You Better Work:* Unconstitutional Work Requirements and Food Oppression

Andrea Freeman[**]

Work requirements attached to the receipt of welfare (TANF) and food stamps (SNAP) disproportionately harm people of color. They arose out of unfounded fears of fraud based on racial stereotypes like the Welfare Queen. While food assistance helps raise households out of poverty, work requirements do not. Instead, they lead to greater food insecurity by removing people from the program through sanctions and deterring others from registering. The nature of the work performed to satisfy work requirements — unskilled and low wage — rarely leads to long-term, gainful employment. When new mothers leave the home to satisfy welfare work requirements, they have no choice but to formula feed their babies. Leveraging hunger to compel low-wage work has been a tool of oppression since slavery. Exercising control over parenting and infant feeding also echoes back to the brutal practices of that period. You Better Work *argues that the harmful effects of TANF and SNAP work requirements are unconstitutional under Equal Protection, Substantive Due Process, the Thirteenth Amendment, and the Unconstitutional Conditions Doctrine.*

TABLE OF CONTENTS

* RUPAUL, SUPERMODEL (YOU BETTER WORK) (Tommy Boy Records 1993).

 Associate Professor of Law, William S. Richardson School of Law. I am grateful to Erika George, Smita Narula, Marc Tizoc-Gonzalez, Ernesto Hernandez-Lopez, Margot Pollans, Noa Ben-Asher, Darren Rosenblum, Bita Amani, Courtney Joslin, and the faculty of the University of Denver Sturm College of Law for helpful feedback on the paper and to Sarah Williams, Kristin Fujiyama, Rachel Murakami, and Ian Tapu for research assistance.

INTRODUCTION

As attitudes toward social assistance programs have changed, so have the conditions attached to them. When first introduced during the New Deal, welfare and other safety net programs primarily benefitted White[1] people. This was by design. Impoverished White women raising children on their own, often due to their husbands' death, elicited sympathy from White lawmakers and the White public.[2] There was a shared sense that these mothers' proper place was in the home and that the government should enable them to stay there.[3] White women were raising the next generation of citizens.

In contrast, beginning in slavery, White society viewed Black women as perpetual laborers and placed little value on the lives of Black children.[4] These views persisted well into the twentieth century. When the demographics of welfare recipients evolved mid-century to include greater numbers of Black and Brown women, the idea that the program rewarded undeserving freeloaders entered the collective consciousness.[5] Through dog whistles alluding to centuries-old stereotypes, politicians persuaded a receptive audience that participants should have to earn their benefits.[6] The popularity of the mythical "Welfare Queen" bolstered this transformation in the perception of welfare as a government duty to a windfall. Ultimately, this change in public opinion led to the introduction of work requirements for welfare recipients, including mothers with infants, in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").[7]

By disproportionately compelling Black mothers to leave their babies at home to perform unskilled labor, work requirements lead to a legally-enforced separation of Black mothers and their children reminiscent of

---

[1] In this article, I capitalize words used to describe socially constructed racial groups, including Black, White, Brown, and Latinx.

[2] *See* Alma Carten, *How Racism Has Shaped Welfare Policy in America Since 1935*, CONVERSATION (Aug. 21, 2016, 8:21 PM), http://theconversation.com/how-racism-has-shaped-welfare-policy-in-america-since-1935-63574.

[3] *See* Bridgette Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, and "Worthiness" in Poverty Discourse and Policy*, MOD. AM., Spring 2010, 4, at 4.

[4] *See id.*

[5] *See* Tracie McMillan, *How One Company is Making Millions Off Trump's War on the Poor*, MOTHER JONES, Jan.-Feb. 2019, https://www.motherjones.com/politics/2018/12/how-one-company-is-making-millions-off-trumps-war-on-the-poor/ [https://perma.cc/F4ZB-P9L3] (quoting Ibram X. Kendi).

[6] *See* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 179-80 (2014).

[7] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

slavery practices.[8] Many Black mothers are unable to breastfeed under these conditions, leading to health consequences for themselves and their infants. These health outcomes, arising from mother-child separation, are a vestige of slavery that violates the Thirteenth Amendment. Forcing new mothers out of the home to perform work valued more highly than domestic labor may also violate the Thirteenth Amendment's proscription against involuntary servitude. Finally, divesting parents of crucial choices about how to care for their children transgresses their Fifth and Fourteenth Amendment substantive due process rights to do so.

Like welfare, food assistance programs began in the wake of the Great Depression.[9] Unprecedented numbers of people across the country lost their jobs and struggled to put enough food on the table. By investing in agricultural products, including wheat, corn, and soy, the government, through the United States Department of Agriculture ("USDA") and the 1934 Agricultural Act (later renamed the Farm Bill) created a reliable supply of foods that would stave off starvation.[10] The first Food Stamp program, which would later evolve into the Supplemental Nutrition Assistance Program ("SNAP"), had two primary functions. It sought to alleviate hunger in the face of widespread unemployment and to relieve the USDA of unmarketable food surpluses.[11] The government discontinued the Food Stamp program in 1943, because it was successful.[12]

During the following eighteen years, research on food insecurity continued. Beginning with the Pilot Food Stamp Program in 1961,[13] Congress revived food assistance with the Food Stamp Act in 1964.[14] As with welfare, the evolution of the face of the SNAP program from White to Black or Brown changed public perspectives. Instead of representing the government's responsibility to care for its citizens, it came to look

[8] The use of the word "mother" is not intended to exclude nursing fathers, gender neutral or non-binary parents or anyone else responsible for nursing an infant. It is simply a term of convenience.

[9] *See, e.g.*, *A Short History of SNAP*, U.S. DEP'T AGRIC. (Sept. 11, 2018), https://www.fns.usda.gov/snap/short-history-snap#1939.

[10] *See* Agricultural Act of 1949, Pub. L. No. 81-439, 63 Stat. 1051.

[11] *See A Short History of SNAP*, *supra* note 9. For every $1 worth of orange stamps a recipient received to put toward regular food expenditures, they also received 50 cents worth of blue stamps, which they could only use to purchase surplus commodities. *Id.*

[12] *See id.*

[13] *See* Federal Food Stamp Act, 26 Fed. Reg. 639 (Jan. 24, 1961) (codified at 7 U.S.C.A. Ch. 51).

[14] *See* Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703.

like an entitlement or handout.[15] In response to this shift in public opinion, the PRWORA added work requirements to SNAP for able-bodied adults without dependents aged 18-59 in 1996.[16] The purported intention of SNAP work requirements was to steer program participants toward gainful employment that would eliminate their need for food assistance. However, long-term studies demonstrate that they do not have this impact.[17] Instead, their primary effect is to reduce the number of individuals who are eligible for SNAP, exposing them to food insecurity.[18]

In the rare instances when work requirements help individuals make positive exits from the program, they do so in a racially disparate way. The people who have been able to lift themselves out of poverty through employment are disproportionately White.[19] SNAP recipients who have become ineligible for the program due to their failure to meet work requirements are disproportionately people of color.[20] For these individuals, work requirements increase food insecurity without alleviating poverty. Leveraging hunger as a method to compel individuals into unskilled work is a tradition that originated during slavery.[21] Even after Emancipation, freed slaves suffered disproportionately from starvation and malnutrition.[22] Racial disparities

[15] *See* Dylan Matthews, *Study: Telling White People They'll Be Outnumbered Makes Them Hate Welfare More*, VOX (June 7, 2018, 9:00 AM), https://www.vox.com/2018/6/7/17426968/white-racism-welfare-cuts-snap-food-stamps.

[16] *See* 7 C.F.R. § 273.7 (2019).

[17] *See* LADONNA PAVETTI, CTR. ON BUDGET & POLICY PRIORITIES, WORK REQUIREMENTS DON'T CUT POVERTY, EVIDENCE SHOWS 2 (2016), https://www.cbpp.org/research/poverty-and-inequality/work-requirements-dont-cut-poverty-evidence-shows [hereinafter WORK REQUIREMENTS].

[18] *See id.* at 3-5.

[19] *See* ANGELA HANKS, DANYELLE SOLOMON & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, HOW AMERICA'S STRUCTURAL RACISM HELPED CREATE THE BLACK-WHITE WEALTH GAP 4 (2018), https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/.

[20] *See* CTR. ON BUDGET & POLICY PRIORITIES, SNAP HELPS MILLIONS OF AFRICAN AMERICANS 3 (2018), https://www.cbpp.org/sites/default/files/atoms/files/3-2-17fa4.pdf; Greg Trotter, *Limiting SNAP Benefits Would Make Food Insecurity Worse, Not Better*, CHI. TRIB. (Mar. 8, 2019, 4:15 PM), https://www.chicagotribune.com/opinion/commentary/ct-perspec-snap-food-insecurity-trump-work-requirement-0311-20190308-story.html.

[21] *See* Daniel C. Littlefield, *The Varieties of Slave Labor*, NAT'L HUMAN. CTR., http://nationalhumanitiescenter.org/tserve/freedom/1609-1865/essays/slavelabor.htm (last visited Nov. 10, 2019).

[22] *See* JIM DOWNS, SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION 4 (2012).

in food insecurity persist into the present.[23] When these disparities arise from work requirements, these requirements represent unequal protection of the law. This Article argues that work requirements attached to welfare and SNAP violate the Thirteenth and Fourteenth Amendments.

The argument proceeds in three parts. Part I links state-enforced control over food and infant feeding during slavery to modern assistance programs. It also explores how racial stereotypes shaped social assistance ideology and policy, leading to the introduction of work requirements into welfare and SNAP in 1996. Part II describes the mechanics of work requirements under welfare and SNAP. It surveys the research on whether work requirements accomplish their purported goals. It also explores how work requirements provide benefits to corporations with close ties to the government. Part III argues that work requirements are unconstitutional as violations of equal protection, the Thirteenth Amendment, substantive due process, and the unconstitutional conditions doctrine.

Work requirements are a manifestation of food and "first food" oppression. Food oppression is food-related law or policy that responds to corporate interests and relies on racial stereotypes to mask disproportionate harms to the health of vulnerable communities. "First food" oppression occurs when these harms take place in the context of our first food, usually breast milk or formula. The constitutional arguments put forth here may offer the best avenue to reform because regulatory capture and social bias create formidable obstacles to change originating in the legislative or executive branches. The conservative nature of the judiciary, however, may stall change through the courts. Nonetheless, these arguments may inspire social movements that ultimately lead to transformation.

I. WORK REQUIREMENTS AS A LEGACY OF SLAVERY

Slave owners' use of hunger as a method of subordination led to large disparities in food-related deaths and illnesses between White slave

[23] Madison Cooper, *Hunger is a Racial Equity Issue*, MOVE FOR HUNGER (Apr. 3, 2018, 10:57 AM), https://www.moveforhunger.org/hunger-racial-equity-issue/.

owners and enslaved Blacks.[24] These racial disparities persist.[25] Slave owners' control over enslaved mothers' ability to feed their infants also led to dramatic health disparities. Most significantly, Black infant mortality rates were twice as high as White infant mortality rates during slavery. This disparity has remained constant,[26] as have Black mothers' low breastfeeding rates.[27] This Part traces racial disparities in hunger and infant feeding methods from slavery to the present. It demonstrates that welfare and SNAP work requirements' perpetuation of these disparities represents a continuing vestige of slavery.

A. Hunger During Slavery

Throughout history, racially unequal food distribution has been a tool of economic and social subordination. In *Cultivating Race*, Bekah Mandell explains how the dynamics of food control can create permanent social divisions: "Commanding access and ownership of food makes it possible to create a powerful imbalance of power between those with command of food, the feeders, and those who are denied ownership and command of their food, the fed."[28] Mandell draws a comparison between domination of the food system during times of peace and the ability to subdue enemy populations during times of

[24] *See* Bekah Mandell, *Cultivating Race: How the Science and Technology of Agriculture Preserves Race in the Global Economy*, 72 ALB. L. REV. 939, 942-43 (2009); Nina Martyris, *Frederick Douglass on How Slave Owners Used Food as a Weapon of Control*, NPR (Feb. 10, 2017, 11:42 AM), https://www.npr.org/sections/thesalt/2017/02/10/514385071/frederick-douglass-on-how-slave-owners-used-food-as-a-weapon-of-control.

[25] *See* Cooper, *supra* note 23; Paul Harris, *How the End of Slavery Led to Starvation and Death for Millions of Black Americans*, GUARDIAN (June 16, 2012, 8:06 AM), https://www.theguardian.com/world/2012/jun/16/slavery-starvation-civil-war.

[26] *See* T.J. Mathews et al., *Infant Mortality Statistics from the 2013 Period Linked Birth/Infant Death Data Set*, NAT'L VITAL STAT. REP., Aug. 2015, at 1, 4, https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_09.pdf; *Infant Mortality and African Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. OF MINORITY HEALTH (Nov. 9, 2017, 9:39 AM), https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23 [hereinafter *Infant Mortality*].

[27] According to data from 2008 only 59% of black mothers ever try breastfeeding with only 12% still breastfeeding at one year, while 75% of white mothers and 80% of Latina mothers report trying breastfeeding. *See* JOE GFROERER ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY & MORTALITY WEEKLY REPORT: PROGRESS IN INCREASING BREASTFEEDING AND REDUCING RACIAL/ETHNIC DIFFERENCES — UNITED STATES, 2000-2008 BIRTHS 79 (2013), https://www.cdc.gov/mmwr/pdf/wk/mm6205.pdf; Margaret E. Bentley et al., *Breastfeeding Among Low Income, African-American Women: Power, Beliefs and Decision Making*, 133 J. NUTRITION 305S, 305S-09S (2003).

[28] Mandell, *supra* note 24, at 941.

war.[29] She describes the hierarchy created by seizing control of the food system as rooted in "the violence of threatened starvation, the violence of fear, and the violence of subordination."[30] Mandell traces the origins of this modern system of oppression to slavery, when it was necessary for slave owners to establish Black racial inferiority as a truth to justify their brutality. Slave owners' ability to root this lie in religion and the myth's centrality to maintaining the social status quo allowed Whites to perpetuate this falsity, even after slavery ended.[31] White supremacy's entrenched relationship to food and agriculture still permeates modern society.

Mandell further explains that both food and reproduction, as core elements of personhood, were essential sites of subordination:

> Ownership and command of the supply of food in the master-slave relationship became an important element of control during slavery — just as the masters' control over his slaves' most personal acts, including reproduction and romantic relationships, was a necessary element of institutionalizing Black subordination. Command and ownership of the food supply served as one of the powerful methods of social control used to reinforce racial power hierarchies between master and slave.[32]

Mandell's insights help explain the connection between the food oppression and "first food" oppression that began in slavery through strict regulation of the intimate acts of eating and infant feeding.

With every available space on plantations employed to grow cash crops, slave owners brought in food for enslaved workers from elsewhere.[33] In this way, slave owners controlled the food supply. Mandell argues that this control took on dimensions of meaning beyond a simple feeder/fed relationship. Instead, the food-centered dependency that slave owners created came to represent and define both Blackness and Whiteness. Domination of an enslaved woman's "self-determination in the most personal areas of her life, reproduction and eating, became essentialized."[34] Effectively, "to be subject to the command of the master in all areas of your life became a characteristic

[29] *Id.*
[30] *Id.*
[31] *Id.* at 942.
[32] *Id.* at 942-43.
[33] *Id.* at 943.
[34] *Id.*

of blackness."[35] In other words, "[t]o be the fed, to be dependent on another for one's very sustenance took on a racialized meaning just as lasting as the meaning assigned to skin-color. To be the fed was to be enslaved, to be black, to be powerless."[36]

Mandell's analysis explains how continued control over how and what vulnerable communities eat is a vestige of slavery. Additionally, in the present, when law and policy directly exert control over many people's diets, the resulting health disparities represent unequal protection of the law. Requiring poor people of color to work under specific conditions to receive food, instead of potentially spending their time on high-skilled job training, education, or fulfilling family responsibilities, is a modern form of control over diet and labor.

Not only did slave owners exercise control over diets by rationing out inhumane amounts of food, primarily corn meal, to enslaved workers, they used supplemental food as rewards. The distribution of small portions of sweet potato, meat, or molasses demonstrated favor.[37] Starvation was a common form of punishment.[38] For it to be effective, slave owners had to restrict access to any other food source. Therefore, sneaking leftovers into slave quarters would lead to harsh retribution.[39] Tar fences guarded fruit trees to prevent enslaved workers from getting to them, and a trace of tar discovered on a piece of clothing would trigger harsh discipline.[40]

Food was a form of power that constantly loomed over interactions on plantations. Slave owners used it as a tool of humiliation, forcing enslaved workers to fight animals for scraps of food.[41] Food also served as a tool of physical experimentation, pushing human endurance to the limit. In one example, slave owners gave enslaved workers cotton seeds mixed with corn to see how their bodies would react.[42] Extra food

[35] *Id.*

[36] *Id.* at 943-44. Mandell further argues that the "racialized feeder/fed dichotomy" established during slavery is reproduced in the present through the global food distribution system. *Id.* at 945.

[37] *See* THEODORE D. WELD, AMERICAN SLAVERY AS IT IS: THE TESTIMONY OF A THOUSAND WITNESSES 28-35 (1839).

[38] *See* Martyris, *supra* note 24.

[39] *See* Nicholas Boston, *The Slave Experience: Living Conditions, Historical Overview,* THIRTEEN MEDIA WITH IMPACT, https://www.thirteen.org/wnet/slavery/experience/living/history.html (last visited Jan. 4, 2020) [https://perma.cc/77VJ-8XG5].

[40] *See* Martyris, *supra* note 24.

[41] *See id.*

[42] *See* WELD, *supra* note 37, at 28-29.

rations also served as a consolation offered to enslaved women for enduring sexual assault intended to lead to pregnancy.[43]

Frederick Douglass's narratives provide some of the most vivid depictions of how hunger infiltrated every aspect of life during slavery. Recounting his childhood, Douglass wrote, "I have often been so pinched with hunger, that I have fought with the dog — 'Old Nep' — for the smallest crumbs that fell from the kitchen table, and have been glad when I won a single crumb in the combat."[44] This desperation guided his movements throughout the day: "Many times have I followed, with eager step, the waiting-girl when she went out to shake the table cloth, to get the crumbs and small bones flung out for the cats."[45]

Douglass identified "[w]ant of food" as his "chief trouble" during his first summer living on a plantation owned by Colonel Edward Lloyd.[46] Determined to refute slave owners' disingenuous claim that slaves received better food than any peasants in the world, Douglass described his monthly rations: "a bushel of third-rate corn, pickled pork (which was 'often tainted') and 'poorest quality herrings.'"[47] Douglass recounts how slave owners used food to create divisions on the plantation. Those chosen to live in the house, who were usually considered the most loyal and the best-looking, partook in some of the delicacies afforded to slave owners: meat, vegetables, seafood, fruit, cheese, butter, and cream.[48] Creating rivalry among slaves through unequal food distribution led to an "immense" distinction "between these favored few, and the sorrow and hunger-smitten multitudes of the quarter and the field."[49]

Douglass moved from the plantation to Baltimore when he was eight years old.[50] There, he learned the alphabet from the mistress of the house until her husband forbade her from continuing the lessons.[51] Determined to continue learning, Douglass used bread as currency to buy reading and writing lessons from poor White children in his

[43] *See* Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE J. C.R. & SOC. JUST. 11, 17 (2001).

[44] FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 75 (Nat'l Endowment for the Human. electronic ed.) (New York, Miller, Orton & Mulligan 1855) [hereinafter MY BONDAGE AND MY FREEDOM].

[45] *Id.* at 75-76.

[46] STEVE KINGSTON, FREDERICK DOUGLASS: ABOLITIONIST, LIBERATOR, STATESMEN 6 (1955).

[47] Martyris, *supra* note 24.

[48] *Id.*

[49] DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 44, at 54, 109-10.

[50] *See* Martyris, *supra* note 24.

[51] *Id.*

neighborhood. "This bread I used to bestow upon the hungry little urchins, who, in return, would give me that more valuable bread of knowledge."[52] Similarly, when slave owners allowed for the cultivation of small gardens next to slave quarters, those who planted and cultivated them could benefit from trading or selling their yield.[53]

Even as a fugitive slave in New York, hunger followed Douglass. He describes his time there as free "from slavery, but free from food and shelter as well."[54] In *Sick from Freedom*, Jim Downs explains how food insecurity led to thousands of deaths of freed slaves through malnutrition and starvation.[55] The destruction of agricultural land in the South during the Civil War and through subsequent drought and crop failures increased hunger and reduced opportunities for agricultural labor.[56] The disparities in food insecurity created intentionally during slavery continued as the social structures built after Emancipation failed to address and reduce this inequality.

