

WHAT WELFARE REQUIRES FROM WORK
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Work is central to much of life and to many areas of law, including recent transformations in the American welfare state. Despite this pervasive importance, work is notoriously difficult to define, and yet doing so is essential to the design and functioning of a work-based welfare system.

This Article provides the first comprehensive analysis of how to define work for the purpose of satisfying welfare work requirements. Work should be understood contextually, its meaning shaped by the underlying normative justifications for linking work to transfer eligibility. Starting from this premise, the Article probes what should count as work according to three major types of justification for work requirements: those emphasizing self-sufficiency, work's non-economic benefits, and reciprocity. Each work rationale leads to distinct and often conflicting work definitions. Deciding which to adopt requires hard choices between competing normative approaches to work and poverty. This conflict belies the superficial consensus in favor of work requirements in the abstract.

Thinking systematically about work in context also opens up new critical perspectives on particular activities. On all accounts, work is less easily identified with paid employment than commonly assumed, something borne out by the actual practices of work-based programs. To illustrate this, the Article concludes by sketching a new avenue for feminist analysis of family caretaking as work, one that exploits rather than rejects a link between work and self-sufficiency.

INTRODUCTION

What is work?

The question has long occupied philosophers, historians, anthropologists, and many others. Work is worth studying because of its familiar importance to how the economy is organized, how individuals pass the hours of the day, how one takes up a role in a community, and how life's projects are pursued and experienced.¹ It is no surprise, then,

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1. See LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 12 (1986); Carole Pateman, *The Patriarchal Welfare State*, in *DEMOCRACY AND THE WELFARE STATE* 231, 252, 258 (Amy Gutmann ed., 1988); Vicki Schultz, *Essay, Life's Work*, 100 COLUM. L. REV. 1881, 1885–6 (2000).

that work plays a central role in many areas of law. When law gives significance to an activity's status as "work" or an individual's status as a "worker," it inevitably engages in a practice of classification. Legal institutions must decide what work is and who is working.

This Article explores broad questions about work's nature by examining the meaning of work in the welfare reforms that have swept the United States since the early 1990s. In this period, work emerged as the centerpiece of a much touted public policy consensus, one cemented by President Clinton's endorsement of "ending welfare as we know it" while "making work pay."²

To design and implement the resulting programs, policymakers and administrators have had to decide what counts as work in some detail. Abstract endorsements of work cannot tell a caseworker when to sanction a public assistance recipient for violating a work requirement, nor can they tell higher-level administrators which services to mandate in order to facilitate or test compliance. Is self-employment work? Is schoolwork work? Is volunteer community service work? Does the answer change if the volunteer is paid?³ The answers to these practical questions make all the difference in the lives of low-income individuals whose access to government services and support turns on their work status.

Answering these questions also illuminates the normative commitments undergirding work's structural role in contemporary antipoverty programs. Deciding whether particular definitions of work faithfully implement, cleverly evade, or hopelessly muddle the underlying work mandate calls forth further specification of that mandate's purpose. This specification can, in turn, provide some principled basis for revising in how work-based policies are designed and implemented.

Despite the practical and theoretical importance of clarifying what work is, the scholarly literature on work-based welfare reform largely neglects this question.⁴ Instead, the literature generally starts from the premise that work means paid employment, and it proceeds from there to debate the morality, the effectiveness, and the need for work-based policies.⁵

2. See Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange With Reporters, 2 PUB. PAPERS 1325, 1325–28 (Aug. 22, 1996) [hereinafter PRWORA Signing Remarks] ("After I sign my name to this bill, welfare will no longer be a political issue."); Ron Haskins, *Liberal and Conservative Influences on the Welfare Reform Legislation of 1996*, in FOR BETTER AND FOR WORSE: WELFARE REFORM AND THE WELL-BEING OF CHILDREN AND FAMILIES 9, 17, 20 (Greg J. Duncan & P. Lindsay Chase-Lansdale eds., 2001); Hugh Heclo, *The Politics of Welfare Reform*, in THE NEW WORLD OF WELFARE 169, 196–97 (Rebecca M. Blank & Ron Haskins eds., 2001); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 164 (1996); Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1, 3 (2003).

3. See Eleanor Brown, *The Scope of Volunteer Activity and Public Service*, LAW & CONTEMP. PROBS., Autumn 1999, at 17, 18 (discussing "stipended volunteering").

4. Amy Wax's writing is a partial exception, though the necessity of defining work is something she poses more as a challenge to critics of current policies than as a task she takes on herself. See Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL'Y & L. 477, 484 (2001); Wax, *supra* note 2, at 30–33; see also Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19 (1998) (comparing permissible work activities under AFDC and TANF).

5. See Wax, *supra* note 2, at 2–3; LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 48, 69 (1992); EDMUND S. PHELPS, REWARDING WORK: HOW TO

This Article is the second of two that interrogate this premise by analyzing with particularity what activities satisfy the work requirements attached to means-tested transfer programs. The first paper⁶ studied the existing legal definitions of work in the centerpieces of work-based welfare reform: the Temporary Assistance for Needy Families (TANF) program⁷ and the Earned Income Tax Credit (EITC).⁸ This Article approaches the question from the opposite direction, exploring how work *should* be defined, according to leading rationales for work requirements.

My previous research demonstrates the need to think more systematically about how to define work. Notwithstanding confident declarations that “work is work” or that paid employment is “real work,”^{8.25} what counts as work varies dramatically across programs.^{8.5} Some state TANF programs focus exclusively on immediate paid private employment or unpaid “work experience” providing public services like cleaning parks (also known as “workfare”). Others emphasize a variety of professional services designed to improve future employability, including job training, education, and rehabilitative services addressing disability, substance abuse, or domestic violence. Still others allow similar activities under the rubric of “community service” and include unpaid care for sick or disabled family members, grandchildren, or foster children. Notwithstanding these varied approaches to unpaid work, TANF programs collectively differ from the EITC, which includes only paid activities as work.⁹

Real decisions are being made, and will continue to be made, among competing approaches to work, notwithstanding the abstract political consensus around work requirements. As I argue in Part I, making these choices in a principled manner requires a “purposive” approach to constructing a legal definition of work, one that relies on the underlying justifications for basing transfer eligibility on work.¹⁰ We cannot simply rely on either ordinary usage or the descriptive categories developed by social scientists, nor on legal definitions used in other contexts. In other words, understanding what work to require from welfare recipients entails understanding what welfare policy itself requires from work.

In Parts II, III, and IV, I pursue this next level of analysis by drawing out the definitions of work implied by three leading rationales for requiring work. First, working discharges a duty to strive to provide economically for oneself before claiming, through

RESTORE PARTICIPATION AND SELF-SUPPORT TO FREE ENTERPRISE 25, 108 (1997); WILSON, *supra* note 2, at 18–19; Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967 (1999); Schultz, *supra* note 1.

6. Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131 (2006).

7. 42 U.S.C. §§ 601.

8. 26 U.S.C. § 32.

8.25. See *infra* notes 28–30 and accompanying text.

8.5. See Zatz, *supra* note 6. After *Welfare to What?* was published, the U.S. Department of Health and Human Services issued new interim regulations defining what the federal government will count as “work activities” for the purpose of federal TANF work requirements. See Reauthorization of the Temporary Assistance for Needy Families Program, 71 Fed. Reg. 37454 (2006). It is too soon to know either what the final federal regulations will be or the extent to which states will revise their policies to conform to the federal government’s definitions. See Amy Goldstein, *Welfare Changes A Burden To States: Work Rules Also Threaten Study, Health Programs*, WASHINGTON POST, Aug. 7, 2006, at A1.

9. See Zatz, *supra* note 6.

10. See Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2238, 2318–19 (1998).

the mechanism of government tax-and-transfer programs, resources produced by others (work as self-sufficiency). Second, working provides to the worker noneconomic benefits essential to a rich and fulfilling life but absent from a life without work (work as self-improvement). Third, working “gives back” to the society that provides economic support, thereby completing a relationship of mutual responsibility (work as reciprocity).

Each rationale has independent appeal, but they often yield conflicting conclusions about whether a given activity should satisfy work requirements, and about how to decide. For example, unpaid community service may satisfy self-improvement and reciprocity goals and yet do nothing to promote self-sufficiency. Moreover, even a single rationale can authorize a surprisingly wide range of activities. For this reason, the activity most widely, and to many self-evidently, equated with work—paid employment—holds no monopoly over the category.

Acknowledging these conflicts, and either resolving them or choosing sides, is important for several reasons. Most concretely, the specific content of welfare work requirements matters greatly to the people subject to them. When benefits are cut off for those who are unwilling or unable to comply, they and their children suffer the economic hardship of lost income when dollars are already desperately scarce.¹¹ Additionally, they may suffer psychological and dignitary harms from finding oneself cast off without support by one’s fellow citizens.¹² An unduly narrow definition of work will inflict these harms on people who do not deserve them.

In addition, compliance can bring its own harms, even if formal sanctions are avoided. These harms may stem either from the physical, psychological, or social toll of the mandated work activity itself or from the lost opportunities to make other use of one’s time.¹³ Moreover, significant autonomy is lost, and by people already facing severe constraints, simply by being told what to do by a powerful bureaucracy.¹⁴

This concern reflects a liberal sensibility protective of individual control over, and deep diversity among, ways of life,¹⁵ though my more specific analytical points do not rely on this inclination being shared by the reader. An ethnographic sensibility nourishes

11. See generally LADONNA PAVETTI ET AL., MATHEMATICA POLICY RESEARCH, INC., REVIEW OF SANCTION POLICIES AND RESEARCH STUDIES: FINAL LITERATURE REVIEW (2003), <http://aspe.hhs.gov/hsp/TANF-Sanctions03/full-report.pdf>; Nancy E. Reichman et al., *TANF Sanctioning and Hardship*, 79 SOC. SERV. REV. 215 (2005).

12. See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994) & JILL WUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994); cf. Michael Ignatieff, *The Broken Contract*, N.Y. TIMES MAG., Sept. 25, 2005.

13. Cf. David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 828–30 (2004) (discussing informal rationing based on the costs of complying with program rules).

14. On the ways in which work requirements enhance bureaucratic control over welfare recipients’ lives, see JOEL F. HANDLER, *SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE* 248–70 (2004); see also Brian Barry, *Real Freedom and Basic Income*, in *REAL LIBERTARIANISM ASSESSED: POLITICAL THEORY AFTER VAN PARIJS* 53, 77 (Andrew Reeve & Andrew Williams eds., 2003).

15. See Alstott, *supra* note 5, at 980; PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL* 28 (1995); but see Richard J. Arneson, *Should Surfers Be Fed?*, in *REAL LIBERTARIANISM ASSESSED: POLITICAL THEORY AFTER VAN PARIJS*, *supra* note 14, at 95, 97–101; KIMBERLY A. YURACKO, *PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES* (2003).

this normative orientation by promoting attention to the wonderfully varied ways people live their lives, including our divergent experiences of seemingly singular institutions and circumstances.¹⁶ This variation, and the opportunity for individuals to sort it out for themselves in different ways, is suppressed by compliance with work requirements.¹⁷ Some such constraints are warranted by legitimate work requirements, but only so long as recipients are neither pressured into inappropriate forms of work nor diverted away from appropriate ones.

Finally, tracing the sensitivity of work definitions to choices among distinct rationales raises new questions about the legitimacy of work requirements themselves. Those who purport to agree on the importance of work still have significant conflicts to sort out and have good reasons to be uneasy about their alliance.

My analysis, however, offers the potential not only to prompt new debates but also to advance some old ones. Longstanding conversations about work, welfare policy, and distributive justice have been distorted by an oversimplified equation of work and employment. This focus on employment unites those who urge cutting existing benefits to nonworkers with those who urge expanded protections or resources for those who do work.¹⁸ Critics of employment-based policies usually are no different, aiming their critiques against the premise that benefits should be tied to work, not against the idea that work means employment.¹⁹

For instance, one major objection to work-based redistributive policies is their exclusion of parents who perform unpaid family labor.²⁰ Taking this exclusion of familial care to be fundamental to work requirements, feminist critics typically either

16. See DANIEL DOHAN, *THE PRICE OF POVERTY: MONEY, WORK, AND CULTURE IN THE MEXICAN AMERICAN BARRIO* 9 (2003); Joan W. Scott, "Experience," in *FEMINISTS THEORIZE THE POLITICAL* 22 (Judith Butler & Joan W. Scott eds., 1992).

17. See Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029 (2004). Actual choices are influenced by structural failures that distort the capacity both to conceive and to follow certain life paths, and it is neither possible nor desirable to escape how we are always shaped by our insertion into particular institutional and cultural milieus. For attempts to acknowledge these challenges to liberalism without abandoning the underlying project, see MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 11 (1999); ERNESTO LACLAU, *EMANCIPATION(S)* 1, 17–18, 101–03 (1996).

18. See JOEL F. HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, & WELFARE* 11–15 (1997); MEAD, *supra* note 1, at 70; MEAD, *supra* note 5, at ix, 48; PHELPS, *supra* note 5, at 14, 23; WILSON, *supra* note 2, at xiii, 19; Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 537–39 (1995); Schultz, *supra* note 1, at 1886.

19. Alstott, *supra* note 5, at 969–71; Pateman, *supra* note 1, at 259.

20. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 108 (1995) [hereinafter FINEMAN, *NEUTERED MOTHER*]; DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 179–80 (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; Martha Albertson Fineman, *Contract and Care* 76 CHI.-KENT L. REV. 1403, 1408 (2001) [hereinafter Fineman, *Contract and Care*]; Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1329–35 (1983); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994) [hereinafter Roberts, *Black Mothers' Work*]; Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. L. REV. 1, 67 (1996); Alstott, *supra* note 5, at 992–95.

reject work-based policies altogether²¹ or advocate policies that separately support and value caretaking.²² What has not been done is to integrate familial caretaking into “work” as part of a general account linking work and redistribution.²³

In the concluding Part V, I sketch such a framework built upon my broader exploration of work requirements for means-tested transfers. Caring for one’s own children—the activity most starkly opposed to work within the welfare reform debate—can advance economic self-sufficiency, just as paid employment can. This becomes possible once child-care costs and child-care subsidies are integrated into the analysis of poverty and transfers.

Admittedly, this argument will raise as many new questions as it answers, but for now, that itself is part of my point. Carefully defining work pushes us to confront other weighty normative and empirical problems that often lurk behind the old claims for or against work. Confronting those problems also can illuminate how the essential but elusive nature of work is shaped by local circumstances and yet also spills over into the countless connected ways in which work shapes our lives.

I. THE NEED FOR A PURPOSIVE ACCOUNT OF WORK

This Article takes what Deborah Malamud has called a “purposive” approach to legal classification.²⁴ It does so by analyzing which definitions of work would vindicate the purposes animating each of the major rationales for work requirements.

One might think this appeal to purpose wrong-headed from the start. After all, the fact that competing rationales could be offered for a 65 miles-per-hour speed limit does not mean that recourse to those rationales is required to understand the meaning of “65,” “miles,” or “hours.” If we could identify descriptively something called “work,” then the real questions might not involve how to define work but simply what to do about it (How fast should people be allowed to drive? What should the penalties be for noncompliance?) or how to identify it accurately in particular cases (Do the numbers generated by radar guns accurately reflect speed?). Such a “descriptive” approach to legal line drawing aims “to discover pre-existing classification schemes ‘in the culture,’

21. Alstott, *supra* note 5, at 974; BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 130 (1999); VAN PARIJS, *supra* note 15, at 28–33; Iris Marion Young, *Mothers, Citizenship, and Independence: A Critique of Pure Family Values*, 105 *ETHICS* 535, 551–52 (1995); Pateman, *supra* note 1, at 240, 259.

22. Fineman, *Contract and Care*, *supra* note 20, at 1411–12; FINEMAN, *NEUTERED MOTHER*, *supra* note 20, at 9, 232–33; EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 30, 142–43 (1999); *see also* ANNE L. ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* (2004) [hereinafter *NO EXIT*]; MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) [hereinafter *FINEMAN, AUTONOMY MYTH*]; JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) [hereinafter *UNBENDING GENDER*]; Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 *YALE L.J.* 1073 (1994); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227 (1994) [hereinafter *Is Coverture Dead?*].

23. For an important exception, see STUART WHITE, *THE CIVIC MINIMUM: ON THE RIGHTS AND OBLIGATIONS OF ECONOMIC CITIZENSHIP*, 97–125 (2003).

24. See Malamud, *supra* note 10, at 2318–19, 2238 (1998).

or even to find the most ‘accurate’ description of the social world through an empirical analysis of the hard facts.”²⁵

In contrast to a purposive approach, most discussions of welfare work requirements, and of work and social policy more generally, approach the meaning of work descriptively. This is true of both the scholarly literature and the political debate, and of work requirement proponents and opponents alike.

Often there is an unstated, or at least uninterrogated, assumption that “work” means labor market participation.²⁶ When alternatives to this type of work are considered at all, typically they are rejected on the basis of a relatively brief observation that the alternative lacks some feature that employment possesses. Missing is any systematic consideration of why that feature matters, how reliably employment itself possesses it, or whether other nonemployment activities might possess it as well.²⁷ By framing the question in terms of whether the alternative is sufficiently like employment, this approach preserves the assumption that employment is the core of work.

In many other cases alternatives to employment are rejected simply by declaring that they are not work, and that this is obvious from the plain meaning of the term. During Congressional debate over the legislation creating TANF, Senator Phil Gramm argued for excluding education from work as follows:

[W]ork does not mean sitting in a classroom. Work means work. Any farm kid who rises before dawn for the daily chores can tell you that. Ask any of my brothers and sisters what ‘work’ meant on our family’s dairy farm. It didn’t mean sitting on a stool in the barn, reading a book about how to milk a cow. ‘Work’ meant milking cows.²⁸

The circular declaration that “work means work” and the invocation of “any farm kid” imply that the content of “work” is obvious and common-sensical, and that anyone who questions it is just playing games.^{28.5} Although less colorfully put, similar views lie beneath assertions that even if education or training are work in some sense, employment and perhaps workfare nevertheless remain “*real* work.”²⁹ The unhelpful nature of this adjective is revealed by the fact that critics often claim that workfare is *not* “real work,” in contrast to paid jobs.³⁰

25. *Id.* at 2239.

26. *Cf.* Andrew Abbott, *Sociology of Work and Occupations*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 307, 307 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005) (criticizing the literature in sociology of work for excessive and unreflective focus on paid work).

27. *See infra* note 32.

28. Quoted in Diller, *supra* note 4, at 25.

28.5. Senator Gramm’s statement suggests some features of work but leaves it quite unclear what his view would be of someone who rises before dawn to milk a cow as part of a college course, or someone who gets paid in part to sit and read.

29. RON HASKINS & PAUL OFFNER, BROOKINGS INST., *WELFARE REFORM & BEYOND POLICY BRIEF NO. 25*; Jason Turner, Heritage Foundation, *Effective Work Programs*, Apr. 9, 2002, <http://www.heritage.org/Research/Welfare/Test040902.cfm>; ACHIEVING COMPROMISE ON WELFARE REFORM REAUTHORIZATION 3 (2003), <http://www.brookings.edu/es/wrb/publications/pb/pb25.pdf>.

30. *See* Press Release, American Federation of State, County, and Municipal Employees, House Republican Welfare Bill Embraces Quotas, Rejects Real Work for Real People (May 16, 2002), *available at* <http://www.afsme.org/press/2002/pr020516b.htm>; National Association of Social Workers, Coalition Letter Opposing Passage of the Personal Responsibility, Work, and Family Promotion Act (May 14, 2002), http://www.naswdc.org/advocacy/welfare/legislation/ltr_051402.asp; *see generally* Chad Alan Goldberg,

The very act of adding “real” or “actual” to try to clarify what should count as work for a particular policy purpose acknowledges, albeit implicitly, that many activities are in some sense work and yet are not the relevant *kind* of work in this context. William Julius Wilson makes this point far more explicitly than most when he, in the course of his influential argument that “the disappearance of work and consequences of that disappearance . . . are the central problems in the inner-city ghetto,”³¹ acknowledges that “[h]ousework is work, baby-sitting is work, even drug-dealing is work.”³² He then goes on to give specific reasons for focusing on work “in the formal labor market”³³ to the exclusion of these other types of work. Giving such reasons is necessary to select among things that are, in some recognizable but not necessarily relevant sense, “work.” This is a term applied to bewilderingly varied activities³⁴: working out, completing household chores, building a friendship, acquiring a skill, or pursuing a hobby. Indeed, as I worked on this section, I heard a radio commentary by journalist Leroy Sievers characterizing his battle with cancer in terms of work; he closed by saying, “I have work to do, because I’m going to fight like hell.”³⁵

This wide-ranging way in which we speak about work finds more thoroughly developed expression in the difficulties scholars of work across many disciplines have had when attempting to define their object of study.³⁶ One immediate challenge for identifying work and employment is the historical and social specificity of labor market institutions. It seems more satisfying to view labor markets as just one way to organize and allocate work, which leaves space to say that slaves, serfs, servants, apprentices, and subsistence farmers work even though they don’t get paid.³⁷ More generally, placing opposite labels on the same physical acts, based solely on the presence or absence of pay,

Welfare Recipients or Workers? Contesting the Workfare State in New York City, 19 SOC. THEORY 187 (2001); John Krinsky, *Work, Workfare, and Contention in New York City: The Potential of Flexible Identities in Organizing Opposition to Workfare*, 24 CRITICAL SOC. 277 (1998).

31. WILSON, *supra* note 2, at xix.

32. WILSON, *supra* note 2, at 74; *see also* KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 109 (1999); PHELPS, *supra* note 5, at 22, 39; Schultz, *supra* note 1, at 1900.

33. *See* WILSON, *supra* note 2, at 73–74.

34. *See, e.g.*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1363 (10th ed. 1998) (defining work as “a: activity in which one exerts strength or faculties to do or perform something a: sustained physical or mental effort to overcome obstacles and achieve an objective or result b: the labor, task, or duty that is one’s accustomed means of livelihood c: a specific task, duty, function, or assignment often being a part or phase of some larger activity.”); R.E. Pahl, *Epilogue to ON WORK: HISTORICAL, COMPARATIVE, AND THEORETICAL APPROACHES* 744, 744 (R.E. Pahl ed., 1988); Keith Thomas, *Introduction to THE OXFORD BOOK OF WORK* xiii–xiv (Keith Thomas ed., 1999); Cato Wadel, *The Hidden Work of Everyday Life*, in *SOCIAL ANTHROPOLOGY OF WORK* 365, 370 (Sandra Wallman ed., 1979).

35. Leroy Sievers, *Living in the World of Cancer, Morning Edition* (NPR radio broadcast, Feb. 16, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5219002>.

36. W. Ronco & L. Peattie, *Making Work: A Perspective from Social Science*, in *ON WORK*, *supra* note 34, at 709, 715.

37. Chris Tilly & Charles Tilly, *Capitalist Work and Labor Markets*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY*, 283, 285 (Nash J. Smelsen & Richard Swedberg eds., 1994); Thomas, *supra* note 34, at xiii; KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 13–14 (2004).

seems both to miss important forms of continuity and also to elide forms of difference distinct from a paid/unpaid divide.³⁸

Scholars have attempted to sort through this welter of possible similarities and differences by enumerating a number of characteristics that might identify work and distinguish it from other practices.³⁹ These can be grouped roughly into three classes: (1) those related to enabling consumption or use by the worker (whether through cash income, subsistence production, or nonmarket exchange relationships);⁴⁰ (2) those related to how or why work is performed (requiring exertion or skill, being driven by necessity or some other purpose beyond the act itself);⁴¹ and (3) those related to producing something valued by others (whether through purchase, noncash exchange, or the potential to be part of such exchanges).⁴² Each may ring true at first, but upon reflection it is easy to generate examples that lead any one, or any combination, of these characteristics to seem problematically restrictive or troublingly expansive.⁴³ Not surprisingly then, although many scholarly accounts define work with reference to one or more of these criteria, no robust consensus has emerged. As a descriptive matter, work may best be understood as a category without an entirely fixed meaning, one that not only varies contextually but also remains malleable even within a given context.⁴⁴

One possible, but still descriptive, way out of this morass would be simply to stipulate that, in the work requirements context, “work” is just being used colloquially, though imprecisely, to refer to the narrower concept of paid employment. This could explain why Sievers’ locution of working to cure himself simultaneously rings true and yet seems a strained example of the work required of welfare recipients.

This approach faces three serious difficulties, however. First, it begs important questions about whether claims made about “work” implicitly rely for their strength on the broader, non-employment-specific connotations of that term. If they do, then substituting “employment” for “work” would make a difference.

38. Cf. Frederick C. Gamst, *Considerations of Work*, in *MEANINGS OF WORK* 1, 9 (Frederick C. Gamst ed., 1995); Pahl, *Epilogue*, *supra* note 34, at 744.

39. Psychological research finds that human categorization practices rely heavily on the process of comparison and analogy to exemplars, rather than beginning with lists of traits. See Gary Blasi, *Lawyers, Guns and Money: Content Contextualism and the Cognitive Foundations of Statutory Interpretation* (2006) (unpublished manuscript on file with author). Nonetheless, in disputes over contested cases, people are pressed to articulate which similarities and dissimilarities between exemplars and the instant case are the relevant ones, and this returns us to the project of identifying packages of necessary, relevant, and irrelevant characteristics. See *id.*

40. See HANNAH ARENDT, *THE HUMAN CONDITION* 9, 77, 110 (1959) (linking “labour” to consumption); Lourdes Benería, *Conceptualizing the Labour Force: The Underestimation of Women’s Economic Activities*, in *ON WORK: HISTORICAL, COMPARATIVE, AND THEORETICAL APPROACHES* 372, 380 (R.E. Pahl ed., 1988); Debra Anne Donahoe, *Measuring Women’s Work in Developing Countries*, 25 *POPULATION & DEV. REV.* 543, 543–45 (1999); Tilly & Tilly, *supra* note 37, at 286.

41. ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 6–7 (1983); Pahl, *supra* note 34, at 744; Thomas, *supra* note 34, at xiii–iv; Wadel, *supra* note 34, at 370; Sandra Wallman, *Introduction to SOCIAL ANTHROPOLOGY OF WORK*, *supra* note 34, at 1, 7.

42. NANCY FOLBRE, *THE INVISIBLE HEART* 66 (2001); HOCHSCHILD, *supra* note 41, at 7; Abbott, *supra* note 26, at 307; Silbaugh, *supra* note 20, at 11; Tilly & Tilly, *supra* note 37, at 285.

43. See RUSSELL MUIRHEAD, *JUST WORK* 4–5 (2004). This pattern is not unique to the category “work,” see Blasi, *supra* note 39, but its relative difficulty compared to other problems of classification, lies beyond the scope of this Article.

44. Pahl, *Epilogue*, *supra* note 34, at 744, 747; Wadel, *supra* note 34, at 365.

Second, questions about whether something other than employment is work can simply be converted into questions about whether employment is the appropriate object of regulation. To illustrate, consider a policy regulating “seafood.” Stipulating that, in this context, “seafood” just means “fish” would clarify that lake trout are seafood and the sea turtles are not.^{44.5} But if the rationale for regulating seafood relied partly on the character of ocean waters, then arguments for and against classifying these aquatic animals as “seafood” (sea turtles live in oceans, lake trout don’t) can now be recast as arguments for and against using “fish” as the regulatory category (regulating lake trout is over-inclusive, not regulating sea turtles is under-inclusive). Because of this fungibility between issues of category scope and issues of the category’s under- or over-inclusiveness relative to policy goals, substantive arguments about the purpose of using the category cannot be avoided simply by stipulating its definition. For similar reasons, for ease of exposition I will often explore the content of work by asking how closely paid employment fits the desiderata of different theories of work requirements.

There is a third reason why stipulating that “work means employment” is hardly more helpful than declaring that “work means work” or that “work means real work.” In the context of welfare work requirements, “work means employment” is simply an inaccurate statement of the law. As I have previously shown in some detail, federal and state TANF law permit a wide range of activities other than paid employment to satisfy welfare work requirements.⁴⁵ Not only may education count as work, but in many places, Sievers’ battle with cancer might well count as work under provisions including medical treatment and rehabilitation.⁴⁶ Even approaches that emphasize employment embrace some unpaid activities workfare.⁴⁷

Putting these three points together, it would not fundamentally clarify matters to stipulate that work means paid employment but acknowledge that certain alternatives to work (like community service) may also satisfy “work” requirements. Doing so would merely shift the question of whether unpaid community service is work (perhaps because it requires time, effort, and contributes to the public good) into the question of whether unpaid community service is a legitimate alternative to employment (perhaps because employment is underinclusive of activities that require time, effort, and contribute to the public good).

It should now be apparent that a descriptive approach to work is doomed. Simply equating work with employment as a matter of definition is also a non-starter, even though doing so could still be justified on purposive grounds. If we are to have any principled basis for choosing among different approaches to work, for criticizing these approaches, or for developing new and better ones, we must begin by identifying the goals that work requirements are thought to serve and then move on to specify the activities that meet those goals. This exercise gains concreteness and imagination from consideration of how actual policies define work.

