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WHAT WELFARE REQUIRES FROM WORK

by

NOAH ZATZ



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WHAT WELFARE REQUIRES FROM WORK

Noah D. Zatz^{*}

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. 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, self-improvement (work's noneconomic 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.....	374
I. THE NEED FOR A PURPOSIVE ACCOUNT OF WORK.....	380
II. WORK AS ECONOMIC SELF-SUFFICIENCY	388
A. Transfer Avoidance Without Employment.....	392
1. Cash Income Without Wages.....	392
2. Reducing Transfers Without Cash.....	395
B. Employment Without Transfer Avoidance.....	400
C. Transfer Avoidance in the Long Run.....	405
1. Incorporating Earnings Growth From Job Experience	406

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2.	Balancing Long-Term Transfer Avoidance Against Immediate Employment	412
a.	Including Unpaid Activities That Improve Employability	414
b.	Excluding Employment That Limits Long-Term Self-sufficiency	416
D.	The Limits of Transfer Avoidance	419
1.	Transfer Avoidance and the Maintenance of Household Well-Being	419
2.	Self-sufficiency and the Ambiguous Role of Unpaid Activities	421
III.	WORK AS SELF-IMPROVEMENT	424
A.	Noneconomic Virtues of the Work Process	427
1.	Discipline and Structure Through Work	429
2.	Self-realization Through Work	434
B.	Self-sufficiency Redux: The Noneconomic Harms of Dependency	437
1.	Dependency and Cultural Contempt	439
2.	Dependency and the Power of Earnings	443
IV.	WORK AS RECIPROCITY	445
V.	CONCLUSIONS AND NEW DIRECTIONS	451
A.	The Empty Consensus	452
B.	Toward a New Analysis of Family Caretaking as Work	456
C.	Other Legal Contexts Organized Around Work	463

INTRODUCTION

What is work?

This 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, 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

1. See generally Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1885-86 (2000); see also LAWRENCE M. MEAD, BEYOND ENTITLEMENT 12 (1986); Carole Pateman, *The Patriarchal Welfare State*, in DEMOCRACY AND THE WELFARE STATE 231, 252, 258 (Amy Gutmann ed., 1988).

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 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

2. William J. Clinton, *Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange With Reporters* (Aug. 22, 1996), in PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: WILLIAM J. CLINTON, 1996, bk. 2, at 1325, 1326 [hereinafter PRWORA Signing Remarks] ("After I sign my name to this bill, welfare will no longer be a political issue."); see also WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 164 (1996); 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); 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*, 62 LAW & CONTEMP. PROBS. 17, 18 (Autumn 1999) (discussing "stipended volunteers").

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 Welfare*, 9 STAN. L. & POL'Y REV. 19 (1998) (comparing permissible work activities under Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF)).

means paid employment, and it proceeds from there to debate the morality, effectiveness, and need for work-based policies.⁵

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 previous article⁶ 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,”⁹ what counts as work varies dramatically across programs.¹⁰ Some state TANF programs focus exclusively on immediate paid private employment or on 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 also 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.¹¹

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

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

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

7. 42 U.S.C. § 601 (2000).

8. 26 U.S.C. § 32 (2000).

9. See *infra* notes 30–33 and accompanying text.

10. See Zatz, *supra* note 6. Since *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 45 C.F.R. § 261.2 (2006) (interim final rule). 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*, WASH. POST, Aug. 7, 2006, at A1.

11. See Zatz, *supra* note 6, at 1177–85.

definition of work, one that relies on the underlying justifications for basing transfer eligibility on work.¹² We cannot simply rely on ordinary usage, on descriptive categories developed by social scientists, or 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 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 of these rationales 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 but may 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 unable or unwilling to comply, they and their children suffer the economic hardship of lost income when dollars are already desperately scarce.¹³ Additionally, they may suffer the psychological and dignitary harms of finding oneself cast off without support by one's fellow citizens.¹⁴ An unduly narrow definition of work will inflict these harms on people who do not deserve them.

12. Cf. Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2239–40 (1998) (describing a “purposive” approach to identifying “white collar” employees exempt from overtime protections under the Fair Labor Standards Act (FLSA)).

13. See generally LADONNA PAVETTI ET AL., MATHEMATICA POLICY RESEARCH, INC., REVIEW OF SANCTION POLICIES AND RESEARCH STUDIES: FINAL LITERATURE REVIEW (2003), available at <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).

14. See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996); cf. Michael Ignatieff, *The Broken Contract*, N.Y. TIMES, Sept. 25, 2005, § 6 (Magazine), at 15.

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.¹⁵ Moreover, significant autonomy is lost (by people already facing severe constraints) simply by being told what to do by a powerful bureaucracy.¹⁶

This concern reflects a liberal sensibility protective of individual control over, and deep diversity among, ways of life,¹⁷ although my more specific analytical points do not rely on this inclination being shared by the reader. An ethnographic sensibility nourishes 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.¹⁸ This variation, and the opportunity for individuals to sort life out for themselves in different ways, is suppressed by compliance with work requirements.¹⁹ 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.

15. 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).

16. For a discussion of 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* 248–72 (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).

17. See PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL* 28 (1995); Alstott, *supra* note 5, at 980. But see KIMBERLY A. YURACKO, *PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES* (2003); Richard J. Arneson, *Should Surfers Be Fed?*, in *REAL LIBERTARIANISM ASSESSED*, *supra* note 16, at 95, 97–101.

18. See DANIEL DOHAN, *THE PRICE OF POVERTY* 9 (2003); Joan W. Scott, "Experience," in *FEMINISTS THEORIZE THE POLITICAL* 22 (Judith Butler & Joan W. Scott eds., 1992).

19. 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 shaped by our insertion into particular institutional and cultural milieus. For an attempt to account for these challenges to liberalism without abandoning the underlying project, see MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 11 (1999); see also ERNESTO LACLAU, *EMANCIPATION(S)* 1, 17–18, 101–03 (1996).

My analysis 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 expanding protections or resources for those who do work.²⁰ 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.²¹

For instance, one major objection to work-based redistributive policies is their exclusion of parents who perform unpaid family labor.²² Taking this exclusion of familial care to be fundamental to work requirements, feminist critics typically either reject work-based policies altogether²³ or advocate policies that separately support and value caretaking.²⁴ What has not been done is to integrate familial caretaking into work as part of a general account linking work and redistribution.²⁵

In 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 childcare costs and childcare subsidies are integrated into the analysis of poverty and transfers.

20. See JOEL F. HANDLER & YEHESKEL HASENFELD, *WE THE POOR PEOPLE* 11–15 (1997); MEAD, *supra* note 1, at 69–70; MEAD, *supra* note 5, at ix–xi, 48–49; 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.

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

22. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 108 (1995); DOROTHY ROBERTS, *SHATTERED BONDS* 179–80 (2002); Alstott, *supra* note 5, at 992–95; Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1409–13 (2001); 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); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 67 (1996).

23. See Alstott, *supra* note 5, at 974; BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 130 (1999); VAN PARIJS, *supra* note 17, at 28–33; Pateman, *supra* note 1, at 240, 259; Iris Marion Young, *Mothers, Citizenship, and Independence: A Critique of Pure Family Values*, 105 ETHICS 535, 551–52 (1995).

24. See FINEMAN, *supra* note 22, at 9, 232–33; EVA FEDER KITTAY, *LOVE'S LABOR* 30, 142–43 (1999); Fineman, *supra* note 22, at 1411–13; see also ANNE L. ALSTOTT, *NO EXIT* (2004); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004); JOAN WILLIAMS, *UNBENDING GENDER* (2000); 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).

25. For an important exception, see STUART WHITE, *THE CIVIC MINIMUM* 97–125 (2003).

Admittedly, this last 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 requirements. Confronting those problems also can illuminate how the essential but elusive nature of work is shaped by a specific legal context 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.²⁶ 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 “hour.” 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 be the penalties 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,’ or even to find the most ‘accurate’ description of the social world through an empirical analysis of the hard facts.”²⁷

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.²⁸ 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

26. Malamud, *supra* note 12, at 2318–19, 2238.

27. *Id.*

28. 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).

feature matters, how reliably employment itself possesses it, or whether other nonemployment activities might possess it as well.²⁹ By framing the question as 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.³⁰

The tautological 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.³¹ Although less colorfully put, similar views lie beneath assertions that even if education or training are work in some sense, employment and workfare nevertheless remain “*real* work.”³² 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.³³

The very act of adding “real” 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

29. See *infra* note 35 and accompanying text.

30. Diller, *supra* note 4, at 25 (quoting 141 CONG. REC. 13,788 (1995) (statement of Sen. Gramm)).

31. Senator Phil Gramm’s statement implies 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, as I do.

32. RON HASKINS & PAUL OFFNER, BROOKINGS INST., WELFARE REFORM & BEYOND POLICY BRIEF NO. 25, ACHIEVING COMPROMISE ON WELFARE REFORM REAUTHORIZATION 3 (2003), available at <http://www.brookings.edu/es/wrb/publications/pb/pb25.pdf>; see also Jason Turner, Heritage Foundation, Testimony: Effective Work Programs (Apr. 9, 2002), <http://www.heritage.org/Research/Welfare/Test040902.cfm> (distinguishing education and training from “actual work,” and discussing how they can be combined).

33. See Press Release, Am. Fed’n of State, County & Mun. Employees, House Republican Welfare Bill Embraces Quotas, Rejects Real Work for Real People (May 16, 2002), available at <http://www.afscme.org/press/7002.cfm>; Nat’l Ass’n of Soc. 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 also Chad Alan Goldberg, *Welfare Recipients or Workers? Contesting the Workfare State in New York City*, 19 SOC. THEORY 187 (2001); John Krinsky, *Work, Workfare, and Contentment in New York City: The Potential of Flexible Identities in Organizing Opposition to Workfare*, 24 CRITICAL SOC. 277 (1998).

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,”³⁴ acknowledges that “[h]ousework is work, baby-sitting is work, even drug-dealing is work.”³⁵ He then goes on to give specific reasons for focusing on work “in the formal labor market”³⁶ to the exclusion of these other types of work. Giving such reasons is necessary to select among activities that are work in *some* recognizable sense but not necessarily in the relevant sense.

“Work” is a term applied to bewilderingly varied activities³⁷: working out, completing household chores, building a friendship, acquiring a skill, or pursuing a hobby. Indeed, as I worked on this part, 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.”³⁸

This wide-ranging way in which we speak about work finds more thoroughly developed expression in the difficulties that scholars of work across many disciplines have faced when attempting to define their object of study.³⁹ One immediate challenge for identifying work with 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 do not get paid.⁴⁰ More generally, placing opposite labels on the same physical acts, based solely on the presence

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

35. *Id.* at 74; see also KATHERINE S. NEWMAN, NO SHAME IN MY GAME 109 (1999); PHELPS, *supra* note 5, at 22, 39; Schultz, *supra* note 1, at 1900.

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

37. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1363 (10th ed. 1998) (defining “work” as “1: 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[;] 2: the labor, task, or duty that is one’s accustomed means of livelihood[;] 3: a specific task, duty, function, or assignment often being a part or phase of some larger activity”); R.E. Pahl, *Epilogue*, in ON WORK: HISTORICAL, COMPARATIVE, AND THEORETICAL APPROACHES 744, 744 (R.E. Pahl ed., 1988); Keith Thomas, *Introduction*, in THE OXFORD BOOK OF WORK, at xiii, 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).

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

39. See William Ronco & Lisa Peattie, *Making Work: A Perspective from Social Science*, in ON WORK, *supra* note 37, at 709, 715.

40. See KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS 13–14 (2004); Thomas, *supra* note 37, at xiii; Chris Tilly & Charles Tilly, *Capitalist Work and Labor Markets*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 283, 285 (Neil J. Smelser & Richard Swedberg eds., 1994).

or absence of pay, seems both to miss important forms of continuity and also to elide forms of difference distinct from a paid/unpaid divide.⁴¹

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.⁴² These characteristics 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);⁴³ (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);⁴⁴ and (3) those related to producing something valued by others (whether through purchase, noncash exchange, or the potential to be part of such exchanges).⁴⁵ 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.⁴⁶ 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.⁴⁷

41. See Frederick C. Gamst, *Considerations of Work*, in *MEANINGS OF WORK: CONSIDERATIONS FOR THE TWENTY-FIRST CENTURY* 1, 9–10 (Frederick C. Gamst ed., 1995); Pahl, *supra* note 37, at 744; Noah D. Zatz, *Prison Labor, Employment Relationships and Economic Exchange* (Sept. 12, 2006) (unpublished manuscript, on file with author).

42. 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, e.g., Gary Blasi, *Lawyers, Guns and Money: Content Contextualism and the Cognitive Foundations of Statutory Interpretation* (2004) (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.*

43. 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*, *supra* note 37, at 372, 380; Debra Anne Donahoe, *Measuring Women’s Work in Developing Countries*, 25 *POPULATION & DEV. REV.* 543, 543–45 (1999); Tilly & Tilly, *supra* note 40, at 286.

44. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART* 6–7 (1983); Pahl, *supra* note 37, at 744; Thomas, *supra* note 37, at xiii–xiv; Wadel, *supra* note 37, at 370; Sandra Wallman, *Introduction*, in *SOCIAL ANTHROPOLOGY OF WORK*, *supra* note 37, at 1, 7.

45. See NANCY FOLBRE, *THE INVISIBLE HEART* 66–67 (2001); HOCHSCHILD, *supra* note 44, at 7; Abbott, *supra* note 28, at 307; Silbaugh, *supra* note 22, at 11; Tilly & Tilly, *supra* note 40, at 285.

46. See RUSSELL MUIRHEAD, *JUST WORK* 4–12 (2004). This problem is not unique to the category “work,” see Blasi, *supra* note 42, but assessing its relative difficulty across different contexts lies beyond the scope of this Article.

47. See Pahl, *supra* note 37, at 744, 747; Wadel, *supra* note 37, at 365.

One possible, but still descriptive, way out of this morass would be 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’s locution of working to cure himself rings true and yet simultaneously may seem a strained example of the work required of welfare recipients.