B. Infant Feeding During Slavery

During slavery, the usurpation of crucial child-rearing decisions from enslaved parents and the disruption of the formation and rhythm of family life were key to oppression. In some cases, slave owners forced their enslaved workers to mate.[57] In others, they prevented them from choosing or staying with the partners they desired.[58] Romantic relationships between Blacks and Whites were not officially permitted during slavery.[59] Racist ideology posited these couplings as harmful to

---

[52] FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 38 (Nat'l Endowment for the Human. electronic ed.) (Boston, Anti-Slavery Office 1845).

[53] *See* LARRY E. HUDSON JR., TO HAVE AND TO HOLD: SLAVE WORK AND FAMILY LIFE IN ANTEBELLUM SOUTH CAROLINA 2-31 (1997).

[54] KINGSTON, *supra* note 46, at 21.

[55] *See* DOWNS, *supra* note 22, at 6; *see also* Harris, *supra* note 25.

[56] *See* DOWNS, *supra* note 22, at 6.

[57] Bridgewater, *supra* note 43, at 14; Thomas A. Foster, *The Sexual Abuse of Black Men Under American Slavery*, 20 J. HIST. SEXUALITY 445, 455-58 (2011); Herbert S. Klein & Stanley L. Engerman, *Fertility Differentials Between Slaves in the United States and the British West Indies: A Note on Lactation Practices and Their Possible Implications*, 35 WM. & MARY Q. 357, 358-59 (1978); Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)Productivity*, 19 YALE J.L. & FEMINISM 1, 21 (2007).

[58] *See* Foster, *supra* note 57, at 455. For a cinematic depiction of this practice, see HARRIET (Perfect World Pictures 2019).

[59] *See, e.g.*, Act Concerning Negroes & Other Slaves, 1664 Md. Laws 533, 533-34 (prohibiting Black men from marrying White women); Act to Preserve Racial Integrity, ch. 371, 1924 Va. Acts 534 (detailing the types of interracial relationships prohibited).

the White race, which would suffer from racial contamination.[60] Anti-miscegenation laws codified this desire for racial purity.[61] Although the Supreme Court declared these laws unconstitutional in *Loving v. Virginia*[62] in 1967, the last state to take them off its books was Alabama, in 2000.[63] However, despite the legal prohibition of interracial relationships, sex between White slave owners and enslaved Black women was a common practice integral to maintaining the system of slavery.

The most reliable and least expensive method for slave owners to increase their workforce was to rape enslaved women and claim their children as property, not progeny. Rape was endemic and systematic on slave plantations.[64] Women had no protection from slave owners' abuses. Then, after giving birth, they had no choice about how to care for, feed, or even whether to keep, their infants. Many slave owners gave infants away to other plantations or separated mothers from their newborns to serve as wet nurses in other households.[65]

In England and Africa, people commonly understood breast milk to be the ideal food for newborns.[66] African women were very close to their infants, often wearing them throughout the day so that they could nurse on demand without interrupting work and other activities.[67] African

See generally Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964) (analyzing the constitutional arguments for and against miscegenation statutes); Kenneth James Lay, *Sexual Racism: A Legacy of Slavery*, 13 NAT'L BLACK L.J. 165 (1993) (discussing how anti-miscegenation statutes of the past legitimized ideas of racial purity and bred the negative attitudes towards interracial marriage and sex that exist today).

60 *See* Applebaum, *supra* note 59, at 72; Lay, *supra* note 59, at 165-67.

61 *See* Applebaum, *supra* note 59, at 50 ("The first miscegenation statute was passed by the Maryland General Assembly in 1661, and was followed by similar statutes in Virginia in 1691, Massachusetts in 1705, North Carolina in 1715, and Pennsylvania in 1725.").

62 388 U.S. 1 (1967).

63 *See* ALA. CONST. art. IV, § 102 (repealed 2000).

64 Tracey Owens Patton & Julie Snyder-Yuly, *Any Four Black Men Will Do: Rape, Race, and the Ultimate Scapegoat*, 37 J. BLACK STUD. 859, 862 (2007); *see also* Foster, *supra* note 57, at 447.

65 *See* WILMA A. DUNAWAY, THE AFRICAN-AMERICAN FAMILY IN SLAVERY AND EMANCIPATION 139 (2003); VALERIE FILDES, WET NURSING: A HISTORY FROM ANTIQUITY TO THE PRESENT 139 (1988); Andrea Freeman, *Unmothering Black Women: Formula Feeding as an Incident of Slavery*, 69 HASTINGS L.J. 1545, 1557 (2018) [hereinafter *Unmothering*].

66 *See* Marylynn Salmon, *The Cultural Significance of Breastfeeding and Infant Care in Early Modern England and America*, 28 J. SOCIETAL HIST. 247, 248-49 (1994).

67 *See* Emily Wax, *In Africa We Carry Our Children So They Feel Loved*, GUARDIAN (June 18, 2004), https://www.theguardian.com/theguardian/2004/jun/18/guardianweekly.guardianweekly12.

mothers customarily nursed for two to three years.[68] English mothers traditionally breastfed for shorter periods, often only for a few weeks.[69]

In America, English settlers believed that Black mothers' milk was better than the breast milk of White mothers, who they perceived to be more delicate and fragile.[70] Slave owners compelled Black women to nurse White babies, leaving the feeding of enslaved mothers' infants to other mothers in the community or sentencing the babies to a diet of gruel.[71] This diet often led to severe malnutrition or death.[72] Even when enslaved new mothers did not serve as wet nurses, slave owners often prevented them from nursing their children for other reasons. They wanted mothers available to perform field or domestic labor, and for further reproduction.[73] Common superstition held that nursing made conception impossible.[74] Limiting or preventing breastfeeding therefore served slave owners' economic interest in creating more slaves quickly, either for themselves or as currency to exchange with other plantations.

---

[68] DUNAWAY, *supra* note 65, at 138 ("West African women nursed children two to three years and abstained from sexual intercourse until the child was weaned."); Freeman, *Unmothering, supra* note 65, at 1556; Klein & Engerman, *supra* note 57, at 358.

[69] *See Breastfeeding in the UK — Position Statement*, ROYAL C. PEDIATRICS & CHILD HEALTH (June 24, 2019), https://www.rcpch.ac.uk/resources/breastfeeding-uk-position-statement. *See generally* P.J. Atkins, *Mother's Milk and Infant Death in Britain, Circa 1900-1940*, ANTHROPOLOGY OF FOOD, Sept. 2003, https://journals.openedition.org/aof/310 [https://perma.cc/H9FC-AFBE].

[70] *See* Emily West & R.J. Knight, *Mother's Milk: Slavery, Wet-Nursing, and Black and White Women in the Antebellum South*, 83 J. S. HIST. 37, 39-40 (2017).

[71] *Id.* at 41.

[72] *See* Richard H. Steckel, *A Peculiar Population: The Nutrition, Health, and Mortality of American Slaves from Childhood to Maturity*, 46 J. ECON. HIST. 721, 732 (1986) ("Manual feeding introduced unsanitary implements and contaminated food or liquid, and the diet emphasized starchy products such as pap and gruel. This diet lacked sufficient protein and was probably deficient in iron and calcium. It is not surprising that the postneonatal infant mortality rate was as high as 162 per thousand in a sample of plantation records."); CHANGING MARKETS FOUND., MILKING IT: HOW MILK FORMULA COMPANIES ARE PUTTING PROFITS BEFORE SCIENCE 15-16 (2017); Steven Mintz, *Childhood and Transatlantic Slavery*, CHILD. & YOUTH IN HIST., http://chnm.gmu.edu/cyh/case-studies/57 (last visited Jan. 4, 2020) [https://perma.cc/7AKW-3A2Y].

[73] Freeman, *Unmothering*, *supra* note 65, at 1556; *see also* NED SUBLETTE & CONSTANCE SUBLETTE, THE AMERICAN SLAVE COAST: A HISTORY OF THE SLAVE-BREEDING INDUSTRY 30-32 (2016) (describing that the practice of "forced mating" during slavery suggests that women being used as breeders would have their children taken away sooner so that they could get pregnant again quickly).

[74] *See* JANET A. FLAMMANG, THE TASTE FOR CIVILIZATION: FOOD, POLITICS, AND CIVIL SOCIETY 138 (2009); Freeman, *Unmothering, supra* note 65, at 1556; Klein & Engerman, *supra* note 57, at 358, 571.

Some slave owners stole Black women's milk to give to White infants.[75] Many English settlers also thought, incorrectly, that African mothers had an immunity to malaria that could be passed on to White babies through breastfeeding.[76]

Enslaved women banded together in efforts to provide babies with breast milk whenever and in any way possible. Particularly in the first few days, access to colostrum, the breast milk that contains the highest amount of anti-immunity properties and nutrients, can have lifelong health benefits.[77] To ensure that infants would benefit from this milk, enslaved women often engaged in cross-nursing, the practice of nursing other women's infants in addition to their own.[78] Community members also covered the duties of new mothers when they could, performing their tasks to free them to nurse on demand as much as possible. These acts of care and community were revolutionary because they were fraught with danger.

Despite this commitment to nourish every new member of the community, choices about infant feeding were often simply out of enslaved parents' control. Black infants died at a rate more than twice as high as White infants in part because of the inability to breastfeed and resulting malnutrition.[79] After slavery, Black mothers continued to face obstacles to breastfeeding. Laws restricted freed slaves to specific professions.[80] Most Black women worked as domestic servants in

[75] *See* West & Knight, *supra* note 70, at 41-42 (quoting MARCUS WOOD, BLACK MILK: IMAGINING SLAVERY IN THE VISUAL CULTURES OF BRAZIL AND AMERICA 2 (2013)) (discussing how white infants were prioritized over the infants of the enslaved wet nurses and that slaves' breast milk was "stolen in vast, unknown, incalculable quantities").

[76] *See* Paula A. Treckel, *Breastfeeding and Maternal Sexuality in Colonial America*, 20 J. INTERDISC. HIST. 25, 49 (1989). This belief was mistaken. Immunity could be transferred through the placenta, but not through breast milk. M. Nathaniel Mead, *Contaminants in Human Milk: Weighing the Risks against the Benefits of Breastfeeding*, 116 ENVTL. HEALTH PERSP. 427, 431 (2008).

[77] *See* David I. Tudehope, *Human Milk and the Nutrition Needs of Preterm Infants*, 162 J. PEDIATRICS S17, S17-S18, S21 (2013); F.O. Uruakpa et al., *Colostrum and Its Benefits: A Review*, 22 NUTRITION RES. 755, 755-58, 762 (2002).

[78] Freeman, *Unmothering*, *supra* note 65, at 1556; DUNAWAY, *supra* note 65, at 136.

[79] *See* Mintz, *supra* note 72.

[80] *See, e.g.*, LA. BLACK CODES § 2 (1865) (repealed 1868) ("Be it further enacted, . . . That persons who have attained the age of majority, whether in this State or any other State of the United States, or in a foreign country, may bind themselves to services to be performed in this country, for the term of five years, on such terms as they may stipulate, as domestic servants and to work on farms, plantations or in manufacturing establishments, which contracts shall be valid and binding on the parties to the same."); S.C. BLACK CODES § LXXII (1865) (repealed 1867) ("No person of color shall pursue or practice the art, trade or business of an artisan, mechanic or shop-keeper, or any other trade, employment or business (besides that of husbandry, or that of a servant under a

conditions that closely resembled those they suffered under during slavery.[81] For meagre pay, Black women often moved into White homes to care for White infants and children as wet nurses and nannies.[82] Even if they did not reside in White homes, they often worked such long days that they would not see their sleeping children during the few hours that they were home, restricting their opportunities to nurse. [83] They may also have been unable to produce sufficient milk to satisfy their babies if they were nursing a White infant at work.

The Black Codes led to the disappearance of many Black men into the carceral system, leaving mothers to fend for themselves.[84] Designed to facilitate the continued operation of a slave system and prevent the loss of Whites' economic advantage after Emancipation, the Black Codes subjected Black men to imprisonment for "crimes" that included loitering in the streets or misspending their time or money.[85] Once in custody, they were subject to compelled labor because of the Thirteenth Amendment's exception to the constitutionality of involuntary servitude for individuals convicted of a crime.[86]

While Black men toiled in prison due to invented charges and guaranteed convictions, Black mothers struggled to support themselves and their children. They found themselves at the mercy of their White employers, subject to sexual assault and other abuses.[87] Under these circumstances, breastfeeding, although not illegal, was impossible. In

contract for service or labor), on his own account and for his own benefit, or in partnership with a white person, or as agent or servant of any person, until he shall have obtained a license therefore from the Judge of the District Court; which license shall be good for one year only.").

81 *See* DUNAWAY, *supra* note 65, at 206; *More Slavery at the South: A Negro Nurse*, *in* PLAIN FOLK: THE LIFE STORIES OF UNDISTINGUISHED AMERICANS 177-85 (David M. Katzman & William M. Tuttle, Jr. eds., 1982) [hereinafter *More Slavery at the South*]; Spencer R. Crew, *The Great Migration of Afro-Americans, 1915-40*, 110 MONTHLY LABOR REV. 34, 36 (1987); Freeman, *Unmothering*, *supra* note 65, at 1561-63.

82 *See* Freeman, *Unmothering, supra* note 65, at 1561-62 (citing *More Slavery at the South*, *supra* note 81, at 178-79, 184-85).

83 *See id.*

84 This continues today. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

85 DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 99-100 (2009).

86 U.S. CONST. amend. XIII, § 2.

87 *See* Patricia A. Broussard, *Black Women's Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systemic Racism — Who Will Tell Her Stories?*, 16 J. GENDER, RACE & JUST. 373, 373-79, 384-85 (2013); Soraya Nadia McDonald, *'The Rape of Recy Taylor' Explores the Little-Known Terror Campaign Against Black Women*, UNDEFEATED (Dec. 14, 2017), https://theundefeated.com/features/the-rape-of-recy-taylor-explores-the-little-known-terror-campaign-against-black-women/.

many cases, it was even more difficult to accomplish than during slavery, when mothers and infants could snatch a few moments together during the day or night. Freed slaves lived in relative isolation, without the community of women that many new mothers depended on to help feed their infants during slavery.

The 1866 Civil Rights Act abolished the Black Codes.[88] By the end of the century, more occupations officially opened up to Black workers,[89] but the majority of Black men did agricultural labor while most Black women worked as domestic servants, well into the twentieth century. When the Great Depression hit in the 1930s, Whites had more to lose during the economic downturn. But many Blacks, already surviving on very little, fell into deep poverty.[90] The New Deal response to the Great Depression was to create social programs to bolster employment and carry families through economic hardship. These innovative programs represented a lost opportunity to uplift Black families along with Whites. The unequal distribution of benefits under social programs designed to facilitate home ownership through loans,[91] reward veterans,[92] support farmers,[93] and provide assistance to people who

[88] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981-1982 (2012)); Freeman, *Unmothering, supra* note 65, at 1562; *see* BLACK CODE, ENCYCLOPAEDIA BRITANNICA (Aug. 20, 2019), https://www.britannica.com/topic/black-code.

[89] *A Brief History of Labor, Race and Solidarity*, LABOR COMM'N ON RACIAL & ECON. JUSTICE, https://racial-justice.aflcio.org/blog/est-aliquid-se-ipsum-flagitiosum-etiamsi-nulla (last visited July 28, 2019); *Black Codes*, HISTORY (June 1, 2010), https://www.history.com/topics/black-history/black-codes#section_2; *Earning a Living as a Free Black in Charleston, South Carolina*, S.C.'S INFO. HIGHWAY, https://www.sciway.net/hist/chicora/freepersons-2.html (last visited July 28, 2019); Jacqueline Jones, *Black Workers Remember*, AMERICAN PROSPECT (Nov. 30, 2000), https://prospect.org/article/black-workers-remember.

[90] *See* DOWN & OUT IN THE GREAT DEPRESSION: LETTERS FROM THE FORGOTTEN MAN 81-94 (Robert S. McElvaine ed., The University of North Carolina Press 2008); Christopher Klein, *Last Hired, First Fired: How the Great Depression Affected African Americans*, HISTORY (Apr. 18, 2018), https://www.history.com/news/last-hired-first-fired-how-the-great-depression-affected-african-americans [https://perma.cc/T6F3-L5JD].

[91] *See* Fair Housing Act, 42 U.S.C. § 1982 (2019); Kevin Fox Gotham, *Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration*, 43 SOC. PERSP. 291, 300 (2000).

[92] *See* Servicemen's Readjustment Act of 1944 (GI Bill), Pub. L. No. 79-268, 59 Stat. 623 (codified as amended in scattered sections of 38 U.S.C. (2019)).

[93] *See* Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649, 649-58 (2014).

could not work[94] generally excluded people of color.[95] Therefore, law and policy continued to reproduce the social and financial inequalities entrenched during and after slavery.

Welfare benefits specifically addressed the problems faced by single mothers. Many men died as soldiers during World War I, leaving wives and children behind. To support these widows' ability to remain in the home and raise their children, the government needed to replace the lost wages of their absent husbands. The idea that White women belonged in the home, not the work force, was firmly entrenched in the popular imagination. There were no corresponding beliefs regarding the proper role of Black mothers.

Instead, since the beginning of slavery, White society demonized Black mothers.[96] The idea that enslaved Black women did not love their children or care for them properly justified their forced separation by slave owners.[97] This false belief made sense of the Mammy myth, which posited that Black mothers were better at taking care of White children than their own.[98] The corresponding view of Black children as

[94] *See* Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections at 42 U.S.C. ch. 7) (2019)). For information on the exclusion of Black farmers from government subsidies and benefits, see generally Austin P. Morris, *Agriculture Labor and National Labor Legislation,* 54 CALIF. L. REV. 1939, 1945 (1966).

[95] *See* Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SECURITY BULL. 49, 49-55 (2010); Freeman, *Unmothering*, *supra* note 65, at 1573; Richard Lyon, *The New Deal: Designed for Jim Crow*, HUFFPOST (Nov. 10, 2012), https://www.huffpost.com/entry/the-new-deal-and-jim-crow_b_1868672?; *A Brief History of Labor, Race and Solidarity*, *supra* note 89.

[96] *See* Freeman, *Unmothering, supra* note 65, at 1577-81; *see, e.g.*, Dorothy E. Roberts, *Race, Gender, and the Value of Mothers' Work*, 2 SOC. POL. 195, 197 (1995) [hereinafter *Mothers' Work*]); *see also* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 16 (2002) [hereinafter ROBERTS, SHATTERED BONDS]; Robin M. Boylorn, *Moonlight Musings & Motherhood: On Paula, Teresa and the Complicated Role of (Bad) Black Mamas in Film*, CRUNK FEMINIST COLLECTIVE (Oct. 28, 2016), http://www.crunkfeministcollective.com/2016/10/28/moonlight-musings-motherhood-on-paula-teresa-and-the-complicated-role-of-bad-black-mamas-in-film/ [https://perma.cc/8Y5Z-TXWR]; David Pilgrim, *The Jezebel Stereotype*, FERRIS ST. U. (July 2002), https://www.ferris.edu/HTMLS/news/jimcrow/jezebel/index.htm. [https://perma.cc/UW2X-B6BC].

[97] *See* Freeman, *Unmothering, supra* note 65, at 1580; Roberts, *Mothers' Work*, *supra* note 96, at 201.

[98] *See* Ann Ferguson, *On Conceiving Motherhood and Sexuality: A Feminist Materialist Approach*, *in* MOTHERING: ESSAYS IN FEMINIST THEORY 169, 171 (Joyce Trebilcot ed., 1984); KIMBERLY WALLACE-SANDERS, MAMMY: A CENTURY OF RACE, GENDER, AND SOUTHERN MEMORY 8 (2009) ("In these characterizations her devotion for the children she cares for is best illustrated by her disregard for her own children."); Freeman, *Unmothering, supra* note 65, at 1580; Roberts, *Mothers' Work*, *supra* note 96, at 197.

unnaturally independent relieved the consciences of those who might fear for their neglect.[99] This misperception persists today, leading to the criminalization of Black boys and sexualization of Black girls.[100]

Politicians, instead of advocating for equal benefits for Black and White mothers, identified Black women as the root of all the problems in the Black community. Ignoring the devastating effects of poverty and racism, they attributed Black struggles to the predominance of single mothers heading households, which they viewed as a cultural defect.[101] Under this paradigm, Black mothers simply were not worthy of social assistance. Crime and poverty were not social ills, but manifestations of poor choices and an inferior culture. Therefore, taxpayers should not waste their money trying to help Black women, who would simply revert to their bad ways, squandering any "handouts" they received. These hateful stereotypes enabled the passage of laws and programs that excluded Black mothers from social assistance, entrenching them in poverty and widening the racial divide. Without state support, Black mothers could not afford to stay home and nurse their babies. Their presence in the work force appeared to some to be a self-fulfilling prophecy, confirming their suitability to labor instead of reflecting unrelenting social discrimination and inequality.

World War II made more jobs available to Black women.[102] The type of work accessible to them also expanded during the Great Migration, during which six million Southern Blacks moved to the North.[103] There, Black mothers often left their homes to work, but not always in the service of Whites' domestic and caregiving needs. Northern cities offered Black women opportunities to work in factories. Also, eventually, the restrictions on who could receive social assistance

99 *See* Freeman, *Unmothering, supra* note 65, at 1577.