44.5. Just as stipulating that work means paid employment would clarify that unpaid volunteering is not work.

45. See Zatz, *supra* note 6.

46. See Zatz, *supra* note 6.

47. Indeed, supporters of unpaid workfare specifically reject classifying it as employment. See *United States v. City of New York*, 359 F.3d 83 (2d Cir. 2004); Jason A. Turner & Thomas Main, *Work Experience Under Welfare Reform*, in *THE NEW WORLD OF WELFARE*, *supra* note 2, at 291.

Developing a purposive account of work starts with answers to the normative question, “Why should whether someone works affect her eligibility for a means-tested transfer?” Some disagreements over what the law counts as work reflect differences over what makes work significant. Next we face the empirical question, “What conduct possesses the features of work that are normatively significant?” Even those who agree on the purpose of work requirements may answer this question differently, and such disagreements cannot be resolved simply by reiterating why work is so important. Finally, those who agree on the closeness of fit may disagree about whether imperfections of fit are nonetheless justified by administrability, cost, or the like.^{47.5}

A purposive definition of work is necessarily context specific. An activity appropriately included as work in means-tested transfer programs might appropriately be excluded in some other legal context. Whether this is so depends on whether there is a different purpose in making work significant.

In the context of means-tested transfers, the major normative justifications offered for conditioning eligibility on work can be organized around three themes.⁴⁸ I label these *self-sufficiency* (providing for oneself economically rather than relying on transfers from others, especially the state), *self-improvement* (achieving the good life for oneself, material resources aside), and *reciprocity* (providing some benefit to society in exchange for publicly financed support). These themes can be woven together in varying degrees (fulfillment can flow from self-sufficiency, or from participating in a collective effort), but they are analytically separable.⁴⁹

As I draw out the implications of each rationale, seemingly incongruous results may suggest the appeal of another of the three, one rationale that would specify work differently. The broad stakes in such shifts among rationales deserve a few preliminary

47.5. I do not discuss this last set of issues here, except to note that a conversation about second-best concessions to practical constraints proceeds on quite different terms than one about fidelity to high moral purpose. And in fact, existing arguments for particular work definitions rarely rely on such considerations.

48. I limit myself to *justifications* for work requirements. The political success, and particular content, of work requirements might nonetheless be *explained* by reference to other factors that supporters would repudiate or deny, or that explain why certain justifications are appealing to particular actors. See Zatz, *supra* note 6, at 1138 & nn. 23–24; MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY (1999). Examples include animus toward people whose membership in race, gender, and other grounds is imagined to be characteristic of welfare recipients, or a desire to use bureaucratic requirements as a covert way of reducing or redirecting access to public benefits. See Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984); Super, *supra* note 13. I do not discount the importance of such analyses, but I also assume that both academic readers and ordinary political actors exercise agency, seek justifications, and respond to reasoned argument. Were it otherwise, there would be little point to either the justificatory or the explanatory projects, because neither minds nor actions would be changed as a result.

49. This typology inevitably fails to do capture all the nuanced variations in arguments for work requirements, but those nuances are not of fundamental importance to my purposes here. For instance, some proponents of promoting employment also claim that it has broader social benefits, or positive externalities, such as reducing crime or fostering democratic politics. See PHELPS, *supra* note 5, at 99–100, 106, 124–26; WILSON, *supra* note 2, at xviii; Akhil Reed Amar, *40 Acres and Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 38, 42 (1990); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 532 (1997). Such claims about positive externalities, however, are generally parasitic upon more direct claims about consequences for workers themselves.

observations here, though I defer elaboration of each rationale to its respective section below. While all three justify denial of a transfer to nonworkers, self-sufficiency uniquely requires that workers *also* face reduced transfers as they rely more on their own resources. Self-improvement and reciprocity approaches need not share this goal of using work to limit transfers, and so they have disproportionate appeal on the political left. Reciprocity and self-sufficiency approaches do, however, share the overall form that transfers have some non-work-related purpose (relieving economic hardship, equalizing access to property, etc.), and then invoke work as a side constraint: a “work requirement” on something larger. In contrast, self-improvement approaches tend to cast recipients’ work as the affirmative purpose of the transfer itself, as in the notion of the transfer as a “work support.”

These are necessarily broad strokes. My purpose is simply to draw out these approaches sufficiently to make clear that they are meaningfully distinct, both in their practical implications and in their normative underpinnings. Directly evaluating and choosing among them is not my task here. Instead, highlighting the need to make those choices is important because it runs contrary to a dominant view of a consensus around work and welfare. Such a consensus on basic principles would imply that the only serious questions remaining concern empirical and institutional design dimensions of effective implementation.⁵⁰

The most consistent dissent from this consensus comes from feminists who object to labeling as nonworkers low-income women (and men) engaged in unpaid family caregiving. Nonetheless, my main analysis eschews making familial caretaking the primary foil for paid employment. Instead, I want to show how this feminist critique may be less about care specifically than about paid/unpaid divides more generally. Consequently, feminist analyses of care as work can in turn illuminate a whole range of issues concerning work, and exploring that full range can shine new light on disputes concerning care.

This breadth also is important because work requirements reach far beyond the paradigmatic unmarried woman with children around whom welfare debates usually swirl.⁵¹ Many means-tested transfer programs do not require the presence of children in the household, but do have concurrent work requirements⁵² or work-related eligibility

50. See Amy L. Wax, *Social Welfare, Human Dignity, and the Puzzle of What We Owe Each Other*, 27 Harv. J.L. & Pub. Pol’y 121, 135–36 (2003).

51. Cf. David A. Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271 (2004) (criticizing excessive focus on TANF).

52. See STAFF OF HOUSE COMM. ON WAYS & MEANS, 108TH CONG., 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 15–30 (Comm. Print 2004) [hereinafter 2004 Green Book], available at <http://www.gpoaccess.gov/wmprints/green/> (46 percent of households receiving food stamps contain no children); ADAM CARASSO & C. EUGENE STEUERLE, TAX POLICY CTR., PROJECTED DISTRIBUTION OF EITC CLAIMS IN 2003 (2004), http://www.urban.org/UploadedPDF/1000669_TaxFacts_071904.pdf (projecting that three million households without children would receive the EITC in 2003); L. JEROME GALLAGHER ET AL., URBAN INST., STATE GENERAL ASSISTANCE PROGRAMS 1998, at 107–12 (1999), available at http://www.urban.org/UploadedPDF/ga_main.pdf (describing state-funded “general assistance” programs for non-elderly, non-disabled adults).

provisions.⁵³ Likewise, recent scholarly proposals and policy experiments tend to integrate programs under the rubric of work rather than separate them based on the presence of children.⁵⁴ Thus, it is important to think about work in ways that illuminate, but are not restricted to, the circumstances of low-income parents.

Finally, even when the topic is families with children, their struggles are not reducible to competing labor market and family caregiving roles. Framing the problem that way obscures the fact that most poor, single mothers *are* employed,⁵⁵ and threatens to reinforce the persistent stereotype that men are (and should be) primarily committed to paid work and that women are (and should be) primarily committed to family responsibilities.⁵⁶ But child care is a challenge not just for parents in jobs but also for parents in school, in treatment, or in service. Employment competes not only with caring for one's children but with those other activities as well.

II. WORK AS ECONOMIC SELF-SUFFICIENCY

Promoting “self-sufficiency” is the most commonly invoked rationale for requiring transfer recipients to work. This concept, along with its antithesis “dependency,” appear frequently in the federal TANF statute and its state counterparts, in policymakers’ pronouncements relating to welfare and work, and in scholarly analysis of the merits of linking redistribution to work.⁵⁷ The crucial characteristic of work, according to this view, is that it generates economic resources for the worker. These resources prevent dependency on government transfers, specifically means-tested transfers. With a sufficiently large paycheck in hand, there is no need to ask for, and indeed no eligibility

53. Almost 4 million nonelderly adults receive Supplemental Security Income (SSI) based on a disability, which is defined in terms of inability to work. See 2004 GREEN BOOK, *supra* note 52, at 3–40. There is also some movement toward integrating into disability benefit programs both supports for concurrent work, see Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 63–67 (2004), and requirements that recipients participate in rehabilitative programs. See Zatz, *supra* note 6, at 1156; Amy L. Wax, *Disability, Reciprocity, and “Real Efficiency”*: A Unified Approach, 44 WM. & MARY L. REV. 1421 (2003).

54. See, e.g., HANDLER & HASENFELD, *supra* note 18; WILSON, *supra* note 2; PHELPS, *supra* note 5; Schultz, *supra* note 1; Wax, *supra* note 53. DEBRA RHINEHART & ABBEY FRANK, NATIONAL TRANSITIONAL JOBS NETWORK & CLASP, TRANSITIONAL JOBS WORK (2003), http://clasp.org/publications/TJ_Outcomes.pdf.

55. In 2002, the employment rate was 59 percent for single mothers under 200 percent of the poverty threshold, 57 percent when a child under 6 was present. See U.S. DEP’T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), SIXTH ANNUAL REPORT TO CONGRESS IV-1 (2004), available at <http://www.acf.hhs.gov/programs/ofa/annualreport6/ar6index.htm> [hereinafter SIXTH ANNUAL TANF REPORT]. These figures have been increasing steadily since the early 1990s, when in 1992 they were 44 percent and 35 percent, respectively. See U.S. DEP’T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROGRAM, THIRD ANNUAL REPORT TO CONGRESS 72 (2000), available at <http://www.acf.hhs.gov/programs/ofa/opreweb/annual3.pdf>.

56. See Barbara R. Bergmann, *Subsidizing Child Care By Mothers at Home*, 6 FEMINIST ECON. 77, 82 (2000); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Law, *supra* note 20, at 1251–53; Schultz, *supra* note 1, at 1915, 1954.

57. See, e.g., Joint Explanatory Statement of the Committee of Conference, H.R. REP. NO. 104-725 (1996) (characterizing the PRWORA as “promot[ing] work over welfare and self-reliance over dependency” by reflecting the principle that “welfare should mean temporary assistance for those striving to return to self-sufficiency”); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1827 (2001).

for, welfare. The point of work is self-sufficiency, and the meaning of self-sufficiency is *transfer avoidance*.

This approach makes a simple, intuitive connection between work requirements and means-tested transfer programs. Work is not a generalized obligation of all individuals, nor a condition on access to most benefits controlled by the state. Relative to welfare recipients, demands for work are rarely directed at adults who live off of inherited wealth or the income of family members;⁵⁸ such individuals are not self-sufficient in the sense of relying only on their own earnings, but they nonetheless do avoid state transfer payments.⁵⁹

Means-tested transfers, however, do trigger this work obligation under a widely shared conception of what these transfers are doing and what justifies them. This view sees means-tested transfers as disruptions, through taxation, of a presumptively just baseline distribution of resources.⁶⁰ The transfer justifiably disrupts this baseline in order to remedy the recipient's deprivation, as measured by pre-transfer cash resources. This basic structure is reflected in the means test itself: Only one who falls below some threshold of resources may claim a transfer, and the transfer's magnitude increases with the depth of the shortfall.

Such a transfer's legitimacy relies on the recipient's genuine need. Individuals are expected first to rely on their own resources, to be as self-sufficient as possible, before claiming transfers from others. Self-sufficiency in this transfer avoidance sense thus is not simply a personal characteristic, but is quite specifically about an individual's relationship to the state and one's fellow citizens.

Relying first on one's own resources implies some level of agency: It will not do to plead poverty based on empty pockets if one can go to the bank and withdraw cash.^{62.5} The self-sufficiency approach includes work within the scope of this expected agency, this obligation to show the "personal responsibility" invoked by PRWORA's title, the Personal Responsibility and Work Opportunity Reconciliation Act that enacted federal welfare reform.

Complying with work requirements demonstrates appropriate efforts toward self-sufficiency, and thus legitimate need. One who fails to comply presents only the superficial appearance of need in the guise of low income, but that income presumably could be raised at will. This account can be criticized or complicated in many respects,⁶¹

58. Similarly, concern over the potential earnings disincentive effects of government transfers far exceeds the analogous possibility that inheritance or intrafamilial transfers will diminish work effort. See Douglas Holtz-Eakin et al., *The Carnegie Conjecture: Some Empirical Evidence*, 108 Q.J. ECON. 413 (1993).

59. For criticism of the selective application of self-sufficiency mandates, see FINEMAN, *AUTONOMY MYTH*, *supra* note 22, at 3–4.

60. The justice of this baseline is required to distinguish such transfers from, for instance, the return of stolen property. See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 8–9 (2002) (describing and criticizing "everyday libertarianism" that fetishizes pre-tax income).

62.5. Asset or "resource" limits are a standard feature of TANF programs. See GRETCHEN ROWE & JEFFREY VERSTEEG, *URBAN INST., WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2003* 52–52, 120–23 (2005) [hereinafter *WELFARE RULES DATABOOK* 2003]. Welfare programs generally require that applicants and recipients pursue and exhaust other sources of financial support, subject to certain exemptions. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 352.23(a) (2006); N.M. ADMIN. CODE R. § 8.102.510.8(e)(3).

61. See *infra* note 335.

but it captures the core intuition that work requirements rightly demand that individuals rely on themselves before invoking state power to take resources legitimately acquired by others.⁶²

Antipoverty policies have long recognized that persons' capacity for paid labor can be drawn upon to provide resources and that, like an untapped bank account,⁶³ failure to do so negates claims of need based on lack of income.⁶⁴ Thus, in an important decision interpreting New York State's constitutional mandate of state "aid, care and support of the needy,"⁶⁵ the New York Court of Appeals held that "employable persons . . . may properly be deemed not to be needy when they have wrongfully refused an opportunity for employment."⁶⁶

Skeptics of work requirement policies typically doubt that poverty is well-explained by individual choices not to work. Instead, they interpret imposition of work requirements to reflect a combination of, first, ignorance of structural economic conditions and personal circumstances that make employment impossible and, second, hostility toward transfer recipients founded on racist and sexist views of low-income single mothers as lazy, sexually irresponsible, and incompetent at parenting.⁶⁷

These criticisms are compelling in their explanations of when and why work requirements have been imposed and in their emphasis on the severe, and unjust, constraints within which actual or potential transfer recipients must operate in the contemporary United States. Nonetheless, these objections to specific current policies do not detract from the moral force of linking work and need-based transfers.⁶⁸ Extending the analogy to bank accounts, the objection that people have no money in the bank (cannot get jobs) does not touch the claim that, if they *did* have substantial savings, they would be obligated to draw it down before claiming welfare. Thus, these objections

62. The same point can be articulated from the perspective of the state by saying simply that work requirements target finite public resources for those most in need. But just as the public interest in preventing theft intertwines with individual obligations not to steal, so too might a public interest in conserving or targeting welfare expenditures intertwine with individual obligations to further the same goals through personal conduct. Insofar as moral disapproval is triggered by violations of such legitimate obligations, imposition of social sanctions should not be dismissed as merely moralistic. See Wax, *supra* note 50.

63. Economists formalize this analogy through the metaphor of "human capital." See generally GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (3rd ed. 1993).

64. See generally HANDLER & HASENFELD, *supra* note 18, at 58 *et seq.* (discussing history of work-related programs); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (10th anniv. ed. 1996).

65. N.Y. CONST. art. 17, § 1.

66. Barie v. Lavine, 357 N.E.2d 349, 352 (N.Y. 1976); see also Mooney v. Pickett, 483 P.2d 1231, 1238 (Cal. 1971); Clark County Soc. Serv. Dep't v. Newkirk, 789 P.2d 227, 29 N.4 (Nev. 1990).

67. See HANDLER & HASENFELD, *supra* note 18, at 99–100, 204; Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339, 352 (1996); Roberts, *Black Mothers' Work*, *supra* note 20; Roberts, *supra* note 12.

68. Alternative accounts of the basis for redistribution do not make deprivation a prerequisite and so reject both means-testing and self-sufficiency arguments for work. See, e.g., ACKERMAN & ALSTOTT, *supra* note 21; see also VAN PARIJS, *supra* note 15.

primarily address whether recipients are making sufficient efforts to fulfill their work obligations, not to the existence of such obligations in the first place.⁶⁹

Furthermore, requiring that we tap personal resources before claiming a government transfer does not simply police need; it also preserves fairness between those who do work (and thus are denied transfers because their income is too high to meet the means test) and those who could work but do not.⁷⁰ Guarding against such unfairness is the principle behind the policy of “less eligibility,” which holds that transfer receipt should not be more attractive than transfer ineligibility.⁷¹ A similar idea can also be articulated in efficiency terms, based on the claim that transfers distort both transferors’ and recipients’ incentives to choose between earnings production and other activities.⁷²

Although formulated in different ways, these views converge on the idea that what matters about work is its capacity to provide the worker with economic resources that preempt the need to claim transfers. Self-sufficiency in this sense reflects a principle of transfer avoidance. To vindicate this principle, activities should be deemed to satisfy work requirements just to the extent they reduce transfers. A definition of work is overinclusive when it includes activities that do not reduce transfers, and it is underinclusive when it excludes activities that do reduce transfers. Typically, paid employment meets the transfer-reduction criterion, but it may cease to do so in cases where means-testing is modified so that rising employment income does not lead to reduced transfer levels. More importantly, and less obviously, activities other than paid employment can meet the transfer-reduction criterion in some circumstances.

A. Transfer Avoidance Without Employment

The receipt of wages from employment is a natural paradigm of transfer-avoiding work. Two steps connect paid employment to transfer reduction. First, employment yields cash income. Second, cash income reduces transfers. Specifying these steps helps identify two corresponding ways to reduce transfers without employment, by finding both of which should count as work on a self-sufficiency account. First, activities other than

69. Consider, for instance, the important roles of “sanctions” for noncompliance with work requirements and deterrence (or “diversion”) of potential recipients by the prospect of having to comply with work requirements. See Turner & Main, *supra* note 47, at 301–03. To the extent that these phenomena reflect errors by welfare administrators, including failure or recognize legitimate reasons for noncompliance, work requirements appear simply to be a mechanism of harassing welfare recipients and cutting the rolls. Cf. Evelyn Z. Brodtkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, 71 SOC. SERV. REV. 1 (1997); Lipsky, *supra* note 48. If, however, one believes that those sanctioned or deterred would otherwise be free-riding on the system by not working despite an ability to do so, then eliminating their welfare receipt may reflect a principled commitment to a work obligation rather than a bare desire to harm. See Turner & Main, *supra*; see also Super, *supra* note 13, at 828.

70. See Wax, *supra* note 2, at 3, 16; *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (upholding welfare budgeting rule designed to “avoid[] discrimination between welfare families and the families of the working poor”).

71. HANDLER & HASENFELD, *supra* note 18, at 22–23.

72. For discussion of this “leaky bucket” theory of redistribution, see Alstott, *supra* note 18, at 548, 555–57; Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363, 385 (1996).

employment can yield cash income. Second, some activities can reduce transfers without producing cash income.

1. Cash Income Without Wages

Many Americans, including some of the poorest, work hard for their money outside of waged labor. They do so on small farms, in child care businesses run from their own homes, as taxi drivers, as street vendors, or as freelancers. These are just a few examples of work performed by independent contractors or small businesspeople.⁷³ A strict focus on “employment,” as that term is normally construed in U.S. law, excludes this entrepreneurial activity from “work.”⁷⁴ Doing so, however, both strains ordinary language and contradicts the foundational role of earned income. Presumably for all these reasons, many states explicitly include “self-employment” in their lists of work activities, often as a sub-category of “employment.”⁷⁵

Treating the self-employed (a term that itself reflects the grip that employment holds on our imagination of work) as workers does more than merely clarify terminology. Instead, it calls into question the routine exclusion of the self-employed from approaches to welfare work requirements that equate work with employment. The focus on employment pervades many data sources used to analyze the extent of work⁷⁶ and many policy mechanisms used to promote work, such as subsidizing employers’ wage payments, wage and other employment regulation, and public works employment programs.⁷⁷ Moreover, self-employment and employment often have radically different institutional characteristics and cultural connotations (work outside the home, regular hours, disciplining hierarchy, workplace sociability), which themselves could matter to some self-improvement approaches.⁷⁸

The self-employment distinction aside, tying employment to work exclusively through income generation raises uncomfortable questions about other cash-producing activities. Consider, for instance, the federal courts’ consistent conclusion that sustained, remunerative criminal activity should be treated interchangeably with legitimate

73. See, e.g., MITCHELL DUNEIER, *SIDEWALK* (1999); MARY C. TUOMINEN, *WE ARE NOT BABYSITTERS: FAMILY CHILD CARE PROVIDERS REDEFINE WORK AND CARE* (2003); Abel Valenzuela Jr., *Day Labourers as Entrepreneurs?*, 27 J. ETHNIC & MIGRATION STUD. 335 (2001).

74. See, e.g., *Goldberg v. Whitaker House Co op., Inc.*, 366 U.S. 28 (1961) (distinguishing “employees” protected by the Fair Labor Standards Act from the “self-employed”); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988).

75. See Zatz, *supra* note 6; see also 71 Fed. Reg. 37454, 37457 (approving this practice). Unlike TANF, the EITC statute explicitly includes self-employment. Compare 42 U.S.C. § 607(d) (2006) with 26 U.S.C. § 32(c)(2)(A)(ii) (2006).

76. Much research in this area relies upon data compiled through employer reporting of its payroll to state unemployment insurance agencies. These datasets exclude the self-employed, those classified (correctly or not) by their employers as independent contractors, and those working off the books. See GAYLE HAMILTON ET AL., *MANPOWER DEMONSTRATION RESEARCH CORP., NATIONAL EVALUATION OF WELFARE-TO-WORK STRATEGIES: HOW EFFECTIVE ARE DIFFERENT WELFARE-TO-WORK APPROACHES? FIVE-YEAR ADULT AND CHILD IMPACTS FOR ELEVEN PROGRAMS*, at ES-1, 48–49 (2001) [hereinafter *NEWS FIVE-YEAR REPORT*].

77. See, e.g., PHELPS, *supra* note 5, at 105–21; WILSON, *supra* note 2, at 225–33; Schultz, *supra* note 1, at 1936–39.

78. See discussion *infra* at Part III.B.

employment when adjudicating eligibility for disability benefits.⁷⁹ Those decisions are premised on the financial equivalence and institutional similarity of income from crime and employment, and a similar logic arguably applies to welfare work requirements. A drug dealer earns his income in a market exchange and by doing so avoids “dependency,” a point made forcefully in the following statement from one interview subject in Wilson’s *When Work Disappears*:

I’m a cocaine dealer—‘cause I can’t get a decent-ass job. So, what other choices do I have? I have to feed my family . . . do I work? I work. See, don’t . . . bring me that bullshit. I been working since I was fifteen years old. I had to work to take care of my mother and father and my sisters. See, so can’t, can’t nobody bring me that bullshit about I ain’t looking for no job.⁸⁰

A similar analysis applies to garnering income through begging,⁸¹ which, like crime, often is thought to be the opposite of work.⁸²

More generally, income-generation alone—which is what reduces dependency on state transfers—provides no basis for distinguishing the earned income associated with market work from other income sources. Not coincidentally, the recent emphasis in U.S. welfare policy on employment earnings has been accompanied by aggressive promotion of other income sources, such as child-support collection from or marriage to another adult with income.⁸³ Just like cash earnings, these income sources reduce the burden of government transfers by replacing them with private funds. If transfer avoidance is the benchmark, such substitutions may be deemed an advance in self-sufficiency despite the absence of employment.⁸⁴ Indeed, something like this logic could provide a rationale for

79. See *Bell v. Comm’r of Soc. Sec.*, 105 F.3d 244, 246 (6th Cir. 1996) (reasoning that a contrary result “would destroy the purpose of the regulations, which is to restrict eligibility for disability benefits to those who are not working”); *Jones v. Shalala*, 21 F.3d 191, 194 (7th Cir. 1994); *Corrao v. Shalala*, 20 F.3d 943 (9th Cir. 1994); see also *Bell v. Sullivan*, 817 F. Supp. 719, 722 (N.D. Ill. 1993).

80. WILSON, *supra* note 2, at 58. Drug-dealing organizations often have many of the features of ordinary businesses with employees. See PHILIPPE BOURGOIS, *IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO* 77–113 (1995); Sudhir Alladi Venkatesh & Steven D. Levitt, “Are We a Family or a Business?” *History and Disjuncture in the Urban American Street Gang*, 29 *THEORY & SOC’Y* 427 (2000).

81. See *Barry v. Shalala*, 840 F. Supp. 29, 32 (S.D.N.Y. 1993) (finding that plaintiff’s panhandling produced earned income for the purpose of calculating disability benefits); but see *Bauta v. Comm’r of Internal Revenue*, 78 T.C.M. (CCH) 485 (1999) (ruling that a prisoner who listed his occupation as “beggar” could not establish EITC eligibility based on donations from family and friends because these were gifts, not earnings).

82. WILSON, *supra* note 2, at xiii; PHELPS, *supra* note 5, at 2.

83. See 42 U.S.C. §§ 601(a)(2) (2006) (stating TANF’s goal to “end the dependence of needy parents on government benefits” by promoting “work” and “marriage”), 608(a)(3) (2006) (requiring that TANF recipients assign their rights to child-support to the state as a condition of eligibility); see also RON HASKINS & ISABEL SAWHILL, *BROOKINGS INST., WELFARE REFORM & BEYOND* BRIEF NO. 28, *WORK AND MARRIAGE: THE WAY TO END POVERTY AND WELFARE* 2 (2003), <http://www.brookings.edu/es/wrb/publications/pb/pb28.pdf>.

84. See VICKI TURETSKY, CTR. L. & SOC. POL’Y, *THE CHILD SUPPORT PROGRAM: AN INVESTMENT THAT WORKS* 2 (2005), available at http://www.clasp.org/publications/cs_funding_072605.pdf. (arguing that “[c]hild [s]upport increases self-sufficiency” because “[c]hild support reduces welfare use”); HASKINS & SAWHILL, *supra* note 83, at 3–4; Adam Thomas & Isabel Sawhill, *For Richer or for Poorer: Marriage as an Antipoverty Strategy*, 21 *J. POL’Y ANALYSIS & MGMT.* 587 (2002).

recent efforts to include marriage promotion activities as TANF work in a leading bipartisan TANF reauthorization proposal.⁸⁵ Wyoming's current TANF regulations suggest something along these lines when they set out the general criterion that work activities "lead to unsubsidized employment or *self-sufficiency through accessing other resources*."⁸⁶ Gaining income from wages differs in many respects from gaining income from a spouse or a noncustodial parent, but they share transfer avoidance in common.

2. Reducing Transfers Without Cash

The self-sufficiency paradigm of work-as-employment leaves out noncash forms of income in addition to nonemployment sources of cash. Earned income and other resources received through market exchange are not the only ways to benefit economically from work and thus contribute to self-sufficiency.⁸⁷ Instead, a person may simply produce needed goods or services directly: farming or gardening instead of buying food, cooking instead of ordering takeout, cleaning instead of hiring a maid, or caring for one's children oneself instead of paying another for childcare.⁸⁸ It seems odd for whether or not one works to depend on whether (a) one performs an activity, gets paid for it, and buys a set of goods and services from another worker, or (b) one simply produces comparable goods and services oneself.⁸⁹

Based on such substitution of market for nonmarket work, tax scholars characterize nonmarket production as generating "imputed income" equal to the market cost of equivalent goods or services.⁹⁰ If it would cost \$500 to hire someone to paint your house but instead you do an identical job yourself, doing so generates \$500 in imputed income.

Notwithstanding the theoretical attraction of this analysis, serious conceptual and administrative objections have been lodged against including imputed income within measures of general economic activity such as the income tax base or the Gross Domestic Product.⁹¹ The deep problem is that virtually everything we do could be treated as producing imputed income: If I find twiddling my thumbs for an hour as entertaining as watching a short play and choose to do the former, have I produced one ticket's worth of imputed income?⁹² These difficulties of boundlessness and valuation arguably are surmountable,⁹³ but many remain unpersuaded.

What has not previously been recognized is that these problems are particularly tractable in the specific context of means-tested transfer programs. The structure and

85. See Zatz, *supra* note 6.

86. 049-187-001 Wyo. Code R. § 8(e)(viii)(8) (2005).

87. Thomas, *supra* note 34, at xiii; Tilly & Tilly, *supra* note 37, at 283, 285–86.

88. See, e.g., Benería, *supra* note 40, at 380, 385; Silbaugh, *supra* note 20, at 11, 15, 23.

89. See Karst, *supra* note 51, at 566..

90. See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996); Thomas Chancellor, *Imputed Income and the Ideal Income Tax*, 67 OR. L. REV. 561 (1988); see also NANCY FOLBRE, WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT 97 (1994); Benería, *supra* note 40, at 380, 385 (similar analysis based on concept of "use value"); Tilly & Tilly, *supra* note 37, at 285.

91. See NAT'L RESEARCH COUNCIL, BEYOND THE MARKET: DESIGNING NONMARKET ACCOUNTS FOR THE UNITED STATES (2005) [hereinafter BEYOND THE MARKET]; Staudt, *supra* note 90, at 1577.