There are three serious difficulties with simply stipulating that work means employment. First, doing so 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.

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 regulatory context, “seafood” just means “fish” would clarify that lake trout are seafood and that sea turtles are not.⁴⁸ 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 do not) now can be recast as arguments for and against using “fish” as the regulatory category (regulating lake trout is overinclusive, not regulating sea turtles is underinclusive). Because of this fungibility between issues of category scope and issues of the category’s under- or overinclusiveness 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.⁴⁹ Not only may education count as work, but in many places, Sievers’s battle with cancer might well count as work under provisions that

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

49. See Zatz, *supra* note 6.

include medical treatment and rehabilitation.⁵⁰ Even approaches that emphasize employment embrace some unpaid activities like workfare.⁵¹

Putting these three points together, it also would not fundamentally clarify matters to stipulate that work means paid employment but then to 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 work (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 nonstarter, even though such an equation might ultimately 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.

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.⁵²

A purposive definition of work is necessarily context specific. An activity appropriately included as work in means-tested transfer programs might

50. *Id.* at 1153–61.

51. Indeed, supporters of unpaid workfare typically oppose classifying it as employment. See Jason A. Turner & Thomas Main, *Work Experience Under Welfare Reform*, in *THE NEW WORLD OF WELFARE*, *supra* note 2, at 291. But see *United States v. City of New York*, 359 F.3d 83 (2d Cir. 2004) (rejecting New York City's claim that workfare workers were not employees for Title VII purposes).

52. 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.

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.⁵³ 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.⁵⁴

As I draw out the implications of each rationale, seemingly incongruous results may suggest the appeal of another rationale, one that would specify work differently. The broad stakes in such shifts among rationales deserve a few preliminary observations here, though I defer elaboration of each rationale to its respective part 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 or equalizing access to property, for example), and then invoke work as a side constraint: a “work

53. 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 184–87 (1999). Examples include hostility or suspicion toward people whose membership in race, gender, and other groups 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 15. 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.

54. This typology inevitably fails to 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, *Forty Acres and a 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.

requirement” on something larger. In contrast, self-improvement approaches tend to cast encouraging or rewarding 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.⁵⁵

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 illuminate a whole range of issues concerning work, and exploring that full range can shine new light on disputes concerning care.⁵⁶

This breadth also is important because work requirements reach far beyond the paradigmatic unmarried woman with children around whom welfare debates usually swirl.⁵⁷ Many means-tested transfer programs do not require the presence of children in the household but do have concurrent work requirements⁵⁸ or work-related eligibility provisions.⁵⁹ Likewise, recent scholarly

55. 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).

56. See Zatz, *supra* note 41 (drawing on feminist treatments of family caretaking in order to analyze prison labor).

57. 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 commentators’ excessive focus on TANF).

58. See STAFF OF HOUSE COMM. ON WAYS & MEANS, 108TH CONG., 2004 GREEN BOOK 15-30 tbl.15-10 (Comm. Print 2004) [hereinafter 2004 GREEN BOOK], available at <http://www.gpoaccess.gov/wmprints/green> (showing that, as of 2001, 46 percent of households receiving food stamps contained no children); ADAM CARASSO & C. EUGENE STEUERLE, TAX POLICY CTR., PROJECTED DISTRIBUTION OF EITC CLAIMS IN 2003 (2004), available at http://www.taxpolicycenter.org/UploadedPDF/1000669_TaxFacts_071904.pdf (projecting that three million households without children would receive the Earned Income Tax Credit (EITC) in 2003); L. JEROME GALLAGHER ET AL., URBAN INST., STATE GENERAL ASSISTANCE PROGRAMS 1998, at 107–12 (1999), available at http://www.taxpolicycenter.org/UploadedPDF/ga_main.pdf (describing state-funded “general assistance” programs for nonelderly, nondisabled adults).

59. In 2002, almost five million nonelderly adults received Supplemental Security Income (SSI) based on a disability, which is defined in terms of inability to work. See 2004 GREEN BOOK, *supra* note 58, at 3-40 tbl.3-12. There is also some movement toward integrating into disability

proposals and policy experiments tend to integrate programs under the rubric of work rather than to separate them based on the presence of children.⁶⁰ 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,⁶¹ 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.⁶² But childcare 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.⁶³ The crucial characteristic of work, according to this view, is that it

benefit programs 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 Amy L. Wax, *Disability, Reciprocity, and "Real Efficiency": A Unified Approach*, 44 WM. & MARY L. REV. 1421 (2003); Zatz, *supra* note 6, at 1156.

60. See, e.g., HANDLER & HASENFELD, *supra* note 20; PHELPS, *supra* note 5; DEBRA RHINEHART & ABBEY FRANK, NAT'L TRANSITIONAL JOBS NETWORK & CTR. FOR LAW & SOC. POLICY, TRANSITIONAL JOBS WORK (2003), available at http://clasp.org/publications/TJ_Outcomes.pdf; WILSON, *supra* note 2; Schultz, *supra* note 1; Wax, *supra* note 59.

61. In 2002, the employment rate was 59 percent for single mothers earning under 200 percent of the poverty threshold, and 57 percent when a child under six was present. See U.S. DEP'T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), SIXTH ANNUAL REPORT TO CONGRESS, at IV-1 fig.A (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 tbl.4:1 (2000), available at <http://www.acf.hhs.gov/programs/ofa/opreweb/annual3.pdf>.

62. 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 22, at 1251–53; Schultz, *supra* note 1, at 1915, 1954.

63. See, e.g., JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 104-725, at 261–62 (1996) (characterizing the PRWORA as "promot[ing] work over welfare and self-reliance over dependency" by reflecting the principle that "welfare should mean temporary

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 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. Indeed, relative to welfare recipients, demands for work are rarely directed at adults who live off of inherited wealth or the income of family members;⁶⁴ such individuals are not self-sufficient in the sense of relying only on their own earnings, but they nonetheless do avoid state transfer payments.⁶⁵

Means-tested transfers, however, do trigger this work obligation under a widely shared conception of what these transfers are doing and what justifies them. That conception sees means-tested transfers as disruptions, through taxation, of a presumptively just baseline distribution of resources.⁶⁶ The transfer justifiably disrupts this baseline in order to remedy the recipient's deprivation, as measured by pretransfer 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 to 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

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).

64. Similarly, far more concern is directed at the potential earnings disincentive effects of government transfers than at 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).

65. For criticism of the selective application of self-sufficiency mandates, see FINEMAN, *supra* note 24, at 3–4.

66. 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* 8–9 (2002) (describing and criticizing “everyday libertarianism” that fetishizes pre-tax income).

withdraw cash.⁶⁷ The self-sufficiency approach includes work within the scope of this expected agency, this obligation of “personal responsibility” invoked by the title of the bill that enacted federal welfare reform, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).

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 actual income is misleading if it can be increased at will. This account can be criticized or complicated in many respects, 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.

The same point can be articulated from the perspective of the state by saying simply that work requirements target finite public resources to those most in need. 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.⁶⁸

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,⁶⁹ failure to do so negates claims of need based on lack of income.⁷⁰ Thus, in an important decision interpreting New York State’s constitutional mandate of state “aid, care and support of the needy,”⁷¹ 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.”⁷²

Skeptics of work requirement policies typically doubt that poverty is well explained by individual choices not to work. Instead, they interpret

67. 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, at 52 tbl.I.C.1, 120–22 tbl.IV.A.3 (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. CODE R. § 8.102.2.8(E)(3) (Weil 2006).

68. Thus, insofar as moral disapproval is triggered by violations of such legitimate obligations, imposition of social sanctions such as reducing transfers to those who fail to satisfy work requirements should not be dismissed as merely moralistic. See Wax, *supra* note 55.

69. 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 (2d ed. 1983).

70. See generally HANDLER & HASENFELD, *supra* note 20, at 58 (discussing history of work-related programs); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE (10th anniv. ed. 1996).

71. N.Y. CONST. art. XVII, § 1.

72. *Barie v. Lavine*, 357 N.E.2d 349, 352 (N.Y. 1976); cf. *Mooney v. Pickett*, 483 P.2d 1231, 1238 (Cal. 1971); *Clark County Soc. Serv. Dep’t v. Newkirk*, 789 P.2d 227, 229 n.4 (Nev. 1990).

imposition of work requirements to reflect a combination of two errors: 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.⁷³

These criticisms provide compelling explanations of when and why work requirements have been imposed, and they rightly emphasize the severe, and unjust, constraints under 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 need-based transfers to work.⁷⁴ 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, the standard objections primarily address whether recipients are making sufficient efforts to fulfill their work obligations, not the existence of work obligations in the first place.⁷⁵

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.⁷⁶ Guarding against such unfairness is the principle behind the policy of “less eligibility,” which holds that transfer receipt should not be more

73. See HANDLER & HASENFELD, *supra* note 20, at 99–100, 204; Linda C. McClain, “Irresponsible” *Reproduction*, 47 HASTINGS L.J. 339, 352 (1996); Roberts, *supra* note 22; Roberts, *supra* note 14.

74. Alternative accounts of the basis for redistribution do not make deprivation a prerequisite, and so, they can reject both means-testing and self-sufficiency arguments for work in a less contingent fashion. See, e.g., ACKERMAN & ALSTOTT, *supra* note 23; VAN PARIJS, *supra* note 17.

75. 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 51, at 301–03. To the extent that these phenomena reflect errors by welfare administrators, including failure to 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 53. 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 Super, *supra* note 15, at 828; Turner & Main, *supra*, at 51.

76. See *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”); Wax, *supra* note 2, at 3, 16.

attractive than transfer ineligibility.⁷⁷ A similar idea can also be articulated in efficiency terms, based on the claim that unconditional transfers distort both transferors' and recipients' incentives to choose between earnings production and other activities.⁷⁸

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 from wages. Second, this cash income reduces transfers. Specifying these steps helps to identify two corresponding ways to reduce transfers without employment, both of which should count as work on a self-sufficiency account: First, activities other than employment can yield cash income; and 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 may do so on small farms, in childcare 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

77. HANDLER & HASENFELD, *supra* note 20, at 22–23.

78. For discussion of this “leaky bucket” theory of redistribution, see Alstott, *supra* note 20, 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).

contractors or small businesspeople.⁷⁹ A strict focus on “employment,” as that term is normally construed in U.S. law, excludes this entrepreneurial activity from “work.”⁸⁰ 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 subcategory of “employment.”⁸¹

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 work⁸² and many policy mechanisms used to promote work, such as subsidies for employers’ wage payments, wage and other employment regulation, and public works employment programs.⁸³ 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.⁸⁴

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

79. See, e.g., MITCHELL DUNEIER, *SIDEWALK* (1999); MARY C. TUOMINEN, *WE ARE NOT BABYSITTERS* (2003); Regina Austin, “An Honest Living”: *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 *YALE L.J.* 2119 (1994); Abel Valenzuela Jr., *Day Labourers as Entrepreneurs?*, 27 *J. ETHNIC & MIGRATION STUD.* 335 (2001).

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

81. See Zatz, *supra* note 6, at 1152–53; see also Reauthorization of the Temporary Assistance for Needy Families Program, 71 *Fed. Reg.* 37,454, 37,457 (June 29, 2006) (interim final rule) (codified at 45 C.F.R. § 261.2 (2006)) (approving this practice). Unlike TANF, the EITC statute explicitly includes self-employment. Compare 42 U.S.C. § 607(d) (2000), with 26 U.S.C. § 32(c)(2)(A)(ii) (2000).

82. Much research in this area relies upon data compiled through employer reporting of 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., MDRC, *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*].

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

84. See discussion *infra* Part III.B.

be treated interchangeably with legitimate employment when adjudicating eligibility for disability benefits.⁸⁵ Those decisions are premised on the financial equivalence and institutional similarity between income from crime and from 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.⁸⁶

A similar analysis applies to garnering income through begging,⁸⁷ which, like crime, often is thought to be the opposite of work.⁸⁸

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.⁸⁹ 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

85. 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); *Bell v. Sullivan*, 817 F. Supp. 719, 722 (N.D. Ill. 1993).

86. WILSON, *supra* note 2, at 58. Indeed, drug-dealing organizations often have many of the features of ordinary businesses with employees. See PHILIPPE BOURGOIS, *IN SEARCH OF RESPECT* 77 (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).

87. 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*, 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).

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

89. See 42 U.S.C. § 601(a)(2) (2000) (stating TANF's goal to "end the dependence of needy parents on government benefits" by promoting "work" and "marriage"); *id.* § 608(a)(3) (requiring that TANF recipients assign their rights to child support to the state as a condition of eligibility); RON HASKINS & ISABEL SAWHILL, BROOKINGS INST., *WELFARE REFORM & BEYOND* BRIEF NO. 28, *WORK AND MARRIAGE: THE WAY TO END POVERTY AND WELFARE* 2 (2003), available at <http://www.brookings.edu/es/wrb/publications/pb/pb28.pdf>.

in self-sufficiency despite the absence of employment.⁹⁰ Indeed, something like this logic could provide a rationale for recent efforts to include marriage promotion activities as TANF work in a leading bipartisan TANF reauthorization proposal.⁹¹ 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*."⁹² 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 thereby contribute to self-sufficiency.⁹³ 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.⁹⁴ It seems odd for the determination that one works or not to depend on whether (1) one performs an activity, gets paid for it, and buys a set of goods and services from another worker, or (2) one simply produces comparable goods and services oneself.⁹⁵

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.⁹⁶ For example, if it would

90. See VICKI TURETSKY, CTR. FOR LAW & SOC. POLICY, *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"); see also HASKINS & SAWHILL, *supra* note 89, 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).

91. See Zatz, *supra* note 6, at 1171–72.

92. 049-187-001 WYO. CODE R. § 8(e)(viii)(13) (Weil 2005) (emphasis added).