100 *See, e.g.*, Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Blacks Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019, 12:30 PM), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non (noting that Black girls are viewed as less innocent and more knowledgeable about sex than their White peers); Zola Ray, *This is the Toy Gun that Got Tamir Rice Killed 3 Years Ago Today*, NEWSWEEK (Nov. 22, 2017, 2:56 PM), https://www.newsweek.com/tamir-rice-police-brutality-toy-gun-720120).

101 *See* Freeman, *Unmothering*, *supra* note 65, at 1581-82; Melissa Harris-Perry, *Bad Black Mothers*, NATION (Nov. 25, 2009), https://www.thenation.com/article/bad-black-mothers/.

102 *Cf.* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 161 (1st ed. 2010) (identifying the labor crisis during World War I as one of the catalysts of a more open work force in the North); Freeman, *Unmothering*, *supra* note 65, at 1563.

103 WILKERSON, *supra* note 102, at 9, 161; Freeman, *Unmothering*, *supra* note 65, at 1563.

loosened, and Black women became eligible in greater numbers.[104] Accompanying this shift was a renewed focus on the allegedly bad influence of matriarchal culture on Black communities. The main proponent of this view was Daniel Moynihan, who produced a 1965 report claiming that Black communities were broken because Black children lacked male role models in the home.[105]

The popularity of this view spread and supported the racist trope of the "Welfare Queen."[106] The Welfare Queen myth has its origins in slavery, when Whites created the archetype of the "Bad Black Mother" to justify the brutal practice of separating Black mothers from their children.[107] The Welfare Queen is a deviant Black single mother. She has children whom she fails to care for because the sole purpose of their existence is to make her eligible for government benefits.[108] She lets the government foot the bill for her extravagant lifestyle and neglects her children's needs.[109] She has a heightened sense of entitlement and an irrepressible sexuality that makes her indifferent to the inevitable products of her wanton sexual activity.[110] Society has to pay the price for her behavior, because she cunningly evades doing so herself. This stereotype opened the door to attaching punitive and unreasonable conditions to the receipt of welfare.

The *Chicago Tribune* introduced the now infamous term in the headline "'Welfare Queen' jailed in Tucson" in an October 12, 1974 article reporting the arrest of Linda Taylor.[111] Taylor's husband, furious because she had taken his television set, tipped authorities off about her whereabouts. When apprehended in Arizona, Taylor was still receiving

---

104 *See* Premilla Nadasen, *From Widow to "Welfare Queen": Welfare and the Politics of Race*, BLACK WOMEN, GENDER + FAMILIES, Fall 2007, at 52, 69.

105 DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 29 (1965), https://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf [https://perma.cc/M3Q5-9BVC]; Freeman, *Unmothering*, *supra* note 65, at 1582.

106 *See* Freeman, *Unmothering*, *supra* note 65, at 1579.

107 *See id.* at 1577, 1579.

108 *See* VIVYAN ADAIR, FROM GOOD MA TO WELFARE QUEEN: A GENEALOGY OF THE POOR WOMAN IN AMERICAN LITERATURE, PHOTOGRAPHY, AND CULTURE 1-3 (2000); Carly Hayden Foster, *The Welfare Queen: Race, Gender, Class, and Public Opinion*, 15 RACE, GENDER & CLASS 162, 162-63 (2008); Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 258-61 (2014).

109 *See* ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 10 (2004).

110 *See* Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 260 (2016).

111 George Bliss, *'Welfare Queen' Jailed in Tucson*, CHI. TRIB., Oct. 12, 1974, at 3.

welfare checks from Illinois.[112] She owned four buildings in South Side Chicago, had over fifty aliases, three cars, and tickets to Hawai'i.[113] Ronald Reagan popularized Taylor's story in 1974 and the Welfare Queen myth on the campaign trail a couple of years later.[114]

The introduction of the Welfare Queen into the popular imagination engendered support for radical changes to social benefit programs. When the federal welfare program began in 1935, the common image of a woman on welfare was that of a Madonna-like White mother who relied on society's support to fulfill her important caretaking roles.[115] At first, Black women did not receive welfare. Because they had always worked, they appeared self-sufficient and undeserving of state assistance.[116] Even if the state had wanted to help Black families out of poverty at that time, the task was too overwhelming.

Later, when welfare benefits extended to unmarried and darker-skinned women, social attitudes toward the program shifted.[117] The initial goal of welfare was to raise children out of poverty. As the color of program participants changed, instead of focusing on children's needs, critics began to view welfare as a reward for some mothers' careless behavior.[118] A White woman who stayed home to care for her children was selfless. A Black woman who stayed home with her kids was lazy. The concept of welfare became void of its original association with the idea of women's, children's, and society's well-being.[119]

Instead of an appropriate government response to entrenched structural inequalities, people came to see welfare as a free handout for undeserving scammers. Since Reagan first invoked the specter of the Welfare Queen, Republicans and Democrats alike have relied on the trope to support welfare cuts.[120] Media, from newspaper articles to

---

112 *See id.*

113 *See id.*

114 *See* Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html.

115 Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 415 (1999).

116 *See* R.A. Lenhardt, *Black Citizenship Through Marriage? Reflections on the Moynihan Report at Fifty*, 25 S. CAL. INTERDISC. L.J. 347, 348-49 (2016); Nadasen, *supra* note 104, at 53.

117 *See* Nadasen, *supra* note 104, at 57-58.

118 *See* Brito, *supra* note 115, at 418.

119 *See* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 1 (2011).

120 *See* Rich, *supra* note 110, at 261 ("[T]he welfare queen construct is used to demonize poor women of color in need of state assistance."); *see also* Nathan J.

Google search results, add to the stereotype by almost exclusively illustrating stories about welfare with images of Black women.[121] This practice misleads media consumers into equating welfare with Blackness[122] and favoring more stringent demands on program recipients.[123] Welfare-to-work thus arose out of a racially-motivated movement to restrict benefits and end perceived hand-outs. This reform reduced Black women's ability to nurse their babies, widening the disparity in breastfeeding rates between Black and White mothers.

Although welfare has always gone to much greater numbers of White than Black women,[124] the social perception that Black women are its

Robinson, *It Didn't Pay Off*, JACOBIN (Oct. 1, 2016), https://www.jacobinmag.com/2016/10/clinton-welfare-reform-prwora-tanf-lillie-harden/ (discussing Bill Clinton's misguided welfare reform). For reactions to the Clinton administration's welfare reform, see Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES (Aug. 23, 1996), http://www.nytimes.com/1996/08/23/us/clinton-signs-bill-cutting-welfare-states-in-new-role.html.

121 *See, e.g.*, ADAIR, *supra* note 108, at 1-2; Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 255-56 (2014); Gilman, *supra* note 108, at 247-48; Ange-Marie Hancock, *Contemporary Welfare Reform and the Public Identity of the "Welfare Queen,"* 10 RACE, GENDER & CLASS 31, 31-32 (2003) (explaining that "single poor Africa-American mothers" are viewed "as a proxy for welfare recipients in general"); Franklin D. Gilliam, Jr., *The 'Welfare Queen' Experiment: How Viewers React to Images of African-American Mothers on Welfare*, NIEMAN REP. (June 15, 1999), https://niemanreports.org/articles/the-welfare-queen-experiment/ (noting a study that found "by seeing a black welfare mother in the television news, viewers were more likely to attribute the cause of her poverty to individual failings"); Harris-Perry, *supra* note 101; Sarah Jaffe, *GOP's "Bad Black Mother" Myth: Meet the Modern-day "Welfare Queens,"* SALON (Aug. 6, 2014, 3:44 PM), http://www.salon.com/2014/08/06/gops_bad_black_mother_myth_meet_the_modern_day_welfare_queens/ (recounting that "the 1990s 'welfare reform' law enhanced surveillance of poor mothers and added to the stigma that already existed"); Levin, *supra* note 114 (describing perceptions of the welfare queen "[]as a lazy black con artist, unashamed of cadging the money that honest folks worked so hard to earn").

122 "[W]hen presented with the image of a Black mother on welfare, viewers commonly attributed her need for benefits to her own personal failings instead of to public policy, historical discrimination, or any other structural factor." Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1112-13 (2017) [hereinafter *Racism*] (citing SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN PERCEPTION 39-42 (1987)); *see also* HANCOCK, *supra* note 109, at 2.

123 *See* FRANKLIN D. GILLIAM, JR., FRAMEWORKS INST., THE ARCHITECTURE OF A NEW RACIAL DISCOURSE 11-13 (2006), http://frameworksinstitute.org/assets/files/PDF_race/message_memo_race.pdf [https://perma.cc/2AC3-KWUE] (finding that repeated exposure to the narrative that equates poverty and Black motherhood led to and reinforced the view that receiving welfare is a result of personal failing and that the government should cut spending on welfare).

124 *See* Freeman, *Unmothering, supra* note 65, at 1582; Karen McCormack, *Resisting the Welfare Mother: The Power of Welfare Discourse and Tactics of Resistance*, 30 CRITICAL

primary recipients has led to support for imposing conditions on participants. These conditions include time limits and work requirements. Welfare offices have enforced sanctions against recipients who are not in compliance with these conditions in a racially unbalanced way.

II. THE IDEOLOGY, MECHANICS, AND EFFECTS OF WORK REQUIREMENTS

In some cases, work requirements result in slight increases in employment rates.[125] Generally, they fail to lift families out of poverty, primarily because they do not provide effective job training, educational opportunities, or pathways to skilled work.[126] Nonetheless, the consequences of failing to comply with work requirements have dramatic effects. Without food assistance, financial support, or work, many people must eat cheap, non-nutritious food, or starve. They may lose their homes or cars and find it impossible to make their way onto their feet again.

The 1935 Social Security Act was the first law to provide for the distribution of cash assistance to poor citizens.[127] The Social Security Act created programs to provide the elderly and unemployed with social insurance in addition to grants for states to disburse benefits to the blind and the aged, and to impoverished families with children.[128] Only citizens in need could receive these benefits. There was no expectation that they would work. Similarly, the first food assistance programs did not demand anything of their recipients. Over time, attitudes toward social assistance changed, leading to the introduction of work requirements. This Part describes the political foundations of work requirements. Next, it details the mechanics of Temporary Assistance

SOC. 355, 361 (2004) ("The dominant image of a welfare mother is of a young, black woman, living in the inner city with a large family. While white recipients represented 39% of AFDC recipients in 1993, Blacks 37%, and Latinos (of any race) 18%, the imaginary welfare mother is black.").

125 *See* LADONNA PAVETTI, CTR. ON BUDGET & POL'Y PRIORITIES, TANF STUDIES SHOW WORK REQUIREMENT PROPOSALS FOR OTHER PROGRAMS WOULD HARM MILLIONS, DO LITTLE TO INCREASE WORK 9-10 (2018) [hereinafter TANF STUDIES], https://www.cbpp.org/sites/default/files/atoms/files/11-13-18tanf.pdf.

126 *See* PAVETTI, WORK REQUIREMENTS, *supra* note 17, at 1, 7-8.

127 Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections at 42 U.S.C.) (2019)).

128 GENE FALK ET AL., CONG. RES. SERV., WORK REQUIREMENTS, TIME LIMITS, AND WORK INCENTIVES IN TANF, SNAP, AND HOUSING ASSISTANCE 4 (2014), https://greenbook-waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/R43400_gb.pdf [https://perma.cc/CUV3-TWGS].

for Needy Families ("TANF") and SNAP work requirements. Finally, it explains how these work requirements benefit industries and corporations with close ties to the government.

A. Political and Philosophical Foundations of Work Requirements

Attaching work requirements to the receipt of government benefits reflects a belief that social assistance is not a right associated with citizenship but a gift that its recipients must earn. Capitalism provides the political and philosophical foundations for this view. To function properly, capitalism requires a certain percentage of the population to be poor. Their poverty is not accidental or surprising, it is built into and necessary to the system. It is not a reflection of poor individuals' choices or capabilities, only an accident of their birth and social circumstances. It arises from a confluence of factors that can include race, geography, access to education, immigration status, physical abilities, and more. From this perspective, the idea that welfare recipients should work to earn government support is absurd at best. In many countries, people consider the provision of a social safety net one of the fundamental roles of government. In countries that recognize this duty, such as Canada and Norway, there is less social and financial inequality than in the United States.[129]

In contrast, U.S. political leaders embrace a pull-yourself-up-by-the-bootstraps, personal responsibility ethic. This was true even under President Barack Obama, who, as a law professor, taught about the intersection of systemic racism and poverty.[130] Under this punishing, individualistic paradigm, benefits are nothing more than an entitlement or hand-out to the undeserving poor, who will likely squander it upon receipt. Four rationales that reflect this perspective undergird work requirements: (1) countering the disincentive to work that disbursing "free money" might create; (2) demonstrating the government's commitment to a culture of work, instead of one of dependency; (3) saving taxpayer money by weeding out the lazy from the truly needy; and (4) fighting poverty by ensuring an income for more families.[131]

---

[129] *See* Ann Jones, *After I Lived in Norway, America Felt Backward. Here's Why*, NATION (Jan. 28, 2016), https://www.thenation.com/article/after-i-lived-in-norway-america-felt-backward-heres-why/.

[130] *See* Steven Gray, *A Tale of Two Speeches: Is Obama Closeting America's Black Experience?*, TIME (Oct. 3, 2011), http://swampland.time.com/2011/10/03/a-tale-of-two-speeches-is-obama-closeting-americas-black-experience/; Jodi Kantor, *As a Professor, Obama Enthralled Students and Puzzled Faculty*, HISTORY NEWS NETWORK (July 30, 2008), https://historynewsnetwork.org/article/52846 [https://perma.cc/7QEF-WCZP].

[131] FALK ET AL., *supra* note 128, at 2.

These justifications primarily highlight the political, not practical, nature of work requirements. They overlook many of the realities facing individuals who receive social assistance. They also fail to acknowledge that these justifications rely largely on racial and gender stereotypes.

For example, the idea embodied by the first two rationales, that social assistance creates disincentives to work and a culture of dependency, depends on the view that labor can only take place in a market outside the home. This definition reflects the devaluation of work that occurs inside the home, which has traditionally fallen on women to perform.[132] In many cases, however, domestic labor is more taxing and more valuable than work performed outside the home. Nonetheless, the U.S. government has consistently failed to recognize work in the domestic sphere, including childcare, elder care, care for sick people, and maintenance of the home through tasks such as cooking and cleaning, as legitimate labor.[133] The proposition that work requirements are necessary to ensure that welfare recipients engage in "real" work is thus a manifestation of sexism. This sexism ultimately results not in a more productive population of program participants, but in doubled or tripled work demands on recipients.[134] Despite this reality, failure to meet work requirements can trigger the reduction or loss of benefits essential to food security and survival.

The second common justification for work requirements, privileging the ideal of work over the danger of dependency, presents a false choice. Work and dependency can and often do coexist. Many Americans who receive some form of social assistance, such as Medicaid or food stamps, are employed.[135] They simply do not make a living wage at their jobs. Reasons for the inadequacy of their incomes may include the absence of a minimum wage law in their state,[136] policies of corporate employers such as Walmart that offer only part time jobs so that it will not have to pay employee benefits,[137] and lack of access to education and training

---

[132] *See id.*

[133] *See* James Lin, *A Greedy Institution: Domestic Workers and a Legacy of Legislative Exclusion*, 36 FORDHAM INT'L L.J. 706, 706-14 (2013).

[134] *See* GUSTAFSON, *supra* note 119, at 46-47.

[135] *See* BRYNNE KEITH-JENNINGS & RAHEEM CHAUDHRY, CTR. ON BUDGET & POL'Y PRIORITIES, MOST WORKING-AGE SNAP PARTICIPANTS WORK, BUT OFTEN IN UNSTABLE JOBS 2 (2018), https://www.cbpp.org/sites/default/files/atoms/files/3-15-18fa.pdf [https://perma.cc/SD3B-KXEK].

[136] The house passed a minimum wage bill recently. Raise the Wage Act, H.R. 582, 116th Cong. (2019).

[137] *See* Nandita Bose, *Half of Walmart's Workforce are Part-Time Workers: Labor Group*, REUTERS (May 25, 2018, 8:16 AM), https://www.reuters.com/article/us-walmart-workers/half-of-walmarts-workforce-are-part-time-workers-labor-group-idUSKCN1IQ295;

for higher paying jobs.[138] These are factors beyond an individual's control. No one wants to find themselves in a position where they lack the ability to provide for themselves or others who depend on them.

The idea of a culture of dependency or work is a rhetorical device that does not reflect a true relationship.[139] It is merely a coded way to perpetuate racial beliefs, such as that Mexicans or Blacks are lazy. All cultures value contributions to society and community through labor.[140] The idea that certain cultures or communities cultivate dependency is rooted in racial stereotyping. In the United States, this myth originated in slavery to justify the institution. The trope that Blacks were naturally lazy and therefore needed Whites to force them to be productive supported White brutality and alleviated White guilt. It continues to serve that purpose today for some scholars who argue that Blacks were "better off" as slaves than they would have been as free people, because slave owners provided them with food and shelter.[141]

After slavery, the myth of lazy Blacks justified the Black Codes, laws applied to freed slaves that criminalized idleness and vagrancy.[142] In the twentieth century, documents such as the Moynihan Report underscored Blacks' natural tendency to avoid work and linked it to other "anti-social" behaviors such as having children out of wedlock.[143] Charles Murray argued that welfare was bad for Blacks, because it eliminated their motivation to work.[144] Work requirements are another

Hiroko Tabuchi, *Walmart to End Health Coverage for 30,000 Part-Time Workers*, N.Y. TIMES (Oct. 7, 2014), https://www.nytimes.com/2014/10/08/business/30000-lose-health-care-coverage-at-walmart.htm.

138 *See* FALK ET AL., *supra* note 128, at 27. Other factors may include factory closures or decreases in imports due to trade wars.

139 *See* Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1578 (1996) [hereinafter *Black Citizenship*].

140 *See, e.g.*, Francesco Giavazzi et al., *Culture, Policies and Labor Market Outcomes* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 15417, 2009), https://www.nber.org/papers/w15417.pdf [https://perma.cc/37RR-AV7Y] (examining whether cultural attitudes are significant determinants of the evolution of employment rates); *see also* Glenn C. Loury, *Why Does Racial Inequality Persist?: Culture, Causation, and Responsibility*, MANHATTAN INST. (May 7, 2019), https://www.manhattan-institute.org/racial-inequality-in-america-post-jim-crow-segregation.

141 *See* Clyde Wilson, *John C. Calhoun and Slavery as a "Positive Good:" What He Said*, ABBEVILLE INST. (June 26, 2014), https://www.abbevilleinstitute.org/clyde-wilson-library/john-c-calhoun-and-slavery-as-a-positive-good-what-he-said/.

142 *See* Nadra Kareem Nittle, *The Black Codes and Why They Matter Today*, THOUGHTCO. (Oct. 20, 2019), https://www.thoughtco.com/the-black-codes-4125744 [https://perma.cc/KFE4-KAMQ].

143 *See* MOYNIHAN, *supra* note 105, at 5-9.

144 CHARLES A. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980, at 81-82 (1984).

manifestation of the racial stereotypes that posit Whites as possessing an inherent work ethic and Blacks as lacking one.

Some work requirement advocates frame the argument that the government should not promote a culture of dependency as a benevolent one, designed to help social assistance recipients of color avoid the stigma that can attach to benefits.[145] This argument is somewhat circular. If welfare were acknowledged as a solution to systemic failures, not as a symbol of personal inadequacies, stigma would not attach to recipients. Instead of approaching the problem from this view, opponents decry the "inevitable" loss of self-esteem that accrues to welfare program participants because of others' perception that they cannot function well in society.[146]

This argument evoking stigma as a caution against leveling the social playing field is also central to the affirmative action debate. Affirmative action opponents, including Justice Clarence Thomas, assert that the stigma associated with affirmative action is more harmful than dismantling the program altogether.[147] Extended to the context of work requirements, this proposition seems particularly unreasonable. Recipients of welfare and food assistance run the risks of extreme poverty, houselessness, hunger, illness, and death. If they did not receive these benefits, their very survival would be threatened. The harm of stigma is de minimis in comparison. It is apples to the oranges of basic necessities.

The third rationale, that it is important to conserve taxpayer money for the neediest individuals, presents another false dichotomy, akin to the choice between work and dependency. There are enough funds in government coffers to assist all families in need, if legislators and administrators prioritize that use of the treasury.[148]

Finally, the fourth justification, combatting poverty through work requirements, represents an exceedingly poor method of putatively

---

[145] *See* PAUL SPICKER, STIGMA AND SOCIAL WELFARE 25, 45 (2011).

[146] *See id.*

[147] *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 333-34 (2013) (Thomas, J., concurring); Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part); Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 788 (2005). In Justice Thomas's case, his view likely stems from personal negative experiences that he experienced from a position of privilege at Yale Law School and as a Supreme Court Justice.