92. See Wax, *supra* note 2, at 31; Chancellor, *supra* note 90, at 561–62.

93. See, e.g., BEYOND THE MARKET, *supra* note 91; Staudt, *supra* note 90.

rationale of these programs provide a basis for discriminating among types of imputed income, for reasons that hark back to the goal of transfer avoidance.

The necessary distinctions can be made using the same tools already used to handle the broader category of in-kind (nonmoney) income: receipt of food, clothing, shelter, and so on. Means-tested programs aim to ensure that some level of basic needs can be met.⁹⁴ A form of income reduces transfer eligibility and amount only if it can be used to meet those needs and therefore narrows the gap between needed and available resources. All cash income meets this criterion, but in-kind income sometimes does and sometimes does not. From a transfer avoidance perspective, the definition of work should track those activities that produce income (both cash and in-kind) that reduce transfers.

To illustrate, consider the treatment of gifts represented in Table I. Someone who needs \$50 worth of food each week receives \$50 in benefits, absent any other way to meet that need (Scenario A). If this transfer recipient now receives \$50 a week from a stranger who explains that it is “for groceries,” the \$50 would plainly be treated as income reducing the need for transfers (Scenario B).⁹⁵ The cash form is not essential here. Nothing would change if, instead, the stranger provided a \$50 gift certificate or bought the groceries himself (Scenario C).⁹⁶ If, however, the stranger switched to providing theater tickets that cost \$50, the outcome *would* change: the tickets would not be treated as \$50 in income (Scenario D). The reason is *not* that they are in-kind rather than cash (remember the groceries). Instead, the tickets are not income because they are not fungible with the type of purchases the transfer is designed to facilitate.⁹⁷

Table I: Comparing Cash and In-kind Gifts with Different Effects on Need

	Scenario A	Scenario B	Scenario C	Scenario D
	No Income	Cash Gift	In-kind Food Gift	In-kind Theater Gift
Food Needs	\$50 worth	\$50 worth	\$50 worth	\$50 worth
Food Available	None	None	\$50 worth	None
Cash Available	None	\$50	None	None
Transfer Needed	\$50	\$0	\$0	\$50

The same analysis applies if we shift from gift income to income earned in exchange for work. If the recipient provided some service to the stranger in exchange for \$50 cash,

94. See 45 C.F.R. § 260.31(a)(1) (2006) (defining TANF “assistance” as payments “designed to meet a family’s ongoing basic needs (i.e., for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses)”); PANEL ON POVERTY AND FAMILY ASSISTANCE, NAT’L RESEARCH COUNCIL, MEASURING POVERTY: A NEW APPROACH 317–81 (Constance F. Citro & Robert T. Michael eds., 1995) [hereinafter MEASURING POVERTY]; Trudi J. Renwick & Barbara R. Bergmann, *A Budget-Based Definition of Poverty with an Application to Single-Parent Families*, 28 J. HUM. RESOURCES 1, 2–3 (1993).

95. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, §§ 351.2(e)(1), 352.31(a) (2006); New York v. Lyng, 829 F.2d 346, 253–3 (2d Cir. 1987). This is an example of the differences between tax and welfare definitions of income, since gifts are not taxable income. See generally Alstott, *supra* note 18, at 571–76.

96. See sources cited *supra* note 95.

97. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, §§ 352.8(c)(2), 352.16 (2006). I am assuming here that the tickets cannot be converted back into cash. Cultural participation is not generally included in official budgets of necessities, but often is prioritized by transfer recipients, especially for their children. See EDIN & LEIN, *supra* note 76; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 27–31 (1990).

this clearly would be the ordinary work of employment. Nothing would change if \$50 in groceries were received instead.⁹⁸ But providing the same service in exchange for theater tickets ought *not* be treated as work, because receiving those tickets does nothing to reduce transfers.

Deciding whether the generation of imputed income is work becomes conceptually straightforward now that we can distinguish between types of in-kind income and the activities that produce them. Doing so is no more practically difficult than counting in-kind income, something the welfare system already does. If the recipient twiddles his thumbs in lieu of going to the theater, there is no cause to treat its entertainment value as income, nor the production of that value as work. Thumb twiddling is not work for reasons that have nothing to do with imputed income. Instead, they are the same reasons we exclude from income theater tickets received as gifts: They do not meet the needs that transfers are designed to address. Because imputed income necessarily is in-kind income, the boundlessness problem can be tamed without rejecting imputed income wholesale.

To put these pieces together, imagine that our recipient (living in a rural area) begins growing, hunting, and cooking food, as represented in Table II. One possibility is that he sells the food to a stranger for \$50 per week (Scenario B). Plainly the \$50 would count as income reducing the extent of transfers, and its production would count as work. If the recipient now switches to *consuming* the products himself and thereby eliminates his weekly grocery bills (Scenario C), a means-tested system should not, in principle, alter its treatment *either* of his income *or* of his work.⁹⁹ Either way, the endeavor identically reduced the need for transfers and thereby contributed to self-sufficiency. If, however, he substituted entertaining thumb twiddling for subsistence agriculture (Scenario D), this entertainment, no matter how valuable, would not put food on the table and thus would require that transfers be reinstated.

Table II: Comparing The Effect on Need of Cash and Imputed Income

	Scenario A No Income	Scenario B Cash Earnings	Scenario C Producing Food	Scenario D Entertaining Thumb Twiddling
Food Needs	\$50 worth	\$50 worth	\$50 worth	\$50 worth
Food Available	None	None	\$50 worth	None
Cash Available	None	\$50	None	None
Transfer Needed	\$50	\$0	\$0	\$50

Of course, the U.S. economy is one where subsistence agriculture is rare, and where subsistence production typically is inefficient relative to wages plus grocery stores. These may be sound reasons of administrative convenience not to incorporate subsistence farming into either the income or the work dimensions of means-tested welfare. These problems, however, are analytically distinct from any conceptual difficulties differentiating farming from thumb twiddling.

This point is not simply a theoretical curiosity because it recommends alertness to circumstances in which transfer recipients *do* rely heavily on nonmarket production to

98. See *Figueroa v. Sunn*, 884 F.2d 1290 (9th Cir. 1989); N.Y. COMP. CODES R. & REGS. tit. 18, § 352.17(a) (2006).

99. See James Tobin, Joseph A. Pechman, & Peter M. Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1, 12 (1967) (arguing for including “[t]he value of food grown and consumed on the farm” in the household income figure used to administer a negative income tax).

meet their basic needs. In such situations, the strength of these administrative concerns decline. Indeed, until recently, subsistence agriculture was sufficiently important that nonmarket production was incorporated into the assessment of need. From its inception until 1981, the official U.S. poverty line was lower for farm families on the assumption some food was grown not bought,¹⁰⁰ and for a time farm and garden production could be counted as available resources that reduced the need for means-tested benefits.¹⁰¹

Today, subsistence agricultural activities still make explicit, though obscure, appearance in official definitions of TANF work. One heavily rural state—Alaska—by regulation explicitly includes “subsistence activities” as TANF work.¹⁰² Another—Vermont—explicitly includes as self-employment “hours a participant spends earning in-kind income” as TANF work.¹⁰³ These hours, however, are countable only if “the in-kind income reduces the family’s . . . financial assistance grant.”¹⁰⁴ This approach precisely mirrors the above analysis of when in-kind production should be work under a transfer-avoidance account of self-sufficiency. Additionally, in some TANF programs administered by Native American polities,¹⁰⁵ several forms of nonmarket food production are included as TANF work activities.¹⁰⁶

Finally, this analysis of nonmarket production has important implications for the treatment of child care. Unlike food, child care costs currently are not incorporated directly into means-tested programs’ cash standard of need. In other ways, however, ensuring that children receive care is recognized as a household need that the means-tested transfer system should meet, more like food than theater tickets. This becomes clear when a transfer recipient enters the labor market. At that point, the system responds by treating child care as a new need caused by work (as if subsistence farmers only start needing food after they leave the farm for wage work!) and authorizes new transfers to

100. See Thomas A. Carlin et al., *The Farm Differentiation in the Poverty Threshold: Should It Be Changed?*, in ASPECTS OF WELFARE AND POVERTY IN RURAL AMERICA: TWO ISSUE BRIEFS (Econ. Dev. Div., U.S. Dep’t of Agric. 1979) (on file with author); GORDON M. FISHER, U.S. CENSUS BUREAU, THE DEVELOPMENT OF THE ORSHANSKY POVERTY THRESHOLDS AND THEIR SUBSEQUENT HISTORY AS THE OFFICIAL U.S. POVERTY MEASURE (Rev. 1997), <http://www.census.gov/hhes/poverty/povmeas/papers/orshansky.html> (reporting that when the federal poverty thresholds were first introduced, 40 percent of farm families’ food needs were met through farm production).

101. During the 1970s, income definitions in federal antipoverty programs were tightened to exclude home food production based on the administrative difficulty of detection and valuation, and on its relative economic insignificance. See H.R. REP. NO. 92-231 (1972), as reprinted in 1972 U.S.C.C.A.N. 4989, 5164; H.R. REP. NO. 95-464, at 21, 29 (1977), as reprinted in 1977 U.S.C.C.A.N. 1978; 7 C.F.R. 273.9 (c)(1) (2005) (Food Stamps exclusion); 42 U.S.C. § 1382a(b)(8) (2005) (SSI exclusion). Today, homeless individuals’ standard of need may be raised to account for the need to pay someone else to prepare food rather than doing it oneself. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 352.7(c) (2006).

102. See ALASKA ADMIN. CODE tit. 7, § 45.260(i)(1), (j)(2).

103. See 13-170-003 VT. CODE R. § 2364.43 (2005).

104. *Id.*

105. See 42 U.S.C. § 612 (2006) (authorizing TANF administration by individual native nations or multitribal entities).

106. See U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: TRIBAL TANF ALLOWS FLEXIBILITY TO TAILOR PROGRAMS, BUT CONDITIONS ON RESERVATIONS MAKE IT DIFFICULT TO MOVE RECIPIENTS INTO JOBS 24–27 (2002), available at <http://www.gao.gov/new.items/d02768.pdf>.

meet that need through the purchase of market care.¹⁰⁷ Reversing the logic, when transfer recipients care for their own children, they avoid the need for these child care transfers. Providing this care thus contributes to self-sufficiency, just like farmers avoid the need for food-purchase transfers by growing their own food. And unlike subsistence food production, nonmarket familial child care remains a very significant way in which care is delivered in today's economy.

In the Conclusion I develop further the significance of these points with regard to child care specifically. For now, though, the point is simply the more general one that cash wages are not the only way to reduce transfers and thereby promote self-sufficiency.

B. Employment Without Transfer Avoidance

As the preceding discussion of in-kind income shows, the connection between producing cash income and avoiding transfers depends not just on the amount of income generated but also on how the transfer system then treats that income. Promoting self-sufficiency thus is not an intrinsic characteristic of paid employment but rather is a product of how pay and transfer size interact.

Means-tested transfer programs typically reduce benefit levels as income rises, so higher earnings mean lower transfers. If, however, the formula determining benefit levels is modified so that higher earnings no longer cause transfers to decline, then the connection between earnings and self-sufficiency dissipates.

Precisely this scenario is increasingly common, as a variety of modifications to means-testing have been introduced in order to encourage or reward employment. These modifications, however, reduce or eliminate the transfer avoidance effect of wages. Justifying such a system thus requires questioning transfer avoidance as the basis for work requirements. Doing so encourages either turning to another rationale entirely, or making the self-sufficiency approach more complex by analyzing transfer avoidance over a longer timeframe.

The EITC's phase-in period provides the simplest example of how increased employment can lead to increased, not reduced, transfer payments. If a parent of two children shifts from part-time employment earning \$5,000 annually to full-time employment earning \$10,000 annually, her entitlement to an EITC transfer actually doubles, roughly from \$2,000 to \$4,000.^{112.5} Similar increases can occur when employment triggers noncash transfers such as child care subsidies.¹⁰⁸

Even if the benefit structure does not lead to increasing transfers as earnings increase, it may lead to transfers that stay constant or decrease only very slowly. This is

107. States do so by paying child care subsidies directly to a provider, reimbursing the parent, or adjusting cash benefit levels using a "child-care disregard." See Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225, 236 (1998); Urban Institute, Welfare Rules Database, <http://anfdata.urban.org/WRD/Query/WRDQuery.html> [hereinafter Welfare Rules Database] (query using Categories: Earned Income Disregard, Variables: ed_ccare, States: All, Year: 2003, Coverage: Majority only, Show Data As: Short Table). Moreover, almost all states provide "transitional" child care subsidies to former welfare recipients whose earnings have rendered them ineligible for cash assistance. See *id.* (query using Categories: Transitional Benefits, Variables: tb_tcpvd).

112.5. See 2004 Green Book, *supra* note 52, at 13-36–13-39.

108. Offsetting decreases in other transfers, such as TANF, typically are too small to lead to net transfer reductions. See Zatz, *supra* note 6.

what happens when, as has become very common, a TANF program uses an “earned income disregard” to reduce transfers by less than a dollar for each new dollar earned; the percentage reduction is the “benefit reduction rate” (BRR).¹⁰⁹ As the BRR approaches zero, the transfer avoidance effect of employment steadily vanishes. Consider, for instance, a TANF program with a \$5,000 annual benefit level and a 0 percent BRR for earned income. If a recipient with no other income goes to school, her nontransfer income remains zero and her transfer remains \$5,000. If the recipient takes a job that pays \$5,000, her nontransfer income now rises to \$5,000, but her transfer remains constant because the 0 percent BRR disregards all her earnings in the benefit calculation. Under these circumstances, employment has no immediate transfer avoidance effect, and it is no different than education or any other unpaid activity.

A BRR above zero will cause transfers to decrease as earnings increase, but at a slower rate than under strict mean-testing (zero percent BRR). With a \$5,000 maximum benefit, a 50 percent BRR means that taking a \$5,000 job yields a \$2,500 transfer and a net income of \$7,500, whereas with a 100 percent BRR taking the same job would mean losing transfer eligibility and maintaining a constant income of \$5,000. At the individual level, the 50 percent BRR thus might cause transfers to decrease by \$2,500, consistent with a self-sufficiency approach.

Focusing only on how transfers respond to individual changes in earnings can obscure some of the aggregate effects of earnings disregards, which are essentially work requirements on receiving benefits when income exceeds the maximum benefit. Relative to not having any earned income disregard, a 50 percent BRR can cause transfers to *increase* if recipients’ earnings levels remain constant or increase only modestly. At a 100 percent BRR and a \$5,000 benefit level, someone with \$4,000 in earnings will receive a \$1,000 transfer. If the BRR is reduced to 50 percent and that individual still earns \$4,000, the transfer will *increase* to \$3,000.¹¹⁰ Whether, in aggregate, such a policy increases or decreases transfers depends on the relative magnitude of these competing effects.

In theory, a program that promotes employment by linking employment to transfer eligibility may nonetheless cause transfer levels to rise. An important body of research performed by the well-respected nonprofit evaluation firm MDRC shows how these effects operate in practice. These studies examined policy experiments with “earnings supplements” or “work supports” that increased the transfer available at a given level of earned income, relative to the pre-existing welfare program, by lowering the BRR or equivalent techniques.¹¹¹ By randomly assigning participants to the experimental

109. See WELFARE RULES DATABOOK 2003, *supra* note __, at 74–75.

110. Moreover, an individual may reduce earnings in order to capture larger transfers. See Robert A. Moffitt, *The Temporary Assistance for Needy Families Program*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 291, 315–16 (Robert A. Moffitt ed., 2003).

111. See GORDON L. BERLIN, MDRC, ENCOURAGING WORK, REDUCING POVERTY: THE IMPACT OF WORK INCENTIVE PROGRAMS (2000), <http://www.mdrc.org/publications/18/full.pdf>; DAN BLOOM & CHARLES MICHALOPOULOS, MDRC, HOW WELFARE AND WORK POLICIES AFFECT EMPLOYMENT AND INCOME: A SYNTHESIS OF RESEARCH 3–4 (2001); CHARLES MICHALOPOULOS, MDRC, DOES MAKING WORK PAY STILL PAY?: AN UPDATE ON THE EFFECTS OF FOUR EARNINGS SUPPLEMENT PROGRAMS ON EMPLOYMENT, EARNINGS, AND INCOME (2005), <http://www.mdrc.org/publications/414/full.pdf>.

program or the pre-existing one, researchers could determine the relative impact of the policy change.¹¹²

These studies show how deviations from strict means-testing can break the connection between employment and transfer avoidance. Earnings supplements produced marked increases in employment and earnings relative to control groups. Employment rates increased approximately 10 percent, and earnings increased by several hundred dollars per quarter.¹¹³ With regard to transfers, however, the programs consistently *increased* aggregate transfer receipt.¹¹⁴ They did so both because participants got to keep some of their new earnings as increased net income rather than losing them all through reduced transfers, and because transfers increased for those with steady earnings.¹¹⁵ In aggregate, then, these programs actually *increased* transfer dependency.”

This interplay between benefit structure and the transfer-avoiding effects of employment is confirmed by MDRC studies that examine a different set of employment-related policy changes. Using the same random-assignment experimental design, the federally sponsored National Evaluation of Welfare-to-Work Strategies (NEWWS)¹¹⁶ investigated the effects of programs that used the “stick” of reducing benefits if participants failed to pursue and ultimately accept employment, rather than the “carrot” of increasing benefits. Like earnings supplements, these “mandatory” programs effectively increased participants’ employment and earnings levels.¹¹⁷

With regard to net income and transfer levels, however, they had opposite effects. The mandatory programs decreased both the length of time participants received welfare and decreased the total amount of welfare payments.¹¹⁸ The income gains from new earnings were smaller than the income losses from reduced transfers, and so these programs led to absolute reductions in net income.¹¹⁹

These two types of program both applied employment requirements to benefits, but the first (the “carrot”) did so by offering new benefits only to the employed while the second (the “stick”) did so by withdrawing existing benefits from the nonemployed. The stick approach is quite consistent with an emphasis on self-sufficiency in the transfer avoidance sense. The carrot approach is more puzzling.

112. See NEWWS FIVE-YEAR REPORT, *supra* note 76, at 32.

113. MICHALOPOULOS, *supra* note 111, at 13–16; see also Bruce D. Meyer & Dan T. Rosenbaum, *Welfare, the Earned Income Tax Credit, and the Labor Supply of Single Mothers*, 116 Q.J. ECON. 1063, 1066 (2001) (attributing about 60 percent of single mothers' increased employment between 1984 and 1996 to EITC expansion).

114. MICHALOPOULOS, *supra* note 111, at 33–35. When earnings supplements were delivered through the welfare system, the duration of welfare receipt increased as well. See *id.* at 16–19.

115. See *id.* at 19; Robert Haveman, *When Work Alone is Not Enough*, LA FOLETTE POL’Y REP. 1, Fall-Winter 2002–2003, at 1.

116. See generally NEWWS FIVE-YEAR REPORT, *supra* note 76; BERLIN, *supra* note 111.

117. Differences among mandatory programs have received extensive attention, see NEWWS FIVE-YEAR REPORT, *supra* note 76, at ES-2–4, 13–16 (comparing Labor Force Attachment, Human Capital Development, and mixed approaches), but my emphasis here is on their effectiveness relative to controls.

118. NEWWS FIVE-YEAR REPORT, *supra* note 76, at 11–12, 108, 111.

119. See NEWWS FIVE-YEAR REPORT, *supra* note 76, at 127; Haveman, *supra* note 115, at 1. These net reductions occurred despite the fact that recipients’ increased earnings entitled them to increased transfers through the EITC. See NEWWS FIVE-YEAR REPORT, *supra* note 76, at 126 & n.4.

When work support programs use employment to increase rather than decrease transfers, they are difficult to square with a transfer avoidance approach to work requirements. Nonetheless, advocates of such programs routinely invoke the rhetoric of self-sufficiency to justify them, usually in a way that is fused with the goal of raising workers' net income and thereby alleviating poverty.¹²⁰

The problem is that in order to link increased employment to increased income, these programs tinker with precisely the mechanism by which employment ordinarily is associated with self-sufficiency. The income gains come not from the *substitution* of earnings for transfers but from the increased ability to *aggregate* earnings and transfers. At least when taking a short-term view, there is an internal contradiction in using employment to pursue both transfer reduction and poverty reduction: one dollar in wages can't go to both.

Self-sufficiency can no longer be the explanation for linking benefits to work once those benefits are structured so that cash earnings—the distinguishing feature of employment—do not reduce transfers. Otherwise, self-sufficiency has lost its mooring as a criterion linking work to employment and becomes simply an honorific applied to the finances of employed people.¹²¹

One possibility is simply to jettison the transfer avoidance rationale and embrace a poverty reduction goal. Clearly, a worker earning \$10,000 a year will be less poor if she receives a \$4,000 transfer. But the same is true for someone with \$10,000 in unearned income, and for someone with no income at all. From the perspective of transfer avoidance, all three equally fail to be self-sufficient if they receive a transfer of \$4,000.¹²² Some new explanation must be offered for why poverty should be reduced only for those who work.¹²³

With that rationale will come new criteria for identifying what activities should count as work. Self-improvement and reciprocity provide two such possible rationales because they do not require that work be used to reduce transfers. Thus, these rationales might explain why some nonemployment activities should not count as work even though they reduce transfers (the phenomenon discussed in Section II.A) and why some employment-focused work requirements fail to reduce transfers (the phenomenon discussed in this section).

120. See WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE* 4 (2003); Alstott, *supra* note 5, at 999.

121. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, *INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS*, at I-3 n.2 (2005) (classifying a household as welfare "dependent" based on the proportion of its income derived from means-tested benefits, but excluding households with identical income and transfer amounts and proportions if a household member is complying with work requirements through employment or workfare).

122. There are alternative definitions of self-sufficiency and dependency that focus on the proportion of total income derived from transfers, rather than on the amount of the transfer. See Peter Gottschalk & Robert A. Moffitt, *Welfare Dependence: Concepts, Measures, and Trends*, 84 AM. ECON. REV. 38 (1994); U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 121, at I-3. According to such definitions, a worker with \$10,000 in earnings who receives \$10,000 in transfer is more self-sufficient than someone with zero earnings who receives \$4,000 in transfers. A theory of work requirements that prefers the former to the latter requires different foundations from those typically associated with self-sufficiency, since the tax burden on others is greater in the former than in the latter.

123. The same income augmentation for the \$10,000 earner could be achieved through an equally large but unconditional transfer. See Alstott, *supra* note 5, at 999–1000.

Before turning to address these alternatives to self-sufficiency, however, I will pause to discuss an important way to increase the sophistication and complexity of the self-sufficiency approach. By assessing transfer avoidance over a longer time period, it becomes possible in theory that even short-term transfer increases are steps on a path that leads eventually to long-term transfer avoidance.¹²⁴

C. Transfer Avoidance in the Long Run

Thus far, I have established two distinct points about work under a self-sufficiency rationale. First, employment is not the only activity that can promote transfer avoidance; other activities can generate either cash income or in-kind imputed income that substitutes for transfers. Second, employment itself may not promote self-sufficiency if the benefit structure causes transfer levels to rise or remain steady despite increased earnings. Both arguments have taken a short-term view by looking at transfer avoidance during the time the work activity occurs.

Expanding the time horizon complicates the picture. Individuals' earnings tend to grow over time as they accumulate labor market experience, and low-wage workers are no exception to this pattern. Indeed, on average, their wages grow with experience at the same rate as the workforce as a whole.¹²⁵ These averages, however, mask substantial variation among low-wage workers, with earnings gains concentrated among the highest earners. One study found that the median hourly wage of former welfare recipients rose roughly 1 percent per year over 11 years,¹²⁶ while another study of a much broader (and less disadvantaged) group of low-earning workers found median annual earnings growth of roughly ten percent per year over six years.¹²⁷

Accounting for long-term earnings growth could affect both of the points made above. First, over the long term, employment might gain an advantage if earnings increase faster than income generated by an alternative activity. Second, even if employment yields no immediate transfer reductions, further increases in earnings could subsequently cause transfers to drop. In these ways, taking a longer-term view could strengthen employment's claim on work within a self-sufficiency approach.

A long-term perspective can also have the opposite effect by opening the door to unpaid activities that increase one's capacity to gain transfer-reducing income in the

124. Similarly, the short-term transfer decreases could be steps on a path that leads eventually to poverty reduction.

125. See Tricia Gladden & Christopher Taber, *Wage Progression Among Less Skilled Workers*, in FINDING JOBS: WORK AND WELFARE REFORM 160 (David E. Card & Rebecca M. Blank eds., 2000); FREDRIK ANDERSSON *et al.*, MOVING UP OR MOVING ON: WHO ADVANCES IN THE LOW-WAGE LABOR MARKET? 51, 74 (2005). Nonetheless, absolute wage growth is smaller because this growth rate applies to a low base wage and because low-wage workers spend more time unemployed. See Gladden & Taber, *supra*.

126. See Gary T. Burtless, *Welfare Recipients' Job Skills and Employment Prospects*, 7 FUTURE OF CHILDREN 39, 44 (Spring 1997) (11 percent over 11 years).

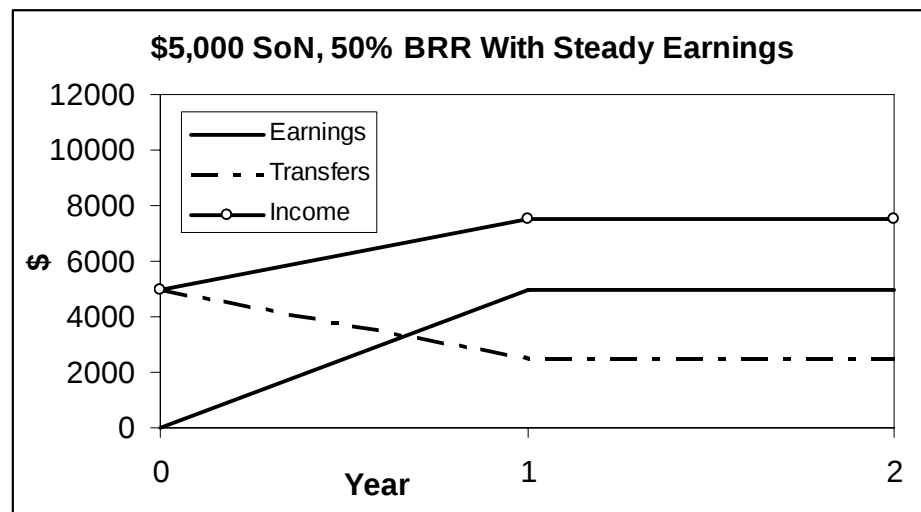
127. ANDERSSON *et al.*, *supra* note 125, at 51 (76 percent over six years). The two studies are not strictly comparable because of a variety of methodological differences, but the contrast remains highly suggestive. Moreover, the same basic top-heavy pattern repeats within the population each study examines. See *id.* (finding average earnings growth of 130 percent compared to a median of 76 percent); Burtless, *supra* note 126, at 44 (finding roughly 30 percent wage growth at the 90th percentile, compared to a median of 11 percent).

future. These future transfer-avoiding income gains could offset the activity's immediate inability to reduce transfers. If these future gains exceed those from labor market experience, then activities without any immediate transfer-avoiding effect could nonetheless have as strong a claim on work as paid employment.

1. Incorporating Earnings Growth from Job Experience

In the previous section, we saw that work support programs fit uneasily within a self-sufficiency framework because they allow transfer recipients to maintain or increase their benefits when their earnings increase. The result is that their net income rises above the designated standard of need, and so the continued "unneeded" transfers appear to be windfalls to the employed (Graph I).¹²⁸

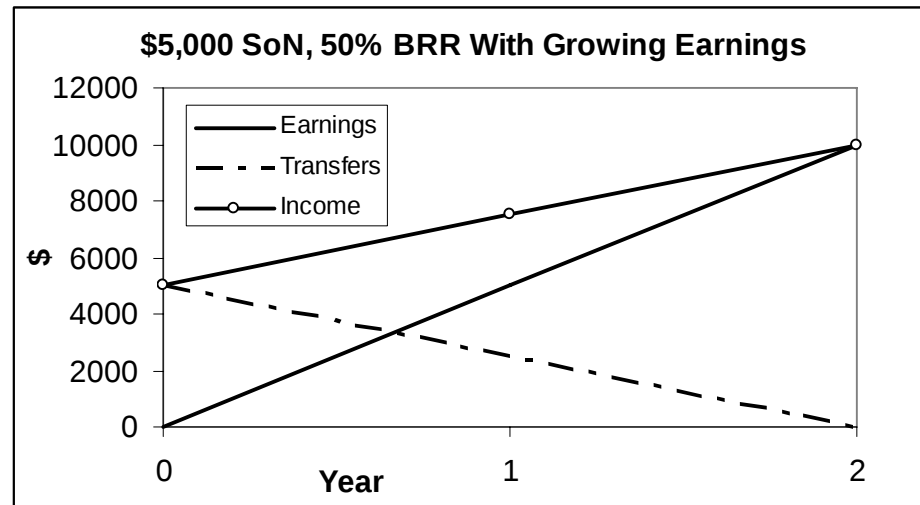
Graph I



These windfalls might, however, be understood as "carrots," enticing transfer recipients onto an upward earnings trajectory and into firm labor market attachment that will eventually allow withdrawal of transfers. For instance, a 50 percent BRR might persuade an unemployed transfer recipient to take a \$5,000 job by letting her keep \$2,500 in income above the \$5,000 standard of need, and then she might go on the following year to earn \$10,000, reducing transfers to zero (Graph II). The \$5,000 transfer avoided in year two more than offsets the \$2,500 "windfall" in year one; it also offsets the similar windfalls paid to other recipients whose behavior is unaffected by the different BRR. Moreover, the additional \$5,000 in earnings growth (from \$5,000 to \$10,000) allows this scenario to transcend the iron trade-off between transfer avoidance and poverty reduction described above: relative to no earnings and a \$5,000 transfer, \$10,000 in earnings yields both a \$5,000 decrease in transfers and a \$5,000 increase in household income.