93. See Thomas, *supra* note 37, at xiii; Tilly & Tilly, *supra* note 40, at 283, 285–86.

94. See, e.g., Benería, *supra* note 43, at 380, 385; Silbaugh, *supra* note 22, at 11, 15, 23.

95. See Karst, *supra* note 54, at 566.

96. 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 43, at 380, 385 (similar analysis based on concept of "use value"); Tilly & Tilly, *supra* note 40, at 285.

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.⁹⁷ 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?⁹⁸ These difficulties of boundlessness and valuation arguably are surmountable,⁹⁹ but many remain unpersuaded.

What has not been recognized previously is that these problems are particularly tractable in the specific context of means-tested transfer programs. The structure and rationale of these programs provide a basis for discriminating among types of imputed income, for reasons that harken 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 (nonmonetary) income: receipt of food, clothing, shelter, and so on. Means-tested programs aim to ensure that some level of basic needs can be met.¹⁰⁰ 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 1. 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,"

97. See NAT'L RESEARCH COUNCIL, BEYOND THE MARKET: DESIGNING NONMARKET ACCOUNTS FOR THE UNITED STATES (Katharine G. Abraham & Christopher Mackie eds., 2005) [hereinafter BEYOND THE MARKET]; Staudt, *supra* note 96, at 1577.

98. See Chancellor, *supra* note 96, at 561–62; Wax, *supra* note 2, at 31.

99. See, e.g., BEYOND THE MARKET, *supra* note 97; Staudt, *supra* note 96.

100. 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)"); MEASURING POVERTY: A NEW APPROACH 317–81 (Constance F. Citro & Robert T. Michael eds., 1995); 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).

the \$50 gift plainly would be treated as income reducing the need for transfers (Scenario B).¹⁰¹ 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).¹⁰² 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.¹⁰³

TABLE 1
COMPARING CASH AND IN-KIND GIFTS WITH DIFFERENT EFFECTS ON NEED

	Scenario A No Income	Scenario B Cash Gift	Scenario C In-kind Food Gift	Scenario D 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, this clearly would be the ordinary work of employment. Nothing would change if payment came instead in the form of \$50 in groceries.¹⁰⁴ 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.¹⁰⁵

Deciding whether the generation of imputed income is work becomes conceptually straightforward now that we can distinguish between types of

101. 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, 353 (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 20, at 571–76.

102. See sources cited *supra* note 101.

103. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, §§ 352.8(c)(2), 352.16 (2006). Cultural participation is not generally included in official budgets of necessities, but often is prioritized by transfer recipients, especially for their children. See KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET* 30 (1997); 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).

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

105. Here and in the gift example, I am assuming that the tickets cannot be converted into cash.

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 2. 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.¹⁰⁶ 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 2
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

106. 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).

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. It recommends alertness to circumstances in which transfer recipients *do* rely heavily on nonmarket production to meet their basic needs. In such situations, the strength of these administrative concerns declines. 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 that some food was grown not bought,¹⁰⁷ and for a time farm and garden production could be counted as available resources that reduced the need for means-tested benefits.¹⁰⁸

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.¹⁰⁹ Another—Vermont—explicitly includes as TANF work those self-employment “hours a participant spends earning in-kind income.”¹¹⁰ These hours, however, are countable only if “the in-kind income reduces the family’s . . . financial assistance grant.”¹¹¹ 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

107. 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, *The Development of the Orshansky Poverty Thresholds and Their Subsequent History as the Official U.S. Poverty Measure* 7 (U.S. Census Bureau, Poverty Measurement Working Papers, 2003), available at <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).

108. 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), reprinted in 1972 U.S.C.C.A.N. 4989, 5164; H.R. REP. NO. 95-464, at 21, 29 (1977), reprinted in 1977 U.S.C.C.A.N. 1978, 2005; 7 C.F.R. § 273.9 (c)(1) (2006) (Food Stamps exclusion); 42 U.S.C. § 1382a(b)(8) (2000) (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).

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

110. 13-170-003 VT. CODE R. § 2364.43 (2005). It is possible that this provision includes only in-kind income received in exchange for self-employment activities, not the direct products of those activities.

111. *Id.*

programs administered by Native American polities,¹¹² several forms of nonmarket food production are included as TANF work activities.¹¹³

Finally, this analysis of nonmarket production has important implications for the treatment of childcare. Unlike food, childcare 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. This becomes clear when a transfer recipient enters the labor market. At that point, the system responds by treating childcare 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 meet that need through the purchase of market care.¹¹⁴ Reversing the logic, when transfer recipients care for their own children, they avoid the need for these childcare 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 childcare remains a very significant way in which care is delivered in today's economy.

In Part V, I develop further the significance of these points with regard to childcare 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 income and avoiding transfers depends not just on the amount of income generated but also on how the transfer system then treats

112. See 42 U.S.C. § 612 (authorizing TANF administration by individual native nations or multiracial entities).

113. 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>.

114. States do so by paying childcare subsidies directly to a provider, by reimbursing the parent, or by 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] (last visited Nov. 17, 2006) (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” childcare subsidies to former welfare recipients whose earnings have rendered them ineligible for cash assistance. See *id.* (query using Categories: Transitional Benefits, Variables: tb_tcpvd).

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 \$5000 annually to full-time employment earning \$10,000 annually, her entitlement to an EITC transfer actually doubles, roughly from \$2000 to \$4000.¹¹⁵ Similar increases can occur when employment triggers noncash transfers such as childcare subsidies.¹¹⁶

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 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).¹¹⁷ As the BRR approaches zero, the transfer-avoidance effect of employment steadily vanishes. Consider, for instance, a TANF program with a \$5000 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 \$5000. If the recipient takes a job that pays \$5000, her nontransfer income now rises to \$5000, 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.

115. See 2004 GREEN BOOK, *supra* note 58, at 13-36 to 13-39.

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

117. WELFARE RULES DATABOOK 2003, *supra* note 67, at 74-75 tbl.II.A.1.

A BRR above zero will cause transfers to decrease as earnings increase, but at a slower rate than under strict means-testing (100 percent BRR). With a \$5000 maximum benefit, a 50 percent BRR means that taking a \$5000 job yields a \$2500 transfer and a net income of \$7500, whereas with a 100 percent BRR, taking the same job would mean losing transfer eligibility and maintaining a constant income of \$5000. At the individual level, the 50 percent BRR thus might cause transfers to decrease by \$2500, 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 \$5000 benefit level, someone with \$4000 in earnings will receive a \$1000 transfer. If the BRR is reduced to 50 percent and that individual still earns \$4000, the transfer will *increase* to \$3000.¹¹⁸ 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 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 preexisting welfare program, by lowering the BRR or equivalent techniques.¹¹⁹ By randomly assigning participants to the experimental program or the preexisting one, researchers could determine the relative impact of the policy change.¹²⁰

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

118. 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).

119. See GORDON L. BERLIN, MDRC, ENCOURAGING WORK, REDUCING POVERTY: THE IMPACT OF WORK INCENTIVE PROGRAMS (2000), available at <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), available at <http://www.mdrc.org/publications/99/full.pdf>; 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), available at <http://www.mdrc.org/publications/414/full.pdf>.

120. See NEWWS FIVE-YEAR REPORT, *supra* note 82, at 32.

groups. Employment rates increased approximately 10 percent, and earnings increased by several hundred dollars per quarter.¹²¹ With regard to transfers, however, the programs consistently *increased* aggregate transfer receipt.¹²² 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 also because transfers increased for those with steady earnings.¹²³ 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)¹²⁴ 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.¹²⁵

With regard to net income and transfer levels, however, they had opposite effects. The mandatory programs decreased both the length of time that participants received welfare and the total amount of welfare payments.¹²⁶ 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.¹²⁷

These two types of programs 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.

121. MICHALOPOULOS, *supra* note 119, 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).

122. MICHALOPOULOS, *supra* note 119, 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.

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

124. *See generally* NEWWS FIVE-YEAR REPORT, *supra* note 82; BERLIN, *supra* note 119.

125. Differences among mandatory programs have received extensive attention, *see* NEWWS FIVE-YEAR REPORT, *supra* note 82, at ES-2–ES-4, 13–16 (comparing Labor Force Attachment, Human Capital Development, and mixed approaches), but my emphasis here is on their effectiveness relative to controls.

126. *See* NEWWS FIVE-YEAR REPORT, *supra* note 82, at 11–12, 108, 111.

127. *See id.* at 127; Haveman, *supra* note 123, 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 82, 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.¹²⁸

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 cannot 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.¹²⁹

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 \$4000 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 \$4000.¹³⁰ Some new explanation must be offered for why poverty should be reduced only for those who work.¹³¹

With that new rationale will come new criteria for identifying what activities should count as work. Self-improvement and reciprocity provide two

128. See WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT* 4 (2003); Alstott, *supra* note 5, at 999.

129. See U.S. DEP'T OF HEALTH & HUMAN SERVS., *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).

130. 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 SERVS., *supra* note 129, at I-3. According to such definitions, a worker with \$10,000 in earnings who receives \$10,000 in transfers is more self-sufficient than someone with zero earnings who receives \$4000 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.

131. 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.

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 Part II.A) and why some employment-focused work requirements fail to reduce transfers (the phenomenon discussed in this subpart).

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 that even short-term transfer increases are steps on a path that leads eventually to long-term transfer avoidance.¹³²

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. Low-wage workers are no exception to this pattern; on average, their wages grow with experience at the same rate as those of the workforce as a whole.¹³³ These averages, however, mask substantial variation among low-wage workers, with earnings gains concentrated among the highest earners.¹³⁴ One study found that the median hourly wage of former welfare recipients rose roughly 1 percent per year over eleven years,¹³⁵ while another study of a much

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

133. 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* 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*.

134. See Brett Theodos & Robert Bednarzik, *Earnings Mobility and Low-Wage Workers in the United States*, *MONTHLY LAB. REV.*, July 2006, at 34, 45–46.

135. See Gary T. Burtless, *Welfare Recipients' Job Skills and Employment Prospects*, 7 *FUTURE CHILD*. 39, 44 (Spring 1997).

broad (and less disadvantaged) group of low-earning workers found median annual earnings growth of roughly 10 percent per year over six years.¹³⁶

Accounting for long-term earnings growth could affect both of the points made above. First, over the long term, employment might gain an advantage in promoting self-sufficiency if earnings increase faster than income generated by an alternative activity. Second, even if employment yields no immediate transfer reductions, later 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 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.

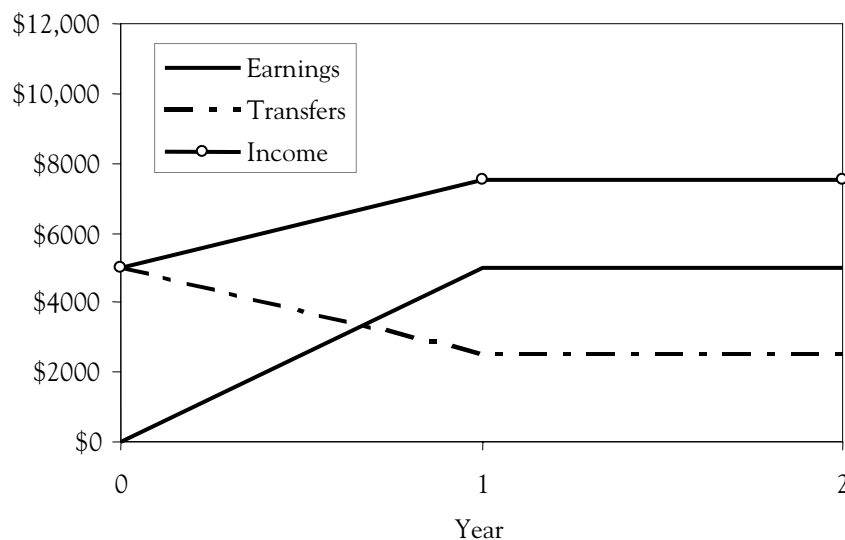
1. Incorporating Earnings Growth From Job Experience

In Part II.B, 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 (Figure 1).¹³⁷

136. ANDERSSON ET AL., *supra* note 133, at 51 (finding 76 percent earnings growth 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 135, at 44 (finding roughly 30 percent wage growth at the 90th percentile, compared to a median of 11 percent).

137. See BERLIN, *supra* note 119, at 20 & n.9; MICHALOPOULOS, *supra* note 119, at 34, 38.

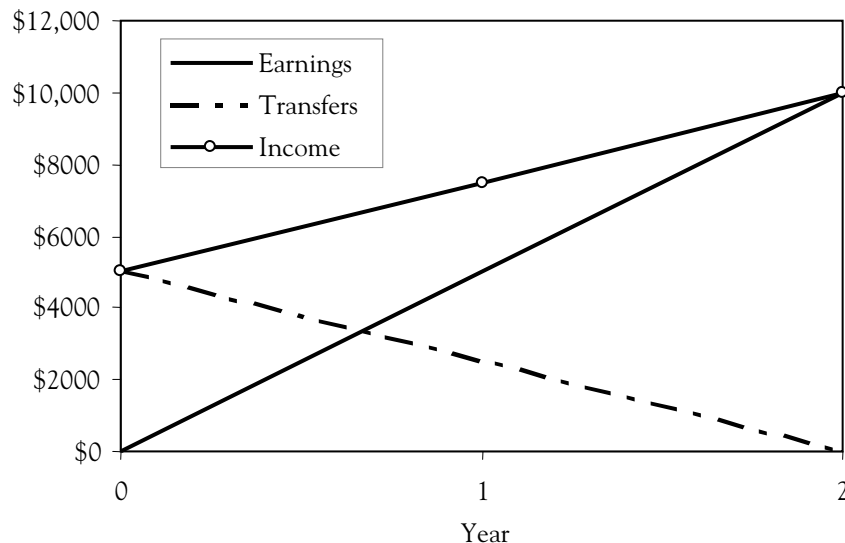
FIGURE 1
LABOR-MARKET ENTRY FOLLOWED BY STEADY EARNINGS



Notes. The benefit structure for this figure is a \$5000 standard of need with a 50 percent BRR for earned income. Income equals earnings plus transfers.