[148] There is no shortage of examples of plentiful budgets for executive priorities. The appropriation of $2.5 million from the Pentagon's budget to build parts of a border wall with Mexico is one. Another is the allocation of $16.5 billion to soy bean farmers to alleviate the damage caused by the Trump administration's trade war with China.

achieving this goal. If government assistance programs truly aimed to alleviate or eradicate poverty, they would provide meaningful resources to help participants gain sustainable employment, such as job training and education.[149] Instead, work programs associated with welfare and SNAP pigeonhole participants in dead-end jobs that provide minimal income, no opportunities for advancement, and no path to self-sufficiency.[150]

Work requirements often mandate recipients to participate in job search, job training, education, employment, and/or community engagement activities.[151] TANF has the strictest requirements of any social assistance program, requiring states to engage their participants in work, with few exceptions, and to sanction participants who fail to comply by decreasing or withdrawing their benefits. States that do not follow these guidelines risk losing their federal block grants.

Federal law allows states to exempt parents caring for a child under one year old from work requirements but does not require them to do so.[152] The more individuals who are exempt from the requirements, the greater chance states have of not meeting federal conditions on funding. TANF does not require states to sanction parents or caregivers of children under six if no child care is available.[153] Able-bodied adults without dependents ("ABAWD") are eligible to receive SNAP for three months out of thirty-six unless they are working or participating in work-related activities for at least twenty hours a week.[154] The following Sections outline how welfare and SNAP work requirements impact social assistance recipients.

---

[149] *See* Aneel Karnani, *Reducing Poverty Through Employment*, 6 INNOVATIONS 73, 75 (2011).

[150] *See* McMillan, *supra* note 5; Alana Semuels, *The End of Welfare as We Know It*, ATLANTIC (Apr. 1, 2016), https://www.theatlantic.com/business/archive/2016/04/the-end-of-welfare-as-we-know-it/476322/.

[151] DIANE K. LEVY ET AL., URBAN INST., PUBLIC HOUSING WORK REQUIREMENTS 3 (2019), https://www.urban.org/sites/default/files/publication/100100/public_housing_works_requirements.pdf [https://perma.cc/BL9Q-6YMF] [hereinafter PUBLIC HOUSING WORK REQUIREMENTS] (citing FALK ET AL., *supra* note 128, at 8-12 and HAHN ET AL., URBAN INST., WORK REQUIREMENTS IN SOCIAL SAFETY NET PROGRAMS 2 (2017)).

[152] *See* FALK ET AL., *supra* note 128, at 11.

[153] *Id.*

[154] *Id.* at 13.

B. TANF Work Requirements

Aid to Families with Dependent Children ("AFDC"), the law preceding TANF, did not contemplate that its recipients would work.[155] AFDC gave "Mothers' Pensions" to single parents.[156] The Social Security Act provided federal funding for these programs, labeled "defense measures for children" by the Committee on Economic Security that proposed and developed them.[157] The pensions were "designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society."[158] This care and concern for children was directed at White mothers, the intended recipients of the pensions.[159]

As more mothers of color entered the program, the idea that it should include work requirements grew.[160] In 1996, the introduction of additional work requirements as part of program reform accompanied the conversion of AFDC into the TANF block grant.[161] TANF requires states to engage a specified percentage of families in particular work-related activities for a minimum number of hours.[162] These activities include job searches, community service, and unpaid work experience programs.[163] Single mothers with pre-school age children must devote

155 *See id.* at 4.

156 *See id.* at 4 n.7.

157 *Id.*

158 *Id.* at 4 n.7 (citing COMMITTEE ON ECONOMIC SECURITY, REPORT TO THE PRESIDENT 36 (1935)).

159 Roberts, *Black Citizenship*, *supra* note 139, at 1570-71.

160 *See id.* at 1572 ("As AFDC became increasingly associated with Black mothers . . . it became increasingly burdened with behavior modifications, work requirements, and reduced effective benefit levels.").

161 *See* FALK ET AL., *supra* note 128, at 4-5.

162 *Id.* at 11 ("The percentage varies based on the caseload reduction the state has experienced."); *see* CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: AN INTRODUCTION TO TANF 4 (2018) https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf [https://perma.cc/V6R8-EBPJ] [hereinafter POLICY BASICS] ("For a state to meet the federal work rates, half of the families receiving TANF cash assistance must be engaged in a work activity for at least 30 hours a week (20 hours a week for single parents with children under the age of 6). States also must have 90 percent of two-parent families engaged in work, generally for 35 hours per week.").

163 FALK ET AL., *supra* note 128, at 9.

at least twenty hours a week to these activities.[164] Approximately 40% of TANF recipients participate in work activities.[165]

TANF's work requirements likely contributed to steep drop-offs in welfare recipients. Between 1994 and 2009, the number of families receiving TANF dropped by two thirds, from 82% of eligible families participating to 32%.[166] Some of this drop is attributable to the removal of families through sanctions for failure to meet work requirements. The decrease may also reflect work requirements' role as a deterrent. In 2010, 260,000 families lost their assistance due to failure to comply with work requirements.[167] Only 25,000 families ran afoul of time limits.[168] States increased the number of full-family sanctions that they enforce, simply eliminating entire families in need for lack of compliance.[169] By 2012, forty-six states adopted full-family sanctions.[170]

The program's disregard for the well-being of its recipients is clearest in the application of sanctions that remove assistance from its neediest participants, who do not or cannot work. Sanctions represent a viable form of leverage to force compliance, but they rely on an assumption that failure to do so represents a rational choice, not circumstances beyond a recipient's control or even irrational decision-making. Sanctions do not account for the children's and mothers' needs that initially motivated the welfare program. Instead, they reflect the goal of reducing the number of single mothers who receive assistance. This

164 *Id.* at 12.

165 *See id.* at 16; POLICY BASICS, *supra* note 162, at 4 (comparing the requirement of 50% of families and 90% of two-parent families, which varies by state due to caseload reduction); *Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 2010*, OFF. OF FAM. ASSISTANCE (Aug. 8, 2012), https://www.acf.hhs.gov/ofa/resource/character/fy2010/fy2010-chap10-ys-final [https://perma.cc/F87L-2WRA] [hereinafter OFA REPORT] ("In FY 2010, work participation was mandatory for three of every five adult recipients. Overall, 41.6 percent of all TANF adult recipients participated in some type of work activity during the reporting month.").

166 FALK ET AL., *supra* note 128, at 16-19.

167 *Id.* at 20. According to a total average monthly population assessed by the administrative agency overseeing the TANF program, this means around 14% of TANF families lost their assistance due to failure to comply. *See generally* OFA REPORT, *supra* note 165 (stating that the average monthly number of TANF families was 1,847,155 during fiscal year 2010).

168 FALK ET AL., *supra* note 128, at 20; *see also* OFA REPORT, *supra* note 165 (stating around 1.3% of closures ran afoul of federally imposed time limits).

169 *See* FALK ET AL., *supra* note 128, at 25.

170 *Id.* at 25-26. Despite the overwhelming majority of states adopting such sanctions, California and New York — who in 2012 were home to a combined 39% of total TANF recipients nationally — reduced rather than ended benefits for non-compliant families. *Id.* at 26.

objective is in line with the program's lack of emphasis on training and education. It does not seek to create more skilled or lucrative opportunities for participants already engaged in the workforce, only to conserve government resources.

In 1996, Congress instituted significant reforms to the welfare system through the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). The PRWORA dismantled AFDC[171] and replaced it with TANF.[172] Part of the putative motivation behind this change was the desire to create a path from welfare to work. The stated goals of TANF are to:

> (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.[173]

Many aspects of these purported goals are problematic from a race and class perspective. Most glaringly, the emphasis on the importance of marriage and its relationship to prosperity and parenthood appears to express a preference for the traditional nuclear family. This type of "model" family exists primarily in the White and Asian middle classes.[174] Yet Black women and single mothers are overrepresented in the program.[175] Modern reality is that two-parent, married households are falling out of favor. In 2015, the Pew Research Center reported that less than half of children in the United States live with two parents who

---

[171] The AFDC (then known as ADC, or Aid to Dependent Children) was established by the Social Security Act of 1935. *See* Social Security Act, Pub. L. No. 74-271, §§ 401-406, 49 Stat. 620, 627-29 (1935).

[172] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 103, 401, 110 Stat. 2105, 2112-13 (1996).

[173] 42 U.S.C. § 601(a) (2019).

[174] Seventy-eight percent of White children are living in a nuclear family (i.e., two-parent household), a stark contrast to the 38% of Black children who live in a nuclear family model. PEW RESEARCH CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 18-19 (2015), https://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf.

[175] The proportion of Black women receiving TANF benefits "far outstrips" their representation in the general population. *See* ANNA MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION 262 (2007).

are in their first marriage.[176] Another change documented in the report is that women have become the primary breadwinners in many households.[177]

The first stated goal of the program, to keep children cared for in their own homes, conflicts with its practical effect of sending new mothers out of the home to work. Most low-wage jobs held by women on welfare do not provide sufficient accommodations for mothers to express milk at work.[178] Pumping requires a private space, a refrigerator, and paid breaks.[179] Without these, most women must turn to formula feeding while they are away from home. Even if they try to continue breastfeeding during the hours that they are at home, supplementing with formula during their time at work diminishes their supply of breast milk because the body produces milk to match an infant's demand, signaled by how often and how much the baby drinks. Inadequate milk results in frustration for parents and infants, often making it easier or necessary to stop altogether.

The most significant change from AFDC to TANF was the ability that TANF gave to states to fashion their own work requirements and sanctions, resulting in a wide range of divergent practices across states.[180] TANF accords states significant latitude to impose conditions on welfare recipients, including lifetime limits on receiving welfare.[181] Under this new regime, states *may* create exemptions to the work requirements for mothers of young children, in the form of an age-of-youngest-child exemption ("AYCE").[182] Under AFDC, the baseline was that mothers with children under three years old did not have to work

176 PEW RESEARCH CTR., *supra* note 174, at 17 (finding that just 46% of children are living with parents who are both in their first marriage).

177 *Id.* at 25.

178 *See* Andrea Freeman, *"First Food" Justice: Racial Disparities in Infant Feeding as Food Oppression*, 83 FORDHAM L. REV. 3053, 3061-62 (2015) [hereinafter *First Food*].

179 *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE ON WOMEN'S HEALTH, YOUR GUIDE TO BREASTFEEDING 40-46, https://www.womenshealth.gov/files/documents/your-guide-to-breastfeeding.pdf (last visited Oct. 6, 2019).

180 *See* POLICY BASICS, *supra* note 162, at 4-5.

181 *See id.* at 3-4.

182 *See* 42 U.S.C. § 607(b)(5) (2019) ("For any fiscal year, a State may, at its option, not require an individual who is a single custodial parent caring for a child who has not attained 12 months of age to engage in work, and may disregard such an individual in determining the participation rates under subsection (a) for not more than 12 months.").

outside the home to receive benefits.[183] States had the option of lowering that age to two years old or one year old, but no younger.[184]

After 1996, under TANF, states can elect to give no AYCE. Consequently, many states provide less than the available twelve-month AYCE. [185] For example, four states provide new mothers with no exemption.[186] Michigan requires women to report to work once their babies turn eight weeks old.[187] Nineteen states have an AYCE of less than twelve months.[188] Exemptions also vary according to how many children a woman has, giving the most time for the first child and significantly less for each additional child,[189] although a child's care needs do not differ according to how many siblings they have. Instead,

---

183 *See* Family Support Act of 1988, Pub. L. No. 100-485, sec. 201, § 402(a)(19)(C), 102 Stat. 2343, 2356 (repealed by amendment in 1996). *See also* H. COMM. ON WAYS AND MEANS, 104TH CONG., 1996 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 411 (Comm. Print 1996) [hereinafter AFDC BACKGROUND MATERIAL] ("To the extent resources are available, a State must require non-exempt AFDC recipients to participate in the JOBS Program. Exempt applicants and recipients may participate on a voluntary basis. Exempt are persons who are . . . the parent or other relative of a child under age 3 who is personally providing care for the child (or, if provided in the State plan, any age that is less than 3 but not less than 1) . . . .").

184 § 201, 102 Stat. at 2356-57; *see also* AFDC BACKGROUND MATERIAL, *supra* note 183, at 411 ("[Forty] jurisdictions exempt the parents of a child under [three]; four lower the age threshold to age [two] (Connecticut, New Jersey, the Virgin Islands, and Wisconsin); and ten lower the threshold to age [one] (Arizona, Arkansas, Colorado, Louisiana, Michigan, Nebraska, Oklahoma, Oregon, South Dakota, and Wyoming). In fiscal year 1994, 40.5 percent of AFDC families had a child below age [three], and 12.6 percent had a child below age [one] (including 1.8 percent who were unborn).").

185 *See* 42 U.S.C. § 607(b)(5); *see also* Chris M. Herbst, *Are Parental Welfare Work Requirements Good for Disadvantaged Children? Evidence from Age-of-Youngest-Child Exemptions*, 36 J. POL'Y ANALYSIS & MGMT. 327, 330 (2016) [hereinafter *Parental Welfare*] ("[T]he 1996 legislation stipulates that states *may, but are not required to*, exempt mothers with young children from participating in work-related activities. The law's flexibility had the effect of both reducing the average length of and increasing the variation in AYCEs across the states." (emphasis added)).

186 *See* Chris M. Herbst, *How Do Parental Welfare Work Requirements Affect Children?*, FOCUS, Spring 2018, at 6, 7 [hereinafter *Affect Children*]. *See* Elizabeth Lower-Basch & Stephanie Schmit, *TANF and the First Year of Life: Making a Difference at a Pivotal Moment,* CLASP, Oct. 2015, at 1, 38-39, https://www.clasp.org/sites/default/files/public/resources-and-publications/body/TANF-and-the-First-Year-of-Life_Making-a-Difference-at-a-Pivotal-Moment.pdf.

187 *See Work Rules and Penalties*, MICH. DEP'T OF HEALTH & HUMAN SERVS., https://www.michigan.gov/mdhhs/0,5885,7-339-71547_5526_7028_7064-280420--,00.html (last visited Jan. 4, 2020) [https://perma.cc/KLW4-LBS7].

188 *See* Herbst, *Parental Welfare*, *supra* note 185, at 330; Herbst, *Affect Children*, *supra* note 186, at 6-7.

189 *See* Lower-Basch & Schmit, *supra* note 186.

they likely increase. Education level also affects exemptions in some states.[190]

TANF introduced harsh sanctions for failing to abide by work requirements and mandated their enforcement. TANF dictates that states must reduce or terminate assistance to recipients who do not fulfill their job requirements.[191] There is a narrow exception for single parents who cannot find adequate childcare.[192] Under this new regime, states disproportionately sanction Black families.[193] These sanctions can

---

[190] *See* Dan Kopf, *A Third of Americans Don't Get Paid Vacation*, QUARTZ (Sept. 4, 2019), https://qz.com/1702181/; Herbst, *Affect Children*, *supra* note 186, at 6-7.

[191] *See* 45 C.F.R. §§ 261.14-261.16 (2019). Section 261.14 provides:

> (a) If an individual refuses to engage in work required under section 407 of the Act, the State must reduce or terminate the amount of assistance payable to the family, subject to any good cause or other exceptions the State may establish. Such a reduction is governed by the provisions of § 261.16.
>
> (b) (1) The State must, at a minimum, reduce the amount of assistance otherwise payable to the family pro rata with respect to any period during the month in which the individual refuses to work. (2) The State may impose a greater reduction, including terminating assistance.
>
> (c) A State that fails to impose penalties on individuals in accordance with the provisions of section 407(e) of the Act may be subject to the State penalty specified at § 261.54. *Id.*
>
> Section 261.16 provides: "A penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under TANF shall not be construed to be a reduction in any wage paid to the individual." 45 C.F.R. § 261.16 (2019).

[192] *See* 45 C.F.R. § 261.56 (2019). Section 261.56 provides:

> What happens if a parent cannot obtain needed child care?
>
> (a)(1) If the individual is a single custodial parent caring for a child under age six, the State may not reduce or terminate assistance based on the parent's refusal to engage in required work if he or she demonstrates an inability to obtain needed child care for one or more of the following reasons: (i) Appropriate child care within a reasonable distance from the home or work site is unavailable; (ii) Informal child care by a relative or under other arrangements is unavailable or unsuitable; or (iii) Appropriate and affordable formal child care arrangements are unavailable. (2) Refusal to work when an acceptable form of child care is available is not protected from sanctioning. *Id.*

[193] *See* LADONNA PAVETTI ET AL., MATHEMATICA POL'Y RESEARCH, INC., THE USE OF TANF WORK-ORIENTED SANCTIONS IN ILLINOIS, NEW JERSEY, AND SOUTH CAROLINA 33 (2004), https://aspe.hhs.gov/system/files/pdf/73576/report.pdf ("[T]ANF recipients who are sanctioned are more likely to have characteristics that are associated with longer welfare stays and lower rates of employment . . . . [A]frican Americans are more likely to be sanctioned than other racial and ethnic groups . . . .").

be unnecessarily punitive and unjust, often targeting families with lower educational levels who never received instructions on how to comply with the program's requirements.[194] Their effects are unreasonably severe. One-third of TANF recipients surveyed reported having inadequate food, housing, and medical care as a result.[195] In many cases, weak oversight of sanctions' enforcement has left recipients vulnerable to discriminatory application and errors that often go uncorrected.[196]

Increased sanctions significantly reduce the number of families who participate in TANF despite their eligibility.[197] The drastic

[194] HEIDI GOLDBERG & LIZ SCHOTT, CTR. ON BUDGET & POL'Y PRIORITIES, A COMPLIANCE-ORIENTED APPROACH TO SANCTIONS IN STATE AND COUNTY TANF PROGRAMS 1-2 (2000), https://www.cbpp.org/archiveSite/10-1-00sliip.pdf ("Policies more stringent than required are found in the 36 states that impose full-family sanctions, which terminate cash assistance to the entire family, and in the 39 states that continue sanctions for fixed periods of time, even if the family has come into compliance with the requirements during the sanction period. Moreover, many states have curtailed or eliminated procedural protections for families facing a sanction."); *id.* at 2. ("Sanctioned families are characterized by a high incidence of health problems and low education levels as well as a lack of transportation and child care. In addition, there is evidence that sanctioned families often do not know or understand what actions they are required to take to be in compliance or the consequences of failing to take those actions.").

[195] *See, e.g.*, Taryn Lindhorst & Ronald J. Mancoske, *The Social and Economic Impact of Sanctions and Time Limits on Recipients of Temporary Assistance to Needy Families*, 33 J. SOC. & SOCIAL WELFARE 93, 109 (2006); *see generally* TIMOTHY CASEY, THE SANCTION EPIDEMIC IN THE TEMPORARY ASSISTANCE TO NEEDY FAMILIES 3-15 (2010), https://www.legalmomentum.org/sites/default/files/reports/sanction-epidemic-in-tanf.pdf (providing useful data and associated discussion related to TANF recipients experiencing sanctions).

[196] *See* CASEY, *supra* note 195, at 1, 9 ("Unlike the federal rules in Food Stamps or the federal rules in the AFDC program that TANF replaced, the federal rules in TANF do not require that states establish a quality control system to measure error and prompt corrective action when error is excessive. The few studies that have sought directly to measure sanction error have all found high error rates."); *see, e.g.*, Kathryn Baer, *A Sad TANF Story That Should Never Have Happened*, POVERTY & POL'Y (July 18, 2011, 7:00 AM), https://povertyandpolicy.wordpress.com/2011/07/18/a-sad-tanf-story-that-should-never-have-happened/ (telling the story of N, a homeless mother, who was facing full family sanctions due to the errors of her TANF caseworkers); Kate Giammarise, *Local Families Struggle Under Welfare Rules*, BLADE (Apr. 22, 2012, 4:38 PM), http://www.toledoblade.com/local/2012/04/22/Local-families-struggle-under-welfare-rules.html (telling the stories of a mother, Amy, who faced sanctions when her severe arthritis kept her from meeting the TANF work requirements, and Victoria and Taschae, who have both exhausted the arbitrary 3-year time limit on benefits).

[197] "Full family sanctions have contributed to a decline in program participation from 84% of eligible families in 1995 to 40% of eligible families in 2005 . . . Currently, only about two million families are receiving TANF although probably at least five million families are eligible." Casey, *supra* note 195, at 1; *see* IFE FLOYD ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, TANF REACHING FEW POOR FAMILIES, 1, 5-7 (2018),

consequences of not receiving or losing these benefits fall on the most vulnerable members of society. All TANF participants live below the poverty line.[198] Approximately 29% are Black and 40% are Latinx.[199] Ninety percent of the parents in the program are single mothers.[200] Despite recipients' lack of resources to mitigate the loss of benefits through sanctions, and the fact that medical and family emergencies often prevent participants from fulfilling their work requirements, forty-five states sanction delinquent participants by terminating their benefits.[201]

[hereinafter REACHING FEW POOR FAMILIES], https://www.cbpp.org/sites/default/files/atoms/files/6-16-15tanf.pdf; *see also* Casey, *supra* note 195, at 1 ("Full family sanctions have contributed to a decline in program participation from 84% of eligible families in 1995 to 40% of eligible families in 2005 . . . Currently, only about two million families are receiving TANF although probably at least five million families are eligible.").