Graph II:

128. See BERLIN, *supra* note 111, at 20 & n.9; MICHALOPOULOS, *supra* note 111, at 34, 38.



A number of common elements of TANF program design reflect aspirations toward this type of scenario. First, substantial earnings disregards usually are available primarily to *existing* transfer recipients, not to new applicants.¹²⁹ Thus, an applicant earning \$5,000 would be turned away as not poor enough, but a current recipient whose earnings went from zero to \$5,000 would remain eligible for a \$2,500 benefit. Second, even among current recipients, disregards often are time limited, so that the \$5,000 earner might remain eligible for a \$2,500 transfer for one year, but thereafter benefits would reduce to zero.¹³⁰ A similar structure characterizes so-called “transitional benefits,” which temporarily suspend or loosen means-testing of noncash benefits—child care subsidies, Medicaid, Food Stamps—for former transfer recipients who left cash welfare because of increased earnings, but which typically expire after one or two years.¹³¹

These features cause individuals to receive different transfers despite identical work and income. This discrimination in favor of current or recent transfer recipients would make little sense if the provisions aimed simply to favor the employed over the unemployed. They are, however, quite consistent with a “carrot” approach that aims to induce eventual transfer avoidance through employment; they also mitigate the earlier point that these sorts of benefit structures appear inconsistent with a self-sufficiency goal for work. Once the time limit on an earnings disregard expires, continued employment *will* cause transfer levels to drop. Whether these targeted windfalls are outweighed by eventual transfer avoidance is an empirical question to which I will return below.

Before doing so, however, it is noteworthy that work support programs often lack the narrowing features just discussed. The EITC, itself often touted as a carrot that entices welfare recipients off the rolls and into the labor market,¹³² provides the paradigmatic

129. Compare WELFARE RULES DATABOOK 2003, *supra* note __, at 60–61, with *id.* at 74–75.

130. See *id.* at 74–75. Benefit time limits have a similar function.

131. See generally Welfare Rules Database, *supra* note 107 (query using Categories: Transitional Benefits; Variables: tb_tcmos, tb_tmms; States: All; Year: 2003; Coverage: Majority only; Show Data As: Short Table); DOROTHY ROSENBAUM, CENTER ON BUDGET & POLICY PRIORITIES (CBPP), TRANSITIONAL FOOD STAMPS: BACKGROUND AND IMPLEMENTATION ISSUES (2003), <http://www.cbpp.org/11-10-03fa.pdf>.

132. Alstott, *supra* note 18, at 537–38, 553–54; cf. V. JOSEPH HOTZ ET AL., EXAMINING THE EFFECT OF THE EARNED INCOME TAX CREDIT ON THE LABOR MARKET PARTICIPATION OF FAMILIES ON

example. It is not limited to current, former, or potential welfare recipients;¹³³ it lacks time limits; and it imposes no obligation to work full-time or pursue higher paying jobs. Other work supports also lack one or more of these features.¹³⁴ Nonetheless, a self-sufficiency account is still possible if, in practice, recipients eventually show sufficient earnings growth that they lose or reduce transfer eligibility, even though program rules do not enforce that result. That is, if a recipient will go from earning \$5,000 in year one to earning \$10,000 in year two, then the transfer avoidance effect of a 50 percent BRR is the same regardless of whether it reverts to a 100 percent BRR after one year.

A substantial body of research sheds light on this theoretical possibility. At the outset, note that the earnings-growth story actually has two hurdles to overcome. First, and most obviously, earnings must grow enough that by the end of the relevant period, transfer levels have declined. This may require quite substantial rates of earnings growth. Even at the very healthy clip of 5 percent annual growth, a low-wage worker would need six years to traverse from the beginning to the end of the EITC's plateau range, during which time transfers would remain constant at their maximum.¹³⁵ After another decade of such growth, the worker would still be eligible for a credit well over \$2,000.¹³⁶ Second, and more subtly, any eventual transfer declines must be large enough to offset the interim windfalls. If a program with a \$5,000 standard of need pays \$2,500/year to a \$5,000/year earner for four years, then an earnings increase to \$10,000 in year five will avoid \$5,000 in transfers that year, but that does not yet erase the previous four years of "extra" transfers totaling \$10,000 (Graph III).^{141.5}

Graph III

WELFARE (Dec. 2005) (discussion paper, Institute for Research on Poverty), <http://www.irlp.wisc.edu/publications/dps/pdfs/dp131305.pdf>.

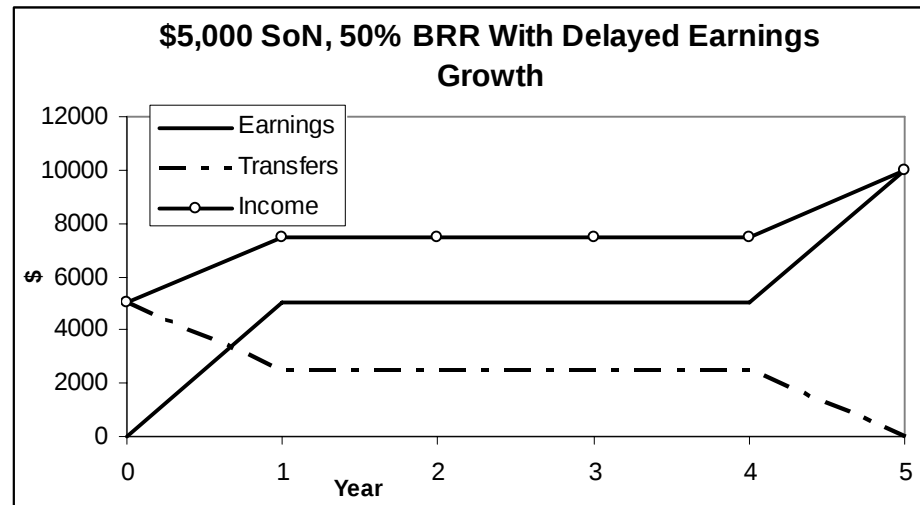
133. The EITC is available to households without children and to certain immigrant workers who are ineligible for TANF. See TANYA BRODER, NAT'L IMMIGR. L. CTR., IMMIGRANT ELIGIBILITY FOR PUBLIC BENEFITS (2005), http://www.nilc.org/immispbs/special/imm_elig_for_pub_bens_aila_0305.pdf.

134. See *supra* notes 129–130 and accompanying text.

135. Starting at \$10,510, after six years earnings would be \$14,084.

136. After sixteen years, earnings would be \$22,942, eligible for a \$2,269 credit. The frequency of this scenario is difficult to assess. Very little research has been done on the dynamics of EITC receipt over time. The existing studies consider EITC recipients as a whole, without distinguishing between the lowest-wage workers receiving large EITCs and the very large number of higher-wage workers receiving smaller benefits closer to the phase-out point. See Timothy Dowd, *Distinguishing Between Short-Term and Long-Term Recipients of the Earned Income Tax Credit*, 58 NAT'L TAX J. 807, 816, 818 (2005); see also John B. Horowitz, *Income Mobility and the Earned Income Tax Credit*, 40 ECON. INQ. 334 (2002).

141.5. Whether a net savings is ever achieved depends on how long transfers would have continued, absent earnings increases. A number of other changes, including household composition, could end transfer eligibility.



The welfare policy experiments studied by MDRC provide the best available evidence on the long-term earnings trajectories of transfer recipients induced to enter the labor market by linkages between transfer eligibility and employment. The key to understanding the results of these experiments is that, even without work requirements, over time most transfer recipients find jobs, increase work hours, and experience earnings growth.¹³⁷ What employment-focused work requirements aim to do is accelerate and intensify this process.

If the long-term theory of transfer avoidance holds true, we should see a permanent gap over time between the earnings of the experimental group subject to work requirements and the control group in the pre-existing program. Even if the control group gets jobs eventually, the experimental group will have a head start up the job ladder.

MDRC's earnings supplement studies find the opposite result at the aggregate level. Despite initially higher earnings and employment in the experimental group, after four years there were almost no statistically significant impacts.¹³⁸ As a result, the programs never made up for the extra costs of the earnings supplements; indeed, they never even began to make up that cost.¹³⁹ Moreover, once the supplements were withdrawn, participant *income* also converged with the control group.¹⁴⁰ In short, taking a longer view failed to overcome the tension between transfer avoidance and poverty reduction goals.¹⁴¹

137. See NEWWS FIVE-YEAR REPORT, *supra* note 76.

138. MICHALOPOULOS, *supra* note 111, at 13–16; see also PETER Z. SCHOCHET ET AL., MATHEMATICA POLICY RESEARCH, INC., NATIONAL JOB CORPS STUDY: FINDINGS USING ADMINISTRATIVE EARNINGS RECORDS DATA xvii, xxvii (2003), http://www.doleta.gov/reports/searcheta/occ/papers/2005-06_Final_Report.pdf (finding similar results for Job Corps, an employment program for disadvantaged youth). These results are due primarily to the eventual “catch-up” in earnings and employment of those not eligible for earnings supplements. *Id.* at 30. The one case of significant impact is ambiguous because it combined a generous initial earnings supplement with a sharp time limit after 21 months. See DAN BLOOM ET AL., MANPOWER DEMONSTRATION RESEARCH CORP., JOBS FIRST: FINAL REPORT ON CONNECTICUT’S WELFARE REFORM INITIATIVE 4–5 (2002), <http://www.mdrc.org/publications/90/full.pdf>.

139. See MICHALOPOULOS, *supra* note 111, at 33–35.

140. PETER Z. SCHOCHET ET AL., *supra* note 139, at 19–20, 30–33.

141. *Id.* at 33.

MDRC's long-term evaluations of mandatory welfare-to-work programs reach complementary conclusions. Their employment and earnings effects also derived almost entirely from their *short-term* consequences.¹⁴² Again, the work requirements successfully accelerated and intensified labor market participation, but the resulting earnings advantage narrowed and ultimately disappeared.¹⁴³ Similarly, over time these programs' transfer avoidance effects decreased rather than increased.¹⁴⁴ Any transfer-avoidance advantage employment has over other activities thus appears to be at its peak in the short rather than the long term.¹⁴⁵ Accordingly, where employment lacks such a short-term advantage over other income sources, the burden of proof should rest on those who nonetheless privilege employment based on the possibility of long-term earnings growth.

In sum, although adopting a longer-term perspective could in theory modify the points made in previous sections, in fact it seems only to reinforce them. At least among the population affected by contemporary welfare work requirements, employment's relative transfer-avoiding effects do not grow over time and may even decline.¹⁴⁶

2. Balancing Long-Term Transfer Avoidance Against Immediate Employment

The previous section explored how employment could serve two distinct functions related to transfer avoidance. First, by bringing in immediate income, it can reduce means-tested transfers. Second, by providing valuable work experience, it can increase future earnings capacity. These two functions are separable. Some paid employment—"dead-end jobs"—will serve the first function but not the second. More importantly, some unpaid activities can serve the second even if not the first. This point provides a

142. Ten of the eleven programs showed statistically significant positive effects on employment and earnings over the first three years, but these effects steadily declined and had largely disappeared by the end of year five. See NEWWS FIVE-YEAR REPORT, *supra* note 76, at 89–95, 106, 352–60. For instance, in year one the Riverside LFA program increased employment by 16.5 percent and earnings by \$719, but by the end of year five those impacts had dropped to only 2.9 percent and \$492 (annualized). See also V. Joseph Hotz et al., *Evaluating the Differential Effects of Alternative Welfare-to-Work Training Components: A Re-Analysis of the California GAIN Program*, 24 J. LABOR ECON. 521, 549 (2006) (finding that effects on an earlier cohort in the Riverside LFA program entirely disappeared after seven to nine years).

143. This is somewhat mysterious, given the general pattern of earnings growth for low-wage workers. See *supra* note 125. Possible explanations include the tendency of welfare leavers' earnings to plateau, see Daniel R. Meyer & Maria Cancian, *Ten Years Later: Economic Well-Being Among Those Who Left Welfare*, 25 J. APPLIED SOC. SCI. 13, 16 (2001), wage profiles that may differ when labor market entry is influenced by more stringent work requirements, cf. P. Lindsay Chase-Lansdale et al., *Mothers' Transitions from Welfare to Work and the Well-Being of Preschoolers and Adolescents*, 299 SCIENCE 1548, 1551 (2003), and the concentration of wage gains in a subset of all low-wage workers that may include relatively few former welfare recipients, see *supra* notes 126 & 127.

144. NEWWS FIVE-YEAR REPORT, *supra* note 76, at 366–69.

145. These results also contradict Charles Murray's influential theory that forcing welfare recipients to work will make them better off economically by forcing them to suffer the short-term pain necessary on the road to long-term prosperity. See CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980* (2d ed. 1995). In the NEWWS studies, not a single program produced a statistically significant positive impact on household income over the five-year period, while two programs had significant negative effects. NEWWS FIVE-YEAR REPORT, *supra* note 76, at 127.

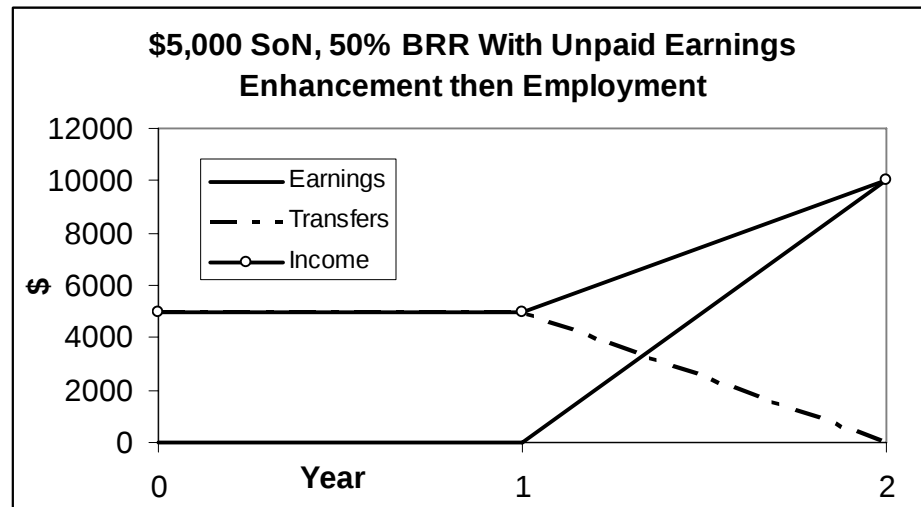
146. I have been discussing aggregate studies, so it remains possible that in individual cases employment will have such advantage, but the challenge is identifying those cases.

framework for incorporating unpaid activities—such as training, internships, and rehabilitation—into a self-sufficiency account .

From a long term perspective, an activity that presently produces no transfer-reducing income may nonetheless be a first step in an eventual transfer-reducing process. At first, earnings capacity is increased outside of employment. Next, the participant shifts into paid employment and begins earning transfer-avoiding income. Consider someone who at the beginning of year one can at best earn \$5,000 annually. During year one she receives a \$5,000 transfer while engaging in an unpaid activity that enables her in year two to earn \$10,000. Over the two-year period that unpaid activity has contributed toward self-sufficiency, even though it did not do so in year one.

Indeed, this year of unpaid activity might do more for self-sufficiency than being employed during that year. Imagine that year one employment was a “dead-end job,” such that year two earnings were again \$5,000. With a \$5,000 standard of need and a 100 percent BRR, the dead-end job shows superior transfer avoidance because its holder receives no transfer in year one and succeeding years, whereas the unpaid activity requires a \$5,000 transfer in year one but none in succeeding years. If, however, the BRR is 50 percent, then the two patterns are equivalent over two years: \$2,500-then-\$2,500 for the dead-end job versus \$5,000-then-\$0 for the sequenced unpaid activity followed by better job. Once the time frame extends to a third year, however, the unpaid activity becomes superior because the occupant of the dead-end job still receives a \$2,500 transfer (Graph I) while the occupant of the better job (facilitated by the first year’s activity) receives none (Graph IV). The dead-end job, however, remains superior to an unpaid activity that fails to increase future earnings.¹⁴⁷

Graph IV



By incorporating future earnings effects, a self-sufficiency perspective can both distinguish among unpaid activities and compare unpaid activities to immediate paid employment. In practical terms, this means that the warrant for an unpaid activity need not be the present unavailability of any job at all. Instead, transfer avoidance may require

147. In addition, the increase in future earnings must be large enough to make up for lost employment income during the period of unpaid training. See *NEWS FIVE-YEAR REPORT*, *supra* note 76, at ES-6.

turning down a bad job today in order to acquire a better one tomorrow.^{152.5} As the previous paragraph's thought experiment showed, assessing the relative merits of employment and a competing unpaid activity will depend on (1) the current wages of available employment, (2) the earnings trajectories yielded by each activity, (3) the means-tested structure of the transfer in question, and (4) the choice of timeframe.

a. Including Unpaid Activities That Improve Employability

This long-term framework helps explain many aspects of when TANF programs allow unpaid activities to count as work. The simplest example is job search, a central element of TANF work policies even though it brings in no income. The point, obviously, is not the search process itself but instead the prospect of finding a job at its end. This stance is institutionalized by short time limits on how long a job search will be allowed.¹⁴⁸

After some period, the approach shifts from matching workers with jobs to changing the recipients' ability to get and keep jobs that actually exist. Formal off-the-job education or training are obvious candidates, since individual knowledge and skill is an important predictor of earnings and employment, including among low-wage workers.¹⁴⁹ Another approach seeks to capture some of the benefits of on-the-job training and experience without getting paid, the familiar theory behind many an unpaid internship and much volunteer activity more broadly.¹⁵⁰

The criteria TANF programs use to classify unpaid activities as work often cast them as temporary activities designed to facilitate future employment. Sometimes, the unavailability of paid employment is an explicit prerequisite for engaging in the activity. Federal TANF law, for instance, permits "work experience" only when "sufficient private sector employment is not available."¹⁵¹ Furthermore, unpaid activities often must be designed to enhance future employability.¹⁵² Educational activities often are subject to this requirement, either explicitly¹⁵³ or implicitly by requiring that they be "vocational" or "related to employment."¹⁵⁴ Finally, they may be limited by time, or indirectly by maximum credential. A number of States allow educational activities only during the first year or two of TANF receipt and thereafter focus more tightly on employment,¹⁵⁵

152.5. See NEWWS Five-Year Report, *supra* note 76, at ES-3 (noting that the program that most effectively raised earnings and reduced transfers was one emphasized job quality over immediate placement).

148. 42 U.S.C. § 607(c)(2)(A)(i) (2006).

149. See, e.g., KARIN MARTINSON & JULIE STRAWN, CTR. L. & SOC. POL'Y, BUILT TO LAST: WHY SKILLS MATTER FOR LONG-RUN SUCCESS IN WELFARE REFORM 8, 16 (2003), <http://www.clasp.org/publications/BTLreport.pdf>.

150. See also John Wilson, *Volunteering*, 26 ANN. REV. OF SOC. 215, 232 (2000) (reporting that about one quarter of all volunteers cite making career-related connections as one of their motivations).

151. 42 U.S.C. § 607(d)(4) (2006).

152. See Zatz, *supra* note 6, at 1140–43; 71 Fed. Reg. 37454, 37460.

153. See Zatz, *supra* note 6.

154. 42 U.S.C. § 607(d)(8), (9) (2006); see also Zatz, *supra* note 6 (discussing analogous requirements for work experience and community service programs).

155. See Zatz, *supra* note 6. Federal law allows vocational education as a "core" work activity only for 12 months, but without regard to prior period of welfare receipt. 42 U.S.C. § 607(d)(8) (2006).

and even expansive endorsements of higher education limit the number and level of degrees that can be pursued.¹⁵⁶

This focus on eventual employment also characterizes activities that address aspects of job holding other than traditional conceptions of vocational skill. Work experience programs, for instance, often are touted as means to correct deficiencies in “soft skills” related to compliance with the behavioral expectations and managerial imperatives typical of low-wage work: timeliness, obedience, avoidance of interpersonal conflict, and cheerful deference to customers, even when they are abusive.¹⁵⁷ Some states also have introduced a battery of rehabilitative and related professional services designed to intervene in substance abuse, physical and mental disabilities or health limitations, domestic violence, and other circumstances that can interfere with employment.¹⁵⁸ Such interventions might yield as large an improvement in future employment prospects as learning how to use Microsoft Office, catheterize a patient, or contain one’s anger when insulted by the boss.¹⁵⁹ Again, current employment limitations often are a prerequisite to entry into these activities, the activity must enhance future employment, or the activity is time limited.¹⁶⁰ All these design features make transfer avoidance the ultimate goal, even if not the immediate one.

b. Excluding Employment That Limits Long-term Self-sufficiency

A focus on eventual self-sufficiency can justify limitations on *paid* activities as well. If a job’s wages are low enough to qualify the worker for transfers, and substantial earnings growth is unlikely, then self-sufficiency may require rejecting that job as a means to fulfill work requirements. This point, too, is reflected in existing TANF programs, albeit more subtly.

An exclusive focus on short-term transfer avoidance would imply that activities like education or rehabilitation, while potentially legitimate, are always a second-best to legitimate paying jobs. Indeed, many advocates of a “Work First” approach take this view, and it is reflected to some extent in common welfare provisions mandating that recipients accept almost any available job.¹⁶¹ Nonetheless, there are limits on the paying work that TANF recipients are expected, or even permitted, to accept. To a large degree, these limits operate implicitly through the background assumption that the jobs in question comply with general labor standards, including the minimum wage. TANF

156. See Zatz, *supra* note 6, at 1170.

157. Turner & Main, *supra* note 47, at 299–300 ; HARRY J. HOLZER, BROOKINGS INSTIT., WELFARE REFORM & BEYOND, POL’Y BRIEF NO. 24, CAN WORK EXPERIENCE PROGRAMS WORK FOR WELFARE RECIPIENTS? 3 (2002), <http://www.brook.edu/es/wrb/publications/pb/pb24.pdf>; KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 89–93, 144–45 (1999); Gordon Lafer, *What is ‘Skill’?: Training for Discipline in the Low-Wage Labour Market*, in THE SKILLS THAT MATTER 108 (Chris Warhurst et al. eds., 2004).

158. See Zatz, *supra* note 6; HEIDI GOLDBERG, CTR. ON BUDGET POL. PRIORITIES, IMPROVING TANF PROGRAM OUTCOMES FOR FAMILIES WITH BARRIERS TO EMPLOYMENT 11–13 (2002), <http://www.cbpp.org/1-22-02tanf3.pdf>.

159. See Sheila R. Zedlewski & Pamela Loprest, *Will TANF Work for the Most Disadvantaged Families?*, in THE NEW WORLD OF WELFARE, *supra* note 2, at 311; GOLDBERG, *supra* note 158.

160. See Zatz, *supra* note 6; 71 Fed. Reg. 37454, 37460.

161. See *infra* note 162.

recipients would not be penalized for turning down a sub-minimum-wage job,¹⁶² even though earnings from such a job *would* reduce transfers relative to any unpaid activity.

A fascinating New York case illustrates how a focus on long-term self-sufficiency can favor unpaid over paid activities. In *Carcamo v. Wing*, a hairdresser was denied means-tested child care assistance on the ground that her job was not a “feasible component of a plan for self-support”; it failed this test because it was a sub-minimum wage job in the informal economy.¹⁶³ The court reasoned that petitioner, who was receiving Food Stamps at the time, should have quit or refused to take this job in the first place. Instead, if no “minimum wage or better job” was available, she should have enrolled in education and training programs, “which would have better equipped petitioner to obtain such a job on her own.” This was so even if the resulting loss of wage income would have required going on welfare.¹⁶⁴ Because this job was deemed to be a dead end, rather than a stepping stone to self-sufficiency, a long-term emphasis on transfer avoidance favored unpaid education and training, despite the resulting short-term increase in transfers.

The *Carcamo* decision was driven in part by the illegality of sub-minimum wage work, but the same principle has been applied to legal, but low-wage, work. Portland’s highly touted NEWWS program, consistent with “Work First,” emphasized rapid employment through job search or short-term training. It did not, however, require that participants pursue and accept just any job. Instead, the program targeted jobs that, while still relatively low-wage, nonetheless paid well above minimum wage and offered prospects for upward mobility.¹⁶⁵ If such a job could not be found, participants were directed to training programs. Although this policy may have had additional goals, as well, it was very successful as a strategy to promote self-sufficiency: Over the five-year evaluation period, the Portland program reduced both the number of participants receiving welfare and the total cost of transfer payments to a greater extent than any other NEWWS approach, including those emphasizing immediate employment in any available job.¹⁶⁶

To be sure, the Portland example does not imply that unpaid activities will *always* be superior to paid employment from a long-term transfer-avoidance perspective. It all depends on how the unpaid activity and the available jobs compare in their ability to raise future earnings,¹⁶⁷ with the caveat that immediate employment always begins with the head start of immediate transfer reductions.¹⁶⁸ The outcome of this comparison also depends on the individuals in question; the same job could be a success for one and a

162. See, e.g., N.Y. SOC. SERV. L. § 336-d(1) (imposing on recipients a “duty to accept any offer of lawful employment in which he or she may engage” (emphasis added)); see also 7 C.F.R. § 273.7(a)(1)(vi), (h) (2006) (specifying similar rule for Food Stamps).

163. *Court Decisions*, N.Y. L.J., Nov. 19, 2001 at p.32.

164. *Id.*

165. NEWWS FIVE-YEAR REPORT, *supra* note 76, at ES-3, 16.

166. *Id.* at ES-3.

167. The effectiveness of programs designed to increase future employability is a hotly debated question. See JUDITH M. GUERON & GAYLE HAMILTON, BROOKINGS INST., WELFARE REFORM & BEYOND, POL’Y BRIEF NO. 20, THE ROLE OF EDUCATION AND TRAINING IN WELFARE REFORM (2002), <http://www.mdrc.org/publications/158/policybrief.pdf>.

168. In addition, if the unpaid activity is paid for out of the budget for transfer programs, participating in the activity is functionally equivalent to *increased* transfers from the taxpayer’s perspective.

disaster for another, and a training program that provides a new credential or skill to one person could be entirely redundant for another.¹⁶⁹ Such an assessment inevitably entails grappling with probabilities: the appropriateness of requiring a given job will require a calculated risk concerning the future earnings trajectory. Finally, as always, the comparison also depends on the structure of the transfer program in question. If thirty hours of minimum wage work yield enough earnings to eliminate transfers, then there is no self-sufficiency argument for training for a higher paying, forty-hour job.

In sum, introducing a long-term analysis of self-sufficiency makes deciding what should count as work quite complex, and quite sensitive to a host of empirical and normative questions.¹⁷⁰ It does not, however, clearly strengthen the connection between work and immediate employment, and in some circumstances certainly weakens it.

D. The Limits of Transfer Avoidance

The analysis above focused on specific activities' transfer-avoidance effects. This leaves out other characteristics that could be relevant to their status as work. Some such characteristics are relevant even within a self-sufficiency approach. Others, however, require going outside self-sufficiency to establish their relevance.

1. Transfer Avoidance and the Maintenance of Household Well Being

Even within a self-sufficiency account, transfer avoidance is not the exclusive purpose of work requirements. That goal could be accomplished more directly simply by abolishing welfare. Instead, the purpose is to generate new sources of income that substitute for transfers. Such a substitution leaves the household with at least the same level of economic resources that the transfer system is designed to assure.

This constraint creates a problem for approaches that raise employment and earnings, reduce transfers, but also reduce household income. This is precisely what strict "Work First" programs typically do.¹⁷¹ Even conservative welfare analysts generally do not endorse this outcome, though it is a consequence of the policies they typically support.^{176.5} This result might be understood simply as an unfortunate

169. Frederick Andersson et al. find that 29 percent of workers with annual earnings under \$12,000 in 1993, 1994, and 1995 also had annual earnings under \$12,000 in 1999, 2000, and 2001. Among these persistent low earners, median total real earnings growth between these two periods was only 8 percent, versus median real earnings growth of 74 percent for all initial low earners. See ANDERSSON, *supra* note 125, at 50, 51, 53. This variation is not randomly distributed but is instead stratified by race, gender, employer, and individual characteristics. *Id.* at 56–57.

170. To name just a few: To what degree will different activities enhance future earning capacity and, if so, by how much and over what period of time? How much variation is there among transfer recipients with respect to these questions, and how accurately can they be answered for individual recipients? Are short-term costs and long-term benefits entirely fungible?