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, implementing a 50 percent BRR might persuade an unemployed transfer recipient to take a \$5000 job by letting her keep \$2500 in income above the \$5000 standard of need, and then she might go on the following year to earn \$10,000, reducing transfers to zero (Figure 2). The \$5000 transfer avoided in year two more than offsets the \$2500 “windfall” in year one; it also offsets the similar windfalls paid to other recipients whose behavior is unaffected by the lower BRR. Moreover, the additional \$5000 in earnings growth (from \$5000 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 \$5000 transfer, \$10,000 in earnings yields both a \$5000 decrease in transfers and a \$5000 increase in household income.

FIGURE 2
LABOR-MARKET ENTRY FOLLOWED BY EARNINGS GROWTH



Notes. The benefit structure for this figure is a \$5000 standard of need with a 50 percent BRR for earned income. Income equals earnings plus transfers.

A number of common elements of TANF program design reflect aspirations toward such a scenario. First, substantial earnings disregards usually are available primarily to *existing* transfer recipients, not to new applicants.¹³⁸ Thus, an applicant earning \$5000 would be turned away as not poor enough, but a current recipient whose earnings went from zero to \$5000 would remain eligible for a \$2500 benefit. Second, even among current recipients, disregards often are time limited, so that the \$5000 earner might remain eligible for a \$2500 transfer for one year, but thereafter benefits would reduce to zero.¹³⁹ A similar structure characterizes so-called “transitional benefits,” which temporarily suspend or loosen means-testing of noncash benefits—childcare subsidies, Medicaid, Food Stamps—for former transfer recipients who leave cash welfare because of increased earnings, but which typically expire after one or two years.¹⁴⁰

138. See WELFARE RULES DATABOOK 2003, *supra* note 67, at 60–61; *cf. id.* at 74–75.

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

140. See generally DOROTHY ROSENBAUM, CTR. ON BUDGET & POLICY PRIORITIES (CBPP), TRANSITIONAL FOOD STAMPS: BACKGROUND AND IMPLEMENTATION ISSUES (2003), available at <http://www.cbpp.org/11-10-03fa.pdf>; Welfare Rules Database, *supra* note 114 (query using Categories: Transitional Benefits; Variables: tb_tcmos, tb_tmms; States: All; Year: 2003; Coverage: Majority only; Show Data As: Short Table).

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, often touted as a carrot that entices welfare recipients off the rolls and into the labor market,¹⁴¹ provides the paradigmatic example. It is not limited to current, former, or potential welfare recipients;¹⁴² it lacks time limits; and it imposes no obligation to work full time or to pursue higher paying jobs. Nonetheless, a self-sufficiency account is still possible if, in practice, recipients eventually show enough 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 \$5000 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 decline. 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.¹⁴³ After another decade of such

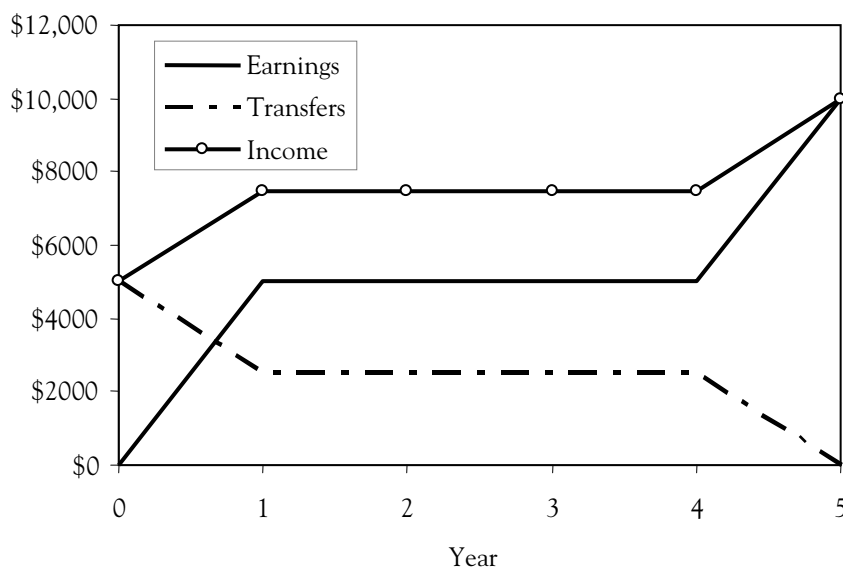
141. Alstott, *supra* note 20, at 537–38, 553–54; cf. V. Joseph Hotz et al., *Examining the Effect of the Earned Income Tax Credit on the Labor Market Participation of Families on Welfare* (Inst. for Research on Poverty, Discussion Paper No. 1313-05, 2005), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp131305.pdf>.

142. The EITC is available to households without children and to certain immigrant workers who are ineligible for TANF. See TANYA BRODER, NAT'L IMMIGRATION LAW CTR., IMMIGRANT ELIGIBILITY FOR PUBLIC BENEFITS 775 (2005), available at http://www.nilc.org/immisps/special/imm_elig_for_pub_bens_aila_0305.pdf.

143. Starting at earnings of \$10,510, after six years of 5 percent annual growth earnings would be \$14,084.

growth, the worker would still be eligible for a credit well over \$2000.¹⁴⁴ Second, and more subtly, any eventual transfer declines must be large enough to offset the interim windfalls. If a program with a \$5000 standard of need pays \$2500 per year to a \$5000 per year earner for four years, then an earnings increase to \$10,000 in year five will avoid \$5000 in transfers that year. It will not yet erase, however, the previous four years of “extra” transfers totaling \$10,000 (Figure 3).¹⁴⁵

FIGURE 3
LABOR-MARKET ENTRY FOLLOWED BY DELAYED EARNINGS GROWTH



Notes. The benefit structure for this figure is a \$5000 standard of need with a 50 percent BRR for earned income. Income equals earnings plus transfers.

144. After sixteen years, earnings would be \$22,942, eligible for a \$2269 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); John B. Horowitz, *Income Mobility and the Earned Income Tax Credit*, 40 ECON. INQUIRY 334 (2002).

145. 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.¹⁴⁶ What employment-focused work requirements 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 preexisting 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.¹⁴⁷ 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.¹⁴⁸ Moreover, once the supplements were withdrawn, participant *income* also converged with the control group.¹⁴⁹ In short, taking a longer view failed to overcome the tension between transfer-avoidance and poverty-reduction goals.¹⁵⁰

MDRC's long-term evaluations of mandatory welfare-to-work programs reach complementary conclusions. Those programs' employment and earnings effects also derived almost entirely from their *short-term* consequences.¹⁵¹

146. See NEWWS FIVE-YEAR REPORT, *supra* note 82, at ES-13, 16. For instance, in MDRC's evaluation of mandatory work programs, the annual earnings of control-group members quadrupled from roughly \$1500 in the first year of the study to roughly \$6000 in the fifth year. *Id.* at ES-16.

147. MICHALOPOULOS, *supra* note 119, at 13–16; see also PETER Z. SCHOCHET ET AL., MATHEMATICA POLICY RESEARCH, INC., NATIONAL JOB CORPS STUDY: FINDINGS USING ADMINISTRATIVE EARNINGS RECORDS DATA, at xvii, xxvii (2003), available at 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. MICHALOPOULOS, *supra* note 119, at 30. The one case of significant impact is ambiguous because it combined a generous initial earnings supplement with a sharp time limit after twenty-one months. See DAN BLOOM ET AL., MDRC, JOBS FIRST: FINAL REPORT ON CONNECTICUT'S WELFARE REFORM INITIATIVE 4–5 (2002), available at <http://www.mdrc.org/publications/90/full.pdf>.

148. MICHALOPOULOS, *supra* note 119, at 33–35.

149. *Id.* at 19–20, 30–33.

150. *Id.* at 33.

151. 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 82, 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

Again, the work requirements successfully accelerated and intensified labor-market participation, but the resulting earnings advantage narrowed and ultimately disappeared.¹⁵² Similarly, over time these programs' transfer-avoidance effects decreased rather than increased.¹⁵³ Any transfer-avoidance advantage that employment has over other activities thus appears to be at its peak in the short rather than the long term.¹⁵⁴ 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 above in Parts II.A–II.B, in fact doing so 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.¹⁵⁵

2. Balancing Long-Term Transfer Avoidance Against Immediate Employment

The previous subpart explored how employment can 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

(annualized). *Id.* at 352, 355, 360; 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. LAB. ECON. 521, 549 (2006) (finding that effects on an earlier cohort in the Riverside LFA program entirely disappeared after seven to nine years).

152. This is somewhat mysterious, given the general pattern of earnings growth for low-wage workers. See *supra* note 133 and accompanying text. 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 135–136 and accompanying text.

153. See NEWWS FIVE-YEAR REPORT, *supra* note 82, at 366–69.

154. 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 to travel the road to long-term prosperity. See CHARLES MURRAY, *LOSING GROUND* 227–33 (1984). 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 82, at 127.

155. I have been discussing aggregate studies, so it remains possible that in individual cases employment will have such an advantage. The challenge, however, is identifying those cases.

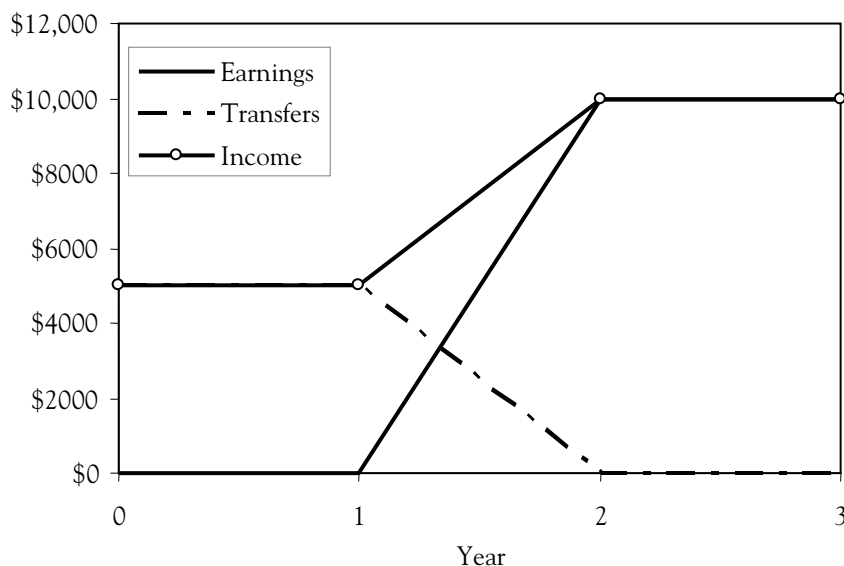
are separable. Some paid employment—“dead-end jobs”—will serve the first function but not the second. More importantly, some unpaid activities can serve the second function but not the first. This point provides a framework for incorporating unpaid activities—such as training, internships, and rehabilitation—into 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 by some form of unpaid job preparation. Next, the participant shifts into paid employment and begins earning transfer-avoiding income. Consider someone who at the beginning of year one could at best earn \$5000 annually. During year one she receives a \$5000 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 alone.

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 \$5000. With a \$5000 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 \$5000 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: \$2500-then-\$2500 for the dead-end job (Figure 1) versus \$5000-then-\$0 for the sequenced unpaid activity followed by a better job (Figure 4, years 1 and 2). Once the timeframe extends to a third year, though, the unpaid activity now appears superior because the occupant of the dead-end job would still receive a \$2500 transfer (Figure 1 if year 3 equals year 2) while the occupant of the better job (facilitated by the first year's activity) receives none (Figure 4). The dead-end job, however, remains superior to an unpaid activity that fails to increase future earnings.¹⁵⁶

156. 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 NEWWS FIVE-YEAR REPORT, *supra* note 82, at ES-6.

FIGURE 4
UNPAID JOB PREPARATION FOLLOWED BY LABOR-MARKET ENTRY
WITH INCREASED EARNINGS CAPACITY



Notes. The benefit structure for this figure is a \$5000 standard of need with a 50 percent BRR for earned income. Income equals earnings plus transfers.

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 turning down a bad job today in order to acquire a better one tomorrow.¹⁵⁷ 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 to explain many aspects of when TANF programs allow unpaid activities to count as work. The simplest example is

157. See *id.* at ES-3 (noting that the program that most effectively raised earnings and reduced transfers was one that emphasized job quality over immediate placement).

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.¹⁵⁸

After some period, the approach shifts from matching workers with jobs to enhancing the recipients' ability to get and keep jobs that actually exist. Formal off-the-job education or training are obvious candidates, because individual knowledge and skill are important predictors of earnings and employment among low-wage workers.¹⁵⁹ 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.¹⁶⁰

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."¹⁶¹ Furthermore, unpaid activities often must be designed to enhance future employability.¹⁶² Educational activities often are subject to this requirement, either explicitly¹⁶³ or implicitly by requiring that they be "vocational" or "related to employment."¹⁶⁴ Finally, they may be limited directly 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.¹⁶⁵ Even expansive endorsements of higher education limit the number and level of degrees that can be pursued.¹⁶⁶

158. 42 U.S.C. § 607(c)(2)(A)(i) (2000) (permitting no more than four consecutive weeks of job search and six to twelve weeks in total).

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

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

161. 42 U.S.C. § 607(d)(4).

162. See Zatz, *supra* note 6, at 1140–43; 45 C.F.R. § 261.2(h) (2006) (interim final rule) (requiring that "community service programs" "improve the employability of recipients").

163. See Zatz, *supra* note 6, at 1141–42, 1170.

164. 42 U.S.C. § 607(d)(8)–(9); see also Zatz, *supra* note 6, at 1150, 1160 (discussing analogous requirements for work experience and community-service programs).

165. See Zatz, *supra* note 6, at 1150. Federal law allows vocational education as a "core" work activity only for twelve months, but without regard to the duration of welfare receipt. 42 U.S.C. § 607(d)(8).