198 Ashley Burnside & Ife Floyd, *TANF Benefits Remain Low Despite Recent Increases in Some States*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (2019), https://www.cbpp.org/research/family-income-support/tanf-benefits-remain-low-despite-recent-increases-in-some-states ("As of July 1, 2018, every state's TANF benefits for a family of three with no other cash income were at or below 60 percent of the poverty line, measured by the Department of Health and Human Services' (HHS) 2018 poverty guidelines. Most states' benefits were below *30 percent* of the poverty line. While benefits are below 60 percent of the poverty line for all TANF recipients, black families are disproportionately impacted by these low benefits, as they are more likely than white families to live in the states with the lowest benefits and that serve the fewest eligible families."); *see* Ife Floyd, *The Truth About "Welfare Reform": TANF is Disappearing*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 13, 2017, 12:00 PM), https://www.cbpp.org/blog/the-truth-about-welfare-reform-tanf-is-disappearing-0.

199 U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS FISCAL YEAR (FY) 2016, tbl.10 (2016), https://www.acf.hhs.gov/sites/default/files/ofa/fy16_characteristics.pdf. CASEY, *supra* note 195, at 2 (citing data from 2010). Blacks make up only 12.3% of the U.S. population. *See* Joseph Carroll, *Public Overestimates U.S. Black and Hispanic Populations*, GALLUP (June 4, 2001), http://news.gallup.com/poll/4435/public-overestimates-us-black-hispanic-populations.aspx.

200 Of the 90% of parents, over half have a child below age six and over a quarter have a child below age two. A third of parent recipients have a disability and many experience domestic violence. One quarter of TANF recipient families include a child who has at least one chronic health problem or disability. CASEY, *supra* note 195, at 2-3; *see also* Lindhorst & Mancoske, *supra* note 195, at 108 (reporting the high association between sanctioned TANF recipients and experiences with domestic violence).

201 Approximately half of these states immediately impose full family sanctions for an initial violation, and about half begin with a partial sanction that escalates to full family sanction if the violation continues beyond a specified period, or if there's a subsequent violation. CASEY, *supra* note 195, at 4. "States continue a sanction at least until a parent demonstrates that she is willing to comply and may continue the sanction for a longer period. A majority of states impose minimum sanction periods generally ranging from 1 to 3 months for a first work requirement violation. Most states impose

After the welfare-to-work shift embodied by TANF, breastfeeding rates significantly decreased for women receiving benefits, although breastfeeding rates rose overall between 1999 and 2000.[202] The decline for TANF recipients was particularly notable after babies reached six months of age, when rates fell by 22% from their AFDC level.[203] Breastfeeding rates also fell by 9% overall at this time, possibly due to a national shift in attitudes toward the practice.[204] Costs associated with this decline included increased health care expenses and mothers' absenteeism from work to care for sick infants.[205] Medicaid likely covered these additional health care costs, indirectly imposing them on taxpayers.[206] In 2003, researchers found the effects to be worst in the twenty-eight states that had work requirements of at least eighteen hours a week combined with regular enforcement of sanctions.[207]

Examining the consequences of these policies over a decade later, in 2016, analysts found that mothers with young infants forced to leave the home to work may have experienced more symptoms of depression.[208] They were less likely to breastfeed or to read to their

longer minimums generally ranging from 3 to 12 months for any subsequent work requirement violation. Four states authorize lifetime full family sanctions for repeated violations." *Id.*

202 The breastfeeding rate dropped 22% for new mothers enrolled in Supplemental Nutrition Program for Women, Infants, and Children. Steven J. Haider et al., *Welfare Work Requirements and Child Well-being: Evidence from the Effects on Breast-Feeding*, 40 DEMOGRAPHY 479, 480, 483 (2003).

203 *Id.* at 483 tbl.1, 494 (describing data collected to determine feeding patterns from birth to 12 months: a questionnaire was sent to mothers selected from a list of names compiled from hospital sources, county records, birth registrations, photography and diaper services, and newspapers; 420,000, 720,000, and 1.4 million questionnaires were mailed in 1991, 1992, and 2000, respectively).

204 *Id.* at 480. *See generally* Jacqueline H. Wolf, *Low Breastfeeding Rates and Public Health in the United States*, 93 AM. J. PUB. HEALTH 2000 (2003) (discussing the historical oscillation between acceptance and ambivalence towards breastfeeding).

205 *See* Haider et al., *supra* note 202, at 495 ("[B]reast-feeding decreases health care costs as well as increases the productivity of working mothers through decreases in absenteeism at work. Because the women who are most at risk of being adversely affected by these policies are poor, it is possible that a greater financial burden will be placed on Medicaid.").

206 *Id.*

207 *Id.* at 494-95 ("[T]he vast majority of the harmful effects on breast-feeding would be eliminated if mothers of infants did not face the combined policies of full-family sanctions and work requirements of more than 18 hours per week—requirements that are currently in place in 28 states.").

208 *See* Adam Burtle & Stephen Bezruchka, *Population Health and Paid Parental Leave: What the United States Can Learn from Two Decades of Research*, 4 HEALTHCARE 30, 37, 40 (2016) (concluding that the overall trend of research conducted shows that parental

children.[209] The study found that, despite these negative effects of maternal employment during the first year, work begun or engaged in during subsequent years had either neutral or positive effects on both mothers and children studied between 1997 and 2001.[210]

In one sense, the change in policy marked by TANF's stricter work requirements and sanctions was a success. It led to a temporary increase in maternal employment.[211] On the other hand, it significantly decreased maternal and child welfare and likely added to national health care expenses.[212] From a social welfare perspective, it appears that the costs of taking women out of the home earlier to work does not justify the benefits. In that case, what motivated these changes? In the arena of welfare reform, the stereotype of the Welfare Queen likely drives policy more than its effects do.

Under the Trump administration, in 2019, Republicans made a renewed effort to bolster work requirements through the Jobs and Opportunity with Benefits and Services Act ("JOBS Act").[213] The bill's sponsors claimed that TANF contains too many loopholes that have led

leave supports improved breastfeeding and immunizations and potentially reduces maternal stress and depression).

209 *See* MARY JANE ENGLAND & LESLIE J. SIM, DEPRESSION IN PARENTS, PARENTING, AND CHILDREN: OPPORTUNITIES TO IMPROVE IDENTIFICATION, TREATMENT AND PREVENTION 125 (Committee on Depression, Parenting Practices, and Healthy Development of Children et al. eds., 2009) (finding mothers with high levels of depressive symptoms were less likely to read to their children); Burtle & Bezruchka, *supra* note 208, at 37-38 (analyzing data from an infant feeding practices study from before and after California implemented its paid family leave law, researchers found a 3-5% increase in exclusive breastfeeding at 3 and 6 months, and a 10-20% increase for some breastfeeding at the 3, 6, and 9 month marks); Haider et al., *supra* note 202, at 494 (finding that the welfare reform work requirements "substantially and statistically significantly reduce breast-feeding").

210 These results provide support for modeling U.S. policies after ones in place in Canada and other countries where employers must provide a full year of maternity leave. *See* PAMELA A. MORRIS, THE EFFECTS OF WELFARE REFORM POLICIES ON CHILDREN, 16 SOC. POL'Y REP. 4 (2002), https://files.eric.ed.gov/fulltext/ED595507.pdf ("For low-income families headed by single mothers, in particular, the associations between maternal employment and children's cognitive and social development tend to be positive when employment begins after the first 9 to 12 months of life.").

211 *See* Haider et al., *supra* note 202, at 481; *see also* CTR. ON BUDGET & POL'Y PRIORITIES, CHART BOOK: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES 10 (2019), https://www.cbpp.org/sites/default/files/atoms/files/8-22-12tanf_0.pdf.

212 *See* Haider et al., *supra* note 202, at 495.

213 Fred Lucas, '*Self-Sufficiency, Not a Sinkhole*': *JOBS Act Updates Work Requirements for Welfare Recipients*, DAILYSIGNAL (Mar. 14, 2019), https://www.dailysignal.com/2019/03/14/self-sufficiency-not-a-sinkhole-jobs-act-updates-work-requirements-for-welfare-recipients/.

to reduced enforcement of the requirements.[214] Statistics, however, belie this assertion. By 2018, two million families had lost their benefits through work-oriented sanctions.[215] Overall, the number of families receiving assistance dropped from 4.4 million in 1996 to 1.3 million in 2018.[216] State agencies' inability to determine who qualifies for work requirements partially accounts for this sharp decrease. For example, in Tennessee, 30% of the sanctions imposed on families were in error.[217]

State agencies also impose sanctions on parents who should never have been subject to work requirements in the first place because they have significant barriers to engaging in employment that qualify them for exemptions.[218] A study of sanctioned parents revealed that they were more likely to suffer from physical or mental illness, to struggle with substance abuse, to experience domestic violence, to have lower education levels or limited work experience, and to lack child care or access to transportation.[219] In almost every state studied, Blacks received more sanctions than Whites.[220]

Work requirements and sanctions do not meet the goals of encouraging work and eliminating poverty. Parents cut off from TANF due to work-related sanctions became less likely to work than participants who left the program for other reasons.[221] For example, in Illinois, parents who left TANF due to work requirement-related sanctions were 44% less likely to have a job.[222] Sanctions also had long-term negative effects on children. They increased their experiences of hardship and disruption, making it less likely that they would succeed as adults.[223] These children were 30% likelier to seek emergency medical treatment multiple times, 50% likelier to go hungry, and 90% likelier to be admitted to a hospital after visiting the emergency room.[224]

Full-family sanctions eliminate cash assistance for rent, bills, and basic necessities.[225] Sanctioned families may have no access to credit on reasonable terms, rendering them vulnerable to predatory, fringe

214 *See id.*
215 PAVETTI, TANF STUDIES, *supra* note 125, at 1.
216 *Id.*
217 *Id.* at 2.
218 *See id.*
219 *Id.* at 5.
220 *Id.* at 6.
221 *Id.* at 9.
222 *Id.*
223 *Id.* at 3.
224 *See id.* at 3-4.
225 *Id.* at 4.

lenders.[226] Recipients in areas dominated by Republicans are more likely to receive sanctions, likely due to the politically conservative foundations of work requirements.[227] This discrepancy highlights the discretionary nature of enforcement. In Michigan, women who had not completed high school were sanctioned at twice the rate of those who had.[228] Sanctions were also imposed at greater rates on domestic violence survivors and on women who did not have a car or driver's license.[229] In Maryland, one fifth of work-sanctioned parents subsequently applied for social security insurance because they suffered from some form of disability.[230]

Initially, it appeared that TANF work requirements addressed the concerns voiced by their proponents. Immediately after TANF's enactment, fewer families received cash assistance, more single mothers became employed, and child poverty declined.[231] In retrospect, however, it is likely that economic climate, not work requirements, led to these changes. In the next decade, household incomes became stagnant while some segments of the population decreased their earnings.[232] Nonetheless, work requirement proponents consider the program a success because of the associated dramatic decline in case workloads.[233] This decrease has led to a push for more extensive work requirements in other social assistance programs.

Any expansion of work requirements to other programs, however, must be approached with caution. Different programs serve different populations and have different goals. While TANF primarily serves women and children, SNAP provides assistance to more men than women.[234] Many people who receive SNAP already work or are not expected to work because of disabilities or age.[235] Taking SNAP away from non-complying participants may lead to more immediate, drastic consequences than eliminating the cash assistance provided by TANF. Some TANF recipients may also qualify for Medicaid, food, and housing assistance. If all these programs have similar work requirements,

---

[226] *See* Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 166-69 (2013); Freeman, *Racism*, *supra* note 122, at 1095.

[227] *See* PAVETTI, TANF STUDIES, *supra* note 125, at 4.

[228] *Id.* at 5.

[229] *Id.*

[230] *Id.*

[231] FALK ET AL., *supra* note 128, at 1.

[232] *See id.*

[233] *See id.* at 15-19.

[234] *Id.* at 22.

[235] *Id.* at 24.

individuals who cannot meet them will be left with nothing. Sanctions can also unfairly unleash devastating consequences on the children of non-complying adults. TANF work requirements force new mothers into the Sisyphean choice between nursing their infants and complying with work requirements. The next Section focuses on SNAP work requirements.

C. SNAP Work Requirements

The initial motivation for the 1939 Food Stamp Program was to provide support for U.S. agriculture.[236] Alleviating the hunger that resulted from high rates of unemployment was another concern. The program began operating nationwide in 1974 and grew to become the USDA's largest nutrition assistance program, in population and budget.[237] The USDA's Food and Nutrition Service ("FNS") administers the program, which is now called SNAP. Income and assets tests determine household eligibility.[238] SNAP benefits range from $16 to $192 per individual.[239] A person working eighty hours a month for $7.25 an hour, the 2019 federal minimum wage, will receive $100 a month of food assistance from SNAP.[240] In 2018, average monthly SNAP

[236] The 1964 Food Stamp Act officially kicked off the program. Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. §§ 2011-2030 (2019)). The 1971 version of the Food Stamp Act added new rules regarding work. It required able-bodied adults to register for work, and it disqualified those who quit jobs or refused employment. *See* Food Stamp Act of 1971, Pub. L. No. 91-671, 84 Stat. 2048 (codified as amended at 7 U.S.C. §§ 2011-2030 (2019)). The 1977 Food Stamp Act permitted limited "pilots" of food stamp workfare programs. *See* Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 958 (codified as amended at 7 U.S.C. §§ 2011-2030 (2019)). The 1981 version added "workfare" as a state option. *See* Agricultural and Food Act of 1938, Pub. L. No. 97-98, § 1333, 95 Stat. 1213 (codified as amended at 7 U.S.C. § 1281 (2019)). The 1985 law provided federal funding for employment and training activities. *See* Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended at 7 U.S.C. § 1281 (2019)).

[237] KATHRYN CRONQUIST & SARAH LAUFFER, CHARACTERISTICS OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM HOUSEHOLDS: FISCAL YEAR 2017 1 (2019), https://fns-prod.azureedge.net/sites/default/files/ops/Characteristics2017.pdf.

[238] For example, in fiscal year 2017, households with assets exceeding $2,250 were ineligible for SNAP. *Id.* at 3-7.

[239] Timothy F. Harris, *Do SNAP Work Requirements Work?* 10 (Upjohn Institute, Working Paper No. 19-297, 2019) [hereinafter *SNAP Work Requirements*], http://www.research.upjohn.org/cgi/viewcontent.cgi?article=1315&context=up_workingpaper.

[240] *Id.*

benefits were $126 for an individual,[241] and $254 per household.[242] If a person works eighty hours a month earning at least $16.34 an hour, their income should enable them to make a "positive exit" from SNAP.[243]

The cost of the program in the 2017 fiscal year was $68 billion.[244] Almost 90% of households receiving SNAP include a child, an elderly adult, or someone with a disability.[245] Although SNAP demands extensive documentation from its participants, creating a high bar to entry, it is in high demand.[246] One fifth of participants have no other income available to spend on food.[247]

In 1996, the PROWRA attached work requirements to SNAP.[248] Able-bodied adults without dependents must work or participate in a work program for eighty hours a month to receive SNAP for more than three months in a three-year period.[249] Job searching does not satisfy this mandate.[250] However, depending on their economic conditions, states may apply for waivers of these conditions.[251]

---

241 Cossy Hough, Opinion, *Stricter Work Rules for SNAP Recipients Won't Accomplish Goal*, UT NEWS (Jan. 24, 2019), https://news.utexas.edu/2019/01/24/stricter-work-rules-for-snap-recipients-wont-accomplish-goal/.

242 CRONQUIST & LAUFFER, *supra* note 237, at xv.

243 Harris, *SNAP Work Requirements*, *supra* note 239.

244 CRONQUIST & LAUFFER, *supra* note 237, at xv.

245 Hough, *supra* note 241.

246 *See* Andrew Goldstein & Akash Goel, *Dear Congress: SNAP Work Requirements Will Harm Health, Not Improve Nutrition*, STAT (Aug. 2, 2018), https://www.statnews.com/2018/08/02/congress-snap-work-requirements-harm-health/; *see, e.g.*, Matthew Cortland, *You Shouldn't Need a Law Degree to Get Food Assistance*, TALK POVERTY (May 2, 2018), https://talkpoverty.org/2018/05/02/shouldnt-need-law-degree-get-food-assistance/ (narrating a Massachusetts lawyer's struggle to receive SNAP benefits).

247 Nessia Berner Wong, *Expanding SNAP Work Requirements Is a Ticket to Poor Health*, CIV. EATS (July 16, 2018), https://civileats.com/2018/07/16/expanding-snap-work-requirements-is-a-ticket-to-poor-health/.

248 *See Able-Bodied Adults Without Dependents (ABAWDs)*, U.S. DEP'T AGRIC. (Jul. 17, 2018), https://www.fns.usda.gov/snap/ABAWD.

249 *Id.*

250 U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM, A GUIDE TO SERVING ABAWDS SUBJECT TO TIME-LIMITED PARTICIPATION 12 (2015), https://fns-prod.azureedge.net/sites/default/files/Guide_to_Serving_ABAWDs_Subject_to_Time_Limit.pdf.

251 A state can qualify for a waiver under the following conditions: "(1) an unemployment rate over 10 percent for the latest 12-month (or 3-month) period; (2) a historical seasonal unemployment rate over 10 percent; (3) a Labor Surplus Area designation from DOL [Department of Labor]; (4) a 24-month average unemployment rate 20 percent above national average; (5) a low and declining employment-population ratio; (6) a lack of jobs in declining occupations or industries; (7) described in an academic study or publication as an area with a lack of jobs; or (8) qualifies for extended

The federal government covers the costs of SNAP benefits. States share the administrative costs of the program with the federal government. These costs decrease with the number of recipients. Without work requirement waivers, state costs are likely higher because it is expensive to verify employment, track the amount of time that a participant who has failed to meet the requirements has already received benefits, and offer job training programs.[252] Therefore, opting not to apply for a waiver likely represents a state's ideological, not economic decision. Kansas and Maine are two states that qualified for waivers but chose not to apply for them. The explanation provided for this choice by Maine governor Paul LePage exemplifies the political motivation behind it: "People who are in need deserve a hand up, but we should not be giving able-bodied individuals a handout . . . ."[253] He continued, "We must protect our limited resources for those who are truly in need and who are doing all they can to be self-sufficient."[254]

After the recession that began in 2008, it became more difficult for people to find employment. Congress passed the Temporary Emergency Unemployment Compensation program to alleviate the resulting hardships.[255] During this time, states that qualified for the program could also obtain waivers for SNAP work requirements.[256] In 2010, the USDA issued a nationwide waiver for SNAP work requirements with the potential for extension into the future.[257] Despite the availability of these waivers, several states did not apply for them between 2011 and 2016, even though their employment rates satisfied the eligibility threshold. Other states that initially received waivers lost them after the economy improved.[258] In 2018, thirty-six states and territories had waivers on time limits for some ABAWD.[259] Seven had statewide

unemployment benefits." U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, LOCAL AREA UNEMPLOYMENT STATISTICS PROGRAM (2017), https://www.bls.gov/lau/lauadminuses.pdf.

252 Harris, *SNAP Work Requirements*, *supra* note 239, at 9.

253 *Id.* at 9-10 (citing Niraj Chokshi, *Need Food? Maine's Governor Wants You to Work for It*, WASH. POST (July 24, 2014, 9:21 AM), https://www.washingtonpost.com/blogs/govbeat/wp/2014/07/24/need-food-maines-governor-wants-you-to-work-for-it/?noredirect=on).

254 *Id.* at 10.

255 *See id.* at 7.

256 *Id.*

257 *See id.* at 1.