171. See *supra* notes 113–123.

176.5. See, e.g., Turner, *supra* note 29 (touting "work first" as a method of poverty reduction); Lawrence M. Mead, *The Reauthorization of TANF: Work and Child Care Provisions*, Hearing before the Subcomm. on 21st Century Competitiveness, House Comm. on Education and the Workforce, 109th Cong. (Mar. 15, 2005), http://www.house.gov/ed_workforce/hearings/109th/21st/welfare031505/mead.htm. See generally Haskins, *supra* note 2; Heclo, *supra* note 2. Claims for the poverty reduction effects of "work first" typically ignore carefully tailored research like MDRC's and instead focus on aggregate changes in

consequence of imperfect program administration and integration. No cash welfare program has a BRR over 100 percent, so in theory increased earnings should never cause a drop in income.¹⁷² Nonetheless, these drops can occur when earnings are unstable, and when errors or unresponsiveness in the transfer system mean that lost earnings are not necessarily replaced by increased transfers.¹⁷³

Deeper problems arise from using cash income to measure need in the first place. The simplest example occurs when rising earnings trigger loss of both cash and noncash transfers, but the earnings substitute only for the former. Consider someone receiving a \$5,000 transfer plus Medicaid who takes a \$5,000 job without health care benefits. If \$5,000 is the income threshold for both transfer payments and Medicaid, then the person with \$5,000 in earnings will lose more in transfers (\$5,000 + health care) than gained from employment (\$5,000). This is a well-known and vexing problem that remains unsolved, though various attempts have been made to mitigate it.¹⁷⁴ Acknowledging it could sometimes permit favoring unpaid activities even over jobs that pay enough to eliminate transfers. The benchmark would become jobs that pay enough (in total compensation) to eliminate transfers and maintain *both* cash and noncash income levels.

Arguably, such over-reduction in transfers should be addressed through better coordination of income eligibility standards,¹⁷⁵ not through the assessment of whether any given activity satisfies work requirements. This move, however, is not always possible. Consider the problem of time. TANF programs specify a minimum amount of time that recipients must spend working in a given week. The exact number varies by program, and it is hotly contested politically. Nonetheless, this disagreement covers the relatively narrow range of 20–40 hours per week. No State requires more than 40, and I am unaware of any proposals that would require transfer recipients to work 50, 60, or 70 hours per week in order to become self-sufficient.¹⁷⁶

Regardless of just where this line should be drawn, the intuitive point is that there are limits on the hardships transfer recipients are expected to endure in order to become self-sufficient. They are not expected to work around the clock, and presumably they are not expected to risk their lives to do jobs that they are physically able to perform but that would considerably endanger their health. Unlike loss of in-kind benefits triggered by income increases, these sorts of harms from work activities largely inhere in the nature of

poverty rates that reflect a variety of concurrent policy and macroeconomic changes. See Turner, *supra*; Mead, *supra*.

172. See generally NORMA B. COE ET AL., URBAN INST., DOES WORK PAY? A SUMMARY OF THE WORK INCENTIVES UNDER TANF (1998), <http://www.urban.org/UploadedPDF/anf28.pdf>.

173. See David H. Autor & Susan N. Houseman, *The Role Of Temporary Employment Agencies In Welfare To Work: Part Of The Problem Or Part Of The Solution?*, 22 FOCUS 63 (2002).

174. See NEWWS FIVE-YEAR REPORT, *supra* note 76, at 160–61; LEIGHTON KU & EDWIN PARK, CTR. ON BUDGET AND POL'Y PRIORITIES, IMPROVING TRANSITIONAL MEDICAID TO PROMOTE WORK AND STRENGTHEN HEALTH INSURANCE COVERAGE (2002), <http://www.cbpp.org/4-24-02health.pdf>.

175. See Jonathan Gruber, *Medicaid in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES*, *supra* note 110, at 15, 43–45, 63–66; MARILYN ELLWOOD, URBAN INST., THE MEDICAID ELIGIBILITY MAZE: COVERAGE EXPANDS, BUT ENROLLMENT PROBLEMS PERSIST: FINDINGS FROM A FIVE-STATE STUDY (1999), available at <http://www.urban.org/UploadedPDF/occa30.pdf>.

176. But see Brittany Wallman, *Housing Costs Too Much? Then Work More, Mayor Says*, L.A. TIMES, May 21, 2006, at A23 (quoting Ft. Lauderdale Mayor Jim Naugle's objections to a proposed affordable housing ordinance: "I'm supposed to subsidize some schlock sitting on the sofa and drinking a beer, who won't work more than 40 hours a week?").

the activity itself: there is no time transfer program that can make up for lost hours in the day.

For these reasons, a self-sufficiency approach should assess work activities based on more than just those activities' transfer avoiding effects. Transfer avoidance must not come at the cost of the standard of living that transfers are meant to protect, and this requires considering not only cash income but also the noneconomic effects of work itself. To some extent, this can be done simply by requiring that work meet existing labor standards, but this is insufficient. A job that complies with occupational health and safety standards might still be unsafe for a given individual,¹⁷⁷ and overtime rules deter but do not bar working more than forty hours per week. For these reasons, assessing tradeoffs between transfer-avoiding employment and activities that promote future employment requires developing some account of which noneconomic harms of work transfer recipients are expected to bear, and which they are not. I do not take on that task here, but it is a necessary one that has yet to be performed.

2. Self-sufficiency and the Role of Unpaid Activities

The issue of time raises another complicating aspect of work activities under a self-sufficiency account. Because transfer-avoiding activities are time intensive, they have significant opportunity costs. Aside from the allowance of some leisure time that is implicit in hours limits on work activities, preserving the ability to pursue other specific activities may also limit demands for transfer-avoiding work.

The two most obvious examples are child care and education. Transfer-avoiding effects aside, these activities may deserve independent consideration as components of the household standard of living that the transfer system aims to enable. Indeed, federal TANF law currently forbids states from sanctioning parents who fail to work because they cannot find appropriate child care for a child under 6 years old and thus must provide care themselves.¹⁷⁸ Most states provide some exemptions from work requirements for parents who are needed at home to care for an infant or a disabled child.¹⁷⁹ Similarly, most states exempt some teenagers from work requirements if they are full-time students.¹⁸⁰ Even if these activities have transfer-avoiding effects inferior to employment, they nonetheless might trump employment simply because, without them, some important aspect of household well-being would suffer: the life or health of a

177. The requirements of particular jobs also might conflict with moral or religious commitments of individual workers. See, e.g., *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (requiring, on 1st Amendment grounds, that unemployment insurance applicants be permitted to refuse lawful employment that conflicted with religious commitment not to manufacture military armaments); Clare Chapman, 'If you don't take a job as a prostitute, we can stop your benefits', SUNDAY TELEGRAPH (LONDON), Jan. 30, 2005, at 35 (noting that strict adherence to Germany's new work requirements, in conjunction with recent legalization of prostitution as employment, could require recipients to work as prostitutes or forfeit benefits).

178. 42 U.S.C. § 607(e)(2) (2006).

179. WELFARE RULES DATABOOK 2003, *supra* note __, at 92–93; see also 42 U.S.C. § 607(b)(5) (permitting exemption of parents of infants); 71 Fed. Reg. 37454, 37462 (permitting exemption for caretakers of disabled relatives).

180. See, e.g., CAL. WELF. & INST. CODE § 11320.3(b)(2); N.Y. SOC. SERV. L. § 332(1)(b); see also 42 U.S.C. § 607(c)(2)(C) (2006) (permitting full-time high school attendance by teen parents to satisfy work requirements); see generally WELFARE RULES DATABOOK 2003 *supra* note __, at 90–91.

family member would be jeopardized, or a child's fundamental preparation for full participation in civic life would be subordinated to the household's economic self-sufficiency.

On this view, these activities are not work, but they are legitimate alternatives to work that justify not working. Just as transfer recipients are not required to take jobs that are unsafe for them because of workplace hazards, they are not required to take jobs that would be harmful because the time is needed to provide care or to attend school.

Now we can see how complicated the assessment of unpaid activities can be. Many unpaid activities—including family caretaking, education, and rehabilitation—can be understood *both* as contributing to self-sufficiency in the transfer-avoidance sense *and* as helping to maintain or achieve protected noncash aspects of the standard of living that the transfer system is designed to preserve.

The relative importance of these distinct considerations can have significant consequences. For instance, relying on an activity's contribution to future earnings means that the activity's legitimacy as work depends on the nature of available employment: Someone with access to a \$10/hour job might be required to drop out of high school, whereas someone with access only to a \$5.15/hour job might not be. But if the point of high school is not merely to avoid future transfers, then completing high school would be justified *even if* dropping out could minimize transfers.

Which consideration is preeminent also affects whether participation in the activity is treated as work itself, or as an exemption from work. This distinction may make a difference to how compliance with work requirements is measured, to whether the activity is stigmatized as an excuse for not working, and to the availability of supportive services that are offered to workers.

All these issues are being played out as states and the federal government refine definitions of work. My previous research noted a trend toward reclassifying a variety of rehabilitative activities from work exemptions to work activities.^{185.5} Along with this reclassification comes an emphasis on those activities' ability to promote eventual employment and self-sufficiency. But the stringency of these self-sufficiency-promoting criteria are themselves contested and confused. If someone becomes well enough to hold down a job, and yet still suffers significant health limitations, is it still appropriate to favor rehabilitation over employment? Focusing on transfer avoidance, the answer seems to be no.¹⁸¹

The tension between these different ways of viewing unpaid activities becomes most acute in the area of family caretaking. Viewed as something that competes with employment, it seems congruent with medical treatment, rehabilitation, or basic education. But it is much harder to make the argument that family caretaking enhances future employability, which provides the self-sufficiency rationale for classifying these other activities as work. Nonetheless, some states, and some TANF reauthorization proposals, have indeed begun to classify certain forms of family caretaking as work.¹⁸²

185.5. See Zatz, *supra* note 6

181. See Zatz, *supra* note 6, at _____. Similarly, postsecondary education could be justified entirely in terms of current job unavailability and future employability, or its advancement of broader goals of personal development. See *id.* at ____.

182. See *id.* at _____. But see 71 Fed. Reg. 37454, 37460, 37462 (rejecting the classification of caring for disabled family members as work but permitting work exemptions for such caretakers).

At this point we reach the limits of a self-sufficiency account of work requirements. If there are valuable aspects of family caretaking that merit calling it work, rather than just providing a sometimes valid reason *not* to work, then we must look either to the ways in which family caretaking can contribute to immediate transfer-avoidance or to criteria for defining work other than transfer avoidance. Bearing this out, during the TANF reauthorization debate, the Senate Finance Committee made no reference to self-sufficiency when justifying its proposal to count as work unpaid care for disabled family members; instead, it asserted that such caregivers are “engaged in meaningful activity.”¹⁸³

In this regard, family caretaking has much in common with community service. Many States classify as work, without significant formal restrictions, unpaid community service that, in the typical words of New Jersey’s regulation, “provide[s] . . . vital services designed to increase the common good and/or improve the condition of the community.”¹⁸⁴ If making these contributions qualifies as work regardless of whether making them will decrease transfers to the worker, then some new rationale for work requirements is necessary.¹⁸⁵

More generally, if an activity’s status as work can derive from its being a “meaningful activity” even absent transfer-reducing effects, then this rationale could extend beyond family caretaking and community service to other activities that are also “substantial, continuous[, and] meaningful.”¹⁸⁶ Thus, one could imagine that rehabilitative or educational activities meet such criteria by enhancing one’s quality of life or capacity for citizenship. They might also enhance earnings capacity, but that characteristic would no longer be essential to classification as work. Similarly, this analysis might apply to employment itself: What renders it meaningful is something other than its transfer-avoidance effects, and this it shares in common with unpaid community service.

In this way, we can see that many activities classified as work could plausibly receive this status on one of a number of different rationales. Nonetheless, identifying the proper rationale or rationales becomes increasingly significant at progressively more specific levels of policy design and implementation. I will now turn to another major approach to work requirements, one that resonates with characterizing an activity as work based on its being “substantial, continuous[, and] meaningful.”

III. WORK AS SELF-IMPROVEMENT

As we have seen, a self-sufficiency approach possesses both normative appeal and a good fit with many aspects of how existing transfer programs implement work requirements. Nonetheless, the fit is imperfect in several respects. A self-sufficiency approach seems to (1) include as work some activities that actual work requirement policies typically exclude by emphasizing cash earnings; (2) exclude from work some

183. S. REP. NO. 109-51, at 26 (2005) (discussed further in Zatz, *supra* note 6).

184. N.J. ADMIN. CODE § 10:90-4.3(g) (2006); *see also* Zatz, *supra* note 6.

185. Indeed, it often is defined specifically to eschew any connection to enhancing earnings capacity. *See* Zatz, *supra* note 6. *But see* 71 Fed. Reg. 37454, 37460 (restricting the scope of “community service” and requiring that community service programs promote employability).

186. S. REP. NO. 109-51, at 26 (2005).

activities that actual policies often include, especially unpaid community service; and (3) struggle to explain work supports that allocate earned income toward greater household income, not toward transfer reduction. One possibility is that in each of these areas the definition and role of work should be reformed to come into line with what self-sufficiency recommends. An alternative, though, is that these mismatches point to the need to articulate an additional or alternative principle guiding the definition of work, a principle that might relieve some of these problems because of its distinct implications for how work should be defined.

One important class of rationales potentially fills this role by focusing on the noneconomic benefits of work to the worker, rather than on earned income. On such a view, working is beneficial independent of financial consequences because it offers access to a superior way of life.¹⁸⁷ The purpose of work requirements is to encourage and support participation in this form of life. Arguments in this vein offer differing accounts of the specific content of this working way of life. Work is associated with structure and discipline, opportunities for accomplishment, or immersion in social relationships, to name just a few common nominees;¹⁸⁸ another is the familiar self-sufficiency now recast as a source of personal dignity. In essence, though, the common notion is that working is a necessary component of the good life because it provides unique access to certain valued qualities or experiences.¹⁸⁹

Variations on this theme have a wide appeal and a deep history.¹⁹⁰ They appear often in justifications for work-conditioned transfers, both in the academic literature and in political rationales for work requirements. President Clinton often spoke of the “dignity” of work,¹⁹¹ and former House Majority Leader Tom DeLay recently defended the work requirements in a House TANF reauthorization bill in these terms. Commenting on low work participation rates of current TANF recipients and the need to increase them, he said:

That is really a sad, sad, sad statistic. And the reason that is really a tragedy is because the people who have climbed up out of welfare and stepped up into the workplace are leading fuller, more satisfying lives. They are moving forward with lives of meaning.¹⁹²

Anthropologist Katherine Newman’s study of low-wage fast-food workers in Harlem has been particularly influential in reinforcing such views. Although her particular policy

187. See Rebecca M. Blank, *The Employment Strategy: Public Policies to Increase Work and Earnings*, in *CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE* 168, 168–69 (Sheldon H. Danziger et al. eds., 1994).

188. See generally Richard J. Arneson, *Is Work Special? Justice and the Distribution of Employment*, 84 AM. POL. SCI. REV. 1127, 1130–33 (1990); Schultz, *supra* note 1.

189. See MUIRHEAD, *supra* note 43, at 44–45. There are variants on this view that make a looser connection between work and the good life. See Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643, 1666–69 (2004).

190. See, e.g., ROBERT WUTHNOW, *POOR RICHARD’S PRINCIPLE: RECOVERING THE AMERICAN DREAM THROUGH THE MORAL DIMENSION OF WORK, BUSINESS, AND MONEY* (1996); PAUL BERNSTEIN, *AMERICAN WORK VALUES: THEIR ORIGIN AND DEVELOPMENT* (1997).

191. See PRWORA Signing Remarks, *supra* note 2 (praising the “the dignity, the power and the ethic of work”).

192. 149 CONG. REC. H465, H529 (daily ed., Feb. 13, 2003) (statement of Rep. DeLay); see also Turner & Main, *supra* note 47, at 292.

prescriptions are far different than DeLay's, she, too, emphasizes the importance of promoting work (by which she means paid employment) because of its noneconomic qualities:

It is in the workplace that we are most likely to mix with those who come from different backgrounds, are under the greatest pressure to subordinate individual idiosyncrasy to the requirements of an organization, and are called upon to contribute to goals that eclipse the personal. All workers have these experiences in common¹⁹³

One challenge for building work requirement policies upon such views is to specify the connection to means-tested transfers specifically. The implication of such theories is that work is good for (or at least should be promoted for) everyone, not just the poor, and yet these arguments often are offered specifically in favor of work-based antipoverty policies and in criticism of unconditional transfers.¹⁹⁴

The nature of this connection is undertheorized, but one plausible approach casts having work as a component of need like food, health, and shelter, albeit less tangible. Work is one of the things on which every minimally decent life depends.¹⁹⁵ If paid employment is what satisfies this need for work, then those lacking income will also be impoverished in this distinct noneconomic sense.¹⁹⁶ Yet this need cannot be met by providing income alone because jobs are not for sale.¹⁹⁷ Instead, it is better met by a combination of earnings plus transfer income.

Consequently, this work as "self-improvement" approach could provide a rationale for promoting work by transfer recipients without invoking economic self-sufficiency. This feature makes it more compatible with maintaining or increasing transfers as earnings rise, because reducing transfers is not the point of increasing earnings.¹⁹⁸ Instead, these work-linked transfers function like in-kind benefits of food, housing, or

193. NEWMAN, *supra* note 157, at 88; *see also* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 281–82 (2004) (relying on Newman's research); Schultz, *supra* note 1, at 1933–34, 1943.

194. NEWMAN, *supra* note 157, at 104, 271–72; STONE, *supra* note 193, at 280–82. In principle, unconditional transfer programs could be combined with additional programs that support employment, or work more generally, based on its nonpecuniary aspects. *See* Alstott, *supra* note 5, at 1007, 1009. Gillian Lester's work is notable for its care in distinguishing programs that aim to support labor market participation from those that aim to relieve poverty. *See* Lester, *supra* note __; Lester, *infra* note 357.

195. *See* Arneson, *supra* note 188, at 1130; *see* PRWORA Signing Remarks, *supra* note 2 (quoting Robert Kennedy as saying "Work is the meaning of what this country is all about. We need it as individuals, we need to sense it in our fellow citizens, and we need it as a society and as a people."). In Rawlsian terminology, work would be counted as a "primary good." *See* JOHN RAWLS, A THEORY OF JUSTICE 62 (1971); *cf.* NUSSBAUM, *supra* note 17, at 40–42 (listing "central human functional capabilities" but not including access to work or employment).

196. The inverse need not be true: the economically secure (from unearned sources) could still lack work.

197. *See* Arneson, *supra* note 188, at 1130; NEWMAN, *supra* note 157, at 104.

198. *See supra* Part II.B; Zatz, *supra* note 6. Not surprisingly, then, this type of approach to work is an especially prominent theme in proposals from the left to *expand* anti-poverty spending through work supports. *See* Schultz, *supra* note 1; PHELPS, *supra* note 5; WILSON, *supra* note 2.

medical care:¹⁹⁹ You get this transfer but only if you work, or only if you spend it on a “cost” of working, such as child care, transportation, tools, or training.²⁰⁰

Disconnecting the role of work from the generation of income also weakens the connection between work and paid employment. More generally, it opens wide the question of which activities can deliver the noneconomic benefits of work. Even if the relevant qualities are associated with paid employment, their very noneconomic character suggests that they could be present in similar but uncompensated activities. Furthermore, the enormous range of working conditions found in real-world jobs suggests that any particular noneconomic trait may be absent from large swaths of the labor market.

If, instead, the relevant noneconomic benefits of work simply follow from the presence of earnings, then self-improvement becomes merely derivative of self-sufficiency. To explore this tension, I now turn to some of the specific qualities often attributed to work that arguably are cultivated by welfare work requirements.

A. Noneconomic Virtues of the Work Process

Many people love their jobs, or at least parts of them. They find their work intellectually engaging, politically fulfilling, spiritually satisfying, or physically thrilling; they relish the heft of a tool, the appreciation of a customer, the camaraderie of co-workers, the sight of a job well done.²⁰¹ Even when ambivalent about their current employment, for many having a job itself is valuable beyond the income it produces.²⁰² Moreover, lacking a job (especially losing one) can be harsh, leaving one feeling devastatingly lonely, aimless, useless, and bored.²⁰³ Many of these experiences of work and its absence are held in common between those often considered to have the best jobs

199. See generally Martha B. Coven, *Freedom to Spend: The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847 (2002); VIVIANA ZELIZER, *THE SOCIAL MEANING OF MONEY: PIN MONEY, PAYCHECKS, AND OTHER CURRENCIES* 119–98 (1997).

200. See EDIN & LEIN, *supra* note 5, at 92; Lawrence Zelenak, *The Income Tax and the Costs of Earning a Living*, 56 TAX L. REV. 39 (2002). This analogy to in-kind benefits makes work supports vulnerable to the standard critiques of in-kind provision. See generally Coven, *supra* note 199; see also Alstott, *supra* note 5, at 980; but see Jeffrey S. Lehman & Deborah C. Malamud, *Saying No To Stakeholding*, 98 MICH. L. REV. 1482, 1501–02 (2000). Contemporary welfare work requirements, moreover, are much stronger than typical in-kind benefit restrictions. Not working means forfeiting both work supports like child care or job training and also most other components of the social safety net, including cash assistance, Food Stamps, and, in some cases, housing and health care. See 7 C.F.R. § 273.7(a)(3) (2006); 42 U.S.C. § 1437j(c) (2006); 42 U.S.C. § 1396u-1(b)(3) (2006). In contrast, other in-kind or conditional transfer typically stand on their own. Someone who doesn’t use her Food Stamps doesn’t lose her cash welfare benefits, or her Medicaid.

201. See, e.g., NEWMAN, *supra* note 157, at 103, 120–21; MICKEY ZEJIMA, *THE MURDERING OF MY YEARS: ARTISTS & ACTIVISTS MAKING ENDS MEET* 52–62 (2003); DOHAN, *supra* note 5, at 38–39; Pierre-Michel Menger, *Artistic Labor Markets and Careers*, 25 ANN. REV. OF SOC. 541, 555 (1999); Thomas, *supra* note 34, at xviii; Schultz, *supra* note 1, at 1886–92; STUDS TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* (New Press ed., 1997).

202. MICHÈLE LAMONT, *THE DIGNITY OF WORKING MEN: MORALITY AND THE BOUNDARIES OF RACE, CLASS, AND IMMIGRATION* 3, 23–24 (2000); EDIN & LEIN, *supra* note 5, at 140.

203. See, e.g., Elizabeth G. Menaghan, *Work Experiences and Family Interaction Processes: The Long Reach of the Job?*, 17 ANN. REV. OF SOC. 419, 435 (1991); Schultz, *supra* note 1, at 1888–89.

and those thought to have the worst, even as many find it hard to imagine what others find attractive in their work.²⁰⁴

The specific virtues attributed to paid work are too numerous to catalogue or assess systematically. In this section I will discuss two—providing discipline and structure and providing opportunities for self-realization—that are especially prominent in arguments for organizing anti-poverty policy around work. These examples illustrate three general points about the beneficial experiences of going about one's work.

First, employment's virtues, while real, are always highly selective. People and jobs both vary radically. For many, doing visibly productive outdoor physical labor (farming, construction, etc.) is intensely satisfying. But many jobs are neither outdoors nor physically demanding. Moreover, many people would not love working in construction, even if they are similarly enthusiastic about some very different form of work. This is the core intuition behind a norm of occupational choice, behind finding what philosopher Russell Muirhead calls "work that fits."²⁰⁵ For these reasons, the particular constellation of virtues that weaves a particular job into the valued identity of any individual is quite likely to be absent not only from many other jobs (were the same individual to work them) but also from the *same* job when held by many other people. This creates serious dangers that a work requirement policy that fails to discriminate among paying jobs, and that fails to give substantial weight to transfer recipients' choices among paying jobs, will be significantly overinclusive.

The second general point is that any particular constellation of virtues associated with paid employment can almost always be found in unpaid activities too. People frequently structure their leisure or volunteer activities in order to gain some access to pleasures that, for others, are integrated into employment: cooking meals, assisting those in immediate need, driving alone on the open road, campaigning for a political cause, working with others as part of a team.²⁰⁶ Each of these is characteristic of some paid employment, and of some common unpaid activities. To the extent that enabling access to any one of these or similar traits, or to any combination, is the purpose of required work, any definition of work that excludes unpaid activities will be highly underinclusive.

Third, making the best of the economic need for earnings can easily be confused with needing to earn for noneconomic reasons. People can love their jobs but still quit them (or reduce their hours or switch to a lower-paying but more satisfying position) if they win the lottery, or accumulate sufficient savings to retire, just as others can insist on having a job despite its apparent economic irrelevance.²⁰⁷ In assessing a work

204. See, e.g., EDIN & LEIN, *supra* note 5, at 140; NEWMAN, *supra* note 157, at 103.

205. MUIRHEAD, *supra* note 43, at 22–24, 22–23 (2004).

206. Occasionally, the opposite happens, and people in paid positions, often high-ranking politicians, refuse their salary and become in some sense "volunteers." See, e.g., Sewell Chan, *Officials' Salaries Reconsidered*, N.Y. TIMES, June 2, 2006, at B7 (reporting New York City Mayor Michael Bloomberg's refusal of his salary); Peter Nicholas and Nancy Vogel, *Schwarzenegger's Consulting Deal: Governor Defends Magazine Deal*, L.A. TIMES, at A1 (reporting California Governor Arnold Schwarzenegger's refusal of his salary). I doubt anyone would suggest that whether such people are working, or even have "jobs," turns on whether or not they refuse the salary. Thanks to Kirk Stark for suggesting this example.

207. See Thomas, *supra* note 34, at xix; Holtz-Eakin, *supra* note 58, at 418 (finding that recipients of large bequests were four times more likely to leave the labor force than recipients of very small

requirement attached to a transfer, the proper question to ask is: “Once a transfer is to be given, what activities will promote the goals of the transfer?” That question might be answered quite differently than the similar question: “Without a transfer, what activities best allow individuals to satisfy needs for both an income and for noncash sources of meaning and fulfillment?”

1. Discipline and Structure Through Work

In *When Work Disappears*, Wilson briefly engages the question “what counts as work?” while pausing to consider the claim, which he gives some credence, that “[h]ousework is work, baby-sitting is work, even drug-dealing is work.”²⁰⁸ He excludes these activities from his broader argument about employment on the grounds that “what distinguishes work in the formal economy from work in the informal and illegal economies is that work in the formal economy is characterized by greater regularity and consistency in schedules and hours.”²⁰⁹ Indeed, one of the book’s central claims—both influential in itself and resonant with widespread arguments for work requirements—is that “non-workers” suffer from their nonparticipation in a life pattern of daily leaving home for a workplace “governed by norms or expectations that place a premium on discipline and regularity.”²¹⁰ Such experiences of discipline and regularity are critical to a personal experience of “self-efficacy.”²¹¹

Even if Wilson is right that unpaid or informal activities fail this test for discipline and regularity, the difficulty remains that formal employment itself only sometimes satisfies it. Wilson’s ideal draws heavily on a particular, somewhat nostalgic image of blue-collar jobs as secure, well-paying bastions of disciplined contentment. This image, however, is at odds with the diversity of today’s labor market.

Employment increasingly is characterized by *unstable* work arrangements in which “flexibility,” not “discipline and regularity,” is the reigning mantra.²¹² Low-wage work—the sort of jobs people leaving welfare actually get—is especially unstable.²¹³ Many employers in the service sector rapidly expand and contract their workforce in response to shifting consumer demand, leading to long-term uncertainty about job tenure. The same basic phenomenon also creates short-term uncertainty about when shifts will be scheduled on a week-to-week basis, or even how long a shift will last on a given day.²¹⁴ Wilson’s Monday-to-Friday, 9-to-5 image excludes vast amounts of quite ordinary

bequests); Guido W. Imbens et al., *Estimating the Effect of Unearned Income on Labor Earnings, Savings, and Consumption: Evidence from a Survey of Lottery Players*, 91 Am. Econ. Rev. 778, 782–83 (2001) (finding that roughly a third of previously employed winners of large lottery prizes permanently left the labor market).

208. See WILSON, *supra* note 2, at 74.

209. See WILSON, *supra* note 2, at 74.

210. *Id.*; see also NEWMAN, *supra* note 157, at 88, 119; MUIRHEAD, *supra* note 43, at 4–5.

211. WILSON, *supra* note 2, at 75. Wilson also asserts they are essential to fostering similar traits in children. *Id.* at 52, 107; see also Zasloff, *supra* note 107, at 303–05.

212. See STONE, *supra* note 193, at 288.

213. See Julia R. Henly, *Informal Support Networks and the Maintenance of Low-Wage Jobs*, in *LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY* 179 (Frank Munger ed., 2002).

