally careful not to let able-bodied men and women subsist long on its charity and thus forget how to work."⁵⁷ For instance, the Bureau capped rations and assistance to guarantee that "Negroes would have to earn their own livings" rather than rely on receipt of government benefits.⁵⁸ To that end, the Bureau compelled all freed people, men and women, to enter into labor contracts, which imposed on black women a mandate fundamentally at odds with the family wage norm.⁵⁹ This policy was predicated on the assumption, shared by Southerners and Northerners alike, that

55. See GOLDBERG, *supra* note 5, at 34. Its full name was the U.S. Bureau of Refugees, Freedmen, and Abandoned Lands. See *id.*

56. DRU STANLEY, *supra* note 11, at 123.

57. GOLDBERG, *supra* note 5, at 40 (quoting GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 144 (1970)).

58. *Id.*

59. Such pressure to perform labor was later reinforced juridically through the Black Codes passed immediately after the Civil War, see DRU STANLEY, *supra* note 11, at 125-27, vagrancy laws, see *id.* at 108-16, 124-30 (discussing the enactment of such laws throughout the U.S.), or through the imposition of vigilante justice, see ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 39 (2010) (quoting ARTHUR F. RAPER, THE TRAG-

both free men and women, whether husbands and wives, would continue to labor as they had during slavery.⁶⁰ One administrator betrayed the degree to which coercing the labor of freedwomen was part and parcel of the nation's first incarnation of welfare: "Unless something is done . . . to induce the freedman to make the female[s] . . . work in the crops next year," the administrator cautioned, "there will be destitution among them."⁶¹ While it was a "disgrace" for an "overburdened" white wife with an "able bodied" husband to work for pay, it was equally disgraceful for an "idle" freedwoman to opt out of the labor market in order to keep her own home.⁶²

The Bureau "rationalize[d] black women's labor as a temporary necessity," but its policies ensured black women "could not afford to withdraw from outside labor . . ."⁶³ Economic reality also pushed black women into the workforce—their removal from the wage labor market by their husbands, in the mold of the family wage norm, was rendered an "impossibility" by the economic reality of low wages paid black men.⁶⁴ Unsurprisingly, only a few short years after the Civil War, more than forty percent of married black women in the Cotton Belt worked, mainly in the fields, while nearly all the area's white women reported "keeping house."⁶⁵ The disparity was also great in Southern cities where black wives were five times as likely to work outside the home.⁶⁶ By 1900, long after the Bureau's dissolution, married black women were "at least ten times more likely to be gainfully employed than white women."⁶⁷

Through its deliberate efforts to force slavewomen back into the fields in the post-bellum era, the incipient welfare state demarcated the relative status of now-free black women relative to their white counterparts. This policy was but a continuation of

EDY OF LYNCHING 36 (1933) (lynching as punishment for those accused, among other things, of "jumping labor contract.")).

60. See DRU STANLEY, *supra* note 11, at 188. Slavewomen had always "worked": in the fields alongside men or in masters' homes performing domestic labor.

61. *Id.* at 188.

62. KERBER, *supra* note 34, at 187-88.

63. *Id.* at 44.

64. See *id.* at 71.

65. See JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY, FROM SLAVERY TO THE PRESENT 63 (1986).

66. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 15 (1997).

67. KERBER, *supra* note 34, at 72.

the past; the state had never “sheltered” black women, as it did whites, and instead had wielded its juridical power to conscript them into servitude. By furthering the labor policy of slavery, the Freedmen’s Bureau, as one of the first formal manifestations of U.S. social welfare policy, denoted the family wage as an ideal, or aspiration, available only to white families. As the foregoing discussion asserts, the coding of the family wage as white bore profound implications for access to citizenship for both black men and women, underscoring the degree to which black women’s standing was not to be earned in the only way white women’s was—derivatively.

However, despite rendering the family wage ideal unrealizable for freedpeople, the Bureau continued to appeal to stereotypical notions of femininity and male authority. Freedwomen, for instance, were expected to “fuse” “wage work and domesticity.”⁶⁸ Northern women provided “assistance” inspecting the cleanliness of black women’s homes as a proxy for their “fitness for freedom.”⁶⁹ The Bureau also urged black men “to take responsibility and provide for their wives and children”⁷⁰ To that end, the Bureau fostered freedmen’s authority by signal[ing] that even black men could achieve manly independence.⁷¹ Noting that the “[black] husband has the same right to control his wife and children that a white man has,” Georgia’s Bureau office jailed adulterous wives and supported freedmen’s efforts to control their children’s labor.⁷² But the Bureau also took steps which arguably undermined the autonomy of black patriarchs by “taking family questions out of [their] hands,” intervening in child support, child custody, and domestic abuse matters,⁷³ a pattern replicated today by child social welfare agencies and the criminal and family court apparatus.⁷⁴

68. DRU STANLEY, *supra* note 11, at 188 (As one Northerner observed, “It was not an unusual thing to meet a woman coming from the field, where she had been hoeing cotton, with a small bucket or cup on her head, and a hoe over her shoulder . . . briskly knitting as she strode along. I have seen . . . a baby strapped to her back.”) (quoting ELIZABETH HYDE BOTUME, *FIRST DAYS AMONGST THE CONTRABANDS* 53 (1893)).

69. *Id.*

70. GOLDBERG, *supra* note 5, at 43.

71. *Id.*

72. *Id.*

73. *Id.* at 44.

74. See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

These contradictions in Bureau policies stemmed from profoundly antithetical goals: on one hand, attempting to “discipline” former slave labor in the interests of economic “reviv[al]” while, on the other, shepherding into existence an independent citizenry that nonetheless still needed state protection from “violence and fraud.”⁷⁵ “Freedpeople’s demands to be recognized as citizens”—independent earners and husbands—“undercut their claims to government protection and assistance; their social rights vanished to the extent that that they acquired civil and political rights” that equipped each with “the means to protect himself” in the competitive marketplace.⁷⁶

These political conflicts have had long-lasting implications for the standing of black women since the days of the Freedmen’s Bureau. Since that time, society has insisted on, demanded in fact, black women’s fulfillment of both “male” and “female” roles, a construction that does not comport with the ideology of dependent white womanhood. At times, this dual role was implicitly condoned, such as when it furthered white conceptions of the independent citizen-worker,⁷⁷ but mainly such a role was

75. GOLDBERG, *supra* note 5, at 45.

76. *Id.* at 52. The contradiction was arguably endemic; once black men were made national citizens by the Fourteenth Amendment, rendering all men formally equal, the very meaning of citizenship was redefined in order to restrict its access to whites. The prospect of legions of freedmen, able to exercise national citizenship rights, joining with working-class whites to secure their own political interests was inconceivable for both Northern and Southern ruling-class whites. Before long, the victories of Reconstruction were forestalled and reversed. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 21 (6th ed. 2008) (arguing post-war compromises “sacrifice[d] the rights of blacks.”). State laws restricted black political power and instituted segregation, while federal court decisions sanctioned limited readings of the Reconstruction Amendments that short-circuited the intent of the Radical Republicans. See *id.* at 48-52.

77. For instance, in *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109, 157 (1998), Ariela Gross discusses the racial classification cases of the pre-Civil War era where biracial or multiracial individuals sued to stake claims as white and therefore free. In court, the inquiry into the performance of whiteness sounded in the discourse of citizenship, of an “individual’s exercise of the social, political, and legal rights and privileges of a white person.” Gross discusses the case of Abby Guy, a successful plaintiff who won freedom for herself and her children. Guy, a single mother, is described in language ordinarily reserved for men: witnesses spoke of Guy functioning “as an equal” to whites in society, “living and working on her own,” “form[ing] contracts,” and “pay[ing] her bills herself.” Assuming Guy was black, and there was evidence on the record she was a “free negro,” one might have expected the jury either to find her behavior at odds with the dictates of dependent, white womanhood because she was a single parent *and* a provider, or to find her behavior at odds with the dictates of white manhood, as she was a woman. However, her acts of citizenship as a provider overrode those considerations, and the jury found in her favor. Perhaps the jury’s finding

maligned. Though “[t]he ideal of motherhood confined to the home and opposed to wage labor never applied to Black women,”⁷⁸ comparisons to the white, heterosexual family wage ideal have been employed to delegitimize black women’s efforts to be either mothers *or* workers. When a black mother worked for wages, often as a caretaker for white people’s children, a “mammy,” she was accused of being an unfit parent to her own children, one who was “deviant and neglectful.”⁷⁹ When she declined to work and “cared for [her] own children rather than the children of others,” she was chastised for evading “what society meant for Black women to do”: be workers, not dependents like white women.⁸⁰ But the married black mother who, out of “political and economic” necessity, entered the labor force⁸¹ was disparaged for emasculating her husband, the would-be patriarch of the family, deprived of his status as the citizen-earner and breadwinner.⁸²

Since the days of the Bureau, dominant white culture has sent conflicting messages to African American men and women alike about work and family formation. Black people have been urged—or coerced—to assimilate to heteronormative patriarchy, as is endorsed by TANF’s marriage and child support policies. At the same time, mainstream America has issued edicts, laced in racial undertones, on the necessity of work to achieve self-sufficiency, earn standing in the polity, and instill a work ethic in children—messages championed by workfare proponents. This contradiction underscores the degree to which black Americans, and black women specifically, have been ensnared by a racist double bind, the burden of which falls even more heavily on welfare recipients of color.

can be rationalized in light of the view of citizenship as “social closure,” as both “a prerequisite for the enjoyment of certain rights” and “a status to which access is restricted.” Rogers Brubaker, *Citizenship as Social Closure*, in *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 2, 2, 6 (Thomas A. Aleinikoff, et al. eds., 6th ed. 2008). The jury, finding Guy’s acts affirmatively dispositive of her status as a citizen, were unwilling to contemplate a non-white could enjoy such rights and breach the boundaries of citizenship. Thus, to preserve their own citizenship status, predicated on similar acts, they needed to affirm Guy’s status as white.

78. ROBERTS (2002), *supra* note 74, at 62.

79. ROBERTS (1997), *supra* note 66, at 13; ROBERTS (2002), *supra* note 74, at 62.

80. Boris, *supra* note 2, at 39.

81. ROBERTS (1997), *supra* note 66, at 15.

82. See, e.g., the discussion of Daniel Patrick Moynihan’s *The Negro Family: A Case for National Action* in Part V(A)(2).

III. WOMEN'S WELFARE: MOTHER'S PENSIONS, AID TO DEPENDENT CHILDREN, AND THE ADVENT OF THE MODERN U.S. WELFARE STATE

The role of marriage in mediating a woman's relationship to the welfare state is manifest in welfare state institutions that tie certain payments to a patriarchal vision of work consistent with the family wage. The modern social welfare state has been bifurcated, or divided, from its inception into two "tiers": a "masculine tier . . . [of] contributory social insurance targeting a male clientele who made claims based on their status in the labor market," which provided "more generous" benefits, and a "feminine tier . . . of inadequate social assistance programs . . . [based on] family status."⁸³ Entitlements like Social Security fell into the former, while means-tested welfare, classified as "relief," were properly categorized in the latter tier. "Welfare," as it emerged with mother's pensions and was institutionalized with Aid to Dependent Children (ADC), provided relief contingent on a woman's status as a mother and the absence of a husband due to widowhood or abandonment.⁸⁴ For a white woman lacking a male provider, the nascent welfare state intervened to provide subsistence for her fatherless children so she would not have to work. In shielding certain women from the market—while foisting others into it—and incentivizing men's work, these programs have mediated women's access to citizenship, in addition to influencing macroeconomic labor market conditions.