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

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 abusive ones.¹⁶⁷ Some states also have introduced a battery of rehabilitative services designed to intervene in substance abuse; physical and mental disabilities, or health limitations; domestic violence; and other circumstances that can interfere with employment.¹⁶⁸ Such interventions might yield as large an improvement in future employment prospects as learning how to use Microsoft Office, to catheterize a patient, or to contain one’s anger when insulted by the boss.¹⁶⁹ Again, current employment limitations often are a prerequisite to entry into such rehabilitative activities, which must enhance future employment and may be time limited.¹⁷⁰ 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 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

167. See HARRY J. HOLZER, BROOKINGS INST., WELFARE REFORM & BEYOND POLICY BRIEF NO. 24, CAN WORK EXPERIENCE PROGRAMS WORK FOR WELFARE RECIPIENTS? 3 (2002), available at <http://www.brook.edu/es/wrb/publications/pb/pb24.pdf>; NEWMAN, *supra* note 35, at 89–93, 144–45; Gordon Lafer, *What Is ‘Skill’? Training for Discipline in the Low-Wage Labour Market*, in THE SKILLS THAT MATTER 109, 113 (Chris Warhurst et al. eds., 2004); Turner & Main, *supra* note 51, at 299–300.

168. See Zatz, *supra* note 6, at 1153–61; see also HEIDI GOLDBERG, CTR. ON BUDGET & POLICY PRIORITIES, IMPROVING TANF PROGRAM OUTCOMES FOR FAMILIES WITH BARRIERS TO EMPLOYMENT 11–13 (2002), available at <http://www.cbpp.org/1-22-02tanf3.pdf>.

169. See GOLDBERG, *supra* note 168; Sheila R. Zedlewski & Pamela Loprest, *Will TANF Work for the Most Disadvantaged Families?*, in THE NEW WORLD OF WELFARE, *supra* note 2, at 311, 323.

170. See Zatz, *supra* note 6, at 1156; 45 C.F.R. § 261.2(g) (2006) (interim final rule).

job.¹⁷¹ 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 recipients would not be penalized for turning down a sub-minimum-wage job,¹⁷² 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 childcare 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.¹⁷³ 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.”¹⁷⁴ This was so even if the resulting loss of wage income would have required going on welfare.¹⁷⁵ 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 emphasized rapid employment through job search or short-term training, consistent with Work First. 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 the minimum wage and offered prospects for upward mobility.¹⁷⁶ 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

171. See *infra* note 172.

172. See, e.g., N.Y. SOC. SERV. LAW § 336-d(1) (McKinney 2003) (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).

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

174. *Id.*

175. *Id.*

176. NEWWS FIVE-YEAR REPORT, *supra* note 82, at ES-3, 16; see also Andersson et al., *supra* note 136, at 61, 94 (finding that wage mobility varies substantially by employer, after controlling for individual workers’ characteristics).

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.¹⁷⁷

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,¹⁷⁸ with the caveat that immediate employment always begins with the head start of immediate transfer reductions.¹⁷⁹ The outcome of this comparison also depends on the individuals in question: The same job could be a success for one and a disaster for another, and a training program that provides a new credential or skill to one person could be entirely redundant for another.¹⁸⁰ 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 per week 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 per week 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.¹⁸¹ It does not, however, clearly strengthen the connection between work and immediate employment, and in some circumstances certainly weakens it.

177. NEWWS FIVE-YEAR REPORT, *supra* note 82, at ES-3.

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

179. 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.

180. 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 ET AL., *supra* note 133, at 50–51, 53. This variation is not randomly distributed but is instead stratified by race, sex, employer, and individual characteristics. See *id.* at 56–57.

181. 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?

D. The Limits of Transfer Avoidance

The analysis above focused on 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 minimum 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.¹⁸² Even conservative welfare analysts generally do not endorse this outcome, though it is a consequence of the policies they typically support.¹⁸³ This result might be understood simply as an unfortunate 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.¹⁸⁴ 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.¹⁸⁵

Deeper problems arise from using cash income to measure need in the first place. The simplest example occurs when rising earnings trigger loss of

182. See *supra* notes 121–131.

183. See, e.g., Turner, *supra* note 32 (touting Work First as a method of poverty reduction); *The Reauthorization of TANF: Work and Child Care Provisions: Hearing Before the Subcomm. on 21st Century Competitiveness, H. Comm. on Education and the Workforce*, 109th Cong. (2005), available at http://www.house.gov/ed_workforce/hearings/109th/21st/welfare031505/mead.htm (testimony of Lawrence M. Mead); see also Haskins, *supra* note 2; Hecl, *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 poverty rates that reflect a variety of concurrent policy and macroeconomic changes. See Noah Zatz, *Welfare Reform—What Really Works*, L.A. TIMES, Aug. 23, 2006, at B13.

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

185. 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).

both cash and noncash transfers, but the earnings substitute only for the former. Consider someone receiving a \$5000 transfer plus Medicaid who takes a \$5000 job without health care benefits. If \$5000 is the income threshold for both transfer payments and Medicaid, then the person with \$5000 in earnings will lose more in transfers (\$5000 + health care) than gained from employment (\$5000). This is a well-known and vexing problem that remains unsolved, though various attempts have been made to mitigate it.¹⁸⁶

Acknowledging the problem 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 overreduction in transfers should be addressed through better coordination of income eligibility standards,¹⁸⁷ not through the assessment of whether any given activity satisfies work requirements. This solution, however, is not always possible.

Consider the problem of working 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 twenty to forty hours per week. No state requires more than forty, and I am unaware of any proposals that would require transfer recipients to work fifty, sixty, or seventy hours per week in order to become self-sufficient.¹⁸⁸

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

186. See NEWS FIVE-YEAR REPORT, *supra* note 82, at 160–61; LEIGHTON KU & EDWIN PARK, CTR. ON BUDGET & POLICY PRIORITIES, IMPROVING TRANSITIONAL MEDICAID TO PROMOTE WORK AND STRENGTHEN HEALTH INSURANCE COVERAGE (2002), available at <http://www.cbpp.org/4-24-02health.pdf>.

187. See 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>; Jonathan Gruber, *Medicaid*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES, *supra* note 118, at 15, 43–45, 63–66.

188. 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?").

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,¹⁸⁹ 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 Ambiguous 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 time to pursue other specific activities may also limit demands for transfer-avoiding work.

The two most obvious examples are childcare 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 childcare for a child under six years old and thus must provide care themselves.¹⁹⁰ Most states provide some exemptions from work requirements

189. 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 First 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).

190. 42 U.S.C. § 607(e)(2) (2000).

for parents who are needed at home to care for an infant or a disabled child.¹⁹¹ Similarly, most states exempt some teenagers from work requirements if they are full-time students.¹⁹² 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 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, 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 it is to assess unpaid activities. 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 per hour job might be required to drop out of high school, whereas someone with access only to a \$5.15 per hour job might not be. But if the point of high school is not merely to avoid future transfers, then completing high school could be justified *even if* dropping out would minimize transfers.

Which consideration is preeminent also affects whether participation in the activity is treated as work itself, or as the basis for an exemption from work requirements. 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 playing out as states and the federal government refine definitions of work. My previous research noted a trend toward reclassifying a

191. See WELFARE RULES DATABOOK 2003, *supra* note 67, at 92–93; see also 42 U.S.C. § 607(b)(5) (permitting exemption of parents of infants); 45 C.F.R. § 261.2(h)(2)(i) (2006) (interim final rule) (permitting exemption for caretakers of disabled relatives).

192. See, e.g., CAL. WELF. & INST. CODE § 11320.3(b)(2) (West 2001 & Supp. 2006); N.Y. SOC. SERV. LAW § 332(1)(b) (McKinney 2003); see also 42 U.S.C. § 607(c)(2)(C) (permitting full-time high school attendance by teen parents to satisfy work requirements); WELFARE RULES DATABOOK 2003, *supra* note 67, at 90–91.

variety of rehabilitative activities from work exemptions to work activities.¹⁹³ 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.¹⁹⁴

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 for limited time, 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.¹⁹⁵

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 U.S. 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."¹⁹⁶

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."¹⁹⁷ If making these contributions

193. See Zatz, *supra* note 6, at 1158.

194. See *id.* at 1159–60. 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 1153–54.

195. See *id.* at 1161–62, 1170–71. But see Reauthorization of the Temporary Assistance for Needy Families Program, 71 Fed. Reg. 37,454, 37,462 (June 29, 2006) (interim final rule) (codified at 45 C.F.R. § 261.2 (2006)) (rejecting the classification of caring for disabled family members as work but permitting work exemptions for such caretakers).

196. S. REP. NO. 109-51, at 26 (2005); see also Zatz, *supra* note 6, at 1170–71.

197. N.J. ADMIN. CODE § 10:90-4.3(g) (2006); see also Zatz, *supra* note 6, at 1160–61.

qualifies as work regardless of whether making them will decrease transfers to the worker, then some new rationale for work requirements is necessary.¹⁹⁸

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."¹⁹⁹ 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."²⁰⁰

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 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

198. Indeed, community service often is defined specifically to eschew any connection to enhancing earnings capacity. See Zatz, *supra* note 6, at 1160. But see 45 C.F.R. § 261.2(h) (2006) (interim final rule) (restricting the scope of "community service" and requiring that community service programs promote employability).

199. S. REP. NO. 109-51, at 26.

200. *Id.*

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 distinctive implications for how work should be defined.

One important class of rationales potentially performs 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.²⁰¹ The purpose of work requirements therefore 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;²⁰² 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.²⁰³

Variations on this theme have a wide appeal and a deep history.²⁰⁴ They appear often in justifications for work-conditioned transfers, both in the academic literature and in political rhetoric. President Clinton often spoke of the “dignity” of work,²⁰⁵ and then–House Majority Leader Tom DeLay recently defended the work requirements in a House TANF reauthorization bill in these terms. Commenting on the 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.²⁰⁶

201. 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).

202. See 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; see also CYNTHIA ESTLUND, *WORKING TOGETHER* 23–24 (2003).

203. See MUIRHEAD, *supra* note 46, 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).

204. See, e.g., PAUL BERNSTEIN, *AMERICAN WORK VALUES* (1997); ROBERT WUTHNOW, *POOR RICHARD'S PRINCIPLE* (1996).

205. See PRWORA Signing Remarks, *supra* note 2, at 1325 (praising the “the dignity, the power, and the ethic of work”).

206. 149 CONG. REC. 465, 529 (2003) (statement of Rep. DeLay); see also Turner & Main, *supra* note 51, at 292.

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 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 common²⁰⁷

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.²⁰⁸

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.²⁰⁹ If paid employment is what satisfies this need for work, then those lacking income will also be impoverished in this distinct noneconomic sense.²¹⁰ Yet this need cannot be met by providing income alone because jobs are not for sale.²¹¹ Instead, it is better met by a combination of earnings plus transfer income.

207. NEWMAN, *supra* note 35, at 88; *see also* STONE, *supra* note 40, at 281–82 (2004) (relying on Katherine Newman's research); Schultz, *supra* note 1, at 1933–34, 1943.

208. *See* NEWMAN, *supra* note 35, at 104, 271–72; STONE, *supra* note 40, 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. Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 25–33, 46–48 (2005) [hereinafter Lester, *A Defense of Paid Family Leave*]; Gillian Lester, *Unemployment Insurance and Wealth Distribution*, 49 UCLA L. REV. 335 (2001) [hereinafter Lester, *Unemployment Insurance*].

209. *See* QUIGLEY, *supra* note 128, at 43–44; Arneson, *supra* note 202, at 1130; PRWORA Signing Remarks, *supra* note 2, 1325 (“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.” (quoting Robert Kennedy)). In Rawlsian terminology, work would be counted as a “primary good.” *See* JOHN RAWLS, *A THEORY OF JUSTICE* 62 (1971); *cf.* NUSSBAUM, *supra* note 19, at 40–42 (listing “central human functional capabilities” but not including access to work or employment).

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

211. *See* NEWMAN, *supra* note 35, at 104; Arneson, *supra* note 202, at 1130.

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.²¹² Instead, these work-linked transfers function like in-kind benefits of food, housing, or medical care²¹³: You get this transfer only if you work, or only if you spend it on a “cost” of working, such as childcare, transportation, tools, or training.²¹⁴

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 also 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 and 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

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

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

214. See EDIN & LEIN, *supra* note 103, 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 213; 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 childcare 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 42 U.S.C. §§ 1396u-1(b)(3), 1437j(c) (2000); 7 C.F.R. § 273.7(a)(3) (2006). In contrast, other in-kind or conditional transfers typically stand on their own. Someone who does not use her Food Stamps does not lose her cash welfare benefits, or her Medicaid.

physically thrilling; they relish the heft of a tool, the appreciation of a customer, the camaraderie of co-workers, or the sight of a job well done.²¹⁵ Even when ambivalent about their current employment, for many having a job itself is valuable beyond the income it produces.²¹⁶ Moreover, lacking a job (especially losing one) can be harsh, leaving one feeling devastatingly lonely, aimless, useless, and bored.²¹⁷ Many of these experiences of work and its absence are held in common between those often considered to have the best jobs and those thought to have the worst, even as many find it hard to imagine what others find attractive in their work.²¹⁸

The specific virtues attributed to paid work are too numerous to catalogue or assess systematically. In this subpart I will discuss two virtues—providing discipline and structure, and providing opportunities for self-realization—that are especially prominent in arguments for organizing antipoverty policy around work. These examples illustrate three general points about the beneficial experiences of going about one's work, points that also apply to other virtues of work that I do not address directly.

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 or construction, for example) 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."²¹⁹ 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.

215. See, e.g., DOHAN, *supra* note 18, at 38–39; NEWMAN, *supra* note 35, at 103, 120–21; STUDES TERKEL, *WORKING* (New Press ed., 1997); MICKEY ZEJIMA, *THE MURDERING OF MY YEARS: ARTISTS AND ACTIVISTS MAKING ENDS MEET* 52–62 (2003); Pierre-Michel Menger, *Artistic Labor Markets and Careers*, 25 ANN. REV. SOC. 541, 555 (1999); Schultz, *supra* note 1, at 1886–92; Thomas, *supra* note 37, at xviii.