214. See EDIN & LEIN, *supra* note 5, at 8, 67, 132, 141; HARRIET B. PRESSER, *WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES* 20–21 (2003); NEWMAN, *supra* note 157, at 94, 152.

employment that involves long periods of travel, seasonal work, work structured around alternating periods of intense activity and breaks, and high levels of risk and instability.²¹⁵

Of course, jobs that have a highly irregular temporal structure may nonetheless require considerable discipline, both to organize one's life to conform to such schedules²¹⁶ and to perform well within work organizations that demand high levels of coordination and subordination to workplace authority. Newman, for instance, describes the emotional discipline required to respond cheerfully to the often abusive and unreasonable customers of fast-food restaurants,²¹⁷ and research on low-wage employers consistently finds that they place a very high premium on the willingness and ability to follow orders and accept supervisory authority without complaint or "attitude."²¹⁸

Moreover, many jobs are structured in ways dramatically different from fast-food jobs with high customer contact, constant interaction among employees, and close onsite supervision. These jobs emphasize quite different qualities: initiative, independent judgment, creative response to unexpected situations, ability to resist improper pressures from co-workers, customers, or even mid-level supervisors. At the extreme is small-scale self-employment, which often features high day-to-day autonomy over work activity and blurring of the work/home distinction itself.²¹⁹

The image of institutionally disciplined, temporally regular work provides an awkward fit, in one respect or another, for flight attendants, construction workers, truck drivers,²²⁰ security guards, artists,²²¹ and live-in home health aides, let alone freelancers of all sorts, family farmers, and shopkeepers. Of course, each of these occupations may have its own distinctive noneconomic virtues. The challenge for a self-improvement account, however, is to specify those virtues in a way that permits meaningful, consistent distinctions to be drawn between work and nonwork activities, rather than simply to provide post hoc validation of distinctions drawn on other grounds, such as pay.

In this regard, it is important to avoid a potential circularity in the self-improvement approach to work. One common argument for work activities that instill discipline, especially unpaid "work experience," is that discipline is demanded by the paying jobs most available to low-skilled transfer recipients, even if many other jobs reward other

215. For a particularly tragic example, see Nina Bernstein, *Daily Choice Turned Deadly: Children Left on Their Own*, N.Y. TIMES, Oct. 19, 2003, at 1 (describing death in a house fire of a child left home alone during a weekend night shift in part because the irregularity of her mother's job at McDonald's interfered with maintaining stable child care arrangements).

216. EILEEN BORIS, *HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES* 176–77, 186 (1994).

217. NEWMAN, *supra* note 157, at 89–93, 144–45.

218. *Id.* at 182–84; ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* 38–40, 171 (2003).

219. See Nancy C. Jurik, *Getting Away and Getting By: The Experiences of Self-employed Homeworkers*, 25 WORK AND OCCUPATIONS 7, 18 (1998); see also BORIS, *supra* note 216 (exploring historically how industrial homework has both challenged and been structured by commitments to a gendered work/home distinction).

220. LAMONT, *supra* note 202, at 22 (reporting aspirations of a worker who mostly unloads and loads trucks but who prefers his stints as a driver: "Once I leave in the morning, it's my responsibility. If I want to listen to the radio and drive with the windows open and its freezing out, it does not matter . . . It's just me and my truck, and I go do my work.")

221. MENDER, *supra* note 201, at 555, 541, 561–62.

qualities.²²² If the goal of work requirements is to get these individuals into those jobs, then instilling discipline might be a desirable means to that end. But note that this argument is driven by the premise that transfer recipients should ultimately perform work distinguished by pay, not by the self-improvement premise that they should work in order to gain discipline. Thus, discipline, nominally invoked to distinguish paid employment from other activities, itself becomes justified as a criterion precisely because it is a characteristic of some paid employment.^{227.5}

Not only does employment often fail to deliver discipline and regularity, but other activities often can deliver them. Consider one federal court's analysis of why panhandling income can be treated as earnings under Supplemental Security Income budgeting rules:

Plaintiff begged for money with continuity and regularity, as well as with the purpose of obtaining income. He treated panhandling as a "serious business. Like any structured activity, he reported to a particular location every day and performed a particular set of behaviors." In addition, the Court finds that plaintiff's activities required a degree of skill in selecting the optimum location and convincing members of the public to contribute money. In short, plaintiff's panhandling operation required considerable effort.²²³

To take a more mundane example, a full-time student who leaves home regularly to attend class, completes assigned work, and is evaluated based on performance would seem to satisfy Wilson's criteria. Indeed, Newman documents the synergy between school enrollment and fast-food employment in her sample of young workers: Employers prefer workers who stay in school because it demonstrates drive and self-discipline, and the structure and discipline of fast-food employment reinforces the qualities needed to succeed in school.²²⁴ Many other unpaid activities can also provide discipline and structure, such as a regular course of physical therapy, a drug rehabilitation program, a volunteer athletic team's games and practices, or a theater company's rehearsals and

222. See Turner & Main, *supra* note 47; DeParle, *supra* note 157; Lafer, *supra* note 157. On the racial aspects of an emphasis on labor discipline, see Zatz, *supra* note 6.

227.5. This more instrumental approach to discipline appears frequently in the design and implementation of TANF work activities. See, e.g., 71 Fed. Reg. 37454, 37460 (requiring that "community service" "involve structure and supervision" in order to ensure that the activity "help[s] participants develop basic works skills, improve work habits, and help move participants toward employment"). See generally Lafer, *supra* note 157. Paying employment or self-employment, however, never are required to possess non-economic traits related to discipline, structure, regularity, or anything else.

223. Barry, 840 F. Supp. at 29, 32–33; see also Commissioner of Internal Revenue v. Groetzinger, 480 U.S. 23, 36 (1987) (classifying gambling as a "trade or business" based in part on persistent effort). Similarly, criminal activity may involve ample work discipline, as anthropologist Philippe Bourgois' research on crack dealers found:

Benzie started using crack while working legally, and not until he quit his legitimate job to work full time as a crack dealer was he able to kick his crack habit. The responsibilities of his new positions as a street seller forced him to straighten out.

See BOURGOIS, *supra* note 80, at 81, 87, 89, 100; see also Bell v. Sullivan, 817 F. Supp. at 719, 722–23; Basada v. Commissioner of Internal Revenue, 75 T.C.M. (CCH) 2159 (1998).

224. NEWMAN, *supra* note 157, at 123–27, 132.

performances.²²⁵ For these reasons, paid employment is highly underinclusive of the activities that can develop and demand disciplined conduct and a structured existence.

Using discipline and regularity as a basis for identifying work activities also generates conflict with other criteria that seemingly are recommended by a self-improvement approach. Many highly valued qualities often associated with employment are the negation of some aspects of discipline and regularity: creativity, spontaneity, principled disobedience, flexibility, adaptability, and risk taking. Indeed, discipline and regularity themselves are often seen as stifling, subordinating, or humiliating.²²⁶ Newman herself shows how contested these values are, with many members of workers' communities shunning and stigmatizing fast-food jobs as requiring undue self-abnegation.²²⁷

Elaborating on this theme, Carol Cleaveland's ethnographic study of job loss among former welfare recipients found that her informants "engaged in confrontations with supervisors to define exactly those working conditions they would tolerate, and to limit their exposure to situations demanding subservience or reinforcing the status injuries [of low-wage work.]"²²⁸ Notwithstanding the attendant economic harms, quitting provided a means to preserve some "agency, dignity, and personhood."²²⁹ These reactions resonate with commonplace, though again not universal, yearnings to stop "punching the clock" and run one's own business, spend time volunteering, or pursue leisure activities; these are desires for freedom *from* discipline and regularity, constrained by financial need.²³⁰ A self-improvement account could in principle resolve these conflicts by assigning moral priority among these noneconomic traits; my point is simply that it will have to do so in order to yield any useful results in concrete situations. If, instead, one favors the embrace of discipline over the rejection of subservience simply because the former is what one needs to do to hold down a paying job, then it is the economic character of employment, not a self-improvement theory, that is driving the analysis.

2. Self-realization Through Work

Another characteristic of work frequently cited to promote employment and decry its absence is a special connection to an ideal of the active, creative life. Edmund Phelps, for instance, suggests that employment offers a privileged locus of "exercises in problem-solving," that to see the special role of employment "[i]t is enough to contrast the interestingness of jobs with the terrible aimlessness and boredom that come with not having one."²³¹ Lawrence Mead focuses more on the vice of "non-work," which he

225. See LOIC WACQUANT, *BODY & SOUL: NOTEBOOKS OF AN APPRENTICE BOXER* (2003).

226. See STONE, *supra* note 193, at 63.

227. NEWMAN, *supra* note 157, at 89–97; see also DOHAN, *supra* note 16, at 53, 68.

228. Carol Cleaveland, *A Desperate Means to Dignity: Work Refusal Amongst Philadelphia Welfare Recipients*, 6 *ETHNOGRAPHY* 35, 42 (2005).

229. *Id.* at 56.

230. See Jurik, *supra* note 219, at 18, 20, 22 (reporting that self-employed homeworkers reliably found in their work "autonomy, freedom from supervision, freedom to set their working conditions and hours, and the opportunity to provide varied, interesting, or challenging work," in contrast to traditional employment); BORIS, *supra* note 216, at 353–54; Wilson, *supra* note 150, at 215, 222.

231. PHELPS, *supra* note 5, at 11.

equates with “passivity” and “incompetence.”²³² A well-developed version of this approach has been presented by philosopher Jon Elster, who spells out a “conception of the good life as one of active self-realization rather than passive consumption”²³³ and explores whether it justifies assuring access to jobs that fulfill this conception.²³⁴ Elster elaborates “self-realization” as involving the development and deployment of one’s abilities and subjecting them to the standards and judgments of others.²³⁵

There is much that is attractive in Elster’s self-realization ideal,²³⁶ but it provides a weak foundation for organizing welfare work requirements around employment. The basic problem here, as when considering discipline and structure, is that the very invocation of the value of the work *process* detaches the concept from any necessary role of a work *product*, let alone one bought by another to yield earned income.²³⁷ Others’ willingness to pay simply is not the only thing that can persuade us that our achievements are appreciated.

A wonderful essay by sociologist H.F. Moorhouse illustrates this point. Moorhouse examines the mid-twentieth-century American “hot rod” subculture of amateur automobile assembly and modification, and he concludes that this “leisure” activity in which participants engage in expensive “consumption” activities is “not one of redolent passivity but rather of urgent prescriptions to labour, to strive, to plan, to exercise skill, to compete, to succeed, to risk: themes like those supposedly typical of some traditional ‘work ethic’ but now directed to unpaid time.”²³⁸ Moorhouse describes a social world that fits Elster’s theory of self-realization to perfection and yet has no connection to paid employment. Indeed, the subjects of Moorhouse’s study typically treat their employment as secondary and instrumental, generating the income necessary to pursue this truly exciting, challenging, and meaningful part of their lives.²³⁹ This is certainly a familiar notion: the “day job” that allows one to “pay the bills” while pursuing one’s true passion.²⁴⁰ The list of nonemployment, non-income-generating practices that hold out opportunities for “self-realization” is long indeed: formal schooling, in which one cultivates intellectual capacities and externalizes them through graded assignments, class

232. MEAD, *supra* note 5, at 13–14, 22

233. Jon Elster, *Self-Realization in Work & Politics: The Marxist Conception of the Good Life*, 3 SO. PHIL. & POL’Y 97, 97 (1986); see also ARENDT, *supra* note 40, at 76–86; NUSSBAUM, *supra* note 17, at 41; William Galston, *Equality of Opportunity and Liberal Theory*, in JUSTICE AND EQUALITY HERE AND NOW 89, 93, 99 (Frank S. Lucash ed., 1986).

234. Jon Elster, *Is There (or Should There Be) a Right to Work?*, in DEMOCRACY AND THE WELFARE STATE 53, *supra* note 1, at 76; see also Schultz, *supra* note 1, at 1927–28, 1939.

235. Elster, *supra* note 234, at 101–03. For a similar view, see Russell Muirhead’s exploration of the idea of “work as a practice.” MUIRHEAD, *supra* note 43, at 149–66.

236. It also finds empirical support in how employed people, particularly professionals, often characterize the importance of work to them. See LAMONT, *supra* note 202, at 21 (noting the absence of self-realization-talk among working class men, in marked contrast to her similar research on professionals); cf. Michael T. Brown et al., *Annual Review, 1990–1996: Social Class, Work, and Retirement Behavior*, 49 J. VOCAT. BEHAV. 159, 173 (1996) (noting class variation in centrality of employment).

237. See Elster, *supra* note 233, at 103.

238. H.F. Moorhouse, *The ‘Work’ Ethic and ‘Leisure’ Activity: the Hot Rod in Post-war America*, in THE HISTORICAL MEANINGS OF WORK 237, 244 (Patrick Joyce ed., 1987)

239. *Id.* at 253.

240. See LAMONT, *supra* note 202, at 17–19; MENDER, *supra* note 201, at 561–62; MICKEY ZEZIMA, *supra* note 201, at 561–62.

presentations, and so forth; organized amateur sports, in which one develops athletic capacities and externalizes them in competitions and demonstrations; music; politics; the list is endless.²⁴¹

Certainly most people cannot afford to do anything but combine remunerative work with self-realization outside work, or find self-realization in activities that also produce income. This, however, is a different matter entirely: the point of an argument from self-realization is to promote work for reasons *independent* of its economic consequences. As Anne Alstott emphasizes in her critique of employment subsidies, unconditional transfers leave recipients with the same option to pursue self-realization through employment that conditional transfers do; what a work requirement does is eliminate the option of reducing employment (or earnings) levels in order to pursue self-realization in different kinds of jobs, or outside the labor market altogether.²⁴² If the connection between self-realization and employment is simply that self-realization is costly (and thus requires an income stream), then again it appears to collapse back into a self-sufficiency account. If, instead, the issue is the relative capacity for self-realization as between two different activities, with income to be held constant, then a self-realization criterion will include many unpaid activities.

Moreover, a self-realization criterion may often *exclude* certain forms of paid employment. Jobs that are routine, low-skilled, or mind-numbingly exhausting may fail quite dramatically to offer anything close to self-realization.²⁴³ This may be true of jobs of greatly varying status and compensation—some attorneys find little self-realization in law firm life²⁴⁴—and some jobs often denigrated as “unskilled” nonetheless provide workers with ways to take pride in what they do, to develop and deploy skill, and to build meaningful community.²⁴⁵ Other occupants of such jobs, however, may experience them

241. See Moorhouse, *supra* note 238, at 252. These examples would have less force if the self-realizing potential of these activities itself depended on their being *supplemental* to employment, as some scholars have suggested. Schultz, for instance, cites research on the experience of unemployment to show that “[h]aving lost their place in the workworld, these men are lost to the larger world.” Schultz, *supra* note 1, at 1889. Here, however, it is important to distinguish involuntary job loss from chosen nonemployment such as retirement or extended leaves. See LAMONT, *supra* note 202, at 99 (describing firefighter who works long hours in order to be able to retire early); Robert S. Weiss, *Processes of Retirement, in* MEANINGS OF WORK 233, *supra* note 38, at 233; Menaghan, *supra* note 203, at 435–36.

242. Alstott, *supra* note 5, at 983, 1012. Other research suggests that unemployment sometimes is experienced not as a loss of work but as a shift among forms of work, and possibly a liberating one at that. See Elizabeth Rudd, *Gendering Unemployment in Postsocialist Germany: ‘What I Do Is Work, Even If It’s Not Paid’*, 71 *ETHNOS* 191, 207 (2006); Abbot, *supra* note 26, at 319.

243. See Elster, *supra* note 234, at 66; Sean Sayers, *The Need to Work: A Perspective from Philosophy*, in *ON WORK: HISTORICAL, COMPARATIVE, AND THEORETICAL APPROACHES*, *supra* note 34, at 722, 724.

244. See RONIT DINOVTZER ET AL., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 48–50 (2004), <http://abfn.org/ajd.pdf>.

245. See Schultz, *supra* note 1, at 1944; MICKEY ZEJIMA, *supra* note 201 (reporting a retail sales associate’s observation that, “Funny thing is, I did find some bright spots in the wage slavery. I get a sense of satisfaction from a job well done, even if it is a shitty line of work. The camaraderie was also nice.”); *id.* at 91; DOHAN, *supra* note 16, at 38–39 (describing janitors’ “substantial knowledge about cleaning techniques” and frustration at management structures that prevented them from doing their job well); BORIS, *supra* note 216, at 183 (noting homemaker embroiderers’ pride in their skill and gendered devaluation of tasks like sewing associated with women’s domestic responsibilities); NEWMAN, *supra* note 157, at 33, 107, 139–49.

as far more bleak, and only an undue romanticism could overlook how many people treat employment principally as “just a job” and turn elsewhere for their primary communities and opportunities for self-realization.

Noneconomic characteristics of the work process provide an exceptionally uncertain basis for defining work, let alone equating it with employment. Perhaps for this reason, the actual definitions of work used in conditional transfer programs give scant and inconsistent attention to such characteristics, despite their popularity as a rhetorical justification for work requirements.

B. Self-sufficiency Redux: The Noneconomic Harms of Dependency

One important variation on the self-improvement theme combats this indeterminacy by tying the noneconomic benefits of work to the pursuit of earnings. This reincarnation of the self-sufficiency paradigm posits that the relevant noneconomic good is self-esteem or self-respect that flows from self-sufficiency through work.²⁴⁶ This idea underpins both a critique of dependency on unearned income as inflicting noneconomic harms on transfer recipients,²⁴⁷ and an endorsement of paid employment for providing a sense of independence that establishes full membership in the community.²⁴⁸ The focus of self-sufficiency has turned inward, away from the burdens that transfers impose on others and toward the psychological and status effects of *receiving* transfers.

This theory rests on an empirical claim about which activities confer self-respect (earnings-producing ones) and which do not (everything else). The claim suffers from the same problems of over- and under-inclusiveness that plagued the related argument above concerning self-realization. People living off the largesse of inheritance or family fortune often manage just fine without being haunted by self-loathing,²⁴⁹ many toiling

246. See, e.g., Elster, *supra* note 234, at 66–67 (suggesting that self-respect flows from producing something “that others value enough to purchase (as consumers or taxpayers) at a price that allows the worker to earn a living that is decent by the standards of the society”); see also Arneson, *supra* note 188, at 1142; Donald J. Moon, *The Moral Basis of the Democratic Welfare State*, in *DEMOCRACY AND THE WELFARE STATE*, *supra* note 1, at 27, 27, 33.

247. See, e.g., H.R. REP. NO. 104-75, at 5 (1995) (accompanying Welfare Reform Consolidation Act of 1995) and noting a poll finding 71 percent support for the proposition that the “current welfare system does more harm than good” and criticizing that system for “actually creat[ing] more dependence on government,” contrary to intent “to show society’s compassion”); DeParle, *supra* note 157, at 88 (characterizing Mayor Giuliani as viewing welfare recipients as “crippled with dependency”); see FINEMAN, *AUTONOMY MYTH*, *supra* note 22, at 31–34.

248. See STONE, *supra* note 193, at 282 (characterizing the choice between work-based redistribution and unconditional cash assistance as one between “dignity and dependency”); Forbath, *supra* note 57, at 1827, 1886; Karst, *supra* note 89, at 532; Schultz, *supra* note 1, at 1886–87 (linking “our notion of citizenship” to “the capacity to earn one’s own living”).

249. To the contrary, some intellectual traditions suggest that freedom from work driven by practical necessity facilitates higher forms of personal development. See Aristotle, *Politics*, in *THE OXFORD BOOK OF WORK*, *supra* note 34, at 38 (“The citizens must not live the life of mechanics or shopkeepers, which is ignoble and inimical to goodness.”); ANDRÉ GORZ, *PATHS TO PARADISE* (Malcolm Imrie trans., 1985) (“Noneconomic activities are the very fabric of life. They encompass everything which is done, not for money, but out of friendship, love, compassion, concern; or for the satisfaction, pleasure and joy derived from the activities themselves and from their end results.”).

desperately to earn their keep may find their jobs humiliating and insulting,²⁵⁰ and activities outside the labor market can be sources of pride and purpose.²⁵¹

That said, it remains true that receipt of means-tested transfers, especially when not combined with market earnings, is widely considered to be a source of shame. Recipients themselves are aware of, and often accept, this contempt or pity for their “dependency.”²⁵² This burden associated with transfer receipt need not outweigh other considerations, including the downsides of employment,²⁵³ but it is a substantial harm. People often sacrifice considerably to avoid it.²⁵⁴ The significance of these facts for the design of work requirements depends, however, in part on the mechanism connecting transfer receipt to an experience of harmful dependency.

I consider two possible accounts of this connection, necessarily schematic for purposes of exposition. The first, the “cultural contempt” approach, explains the harms of dependency through the contempt that others have for transfer recipients. The second, the “power imbalance” approach, explains the harms of dependency entirely through the risks to autonomy caused by others’ control over economic resources on which one depends.^{261.5} Our thinking about both approaches is sharpened by keeping in mind how selectively the label of harmful “dependency” is and has been applied to those lacking earned income. It is institutionally selective, insofar as concerns about dependency today are focused on recipients of means-tested transfers, not other unearned income sources. And it is historically specific, insofar as the conditions deemed to cause harmful dependency have evolved dramatically over time in ways linked to the changing political economy of gender, race, and labor.²⁵⁵

1. Dependency and Cultural Contempt

Most arguments connect self-esteem to employment through its satisfaction of powerful social norms.²⁵⁶ As Jon Elster and Donald Moon both articulate the theory,

250. See BOURGOIS, *supra* note 80, at 145–61; DOHAN, *supra* note 16, at 69, 84.

251. See REBECCA ANNE ALLAHYARI, VISIONS OF CHARITY: VOLUNTEER WORKERS AND MORAL COMMUNITY 151 (2000); Arneson, *supra* note 188, at 1132; Wilson, *supra* note 150, at 232.

252. See JEB BUSH & BRIAN YABLONSKI, PROFILES IN CHARACTER 52–55 (1995) (arguing that welfare recipients should be ashamed of themselves); DOHAN, *supra* note 16, at 193; cf. Robert MacDonald, *Fiddly Jobs, Undeclared Working, and the Something for Nothing Society*, 8 WORK, EMP., & SOC’Y 507, 507–08 (1994) (describing vitality of the work ethic among unemployed working-class Britons who combine unreported “fiddly jobs” with unemployment benefits).

253. See DOHAN, *supra* note 16, at 200–05; Ellen K. Scott et al., *My Children Come First: Welfare-Reliant Women's Post-TANF Views of Work-Family Trade-Offs and Marriage*, in FOR BETTER AND FOR WORSE, *supra* note 2, at 132.

254. See Meyer & Rosenbaum, *supra* note 113, at 1092 (calculating that single mothers are willing to forgo upwards of \$3,000 annually to avoid welfare stigma); Jennifer Stuber & Karl Kronebusch, *Stigma and Other Determinants of Participation in TANF and Medicaid*, 23 J. POL’Y ANALYSIS & MGMT. 509, 509 (2004).

261.5. Cf. Young, *supra* note 21, at 548–49 (distinguishing autonomy and self-sufficiency as distinct senses of “independence”).

255. The indispensable text on this point is Fraser & Gordon, *supra* note ___, at 121.

256. For instance, William Forbath has traced the association between “independence” and market work in the “social citizenship” tradition. See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 15–16, 64, 90 (1999); Forbath, *supra* note 57, at 1886, see also HANDLER & HASENFELD, *supra* note 18, at 216–17; NEWMAN, *supra* note 157, at 104, 119.

self-respect flows from employment because income-earning work is a prerequisite of *others'* respect.²⁵⁷

This approach begs questions of both the content and the stability of those social norms. Nonworkers' self-respect could be improved either by increasing work or by changing the content or efficacy of the norms in question. Which approach to take must turn in part on one's view of the validity of these norms. If stigmatizing dependency is itself reprehensible, however, then the value of social policies designed to avoid such stigma "is entirely an artifact of consorting with an enemy that should rather be fought tooth and nail—even if it is presently part of the 'self-understanding' of many citizens of contemporary societies."²⁵⁸

Such concerns cannot simply be shunted aside as irrelevant to the immediate response to the current state of social norms. The reason is that tying transfers to employment does not simply *recognize* pre-existing dignitary considerations and leave them unchanged. Instead, it *enhances* them both by directly endorsing the underlying norms²⁵⁹ and by adding the weight of financial incentives to the social sanctions already imposed on those who violate the norms.

More generally, the norms in question do not simply float freely and uniformly throughout all social contexts. Instead, they are picked up, refined, reinforced, or contested in particular institutional sites. Newman, for instance, places great weight on the self-respect that young fast-food workers gain from adhering to "mainstream values" of economic self-reliance.²⁶⁰ Her research, however, also reveals a much more complex phenomenon. Fast-food employers quite actively promote a discourse of self-respect through paid work, one specifically oriented toward counteracting competing social norms that cast low-wage service work as a *denial* of self-respect. This process requires "a workplace culture that actively functions to overcome the negatives by reinforcing the value of the work ethic. Managers and veteran employees play a critical role in the reinforcement process."²⁶¹ In this context, employees at the bottom rung of the ladder take comfort by distinguishing themselves from the unemployed: "[Their] dignity is underwritten by the critique [they have] absorbed about the 'welfare-dependent.'"²⁶²

Thus, basing work requirements simply on the social fact of existing norms requires sorting through a welter of potentially conflicting norms with context-specific salience and relative weight. This is, at best, quite hard to do. For instance, Elster characterizes

257. Elster, *supra* note 234, at 62; Moon, *supra* note 246, at 27, 32–33; see also Karst, *supra* note 89, at 532; Diller, *supra* note 4, at 28.

258. Arneson, *supra* note 188, at 1144. The underlying normative basis of such arguments from self-respect becomes clear when commentators worry that some welfare recipients' self-respect has become too independent of others' disrespect for them. See BUSH & YABLONSKI, *supra* note 252, at 52–55; WILSON, *supra* note 2, at 84–86.

259. See Alstott, *supra* note 5, at 996. Research on the implementation of work requirements in the 1990s finds that the new employment-focused programs did not simply reflect widespread and longstanding suspicion of transfer receipt; they also actively consolidated the notion that transfer receipt was shameful. See Thomas L. Gais et al., *Implementation of the Personal Responsibility Act of 1996*, in THE NEW WORLD OF WELFARE, *supra* note 2, at 35; MIDWEST WELFARE PEER ASSISTANCE NETWORK, THE NEW FACE OF WELFARE: EVOLVING PURPOSES, EMERGING INSTITUTIONAL CULTURES 1-1 (2000), available at <http://www.irlp.wisc.edu/initiatives/outreach/welpan/oct00part1.pdf>.

260. NEWMAN, *supra* note 157, at 115, 119.

261. *Id.* at 102.

262. *Id.* at 98.

the relevant self-sufficiency norm as producing something that others “value enough to purchase (as consumers or taxpayers) at a price that allows the worker to earn a living that is decent by the standards of the society.”²⁶³ As a claim about the norms applicable even to able-bodied adults, this is clearly overbroad. It fails to account for how gender, race, and kinship have structured norms of wage-earning independence around white married men.²⁶⁴ In this regard, Moon revealingly characterizes the self-sufficiency ideal as requiring “working-age *men* to provide for their own needs and those of their family.”²⁶⁵ And to this day, many see the problem of “dependency” as at root one of *male* joblessness that interferes with a man’s ability to become a breadwinner upon whom wife and child can become financially dependent.²⁶⁶

Indeed, TANF and the EITC structure their work requirements so that one market-working spouse and one “dependent” spouse are in full compliance and may continue to receive transfers.²⁶⁷ Policymakers today are vigorously promoting marriages that form such households as a way to reduce poverty and welfare receipt through compliance with prevailing, or at least “traditional,” norms.²⁶⁸ Few suggest that such a dependent spouse, most often a woman, must be restored to self-respect by requiring that she, too, enter the labor market or otherwise forfeit transfers.

Instead, in some circumstances, self-respect and social respect, may flow from labor market *withdrawal*, given the continuing strength of social norms that, for some women, make conformity to what Sharon Hays has called “intensive mothering” at least as powerful as those emphasizing market work.²⁶⁹ Another example is college education: Many would consider college attendance more respectable, and worthy of self-respect,

263. Elster, *supra* note 234, at 66–67.

264. See generally Forbath, *supra* note 256, at 18–20; see also Rogers M. Smith, *American Conceptions of Citizenship and National Service*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS AND COMMUNITIES* 233 (Amitai Etzioni ed., 1995); Fraser & Gordon, *supra* note ____.

265. Moon, *supra* note 246, at 33 (emphasis added).

266. See PHELPS, *supra* note 5, at 4, 14, 96, 126, 134; see also WILSON, *supra* note 2, at 91–92, 104–07; Young, *supra* note 21, at 544 (criticizing this approach to dependency); Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *AM. J. GENDER & L.* 1, 26–29 (1993).

267. See 42 U.S.C. § 607(c)(1)(B) (2006) (permitting two-adult households to satisfy TANF work requirements with 35 hours between them both); 26 U.S.C. § 32(b)(2) (2006) (providing for the maximum EITC benefit beginning at the same level of earned income for both single and joint filers); see also Nada Eissa & Hilary Williamson Hoynes, *Taxes and the Labor Market Participation of Married Couples: The Earned Income Tax Credit*, 88 *J. PUB. ECON.* 1931, 1933–34 (2004).