A. *The Family Wage and "Mother's Pensions"*

The driving force behind the institution of mother's pensions were the Maternalists, mainly Progressives, who latched onto a family wage vision of women's proper productive role as domestic, "claiming special rights for women, not to increase women's political or social rights" but to "enhance their roles as mothers"⁸⁵ They deployed the specter of women as "mother-citizens" selflessly performing the civic duty of childrearing.⁸⁶ Government aid ensured that "female victims of misfortune and male irresponsibility would not have to relinquish maternal duties at home in order to join the work force," thereby tarnishing their

83. Ann Shola Orloff, *Explaining U.S. Welfare Reform*, 22 *CRITICAL SOC. POL'Y* 96, 102 (2002).

84. See WARD, *supra* note 2, at 105; GOLDBERG, *supra* note 5, at 192.

85. KESSLER-HARRIS (2001), *supra* note 34, at 15.

86. See ROBERTS (1997), *supra* note 66, at 203.

dignity as mothers and homemakers.⁸⁷ Though aid was based on women's status as husband-less mothers—not necessarily as rights-bearing individuals—their redemption from pauperdom lay in the “services rendered” in exchange: reproductive work.⁸⁸ “We cannot afford to let a mother,” proclaimed one Maternalist, “one who has divided her body by creating other lives for the good of the state, one who has contributed to citizenship, be classed as a pauper, a dependent.”⁸⁹

While on one hand Progressives touted the virtue of white mothers, on the other they believed welfare was a means of “social control” over poor, immigrant families and the threat they posed to “social order.”⁹⁰ Progressives believed that through supervision and discipline, immigrant women could be “socializ[ed] . . . to conform to ‘American’ family standards” and accordingly, aid should be “conditioned on compliance with morality provisions.”⁹¹ This is consistent with the claim that relief programs have “tended to conflate poverty with deviance and criminality” and have aimed “to mold the habits, behavior, or dispositions of their clients and [to] turn them into . . . good and virtuous citizens.”⁹² In essence, “white”⁹³ immigrant women were capable of becoming citizens, at least to the extent women could exercise citizenship.

87. *Id.* Some states explicitly aided only widows, as opposed to divorced, deserted, or unmarried mothers, while others aided all. Overall, in 1931, eighty-two percent of recipients' husbands were deceased, another five percent “deserted,” and two percent, divorced. WARD, *supra* note 2, at 77 (citing U.S. DEPT OF LABOR, MOTHERS' AID—1931 at 11-13).

88. GOLDBERG, *supra* note 5, at 191.

89. *Id.*

90. ROBERTS (1997), *supra* note 66, at 204.

91. *Id.*

92. GOLDBERG, *supra* note 5, at 3.

93. Arguably, the Progressives and other reformers were not responding to any *prima facie* whiteness of Southern and Eastern Europeans, whose racial status in the early twentieth century was, without doubt, questionable. “The acceleration of immigration . . . increased racial nativist anxiety that Anglo-Saxon superiority would be diluted, thus drawing many dominant elites . . . towards racialist logics that echoed Southern justifications of white supremacy.” Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 181, 209 (Michael C. Dorff ed., 2004). Broadening the category of whiteness to include “white ethnics” facilitated its consolidation and helped maintain white hegemony. Whiteness was conflated with capacity for citizenship (or naturalization) while racial immigration bars were instituted. See Devon W. Carbado, *Yellow by Law: The Story of Ozawa v. United States*, in RACE LAW STORIES 175, 175-235 (Devon W. Carbado et al. eds., 2008).

In contrast, African American women “were simply excluded” from mother’s pensions and state protection, both in the North and the South.⁹⁴ The exclusion was accomplished by failing to locate program offices in areas where blacks lived or through the creation of standards that disproportionately disqualified black women, such as barring unmarried mothers.⁹⁵ Moreover, some counties and states summarily blocked receipt by black women.⁹⁶ Ideologically speaking, white reformers appeared to believe that black women, unlike their immigrant counterparts, were “unassimilable” and had no “potential of becoming citizens.”⁹⁷ Thus, it can be inferred that Progressives believed any efforts to socialize them in accordance with their vision of the normative family would be fruitless.⁹⁸

B. *The Creation of Aid to Dependent Children*

In 1935, the Social Security Act created ADC through legislation that left the administration of welfare programs up to the states but obligated them to broaden the pre-existing requirements of mother’s pensions.⁹⁹ Expanding the definition of “dependency,” for instance, captured more children and enabled them to live in relatives’ homes.¹⁰⁰ However, as eligibility was still conditioned on “the absence of one or both parents,” ADC continued to legitimate the family wage ideal of the two-parent home, just as mother’s pensions programs had previously.¹⁰¹ Furthermore, language allowing states to consider “moral character” in determining eligibility traded on notions of “fit” or “deserving” mothers and/or homemakers, mothers who were racialized white.¹⁰²

While its provisions were formally race-neutral, the devolution to the states allowed ADC to be discriminatorily and arbitrarily implemented. At the most fundamental level, Deborah Ward argues ADC nominally federalized “existing patterns of

94. ROBERTS (1997), *supra* note 66, at 204.

95. *See id.*; *see also* WARD, *supra* note 2, at 65 (“In 1921, the illegitimate birth-rate per 100 live births was 1.4 for whites and 12.5 for blacks . . .”).

96. *See* KERBER, *supra* note 34, at 72 (“Throughout the country, only 3 percent of the money in mother’s pensions went to black women . . .”).

97. ROBERTS (1997), *supra* note 66, at 205.

98. *See* ROBERTS (1997), *supra* note 66, at 205.

99. *See* Title IV, Social Security Act, *Publ. L.* 74-271, 49 Stat. 620 (1935); WARD, *supra* note 2, at 108.

100. *See* WARD, *supra* note 2, at 108.

101. *Id.*

102. *See id.* at 109.

exclusion” of African American women from “mothers’ pension advocacy, legislation, and administration” by the states during the Progressive Era.¹⁰³ Yet neutral standards actually enforceable at the federal level were sacrificed at the behest of “Dixiecrat congressmen [who] formed a reactionary core at the heart of” the New Deal coalition.¹⁰⁴ Southern legislators complained that if ADC “freed” working-class black women from the drudgery of domestic and agricultural work, employers might be forced to raise wages.¹⁰⁵ Excluding black women enabled southern interests to compete with the North economically.¹⁰⁶ Accordingly, some southern states rejected black women’s applications for welfare or disqualified them during the cotton-picking season.¹⁰⁷ The symbiotic relationship between benefit access and the availability of a reserve labor pool underscores the disciplinary function of means-tested welfare. “[W]hile the government has subsidized certain ‘deserving’ mothers to enable them to stay at home, its welfare policy has ensured the availability of less privileged women to do low-wage work.”¹⁰⁸ The exclusion of women of color, however, acceded to more than just predominant economic interests. ADC, within the aegis of the SSA, was “constructed in conformity with contemporary white Americans’ assumptions about the proper dynamics of a respectable family and their belief it was appropriate that black women *not* be shielded from the obligation to work.”¹⁰⁹

In 1939, an amendment diverted widows and their children to survivors’ insurance, broadening the moral distance between widows and the single or divorced mother “judged undeserving because she was . . . without a man mediating her relation to the state from the grave.”¹¹⁰ Survivors’ insurance, which was administered federally, compensated deceased husbands’ wages so that “fatherless children might learn the sweet lesson of continuing parental support beyond the grave, and aging wives would continue to be dependent, though on phantom earnings.”¹¹¹ In pro-

103. WARD, *supra* note 2, at 27.

104. Forbath, *supra* note 22, at 170.

105. See WARD, *supra* note 2, at 106.

106. See *id.*

107. See Boris, *supra* note 2, at 38.

108. *Id.*

109. KERBER, *supra* note 34, at 73.

110. Boris, *supra* note 2, at 37-38.

111. KESSLER-HARRIS (2001), *supra* note 34, at 141; see also Geoffrey Kollman, Congressional Research Service, “Major Decisions in the House and Senate on So-

viding payments in lieu of a father's earnings, survivors' insurance ensured mothers could retain their "deserving" status, derived from their husbands' pre-death work. Additionally, the separation of survivors' benefits from ADC further broadened the racial distance between the two classes of recipients. As a subsidiary of Social Security, only widows whose husbands were covered by the program, *i.e.*, men who worked in qualifying industries, could collect. However, as the SSA did not cover agricultural or domestic industries, sectors in which three fifths of blacks worked, many black widows remained uncompensated.¹¹²

C. *The Bifurcated Modern Welfare State: Social Security versus ADC and the Meaning of Work*

The passage of the SSA swept the modern U.S. welfare state into being and codified normative beliefs about gender, race, work, and the capacity of women and people of color for full citizenship in the American polity. The SSA instituted Social Security, which tied benefits to remunerative work. At a time when men composed the vast majority of the workforce, Social Security, which also excluded from coverage industries in which women and people of color disproportionately worked, was an entitlement designed to benefit "those deemed deserving," or wage workers.¹¹³ The SSA, which also enacted federal disability and unemployment insurance,¹¹⁴ regarded claimants as rights-bearing citizens who earned state-funded support during periods of inability to work or in retirement through work-based contributions. Programs linking work to entitlements, which constitute the bulk of social welfare programs in the U.S.,

can best be understood as enforcing or supporting the male-headed nuclear family, and enforcing or supporting women's several family roles as unpaid domestic laborers, as providers

cial Security: 1935-2000" 9, available at http://assets.opencrs.com/rpts/RL30920_20010326.pdf.

112. Forbath, *supra* note 22, at 204.

113. GOLDBERG, *supra* note 5, at 3; see also Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POL'Y HIST. 416, 419 (1995). Goodwin Liu argues Social Security's structure continues to penalize dual earners today by advantaging "one-earner couples over two-earner couples, wives who work at home over wives who work for pay, married women over divorced women, and men over women." Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 2 (1999).

114. See 42 U.S.C. §§ 401-34, 501-04.

of sexual and reproductive services, and as consumers of food and services produced in the market economy.¹¹⁵

The linkage of benefits and employment has effectively cloaked the redistributive character of *all* “safety net” programs and created the everlasting fiction that such benefits were and continue to be “earned.”

The supremacy of work-based entitlements “delineated the secondary [citizenship] positions of those without good jobs or any jobs at all,” such as ADC recipients.¹¹⁶ Although ADC benefits were also created by SSA, such benefits were classified as means-tested relief and were not designed to support women as earners. Means-tested relief continued to “treat the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them—as claims which could be met only if the claimants ceased to be citizens in any true sense of the word,” by surrendering their citizenship.¹¹⁷ Non-working single mothers receiving ADC shared this subordinate lot with millions of other workers who had been written out of a “carefully crafted” SSA, which excluded teachers, healthcare workers, and social workers, in addition to agricultural and domestic workers.¹¹⁸ Ultimately, as many as two thirds of employed African Americans and half of all working women were excluded from coverage under the SSA.¹¹⁹ To add insult to injury, after being sacrificed in the SSA, domestic and agricultural workers were also exempted from coverage under the new national minimum wage law.¹²⁰

The dichotomy between relief and entitlements—between the “masculine” and “feminine” tiers of the social welfare state—is not necessarily fixed. Throughout the twentieth century, means-tested welfare recipients waged recurring struggles to attain the status of “deserving,” rather than that of paupers on “relief.”¹²¹ The Maternalists were, on the whole, able to sell mothers’ pensions as a more “dignified” choice for women with children but not husbands; while the pensions were not entitle-

115. FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 414 (Second Vintage Ed., 1993).

116. KESSLER-HARRIS (2001), *supra* note 34, at 4.

117. GOLDBERG, *supra* note 5, at 2 (citing MARSHALL (1964), *supra* note 20, at 80).

118. Palmer, *supra* note 113, at 419-20; *see also* KERBER, *supra* note 34, at 73.

119. Kerber, *supra* note 34, at 73 (citing Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* 157 (1994)).

120. *See* Palmer, *supra* note 113, at 419-20.

121. *See* generally GOLDBERG, *supra* note 5.

ments *per se*, they straddled a divide between “relief” and “rights” that makes sense only when juxtaposed with a white family wage ideology. On the other hand, welfare recipients today find themselves wedged on one end of the classification divide: TANF recipients are quintessentially undeserving paupers. In the struggle between relief and entitlements, recipients have been less apt to be classed “deserving” when their “opponents mobilized a racial backlash against them” through “symbolic work . . . render[ing] racial divisions explicit, salient, and socially significant”¹²² Despite successful efforts to improve their standing under ADC and to move welfare into the realm of an entitlement, discussed below, welfare recipients’ gains were destroyed by the racial politics that are ingrained in the U.S. welfare state.

IV. THE ADC ERA: DIGNIFYING WELFARE

From the enactment of the Social Security Act until the 1960s, restrictive welfare policies disproportionately excluded African Americans. However in the 1960s, several factors led to a sustained upswing in the total number of welfare recipients, especially recipients of color, and particularly Latinas.¹²³ Population migration, recipient organizing, and notable Supreme Court decisions all played a role in securing broader access to welfare.

Demographic factors, such as the relocation of millions of black people during the Great Migration from southern states¹²⁴ that provided “paltry” aid to more generous northern and western states with less discriminatory caseworkers, upped the numbers.¹²⁵ Structural economic conditions, particularly post-war disinvestment in urban centers, also contributed to greater im-

122. *Id.* at 282.