216. See EDIN & LEIN, *supra* note 103, at 140; MICHÈLE LAMONT, *THE DIGNITY OF WORKING MEN* 3, 23–24 (2000).

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

218. See, e.g., EDIN & LEIN, *supra* note 103, at 140; NEWMAN, *supra* note 35, at 103.

219. MUIRHEAD, *supra* note 46, at 21.

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, or working with others as part of a team.²²⁰ 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.²²¹ In assessing a work 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

As I noted above, 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."²²² He excludes these activities from his broader

220. 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 & Nancy Vogel, *Schwarzenegger's Consulting Deal: Governor Defends Magazine Deal*, L.A. TIMES, July 15, 2005, 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.

221. See Thomas, *supra* note 37, at xix; Holtz-Eakin et al., *supra* note 64, at 418 (finding that recipients of large bequests were four times more likely to leave the labor force than recipients of very small 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 one-third of previously employed winners of large lottery prizes permanently left the labor market).

222. WILSON, *supra* note 2, at 74.

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.”²²³ 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.”²²⁴ Such experiences of discipline and regularity are critical to a personal experience of “self-efficacy.”²²⁵

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.²²⁶ Low-wage jobs—the sort of jobs people leaving welfare actually get—are especially unstable.²²⁷ 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.²²⁸ Wilson’s Monday-to-Friday, nine-to-five image excludes vast amounts of quite ordinary 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.²²⁹

223. *Id.*

224. *Id.*; see also MUIRHEAD, *supra* note 46, at 4–5; NEWMAN, *supra* note 35, at 88, 119.

225. WILSON, *supra* note 2, at 75. William Julius Wilson also asserts they are essential to fostering similar traits in children. *Id.* at 52, 107; see also Zasloff, *supra* note 114, at 303–05.

226. STONE, *supra* note 40, at 288.

227. 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).

228. See EDIN & LEIN, *supra* note 103, at 8, 67, 132, 141; NEWMAN, *supra* note 35, at 9, 154; HARRIET B. PRESSER, *WORKING IN A 24/7 ECONOMY* 20–21 (2003).

229. 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 childcare arrangements).

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 schedules²³⁰ 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,²³¹ 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."²³²

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, such as initiative, independent judgment, creative response to unexpected situations, and 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.²³³

The image of institutionally disciplined, temporally regular work provides an awkward fit, in one respect or another, for flight attendants, construction workers, truck drivers,²³⁴ security guards, artists,²³⁵ 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

230. See EILEEN BORIS, *HOME TO WORK* 176–77, 186 (1994).

231. NEWMAN, *supra* note 35, at 89–93, 144–45.

232. *Id.* at 182–84; see also ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS* 38–40, 171 (2003).

233. See Nancy C. Jurik, *Getting Away and Getting By: The Experiences of Self-employed Homeworkers*, 25 *WORK & OCCUPATIONS* 7, 18 (1998); see also BORIS, *supra* note 230 (exploring historically how industrial home work has both challenged and been structured by commitments to a gendered work/home distinction).

234. See LAMONT, *supra* note 216, 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.").

235. See Menger, *supra* note 215, at 541, 555, 561–62.

demanding by the paying jobs most available to low-skilled transfer recipients, even if many other jobs reward other qualities.²³⁶ 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.²³⁷

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.²³⁸

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

236. See Jason DeParle, *What Welfare-to-Work Really Means*, N.Y. TIMES, Dec. 20, 1998, § 6 (Magazine), at 50, 59; Lafer, *supra* note 167, at 114–16; Turner & Main, *supra* note 51. For a discussion of the racial aspects of an emphasis on labor discipline, see Zatz, *supra* note 6, at 1152 n.100.

237. This more instrumental approach to discipline appears frequently in the design and implementation of TANF work activities. See, e.g., Reauthorization of the Temporary Assistance for Needy Families Program, 71 Fed. Reg. 37,454, 37,460 (June 29, 2006) (interim final rule) (codified at 45 C.F.R. § 261.2(h) (2006)) (justifying a requirement that community service “involve structure and supervision” as a means to ensure that the activity “help[s] participants develop basic works skills, improve work habits, and help move participants toward employment”); see also Lafer, *supra* note 167. Paid employment or self-employment, however, never are required to possess noneconomic traits related to discipline, structure, regularity, or anything else.

238. *Barry v. Shalala*, 840 F. Supp. 29, 32–33 (S.D.N.Y. 1993) (quotation marks and citations omitted); see also *Comm'r 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's 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.

BOURGOIS, supra note 86, at 89; see also *Bell v. Sullivan*, 817 F. Supp. 719, 722–23 (N.D. Ill. 1993); *Basada v. Comm'r*, 75 T.C.M. (CCH) 2159 (1998).

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.²³⁹ Many other unpaid activities can also provide discipline and structure, such as a regular course of physical therapy, a drug rehabilitation program, an amateur athletic team's games and practices, or a theater company's rehearsals and performances.²⁴⁰ 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.²⁴¹ 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.²⁴²

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]."²⁴³ Notwithstanding the attendant economic harms, quitting provided a means to preserve some "agency, dignity, and personhood."²⁴⁴ 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.²⁴⁵ A self-improvement account could in principle resolve these conflicts by assigning moral priority among these noneconomic

239. NEWMAN, *supra* note 35, at 123–27, 132.

240. See LOÏC WACQUANT, *BODY & SOUL* 17–41, 66–71 (2004).

241. See STONE, *supra* note 40, at 63.

242. NEWMAN, *supra* note 35, at 89–97; see also DOHAN, *supra* note 18, at 53, 68.

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

244. *Id.* at 56.

245. See Jurik, *supra* note 233, 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); see also BORIS, *supra* note 230, at 353–54; Wilson, *supra* note 160, at 215, 222.

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 may be necessary 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.”²⁴⁶ Lawrence Mead focuses more on the vice of “non-work,” which he equates with “passivity” and “incompetence.”²⁴⁷ 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”²⁴⁸ and explores whether it justifies assuring access to jobs that fulfill this conception.²⁴⁹ Elster elaborates “self-realization” as involving the development and deployment of one’s abilities and subjecting them to the standards and judgments of others.²⁵⁰

There is much that is attractive in Elster’s self-realization ideal,²⁵¹ 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 a product bought by

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

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

248. Jon Elster, *Self-Realization in Work & Politics: The Marxist Conception of the Good Life*, 3 SOC. PHIL. & POL’Y 97, 97 (1986); see also ARENDT, *supra* note 43, at 76–86; NUSSBAUM, *supra* note 19, 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).

249. Jon Elster, *Is There (or Should There Be) a Right to Work?*, in DEMOCRACY AND THE WELFARE STATE, *supra* note 1, at 52, 76; see also Schultz, *supra* note 1, at 1927–28, 1939.

250. Elster, *supra* note 249, at 101–03. For a similar view, see Russell Muirhead’s exploration of the idea of “work as a practice.” MUIRHEAD, *supra* note 46, at 149.

251. It also finds some empirical support in how employed people, particularly professionals, often characterize the importance of work to them. See LAMONT, *supra* note 216, at 21 (noting the absence of self-realization talk among working-class men, in marked contrast to professionals); cf. Michael T. Brown et al., *Annual Review*, 1990–1996: *Social Class, Work, and Retirement Behavior*, 49 J. VOCATIONAL BEHAV. 159, 173 (1996) (noting class variation in centrality of employment).

another to yield earned income.²⁵² 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 through an examination of the mid-twentieth-century American "hot rod" subculture of amateur automobile assembly and modification. Moorhouse 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."²⁵³ 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.²⁵⁴ This is certainly a familiar notion: the "day job" that allows one to "pay the bills" while pursuing one's true passion.²⁵⁵ 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 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.²⁵⁶

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

252. See Elster, *supra* note 248, at 103.

253. 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).

254. *Id.* at 253–54.

255. See LAMONT, *supra* note 216, at 17–19; ZEJIMA, *supra* note 215, at 61–62; Menger, *supra* note 215, at 561–62.

256. See Moorhouse, *supra* note 253, 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. Vicki 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 216, 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*, *supra* note 41, at 233, 233; Menaghan, *supra* note 217, at 435–36.

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.²⁵⁷ If the connection between self-realization and employment is simply that self-realization is costly (and thus requires an income stream), then 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.²⁵⁸ This may be true of jobs of greatly varying status and compensation—some attorneys find little self-realization in law firm life²⁵⁹—and some jobs often denigrated as “unskilled” nonetheless provide workers with ways to take pride in what they do, to develop and deploy skills, and to build meaningful communities.²⁶⁰ Other occupants of such jobs, however, may experience them 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. I am not aware of any welfare work-requirement policy that permits, let alone

257. 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 Abbott, *supra* note 28, at 319; Elizabeth Rudd, *Gendering Unemployment in Postsocialist Germany: 'What I Do Is Work, Even If It's Not Paid'*, 71 *ETHNOS* 191, 207 (2006).

258. See Elster, *supra* note 249, at 66; Sean Sayers, *The Need to Work: A Perspective from Philosophy*, in *ON WORK*, *supra* note 37, at 722, 724.

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

260. See BORIS, *supra* note 230, at 183–84 (noting both homemaker embroiderers' pride in their skill and the gendered devaluation of tasks like sewing associated with women's domestic responsibilities); DOHAN, *supra* note 18, at 38–39 (describing janitors' “substantial knowledge about cleaning techniques” and frustration at management structures that prevented them from doing their job well); NEWMAN, *supra* note 35, at 33, 107, 139–49; ZEJIMA, *supra* note 215, at 64 (reporting a retail sales associate's observation, “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; Schultz, *supra* note 1, at 1944.

requires, recipients to reject a given job because it provides insufficient opportunities for discipline, structure, self-realization, or any other such trait, or because it fails to advance the recipient's career goals.²⁶¹

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

One important variation on the self-improvement theme combats its 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.²⁶² This idea underpins both a critique of dependency on unearned income as inflicting noneconomic harms on transfer recipients,²⁶³ and an endorsement of paid employment for providing a sense of independence that establishes full membership in the community.²⁶⁴ 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 underinclusiveness that plagued the related argument above concerning self-realization. People living off the largesse of inheritance or family fortune often manage just fine without

261. Some states permit, but do not require, welfare caseworkers to consider recipients' preferences when deciding which work activities to assign. Compare N.Y. SOC. SERV. LAW § 335(b) (McKinney 2003) (requiring the development of "employability plans" that "[t]o the extent possible . . . reflect the preferences of the participant"), with CAL. WELF. & INST. CODE §§ 11325.21, 11325.4 (West 2001 & Supp. 2006) (providing for assessments and welfare-to-work plans without any reference to recipients' preferences or employment goals). See generally Zatz, *supra* note 6, at 1147 (describing TANF recipients' lack of control over the work activities to which they are assigned by local welfare agencies); cf. *supra* note 237 (describing requirements relating to structure and supervision in unpaid activities).

262. See, e.g., Elster, *supra* note 249, 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 202, at 1142; J. Donald Moon, *The Moral Basis of the Democratic Welfare State*, in *DEMOCRACY AND THE WELFARE STATE*, *supra* note 1, at 27, 33.

263. 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 167, at 88 (characterizing Mayor Rudolph Giuliani as viewing welfare recipients as "crippled with dependency"); see also FINEMAN, *supra* note 24, at 31–34.

264. See STONE, *supra* note 40, at 282 (characterizing the choice between work-based redistribution and unconditional cash assistance as one between "dignity and dependency"); Forbath, *supra* note 63, at 1827, 1886; Karst, *supra* note 54, at 532; Schultz, *supra* note 1, at 1886–87 (linking "our notion of citizenship" to "the capacity to earn one's own living").

being haunted by self-loathing,²⁶⁵ many toiling desperately to earn their keep may find their jobs humiliating and insulting,²⁶⁶ and activities outside the labor market can be sources of pride and purpose.²⁶⁷

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.”²⁶⁸ This burden associated with transfer receipt need not outweigh other considerations, including the downsides of employment,²⁶⁹ but it is a substantial harm. People often sacrifice considerably to avoid it.²⁷⁰ The significance of these facts for the design of work requirements depends, however, in part on the mechanism that connects 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 through the risks to autonomy caused by others’ control over economic resources on which one depends.²⁷¹ 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

265. To the contrary, some intellectual traditions suggest that freedom from work driven by practical necessity facilitates higher forms of personal development. See ANDRÉ GORZ, *PATHS TO PARADISE* 48 (Malcolm Imrie trans., 1985) (“Non-economic activities are the very fabric of life itself. 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.”); ARISTOTLE, *POLITICS* (Ernest Barker trans., R.F. Stalley ed. 1995), quoted in *THE OXFORD BOOK OF WORK*, *supra* note 37, at 38 (“The citizens must not live the life of mechanics or shopkeepers, which is ignoble and inimical to goodness.”).

266. See BOURGOIS, *supra* note 86, at 145–61; DOHAN, *supra* note 18, at 69, 84.

267. See REBECCA ANNE ALLAHYARI, *VISIONS OF CHARITY* 151 (2000); Arneson, *supra* note 202, at 1132; Wilson, *supra* note 160, at 232.

268. See JEB BUSH & BRIAN YABLONSKI, *PROFILES IN CHARACTER* 52–55 (1995) (arguing that welfare recipients should be ashamed of themselves); DOHAN, *supra* note 18, 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).

269. See DOHAN, *supra* note 18, 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.

270. See Meyer & Rosenbaum, *supra* note 121, at 1092 (calculating that single mothers are willing to forgo upward of \$3000 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).

271. Cf. Young, *supra* note 23, at 548–49 (distinguishing autonomy and self-sufficiency as distinct senses of “independence”).

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.²⁷²

1. Dependency and Cultural Contempt

Most arguments connect self-esteem to employment through the latter's satisfaction of powerful social norms.²⁷³ As Jon Elster and Donald Moon both articulate the theory, self-respect flows from employment because income-earning work is a prerequisite of *others'* respect.²⁷⁴

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, 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."²⁷⁵

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* preexisting dignitary considerations and leave them unchanged. Instead, it *enhances* them both by directly endorsing the underlying norms²⁷⁶ and by adding the weight of financial incentives to the social sanctions already imposed on those who violate the norms.