268. See HASKINS & SAWHILL, *supra* note 83, at 6; MARY PARKE, *CTR. L. & SOC. POL’Y*, *MARRIAGE-RELATED PROVISIONS IN WELFARE REAUTHORIZATION PROPOSALS: A SUMMARY* 1–2 (2004), http://www.clasp.org/publications/marr_prov_upd.pdf.

269. SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 8, 139–40 (1996); see also SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* 18–19, 85–86 (2003); Katherine Teghtsoonian, *The Work of Caring for Children: Contradictory Themes in American Child Care Policy Debates*, 17 *WOMEN & POLITICS* 77, 83–86 (1997); Scott, *supra* note 253, at 132. A poll conducted in 2000 by the *Washington Post*, the Kaiser Family Foundation, and Harvard University found that 79 percent of registered voters agreed, with the statement “It may be necessary for mothers to be working because the family needs money, but it would be better if she could stay home and take care of the house and children.” See *THE WASHINGTON POST/KAISER FAMILY FOUNDATION/HARVARD UNIVERSITY, ISSUES IN THE 2000 ELECTION: VALUES* 16 (2000), <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13536>.

than full-time employment after high school, even if the former means relying on substantial public and private transfers while the latter might enable self-sufficiency.²⁷⁰

There is not, then, a single, consolidated norm about the contours of harmful dependency. There is, instead, a realm of political and cultural contestation in which work requirement policy inevitably participates. Nor can the question be resolved simply by looking statistically at what most people in fact do; this simply begs questions of the relevant comparison group and of the relationship between norms and existing practice. For instance, a majority of married women with a child under age six *are* employed,²⁷¹ and yet married transfer recipients are *not* required to work if their spouse does. In contrast, only a minority of unmarried women with a child under age two are employed full time,²⁷² and yet work requirements typically do demand full-time work from them.²⁷³ As these examples suggest, the thrust of work-based welfare reform has been to *change* patterns of labor participation, and change they have.²⁷⁴ A purely descriptive approach to specifying work requirements based on existing norms or practices is doomed from the start.²⁷⁵

One can, however, go beyond the mere fact of social norms and attempt to characterize and defend insights that may be reflected, however partially, in those norms. Perhaps transfer recipients *ought* to be deprived of social respect, and to lack self-respect. Indeed, a commitment to self-sufficiency of the sort described previously implies that those who claim transfers unnecessarily are morally blameworthy. But if the relevant noneconomic harms of dependency occur precisely when the obligations of self-sufficiency are breached, then invoking these noneconomic harms adds little to the underlying theory of self-sufficiency. For cultural contempt to make a difference, public policy must both ratify unjustified disrespect of transfer recipients *and* sort through the thicket of competing bases for such disrespect.

270. MICKEY ZEZIMA, *supra* note 201, at 58 ; KATHRYN EDIN AND MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 139 (2005).

271. See U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2005, Table 4 (2005), <http://www.bls.gov/news.release/pdf/famee.pdf> (58 percent).

272. *Id.* (47 percent); in 1995, the figure was 39 percent. U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES: 1996, Table 6 (1997), http://www.bls.census.gov/cps/pub/famee_0697.htm.

273. Advocates of a “community standards” approach rarely seem interested in delving into these issues. See HASKINS & OFFNER, *supra* note 29, at 4 (noting that the Bush Administration supports a 40-hour per week TANF work requirement because “many taxpaying Americans (including single mothers) work forty hours per week, so welfare recipients should do no less”); *but see* MARK GREENBERG & HEDIEH RAHMANOU, CTR. L. & SOC. POL’Y, IMPOSING A 40-HOUR REQUIREMENT WOULD HURT STATE WELFARE REFORM EFFORTS 4 (2003), http://www.clasp.org/publications/40_hours.pdf (criticizing the 40-hour proposal for requiring more hours of employment from welfare recipients than that performed by most mothers of young children); Suzanne M. Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?*, 37 DEMOGRAPHY 401, 407 (2000).

274. See HASKINS & OFFNER, *supra* note 29, at 1–2.

275. Cf. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 506–09 (1989) (offering analogous criticisms of using sociological study of existing practices to determine appropriate rules of contract law).

2. Dependency and the Power of Earnings

Another approach locates dependency's harms in a lack of power over one's life. This view resonates with critiques of welfare as a "trap," a system that subordinates recipients to bureaucratic control and stifles their ability to set out on their own course. It also facilitates a feminist response to the family wage model of male independence discussed above. This response rejects women's economic dependence on *either* wage-earning men *or* government transfers.²⁷⁶ Thus, it accepts the link between the good life and economic independence through market labor, but it universalizes the model to include women and to reject a household division of labor between independent breadwinners and dependent spouses.²⁷⁷

The question now becomes whether this concern for autonomy supports a definition of work centered on employment. An initial seed of doubt should be planted by the historical irony that wage work, as opposed to working one's own farm or business, was once considered antithetical to independence.²⁷⁸ Only during the nineteenth century consolidation of the wage labor system was nonmarket housework differentiated from the family business and categorized as unproductive dependency in opposition to wage work outside the home.²⁷⁹ Even today, self-employment retains vital appeal as a means to achieve the dignity and sense of independence that many associate with "[b]eing one's own boss."²⁸⁰

The continuing attractions of self-employment contradict the notion that employment intrinsically promotes experiences of independence and self-worth. When maintaining one's livelihood, social position, and other goods relies (depends!) on succeeding at work, staying in the good graces of the boss, and so on, it is easy for employment itself to create dependency.²⁸¹ Even absent abusive behavior or mistreatment, the ordinary structures of workplace accountability—being told what to do by your boss and being

276. But see Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1633 (1991) (noting how the traditional "breadwinner" himself depends on unpaid services provided by "dependent" wife); Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought*, 16 SIGNS 463, 463–84 (1991).

277. See Schultz, *supra* note 1, at 1945; HAYS, *supra* note 269, at 16; ; see also FRASER, *supra* note __, at 51–54 (sketching a "Universal Breadwinner" model of economic and gender justice).

278. See Fraser & Gordon, *supra* note 255, at 121, 126–28; ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* xii–xvii (1995); Akhil Reed Amar, *40 Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 41–42 (1990); Forbath, *supra* note 256, at 15, 18–20.

279. See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930* 82 GEO. L.J. 2127, 2139–40 (1994); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 200, 211–15 (1998); see also Fraser & Gordon, *supra* note 255 at 128–30.

280. See G. Steinmetz & Erik Olin Wright, *The Fall and Rise of the Petty Bourgeoisie: Changing Patterns of Self-Employment in the Postwar United States*, 94 AM. J. SOC. 973, 973–74 (1989) (finding that a majority of Americans aspire to become self-employed, and that between a quarter a third are or have been at some point in their lives).

281. See Young, *supra* note 21, at 549. Indeed, under the Fair Labor Standards Act, economic dependency actually *defines* the employment relationship, in contrast to "independent contractors." See *Reich v. Circle C. Investments Inc.*, 998 F.2d 324, 327 (5th Cir. 1993) (describing "economic reality" test in which "the underlying question [is] dependency"); *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208 (11th Cir. 2003).

judged based on others' evaluation of the quality of your work—can create feelings of subordination and constraint, as can the need to conform to organizational codes of speech, dress, time use, and so forth.²⁸² For others, this might not be so. Other features of employment—being able to leave a failing or unpleasant work situation, to be geographically mobile, to specialize, to achieve recognition within a stable organization—may contribute to a sense of independence and self-worth that self-employment might not offer. Thus, the relationship between employment and dependency seems unavoidably to rely, as self-realization did before, both on institutional context and on its interaction with individualized circumstances relating to ordinary variations in personality, priorities, abilities, and so on.²⁸³

Similar things can be said about transfers and dependency. The welfare agency can be like a nightmare boss, imposing demands and indignities that cannot be resisted without jeopardizing essential economic resources.²⁸⁴ But whether this is so turns entirely on the structure of the institution: The more automatic the transfer is, and the less discretion the bureaucracy has, the less dependent the recipient will be in the sense of being subject to another's control.²⁸⁵ For instance, the "independent living" strand of the disability rights movement long has advocated for expanding the availability of publicly funded personal assistants.²⁸⁶ Such assistants can enhance "independence" in the sense of "agency, freedom from paternalistic institutions, and the ability to live a full life in the community."²⁸⁷ Independent living advocates have insisted, however, that individuals with disabilities retain firm control over the relationship relative to the personal assistant, the funding agency, and the medical profession.²⁸⁸

To press the analogy, a secure transfer is rather like a secure job protected by a union contract with seniority rights and just-cause dismissal protections: Neither the welfare caseworker nor the foreman need be feared.²⁸⁹ In both cases, contingent institutional features of the income source, not its earned or unearned character, determine whether it leads to dependency.

As our economic institutions, including welfare itself, currently are structured, employment *does* offer unparalleled, though highly imperfect and hardly exclusive, access to independence. But this very unevenness makes this fact less helpful in the design of welfare work policy. Depending on the nature of one's labor market prospects, work requirements oriented toward maximizing effective control over one's life might

282. See BOURGOIS, *supra* note 80, at 115.

283. See MUIRHEAD, *supra* note 43, at 20–21, 50, 132, 164.

284. See JOEL F. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION 251–56 (2004) (discussing the power relations between caseworkers and welfare recipients). HAYS, *supra* note 269, at 110–12.

285. See Hander, *supra* note 284, at 248–49.

286. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 991–94 (2003).

287. *Id.* at 991.

288. *Id.* at 994; Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 75–81 (2004).

289. Work requirements may exacerbate the dependency associated with *both* employment and welfare. Work-linked transfers increase the stakes of losing a job. See VAN PARIJS, *supra* note 15, at 126; Alstott, *supra* note 5, at 988–89. Work requirements also increase welfare agencies', and individual caseworkers', power through discretionary or difficult-to-review eligibility determinations and service offerings. See HANDLER, *supra* note 284, at 251–56; Brodtkin, *supra* note 69.

recommend employment, activities leading to better employment someday, exemption from any requirements, pursuing marriage to a generous spouse,²⁹⁰ or many other things. Moreover, the design of these policies themselves fundamentally shapes the very phenomenon to which an emphasis on dependency purports to respond.

IV. WORK AS RECIPROCITY

Where self-sufficiency and self-improvement frameworks emphasize work's economic and noneconomic returns to transfer recipients, a third important approach emphasizes what work does for transferors or, more broadly, for the society that mandates transfers. This type of rationale typically invokes the idea of a "social contract" in which recipients adhere to certain behavioral standards "in exchange" for receiving a need-based transfer,²⁹¹ substituting a relationship based on "reciprocity" for one based on "dependency."²⁹²

Reciprocity rationales are quite diverse in exactly what behavior they demand in exchange for transfers, and in what general criteria are used to identify these behaviors. Some, generally associated with more conservative and communitarian voices, emphasize ideas of social conformity. Mead, for instance, calls for conformity to "community standards": "[g]overnment's duty toward the needy [does] not cancel their own obligation to function in ways other Americans expect[]."²⁹³ The principal proposed community-wide norm is that able-bodied adults hold down paying jobs.²⁹⁴ Reciprocity rationales heard from the left tend to invoke ideals of mutuality, and participation, and contribution toward a joint enterprise.²⁹⁵ What they have in common, though, is the value that society at large places on a transfer recipient's work.

Because reciprocity does not, at least on the surface, rely either on the transfer-avoiding effects of work or on the transfer recipient's own experience of work, can justify results quite different from either self-sufficiency or self-improvement approaches. It easily can *exclude* activities despite their contribution to self-sufficiency (from crime) or their work-like satisfactions (from a highly disciplining, self-realizing hobby). It also

290. Cf. Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998) (rejecting blanket criticism of single-earner marriages as necessarily subordinating to the non-earner); Francine D. Blau et al., *Understanding Young Women's Marriage Decisions: The Role of Labor and Marriage Market Conditions*, 53 INDUS. & LAB. REL. REV. 624 (2000) (finding that women's marriage rates decrease with improving labor market conditions for women).

291. See Ron Haskins & Rebecca M. Blank, *Welfare Reform: An Agenda for Reauthorization*, in THE NEW WORLD OF WELFARE, *supra* note 2, at 3, 25; H.R. REP. NO. 104-81, at 19 (1995) (rejecting providing public assistance without welfare recipients "being required to return anything to society"); MICH. COMP. LAWS § 400.57e (1981) (structuring TANF benefits around a "social contract" specifying various "obligations" of the recipient); S.C. CODE ANN. § 43-5-1120 (2005) (emphasizing "the reciprocal responsibility that exists between welfare recipients and the taxpayers who pay for welfare").

292. See Diller, *supra* note 4, at 28; William A. Galston, *What About Reciprocity?*, in WHAT'S WRONG WITH A FREE LUNCH? 29 (Philippe Van Parijs ed., 2001); Wax, *supra* note 4; Stuart White, *Fair Reciprocity and Basic Income*, in REAL LIBERTARIANISM ASSESSED: POLITICAL THEORY AFTER VAN PARIJS, *supra* note 15, at 136.

293. MEAD, *supra* note 1, at 223; see also Jeffrey S. Lehman & Deborah C. Malamud, *Saying No To Stakeholding*, 98 MICH. L. REV. 1482, 1501–02 (2000).

294. WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 159 (1991); MEAD, *supra* note 1, at 108, 223; Wax, *supra* note 2, at 1, 2–4.

295. See White, *supra* note 292, at 136; MUIRHEAD, *supra* note 205, at 17.

can *include* activities that don't contribute to self-sufficiency but nonetheless are valued (like community service) or that are experienced as purely onerous but do benefit others (like an awful job, or unpaid workfare).

This very flexibility, however, risks vagueness and indeterminacy. In order for a theory of reciprocity to specify the work required from transfer recipients, we need to distinguish between general social obligations and those that arise from transfer receipt in particular, and we also need criteria that identify the relevant sort of social contribution.

First, note that work requirements are not a general feature of social obligation. Nonworkers generally are not subject to civil or criminal liability, nor are they stripped of the right to vote, to send one's children to public school,²⁹⁶ to have the police investigate the burglary of one's home, or to receive substantial bequests through the state-operated system of inheritance.²⁹⁷ Most of us share the intuition that these examples are different from means-tested transfer receipt, but the question is, why? All of these activities constitute participation in and benefit from schemes of social cooperation, and so the general claim that a duty to contribute, participate, or conform flows from such cooperation does not tell us much.

Making a more narrowly tailored connection between transfer receipt and a special form of obligation requires resort to some underlying theory of what justifies public transfers in the first place. If they are viewed as the collective analogue of a purely discretionary act of private charity,²⁹⁸ then the collective attachment of conditions, however arbitrary or capricious, seems permissible.²⁹⁹ If, however, these transfers vindicate some entitlement normatively prior to the property rights of taxpayers from whom transfers nominally flow,³⁰⁰ then such conditions seem more like work requirements for police protection, voting, or sending one's children to public school.

One way to sharpen the nexus between work and means-tested transfers is to focus on the specifically economic nature of transfer receipt. The obligation of a transfer recipient to "do her part" through work arises from the recognition that the resources received were themselves generated by others' labor.³⁰¹ Amy Wax, for instance, posits such a principle of "conditional reciprocity" as the answer to the question "[w]hat do people owe one another?" and as the justification for work requirements.³⁰² Exactly what "doing one's part" should consist of, however, remains quite unclear.

296. But see David Alstadt, *Ohio Work Rule Bars Child Schooling*, WELFARE TO WORK, Oct. 24, 2005, at 1 (reporting on Ohio Early Learning Initiative that limited eligibility based on parental employment status).

297. See FINEMAN, *AUTONOMY MYTH*, *supra* note 22, at 49–53 (criticizing restrictions placed on welfare recipients in the name of "self-sufficiency" when "[w]e all exist in contexts and relationships, in social and cultural institutions, such as families, which facilitate, support, and subsidize us and our endeavors" and so "we all live subsidized lives").

298. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 190–95 (1962).

299. Lehman & Malamud, *supra* note 293, at 1501–02.

300. Cf. MURPHY & NAGEL, *supra* note 60, at 8–9 (rejecting pre-tax property rights as an appropriate, or even coherent, benchmark against which to evaluate taxes and transfers).

301. See White, *supra* note 292, at 138, 144 (making this argument but noting that, under it, work requirements may be inappropriate when transfers distribute natural resources); see also MUIRHEAD, *supra* note 43, at 17–19.

302. Wax, *supra* note 4, at 477; Wax, *supra* note 2, at 4–5.

Just as there are many ways to benefit from social cooperation and thereby trigger some obligation to participate or contribute, so too are there many activities that could plausibly be construed as reciprocal participation or contribution. Is voting “doing one’s part”? Volunteering on a partisan political campaign? Praying for the well-being of one’s fellow citizens? Sitting on the stoop keeping an eye on the neighborhood? Avoiding sexual acts that could call down the wrath of God onto the entire community?³⁰³ Speaking a language that affirms the common identity of all citizens?³⁰⁴ Buying products in the market to stimulate the economy?³⁰⁵

Depending on what activities are valued in some fashion, to what degree, and with what level of fungibility with the benefits received through transfers, it is easy to generate a startlingly broad and long list of activities that might fulfill a transfer recipient’s reciprocal obligation.³⁰⁶ This is no mere theoretical speculation. Some jurisdictions, and some major Congressional TANF reauthorization proposals, invoke very broad conceptions of activities that “benefit the community” under the rubric of “community service,” or include very specific activities that could be fit under such rubric: caring for foster children, recovering from substance abuse, or attempting to get or stay married.³⁰⁷

The relevant conception of contribution might be narrowed by limiting the degree of fungibility between what recipients receive and what they “give back”: receiving an economic benefit would require making an economic contribution in return.³⁰⁸ On such a view, transfer recipients should replenish the very pool of resources from which they have withdrawn.³⁰⁹

This interpretation of reciprocity may explain the form of work most closely associated with the rhetoric of contribution: unpaid workfare programs in which welfare recipients do public work in government agencies or nonprofit community organizations as a condition of receiving public assistance.³¹⁰ Former New York City Mayor Rudolph Giuliani, who presided over the development of the largest workfare program in the country, frequently justified the program as vindicating a “social contract” under which “you have to give back.”³¹¹

A work program benefiting the public could satisfy reciprocity even if it brought in no earnings and had no effect on future labor market prospects, and thus failed to advance

303. See Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 122–25 (2002).

304. MEAD, *supra* note 1, at 12.

305. See Franke, *supra* note 56, at 189–91; Jennifer Goldblatt, *Bucks to Buoy America*, ST. PETERSBURG TIMES, Oct. 12, 2001, at 1.

306. See WHITE, *supra* note 23, at 102–03.

307. See Zatz, *supra* note 6, at 160–63; see also OFFICE OF FAMILY ASSISTANCE, CHARACTERISTICS OF TRIBAL TANF PROGRAMS (2002), http://www.acf.hhs.gov/programs/dts/ttanchar_1002.htm (including teaching or participating in cultural activities as a work activity for a number of tribally-administered TANF programs).

308. Wax, *supra* note 4, at 484.

309. See, e.g., White, *supra* note 292, at 138; William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1785 (1994).

310. See generally HOLZER, *supra* note 157, at 3; Diller, *supra* note 4, at 19 (1998); Turner & Main, *supra* note 47, at 291. In New York, as in many states, the work performed must serve a “useful public purpose.” N.Y. SOC. SERV. LAW § 336-c(2)(d).

311. DeParle, *supra* note 157, at 59.

self-sufficiency.³¹² TANF comes closest to this approach where it allows work requirements to be satisfied by either “community service” or child care for those performing such service. Instead of reducing transfers directly, the point is to net them out with countervailing contributions.

But here, too, there are difficult questions of fungibility that are not solved by labeling an activity “economic.” Making a city park cleaner may not directly contribute to the pool of state and federal funds from which TANF transfers are drawn. Indeed, it does not even save the *city* any money unless it displaces employees who would otherwise being paid to clean the parks, something that state and federal laws forbid and that workfare proponents deny the programs do.³¹³ Similarly conferring an economic benefit on a single private business, whether through paid employment or unpaid workfare, seems at most tangential to a reciprocal relationship with the taxpayers at large.

Indeed, if benefiting an individual employer, or conferring a benefit that would not otherwise have been purchased, suffices to make an activity work, then why not treat unpaid childrearing, which certainly benefits the child, as fulfilling the contribution requirement?³¹⁴ Even if such benefits were deemed insufficiently “public” in nature,³¹⁵ other unpaid activity like community service would seem to qualify easily. Thus, a reciprocity approach may validate as work quite a broad range of unpaid activities that are socially beneficial in some relevant sense.

For these reasons, the rhetoric of “giving back” can take us a long way from the paradigm of employment, and from adherence to a norm of adult job holding. The potential breadth of this idea is illustrated by how Wax translates her “making a contribution” ideal into a more specific delineation of exactly what should count as work. In the course of doing so, she jettisons the broad “contribution” concept in favor of a much narrower “duty imposed upon the ‘able-bodied’ . . . to strive for self-sufficiency,” a duty reflecting the principle that “persons should try to support themselves before calling upon public help.”³¹⁶ Although Wax continues to refer to this principle as one of

312. See Diller, *supra* note 4, at 27. Workfare supporters often justify the programs on *both* reciprocity *and* training grounds. See, e.g., Turner & Main, *supra* note 47, at 291; DeParle, *supra* note 157. But rigorous evaluations have found “little evidence that unpaid work experience leads to consistent employment or earnings effects.” THOMAS BROCK ET AL., MANPOWER DEMONSTRATION RESEARCH CTR., UNPAID WORK EXPERIENCE FOR WELFARE RECIPIENTS: FINDINGS AND LESSONS FROM MDRC RESEARCH 3 (1993); accord David T. Ellwood & Elisabeth D. Welty, *Public Service Employment and Mandatory Work: A Policy Whose Time Has Come and Gone and Come Again?*, in FINDING JOBS: WORK AND WELFARE REFORM, *supra* note 125, at 299, 346. There is, however, substantial evidence that workfare workers provide publicly valuable labor, often reducing the demand for paid public employees in the process. See Ellwood & Welty, *supra* at 345; Steven Greenhouse, *Many Participants in Workfare Take the Place of City Workers*, N.Y. TIMES, Apr. 13, 1998, at A1.

313. See 42 U.S.C. § 607(f); N.Y. Soc. Servs. L. § 336-c(2)(e); Turner & Main, *supra* note 47, at 304; but see Greenhouse, *supra* note 312, at A1.

314. Forbath, *supra* note 57, at 1888–90; Karst, *supra* note 89, at 566; Wax, *supra* note 4, at 491.

315. See N.Y. State Dep’t of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (characterizing one rationale for welfare employment requirements as “encouraging those of its citizens who can work to do so, and thus contribute to the societal well-being in addition to their personal and family support”); but see Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86 (1994). Cf. WHITE, *supra* note 23, at 108–13 (contrasting the public interest in caretaking with the purely private nature of housework).

316. Wax, *supra* note 4, at 492–93, 503; see also Wax, *supra* note 2, at 4–5. Revealingly, Wax turns to a self-sufficiency criterion at precisely the points in her argument where she acknowledges that

“reciprocity,” this second gloss on mutual support actually strives to *minimize* interdependence and transfers. It merely adds the language of duty, to the more familiar self-sufficiency norm discussed above without adding additional substance. What the individual now owes the community is trying to leave it alone by minimizing transfer claims, hardly the affirmative vision of mutual benefit and interconnection evoked by reciprocity.

This slippage from reciprocal contribution back to maximum feasible self-sufficiency is difficult to avoid within a means-tested redistributive system.³¹⁷ In such a system, the most straightforward way to offset the financial burden on the community is simply to reduce transfers by reducing need. But some net resource flow to the transfer recipient is inherent in transfers justified by need. To the extent work requirements correct this asymmetry by mitigating the one-way flow of resources,³¹⁸ this simply amounts to recipients partially funding, and ideally eliminating, their own transfers. It is hard to see the difference between giving me \$100 in exchange for my contributing \$100 in return, and simply giving me nothing. In other words, what is offered as a gesture of inclusion and equality may simply mask a refusal of support. Avoiding this result—the collapse of reciprocity back into self-sufficiency—*requires* some fungibility between cash transfer receipt and forms of contribution that cannot easily be monetized.³¹⁹

Such an exchange of cash transfers for uncompensated contributions is suggested by both the reciprocity rhetoric supporting work requirements and by some of the policies actually implementing them suggest. But before we can distinguish between cleaning a city park, caring for a child, and pursuing moral virtue—none of which directly offset a cash transfer but all of which arguably are socially beneficial—we need either to generate a much richer specification of contribution or to accept highly localized and variable judgments about what contribution entails.^{330.5}

“making a contribution” could theoretically include parental caretaking as work. See Wax, *supra* note 4, at 483–86, 491–92, 503; Wax, *supra* note 2, at 30–33.

317. Not coincidentally, Stuart White’s theory of “fair reciprocity,” which relies on a concept of contributory obligation that consistently avoids reversion to self-sufficiency, links a work obligation to a robust, non-means-tested program of redistribution. See WHITE, *supra* note 23, at 176–200.

318. MEAD, *supra* note 1, at 43; Wax, *supra* note 2, at 1, 4–5; White, *supra* note 292, at 136.

319. This problem can be moderated by expanding the time horizon and incorporating ideas of risk. During periods of benefit eligibility, social security and unemployment insurance recipients receive payments and provide nothing in return. Prior to the event that triggered the transfer, however, these recipients had been contributing to the system through either their socially productive labor or, more narrowly, the taxes levied on it. See MICHAEL J. GRAETZ & JERRY L. MASHAW, *TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE* 288 (1999); Liu, *supra* note 23, at 61. The fact that benefits may exceed taxes paid in simply reflects the insurance character of the programs: If the recipient had the good fortune not to experience the triggering event but instead someone else did suffer it, then the transfer would have flowed the other way. The same logic could be applied to means-tested programs. See GRAETZ & MASHAW, *supra* at 288–89; DWORKIN, *supra* note 60, at 92–109, 331–46 (2000); see also Hal R. Varian, *Redistributive Taxation as Social Insurance*, 14 J. PUB. ECON. 49, 49–50 (1980); but see Louis Kaplow, *A Note on Taxation as Social Insurance for Uncertain Labor Income*, 49 PUBLIC FINANCE 244 (1994).

330.5. See WHITE, *supra* note 23, at 124–25. Similar difficulties face accounts of work requirements built on the premise that such requirements are the political consequence of deep-seated psychological (even biological) hostility to free riding and shirking. See Wax, *supra* note 2, at 67–70. To give this view sufficient content to explain reactions to particular behaviors and public policies, we need to make

CONCLUSIONS AND NEW DIRECTIONS FOR WORK-BASED REDISTRIBUTION, CARE AS WORK, AND EMPLOYMENT LAW

The preceding analysis leads me to three main conclusions, each of which suggests directions for further research and reflection. First and foremost, the purported consensus in favor of welfare work requirements exists at too high a level of abstraction to resolve the pressing questions actually facing contemporary policymakers. Answering those questions requires both reopening and sharpening normative debate over the purpose of conditioning redistribution on work. Second, rigorous application of the preeminent (and seemingly most conservative) work rationale—self-sufficiency—surprisingly offers new support classifying unpaid family caretaking as work in the narrow context of means-tested welfare work requirements. Third, the Article’s general method of analyzing welfare work requirements, and some of its specific conclusions, may shed new light on fundamental questions at the heart of labor and employment law.

A. The Empty Consensus

Part of work requirements’ allure stems from how many different normative perspectives seem to recommend them. Almost magically, work can appeal to libertarians, neo-Marxists, conservative moralists, liberal egalitarians, and feminists alike. But once we get down to the essential tasks of institutional design—classifying activities as work or not, determining how earnings affect transfer size and eligibility and so on—trouble brews in policy paradise. Resolving the very kinds of questions to which actual policymakers are giving different answers—How attenuated a connection to employment will be permitted? Is such a connection required at all for community service to count as work? Is caring for family members more like an obligation that interferes with work or more like a public service that itself constitutes work?—requires very different modes of analysis depending on the underlying rationale for work requirements.

Commitments to work based on self-sufficiency, self-improvement, and reciprocity lead to different criteria for testing satisfaction of work requirements.³²⁰ Application of different criteria can, of course, lead to the same bottom-line result—work or not work—in particular cases, or they can lead to conflict. Both possibilities are illustrated by considering four stylized candidates for meeting welfare work requirements: fast-food restaurant employment, subsistence farming, unpaid volunteering at a hospital, and full-time college education.

Fast-food employment plainly generates income and therefore qualifies as work on a self-sufficiency account. If, however, wage levels are low and means-testing is relaxed, there may be little immediate transfer avoidance, leaving the relationship to self-sufficiency dependent on how the job affects future wage growth. With regard to noneconomic characteristics, it is difficult to generalize. Fast-food workers can find their jobs both a source of dignity, community, and fulfillment and a cause of humiliation,

precisely the same, far from obvious distinctions between contributory and shirking conduct discussed above.