123. While the absolute number of recipients increased dramatically between the 1960s and 1990s, the percentage of black people on welfare has declined. In 1960, there were 3 million recipients and in 1996, there were approximately 12.6 million (including children). MEAD (1986), *supra* note 9, at 7; MCCONNELL & BRUE, *supra* note 6, at 645. In 1961, forty-three percent of families receiving ADC assistance were black. WARD, *supra* note 2, at 135. In 1994, two thirds of adult recipients were women of color: 37.4% white, 36.4% black, 19.9% Latina, 2.9% Asian, and 1.3% Native American. Gwendolyn Mink, *Aren't Poor Single Mothers Women? Feminists, Welfare Reform, and Welfare Justice*, in WHOSE WELFARE? 184 (Gwendolyn Mink ed., 1999).

124. See generally WILKERSON, *supra* note 59 (history of Great Migration, beginning around World War I and lasting through 1970).

125. See WARD, *supra* note 2, at 110.

poverishment.¹²⁶ This upswing contributed to the welfare “crisis”¹²⁷ used to justify the overhaul of 1996.¹²⁸

Political activism and organizing among poor women in the milieu of the Civil Rights Movement expanded access to welfare. By the mid-sixties, women had joined in a multiracial coalition to reform welfare. Organizations like the National Welfare Right Organization (NWRO) sought to redefine welfare mothers as rights-bearing citizens and resist their pauperization. NWRO sought to move welfare into the realm of entitlement, to make it an “inalienable citizenship right,” a social citizenship “right to resources, goods, and services—above and beyond mere subsistence—that make it possible for a low-income person to earn the respect of his or her peers, according to the prevailing sociocultural standards” of standing.¹²⁹

NWRO members also agitated for a “right to self-determination where adult intimacy and family structure are concerned.”¹³⁰ State eligibility rules allowed case-workers to deny welfare to children whose mothers’ behavior was deemed morally objectionable¹³¹ or whose homes unsuitable, discretionary provisions which were used to disproportionately disqualify black women.¹³² Such inquiries often turned on women’s sexual behavior. While sexual virtue substantiated white women’s ca-

126. See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1997) (arguing that the “disappearance” of blue collar jobs from the urban core in the post-Fordist economy is responsible for a host of problems plaguing America’s inner cities).

127. 42 U.S.C. § 601(10).

128. Lawrence Mead, for example, framed the rise in the number of welfare recipients as one factor in the “decline” in “social functioning” in America, along with the increases in the rates of unemployment and serious crime and declines in SAT scores. Mead argues that the “numbers give credibility to the concern over the decay of ‘traditional values’ that has colored American politics since the late 1960s.” MEAD (1986), *supra* note 9, at 8.

129. SMITH, *supra* note 13, at 227.

130. *Id.*

131. For example, in 1960, Louisiana removed from its rolls 23,000 children born to unmarried women, which Ward attributed to a racially-motivated interpretation of the discretionary morality provisions. WARD, *supra* note 2, at 129.

132. See *id.* In reference to “suitable home” provisions, Gunnar Myrdal wrote, “According to popular belief in the South, few Negro low-income families have homes which could be called ‘suitable’ for any purpose . . . and since practically all Negroes are believed to be ‘immoral,’ almost any discrimination against Negroes can be motivated on such grounds.” *Id.* (citing GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 359-60 (Vol. 1, 1944)).

capacity for citizenship,¹³³ unmarried black women's extra-marital sexuality signified moral deviance and rendered them unfit parents. As part of what Frances Fox Piven calls "rituals of degradation," women on welfare were

often forced to answer questions about their sexual behavior ("When did you last menstruate?"), open their closets to inspection ("Whose pants are those?"), and permit their children to be interrogated ("Do any men visit your mother?"). Unannounced raids, usually after midnight and without the benefit of a warrant, in which a recipient's home is searched for signs of "immoral" activities, have also been part of life on AFDC.¹³⁴

Such uninvited visits—along with surveillance, eavesdropping, and interrogation—plagued recipients for decades.¹³⁵ Though recipients had a right to refuse access to caseworkers, it was grudgingly accepted that they needed to "surrender commonly accepted rights" as quid pro quo for benefits.¹³⁶

The state practice of determining parental "fitness" with regard to a mother's sexual relations rose to the fore in *King v. Smith* in 1968.¹³⁷ The plaintiffs in *King* specifically challenged Alabama's "substitute father" rule, which denied welfare payments to children of a woman who "cohabited," either inside or outside her home, with a man.¹³⁸ As ADC provided benefits only if one parent was "continually absent" from the home, Alabama deemed "any able-bodied man" a "non-absent parent" duty-bound to provide for any present children.¹³⁹ The state thereby disqualified recipient's children if a man "live[d] in" the

133. In the racial classification cases discussed by Ariela Gross, *see supra* note 77, the whiteness, or citizenship status, of women litigants was determined by the performance of honor and virtue rather than through the exercise of rights—the performance by which men proved their whiteness to juries. Performing "white womanhood," "the most precious fetish of white supremacy," required a showing of sexual and moral purity sufficient to demonstrate one did not possess the "degraded sexuality of a black 'Jezebel.'" *See* Gross, *supra* note 77, at 157, 166-67, 171-76.

134. FOX PIVEN, *supra* note 115, at 166.

135. *See id.*

136. *Id.* Fox Piven notes a case where the State of California prevailed in the lower court, though losing appeal, on the argument that welfare recipients "waive certain constitutional rights, among them the right to privacy." One judge acknowledged that although recipients had a right to refuse access, by doing so, they "r[an] the risk then of being cut off the rolls." *Id.*

137. *See King v. Smith*, 392 U.S. 309, 311 (1968) (barring additional non-financial requirements to qualify for means-tested welfare, including "moral character" provisions that had been used to arbitrarily deny access).

138. *Id.*

139. *Id.* at 313.

mother's home, "visit[ed]" frequently, or "cohabit[ed] elsewhere" with her.¹⁴⁰ The court's discussion of the definition of "cohabitation" underscores both the scrutiny to which recipients' intimate practices were subjected while exemplifying the discretionary nature of the inquiry:

"[C]ohabitation," as used in the regulation, means essentially [they] have "frequent" or "continuing" sexual relations. With regard to how frequent or continual these relations must be, the testimony is conflicting. One state official testified that the regulation applied only if the parties had sex at least once a week; another thought once every three months . . . and still another believed once every six months sufficient. The regulation itself provides that pregnancy or baby under six months of age is prima facie evidence of a substitute father.¹⁴¹

The Alabama law assumed any male partner of the mother would and could assume care for her and her children.

King held that states could not burden recipients with additional eligibility requirements as long as recipients' household income fell below the poverty line. In doing so, the Court recognized the long legacy of "moral character" provisions in welfare since the mothers' pensions era, and that such provisions "were habitually used to disguise systematic racial discrimination," even though facially neutral.¹⁴² Anna Marie Smith argues that *King* "contributed to the federalization of poverty assistance rights insofar as the Court's decision gave the poor some protection against the arbitrariness and stinginess of the states."¹⁴³ More importantly, *King* established a "statutory right to welfare."¹⁴⁴ Along with *Goldberg v. Kelly*, recognizing welfare benefits as property requiring due process before termination, the welfare rights movement successfully used the law to broaden access to welfare for all women, another factor in the ensuing rise in the number of welfare recipients.¹⁴⁵

However, broader access by African Americans and people of color may be what hastened the demise of "welfare as we know it."¹⁴⁶ It was precisely the "rapid and intense inclusion of African Americans" on welfare after the sixties that "resulted in a public and government policy backlash" precipitating welfare

140. *Id.* at 313-14.

141. *Id.* at 314.

142. *King v. Smith*, 392 U.S. 309, 321-22 (1968).

143. SMITH, *supra* note 13, at 85.

144. *Id.*

145. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

146. Bill Clinton, *supra* note 1, at A14.

reform in 1996.¹⁴⁷ The backlash purposefully and strategically relied on racial animus in the service of gutting welfare as an entitlement and successfully “rendered racial divisions explicit, salient, and socially significant,”¹⁴⁸ just as they had been in the enactment of previous incarnations of welfare:

During the passage of the [SSA], legislators could have fought for provisions that did not . . . guarantee the continued exclusion of African-Americans from [welfare] During the War on Poverty . . . the Johnson administration did nothing to counterbalance the growing rhetoric linking race to the “welfare problem.” [With PRWORA] legislators could have raised the . . . debate beyond the inflammatory racial discourse but instead chose to embrace this discourse to their advantage.¹⁴⁹

While the absolute share of African American women recipients actually declined between the sixties and nineties,¹⁵⁰ blackness remained salient in the prelude to reform. The greater inclusion of black women, and their subsequent overrepresentation on the rolls,¹⁵¹ engendered attacks on welfare sounding in anti-black racism and sexism. These attacks traded on the trope of the black “welfare queen—a lazy mother on public assistance who deliberately breeds children at the expense of taxpayers to fatten her monthly check.¹⁵²

Perhaps the eventual sacrifice of the welfare rights movement’s achievements is best explained by Kimberlé Williams Crenshaw’s claim that achievements of “equal opportunity”—here, access to welfare—“contain within them the seeds of defeat.”¹⁵³ While the welfare rights movement had “moral force,”

147. WARD, *supra* note 2, at 130.

148. GOLDBERG, *supra* note 5, at 282. For a more comprehensive discussion on the role of racial animus in welfare reform, see ch. 3, *Racial Attitudes, the Undeserving Poor, and Opposition to Welfare*, 60, 60-79, and ch. 7, *Racial Stereotypes and Public Responses to Poverty*, 154, 154-73, in MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 67 (1999) (“Welfare is a ‘race-coded’ topic that evokes racial imagery and attitudes even when racial minorities are not explicitly mentioned.”).

149. WARD, *supra* note 2, at 145.

150. From 1961 to 1994, the total proportion of black recipients fell from 43 to 36.4%. See *supra* note 123.

151. Though constituting 36.4% of recipients in 1994, African Americans were 12.7% of the total U.S. population in 1996. U.S. CENSUS, *CENSUS FACTS FOR AFRICAN AMERICAN HISTORY MONTH*, Jan. 31, 1997, available at <http://www.census.gov/Press-Release/fs97-01.html>.

152. ROBERTS (1997), *supra* note 66, at 17.

153. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 103, 106 (Kimberlé Williams Crenshaw, et al., eds., 1996). Derrick Bell writes, “What appears to be progress toward

it achieved success through appealing to “the stability of the institutions and interests” it opposed.¹⁵⁴ The movement secured access to ADC but was unable to challenge the fact that welfare did not substantiate women’s citizenship but instead reified recipients’ status as paupers.

V. THE FAMILY WAGE IN TANF

Fourteen years ago, welfare reformers successfully advanced their agenda of reducing welfare dependency through both houses of Congress and across and past the desk of Bill Clinton.¹⁵⁵ PRWORA fundamentally overhauled ADC, scrapping the statutory entitlement to welfare,¹⁵⁶ and instituting far-reaching changes including a lifetime time limit, bars to receipt by certain noncitizen immigrants,¹⁵⁷ and child support provisions. Its proponents codified two agendas: the first sanctions heteronormative family formation through allocations for marriage promotion and the implementation of child support provisions that transfer state “dependency” to fathers, and the second promotes work in exchange for welfare receipt. Though work promotion is couched as “self-sufficiency,” the administrative fine print suggests that workfare is more consistent with the tenets of the family wage than with any common-sense understanding of financial “independence.”

racial justice is, in fact, a cyclical process. Barriers are lowered in one era only to reveal a new set of often more sophisticated but no less effective policies that maintain blacks in a subordinate status.” BELL, *supra* note 76, at 20.

154. Crenshaw, *supra* note 153, at 106.

155. Though coined “the first black president” by author Toni Morrison, some commentators argue Bill Clinton was seeking to redeem his party from its association with black interests by passing PRWORA. For instance, Tony Platt writes, Clinton’s “assault on welfare was motivated primarily by the Democratic Party’s desire to capture the White House by . . . repositioning itself as an advocate of ‘third way’ neo-liberalism, especially on matters relating to race (crime, welfare, and affirmative action).” Tony Platt, *The State of Welfare 2003*, 55 MONTHLY REV. (2003).

156. 42 U.S.C. § 601(b) states, “This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.”