258 *Id.*

259 Julia Belluz, *A New Trump Rule Could Take Food Stamps Away from 755,000 People*, VOX (Dec. 21, 2018, 8:19 AM), https://www.vox.com/science-and-health/2018/12/20/18150449/food-stamps-snap-usda.

exemptions.[260] States can also exempt 15% of their caseload from time limits, which can extend participants' eligibility. These exceptions can accumulate and become "carry-overs."[261] For example, California has stockpiled 800,000 exemptions.[262] California, Texas, Florida, and New York have the largest ABAWD populations.[263]

A proposal by the Trump administration sought to expand SNAP's work requirements and clamp down on these carry-overs, exemptions, and state waivers.[264] Trump introduced this proposal soon after the 2018 Farm Bill passed, signaling his intention to work around the fact that the additional SNAP work requirements he wanted did not make it into the law.[265] The proposal raised the age limit for work requirements from fifty to sixty-two and limited waivers for high-unemployment areas.[266] It cut more than $213 billion (nearly 30%) from SNAP over ten years, which would render at least four million people ineligible for the program and reduce benefits for many remaining participants.[267]

One of the more radical aspects of Trump's proposal was to replace the Electronic Benefit Transfer ("EBT") cards that participants use to make purchases at grocery stores and farmers markets with food boxes containing shelf-stable products.[268] The USDA already provides similar

---

[260] Catherine Boudreau, *USDA Will Clamp Down on Work Rules for Food-Stamp Recipients*, POLITICO (Dec. 20, 2018, 6:35 PM), https://www.politico.com/story/2018/12/20/food-stamp-rules-1045255 (including Alaska, Louisiana, New Mexico, and D.C.).

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *See Trump's Food Stamp Proposal Would Add Work Requirements in Some States*, CBS NEWS (Dec. 20, 2018, 9:19 AM), https://www.cbsnews.com/news/trumps-food-stamp-proposal-add-work-requirements-in-some-states/ [hereinafter *Trump's Food Stamp Proposal*]. The proposal would also eliminate the ability of more than five hundred thousand children to access free school lunches. This information was not made available to the public until months later, after the notice and comment period for the new rule expired. *See* N'dea Yancey-Bragg, *500,000 Kids Could Lose Free School Lunch Under Trump Administration Proposal*, USA TODAY (July 29, 2019, 10:21 PM), https://www.usatoday.com/story/news/politics/2019/07/29/500-000-kids-could-lose-free-school-lunch-trump-plan/1863720001/.

[265] *See Trump's Food Stamp Proposal*, *supra* note 264.

[266] *See* STACY DEAN, ED BOLEN & BRYNNE KEITH-JENNINGS, CTR. ON BUDGET & POLICY PRIORITIES, MAKING SNAP WORK REQUIREMENTS HARSHER WILL NOT IMPROVE OUTCOMES FOR LOW-INCOME PEOPLE 1 (2018), https://www.cbpp.org/sites/default/files/atoms/files/3-1-18fa.pdf.

[267] *See* ROSENBAUM ET AL., CTR. ON BUDGET & POLICY PRIORITIES, PRESIDENT'S BUDGET WOULD CUT FOOD ASSISTANCE FOR MILLIONS AND RADICALLY RESTRUCTURE SNAP 1 (2018), https://www.cbpp.org/sites/default/files/atoms/files/2-15-18snap.pdf.

[268] *See id.* at 3.

boxes to indigenous people on and near reservations, with disastrous health consequences.[269] The idea faced pushback from health advocates across the country because of the likelihood that it would reduce the nutritional value of recipients' diets, in addition to removing their choice of what to eat from them.[270] This would cause psychological and dignitary harm and increase the stigma attached to receiving food assistance.[271] In turn, this could prompt more people to leave or not apply for the program, despite their need for food assistance.[272] Most likely, however, food boxes will not become part of SNAP because they run counter to the interests of large corporations such as Walmart.[273]

Additionally, the proposed new rules effectively eliminate SNAP work requirement waivers by making them inapplicable to cities or counties in states with unemployment rates below seven 7%. In 2019, there were no states with an unemployment rate above Alaska's 6.4%.[274] The new rules would also exclude recipients residing in rural areas with high unemployment rates.[275]

The disproportionate harm that these new rules and the current SNAP work requirements have on food-insecure people of color represent violations of the constitutional right to equal protection of the law. They do not raise some of the Thirteenth Amendment and due process issues that TANF work requirements do because they do not apply to new mothers.[276] However, that could quickly change. In 2019, Congress

269 *See* Elizabeth Hoover, *Food Boxes Have Already Failed for Native Communities, Why Would They Work for SNAP?*, TEEN VOGUE (Mar. 9, 2018), https://www.teenvogue.com/story/food-boxes-have-already-failed-for-native-communities-why-would-they-work-for-snap.

270 *See* Erica Hunzinger et al., *Trump Administration Wants to Decide What Food SNAP Recipients Will Get*, NPR (Feb. 12, 2018, 3:21 PM), https://www.npr.org/sections/thesalt/2018/02/12/585130274/trump-administration-wants-to-decide-what-food-snap-recipients-will-get.

271 *See* Lindsey Wahowiak, *SNAP Restrictions Can Hinder Ability to Purchase Healthy Food: Stigma, Payment Options Among Issues*, NATION'S HEALTH, Aug. 2015, at 1; Hunzinger et al., *supra* note 270.

272 *See id.*

273 *See* Jillian Berman, *Walmart is One of the Biggest Beneficiaries of Food Stamps*, HUFFPOST (Nov. 1, 2013), https://www.huffpost.com/entry/walmart-food-stamps_n_4181862.

274 *See* U.S. BUREAU OF LABOR STATISTICS, LOCAL AREA UNEMPLOYMENT STATISTICS, https://www.bls.gov/web/laus/laumstrk.htm (last updated Dec. 20, 2019) [https://perma.cc/DZ4R-J7KX].

275 *See* Hough, *supra* note 241.

276 Although a new food economy article suggests that coerced labor may be an issue. *See* H. Claire Brown, *When the Government Mandates Work Requirements for Food Stamps, Who Actually Profits?*, NEW FOOD ECON. (Apr. 10, 2019), https://newfoodeconomy.org/work-requirements-snap-mandatory-employment-training-

considered the Welfare Reform and Upward Mobility Act, which would expand SNAP work requirements to households with dependents. Future iterations of the Farm Bill also might do this. The 2014 Farm Bill provided funding for ten pilot projects that have some features similar to TANF's work programs.[277]

Under the present system, states have latitude to impose additional work requirements for SNAP participants. SNAP mandates that recipients register for work and take any job offer that they receive.[278] States can go beyond the federally required twenty hours a week of work minimum to thirty hours and remove benefits from adults who do not comply.[279] Additionally, some states insist that non-working SNAP participants engage in job search and workfare activities, even though research demonstrates that they do not lead to long-term employment or raise incomes.[280] Other states have transitioned to programs where recipients receive information instead of participating in activities more directly related to employment training.[281] Despite its own findings that these methods are ineffective, the USDA spent more than $700 million on work-oriented programs in 2016.[282] Studies of work requirements in other programs reveal that they rarely lead to long-term employment but do cause movement into deep poverty for thousands of non-complying households.[283]

Some SNAP participants face barriers to employment that work requirements do not recognize. These include having a criminal background, such as felony charges, being on probation or parole, or having a conviction for driving under the influence. People of color disproportionately have some kind of criminal history, often due to

program-profits/. Maximus, one of the companies contracted to provide job services to SNAP participants, has been accused of coerced labor. That is not the only problem with the company: "Maximus currently owns a contract to run Indiana's work programs for SNAP and TANF. 'In that contract, the company estimates it will see 93,000 clients and earn about $9.1 million each year. But it expects fewer than 200 people annually will find and keep jobs for at least six months,' writes reporter Tracie McMillan." *Id.* "In 2016, FSET cost taxpayers $283 per enrollee, per month. That's more than double what the average SNAP recipient received during the same time period." *Id.*

277 *See* FALK ET AL., *supra* note 128, at 1.

278 *See* DEAN ET AL., *supra* note 266, at 2.

279 *See id.*

280 *See* DEBORAH KOGAN, ANNE PAPROCKI & HANNAH DIAZ, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) EMPLOYMENT AND TRAINING (E&T) BEST PRACTICES STUDY: FINAL REPORT, at II-2, II-3 (2016), https://fns-prod.azureedge.net/sites/default/files/ops/SNAPEandTBestPractices.pdf.

281 *See id.* at II-7, II-8.

282 *See* DEAN ET AL., *supra* note 266, at 2.

283 *See* PAVETTI, WORK REQUIREMENTS, *supra* note 17, at 1-2.

racial profiling and racism in the criminal justice system.[284] They also have lower employment rates and lower educational achievement, often due to discrimination and the school to prison pipeline.[285] A history of drug use or being fired from previous jobs can also create significant obstacles to finding work.[286] Sometimes, even when an individual has a job, they fail to follow SNAP instructions for recording it properly. Some households might not report earning on tax forms because their lost income through taxation might be higher than their SNAP benefits.[287] Some individuals suffer from chronic illnesses that prevent them from working but do not satisfy the legal definition of a disability to meet social security insurance requirements. Others are houseless.

The nature of low-wage work can also make it difficult to meet SNAP's work requirements. Many jobs pay little, do not provide benefits, offer unpredictable hours, and have high turnover rates.[288] Employers in this sector often see their employees as fungible and are therefore willing to fire them for small transgressions such as a missed bus, a broken-down car, a doctor's appointment, or a relative that needs care. SNAP is essential for workers between jobs and to supplement low wages.[289] In 2016, 500,000 people who were underemployed or searching for work lost their SNAP benefits.[290]

States and anti-hunger advocates call for more flexible SNAP work requirements or more straightforward, effective paths to employment.[291] These tactics include combining job training and education with more affordable housing; increasing the minimum wage; and providing skills training in high-demand sectors. [292] If nothing else, the USDA should expand, not constrict SNAP benefits. Each dollar

[284] *See* SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1, 5 (2018), https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf.

[285] *See* KATHERINE ROSICH, AM. SOC. ASS'N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM 8 (2007); Marilyn Elias, *The School-to-Prison Pipeline*, TEACHING TOLERANCE, Spring 2013, https://www.tolerance.org/magazine/spring-2013/the-school-to-prison-pipeline.

[286] *See* Harris, *SNAP Work Requirements*, *supra* note 239, at 11-12.

[287] *See id.* at 12.

[288] *See* DEAN ET AL., *supra* note 266, at 1.

[289] *See id.*

[290] *See id.* at 2.

[291] *See id.*

[292] *Id.*; Melissa S. Kearney et al., *Policies to Address Poverty in America*, HAMILTON PROJECT 137-47 (June 2014).

spent on SNAP yields $1.80 in economic activity.[293] The program is an economic multiplier, benefiting the general economy in addition to its participants.

D. How Corporations Benefit from TANF and SNAP Work Requirements

In addition to their ideological roots in racialized ideas about who deserves government support, work requirements can reflect the prioritization of industry over individual interests. When TANF work requirements compel new mothers to formula feed their infants, formula corporations profit. The U.S. government has long enjoyed a close relationship with the formula industry.[294] This often-hidden partnership entered the world spotlight during a 2018 meeting of the World Health Assembly, when U.S. members threatened Ecuador with trade and aid sanctions if it did not withdraw a resolution promoting breastfeeding.[295] This ultimatum successfully forestalled the resolution's passage until Russia stepped forward to propose it, unintimidated by potential repercussions from the United States.[296] The United States' willingness to alter the status quo of international relations for the sake of formula sales was a clear testament to the formula industry's influence over laws and policies governing breastfeeding, domestically and globally. Pharmaceutical companies' capture of law and policy makes judicial relief from laws and policies that discourage breastfeeding, such as work requirements, unlikely.

The USDA is the largest purchaser of formula in the United States.[297] It receives rebates of approximately 85% on the formula it buys to distribute for free to Supplemental Nutrition Program for Women, Infants, and Children ("WIC") participants.[298] These rebates comprise a significant portion of WIC's budget.[299] Government support of the

---

[293] *See* KENNETH HANSON, THE FOOD ASSISTANCE NATIONAL INPUT-OUTPUT MULTIPLIER (FANIOM) MODEL AND STIMULUS EFFECTS OF SNAP 29 (2010), https://www.ers.usda.gov/publications/pub-details/?pubid=44749.

[294] *See* Freeman, *Unmothering*, *supra* note 65, at 1550.

[295] *See* Andrew Jacobs, *Opposition to Breast-Feeding Resolution by U.S. Stuns World Health Officials*, N.Y. TIMES (July 8, 2018, 2:24 PM), https://www.nytimes.com/2018/07/08/health/world-health-breastfeeding-ecuador-trump.html.

[296] *See id.*; *see also* Julia Belluz, *The Next Frontier of Trump's Defense of Baby Formula*, VOX (July 10, 2018, 8:40 AM), https://www.vox.com/science-and-health/2018/7/10/17548028/trump-baby-formula-breastfeeding-mothers-health.

[297] *See* Victor Oliveira, *Winner Takes (Almost) All: How WIC Affects the Infant Formula Market*, U.S. DEP'T AGRIC. (Sept. 1, 2011), https://www.ers.usda.gov/amber-waves/2011/september/infant-formula-market/.

[298] *See id.*

[299] *See id.* at 51.

formula industry also comes from state hospitals and clinics, which give out formula to new mothers as part of the industry's marketing scheme.[300] The pharmaceutical companies that manufacture the major formula brands employ powerful lobbyists.[301] These corporations are members of the American Legislative Exchange Council, which successfully writes and promotes industry-friendly laws.[302] These close ties explain the U.S. government's willingness to oppose breastfeeding promotion on the global and national stage. It is in formula corporations' interests to expand TANF work requirements, to ensure that there is no mandatory AYCE, and to extend SNAP work requirements to mothers with children.

SNAP work requirements also benefit corporations, primarily in the job training industry.[303] The privatization of social services began in 1996 with PROWRA.[304] At that time, Maximus, a multi-services company, entered the business of welfare-to-work.[305] Maximus seized the opportunity to manipulate racialized fear of food stamp fraud for profit. It designed programs to hire caseworkers, help assess SNAP participants, and find them jobs.[306] Twenty years later, it was running work assistance programs in twenty-one states.[307] This growth came in spite of allegations of corruption arising from ties between Maximus and Seema Verma, the head of Centers for Medicare and Medicaid Services.[308]

---

[300] *See* Kenneth D. Rosenberg et al., *Marketing Infant Formula Through Hospitals: The Impact of Commercial Hospital Discharge Packs on Breastfeeding*, 98 AM. J. PUB. HEALTH 290, 290 (2008).

[301] *See* Olga Khazan, *The Epic Battle Between Breast Milk and Infant-Formula Companies*, ATLANTIC (July 10, 2018), https://www.theatlantic.com/health/archive/2018/07/the-epic-battle-between-breast-milk-and-infant-formula-companies/564782/.

[302] *See* Rebekah Wilce, *Some ALEC Funders Flee, but Koch, Big Tobacco, and PhRMA Remain Loyalists*, CTR. FOR MEDIA & DEMOCRACY (Aug. 1, 2014, 7:22 AM), https://www.prwatch.org/news/2014/07/12552/alec-funders-flee-but-koch-tobacco-phrma-remain-loyal; Don Wiener, *ALEC's Corporate Sponsors Top Nation's Lawbreaker List*, MOYERS (Oct. 30, 2017), https://billmoyers.com/story/alecs-corporate-sponsors-top-nations-lawbreaker-list/.

[303] *See* DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS 1-7 (2016).

[304] *See* McMillan, *supra* note 5.

[305] *See id.*

[306] *See MAXIMUS to Begin Helping Idahoans Through the Idaho Employment and Training Services Program*, LA PRENSA (Sept. 6, 2016), https://laprensafl.com/latinowire/maximus-to-begin-helping-idahoans-through-the-idaho-employment-and-training-services-program/.

[307] McMillan, *supra* note 5.

[308] *See id.*

Wisconsin provides a salient example of how corporations can profit from SNAP work requirements. In 2015, the state required ABAWD who did not work twenty hours a week but wanted to extend their SNAP benefits to enroll in a work training program called FoodShare Employment ("FSET").[309] The state awarded the contract for FSET to the Kentucky-based company ResCare. ResCare did not perform well — only a third of FSET program participants found jobs. ResCare failed to follow program guidelines, resulting in several violations during USDA audits, and it engaged in unnecessary billing.[310]

Under ResCare, FSET costs taxpayers more than double per month what a SNAP recipient receives.[311] Despite these costs to the state, Wisconsin conducts little oversight of the program, and does not provide ResCare with performance measures. One ResCare client alleged that the company coerced her to work at a food service facility.[312] ResCare bussed her to this facility, which was several hours away from her home.[313] Once she arrived, ResCare took away her cell phone and told her that she had to stay in the workers' dorm for three months, peeling potatoes for twelve hours a day for six days a week.[314] She had no access to transportation back to her home.[315] Her story matched other allegations made against the company.[316] USDA audits uncovered other civil rights and procedural violations. Despite these problems, the state chose to contract with ResCare, a for-profit company, over a technical college program with a 97% success rate.[317]

III. UNCONSTITUTIONAL WORK REQUIREMENTS

SNAP and TANF work requirements raise a multitude of constitutional concerns. In both cases, the stakes are high. Losing SNAP food assistance leads directly to hunger and malnutrition. Poor nutrition is the leading cause of preventable deaths in the United States.[318] TANF work requirements and sanctions that force new

309 Brown, *supra* note 276.

310 *See id.*

311 *Id.*

312 *Id.*

313 *Id.*

314 *Id.*

315 *Id.*

316 *See id.*

317 *Id.*

318 *See New Study Finds Poor Diet Kills More People Globally than Tobacco and High Blood Pressure*, INST. FOR HEALTH METRICS & EVALUATION (Apr. 3, 2019),

mothers out of the home compel a disproportionate number of parents of color to feed their infants formula. Research links formula feeding to higher rates of a number of harms, from jaw disorders to infant mortality,[319] suffered disproportionately by Black infants. The following Sections outline how SNAP and TANF work requirements violate equal protection, the Thirteenth Amendment, due process, and the unconstitutional conditions doctrine.

A. Equal Protection

The Fourteenth Amendment guarantees equal protection of the law to similarly situated individuals.[320] The original purpose of the amendment was to intervene into state actions that violated the rights of freed slaves after Emancipation.[321] After the Thirteenth Amendment abolished slavery, some states continued to propagate laws to maintain slavery's economic system.[322] Many states also turned a blind eye to acts of violence and intimidation designed to enforce the social stratification established during slavery.[323] The authors of the Fourteenth Amendment intended to alter the balance between the federal and state governments by allowing the federal government to intervene to stop state-sponsored state-perpetuated inequality and states' condoning of

http://www.healthdata.org/news-release/new-study-finds-poor-diet-kills-more-people-globally-tobacco-and-high-blood-pressure.

319 Despite its manufacturers' claims that it closely resembles breast milk, formula is in fact a type of junk food that few mothers would wish to use to nurture their children. Typical ingredients of soy-based formula are: corn maltodextrin, vegetable oils (palm olein, soy, coconut, and high-oleic safflower or high-oleic sunflower), enzymatically hydrolyzed soy protein isolate, and sucrose. Sylvia Onusic, *The Scandal of Infant Formula*, WESTON A. PRICE FOUND. (Dec. 9, 2015), https://www.westonaprice.org/health-topics/childrens-health/the-scandal-of-infant-formula/. Translated, these are corn syrup, oil, monosodium glutamate, and sugar. Research has linked formula to leukemia, sudden infant death syndrome ("SIDS"), ear, respiratory, and blood infections, asthma, gastroenteritis, and diabetes, among other ailments. *See* Alison Stuebe, *The Risks of Not Breastfeeding for Mothers and Infants*, 2 REVIEWS IN OBSTETRICS GYNECOLOGY 222, 222-26 (2009); Lawrence M. Gartner et al., *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 496 (2005).

320 *See* U.S. CONST. amend. XIV, § 1.

321 *See* Fred Elbel, *The Original Intent of the 14th Amendment - Part 2 of Birthright Citizens and the 14th Amendment,* CALIFORNIANS FOR POPULATION STABILIZATION (July 23, 2011), https://www.capsweb.org/blog/original-intent-14th-amendment-part-2-birthright-citizenship-and-14th-amendment.

322 *See* Becky Little, *Does an Exception Clause in the 13th Amendment Still Permit Slavery?*, HISTORY (Oct. 2, 2018), https://www.history.com/news/13th-amendment-slavery-loophole-jim-crow-prisons.

323 *See id.*

violence against Blacks.[324] Cases interpreting the Fourteenth Amendment extended this protection beyond freed slaves to members of any group subject to differential treatment based on race and other categories. [325]

The evolution of the Supreme Court's equal protection jurisprudence has made it increasingly difficult to employ the clause to eradicate any but the most obvious cases of racial discrimination.[326] With very few exceptions,[327] to prove unequal protection, a plaintiff must demonstrate that the state took an adverse action against them based on a specific intent to discriminate.[328] Unlike in certain federal laws, such as the Fair Housing Act[329] and the Equal Credit Opportunity Act,[330] a law, policy, or state action's disparate impact on a protected group is not sufficient to establish a discriminatory purpose. Instead, a plaintiff must uncover proof of deliberate intent to harm an individual because of their race.[331] This is a Herculean task. Nonetheless, work requirements present an opportunity to make persuasive arguments to expand the definition of discriminatory purpose to encompass laws and policies that violate the intention and spirit of equal protection.