320. Cf. MUIRHEAD, *supra* note 43, at 170 (exploring deep tensions between work’s “social fit” and “personal fit” that arise because “[s]ocieties in every age need certain things done that are not fulfilling to do.”).

isolation, instability, and resignation.³²¹ Which of these experiences, or what combination of them, matters most is sensitive to a variety of individual and institutional circumstances. As to how such employment fulfills a relationship of reciprocity, the answer will depend largely on one's view of the market. The work performed is in demand by the employer and its customers, so if this suffices to establish some contribution to society, then this criterion will also be fulfilled.³²²

Now consider the subsistence farmer. Certainly a work setting less like the fast-food employee's is difficult to imagine. No cash income is generated, and so if self-sufficiency is measured in this coin, then, ironically, the iconic Jeffersonian yeoman looks the idler. This activity does not reduce transfers if the means test ignores nonmarket production when measuring need. If, however, reduced need for market purchases of food is accounted for, then the transfer avoidance effect justifies classifying subsistence farming as work. On the noneconomic front, the answers will again be mixed, depending on the characteristics in question, the individual experience of the work, and the work's place in a wider community. There might be ample challenge and self-reliance, but also potential for isolation, insecurity, and lack of place within larger institutional structures. Reciprocity appears difficult to find when the work products are consumed by the worker rather than circulating through networks of exchange. Assuming, though, that our farmer has a family, then perhaps the criterion is satisfied if providing for immediate family members counts as "giving back to society."

The unpaid hospital volunteer is the subsistence farmer's mirror image. There is no income or other meeting of the worker's immediate needs, so this activity fails the transfer avoidance test unless it enhances future job prospects. The potential for noneconomic benefits appears quite substantial—institutional role, challenging work, a social network, and the satisfactions of helping others—though all of these are contingent on the nature of the tasks, relationships with co-workers, attitudes of patients, and so on. The case for reciprocity also looks strong: assistance in the delivery of an uncontroversial good in an area of recognized public responsibility under the auspices of an established institution.

Finally, consider the full-time college student busy with her studies. Again, there is no immediate transfer avoidance, but there is a prospect of long-term increases in earnings capacity. The noneconomic consequences are, as usual, highly contingent. Perhaps the student finds school boring, disconnected from the "real world," and an institution constantly judging her to be inadequate. Perhaps, instead, she thrives on the academic challenge, the structured course of study and evaluation, and the collective enterprise of learning. With regard to reciprocity, the student looks more like the farmer. There are no immediate benefits to others. Nonetheless, expanding the time frame could bring in future contributions through paid employment or enhanced ability to participate as a citizen or community member.

Notwithstanding all this heterogeneity among, and uncertainty within, different approaches to work, there are some distinct patterns. Paid employment is especially versatile in its ability to satisfy all three major rationales. This conclusion is consistent

321. NEWMAN, *supra* note 157, at 89–104.

322. *But see* Young, *supra* note 21, at 551 (questioning the social value of some paid jobs); MUIRHEAD, *supra* note 43, at 57; Wadel, *supra* note 34, at 371.

with employment's central role in both the theory and practice of work requirements. On no account, however, is market labor the only activity that can fulfill the purposes of work requirements. Various forms of subsistence nonmarket economic production may perform well in terms of transfer avoidance and noneconomic benefits, but they fare poorly in terms of reciprocity unless that concept is understood especially broadly. Unpaid community service performs best from a reciprocity perspective but is weak in terms of self-sufficiency. Education presents yet another combination. It is weak on reciprocity but possibly quite strong on noneconomic benefits, from a self-sufficiency perspective, education is highly sensitive to the balance between short-and long-term perspectives, to the effectiveness of the particular educational program, and to the nature of available employment alternatives.

Because such divergent activities all are plausible candidates for work under at least some of the leading rationales for work requirements, the vaunted consensus around work turns out not to be worth much at all, at least not in its present form. On one hand, almost any activity might count as work under some approach to work requirements. On the other, that activity rarely will be the sole form of work, and under another approach it might not count as work at all.

It is easy to make a case for or against any given activity in a purely ad hoc fashion, but the challenge is to find criteria that one is willing to apply consistently. If workfare counts as work because it gives back to the community, despite being unpaid and having no effect on employability, does that same standard apply to other forms of community service and to providing care for foster children? If unpaid family caretaking does not count as work because it lacks day-to-day supervision and operates outside a public institutional setting, is self-employment suspect for the same reasons?³²³

Choices about appropriate work activities are being made all the time. They are being made by Congress, by the Department of Health & Human Services, by state legislatures and executive agencies, by local welfare administrators, and by frontline caseworkers. There is no way for any of these actors to make a principled decision about what to allow, to require, or to forbid as work without implicitly making choices between, or developing some method to combine, divergent rationales for work requirements. Similarly, there is no way for members of the public, or for supervisory authorities, to hold them accountable without doing the same.³²⁴

323. Fundamentally different approaches to work sometimes produce the same bottom-line conclusion by focusing on different aspects of one activity. This convergence permits deeper disagreements to be submerged temporarily or to be obscured by exaggerated descriptive claims. For instance, a supporter of workfare could evade the conflict between self-sufficiency and reciprocity approaches by claiming that it facilitates future employment rather than by relying on the public's benefit from the work performed. *Cf. supra* note 312.

324. Welfare work requirements thus illustrate certain risks associated with public policies built on what Cass Sunstein has called an "incompletely theorized agreement," and with Dan Kahan's and Donald Braman's closely related category of "expressively overdetermined" policies. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995); Dan M. Kahan & Donald Braman, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing A Better Gun Debate*, 55 EMORY L.J. 569, 587, 598–601 (2006). The ability of political actors to reach a first-order agreement (for instance, on the appropriateness of welfare work requirements) without reaching agreement on the underlying rationale (self-sufficiency, self-improvement, reciprocity, etc.) may distract attention from deep disagreements about essential second- or third-order questions of policy design and implementation that are sensitive to precisely the differences glossed over by the first-order agreement.

Actually achieving this normative clarity is not something I take on here, not only for reasons of space but also because the controversial nature of any one normative stance would distract from my analytical points of more general application. Indeed, the combined facts that distinct work rationales have substantial appeal and yet yield conflicting results suggest that the best route forward requires giving some purchase to each approach. I am skeptical, however, that this recommends simply embracing a muddle because doing so provides no guidance for resolving the conflicts already described, though it may well be that understandably muddled thinking and political compromise help explain the current system.³²⁵

Another approach, however, may hold more promise. As I have already suggested, the various rationales for requiring work have differential affinities for distinct justifications for redistribution itself. These distinct theories of redistribution imply policies that differ in design features beyond simply their approach to work. For instance, correcting for the hardships and the unfairness produced by morally arbitrary differences in earnings capacity suggests an emphasis on self-sufficiency and on means-testing. In contrast, providing opportunities to pursue a socially and personally meaningful “life’s work”³²⁶ suggests an emphasis on self-improvement and on lack of work, regardless of household income.

The solution may lie in more clearly differentiating among multiple forms of justified redistribution and then parceling out different approaches to work among them, rather than either giving preeminence to one approach to work or formulating some algorithm that combines them. Current programs may already be trying, awkwardly, to do too many things at once.³²⁷ Separating out these different functions—for instance, distinguishing between insuring that basic economic needs can be met and supporting particularly worthy or valuable forms of life—may be a necessary step toward disentangling our many aspirations for work. In this way, achieving clarity about the multifaceted nature of work may help us better understand and more fully implement a multi-faceted welfare state.

B. Toward a New Analysis of Family Caretaking as Work

Achieving greater clarity about the purpose of work requirements can do more than just resolve some conflicts among existing definitions of work. It also provides a critical stance from which new work activities may be identified and others’ exclusion may be questioned.

This may be especially problematic if those decisions will be made by different actors (such as state legislature, administrators, or “street level bureaucrats,” MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY* (1983)) who lack the visibility or the accountability of those party to the first-order agreement.

325. See THEODORE R. MARMOR ET AL., *AMERICA’S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* __ (1990) (criticizing attempts to reduce U.S. welfare policy to a single animating principle).

326. Schultz, *supra* note 1, at 1883.

327. See Zatz, *supra* note 6, at 1178 (discussing tensions between the EITC’s poverty reduction and work promotion goals); see generally Alstott, *supra* note 18. This can lead to doing too little. Teghtsoonian, *supra* note 269, at 81, 87–88 (showing how characterizing child-care subsidies as an anti-poverty strategy led to the imposition of means-testing restrictions that blunted feminist goals of encouraging employment by among women with spouses earning a decent income).

One example of this creative process is the reconceptualization underway of “barriers to employment” such as disability. Rather than viewing disability as a permanent state of nonwork, there has been a marked trend toward interpreting rehabilitative activities as work itself while also mandating participation in such activities as a condition of continued transfer eligibility.³²⁸ This shift flows from taking a long-term view of self-sufficiency. It also builds on changing conceptions of people with disabilities that emphasize their capacity for agency and insist that their disability-related limitations arise from contingent social relations, not from their medical condition.

As I have already suggested, a related rethinking is also possible for unpaid family caretaking. This is another example of how work status is highly sensitive not only to choices among work rationales but also to how each is elaborated. According to one set of views, family labor has all the versatility of paid work: it can contribute to immediate self-sufficiency (if care is acknowledged as a need), can provide a number of experiences sometimes associated with “job satisfaction” (depending in part on how care is organized),^{340.5} and can give back to society (if parent-to-child benefits count). Other versions of each criterion could, however, exclude caretaking at every turn.

These observations about the status of family labor, and particularly its relationship to self-sufficiency, offer a new perspective on the longstanding debate over the connection between public support for family caregivers and the status of unpaid care as work. An important strand of feminist theory long has criticized the economically marginal position of unpaid caregivers across a wide range of family forms and household income levels.³²⁹ These critiques often invoke the idea that unpaid caretaking, and housekeeping, are forms of work that should underwrite conditions of economic independence and social inclusion analogous to those conveyed by paid employment.³³⁰ In the context of welfare work requirements, this critique focuses on how excluding unpaid caretaking from the category of “work” deprives single parents, typically mothers and disproportionately (numerically, but especially symbolically) women of color, of an economic safety net and stigmatizes them as unproductive, lazy, and parasitic.³³¹

Feminist arguments for treating family labor as work typically emphasize ideas of productivity and contribution. When focused on family law solutions to the problem, these arguments highlight the benefits conferred on spouses, partners, or co-parents and assent corresponding claims on these beneficiaries’ income.³³² Analogous arguments are made in favor of public support for caregivers. Public support would recognize that caregivers contribute to the public good, either because their children go on to benefit

328. See Zatz, *supra* note 6; Amy L. Wax, *Disability, Reciprocity, and “Real Efficiency”: A Unified Approach*, 44 WM. & MARY L. REV. 1421 (2003).

340.5. See Laura T. Kessler, *Transgressive Caregiving*, 33 FLORIDA STATE UNIV. L. REV. 1, 26, 72 (2005); EDIN & KEFALAS, *supra* note 270, at 138–43.

329. See generally Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605, 1605–17 (2001).

330. See generally Silbaugh, *supra* note 20; Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition* 76 CHI.-KENT L. REV. 1441, 1461–67 (2001).

331. See generally Roberts, *Black Mothers’ Work*, *supra* note 20; sources cited *supra* note 20.

332. See SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 175–76, 180 (1989); WILLIAMS, *UNBENDING GENDER*, *supra* note 22, at 114–41; Siegel, *supra* note 22; Williams, *Is Coverture Dead?*, *supra* note 22.

others or because children's well-being and development is ultimately a public obligation.³³³

Feminist critiques of welfare work requirements typically are just specific applications of this general argument for public support of caretaking.³³⁴ Such critiques first reject a self-sufficiency rationale for work requirements³³⁵ and then define work based on social contribution, of which caring for one's children constitutes a prime example.³³⁶ These arguments for public support are subject to serious criticisms,³³⁷ which I do not evaluate here.

Instead, a careful analysis of self-sufficiency reveals an entirely different path to classifying unpaid care as work, one specific to the context of welfare work requirements. Proceeding down this path begins by embracing, not rejecting, the transfer avoidance theory of self-sufficiency.

The essential point is that activities that replace transfers with in-kind production make the same contribution to self-sufficiency as do activities that replace equally costly transfers with cash income. A farmer who grows her own food makes a contribution to her self-sufficiency equivalent to earning wages to buy her food. So too does a parent who cares for her own children, as long as, like food, we recognize child care as a need that means-tested transfers aim to meet.

This is not a general argument for treating unpaid caretaking as work in all contexts, nor for publicly compensating it. Instead, it is a contextually specific argument for maintaining means-tested transfer eligibility for at least some unpaid caregivers on the ground that their caregiving fulfills work requirements.

Some otherwise curious recent policy developments are consistent with a self-sufficiency rationale for treating caretaking as work. A few states count family caregiving as TANF work under limited circumstances.³³⁸ These circumstances are ones that trigger heightened levels of public obligation to provide care. Minnesota, for instance, makes caregiving "work" when the family member receiving care would

333. See ALSTOTT, *NO EXIT*, *supra* note 22, at 66–69; FINEMAN, *NEUTERED MOTHER*, *supra* note 20; KITTAY, *supra* note 22, at 142–44; Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, at 199 (1999); Fineman, *Contract and Care*, *supra* note 20, at 1406; Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, at 1582–98 (2001).

334. See Fineman, *Contract and Care*, *supra* note 20, at 1403; Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 95 (1989); Paula England & Nancy Folbre, *Reforming the Social Family Contract: Public Support for Child Rearing in the United States*, in *FOR BETTER AND FOR WORSE*, *supra* note 2, at 290–91; KITTAY, *supra* note 22, at 122–28.

335. In particular, feminists have criticized self-sufficiency as a normative ideal for its difficulty accounting for periods of what Martha Fineman has labeled "inevitable dependency." See FINEMAN, *NEUTERED MOTHER*, *supra* note 20, at 161–63; FINEMAN, *AUTONOMY MYTH*, *supra* note 22, at 174; KITTAY, *supra* note 22.

336. Not surprisingly, such arguments tend also to include unpaid community service and a variety of other socially beneficial activities outside the labor market. See KITTAY, *supra* note 22, at 14, 142–44; White, *supra* note 292, at 149; Young, *supra* note 21, at 552; *but cf.* ALSTOTT, *NO EXIT*, *supra* note 22, at 35–46 (grounding public support for parents in their legal obligations to provide "continuity of care").

337. See, e.g., ERIC RAKOWSKI, *EQUAL JUSTICE* 153–55 (1991); Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, at 1753–56 (2001); Franke, *supra* note 56, 181–83; Wax, *supra* note 2, at 30–33.

338. See Zatz, *supra* note 6, at 1161–62.

otherwise be eligible for home care services under Medicaid.³³⁹ Private caregiving by a family member thus substitutes for a publicly paid home health aide.³⁴⁰

This fungibility between means-tested cash transfers to family caregivers and publicly subsidized third-party care is more explicit in a new program known as At-Home Infant Caregiver (AHIC).³⁴¹ Like TANF, AHIC grants cash payments to low-income parents of infants. Unlike TANF, however, the grant amount equals the child care subsidies that the state would otherwise pay to a commercial child care provider while the parent satisfied TANF work requirements, and the explicit purpose of the program is to permit parental infant care.³⁴² Linking transfers to high-cost commercial infant care emphasizes the tradeoff between familial and market care. The resulting cost savings, relative to providing infant-care subsidies *plus* TANF benefits, has been central to AHIC's political appeal.³⁴³

The core insight behind both AHIC and my argument—that, once the state commits to covering child care costs, recipient employment simultaneously decreases one form of transfer (cash) and increases another (child-care subsidies)—could be implemented more systematically. The mechanism would be to incorporate the cost of child care into the standard of need for all households, independent of adult labor market participation.³⁴⁴ This would integrate eligibility for child care subsidies and cash transfers, which could mitigate the still serious problem of underestimating poverty among employed parents.³⁴⁵

339. MINN. STAT. ANN. § 256J.561(2)(d)(2).

340. Other states count caregiving as work when provided by grandparents or foster parents, again circumstances where the usual balance between parental and public responsibility shifts. See Zatz, *supra* note 6, at 1162.

341. AHIC programs have been implemented in Minnesota, Montana, and New Mexico. They have also been included in welfare-related bills that received extensive support in Congress but ultimately were not enacted. See generally NAT'L CHILD CARE INFO. CTR., AT-HOME INFANT CARE INITIATIVES SPONSORED BY STATES (2005), <http://nccic.org/poptopics/stateathome.pdf>; NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, AT-HOME INFANT CARE (AHIC): A SIDE-BY-SIDE COMPARISON OF FEDERAL AND STATE INITIATIVES (2005), <http://www.nationalpartnership.org/portals/p3/library/PaidLeave/AHICchartOct05.pdf>; Work, Opportunity and Responsibility for Kids (WORK) Act of 2002, H.R. 4737, 107th Cong., § 706, 148 CONG. REC. S7372 (daily ed. July 25, 2002) (as introduced in the Senate by Sen. Baucus pursuant to S. REP. NO. 107-221 (2002)), available at <http://finance.senate.gov/leg/leg062602lan.pdf>.

342. To date, AHIC formally is a standalone program, not a work option within TANF, but functionally these are largely equivalent. Ideas of work are central to advocacy for the program by the Montana grassroots welfare rights organization Working for Equality and Economic Liberation (WEEL), which sees AHIC as affirming that “the caregiving they do at home [should] be recognized as the work that it is. . . .” Betty Holcomb, *Montana Women Score Victory on Valuing Caregiving*, WOMEN'S ENEWS Sept. 1, 2002, <http://www.womensenews.org/article.cfm/dyn/aid/1024/context/cover/>.

343. *Id.*

344. For proposals that take a similar approach to poverty measurement generally, see Renwick & Bergmann, *supra* note 94; JARED BERNSTEIN ET AL., HOW MUCH IS ENOUGH?: BASIC FAMILY BUDGETS FOR WORKING FAMILIES 1–2 (2000); WIDER OPPORTUNITIES FOR WOMEN, SETTING THE STANDARD FOR AMERICAN WORKING FAMILIES (2003), available at http://www.wowonline.org/docs/FINAL_FESS_report_072103.pdf.

345. Feminist tax scholars have long noted that market workers who pay for care appear richer, relative to nonmarket caretakers, than they are, because cash income must also cover the additional expense of child care. See Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 63–80 (1971–72); Staudt, *supra* note 90; Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L.

Acknowledging the child care needs that all parents face also suggests how nonmarket caretakers meet those needs outside the cash economy. Institutionalizing this insight would mean both attributing income to caretaking in amounts equal to child care needs³⁴⁶ and also treating that income generation as work.

This approach could contribute to feminist analysis of care/work issues in several ways. First, by operating within the self-sufficiency framework that plays such a dominant role in justifying work requirements, it challenges the dominance of market work on what seems to be its home turf. Second, by building on means-tested child care subsidies, the argument avoids problems of overbreadth associated with imputed-income or benefiting-others criteria.³⁴⁷ Third, for similar reasons, the argument is tailored to means-tested transfer recipients and does not imply a general program of redistribution to caretakers or parents. This mitigates feminist concerns about reinforcing gendered divisions of labor within two-adult households³⁴⁸ and about marginalizing women who choose not to be parents.³⁴⁹

This institutional context also enables relevant distinctions to be made *among* nonmarket caretakers. Most child care subsidies are a function of the number, age, and health of children. Correspondingly, the parent who stays home to provide care to a seventeen-year-old would not be working in the relevant sense because no transfers are avoided.³⁵⁰ The parent of three preschool-age children, in contrast, clearly would be.³⁵¹ Analogous distinctions are made among forms of market work: Self-employment in an unprofitable business might not satisfy a work requirement, no matter how time consuming or personally fulfilling.³⁵²

Evaluating nonmarket caretaking under the same standards as market work supports feminist integration of nonmarket care into the privileged place historically granted to wage work.³⁵³ Moreover, it does so without segregating and potentially trapping

REV. 983, 1001–05 (1993); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2056–59 (1996).

346. This component would largely import into the welfare context Nancy Staudt's proposal for including imputed income from housework in taxable income. See Staudt, *supra* note 90.

347. See Chancellor, *supra* note 90, at 561–62; Staudt, *supra* note 90, at 1577; Wax, *supra* note 2, at 30–33; see also discussion *supra* at Part II.A.2.

348. See Schultz, *supra* note 1, at 1916–17.

349. Case, *supra* note 337, at 1781–83; Franke, *supra* note 56, at 185. This integration with means-testing also enhances feasibility by building on existing institutions.

350. This is not to say that such a parent is doing nothing at all, or nothing useful, just nothing that is captured by the standards used to allocate transfers.

351. The same point applies to distinctions between child-care and care for other family members. Currently, low-income working-age adults do not generally receive means-tested subsidies to allow them to purchase market care for parents, siblings, or spouses while they themselves engage in market work. In the absence of such subsidies, providing nonmarket care instead would not satisfy work requirements. Cf. WHITE, *supra* note 23, at 111 (conditioning the ability of elder-care to satisfy work requirements on the existence of “a community-wide obligation to help ensure that the basic needs of the infirm are met.”); Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557, 1561 n.15 (2001) (distinguishing child and elder-care based on differing opportunities for the person receiving care to arrange for its provision).

352. States often give work credit for self-employment based on earnings divided by the minimum wage. See, e.g., TENN. COMP. R. & REGS. 1240-1-49.03(1) (2006); WASH. ADMIN. CODE § 388-310-1700(2) (2006); see also 71 Fed. Reg. 37454, 37467 (ratifying this practice).

353. See Pateman, *supra* note 1; Silbaugh, *supra* note 20.

nonmarket caretakers in a program separate from those serving low-paid wage workers. From this perspective, the barrier to recognizing nonmarket care is a rigid and artificial market/nonmarket divide,³⁵⁴ not the distinction between work and nonwork.

I realize that any move to equate nonmarket caretaking with market work (in particular respects³⁵⁵) will meet resistance from many readers. But to the extent one advocates distinctions between market and non-market work despite identical consequences for self-sufficiency, this only reinforces my overarching argument that deciding what counts as work requires clarity about what the goals are. Some derogate the nonmarket care provided by transfer recipients (doubting their contribution),³⁵⁶ while others elevate the experience of performing market labor (evoking a self-improvement framework).³⁵⁷ Additionally, some resist supporting nonmarket caretakers on the ground that the public is not responsible for their reproductive decisions.³⁵⁸

I am deeply skeptical of each of these objections and intend to address them in future work that fully develops the ideas I have sketched here.³⁵⁹ But for now, it is enough simply to observe that each of these objections attacks treating caretaking as work from *outside*, not inside, a self-sufficiency approach to work requirements. That itself represents a remarkable shift in the usual terms of debate.

354. Cf. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1567 (1983).

355. See Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That is Not the Question*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 362, 371 (Martha M. Ertman & Joan C. Williams eds., 2005) (noting distinctions between attaching financial entitlements to non-market caretaking and organizing care through market mechanisms).

356. See Wax, *supra* note 2, at 31 (characterizing welfare recipients as “second-rate single mother[s]” whose caretaking is “of little value”); Wax, *supra* note 4, at 503.

357. Schultz, *supra* note 1, at 1908–11, 1917–18; Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 25–33, 46–48 (2005).

358. See RAKOWSKI, *supra* note 337, at 153–55; but see Anne L. Alstott, *What Does a Fair Society Owe Children—And Their Parents?*, 72 FORDHAM L. REV. 1941, 1941 (2003–04); Case, *supra* note 337, at 1785; Amy L. Wax, *Against Neutrality*, 29 BOSTON REV. 12, 13 (2004).

359. The first objection is undermined by research showing both that welfare recipients are similar in their parenting to other low-income individuals and that the child development effects of welfare-to-employment transitions driven by work requirements are mixed and, where positive, largely driven by income. See Greg J. Duncan et al., *How Different Are Welfare and Working Families? And Do These Differences Matter for Children's Achievement?*, in FOR BETTER AND FOR WORSE, *supra* note 2, at 103; Chase-Lansdale et al., *supra* note 143, at 1548; Pamela A. Morris et al., *Effects of Welfare and Employment Policies on Young Children: New Findings on Policy Experiments Conducted in the Early 1990s*, 19 SOC. POL'Y REP. 1 (2005). Moreover, it draws heavily on an entrenched pattern of class- and race-based hostility to low-income women's parenting. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 9, 19, 110–12 (1997); ROBERTS, *SHATTERED BONDS*, *supra* note 20, at 21–24, 74–75, 237, 244–45; Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 329–33, 340, 348–49, 355–56, 386 (2002). I am sympathetic to the second argument to the extent it seeks to counteract various forms of discrimination that suppress women's labor market participation, but not to the extent that it does so by increasing the hardships of nonemployment rather than by increasing access to employment. Cf. Lester, *supra* note 194 (advocating paid family leave in part to encourage women's employment). The third objection, in my view, is a non sequitur, albeit a pervasive one. Whatever limits parental responsibility places on shifting child-rearing costs to the public, those limits should apply equally to childcare subsidies and to transfers to those providing care personally.

C. Other Legal Contexts Organized Around Work

This analysis of unpaid caretaking, like this Article generally, emphasizes the importance of grounding an assessment of work in the particular policy context in which it arises. Despite their specificity, however, means-tested transfers are not radically disconnected from other legal domains where work matters. Matters of economic redistribution, mutual responsibility, self-sufficiency, and the place of work in the good life are relevant both to non-means-tested social insurance policies like social security and unemployment compensation, and also to labor and employment statutes regulating wages, hours, discrimination, collective action and bargaining, and other topics. This leads to another way in which my examination of welfare work requirements has much broader implications, in this case for central issues in labor and employment law.

In this field, the foundational legal category is “employment,” and substantial conflicts arise over its scope. Consider, for instance, the question of whether unpaid volunteers are employees.³⁶⁰ If we regulate employment because it provides most people’s income, then the absence of pay suggests that an activity is not employment. If, however, employment matters because it mediates important noneconomic goods, such as structured opportunities to cooperate in and contribute to socially useful endeavors, then the absence of pay might be less decisive.

Many scholars, as well as the Clinton-era Dunlop Commission, have called both for expanded definitions of “employment” to ensure fidelity with policy goals³⁶¹ and for harmonization of employment definitions across various statutes.³⁶² But these two aims will conflict if what makes employment worth regulating actually varies from statute to statute: The minimum wage may have an emphasis on economic status that differs from broader forms of social inclusion promoted by antidiscrimination law,³⁶³ which in turn differ from an emphasis on democratic self-organization in labor law.³⁶⁴ If so, then a

360. See *Pietras v. Board of Fire Comm'rs.*, 180 F.3d 468, 473 (2d Cir. 1999) (volunteer firefighter was Title VII “employee”); *York v. Ass’n of the Bar of the City of New York*, 286 F.3d 122, 125–26 (2d Cir. 2002) (opposite result for bar association volunteer); *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 142–45 (4th Cir. 1999) (volunteer rescue squad duty not “employment” under the FLSA); *WBAI Pacifica Found.*, 328 N.L.R.B. 1273, 1276 (1999) (radio station volunteers not employees under the NLRA); Janelle Brown, *Must AOL Pay “Community Leaders”?*, SALON.COM, Apr. 16, 1999, http://www.salon.com/tech/feature/1999/04/16/aol_community/index.html.

361. But see *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–25 (1992) (holding that, absent specific statutory definition, “employment” refers to the common-law master-servant relationship and should not be modified to respond to specific goals of the statute in question).

362. U.S. COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS (a/k/a “Dunlop Commission”), FINAL REPORT 12 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2/; Katherine V.W. Stone, *Rethinking Labor Law: Employment Protection for Boundaryless Workers*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK (Guy Davidov & Brian Langille eds., forthcoming 2006); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 172–74 (2003).

363. Cf. Shiffrin, *supra* note 189.

364. See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994).

unitary concept of employment might be inappropriate.³⁶⁵ These are questions well worth asking, but thus far they have received little attention. Similar issues arise concerning whether employment ought to be the triggering category in the first place, a point of particular importance in the design of social insurance.³⁶⁶

We should be asking these questions wherever work and related concepts like employment play a central role in allocating important legal protections and benefits.³⁶⁷ The ultimate answers are likely to vary with the specific legal context. Nonetheless, many of the particular points I have made in this Article will remain relevant. Whether and in what way self-sufficiency, self-improvement, reciprocity, or some other aspect of work provides the link to policy coverage cannot be assumed in advance. But I hope my analysis of which activities advance or betray these goals, and how we could know the difference, offers a helpful start.

365. See, e.g., *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992) (suggesting that differences in purpose between minimum wage and discrimination protections could lead to different outcomes in the treatment of prison labor under distinct employment statutes).

366. Significant issues include coverage of the self-employed. See Patricia E. Dilley, *Breaking the Glass Slipper: Reflections on the Self-Employment Tax*, 54 TAX LAW. 65, 70–74 (2000); Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 204–08, 212–17 (1999). Also significant is the treatment of unpaid household labor. See Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 276–85 (1989); Staudt, *supra* note 90; Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 2–3 (1999); Silbaugh, *supra* note 20, at 38–41; Lester, *supra* note __, at 338, 386–87.

367. For examples of this type of analysis, see Liu, *supra* note 366, at 61.