157. 8 U.S.C. § 1601(1)-(2) states:

(1) Self-sufficiency has been a basic principle of United States immigration law (2) It continues to be the immigration policy . . . that—(A) aliens . . . not depend on public resources . . . but rather rely on their own capabilities and the resources of their families, their sponsors, and [charity] and (B) the availability of public benefits not constitute an incentive for immigration.

Welfare reform’s exclusion of aliens “promoted both internal and external social closure, limiting the rights of citizen [recipients] while simultaneously fostering the exclusion of noncitizens.” GOLDBERG, *supra* note 5, at 194.

A. Marriage Promotion Policies

1. Single Motherhood and "Illegitimacy"

Importantly, reformers were able to position single motherhood at PRWORA's front and center. Congress latched onto the coat-tails of conservative and neoliberal critics and policy-makers who had convinced the public that "[i]llegitimacy [was] the single most important social problem of our time—more important than crime, drugs, poverty, illiteracy, welfare, or homelessness, because it drives everything else."¹⁵⁸ PRWORA's "findings" linked a three-fold increase in the number of extramarital births to an equivalent rise in the number of child recipients by declaring that, as both had risen at similar rates over a (mostly) overlapping time frame, the two were correlative.¹⁵⁹ The "findings" draw causal ties between extramarital childbearing and a host of ills, drawing directly upon the assertion that illegitimacy "drives everything else." PRWORA's drafters focused heavily on teen pregnancy, the exemplar of "illegitimacy," and the associated increase in welfare expenditures.¹⁶⁰ The Act lists negative outcomes for children born extramaritally, including "low birth weight," "low cognitive attainment," "lower educational aspirations," a higher likelihood of future welfare receipt, and a greater poverty rate, among other dire predictions.¹⁶¹ Such "findings" demonstrate a "crisis in our Nation," that Congress could and would avert through

[e]nd[ing] the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent[ing] and reduc[ing] the incidence of out-of-wedlock pregnancies and establish[ing] annual numerical goals for preventing and reducing the incidence of these pregnancies;

158. Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1664 (2005) (quoting Charles Murray) (internal citations and quotation marks omitted).

159. See *supra* note 8.

160. The teenage (age 16-19) pregnancy rate actually dropped in 1996, the year PRWORA was passed, compared to 1986: 106.7 pregnancies per 1,000 teens to 95.6. GUTTMACHER INST., U.S. TEENAGE PREGNANCIES, BIRTHS AND ABORTIONS: NATIONAL AND STATE TRENDS AND TRENDS BY RACE AND ETHNICITY 6 (2010), available at <http://www.guttmacher.org/pubs/USTPTrends.pdf> (last visited Sept. 13, 2010). The actual birth rate among teens increased slightly between the same time period, likely due to a sharp decrease in abortion rates, from 50.2 births per 1,000 teens to 53.5. *Id.* Nonetheless, teen pregnancy and birth rates spiked in the early nineties and remained high until the mid-nineties. See *id.*

161. 42 U.S.C. § 601(8)(A)-(F).

and (4) encourag[ing] the formation and maintenance of two-parent families.¹⁶²

Congress included specific measures designed to serve these “very important Government interests.”¹⁶³ PRWORA provided for “Abstinence Education;”¹⁶⁴ delineated annual numerical goals toward the reduction of extra-marital births;¹⁶⁵ sanctioned states’ continued use of “family caps,” child exclusion provisions that curtail additional benefits for the birth of a new child;¹⁶⁶ and enhanced a comprehensive child support scheme to replace state support with that of absent fathers.¹⁶⁷ Institutionalizing a waiver process increasingly popular under ADC and giving states greater administrative latitude, TANF is funded by federal block grants to the states, which devise and institute programs in compliance with PRWORA’s mandates.¹⁶⁸ The grants, in conjunction with the rescission of welfare as an entitlement, revive state discretion in welfare administration.¹⁶⁹ States are now empowered to deny benefits even to qualified individuals on budgetary grounds—the federal government will not provide additional funding after a state fully exhausts its grant, absent that state’s qualification for any performance-based “bonuses.”¹⁷⁰ Bonuses are awarded to states achieving net reductions in extramarital childbirth and reductions in abortion rates, a rather quixotic juxtaposition because PRWORA provides no contraceptive or fam-

162. 42 U.S.C. § 601(10); 42 U.S.C. § 601(a)(2)-(4).

163. 42 U.S.C. § 601(10).

164. A qualifying “abstinence education” program
(C) teaches that abstinence . . . is the only certain way to avoid out-of-wedlock pregnancy . . . D) teaches that a . . . monogamous relationship in context of marriage is the expected standard of human sexual activity . . . F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society . . . (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

42 U.S.C. § 710(b)(2).

165. 42 U.S.C. § 601(a)(3).

166. See JODIE LEVIN-EPSTEIN, CENTER FOR LAW AND SOCIAL POLICY, *LIFTING THE LID OFF THE FAMILY CAP 3* (2003), available at http://www.clasp.org/publications/family_cap_brf.pdf (last visited Aug. 25, 2010) (“TANF is silent on the issue of family cap, but the law’s broad flexibility allows each state to decide for itself whether to establish such policies.”). Fifteen states had sought waivers from the federal government to establish the practice before the passage of TANF. *Id.* at 1.

167. See 42 U.S.C. §§ 654-669.

168. See WARD, *supra* note 2, at 141.

169. See Phoebe G. Silag, *To Have, To Hold, To Receive Public Assistance: TANF and Marriage-Promotion Policies*, 7 J. GENDER, RACE & JUST. 413, 416 (2003).

170. See *id.*

ily planning funding beyond abstinence education.¹⁷¹ The implication is that poor women, alone among autonomous citizens, should not engage in extramarital sex for “they are considered to be predisposed toward bearing children outside of marriage.”¹⁷²

Since 1996, almost every state has undertaken efforts to “promote marriage, reduce divorce, or strengthen two-parent families,” under federal TANF grants.¹⁷³ During the Bush administration, federal funding for The Healthy Marriage Initiative of the Administration for Children and Families (ACF) increased.¹⁷⁴ As of 2005, ACF has allocated \$150 million annually to community-based contractors for marriage programming, including money for fatherhood promotion.¹⁷⁵ Monies can be spent on counseling, couples and marriage education, media campaigns, and the implementation of laws or policies promoting marriage.¹⁷⁶ Despite the fact that programs have been run under the auspices of ACF since 2001, to date the only serious evidence ACF has put forward on these programs is one study of eight ACF-funded “Building Strong Families”¹⁷⁷ programs that “offer relationship skills, education and other support services to [low-income] unwed couples who are expecting a child or who have just had a baby.”¹⁷⁸ The study found definitively that the pro-

171. 42 U.S.C. § 603(2).

172. SMITH, *supra* note 13, at 92.

173. Steven L. Nock, Marriage as a Public Issue, *THE FUTURE OF CHILD.*, Autumn 2005, at 13, 24.

174. *See id.*

175. *See* The Healthy Marriage Initiative: General Information, *supra* note 14, and the HEALTHY MARRIAGE INITIATIVE 2002-2009: AN INTRODUCTORY GUIDE, *supra* note 15, for more information.

176. *See* Nock, *supra* note 173, at 24. For a discussion of existing programs, *see* generally M. Robin Dion, Healthy Marriage Programs: Learning What Works, *THE FUTURE OF CHILD.*, Autumn 2005, at 139, 139-156.

177. *See* Building Strong Families, <http://www.buildingstrongfamilies.info/> (“Strengthening and stabilizing the relationships of low-income couples has emerged as a focus of national policy development and testing. If unmarried parents can be helped to fulfill their aspirations for stable, healthy lives together, there could be important benefits for child well-being. Building Strong Families (BSF) is an initiative to develop and evaluate programs designed to help interested unwed parents achieve those goals.”) (last visited Apr. 3, 2011).

178. Robert J. Wood et al., Mathematica Policy Research, Inc., Building Strong Families: Strengthening Unmarried Parents’ Relationships: The Early Impact of Building Strong Families 1, 1-3 (2010), available at http://www.mathematica-mpr.com/publications/pdfs/family_support/BSF_impact_execsumm.pdf (last visited Apr. 3, 2011). In Healthy Marriage Initiative 2002-2009: An Introductory Guide, *supra* note 15, at 15-17, the Office of Planning, Research and Evaluation identifies ongoing and forthcoming studies and evaluations of marriage promotion efforts.

grams, on the whole, had absolutely no effect on the 5,102 couples covered by the study.¹⁷⁹ In comparison to the control group, the Building Strong Families programs have, thus far, had no beneficial impact on the rate at which couples remained together or married, on “relationship quality” or conflict management, or on co-parenting or father involvement.¹⁸⁰ Among the individual programs, there were exceptions: the Oklahoma program showed some statistically significant increases in all of the above criteria except marriage; one program demonstrated a negative influence on outcomes in most of the criteria (with no impact on marriage whatsoever).¹⁸¹

Though PRWORA “declared out-of-wedlock births . . . and single mother families contrary to the national interest”—and several billion dollars have been spent pursuant to Act’s objective to eradicate the scourge of “illegitimacy”—there has been scant inquiry into any correlation between single motherhood, poverty, and welfare receipt.¹⁸² Single mothers are indeed more likely to be poor; 38.1% live below 125% of the poverty level, as opposed to 8.9% of married couples.¹⁸³ One explanation for the discrepancy is that

poverty results from inadequate family income, due to the declining ability of one parent—especially the mother—to earn enough to stay above the poverty line. This problem is exacerbated by working conditions that make it virtually impossible for mothers to combine low-wage jobs with child-raising.¹⁸⁴

The structural factors implicated suggest that any claim that female-headed household poverty¹⁸⁵ is a result of extramarital child-bearing per se is not airtight.¹⁸⁶ One marriage proponent

179. Wood et al., *supra* note 178, at 1-3.

180. *See id.* at 4-5. Couples in which both partners were African Americans showed statistically significant increases in all categories—relationship quality, conflict management, and co-parenting and father involvement—*except* marital rates, where there was no demonstrable impact when compared to the control group. *See id.*

181. *See id.* at 4-5.

182. *See* Nock, *supra* note 173, at 14.

183. U.S. CENSUS, 2005-2007 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES, “Selected Characteristics of People at Specified Levels of Poverty in the Last 12 Months,” Mar. 20, 2012, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_07_3YR_S1703&prodType=table.

184. Roberts (1997), *supra* note 66, at 223.

185. For a discussion of the feminization of poverty, *see generally* Randy Albelda et al., *Glass Ceilings and Bottomless Pits: Women’s Work, Women’s Poverty* (1997).

186. Though some find causal connections between poverty and family structure, those that do “attribute only 10 to 20 percent of poverty to the prevalence of female-headed households.” Roberts (1997), *supra* note 66, at 223.

conceded it was “not possible to disentangle the direction of causation.”¹⁸⁷ The number of single mothers also reflects the greater likelihood that mothers retain custodial control of children born extramaritally.¹⁸⁸ Secondly, given the high divorce rates in the U.S., many children may end up residing in one-parent, female-headed households.¹⁸⁹

In contrast, among the arguments concerning why heterosexual married couples are less likely to be impoverished—beyond self-evident explanations such as the possibility of two wage-earners, instead of one¹⁹⁰—is that they are able to structure household labor structure to conform to the family wage archetype. If a wife works at home and tends to domestic tasks, her husband, “freed from the need to spend time caring for children or preparing meals . . . may be able to command relatively higher wages.”¹⁹¹ The couple, in other words, “markets” its more profitable half.¹⁹² Employers may compound advantages that married couples experience through preferential benefits and opportuni-

187. Theodora Ooms, *Strengthening Couples and Marriage in Low-Income Communities, in Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage* 79, 80 (Alan J. Hawkins et al. eds., 2002).

188. See Sara McLanahan & Gary Sandefur, *Growing up with a Single Parent: What Hurts, What Helps* 72 (1994) (noting men become custodial parents usually only because the mother is “unwilling or unable” or “unfit” to do so).

189. See *Encyclopedia of Women and Gender: Sex Similarities and Differences and the Impact of Society on Gender* 356 (Judith Worell ed., 2001) (“The most common custody arrangement is for the mother to have sole physical custody of the child.”).

190. Almost sixty-four percent of married couples are dual earners. See U.S. CENSUS, 2005-2007 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES, “Employment Characteristics of Families.” Mar. 20, 2012, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_07_3YR_S2302&prodType=table.