272. The indispensable text on this point is Nancy Fraser & Linda Gordon, *A Genealogy of "Dependency": Tracing a Keyword of the U.S. Welfare State*, in NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 121 (1997).

273. 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 63, at 1886; see also HANDLER & HASENFELD, *supra* note 20, at 216–17; NEWMAN, *supra* note 35, at 104, 119.

274. Elster, *supra* note 249, at 62; Moon, *supra* note 262, at 27, 32–33; see also Diller, *supra* note 4, at 28; Karst, *supra* note 54, at 532.

275. Arneson, *supra* note 202, 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 268, at 52–55; WILSON, *supra* note 2, at 84–86.

276. 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

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.²⁷⁷ 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.”²⁷⁸ 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.’”²⁷⁹

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 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.”²⁸⁰ 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.²⁸¹ 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.”²⁸² And to this day, many see the problem of dependency as at root one of *male* joblessness that

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.irp.wisc.edu/initiatives/outreach/welpan/oct00part1.pdf>.

277. NEWMAN, *supra* note 35, at 115, 119.

278. *Id.* at 102.

279. *Id.* at 98.

280. Elster, *supra* note 249, at 66–67.

281. See generally Forbath, *supra* note 273, at 18–20; Fraser & Gordon, *supra* note 272; 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).

282. Moon, *supra* note 262, at 33 (emphasis added).

interferes with a man's ability to become a breadwinner upon whom wife and child can be financially dependent.²⁸³

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.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶ Another example is college education: Many would consider college attendance more respectable, and worthy of self-respect, 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.²⁸⁷

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

283. See PHELPS, *supra* note 5, at 4, 14, 96, 126, 134; see also WILSON, *supra* note 2, at 91–92, 104–07. But see Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 26–29 (1993); Young, *supra* note 23, at 544.

284. 42 U.S.C. § 607(c)(1)(B) (2000) (permitting two-adult households to satisfy TANF work requirements with thirty-five hours between them both); 26 U.S.C. § 32(b)(2) (2000) (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).

285. See HASKINS & SAWHILL, *supra* note 89, at 6; MARY PARKE, CTR. FOR LAW & SOC. POLICY, MARRIAGE-RELATED PROVISIONS IN WELFARE REAUTHORIZATION PROPOSALS: A SUMMARY 1–2 (2004), available at http://www.clasp.org/publications/marr_prov_upd.pdf.

286. SHARON HAYS, THE CULTURAL CONTRADICTIONS OF MOTHERHOOD 8, 139–40 (1996) [hereinafter HAYS, THE CULTURAL CONTRADICTIONS OF MOTHERHOOD]; SHARON HAYS, FLAT BROKE WITH CHILDREN 18–19, 85–86 (2003) [hereinafter HAYS, FLAT BROKE WITH CHILDREN]; Scott, *supra* note 269, at 132; Katherine Teghtsoonian, *The Work of Caring for Children: Contradictory Themes in American Child Care Policy Debates*, 17 WOMEN & POL. 77, 83–86 (1997). 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), available at <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13536>.

287. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP 139 (2005); ZEZIMA, *supra* note 215, at 58.

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,²⁸⁸ 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,²⁸⁹ and yet work requirements typically do demand full-time work from them.²⁹⁰ As these examples suggest, the thrust of work-based welfare reform has been to *change* patterns of labor-market participation, and change they have.²⁹¹ A purely descriptive approach to specifying work requirements based on existing norms or practices is doomed from the start.²⁹²

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.

288. See U.S. Bureau of Labor Statistics, Employment Characteristics of Families in 2005, at tbl.4 (Apr. 27, 2006), <http://www.bls.gov/news.release/pdf/famee.pdf> (58 percent).

289. *Id.* (47 percent); in 1995, the figure was 39 percent. U.S. Bureau of Labor Statistics, Employment Characteristics of Families: 1996, at tbl.6 (June 16, 1997), http://www.bls.census.gov/cps/pub/famee_0697.htm.

290. Advocates of a community-standards approach rarely seem interested in delving into these issues. See HASKINS & OFFNER, *supra* note 32, at 4 (noting that the Bush Administration supports a forty-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. FOR LAW & SOC. POLICY, IMPOSING A 40-HOUR REQUIREMENT WOULD HURT STATE WELFARE REFORM EFFORTS 4 (2003), available at http://www.clasp.org/publications/40_hours.pdf (criticizing the forty-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).

291. See HASKINS & OFFNER, *supra* note 32, at 1–2.

292. 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.²⁹³ 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.²⁹⁴

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.²⁹⁵ 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.²⁹⁶ 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."²⁹⁷

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

293. 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).

294. See HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD*, *supra* note 286, at 16; Schultz, *supra* note 1, at 1945; see also FRASER, *supra* note 272, at 51–55 (sketching a "Universal Breadwinner" model of economic and gender justice).

295. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN*, at xii–xvii (1995); Amar, *supra* note 54, at 37–38; Forbath, *supra* note 273, at 15, 18–20; Fraser & Gordon, *supra* note 272, at 121, 126–28.

296. See AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT* 200, 211–15 (1998); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2139–40 (1994); see also Fraser & Gordon, *supra* note 272 at 128–30.

297. 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 one-quarter and one-third are or have been at some point in their lives).

boss, and so on, it is easy for employment itself to create dependency.²⁹⁸ Even absent abusive behavior or mistreatment, the ordinary structures of workplace accountability—being told what to do by your boss and being 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.²⁹⁹ 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.³⁰⁰

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.³⁰¹ 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.³⁰² For instance, the "independent living" strand of the disability rights movement long has advocated expanding the availability of publicly funded personal assistants.³⁰³ 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."³⁰⁴ Independent-living advocates have

298. See Young, *supra* note 23, at 549. Indeed, under the FLSA, economic dependency actually *defines* the employment relationship, in contrast to "independent contractors." See *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208 (11th Cir. 2003); *Reich v. Circle C. Invs. Inc.*, 998 F.2d 324, 327 (5th Cir. 1993) (describing "economic reality" test in which "the underlying question [is] dependency").

299. See BOURGOIS, *supra* note 86, at 115.

300. See MUIRHEAD, *supra* note 46, at 20–21, 50, 132, 164.

301. See JOEL F. HANDLER, *SOCIAL CITIZENSHIP AND WELFARE IN THE UNITED STATES AND WESTERN EUROPE* 251–56 (2004) (discussing the power relations between caseworkers and welfare recipients); HAYS, *FLAT BROKE WITH CHILDREN*, *supra* note 286, at 49, 110–12.

302. See HANDLER, *supra* note 301, at 248–49.

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

304. *Id.* at 991.

insisted, however, that individuals with disabilities retain firm control over the relationship relative to the personal assistant, the funding agency, and the medical profession.³⁰⁵

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. In both cases, contingent institutional features of the income source, not its earned or unearned character, determine whether it leads to dependency. Indeed, work requirements may exacerbate the dependency associated with *both* employment *and* welfare. Work-linked transfers increase the stakes of losing a job and work requirements increase welfare agencies'—and individual caseworkers'—power through discretionary or difficult-to-review eligibility determinations and service offerings.³⁰⁶

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 recommend employment, activities leading to better employment someday, exemption from any requirements, pursuing marriage to a generous spouse,³⁰⁷ 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

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

306. See VAN PARIJS, *supra* note 17, at 126; Alstott, *supra* note 5, at 988–89; see also HANDLER, *supra* note 301, at 251–56; Brodtkin, *supra* note 75.

307. 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 nonearner); 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).

“in exchange” for receiving a need-based transfer,³⁰⁸ substituting a relationship based on “reciprocity” for one based on “dependency.”³⁰⁹

Reciprocity rationales are quite diverse in exactly what behavior they demand in exchange for transfers, and in what general criteria they use 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”: “Government’s duty toward the needy [does] not cancel their own obligation to function in ways other Americans expect[.]”³¹⁰ The principal proposed community-wide norm is that able-bodied adults hold down paying jobs.³¹¹ Reciprocity rationales heard from the left tend to invoke ideals of mutuality, participation, and contribution toward a joint enterprise.³¹² 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, it can justify results quite different from either self-sufficiency or self-improvement approaches. It easily can *exclude* activities despite their contribution to self-sufficiency (such as income from crime) or their work-like satisfactions (such as the experience of a highly disciplining, self-realizing hobby). It also can *include* activities that do not 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; we also need criteria that identify the relevant sort of social contribution.

308. See MICH. COMP. LAWS ANN. § 400.57e (West 1997 & Supp. 2006) (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”); H.R. REP. NO. 104-81, at 19 (1995) (rejecting providing public assistance without welfare recipients “being required to return anything to society”); Ron Haskins & Rebecca M. Blank, *Welfare Reform: An Agenda for Reauthorization*, in THE NEW WORLD OF WELFARE, *supra* note 2, at 3, 25.

309. 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, *supra* note 16, at 136.

310. 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).

311. MEAD, *supra* note 1, at 108, 223; see also WILLIAM A. GALSTON, LIBERAL PURPOSES 159 (1991); Wax, *supra* note 2, at 1, 2–4.

312. See MUIRHEAD, *supra* note 46, at 17; White, *supra* note 309, at 136–39.

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 rights to vote, to send one's children to public school,³¹³ to have the police investigate the burglary of one's home, or to receive substantial bequests through the state-operated system of inheritance.³¹⁴ Most of us share the intuition that these examples are different from means-tested transfer receipt, but why is that? 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 provide an answer.

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,³¹⁵ then the collective attachment of conditions, however arbitrary or capricious, seems permissible.³¹⁶ If, however, these transfers vindicate some entitlement normatively prior to the property rights of taxpayers from whom transfers nominally flow,³¹⁷ then such conditions begin to 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.³¹⁸ 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.³¹⁹ Exactly what "doing one's part" should consist of, however, remains quite unclear.

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

314. See FINEMAN, *supra* note 24, 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").

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

316. See Lehman & Malamud, *supra* note 310, at 1501–02.

317. Cf. MURPHY & NAGEL, *supra* note 66, at 8–9 (rejecting pre-tax property rights as an appropriate, or even coherent, benchmark against which to evaluate taxes and transfers).

318. See White, *supra* note 309, 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 46, at 17–19.

319. Wax, *supra* note 4, at 477; see also 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?³²⁰ Speaking a language that affirms the common identity of all citizens?³²¹ Buying products in the market to stimulate the economy?³²²

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.³²³ 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 fit under such a rubric: caring for foster children, recovering from substance abuse, or attempting to get or stay married.³²⁴

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.³²⁵ On such a view, transfer recipients should replenish the very pool of resources from which they have withdrawn.³²⁶

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

320. 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).

321. See MEAD, *supra* note 1, at 12.

322. See Jennifer Goldblatt, *Bucks to Buoy America*, ST. PETERSBURG TIMES, Oct. 12, 2001, available at <http://www.sptimes.com/home.shtml> (search St. Petersburg Times Archive for "Bucks to Buoy America"; select "full text" under "results"); see also Franke, *supra* note 62, at 189–91.

323. See WHITE, *supra* note 25, at 102–03.

324. See Zatz, *supra* note 6, at 160–63; see also Office of Family Assistance, Characteristics of Tribal TANF Programs (Oct. 1, 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).

325. See Wax, *supra* note 4, at 484.

326. See, e.g., White, *supra* note 309, 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).

assistance.³²⁷ 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.”³²⁸

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 self-sufficiency.³²⁹ TANF comes closest to this approach where it allows work requirements to be satisfied by either community service or childcare 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 be paid to clean the parks, something that state and federal laws forbid and that workfare proponents deny the programs do.³³⁰ 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?³³¹ Even if such benefits were deemed

327. See generally HOLZER, *supra* note 167, at 3; Diller, *supra* note 4, at 19 (1998); Turner & Main, *supra* note 51, 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) (2003 & Supp. 2006).

328. DeParle, *supra* note 236, at 50, 59.

329. See Diller, *supra* note 4, at 27. Workfare supporters often justify the programs on both reciprocity and training grounds. See, e.g., DeParle, *supra* note 236, at 59; Turner & Main, *supra* note 51, at 291. However, rigorous evaluations have found “little evidence that unpaid work experience leads to consistent employment or earnings effects.” THOMAS BROCK ET AL., MDRC, UNPAID WORK EXPERIENCE FOR WELFARE RECIPIENTS: FINDINGS AND LESSONS FROM MDRC RESEARCH 3 (1993), available at <http://www.mdrc.org/publications/171/abstract.html>; 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, *supra* note 133, 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.

330. See 42 U.S.C. § 607(f) (2000); N.Y. SOC. SERV. LAW § 336-c(2)(e); Turner & Main, *supra* note 51, at 304. But see Greenhouse, *supra* note 329, at A1.

331. See Forbath, *supra* note 63, at 1888–90; Karst, *supra* note 54, at 566; Wax, *supra* note 4, at 491.

insufficiently “public” in nature,³³² 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.”³³³ Although Wax continues to refer to this principle as one of 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, but it adds no 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.³³⁴ 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,³³⁵ this simply amounts to recipients

332. 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”); Reauthorization of the Temporary Assistance for Needy Families Program, 71 Fed. Reg. 37,454, 37,460 (June 29, 2006) (interim final rule) (codified at 45 C.F.R. § 261.2(h) (2006)) (excluding caring for a disabled household member from the definition of “community service” because it “[is] not primarily directed to benefiting the greater community”). But see Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86 (1994); cf. WHITE, *supra* note 25, at 108–13 (contrasting the public interest in caretaking with the purely private nature of housework).

333. 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 “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.

334. 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 25, at 176–200.