Challenging work requirements on equal protection grounds would allow the court to reconsider its dictate that a plaintiff must establish that the state must act "because of," not merely "in spite of" the

---

[324] *See 14th Amendment*, HISTORY (Aug. 21, 2018), https://www.history.com/topics/black-history/fourteenth-amendment.

[325] *See* Hernandez v. Texas, 347 U.S. 475, 477-78, 482 (1954); *see, e.g.*, Korematsu v. United States, 323 U.S. 214, 244-48 (1944) (Frankfurter, J., concurring) (Roberts, J., dissenting) (Murphy, J., dissenting) (Jackson, J., dissenting) (1944) (concurrence and dissent analyzing discrimination against Japanese citizens under the Fourteenth Amendment), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018). Even Whites receive protection. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 381 (1978); Grutter v. Bollinger, 539 U.S. 306, 343 (2003); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007).

[326] *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119-29 (1997).

[327] *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (placing the burden on the State to prove a redistricting map that excluded only Blacks was not discriminatory); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (finding discrimination where an ordinance restricting laundries to brick buildings was almost exclusively enforced against Chinese laundry owners).

[328] *See* Siegel, *supra* note 326, at 1137.

[329] *See* Pac. Shores Properties, LLC v. Newport Beach, Props., 730 F. 3d 1142, 1165 (9th Cir. 2013).

[330] *See Policy Statement on Discrimination in Lending*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/regulations/laws/rules/5000-3860.html (last updated Apr. 20, 2014).

[331] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

discriminatory effect of a challenged law, policy, or act. In torts, we assume that the obvious outcome of an act reflects the actor's intent.[332] This reflects a logical understanding of human behavior and should also provide the baseline for constitutional standards of intent. Federal and state legislatures have access to resources that provide detailed information about the effects of government programs on members of different racial and other protected groups.[333] Where information is lacking, the government can commandeer research and reports. These types of government-mandated studies form the basis of many of our laws and policies and should therefore be more than adequate to establish government knowledge and purpose.

In the case of SNAP work requirements, statistics demonstrate that they impose unequal harms on poor people of color and that they do so while failing to accomplish their stated goals. This information should suffice to establish an Equal Protection violation. A 2019 working paper produced for the W.E. Upjohn Institute for Employment Research investigated the question, "Do SNAP Work Requirements Work?"[334] The study concluded that SNAP work requirements significantly decrease SNAP participation while only marginally increasing employment for able bodied adults without dependents ("ABAWD").[335] Specifically, for every five ABAWD that lost SNAP benefits due to work requirements, only one additional person found employment.[336] The increase in employment was primarily for older adults.[337] Other studies found that work requirement waivers increase SNAP participation.[338]

SNAP is particularly beneficial to populations of color, who suffer disproportionately from program exits or ineligibility due to work requirements. People of color are disproportionately food insecure. Of

---

[332] *See generally* Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 18, 71 (1980).

[333] *See generally* R.A. Hahn et al., *Civil Rights as Determinants of Public Health and Racial and Ethnic Health Equity: Health Care, Education, Employment, and Housing in the United States*, 4 SSM POPULATION HEALTH 17 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5730086/ (describing how civil rights have affected racial and ethnic minority populations in the United States through the use of data collected from government programs).

[334] Harris, *SNAP Work Requirements*, *supra* note 239. Fluctuations in state waiver requirements between 2010 and 2016 facilitated a study of their effects on employment and SNAP participation for ABAWD.

[335] *Id.* at 27.

[336] *Id.* at 4.

[337] *See id.* at 27.

[338] *See* LAUREN BAUER ET AL., BROOKINGS, HOW DO WORK REQUIREMENT WAIVERS HELP SNAP RESPOND TO A RECESSION? (2019), https://www.brookings.edu/wp-content/uploads/2019/04/EA-SNAP-Triggers-final.pdf.

fifty million food insecure people in the United States, 10.6% are White, 23% are indigenous, 23.7% are Latinx, and 26.1% are Black.[339] Blacks have the lowest household income next to indigenous peoples, with a poverty rate double that of the U.S. population.[340] In a typical month in 2016, SNAP gave food assistance to 13 million Blacks[341] and ten million Latinx.[342] That year, the program lifted 2.1 million Blacks and 2.5 million Latinx out of poverty and kept 1.2 million Blacks out of deep poverty.[343] It raised the monthly income of Blacks and Latinx by 29%.[344] In 2016, 19% of Latinx-headed households were food insecure compared to 12% of all households.[345]

Race, poverty, and food insecurity are correlated with obesity and diet related disease. In the United States, 38% of Blacks and 35% of Latinx suffer from obesity.[346] Additionally, 7.4% of Whites, 8% of Asians, 12% of Latinx, 12.7% of Blacks, and 15.9% of indigenous people suffer from diabetes.[347] Diabetes costs the government $327 billion a year.[348] A study of an Ohio law that exempted counties with high unemployment levels from SNAP work requirements showed that the exemption benefited White rural residents but disproportionately burdened the state's Black population, which is concentrated in urban areas where the exemption does not apply.[349] Additionally, restaurant workers, who are

339 Eric Holt-Giménez & Breeze Harper, *Food-Systems-Racism: From Mistreatment to Transformation*, FOOD FIRST: INST. FOR FOOD & DEV. POL'Y, Winter-Spring 2016, at 1, 4, https://foodfirst.org/wp-content/uploads/2016/03/DR1Final.pdf.

340 *See* CTR. ON BUDGET & POLICY PRIORITIES, SNAP HELPS MILLIONS OF AFRICAN AMERICANS, *supra* note 20, at 1.

341 *Id.* at 3.

342 CTR. ON BUDGET & POLICY PRIORITIES, SNAP HELPS MILLIONS OF LATINOS 3 (2018), https://www.cbpp.org/sites/default/files/atoms/files/3-2-17fa3.pdf [hereinafter SNAP HELPS MILLIONS OF LATINOS].

343 *Id.*; CTR. ON BUDGET & POLICY PRIORITIES, SNAP HELPS MILLIONS OF AFRICAN AMERICANS, *supra* note 20, at 3.

344 CTR. ON BUDGET & POLICY PRIORITIES, SNAP HELPS MILLIONS OF AFRICAN AMERICANS, *supra* note 20, at 3; SNAP HELPS MILLIONS OF LATINOS, *supra* note 342, at 3.

345 CTR. ON BUDGET & POLICY PRIORITIES, SNAP HELPS MILLIONS OF LATINOS, *supra* note 342, at 1.

346 SUMMARY HEALTH STATISTICS: NATIONAL HEALTH INTERVIEW SURVEY 1 (2018), https://ftp.cdc.gov/pub/Health_Statistics/NCHS/NHIS/SHS/2018_SHS_Table_A-15.pdf.

347 *Statistics About Diabetes*, AM. DIABETES ASS'N, https://www.diabetes.org/resources/statistics/statistics-about-diabetes (last visited Jan. 4, 2020).

348 *The Cost of Diabetes*, AM. DIABETES ASS'N, https://www.diabetes.org/resources/statistics/cost-diabetes (last visited Jan. 4, 2020).

349 *See* Adam White, *Who Receives Food Assistance in Ohio? Implications of Work Requirements for SNAP Enrollment Across Racial, Ethnic and Geographic Divisions*, CTR. FOR CMTY. SOLS. (Oct. 8, 2018), https://www.communitysolutions.com/research/

predominantly people of color, are twice as food insecure as the national average.[350] The consequences of food insecurity include stress, fatigue, increased infections, and the need to eat cheaper and less nutritious food, often resulting in the development of type II diabetes and heart disease.[351] Work requirements punish individuals with chronic diseases such as lupus or Chron's, which are related to poor nutrition and cause people to miss work sporadically.[352]

Work requirements reduce the number of program participants, driving them to hunger, poor nutrition, and poverty. They disproportionately harm people of color, who are overrepresented in the program. Work requirements stem from racialized stereotypes of who does or does not deserve social assistance. People of color disproportionately suffer from conditions, illnesses, and deaths related to food insecurity and poor nutrition. Despite having this information, the USDA continues to enforce SNAP work requirements and the administration seeks to expand them. The racial disparities in food insecurity caused by SNAP work requirements represent the type of inequality that the Fourteenth Amendment was designed to prevent. The results of this unequal protection are life-threatening and perpetuate inequality across all social and economic sectors. Similarly, eliminating TANF work requirements represents an opportunity to allow the physical and psychological benefits of breastfeeding to adhere to parents and children who choose it equally, irrespective of race.

The heightened scrutiny of laws that discriminate by race dictated by Fourteenth Amendment jurisprudence is intended to protect the politically powerless.[353] One of the roles of the Court is to be counter-majoritarian, to provide protection for those groups who will rarely if ever be able to win it for themselves through the democratic process. That is why the Court is entrusted with the immense power of being able to overturn the carefully constructed rules of legislators, if those laws contravene constitutional mandates. It is hard to think of a more politically powerless group than infants of color. By virtue of being

receives-food-assistance-ohio-implications-work-requirements-snap-enrollment-across-racial-ethnic-geographic-divisions/.

350 *Food Insecurity of Restaurant Workers*, FOOD FIRST (July 24, 2014), https://foodfirst.org/publication/food-insecurity-of-restaurant-workers/; MICH. STATE UNIV. CTR. FOR REG'L FOOD SYS., MEASURING RACIAL EQUITY IN THE FOOD SYSTEM: ESTABLISHED AND SUGGESTED METRICS 8 (May 2019), https://www.canr.msu.edu/foodsystems/uploads/files/measuring-racial-equity-in-the-food-system.pdf.

351 *See* Goldstein & Goel, *supra* note 246.

352 *See id.*

353 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

minors, they are literally disenfranchised. There is a presumption that parents will protect minors' rights.

However, here, the job of securing protection for minors is primarily in the hands of another largely disenfranchised group, women of color. There is extensive documentation, through judicial challenges and scholarly works, of acts taken to prevent Black voters from reaching the polls.[354] Many of these efforts, such as creating unnecessary and burdensome voter ID requirements,[355] limiting voting places [356] and hours,[357] and even gerrymandering political boundaries,[358] have received a seal of approval from the courts. Even though women gained the right to vote long ago and make up more than half the U.S. population, sexism continues to perpetuate their underrepresentation on legislative bodies.[359] There is simply no guarantee that the political process will protect parents' right to choose how to feed their infants. Equal protection represents one of the most viable ways to establish and maintain that right. Where laws and policies create inequality, the Equal Protection Clause is the most appropriate clause to invoke. When, as here, rhetoric about personal responsibility and racial stereotypes cloak the structural effects of these laws, constitutional remedies are even more important.

---

354 *E.g.*, Karina Schroeder, *How Systemic Racism Keeps Millions of Black People from Voting*, VERA INST. JUSTICE: THINK JUSTICE BLOG (Feb. 16, 2018), https://www.vera.org/blog/how-systemic-racism-keeps-millions-of-black-people-from-voting (explaining how African Americans have historically been disenfranchised, and continue to be disenfranchised).

355 *See* Andrew Cohen, *How Voter ID Laws Are Being Used to Disenfranchise Minorities and the Poor*, ATLANTIC (Mar. 16, 2002), https://www.theatlantic.com/politics/archive/2012/03/how-voter-id-laws-are-being-used-to-disenfranchise-minorities-and-the-poor/254572/.

356 *See* Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/.

357 *See* U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 160-61 (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

358 *See* Kim Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST (June 9, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/?utm_term=.4959dfcae9df.

359 *See Status of Women in the States*, INST. FOR WOMEN'S POL'Y RES., https://statusofwomendata.org/explore-the-data/political-participation/political-participation-full-section/ (last visited Oct. 6, 2019).

B. The Thirteenth Amendment

Section 1 of the Thirteenth Amendment states that, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[360] The 1883 *Civil Rights Cases* opened the door to an expansive interpretation of this text by stating that "it is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States[.]"[361] Section 2 advises that, "Congress shall have power to enforce this article by appropriate legislation."[362] The next Subsection details the trajectory of the Supreme Court's interpretation of the Thirteenth Amendment and argues that mandated work requirements are a form of involuntary servitude.

1. Work Requirements as Forced Labor

The Court has never questioned the Thirteenth Amendment's ability to prohibit forced labor that closely resembles slavery. Scholars have pushed the Court, however, for a liberal interpretation of "compulsory" or "involuntary" servitude.[363] Interpreting the Thirteenth Amendment for the first time in 1872 in the *Slaughter-House Cases*, the Court held that the amendment applied solely to literal enslavement, as opposed to

360 U.S. CONST. amend. XIII, § 1.

361 *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883).

362 U.S. CONST. amend. XIII, § 2; *see, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (holding that the Thirteenth Amendment gives Congress the power to eliminate all racial barriers to obtain real and personal property); The Civil Rights Cases, 109 U.S. at 20 (holding that Congress has the power to pass all laws necessary and proper to enforce the Thirteenth Amendment).

363 *See, e.g.*, Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 983-85 (2002) (discussing the possible application of the Thirteenth Amendment to modern labor trafficking); Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397, 398-400 (1999) (asserting that the exploitation of immigrant garment workers violates the Thirteenth Amendment); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-*Hoffman *World — Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 658 (2004) (arguing that the Thirteenth Amendment should apply to undocumented workers); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) ("[T]he thirteenth amendment can be interpreted to stand for a much broader idea of employee autonomy and independence."); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 974-75 (2002) (contending that the Thirteenth Amendment applies to involvement of U.S. firms in forced labor abroad).

oppressive work conditions.[364] Eleven years later, in the *Civil Rights Cases*, the Court expanded the amendment's reach: "[T]he [Thirteenth] [A]mendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[365]

Despite the opinion's further acknowledgement that the Thirteenth Amendment's protection encompasses "badges and incidents of slavery,"[366] the Court refused to apply this more expansive doctrine to the case at hand to invalidate segregation in public accommodations.[367] The Court viewed integration of private facilities as a social, not a civil right.[368] As such, it fell outside of the Court's definition of badges or incidents of slavery. It viewed "incidents" of slavery primarily as legal impediments to equality.[369] "Badges" initially referred to physical markers, such as skin color.[370]

In 1883, the same year as the *Civil Rights Cases*, the Court heard *United States v. Harris*.[371] The *Harris* Court struck down the 1871 Force Act, a law designed to keep the Ku Klux Klan in check by criminalizing conspiracy to deprive a person of equal protection.[372] Tennessee Sherriff R. G. Harris led an armed lynch mob into the state jail, where he captured four Black prisoners, killing one of them, despite the Deputy Sherriff's attempts to intervene.[373] Harris won his case on appeal when the Court held that the Thirteenth Amendment did not authorize the Force Act because the law did not implicate either slavery or

364 *See* The Slaughter-House Cases, 83 U.S. 36, 69 (1872).

365 *See* The Civil Rights Cases, 109 U.S. at 20.

366 *Id.* at 20-21.

367 *See* Plessy v. Ferguson, 163 U.S. 537, 542-43, 562-63 (1896); The Civil Rights Cases, 109 U.S. at 24.

368 *See* The Civil Rights Cases, 109 U.S. at 22-24.

369 *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 571 (2012) ("[A]n 'incident' of slavery was an aspect of the law that was inherently tied to or that flowed directly from the institution of slavery — a legal restriction that applied to slaves qua slaves or a legal right that inhered in slaveowners qua slaveowners.").

370 *See id.* at 575 ("In its most general sense, the term 'badge of slavery' therefore refers to indicators, physical or otherwise, of African Americans' slave or subordinate status."); *see, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442-43 (1968) ("[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.").

371 United States v. Harris, 106 U.S. 629 (1883).

372 *See id.* at 641.

373 *Id.* at 629-31; *see also United States v. Harris*, OYEZ, https://www.oyez.org/cases/1850-1900/106us629 (last visited Jan. 4, 2020) (summarizing the facts of *Harris*).

involuntary servitude.[374] The Court noted that the Fourteenth Amendment also failed to provide authority for Congress to enact the Force Act because the law prohibited the acts of individuals, not the state.[375]

In 1896, in *Plessy v. Ferguson*, the Court upheld the segregation of railroad cars based on its professed belief that the race-assigned carriages were "separate but equal," thereby satisfying the Fourteenth Amendment's guarantee of equal protection.[376] Considering whether the Court could insist on the railway cars' integration under the Thirteenth Amendment, the Court decided that it could not.[377] It confined the meaning of slavery to "a state of bondage; the ownership of mankind as chattel, or at least, the control of the labor and services of one man for the benefit of another[.]"[378] It did not consider whether integration was a badge or incident of slavery, although strong arguments could have been made that it was. Having declined to interpret housing segregation as a social right in the *Civil Rights Cases*, it was unlikely to view railway segregation as a civil right in *Plessy*. Nonetheless, because rail is a public accommodation, expectations of equality should have been higher.

In *Hodges v. United States*, in 1906, the Court again declined to expand the meaning of the Thirteenth Amendment to include situations that did not involve "the entire subjection of one person to the will of another."[379] White sawmill workers and farmers in Arkansas who resented Blacks working alongside or instead of them drove Black workers out of their jobs through threats of violence.[380] The White aggressors faced charges for this intimidation under a law prohibiting interference with the ability to make contracts.[381] Siding with the White attackers, the Court struck down the law, declaring it beyond the purview of the Thirteenth Amendment, because it did not involve

374 *Harris*, 106 U.S. at 641, 644.

375 *See id.* at 643-44.

376 Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896); *id.* at 552 (Harlan, J., dissenting).

377 *See id.* at 540-43 (majority opinion).

378 *Id.* at 542.

379 Hodges v. United States, 203 U.S. 1, 17 (1906).

380 Pamela S. Karlan, *Contracting the Thirteenth Amendment:* Hodges v. United States, 85 B.U. L. REV. 783, 786 (2005) (citing Transcript of Record at 4, Hodges v. United States, 203 U.S. 1 (1906) (No. 14 of Oct. 1905 term)).

381 *See Hodges*, 203 U.S. at 14. The indictment was based on Sections 1977 and 5508 of the Revised Statutes of 1874. Section 1977 is now 42 U.S.C. § 1981 and Section 5508 is now 18 U.S.C. § 241.

forced labor.[382] The *Hodges* decision relied in part on the fact that, instead of compelling the victims to labor, their attackers had forced them to *stop* working.[383] Despite invalidating the law by maintaining a narrow definition of the Thirteenth Amendment, the *Hodges* opinion expanded the Thirteenth Amendment's coverage beyond freed slaves and their descendants to other races, such as Chinese and Italian.[384]

In 1926's *Corrigan v. Buckley*, the Court continued to construe the Thirteenth Amendment narrowly, deciding that it does not govern the issue of racially restrictive covenants against Black homeowners.[385] The Court held that the Thirteenth Amendment does not protect Blacks' individual rights.[386] But, in the next case to interpret the Thirteenth Amendment, 1944's *Pollock v. Williams*, the Court reinforced its commitment to eradicating all forms of forced labor under the Thirteenth Amendment, opening the door to more expansive definitions of involuntary servitude.[387]

Pollock considered a Florida law that made it a crime of fraud to accept advance payment for labor that an individual did not subsequently perform.[388] This type of law was popular in the South, where employers sought to compel farm laborers to work under even

---

[382] *See Hodges*, 203 U.S. at 18-20.

[383] *See id.* at 17-18.

[384] The Court wrote:

> "While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual . . . . Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African."

Id. at 16-17. The Court also expanded the Amendment's protection to Whites in 1976. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295-96 (1976) (holding that the Civil Rights Act of 1866, which was enacted under Section 2 of the Thirteenth Amendment, prohibited all forms of racial discrimination, including discrimination against Whites). The Northern District of Texas considered and rejected an argument to expand its protection to disabled persons, finding that they did not constitute a race. Keithly v. Univ. of Tex. Sw. Med. Ctr. at Dallas, No. 3:03-CV-0452-L, 2003 WL 22862798, at *3-4 (N.D. Tex. Nov. 18, 2003).

[385] *See* Corrigan v. Buckley, 271 U.S. 323, 327-28, 330-31 (1926).

[386] *Id.* at 330 (citing *Hodges*, 203 U.S. at 16, 18) ("The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another does not in other matters protect the individual rights of persons of the negro race.").

[387] *See* Pollock v. Williams, 322 U.S. 4, 24 (1944).

[388] *See id.* at 5.

the most egregious conditions.[389] Blacks made up the majority of farm workers because post-Reconstruction laws restricted Black men primarily to agricultural labor.[390] Under the Florida law, failure to pay back an advance without fulfilling the contract served as intent to defraud and came with exorbitant penalties.[391] The county sheriff took Pollock, a Black laborer, into custody for failing to pay back five dollars, and set his release bond at $500.[392] These harsh penalties ran afoul of the 1867 Peonage Abolition Act.[393]

Upholding Congress' authority to enact this anti-peonage law under the Thirteenth Amendment and striking down Florida's law, the Court identified the Thirteenth Amendment's goal as "not merely to end slavery, but to maintain a system of completely free and voluntary labor throughout the United States."[394] The Court went on to explain that "Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor."[395]

This language sheds light on the constitutionality of sanctions against welfare recipients that are new mothers who refuse to leave the home to perform labor imposed on them by the state. Infant care is an important, if undervalued, form of labor. Although this labor is uncompensated when performed by the mother, it is not free. If a mother does not do it, she must pay someone else to do it for her. In rare cases, a family member may be available to do this work, but their time also has value that they must forfeit to fulfill this duty. Work requirements and accompanying sanctions allow the government to remove mothers' choice of labor from them and impose its own.