191. Adam Thomas & Isabel Sawhill, *For Love and Money? The Impact of Family Structure on Family Income*, 2 THE FUTURE OF CHILD., Autumn 2005, at 57, 60 (2005) (citing GARY BECKER, A TREATISE ON THE FAMILY (1981) for his “wage premium” theory about household specialization of labor and household efficiency). The authors cite research that the wages of married men are as much as sixteen to thirty-five percent higher than those of unmarried men, due to incentives provided by marriage and to the “selection” of men with “greater earning power” into marriage. *Id.* (citing research by Robert Lerman).

192. Women workers earn on average 77.3% of what men earn. U.S. CENSUS, 2005-2007 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES, “Median Earnings in the Past 12 Months of Workers by Sex and Women’s Earnings as a Percentage of Men’s Earnings by Selected Characteristics.” Mar. 20, 2012, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_07_3YR_S2002&prodType=table.

ties, reflecting societal biases that married people are more committed, stable, and mature.¹⁹³

Overall, arguments that married couples are better poised to thrive in the U.S. labor market as a function of being married, rather than as a result of the benefit of two earnings, have the effect of reinforcing the durability of the family wage. Moreover, such arguments lend weight to society's heterosexist and patriarchal commitments to policies favoring men in the workplace and at home, as breadwinners and providers. An honest assessment of the incentives favoring married couples undercuts any logic underlying any claim that "illegitimacy" causes poverty; rather social and labor market policy—notwithstanding lack of affordable child care—disadvantages single people with children.

2. The Decline of Marriage

Welfare regulations have historically disfavored partnered recipients, married or otherwise. Regulations have either cut-off the benefits of coupled women—as one example, the "substitute father" rule¹⁹⁴—or created financial disincentives to coupling, though a majority of states have loosened restrictions under TANF.¹⁹⁵ In the eyes of proponents, "the government was stepping in to take the place of fathers, undermining their families, and creating financial incentives to break up or discourage marriage" under ADC.¹⁹⁶ In their estimation, ADC instituted an incentive structure antithetical to the family wage that stripped fathers of their status as breadwinners and citizen-earners.

Yet, the rise in extramarital births speaks to changes in society that have uprooted and marginalized marriage. Although marriage "once forcefully organized American life,"¹⁹⁷ single parenthood has been normalized across the socioeconomic spectrum. Overall, the extramarital birth rate in 2009 was 35.2%,¹⁹⁸

193. See Nock, *supra* note 173, at 19.

194. "Substitute father" rules denied welfare payments to children of a woman who "cohabited," either inside or outside her home, with a man who was construed by a state as a potential provider. See *generally* King v. Smith, 392 U.S. 309 (1968); see also Part IV, *supra*.

195. Under TANF, 36 states have fully, and another 11 partially, eliminated two-parent eligibility requirements; 22 states operate separate programs for two-parent families with state dollars. Nock, *supra* note 173, at 25.

196. Ooms, *supra* note 187, at 84.

197. Nock, *supra* note 173, at 14.

198. U.S. CENSUS, 2009 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, "S1301: Fertility." Mar. 20, 2012, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_09_1YR_S1301&prodType=table.

up from 29.5% in 1991 and 10.7% in 1971.¹⁹⁹ Looser sexual mores, the waning taboo on cohabitation, and the eradication of legal stigma regarding extramarital childrearing, have rendered “parenthood and marriage . . . much less predictably connected.”²⁰⁰ The availability of effective birth control since 1960 also decoupled sex and marriage, leading to increased sexual activity and delays in marriage.²⁰¹ An increase in women’s educational attainment has engendered further delay, leading to more extramarital pregnancies in tandem with greater hesitancy to enter into “potentially unstable marriage[s] undertaken solely to prevent an out-of-wedlock birth.”²⁰² The number of initially unmarried pregnant women who marry before childbirth has fallen from approximately sixty percent in the mid-1960s to twenty-nine percent in the early 1980s.²⁰³ Rising divorce rates in the second half of the twentieth century also added to the number of single-parent families.²⁰⁴ Currently, approximately forty-three percent of marriages are expected to end in divorce within fifteen years.²⁰⁵

199. 42 U.S.C. §601(6).

200. Nock, *supra* note 173, at 15-17. This decoupling is especially salient for low-income people who studies have shown no longer believe that childbearing and marriage “go together.” See Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, THE FUTURE OF CHILD., Autumn 2005, at 117, 128.

201. See June Carbone & Naomi Cahn, *The Power of the Pill*, THE HUFFINGTON POST (Mar. 22, 2010, 14:27 EST), http://www.huffingtonpost.com/june-carbone/the-power-of-the-pill_b_508590.html (last visited Aug. 25, 2010) (noting that the availability of the birth control pill has led to increasing stratification between the opportunities of more affluent women—who can afford the “Pill”—to delay childbirth, and poor and unmarried women, who are less likely to be do so); see also Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, THE FUTURE OF CHILD., Autumn 2005, at 33, 38 (“Among the less educated, early childbearing outside of marriage has become more common, as the ideal of finding a stable marriage and then having children has weakened, whereas among the better educated, the strategy is to delay childbearing and marriage until after investing in schooling and careers.”).

202. AMARU BACHU, U.S. CENSUS BUREAU, TRENDS IN PREMARITAL CHILDBEARING: 1930-1994 3-4 (1999), available at <http://www.census.gov/prod/99pubs/p23-197.pdf>.

203. *Id.* at 4. I was unable to locate more current information.

204. See Nock, *supra* note 173, at 14-15. Nock notes that divorce rates have come down in the last two decades.

205. Cherlin, *supra* note 201, at 36 (citing Matthew Bramlett & William D. Mosher, Nat'l Ctr. for Health Statistics, *Cohabitation, Marriage, Divorce and Remarriage in the United States*, VITAL HEALTH STATISTICS, July 2002, at 55, available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf (last visited Aug. 25, 2010)).

Despite the prevalence of single parenthood, disparities remain among different racial and socioeconomic groups. Poor women with children, including welfare recipients, do not marry as often as their wealthier counterparts.²⁰⁶ According to Census data, almost a third of poor women over the age twenty-five have had a child extramaritally, as compared with only five percent of non-poor women.²⁰⁷ Among women who identify as black or African American, the current extramarital birth rate is approximately two thirds for women of all ages—twice the rate of all women across race and age.²⁰⁸ Notwithstanding the changes that have “disrupted traditional marriage and family patterns,” the marriage movement has seized onto such statistics to demonstrate the “crisis” and to justify marriage promotion for low-income people.²⁰⁹

Stephen Nock positions the contemporary marriage movement in the long legacy of anti-black bias in social and family policy, evident in the movement’s adoption of arguments from Assistant Labor Secretary Daniel Patrick Moynihan’s 1965 report, *The Negro Family: The Case for National Action*.²¹⁰ “At the heart of the deterioration of the fabric of the Negro society,” Moynihan declared, “is the deterioration of the Negro family.”²¹¹ The report embraced earlier contentions that unwed motherhood was a “cause of family instability” for African Americans.²¹² Moynihan charged the “matriarchal family structure” of black America with “causing the black male to be displaced and de-

206. See Edin & Reed, *supra* note 200, at 118.

207. Edin & Reed, *supra* note 200, at 118. Edin excludes births to adolescents in this figure as almost all are non-marital.

208. U.S. CENSUS, *supra* note 198. This statistic reflects a decline in children born to married African American women, leading to a relative rise in the percentage born to single mothers. See DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 283 (1994) (demonstrating that any increase in the percentage of black children born to unmarried women is a function of a fall in the number of black women who married and a drop in the birth rate by married black women, not a rise in the rate for unmarried black women). The overall rate of extramarital childrearing for white women is 26.2%. U.S. CENSUS, *supra* note 198.

209. Nock, *supra* note 173, at 14.

210. See *id.* at 26; DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, OFFICE OF POL’Y PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), available at <http://www.dol.gov/oasam/programs/history/webid-meynihian.htm> (last visited Apr. 3, 2011).

211. MOYNIHAN, *supra* note 210, at ch. 2, *The Negro American Family*, 5, 5, available at <http://www.dol.gov/oasam/programs/history/moynchapter2.htm> (last visited Apr. 3, 2011).

212. ROBERTS (1997), *supra* note 66, at 15-16 (citing E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939)).

graded such that he was doomed to socioeconomic failure.”²¹³ Moynihan argued that matriarchy “imposed a crushing burden on the Negro male”²¹⁴ which eroded his capacity to exercise his rights as a “citizen-earner.” This explained the black community’s “inability . . . to follow in the footsteps of upwardly mobile whites and white ethnics,” who had subscribed to patriarchal norms of family formation.²¹⁵

As before, today’s marriage proponents find fault in the “matriarchal” structure of poor black households, made poor due to “their failure to establish links with husbands who could support them and their children.”²¹⁶ “The judgment that this type of independence is bad,” Dorothy Roberts writes, “is a normative decision which prefers encouraging women’s economic dependence on husbands over providing aid for child care directly to women or improving women’s own economic opportunities in combination with state subsidies.”²¹⁷ Black women’s independence, rather than a feminist badge, has “promoted Black male jealousy and irresponsibility.”²¹⁸ Moreover, it has denied women “‘the status of legitimate womanhood,’” characterized by wifely dependency and sexual virtue.²¹⁹

On the other side of the proverbial aisle are scholars who put marriage in economic perspective. Kathryn Edin argues that marriage is now a “luxury rather than a necessity, a status symbol in the true meaning of the phrase.”²²⁰ Marriage’s symbolic prominence augments poor-women’s pre-existing high expectations about matrimony. Such expectations, Edin claims, may create “barriers” to marriage among women who may not feel financially secure. The mothers with whom Edin spoke believed “marriage ought to be reserved” for those who can afford a “‘white picket fence’ lifestyle. . . a mortgage on a modest row home, a car and some furniture, some savings in the bank, and

213. SMITH, *supra* note 13, at 20-21, n.36.

214. MOYNIHAN, *supra* note 210, at ch. 4, *The Tangle of Pathology*, 29, 29, available at <http://www.dol.gov/oasam/programs/history/moynchapter4.htm> (last visited Apr. 3, 2011).

215. SMITH, *supra* note 13, at 20-21, n.36.

216. Onwauchi-Willig, *supra* note 158, at 1669-70.

217. ROBERTS (1997), *supra* note 66, at 223.

218. *Id.* at 15.

219. Onwauchi-Willig, *supra* note 158, at 1669 (quoting Catherine R. Albiston, et al., *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 485-86 (1995)).

220. Edin & Reed, *supra* note 200, at 121.

enough money left over to pay for a ‘decent’ wedding.”²²¹ Moreover, there is a “financial floor” below which marriage is viewed as impractical for some.²²²

Robert Staples corroborates Edin’s findings that “economic” considerations enter into marital decision-making, by examining how structural factors shape choices among African Americans. In 1965, more than three quarters of black families with children were headed by married parents.²²³ In 1985, only seventeen years later, the percentage being raised in two-parent households had dropped to one half.²²⁴ Staples argues the decline in marriage by women, and the attendant rise in children born outside of marriage, is not the “result of any devaluation of marriage *qua* institution but rather a function of limited choices to find [partners] . . . who can fulfill the normatively proscribed familial roles” of the family wage.²²⁵ In sum, when individuals do a “cost-benefit analysis” of marriage, single parenthood seems less costly than the prospect of a male partner who is unable to function as a “male breadwinner,” a reminder of how aggressively the family wage ideology circulates. Conversely, some men, particularly black men, may not benefit as much from the “wage premium” as whites and Latinos,²²⁶ suggesting that the “benefits” of marriage for men are not as universal as the patriar-

221. *Id.* at 122.

222. *Id.* Despite hesitancy on the part of some low-income women to marry, “studies uniformly show that marital aspirations are quite high among all Americans, including the economically disadvantaged.” *Id.* at 119.

223. Robert Staples, Changes in Black Family Structure: The Conflict Between Family Ideology and Structural Conditions 47 *J. MARRIAGE & FAM.* 1005, 1006 (1985). For a discussion on the increase in children born or raised in single-parent families since the 1960s, see generally Robert Rector et al., Heritage Foundation, The Effect of Marriage on Child Poverty (2002), available at <http://www.heritage.org/research/Family/CDA02-04.cfm> (last visited Aug. 24, 2010).

224. Staples, *supra* note 223, at 1006.

225. *Id.* at 1005.