335. See MEAD, *supra* note 1, at 43–44; Wax, *supra* note 2, at 1, 4–5; White, *supra* note 309, at 136.

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.³³⁶

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. But before we can distinguish between cleaning a city park, caring for a child, and pursuing moral virtue—none of which directly offsets 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.³³⁷

V. CONCLUSIONS AND NEW DIRECTIONS

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 facing contemporary policymakers. Answering those questions requires both reopening and sharpening normative debate over the purpose of conditioning redistribution on work.

336. 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* 288 (1999); Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 61 (1999). 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 suffered it, then the transfer would have flowed the other way. The same logic could be applied to means-tested programs. See RONALD DWORKIN, *SOVEREIGN VIRTUE* 92–109, 331–46 (2000); GRAETZ & MASHAW, *supra*, at 288–89; 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 PUB. FIN. 244 (1994).

337. See WHITE, *supra* note 25, 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 precisely the same, far from obvious distinctions between contributory and shirking conduct discussed above.

Second and surprisingly, rigorous application of the preeminent (and seemingly most conservative) work rationale—self-sufficiency—offers new support for classifying unpaid family caretaking as work in the narrow context of means-tested welfare work requirements. Third, this 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.³³⁸ 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 to be both a source of dignity,

338. Cf. MUIRHEAD, *supra* note 46, 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”).

community, and fulfillment and a cause of humiliation, isolation, instability, and resignation.³³⁹ 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 be fulfilled.³⁴⁰

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

339. See NEWMAN, *supra* note 35, at 89–104.

340. But see MUIRHEAD, *supra* note 46, at 57; Wadel, *supra* note 37, at 371; Young, *supra* note 23, at 551 (questioning the social value of some paid jobs).

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 timeframe 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 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?³⁴¹

Choices about appropriate work activities are being made all the time. They are being made by the U.S. Congress, by the Department of Health and 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.³⁴²

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.³⁴³

341. 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 benefit from the work performed. Cf. *supra* note 329.

342. 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, or reciprocity, for example) 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. This may be especially problematic if those second- or third-order decisions will be made by different actors (such as state legislatures, administrators, or “street-level bureaucrats,” as described in MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY*, at xii (1980)) who lack the visibility or the accountability of those party to the first-order agreement.

343. It may well be, though, that muddled thinking and political compromise help explain the current system, rather than any coherent theory of work requirements. See THEODORE R. MARMOR ET AL., *AMERICA’S MISUNDERSTOOD WELFARE STATE* 23–31 (1990) (criticizing attempts to reduce U.S. welfare policy to a single animating principle).

Another approach 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”³⁴⁴ 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.³⁴⁵ 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 to better understand and more fully implement a multifaceted 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.

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

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

345. See Zatz, *supra* note 6, at 1178–79 (discussing tensions between the EITC’s poverty-reduction and work-promotion goals); see also Alstott, *supra* note 20. This can lead to doing too little. See Teghtsoonian, *supra* note 286, at 81, 87–88 (showing how characterizing childcare subsidies as an antipoverty strategy led to the imposition of means-testing restrictions that blunted feminist goals of encouraging employment among women with spouses earning a decent income); Lester, *Unemployment Insurance*, *supra* note 208, at 376–77, 385–86 (arguing that using the unemployment insurance system to redistribute income to the poor or to nonmarket caretakers would do so incompletely and in arbitrary ways).

eligibility.³⁴⁶ 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.³⁴⁷

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),³⁴⁸ 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.³⁴⁹ 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.³⁵⁰ In the

346. See Amy L. Wax, *Disability, Reciprocity, and "Real Efficiency": A Unified Approach*, 44 WM. & MARY L. REV. 1421, 1423 (2003); Zatz, *supra* note 6, at 1158–59.

347. See Bagenstos, *supra* note 303, at 991–94; Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 426–36 (2000).

348. See EDIN & KEFALAS, *supra* note 287, at 138–43; HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD*, *supra* note 286, at 83–91; Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 26, 72 (2005).

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

350. See generally Silbaugh, *supra* note 22; Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1461–67 (2001). Another line of feminist critique focuses on changes to paid employment and benefits to paid employees that would enable adults to be both successful "workers" (meaning employees) and also responsible and satisfied family caregivers. See, e.g., Lester, *A Defense of Paid Family Leave*, *supra* note 208; Schultz, *supra* note 1. Such arguments often rely on public recognition or accommodation of how important family roles are to individual lives, see FRASER, *supra* note 272, at 62; Schultz, *supra* note 1, at 1937–39; Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 270, 295–96 (Philip Pettit et al. eds., 2004), rather than emphasizing the value of caregiving to third parties; see Shiffrin, *supra*, at 281–82. For discussions of the tensions, and also some potential common ground, between these traditions, see FRASER, *supra* note 272; Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812 (2002).

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.³⁵¹

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 assert corresponding claims on these beneficiaries’ income.³⁵² 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 others or because children’s well-being and development is ultimately a public obligation.³⁵³

Feminist critiques of welfare work requirements typically are just specific applications of this general argument for public support of caretaking.³⁵⁴ Such critiques first reject a self-sufficiency rationale for work requirements³⁵⁵ and then define work based on social contribution, of which caring for one’s children constitutes a prime example.³⁵⁶ These arguments for public support are subject to serious criticisms,³⁵⁷ 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

351. See generally Roberts, *Black Mothers’ Work*, *supra* note 22; other sources cited *supra* note 22.

352. See SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 175–76, 180 (1989); WILLIAMS, *supra* note 24, at 114; Siegel, *supra* note 24, at 1078–79; Williams, *supra* note 24, at 2229, 2252–53.

353. See ALSTOTT, *supra* note 24, at 66–69; FINEMAN, *supra* note 22; KITTAY, *supra* note 24, at 142–44; Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 199 (1999); Fineman, *supra* note 22, at 1406; Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1682–98 (2001).

354. See KITTAY, *supra* note 24, at 122–28; 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, 290–91; Fineman, *supra* note 22, at 1403; Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL’Y REV. 89, 95 (1998).

355. In particular, feminists have criticized self-sufficiency as a normative ideal for its difficulty in accounting for periods of what Martha Fineman has labeled “inevitable dependency.” FINEMAN, *supra* note 22, at 161–63; FINEMAN, *supra* note 24, at 174; see also KITTAY, *supra* note 24.

356. Not surprisingly, such arguments also tend to include unpaid community service and a variety of other socially beneficial activities outside the labor market. See KITTAY, *supra* note 24, at 14, 142–44; White, *supra* note 309, at 149; Young, *supra* note 23, at 552. But cf. ALSTOTT, *supra* note 24, at 35–46 (grounding public support for parents in their legal obligations to provide “continuity of care”).

357. 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, 1753–56 (2001); Franke, *supra* note 62, 181–83; Wax, *supra* note 2, at 30–33.

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 enough wages to buy her food. So too does a parent who cares for her own children, as long as, like food, we recognize childcare 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.³⁵⁸ 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 otherwise be eligible for home care services under Medicaid.³⁵⁹ Private caregiving by a family member thus substitutes for a publicly paid home health aide.³⁶⁰

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).³⁶¹ Like TANF, AHIC grants cash payments to low-income parents of infants. Unlike TANF, however, the grant amount equals the childcare subsidies that the state would otherwise pay to a commercial childcare provider while the parent satisfied TANF work

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

359. MINN. STAT. ANN. § 256J.561(2)(d)(3) (West Supp. 2006).

360. 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.

361. At-Home Infant Caregiver (AHIC) programs have been established 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), available at <http://nccic.org/poptopics/stateathome.pdf>; NAT'L P'SHIP FOR WOMEN & FAMILIES, AT-HOME INFANT CARE (AHIC): A SIDE-BY-SIDE COMPARISON OF FEDERAL AND STATE INITIATIVES (2005), available at <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 (2002) (introduced in the U.S. Senate by Sen. Baucus), available at <http://finance.senate.gov/leg/leg062602lan.pdf>.

requirements, and the explicit purpose of the program is to permit parental infant care.³⁶² 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.³⁶³ The core insight behind both AHIC and my argument is that, once the state commits to covering transfer recipients' childcare costs, employment simultaneously decreases one form of transfer (cash) and increases another (childcare subsidies).

Existing means-tested transfer programs, and their work requirements, could be reformed so as to implement this insight more systematically. The mechanism would be to incorporate the cost of childcare into the standard of need for all households, independent of adult labor-market participation.³⁶⁴ This would integrate eligibility for childcare subsidies and cash transfers, which could mitigate the still serious problem of underestimating poverty among employed parents.³⁶⁵

Acknowledging the childcare needs that all parents face also shows how nonmarket caretakers meet those needs outside the cash economy. Institutionalizing this point would mean attributing income to caretaking in amounts equal to childcare needs.³⁶⁶ Finally, it would also require treating that income generation as work.

This approach I have sketched contributes 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

362. To date, AHIC formally is a standalone program, not a work option within TANF, but these are functionally equivalent in most respects. 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>.

363. See *id.*

364. For proposals that take a similar approach to poverty measurement generally, see 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; Renwick & Bergmann, *supra* note 100.

365. 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 childcare. See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2056–59 (1996); 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); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1001–05 (1993); Staudt, *supra* note 96.

366. This component would largely import into the welfare context Nancy Staudt's proposal for including imputed income from housework in taxable income. Staudt, *supra* note 96.

challenges the dominance of market work on what seems to be its home turf. Second, by building on means-tested childcare subsidies, the argument avoids problems of overbreadth associated with imputed-income or benefiting-others criteria.³⁶⁷ Third, for similar reasons, the argument is tailored to means-tested transfer recipients and does not imply a general program of redistribution to all caretakers or parents. This feature mitigates feminist concerns about reinforcing gendered divisions of labor within two-adult households³⁶⁸ and about marginalizing women who choose not to be parents.³⁶⁹

This institutional context also enables relevant distinctions to be made among nonmarket caretakers. Most childcare 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 child would not be working in the relevant sense because no transfers are avoided.³⁷⁰ The parent of three preschool-age children, in contrast, clearly would be.³⁷¹ 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.³⁷²

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.³⁷³ Moreover, it does so without segregating and potentially trapping nonmarket caretakers in a program separate from those serving low-paid wage workers. From this perspective, the barrier

367. See Chancellor, *supra* note 96, at 561–62; Staudt, *supra* note 96, at 1577–78; Wax, *supra* note 2, at 30–33; *supra* Part II.A.2.

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

369. See Case, *supra* note 357, at 1781–83; Franke, *supra* note 62, at 185. This integration with means-tested programs also enhances feasibility by building on existing institutions.

370. 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.

371. The same point applies to distinctions between childcare 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 25, 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).

372. 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); Reauthorization of the Temporary Assistance for Needy Families Program, 71 Fed. Reg. 37,454, 37,467 (June 29, 2006) (interim final rule) (codified at 45 C.F.R. § 261.61 (2006)) (ratifying this practice).

373. See Pateman, *supra* note 1; Silbaugh, *supra* note 22.

to recognizing nonmarket care is a rigid and artificial market/nonmarket divide,³⁷⁴ not the distinction between work and nonwork.

I realize that any move to equate nonmarket caretaking with market work (in particular respects³⁷⁵) will meet resistance from many readers. But to the extent one advocates distinctions between market and nonmarket 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),³⁷⁶ while others elevate the experience of performing market labor (evoking a self-improvement framework).³⁷⁷ Additionally, some resist supporting nonmarket caretakers on the ground that the public is not responsible for their reproductive decisions.³⁷⁸

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.³⁷⁹ But for now, it is enough simply to observe that each of these objections attacks

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

375. 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 nonmarket caretaking and organizing care through market mechanisms).

376. 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.

377. See Lester, *A Defense of Paid Family Leave*, *supra* note 208, at 25–33, 46–48; Schultz, *supra* note 1, at 1908–11, 1917–18.

378. See RAKOWSKI, *supra* note 357, at 153–55; Case, *supra* note 357, at 1785; Amy L. Wax, *Against Neutrality*, 29 BOSTON REV. 12, 13 (Apr./May 2004). But see Anne L. Alstott, *What Does a Fair Society Owe Children—And Their Parents?*, 72 FORDHAM L. REV. 1941 (2004).

379. 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 caused 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 152, 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, this objection draws heavily on an entrenched pattern of class- and race-based hostility to low-income women’s parenting. See DOROTHY ROBERTS, *KILLING THE BLACK BODY* 9, 19, 110–12 (1997); ROBERTS, *supra* note 22, 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, *A Defense of Paid Family Leave*, *supra* note 208, at 2 (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 childrearing costs to the public, those limits should apply equally to childcare subsidies and to transfers to those providing care personally.

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.

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.³⁸⁰ 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 goals³⁸¹ and for harmonization of employment definitions across various

380. See *Pietras v. Bd. of Fire Comm’rs*, 180 F.3d 468, 473 (2d Cir. 1999) (holding 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) (holding opposite result for bar-association volunteer); *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 142–45 (4th Cir. 1999) (holding volunteer rescue-squad duty not “employment” under the FLSA); *WBAI Pacifica Found.*, 328 N.L.R.B. 1273, 1276 (1999) (holding radio-station volunteers not employees under the National Labor Relations Act); 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.

381. 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).

statutes.³⁸² 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,³⁸³ which in turn differ from an emphasis on democratic self-organization in labor law.³⁸⁴ If so, then a unitary concept of employment might be inappropriate.³⁸⁵ 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.³⁸⁶

We should be asking these questions wherever work and related concepts like employment play a central role in allocating important legal protections and benefits.³⁸⁷ 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 can know the difference, offers a helpful start.

382. See U.S. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FINAL REPORT 12 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2; 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); 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), available at <http://ssrn.com/abstract=781184>.

383. Cf. Shiffrin, *supra* note 203.

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

385. 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).

386. Significant issues include the coverage of the self-employed, and the treatment of unpaid household labor. For the 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). For 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); Lester, *Unemployment Insurance*, *supra* note 208, at 338, 386–87; Liu, *supra* note 336, at 2–3; Silbaugh, *supra* note 22, at 38–41; Staudt, *supra* note 96.

387. For examples of this type of analysis, see Lester, *Unemployment Insurance*, *supra* note 208, at 338, 386–87; Liu, *supra* note 336, at 61.