226. Despite suffering from “racial discrimination and inequality, Latinos still have “a relatively higher earnings advantage over their wives than Black men.” Rebecca Glauber, *Race and Gender in Families and at Work: The Fatherhood Wage Premium*, 22 *GENDER & SOC’Y* 8, 12 (2008) (citing LESLIE MCCALL, *COMPLEX INEQUALITY: GENDER, CLASS, AND RACE IN THE NEW ECONOMY* (2001)).

chal ideal boasts.²²⁷ Put simply, marriage has “become a less desirable option for African Americans.”²²⁸

3. Marriage Promotion as Behavior Modification

Given the deliberations individuals make before marrying, and the overriding conviction that “a poor but happy marriage has virtually no chance of survival,”²²⁹ it is doubtful marriage promotion programs will make any significant dent in marital rates. Although low-income women see single parenthood as a socially acceptable and rational decision, marriage proponents regard it as an act of deviance. While some women might view marriage as an unattainable luxury, reformers instead see it as a necessity to end family poverty. And, finally, where some women saw in welfare an opportunity to achieve financial independence, reformers see only state dependency and “irresponsible reproduction.”²³⁰ Proponents locate fault in the recipient’s behavior—the choices not to marry and to nonetheless bear children.²³¹ The marriage movement has directed efforts “toward changing or ‘fixing’ individuals,” reflecting an “assumption that the root ‘problem’ lies within the person, not . . . society or environment.”²³²

This is more than a differing perspective; it is a clash between personal autonomy and the social regulation of recipients through governmental policy that sounds in moralistic tones about “virtue” and “good behavior.”²³³ If welfare “regulat[es] the poor,” then TANF’s marriage provisions, couched in dis-

227. See Glauber, *supra* note 226, at 9 (“[H]egemonic cultural constructions of masculinity, fatherhood, and breadwinning . . . lead employers to favor fathers over childless men.”). Wilson also argues that black men today “embrace the very role that slavery” and white culture “forced upon them,” that of predators, not protectors. WILSON, *supra* note 38, at 127.

228. *Id.* at 149.

229. Edin & Reed, *supra* note 200, at 122.

230. See generally Linda C. McClain, “Irresponsible” Reproduction, 47 HASTINGS L.J. 339 (1995-96).

231. See, e.g., Joel Schwartz, *PRWORA and the Promotion of Virtue*, in WELFARE REFORM AND POLITICAL THEORY 223-24 (Lawrence Mead et al. eds., 2007) (“PRWORA has significantly changed the goals of American welfare policy. Instead of aiming primarily to provide for the material needs of the poor, the act seeks to promote and encourage the good behavior of the poor, and the virtues or commendable habits that underlie good behavior. The expectation is that virtue and good behavior will reduce dependency and . . . increase the prosperity and well-being of the poor.”).

232. Nock, *supra* note 173, at 28.

233. See Schwartz, *supra* note 231, at 222-23.

course about the “crisis” of welfare dependency and “illegitimacy,” directly regulate poor women’s mothering and reproductive choices. The regulatory function of the welfare state inheres in its institutional biases—such as Social Security’s favor of one-earner households over two, or married over divorced couples—which in turn creates economic incentives or disincentives to create or maintain certain family formations.²³⁴ Sometimes, of course, incentives are supplanted by patently coercive methods, like “midnight raids” and other “rituals of degradation,” that underscore recipients’ degraded status.²³⁵

While the *King* decision would imply that such abusive methods are a relic of the past, Lawrence Mead continues to insist that incentives alone are insufficient. Instead, Mead argues the state’s coercive powers *should* be deployed, through mechanisms like workfare, to modify the behavior of the “non-functional.”²³⁶ “The challenge to welfare statesmanship is not so much to change the extent of the benefits,” Mead writes, “as to couple them with serious work and other obligations that would encourage functioning”²³⁷ “[T]he private sector” alone, Mead added, cannot provide the “supervision required to change the behavior of the poor.”²³⁸

For reformers, marriage and child support policies “civilize” or “domesticate” the single welfare mothers and “deadbeat dads” who are “cast as irresponsible citizens.”²³⁹ Angelina Onwauchi-Willig situates TANF policies in the historical use of marriage law to “coloniz[e] . . . unruly outsiders,” especially during the postbellum era.²⁴⁰ Under slavery, marriages were not legally recognized, though some masters sanctioned them because marriage deterred would-be fugitives and encouraged reproduction.²⁴¹ Despite the existence of informal marriages, it was not always feasible for couples to coalesce into nuclear households:

234. See generally Liu, *supra* note 113.

235. See FOX PIVEN, *supra* note 115, at 166.

236. MEAD (1986), *supra* note 9, at 8. “Non-functional” is to be understood as those who fail to conform to hetero-patriarchal and meritocratic ideals. For instance, Mead cites low SAT scores as one indicator of “non-functional[ity].” *Id.*

237. *Id.* at 3.

238. Brenda Cossman, *Contesting Conservatism, Family Feuds, and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 430-31 (2005) (quoting Lawrence Mead, *The Rise of Paternalism*, in *THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY* 10 (Lawrence Mead ed., 1997)).

239. *Id.* at 440.

240. Onwauchi-Willig, *supra* note 158, at 1653.

241. See ROBERTS (1997), *supra* note 66, at 52.

many married "abroad" on other plantations and couples were separated as a result of sale, subcontracting arrangements, or inheritance.²⁴² As a result, many households were composed of women and children in kinship "networks" that transcended genetic and marital ties.²⁴³ In spite of these pre-existing family formations, freed slaves were pressured after the Civil War to "comply with the free white model for normal familial relationships."²⁴⁴ One manifestation of this pressure was prosecution for failure to abide by marriage registration laws.²⁴⁵

Policymakers and the Freedmen's Bureau sought to impose marital relationships on freed people in order to "privatize responsibility" within the nuclear family unit.²⁴⁶ If, as Nock argues, "marriage was an institutional and societal arrangement that allocated responsibility for children,"²⁴⁷ servitude rendered marriage irrelevant—slavemasters' succor meant that children's subsistence needs were met regardless of parents' relationship status. Post-emancipation, former slave children were "technically illegitimate" and thus "the government's responsibility."²⁴⁸ By encouraging adherence to the family wage archetype, the government believed it could minimize its liability for the care of mothers and children; marriage would "reduce births of children for whom no male kin were obviously and legitimately responsible."²⁴⁹ Simultaneously, marriage would transform freedmen into "citizen-earners" and providers. As one Bureau agent urged, "Husbands must provide for their families By industry and economy, you can soon provide a real good home, and plenty of food and clothing for your family; and you should not rest until this is done."²⁵⁰

B. *Child Support Policies and "Paternafare"*

In 1994, Congress attempted to again privatize responsibility through a proposal to categorically eliminate support for children

242. *See id.* at 53.

243. *See id.*

244. Onwauchi-Willig, *supra* note 158, at 1656-57.

245. *See id.* at 1656.

246. *Id.* at 1653.

247. Nock, *supra* note 173, at 15.

248. Onwauchi-Willig, *supra* note 158, at 1659.

249. Nock, *supra* note 173, at 15.

250. Onwauchi-Willig, *supra* note 158, at 1659 (quoting DOROTHY STERLING, WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY 319-20 (1984)) (internal quotation marks omitted).

born extramaritally.²⁵¹ It proposed to ban benefits to children “born to young unmarried mothers [under the age of eighteen], to children for whom legal paternity has not been established, and to children whose parents received welfare at any time during the ten months prior to the child’s birth.”²⁵² It was estimated the paternity clause alone would have rendered almost twenty-nine percent of 1994 welfare recipients ineligible.²⁵³ While the Center on Budget and Policy Priorities castigated the clause as “far more” than “reform” and instead as an “abandon[ment]” of the “government’s side of [the] bargain” to “maintain a basic safety net under beneath poor children,”²⁵⁴ vestiges of this provision can be seen in PRWORA’s sanction of “family caps.” A family cap or “child exclusion” provision “trumps the principle” of calculating welfare benefits according to family size and, by design, is intended to discourage recipients from procreating.²⁵⁵ Households are paid a flat benefit amount, regardless of the number of children in the household or a new birth.²⁵⁶ These policies are based on the erroneous assumptions that welfare families are large²⁵⁷ and that welfare inhibits the “‘responsible’ reproduction . . . [that] takes place within marriage, the traditional ‘legitimate’ family form.”²⁵⁸ Under ADC, states applied for waivers to implement caps.²⁵⁹ Fifteen did so prior to the passage of PRWORA, the first in 1992.²⁶⁰ Though the language of PRWORA is silent on caps, as a result of devolution of control, nine additional states have implemented caps, bringing the total to twenty-four states as of 2004.²⁶¹

Child support policies have been and are still encapsulated in the family wage rubric. Such policies emerged alongside the consolidation of the “rhetoric of respectable masculinity that en-

251. See DAN BLOOM ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, *THE PERSONAL RESPONSIBILITY ACT: AN ANALYSIS* xiii (1994). The Act was vetoed by President Clinton in early 1996. See McClain, *supra* note 230, at 341.

252. BLOOM, *supra* note 251, at xiii.

253. *Id.* at xiv.

254. *Id.* at viii.

255. SMITH, *supra* note 13, at 148.

256. See Levin-Epstein, *supra* note 166, at 1.

257. See BLOOM, *supra* note 251, at xv (“Some seventy-three percent of AFDC families . . . include two or fewer children. Families receiving AFDC are no larger than other families with children . . .”).

258. McClain, *supra* note 230, at 345.

259. See Levin-Epstein, *supra* note 166, at 3.

260. *Id.* at 2. New Jersey was the first state to implement a cap. See *id.*

261. SMITH, *supra* note 13, at 152.

hanced the responsibilities of male citizenship” and legitimated “calls for a family wage for men.”²⁶² Policies roped men into provider roles; states began “chasing down and prosecuting errant husbands who refused financial support to wives and children in order to coerce them into keeping their part of an increasingly formal bargain.”²⁶³ Child support, like “substitute father” regulations, enabled the government to assign men responsibility for “unclaimed” children.

PRWORA’s child support provisions underscore the ambiguity in Congress’ commitment to marriage. After all, a recipient can comply with TANF stipulations by identifying the father of her child—it is not necessary to marry him. There are several ways to rationalize the Act’s willingness to contemplate a regime that, in its current instantiation, relies on the lack of marriage relationship. While politicians and reformers heartily endorse marriage, they cannot, under constitutional doctrine safeguarding the rights of individuals to intimate association and procreation outside of marriage, actually compel it.²⁶⁴ Perhaps child support policies are a fallback for those who want to privatize dependency. At a minimum, the monthly child support payment requires men to assume financial responsibility, if not parental roles.

Alternatively, the “fatherhood movement,” the marriage movement’s significant other, provides insight into reformers’ agenda with regard to child support, as well as child support’s resonance with the family wage in the context of TANF more generally. The movement—which attributes the same ills to the absence of fathers as to “illegitimacy,” or the presence of mothers²⁶⁵—is unified by an “uneasiness about women forming

262. KESSLER-HARRIS (2001), *supra* note 34, at 26-27.

263. *Id.* at 27.

264. See *Griswold v. Connecticut* 381 U.S. 479, 485-86 (1965) (holding a law prohibiting the use of contraceptives by married couples to violate the right to privacy in the “marital bedroom”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (expanding *Griswold* to recognize individual right to control reproduction regardless of marital status); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing an individual’s right to decide, free from government interference, whether to continue or terminate a pregnancy). McClain argues these decisions “afford protection to reproductive liberty outside the marital family . . . [and] make it legally permissible to separate heterosexual activity . . . from reproductive consequences.” McClain, *supra* note 230, at 365.

265. See, e.g., Wade Horn, *Promoting Marriage as a Means for Promoting Fatherhood*, in *REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY: AN AGENDA FOR STRENGTHENING MARRIAGE* 101-02 (Alan J. Hawkins et al., eds., 2002).

families without men,” men “render[ed] unnecessary” by ADC’s subsidization of female-headed families.²⁶⁶ The movement seeks to improve child outcomes through reinforcing the rights of men—what Anna Marie Smith calls “patriarchal moral rehabilitation”—to fulfill stereotypical gender roles.²⁶⁷ Smith locates welfare child support, or “paternafare,” alongside pro-marriage and divorce prevention measures which assert that the “male breadwinner who ‘pays the bills’ ought to have the most authority in the family unit . . . regardless of whether men actually do make a fair contribution . . . to caregiving.”²⁶⁸

While the fatherhood movement stresses the more wholesome aspects of male parenting, Smith argues that buttressing fathers’ rights serves juridical functions. Such efforts “pave the way for better child support collections” by exposing “unruly bachelors” to the “disciplining impact of patriarchal obligation.”²⁶⁹ The fact that support payments do little to alleviate poverty or assist in recipients’ care-taking efforts—in most states, much of the money collected is assigned to the state as “reimbursement”²⁷⁰—supports a more critical interpretation of child support under TANF. Moreover, the costs of child support enforcement have risen 119% from 1994 to 2001.²⁷¹ Not only are states “falling into the red” as a result, but the federal government, which defrays states’ administrative costs, ran an enforcement deficit of \$2.252 billion in 2002.²⁷² That legislators have reauthorized TANF despite these losses underscores the reality that ideology, not financial efficacy, is driving policymaking.

TANF’s child support regime is “the perpetuation of a long-standing policy tradition in which State intervention into the inti-

266. McClain, *supra* note 230, at 385.

267. See SMITH, *supra* note 13, at 93. For instance, Wade Horn, founder of the National Fatherhood Initiative and Assistant Secretary for the ACF under President George W. Bush, see HEALTHY MARRIAGE INITIATIVE 2002-2009: AN INTRODUCTORY GUIDE, *supra* note 15, at 4, stresses the importance of fathers’ engagement in “authoritative parenting” to child outcomes. The practice of “authoritative parenting” includes stereotypically fatherly activities such as “provid[ing] explanations for rules, monitor[ing] academic performance, help[ing] with homework . . . and disciplin[ing] children.” Horn, *supra* note 265, at 103.

268. SMITH, *supra* note 13, at 93, 126.

269. *Id.* at 179.

270. See 42 U.S.C. § 608(a)(3)(A); SMITH, *supra* note 13, at 98, 271. In half of states, payment is seized in full, in another 17, mothers receive a \$50 per month, and in only four states do recipients receive more than \$50. SMITH, *supra* note 13, at 122.

271. *Id.* at 272 (figures in adjusted dollars).

272. *Id.* at 272, 137.

mate lives of the poor . . . [is] at the core of poverty policy.”²⁷³ The policies have historical antecedents, including a 1950 ADC amendment requiring case-workers to notify law enforcement if a recipient was abandoned by a “living male partner” and requiring recipients to assist in searching for the father.²⁷⁴ The 1974 Child Support Act first required that parents assign rights to payments to states, though recipients would receive the remainder after the states determined they were fully compensated.²⁷⁵ Since 1975, recipients have been required to identify the father of her child and assist in efforts to collect support.²⁷⁶

PRWORA enhanced many practices codified in earlier welfare support regimes, including allowing states to keep a larger share of any child support payments collected than under ADC.²⁷⁷ New elements include a state’s right to sanction recipients who do not make “good faith efforts” to comply with child support measures.²⁷⁸ A sanction can include reducing a mother’s benefits, cutting the family off altogether, or delaying payment of benefits until the mother has “initiated a support action” against a putative father.²⁷⁹ States may also receive bonuses for high collection rates and, conversely, may see federal funding cut if they do not establish paternity for ninety percent of covered children.²⁸⁰ These provisions give states the power of the stick and compelling reasons to use it.²⁸¹

The child support provisions have been extraordinarily punitive for women. In 2001, approximately 22.2% of TANF case closures resulted from recipients’ failure to pass the “performance test” of cooperation with child support rules.²⁸² While cooperation rates are still rather high, Smith speculates that women may be avoiding TANF because of “paternafare,” citing the curious fact that some very poor households who would be eligible

273. *Id.* at 94.

274. *Id.* at 96 (referencing the Notification of Law Enforcement Officers amendment to the SSA). A 1974 amendment ordered each state to create a child support agency tasked with locating parents, establishing support orders, and collecting payments, and required recipients to cooperate with agency efforts. *See id.* at 98.

275. *See id.*

276. *See id.* at 99.

277. Under ADC, states were required to provide a \$50 per month “pass-through” from payments collected which PRWORA made optional. *Id.* at 123.

278. *Id.* at 119-21.

279. *Id.* at 120-21.

280. *See id.* at 119.

281. *See id.*

282. *Id.* at 122.

for TANF receipt are failing to enroll.²⁸³ Cooperation comes with risks, though. Recipients may be forced to name a violent or abusive parent and face the possibility of retribution; or, in naming a present and active father, gamble that he does not flee. These risks suggest the government does not have the best interests of children in mind. The costs of coercion are also high for men, as President Bill Clinton's address to Congress after PRWORA's passage indicates:

This bill . . . continues the most sweeping crackdown on deadbeat parents in history. If every parent paid the child support they should, we would move 800,000 women and children off welfare immediately . . . [I]f you don't pay [what] you owe, we will garnish your wages, take away your drivers license, track you across state lines and, as necessary, make you work off what you owe.²⁸⁴

In essence, the government will criminalize poor fathers,²⁸⁵ subject them to surveillance and possibly even debt slavery in order to compel them to meet their provider obligations.²⁸⁶

Both TANF's marriage and child support policies underscore the degree to which allowing intrusion into what is private for most citizens—the home and family life—is the *quid pro quo* for welfare receipt. In her failure to meet the obligations of citizenship, to support herself or to rely on a male provider, the welfare mother is rendered an unfit citizen. Due to her failure to repress her untamed sexuality, she is both an unfit citizen and woman. As a result of her “choice” to bear children extramaritally, thereby propagating her “pathological” lifestyle, she is an unfit parent. As a result, she has sacrificed her right to reproductive autonomy and exposed herself to the patriarchal authority of the state; she has become the pauper who has forsaken the rights of citizenship.

C. *Finding the Family Wage in Workfare*

TANF has become synonymous with “workfare.” Advocates on both sides of the ideological spectrum were able to coa-

283. *Id.* at 121.

284. *Id.* at 117 (citing Statement by the President, 31 July 1996, 142 Congressional Record S9360 (1996)).

285. See SMITH, *supra* note 13, at 125 (“Many of the men targeted as payers do not . . . hold living-wage jobs; many are unemployed or disabled, others are incarcerated, and still others can only find minimum-wage . . . or seasonal work.”).

286. Heeding Clinton's words, in 1998 Congress made it a felony to cross state lines to evade child support and a crime to willfully support a child in another state with the Deadbeat Parents Punishment Act. See *id.* at 120.

lesce around work mandates, with conservatives touting work as the antidote to "dependency" and feminists supporting work as a vehicle for women's advancement. However, rhetoric aside, a closer examination of PRWORA's language and its federal and state implementing regulations and rules demonstrate workfare's consonance with the dictates of a racialized and patriarchal family wage ideology. Ultimately, despite appearances to the contrary, workfare incentivizes a traditional "breadwinner/caretaker" division of labor.

There is a history of promoting or requiring work for means-tested welfare recipients which gained traction in the late eighties. Since the early 1960s, proposals have been floated which allowed recipients to earn wages while collecting partial benefits. Federal welfare regimes mandating work were institutionalized in 1988 with the Family Support Act, the "primary objective" of which was to "link poverty with the lack of a work ethic."²⁸⁷ Although the Family Support Act promoted wage work, it permitted training and education to count as "work activities."²⁸⁸ PRWORA mandated stricter policies requiring thirty hours weekly work activity²⁸⁹ by all single adult recipients by 2000²⁹⁰ and conditioned federal block grant funding on states' attainment of minimum participation rates.²⁹¹ The duration and extent to which recipients can participate in training and educational activities not "directly related to employment" has been curtailed under TANF, forcing many to forego self-promotional opportunities for dead-end jobs in order to retain benefits.²⁹² States have

287. Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 110 (1995).

288. Boris, *supra* note 2, at 39.

289. "Work activities" include unsubsidized unemployment; subsidized private sector employment; subsidized public sector employment; work experience if private sector employment is not available; on-the-job training; job search and job readiness assistance; community service programs; vocational educational training (not to exceed twelve months per person); job skills training directly related to employment; education directly related to employment, if recipient as not achieved high school equivalency; attendance at a secondary school or course leading to completion of a GED; provision of child care services to another person participating in a community service program. 42 U.S.C. § 607(d)(1) *et seq.* Two-parent families are required to work thirty-five hours per week. 42 U.S.C. § 607(c)(1)(B).

290. 42 U.S.C. § 607(c)(1)(A).

291. 42 U.S.C. § 607(a)(1)-(2).

292. *See* 42 U.S.C. § 607(d)(8)-(10). The first twenty hours per week of work activity cannot be fulfilled by participation in job skills training directly related to employment; education directly related to employment; or attendance at a secondary school or course leading to completion of a GED. 45 C.F.R. § 610(b).

been allowed to create even more stringent policies. As a result of work requirements, states shifted expenditures from cash benefits—cutting money from the benefit disbursements allocated directly to recipients—to “work supports” such as child care, transportation, tax credits, and, finally, to fund marriage initiatives.²⁹³

Unsurprisingly, the number of working recipients has steadily increased since 1996. In combination with those who have dropped out or reached the five-year cut-off, rolls have dropped dramatically—but that does not ensure former recipients have achieved “self-sufficiency,” one of the catchphrases of welfare reform—through wage work. Evidence shows wages hovered in the twentieth percentile for women in 2002, around \$8.00 per hour, insufficient to put a single parent with two children working full-time above the poverty line.²⁹⁴

Of the twelve permissible work activities for welfare recipients, not one concerns carework or familial duties. TANF’s compulsory work provisions appear to repudiate the family wage ideology by disqualifying recipient’s home-based carework, and conversely, by stipulating that women work for wages. Sylvia Law argues the devaluation of carework is endemic to means-tested welfare and embedded in the bifurcated welfare state:

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.²⁹⁵

However, the devaluation of carework is consistent with the foregoing construction of the family wage as a race- and class-exclusive ideology: cultural attitudes maligning caregiving efforts by poor women have coexisted with the glorification of carework by white and middle-class women—a juxtaposition especially salient when one considers African American recipients. Criticism of welfare mothers became even more trenchant in the eighties, as

293. See GOLDEN, *supra* note 6, at 10.

294. *Id.* A full-time worker earning \$8.00 per hour, working thirty-five hours per week, for fifty weeks of the year would gross \$14,000 annually, below the \$15,020 required for a three-person family by the 2002 Health and Human Services Federal Poverty Guidelines, available at <http://aspe.hhs.gov/poverty/02poverty.htm> (last visited Apr. 3, 2011).

295. Sylvia Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1251 (1983).

welfare opponents mobilized anti-black stereotypes about sexuality, illegitimacy, and work ethic, in addition to the dependency refrain.²⁹⁶ The stay-at-home welfare recipient was blamed for “transmit[ing] a pathological lifestyle to [her] children, perpetuating poverty and antisocial behavior.”²⁹⁷

While the denigration of full-time mothering has historically served disciplinary labor market functions,²⁹⁸ the status of domestic work remains contested terrain for feminists given the centrality of work to questions of citizenship and standing. Nancy Fraser's schema illustrates two paradigms under which feminists have debated the possibility of women's equal citizenship in light of the feminization of carework. The “Caregiver Parity Model” re-envisioning “women's work” while the “Universal Breadwinner Model” promotes wage work for women.²⁹⁹ With regards to the former, some have attempted to re-classify home duties as unpaid work that should be compensated. The “aim is not to make women's lives the same as men's but, rather, to make ‘difference costless’” by placing informal carework on par with market labor through allowances, single-payer benefits, and “flextime,” which allows women to cycle through the workplace as necessary.³⁰⁰ In contrast, Breadwinner supporters argue making the home the “primary locus for redistributive efforts” is a product of vestigial family wage thinking.³⁰¹ Vicki Schultz contends promoting women's wage work is critical to the creation of equal citizenship because “we are what we do for a living,”³⁰² or, in other words, “women, too, can be citizen-workers.”³⁰³ Transcending gendered labor market segregation, a legacy of family wage ideology deeming women “inauthentic workers,” requires democratizing access to “equal work.”³⁰⁴

296. See ROBERTS (1997), *supra* note 66, at 16; GILENS, *supra* note 148, at 156-58, 168-77.

297. ROBERTS (1997), *supra* note 66, at 16.

298. See Part III(B), “The Creation of Aid to Dependent Children,” *supra*.

299. See ch. 2, *After the Family Wage: A Postindustrial Thought Experiment*, 41, 41-66, in NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* (1997). Fraser ultimately dismisses both models instead arguing that to achieve equity, the welfare state must “make women's current life-patterns the norm for everyone,” suggesting a framework whereby all can “combine breadwinning and caregiving.” *Id.* at 61.

300. *Id.* at 55-56.

301. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1884 (2000)

302. *Id.* (“Work is a site of deep self-formation.”).

303. FRASER, *supra* note 299, at 51.

304. Schultz, *supra* note 301, at 1885.

Noah Zatz makes explicit the overlap between feminists of the Breadwinner ilk and workfare advocates: “Insofar as work-focused welfare reform endorses ‘universal employment’ by ‘all able-bodied adults,’ it helps to dismantle the portrayal of women as ‘inauthentic workers’ whose proper place” is at home.³⁰⁵ Also, as a whole, the pro-work camp tends to devalue carework as antithetical to “liberat[ion] and self-fulfill[ment].”³⁰⁶ For workfare critics, this devaluation projects middle-class white women’s experience onto poor women who have always worked “and especially working-class black women, few of whose men earned a family wage.”³⁰⁷

Zatz also argues that the “class parity analysis”—which “requires from transfer recipients . . . the level of work exhibited by the population as whole”—lends further credence to arguments in favor of workfare.³⁰⁸ The analysis holds just as the majority of women now work and “work is the norm,” women on welfare should likewise be employed.³⁰⁹ In debunking the assumptions and quantitative methods underlying class parity, Zatz reveals that workfare generally requires long-term single-parent recipients to “out-work” “typical” mothers.³¹⁰

Secondly, and of importance here, Zatz shows that workfare rules³¹¹ regarding work hours permit couples—who, unlike under ADC are now generally eligible for assistance—to maintain “the stereotypical breadwinner/caretaker division of labor” of the family wage. PRWORA requires “only one parent in two-parent families to be working, thus allowing housewifery in two-parent

305. Noah Zatz, *Revisiting the Class Parity Analysis of Welfare Work Requirements*, 83 SOC. SERV. REV. 313, 317 (2009), available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/Faculty/Zatz-Revisiting%20Class%20Parity.pdf> (citing Carole Pateman, *Another Way Forward: Welfare, Social Reproduction, and a Basic Income*, in WELFARE REFORM AND POLITICAL THEORY 35 (Lawrence Mead et al. eds., 2007)).

306. Boris, *supra* note 2, at 45.

307. *Id.*

308. Zatz, *supra* note 305, at 314.

309. *See id.* at 314 (citing Maria Cancian, *Rhetoric and Reality of Work-Based Welfare Reform*, 46 SOC. WORK 309, 309 (2001)).

310. *See id.* at 315. Zatz undermines the statistical analysis used by class parity advocates to show “consistency between welfare mothers and other mothers,” demonstrating that seventy-five percent of women do not work the thirty hours per week required of TANF mothers in four of seven years their child is between the ages of six and twelve. *Id.* at 317.

311. The rules under discussion here apply only to households without a child under the age of six. *See id.* at 329.

families receiving assistance.”³¹² The federal rules only mandate five additional hours from couples than singles and allow the couple discretion over how to split the hours.³¹³ If a two-parent household uses child care subsidies, the household is now required to work fifty-five total hours, presumably because the second parent is no longer encumbered with the same childcare duties.³¹⁴ In contrast, a single parent must work thirty hours, while juggling caretaking and housework, meaning she may work more than a coupled recipient and, unlike her, is not permitted “to prioritize care over employment.”³¹⁵

Given the devolution of TANF, states are permitted to craft more onerous rules. A state could theoretically require both adults in two-parent households to each work thirty hours, for a total of sixty. Zatz’s research shows this is not the case: state rules are, on the whole, congruent with federal ones, and thus in a majority of states, one of two parents is allowed to work less than the thirty hours required of a single parent.³¹⁶ In almost half the states, a household can comply with rules even if one parent does not work.³¹⁷ A significant number of states only require five more work hours for a couple than an individual, thirty-five versus thirty; only three states operationalize a bona fide Breadwinner model where total work hours required are equal regardless of whether there are one or two household adults.³¹⁸ Thus, in the majority of states, “The two-parent work requirements are . . . low enough to be fulfilled entirely by one full-time breadwinner.”³¹⁹

Though TANF’s rules are gender-neutral—they are silent on which parent should work³²⁰—the foregoing discussion demonstrates how the rules allow couples to divide their labor according to the stereotypical masculine and feminine tasks of wage work and caregiving, respectively. TANF’s work rules lessen the “burden” of workfare on women with partners or husbands, perhaps incentivizing marriage and two-parent family formation

312. Orloff, *supra* note 83, at 108 (citation omitted).

313. 42 U.S.C. § 607(c)(1)(B) (requiring thirty-five total hours from couples); Zatz, *supra* note 305, at 322.

314. 42 U.S.C. § 607(c)(1)(B); *see* Zatz, *supra* note 305, at 322.

315. Zatz, *supra* note 305, at 339.

316. *See id.* at 324, 326.

317. *See id.* at 324.

318. *See id.* at 325.

319. *Id.*

320. *See* 42 U.S.C. § 607(a) *et seq.*

among recipients. In so doing, the rules subscribe to the notion that “marital stability, and the family itself, depend upon male economic dominance” in accord with the family wage, an assumption that, in turn, reinforces labor market policies privileging male workers.³²¹ This suggests that any possibility Breadwinner advocates see for more equitable citizenship for welfare recipients through work is circumscribed by TANF’s appeal to patriarchal norms. In fact, this may be another explanation for the allocation of only \$150 million annually for marriage promotion—it is more efficient to weave economic inducements that promote marriage into the very fabric of welfare rules.

D. *The Neoliberal Nineties*

In the nineties, the political climate was characterized by a neoliberal fervor to downsize, privatize, and moralize: “a leaner, meaner government (fewer social services, more ‘law and order’), a state-supported but ‘privatized’ economy . . . and a moralized family with gendered marriage at its center.”³²² The fervor was unchecked by left-leaning forces, who arguably were co-opted by Clinton’s “third way.”³²³ Yet in the same decade Congress gutted means-tested welfare in favor of limited benefits, workfare, and paternafare, and marriage, it oversaw the expansion of the Earned Income Tax Credit (EIC), a progressive, redistributive mechanism. The seeming ideological dissonance between those two statutory regimes can, however, be reconciled in their shared embrace of a gendered vision of work.

The political strains that coalesced in welfare reform’s marriage and workfare components were broad. Social conservatives saw extramarital childbearing as a sign the welfare state was breaking down the two-parent family, society’s moral basis, and sought to reverse the decline by promoting heterosexual marriage and responsible fatherhood, thereby reinstating traditional gender roles.³²⁴ Fiscal conservatives, libertarians, and neo-liberals, concerned with welfare’s costs but more concerned with the loss of economic initiative through “over-reliance on the state,” sought to restore the “state’s distance from the family” by “transferr[ing] the public responsibility” for carework “back to the

321. Law, *supra* note 295, at 1251-52.

322. LISA DUGGAN, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 10 (2003).

323. *See id.* at 9.

324. *See* Cossman, *supra* note 238, at 428-30.

family.”³²⁵ Liberals expressed both “concern with the marital choices made by the poor” and judged “marital status an appropriate objective to be fostered by public policy.”³²⁶ “[A]dvocates for inner-city development and minority communities,” troubled by black male unemployment, joined the “fatherhood” bandwagon’s push for traditional family roles.³²⁷ Moving “right on ‘wedge issues,’” the Democrats, “ceased to see the protection of welfare as an important goal.”³²⁸ Feminists and equality advocates—presumed to speak for all women, including welfare mothers—acquiesced to workfare, given their consensus that work “furthers women’s prospects”—and also their disidentification with poor black recipients.³²⁹ All sides were able to unite behind an agenda committed to privatizing “dependency within the family”³³⁰ through a prescription of marriage, work, and a reduction in extramarital births.³³¹ Welfare reform can be thus characterized “as a fusion of the neoliberal urge to privatize and the hard Right’s urge to moralize,” and likely, liberal complacency, as well.³³²

The success of EIC also rested on an ideological consensus that fed into the centrality of work to citizenship, making it easier both for Democrats to push and for the Right to swallow, even though it is “functionally equivalent to a means-tested welfare benefit.”³³³ EIC would “make work pay” by providing tax returns to low-income workers with children. EIC shared with TANF a commitment to wage work: “Poverty would be fought not with higher benefits or expanded coverage but by getting everyone—including mothers—into employment”³³⁴

Zatz’s analysis shows that EIC, yet again, comports with the family wage ideology, reflecting the “breadwinner priority”

325. *Id.* at 436. Reformers decried ADC’s cost despite the fact that means-tested welfare constituted only three percent of total U.S. welfare state expenditures in 1996. In comparison, social insurance spending (Social Security, Medicare, public employee retirement, unemployment insurance, veterans’ programs, and worker’s compensation, among other expenditures) accounted for fifty-five percent of all social welfare spending. WARD, *supra* note 2, at 136.

326. FINEMAN, *supra* note 287, at 109.

327. SMITH, *supra* note 13, at 179.

328. Orloff, *supra* note 83, at 102, 104.

329. *Id.* at 110, 104.

330. Cossman, *supra* note 238, at 416.

331. *See* Nock, *supra* note 173, at 27.

332. Platt, *supra* note 155.

333. Zatz, *supra* note 305.

334. Orloff, *supra* note 83, at 111.

structure of TANF. In a married-parent household, wages, like hours, are summed, and thus EIC is “insensitive to married couples division of earnings.”³³⁵ In other words, a couple who divides its labor along the breadwinner/caretaker paradigm receives the same tax credit as a single earner with identical earnings and number of children. This demonstrates that tax policy, like welfare or Social Security, similarly favors particular family formations.³³⁶

VI. CONCLUSION: THE QUICK FIX

Ultimately, perhaps the reason marriage figures so prominently in the language of PRWORA and TANF, as well as in the ambient discourse, is because marriage promotion policies are “relatively cheap . . . and suggest that marriage is an easy answer to poverty.”³³⁷ Rather than spend resources and political capital on anti-poverty policies that mobilize the welfare state’s powerful redistributive capacity, raise the floor on wages, working conditions, and associational rights, or invest in educational opportunities, Congress has time and again defaulted to hackneyed “quick fixes.” Instead of a robust reform agenda, marriage promotion, in conjunction with low-wage work and child support enforcement, was proffered as a legitimate response to institutional poverty and the “scourge” of “dependency.” These policies subscribe to the heteronormative and racialized family wage ideology—despite decades of struggle by the civil rights and feminist movements—that a woman’s place is in the home, so long as her husband’s is in the workplace. What has ensued from PRWORA is a wholesale abdication of responsibility by the welfare state for the welfare of poor women and children.

The role the social welfare state plays in determining the color and character of recipients’ standing in society suggests that “welfare rights” is not simply a struggle of the past that can be consigned to the archives. Rather the struggles to achieve equal citizenship are ongoing for those receiving welfare and those who are not; for those at home and those in the workplace; for those

335. Zatz, *supra* note 305, at 328. Note that tax policy does not allow cohabitating partner or parents to file jointly, only married couples.

336. Given that EIC emerged from the welfare backlash of the sixties and seventies, it should be less surprising that what is couched as a tax regime looks a lot like other welfare state policies. See GOLDBERG, *supra* note 5, at 245.

337. Julia M. Fisher, *Marriage Promotion Policies and the Working Poor: A Match Made in Heaven?* 25 B.C. THIRD WORLD L.J. 475, 497 (2005).

who are married and those who are single; for those who are parents or caretakers and those who are not; for women and, yes, for men, too. Recognizing the way that the family wage ideology mediates our own conceptions of what it means to be a worker—and what it means to be “on welfare”—is only the proverbial beginning. The family wage persists not because of the personal choices families make to balance wage work and caregiving; it persists because of social welfare policies that magnify gender difference, distort meaningful attempts to achieve economic parity, and marginalize carework. The burdens of these policies fall heaviest on welfare recipients, poor women and women of color and their children, who continue to suffer the indignities of welfare as “dependency,” rather than an entitlement. But they are not alone—the standing of all women in our society is compromised by an ideology that conceives of our status as derivative. To the extent that feminists and advocates for gender equality ignore the degree to which the current means-tested welfare regime undermines recipients’ financial independence and personal autonomy, we forfeit significant opportunities to transcend the family wage ideology—and its legacy of white, patriarchal hegemony—in all welfare state programs. Only in recognizing the true import of the family wage can we begin to conceive of a robust welfare regime that truly supports and sustains parents and children, in whatever family formation they choose.