Compelling a mother, through punitive sanctions, to perform one specific type of labor over another is an unconstitutional restraint on freedom. Unlike the consequences for not working in *Pollock*, sanctions

389 *See id.* at 8-10.

390 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, 199-200 (1988) (identifying the Black Codes that prohibited Blacks from pursuing any occupation other than farmer or servant).

391 *Pollock*, 322 U.S. at 5 n.1.

392 *Id.* at 14-15. Five hundred dollars in 1944 is the equivalent of approximately $7,307 in 2020.

393 *Id.* at 8, 11, 25.

394 *Id.* at 17.

395 *Id.* at 18.

imposed on benefits recipients are not criminal penalties.[396] Nonetheless, the withholding or decreasing of benefits leads to extreme consequences for women who are already in a precarious financial position.[397] These include homelessness, inadequate nutrition, and medical crises.[398] This degree of punishment is arguably equivalent to the criminalization of the failure to comply with forced labor conditions in *Pollock*.[399] Also, the burdens of this highly punitive regime fall disproportionately on Black women.[400] Although the Thirteenth Amendment prohibits involuntary servitude imposed on individuals of any race, when Blacks suffer more than other groups, this heightens Thirteenth Amendment concerns because the Amendment was written to protect the descendants of freed slaves.

Since *Pollock*, the Court has both contracted and extended the case's expansive view of the Thirteenth Amendment. For example, in 1981's *City of Memphis v. Greene*, the Court considered whether a street closing that prevented Blacks from entering a White community violated the Thirteenth Amendment.[401] It concluded that the "inconvenience" imposed on the city's affected residents "cannot be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate."[402] The Court characterized the complaint instead as one against the *symbolic* significance of the fact that most of the excluded residents were Black. It then refuted the argument that this represented impermissible stigma with the assertion that this disparate impact was merely an inevitable consequence of segregation.[403]

---

396 *See* PAVETTI, WORK REQUIREMENTS, *supra* note 17, at 8, 11.

397 FLOYD, REACHING FEW POOR FAMILIES, *supra* note 197, at 2 ("Researchers found the growth of families living in extreme poverty occurred among the groups most affected by welfare reform. . . . The limited availability of TANF benefits has put poor families — and especially their children — at risk of much greater hardship, with the potential for long-term negative consequences.").

398 *See* Alejandra Marchevsky & Jeanne Theoharis, *Why It Matters That Hillary Clinton Championed Welfare Reform*, NATION (Mar. 1, 2016), https://www.thenation.com/article/why-it-matters-that-hillary-clinton-championed-welfare-reform/ (telling the story of Lillie Harden, used as the poster child for Clinton's welfare reform, who had been unable to afford her monthly prescription and passed away after being rejected from Medicaid coverage).

399 *Cf.* Pollock v. Williams, 322 U.S. 4, 15 (1944) (invalidating the incarceration of an individual who failed to repay a five-dollar advance).

400 *See* Lindhorst & Mancoske, *supra* note 195, at 96 (findings show that African Americans are more likely to be sanctioned).

401 City of Memphis v. Greene, 451 U.S. 100, 102 (1981).

402 *Id.* at 128.

403 *See id.* at 128-29.

Raising the effect of this segregation to the level of a Thirteenth Amendment violation, the Court feared, "would trivialize the great purpose of that charter of freedom."[404] Finding that the interests of safety and tranquility, not discrimination, motivated the street closure, the Court declined to revisit the question of whether Congressional action was necessary to trigger scrutiny under the Thirteenth Amendment.[405] *Greene* reinforced the difficulties posed by attempting to redress the social impact of discrimination through the Thirteenth Amendment. Realistically, racial segregation is not about preserving tranquility, but about enforcing racism and inequality.[406] The *Greene* decision embodied the Court's willingness to turn a blind eye to systemic racism and its resistance to dealing with any repercussions of slavery beyond forced labor. However, the Court's next, and most recent as of 2020, Thirteenth Amendment case offers hope for a challenge to work requirements.

Pollock provides the legal foundation for viewing work requirements as violations of the Thirteenth Amendment. The 1988 *United States v. Kozminski*[407] decision offers some insights into how the Court might

[404] *Id.* at 128.

[405] *See id.* at 125-26. The idea that only laws enacted by Congress are subject to the Thirteenth Amendment arises from Section 2's enforcement clause. This strict interpretation would put actions by executive agencies outside the Thirteenth Amendment's purview. Nonetheless, the Court has made clear that Section 1 applies across the board, that is, not just to government branches but to individuals and entities.

[406] In *Allen v. Wright*, 468 U.S. 737, 754 (1984), the Court held that stigma arising from racism was not a cognizable injury, reinforcing the idea that the Court should not intervene to remedy the psychological harms of discrimination. This approach, however, ignores how psychological harm manifests itself in more tangible ways, such as the denial of housing, employment, and educational or entrepreneurship opportunities, often due to unconscious bias and the understanding that segregation is "natural." In fact, segregation is the result of concerted efforts to keep people apart, such as through the construction of the "unnatural" barrier at issue in *Greene*.

[407] United States v. Kozminski, 487 U.S. 931 (1988). Lower court cases have also shed light on the scope of Thirteenth Amendment jurisprudence. For example, in *Draper v. Rhay*, the Court held that, where a person is "duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises." 315 F.2d 193, 197 (9th Cir. 1963), *cert. denied*, 375 U.S. 915 (1963). The Second Circuit declined to extend the amendment's protection in response to a challenge to state adoption laws that required the permanent sealing of adoption records. *See* Alma Soc'y Inc. v. Mellon, 601 F.2d 1225, 1237 (2d Cir. 1979) ("The Court has never held that the Amendment itself, unaided by legislation as it is here, reaches the 'badges and incidents' of slavery as well as the actual conditions of slavery and involuntary servitude."). Similarly, the Fourth Circuit rejected a Thirteenth Amendment challenge to an at-large districting scheme that diluted minority votes. *See* Washington v. Finlay, 664 F.2d 913, 927 (4th Cir. 1981) ("While Congress may arguably have some discretion in determining what kind of protective legislation to

respond to a Thirteenth Amendment challenge to work requirements and sanctions.[408] In *Kozminski*, the Court analyzed two statutes enacted under the Thirteenth Amendment that criminalized involuntary servitude.[409] The case involved two intellectually disabled men working

enact pursuant to the thirteenth amendment, it appears that the amendment's independent scope is limited to the eradication of the incidents or badges of slavery and does not reach other acts of discrimination [including the vote dilution claims alleged]."). In *Wong v. Stripling*, a Chinese-American physician claimed that the private hospital where he was employed revoked his hospital privileges because of his race. 881 F.2d 200, 201 (5th Cir. 1989). He argued that this violated his Thirteenth Amendment right to "equal protection" and that the amendment's proscription of the badges and incidents of slavery "extends to any abuse predicated upon race." *Id.* at 203. The court rejected his claim, holding that "[t]he proscription in the thirteenth amendment is a broad one, but no court has held that its words alone create a general right to be free from private racial discrimination in all areas of life." *Id.* For a critique of the plaintiff's argument based on his failure to "[make] any particular effort to tie his claim to the structures created by or essential to literal slavery," see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 UC DAVIS L. REV. 1311, 1356 n.160 (2007). In *United States v. Nelson*, the court deferred to the legislature to determine whether religiously motivated violence against a Jewish person amounted to a badge or incident of slavery. *See* 277 F.3d 164, 185 n.20 (2d Cir. 2002). There are additional lower court decisions that examine the scope of the Thirteenth Amendment. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (dismissing a Black woman's Thirteenth Amendment claim for employment discrimination based on her "corn row" braided hairstyle, saying "unless a plaintiff alleges she does not have the option of leaving her job, [the Thirteenth Amendment] does not support claims of racial discrimination in employment"); *see also* United States v. Alzanki, 54 F.3d 994, 1005 (1st Cir. 1995) (affirming conviction for holding a household worker in involuntary servitude); United States v. King, 840 F.2d 1276, 1281 (6th Cir. 1988) (holding that religious cult held children in involuntary servitude in violation of federal law and the Thirteenth Amendment); United States v. Warren, 772 F.2d 827, 834 (11th Cir. 1985) (affirming convictions for holding migrant workers in involuntary servitude); Crenshaw v. City of Defuniak Springs, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995) ("While neither the Supreme Court . . . or the Courts of Appeal have decided the extent to which a direct cause of action exists under the Thirteenth Amendment, district courts have uniformly held that the amendment does not reach forms of discrimination other than slavery or involuntary servitude."); Atta v. Sun Co., Inc., 596 F. Supp. 103, 105 (E.D. Pa. 1984) (dismissing employment discrimination claim based on the Thirteenth Amendment); Davidson v. Yeshiva Univ., 555 F. Supp. 75, 78-79 (S.D.N.Y. 1982); James v. Family Mart, 496 F. Supp. 891, 894 (M.D. Ala. 1980) (rejecting plaintiff's claim for racial discrimination in employment because it did not relate to involuntary servitude or compulsory labor).

408 For further analysis of this case, see generally Kenneth T. Koonce, Jr., Note, United States v. Kozminski: *On the Threshold of Involuntary Servitude*, 16 PEPP. L. REV. 689 (1989); Catherine M. Page, Note, United States v. Kozminski: *Involuntary Servitude-A Standard at Last*, 20 U. TOLEDO L. REV. 1023 (1989).

409 *Kozminski*, 487 U.S. at 934. The first, § 241, "prohibits conspiracy to interfere with an individual's Thirteenth Amendment right to be free from 'involuntary servitude.'" *Id.*; *see* 18 U.S.C. § 241 (2019). The second, § 1584, "makes it a crime

against their will on a dairy farm in Michigan owned by Ike Kozminski, his wife Margarethe, and their son, John.[410] The two men labored seventeen hours a day, every day, at first for $15 a week and then for free.[411]

Margarethe found Robert Fulmer on the road near a farm where he was working.[412] She left a note at the farm stating that he was gone then took him to the Kozminski farm.[413] Ike encountered Louis Moltinaris on the street in Ann Arbor.[414] Moltinaris was homeless after a state mental institution discharged him.[415] The Kozminskis housed the two men in isolated, squalid conditions. They subjected them to physical and verbal abuse, including threats of institutionalization.[416] They denied Louis and Robert medical treatment after a bull gored one of them and the other lost his thumb.[417] They told the men's relatives that they had no desire to see them and ripped the phone out of the wall when they tried to make a call.[418] The family also kept the men docile by failing to provide them with adequate nutrition.[419] Robert and Louis, who had the intellectual capabilities of an eight- and ten-year-old, respectively, tried to leave the farm several times, but the Kozminskis always brought them back.[420] Eventually, a herdsperson working on the farm contacted county officials, who came to rescue the men, moving them to an adult foster care home.[421]

The definition of involuntary servitude for Thirteenth Amendment purposes was the central issue in the case.[422] Reviewing previous decisions, the majority concluded that, "in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction."[423] In other

knowingly and willfully to hold another person 'to involuntary servitude.'" *Kozminski*, 487 U.S. at 934; *accord* 18 U.S.C. § 1584 (2019).

410 *Kozminski*, 487 U.S. at 934-35.

411 *Id.* at 935.

412 *See id.*

413 *Id.*

414 *Id.*

415 *See id.*

416 *Id.*

417 *Id.* at 956 n.3 (Brennan, J., concurring).

418 *Id.*

419 *Id.* at 935 (majority opinion).

420 *Id.*

421 *Id.*

422 *See id.* at 934.

423 *Id.* at 943 (citing Pollock v. Williams, 322 U.S. 4 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); United States v. Reynolds, 235 U.S. 133, 146, 150 (1914); Bailey v.

words, "our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion."[424] The Court elaborated on this definition, asserting that, "'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant . . . by the use or threat of coercion through law or the legal process."[425] Further, "the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve."[426]

Kozminski is a criminal case where the defendants were charged with conspiring to deprive their captives of the constitutional right to be free of involuntary servitude.[427] Other, civil cases have looked directly at the relationship between work requirements attached to benefits programs and the Thirteenth Amendment, holding that these requirements fall squarely within states' rights. In *Brogan v. San Mateo County*, the Ninth Circuit affirmed the dismissal of a claim that San Mateo County's food stamp workfare program was unconstitutional.[428] Analyzing whether the workfare program constituted involuntary servitude, the court distinguished the program from situations where one person coerces another into service "by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that [they have] no alternative but to perform the labor."[429] The *Brogan* court cited to *Delgado v. Milwaukee County*, a case affirmed by the Seventh Circuit, holding that states may constitutionally require benefits recipients to work.[430] *Delgado* explained that work requirements do not violate the Thirteenth Amendment absent threats of penal sanctions for failure to comply with the requirements.[431]

Alabama, 219 U.S. 219, 244 (1911); and Clyatt v. United States, 197 U.S. 207, 215, 218 (1905)). Lauren Kares rues the Court's vague definition of involuntary servitude: "[N]early 130 years of judicial construction have failed to provide a uniform definition of involuntary servitude and thus have failed to afford the Thirteenth Amendment a clear role in the shaping of civil rights law." Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 375 (1995).

[424] *Kozminski*, 487 U.S. at 944.

[425] *Id.* at 952.

[426] *Id.*

[427] *Id.* at 934.

[428] Brogan v. San Mateo Cty., 901 F.2d 762, 764-65 (9th Cir. 1990).

[429] *Id.* at 764 (quoting United States v. Mussry, 726 F.2d 1448, 1453 (9th Cir. 1984), *cert. denied,* 469 U.S. 855 (1984)).

[430] *Id.* (citing Delgado v. Milwaukee Cty., 611 F. Supp. 278, 280 (E.D. Wis. 1985)).

[431] Delgado v. Milwaukee Cty., 611 F. Supp. 278, 280 (E.D. Wis. 1985).

Brogan and *Delgado* demonstrate the judiciary's commitment to upholding work requirements, likely for the politically motivated reasons outlined above.[432] Law and policy in the United States ordinarily fail to recognize the structural reasons for poverty that would justify providing poor people with assistance without asking for anything in return. Because work requirements are grounded in political attitudes, not statistical assessments of their success, it is likely irrelevant to the courts that work requirements in their current form do not accomplish their stated goals of moving participants into long-term gainful employment. Therefore, Thirteenth Amendment challenges against SNAP work requirements are unlikely to succeed.

TANF work requirements present a much stronger case.[433] TANF work requirements compel a single mother away from the work of parenting an infant to perform a specific type of work that is more valued by the state.[434] The method of this compulsion is through legal coercion. The application of sanctions to women who do not meet these work requirements are products of state laws and regulations. They are highly punitive, resulting in drastic and untenable consequences, including hunger and houselessness.

Benefits recipients do not face true choice regarding caring for their infants. They must either leave their babies at home or relinquish the ability to support them. The cruelty of this false choice is analogous to the level of coercion imposed on the laborers in *Kozminski*.[435] The *Kozminski* concurrence explains, "[i]n some minimalist sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, or go to jail. We can all agree

---

[432] *See* FALK ET AL., *supra* note 128, at 2.

[433] These types of work requirements also exist in other government assistance programs that are beyond the scope of this article. There are 9 HUD housing authorities that are "MTW agencies" (Moving to Work) that have work requirement policies. DIANE K. LEVY ET AL., WORK REQUIREMENTS IN PUBLIC HOUSING AUTHORITIES 3 (2018), https://www.urban.org/sites/default/files/publication/95821/work-requirements-in-public-housing-authorities.pdf. Part-time work does not count as employment and there is no exemption for mothers with infants. *See* Heather D. Hill, *Welfare as Maternity Leave?*, 86 SOC. SERV. REV. 37, 38 (2012); Rachel M. Cohen & Zaid Jilani, *Draft Legislation Suggests Trump Administration Weighing Work Requirements and Rent Increases for Subsidized Housing*, INTERCEPT (Feb. 1, 2018, 5:40 PM), https://theintercept.com/2018/02/01/hud-subsidized-housing-rent-increase-work-requirement/. These programs raise the same constitutional issues as welfare to work.

[434] *See* GENE FALK, CONG. RESEARCH SERV., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): WELFARE-TO-WORK REVISITED (2012).

[435] *Cf. Kozminski*, 487 U.S. at 934-35 (1988).

that these choices are so illegitimate that any decision to work is 'involuntary.'"[436]

Similarly, parents who receive social assistance cannot "choose" to forfeit state financial support. If they do, they will likely lose their ability to shelter, feed, and clothe their children. The state wields work requirements and sanctions as a tool of coercion, threatening to or imposing extreme deprivation on participating mothers who refuse to comply with the requirements and decide instead to labor as a parent. Due to the *Brogan* and *Delgado* courts' unequivocal upholding of work requirements, a finding that TANF work requirements violate the Thirteenth Amendment is likely to be extremely narrow. A favorably inclined court would likely hold only the lack of an exception for new mothers implicates involuntary servitude and leave the rest of the requirements intact. A decision of this nature would be a positive step in the right direction. The next Subsection argues that TANF and SNAP work requirements violate the Thirteenth Amendment as a vestige or incident of slavery.

2. Work Requirements as a Vestige or Incident of Slavery

The *Civil Rights Cases* determined that the Thirteenth Amendment's protections extend beyond pure slavery to vestiges and incidents of slavery. Defining a badge or incident of slavery has presented a formidable challenge to the Court. Arguably, practices that originated in slavery and have continued, in some form, into the present, are vestiges of slavery. Thus, a practice designed to enforce slavery that continues to oppress Blacks or other people of color is a vestige of slavery. The Court should expand the definition of "incidents" of slavery to incorporate both the food insecurity and forced formula feeding caused by the imposition of work requirements.

This definition would be a reasonable extension of the holding in 1968's *Jones v. Alfred Mayer*.[437] The *Jones* Court confronted an apartment owner's refusal to sell property to an interracial couple.[438] The couple alleged that this refusal violated the Fair Housing Act, which had recently been incorporated into the 1968 Civil Rights Act.[439] The Fair Housing Act prohibited discrimination in the sale, rental, and financing of housing based on race and other factors.[440]

[436] *Id.* at 959 (Brennan, J., concurring).

[437] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-42 (1968).

[438] *Id.* at 412.

[439] *See Jones*, 392 U.S. at 412. *See generally* 42 U.S.C.S. § 1982 (2019).

[440] *See Jones*, 392 U.S. at 413-14; 42 U.S.C.S. § 1982.

Acknowledging the role that segregation played in slavery and subsequent attempts to reinstate it, the Court identified racial housing segregation as an incident of slavery.[441] It held that Congress could use its authority under Section 2 of the Thirteenth Amendment to prohibit private housing discrimination through the Civil Rights Act because residential segregation is a relic of slavery.[442] This decision represented a significant departure from *Corrigan v. Buckley*, where the Court identified racially restrictive covenants, a different form of housing segregation, as beyond invalidation by the Thirteenth Amendment.[443] One important distinction between the cases, however, was the Congressional intervention in *Jones*. The *Corrigan* Court simply evaluated how the Thirteenth Amendment might protect potential home buyers from the discriminatory acts of individual (and collective) home owners.[444] Although *Jones* seemed at the time to foretell future use of the Thirteenth Amendment to protect against different forms of racial discrimination that originated in slavery, the case has been an outlier.

After presenting a more expansive interpretation of badges and incidents of slavery in *Jones*, the Court backpedaled to a more restrictive definition of these terms in 1971's *Palmer v. Thompson*.[445] The *Palmer* Court considered whether the decision of the city of Jackson, Mississippi, to close its public swimming pools instead of integrating them violated the Thirteenth Amendment.[446] The Court exhibited reluctance to find that it did on two fronts.[447] First, it seemed hesitant to extend the definition of badges and incidents from housing discrimination to public accommodations.[448] Its Fourteenth Amendment analysis partially explains this hesitation.[449] In this section of the opinion, the Court found that there was no affirmative duty for the city to operate swimming pools at all.[450] The lack of congressional

[441] *Jones*, 392 U.S. at 438-43.

[442] *Id.*

[443] Corrigan v. Buckley, 271 U.S. 323, 330-31 (1926).

[444] *Id.* Later, *Shelley v. Kraemer* held that, although racially restrictive covenants were lawful, the courts' enforcement of the covenants was unconstitutional under the Fourteenth Amendment's promise of equal protection under the law. 334 U.S. 1, 10-12 (1948).

[445] 403 U.S. 217 (1971).

[446] *Id.* at 226.

[447] *Id.* at 220, 226-27.

[448] *See id.* at 226-27.

[449] *See id.* at 224-27.

[450] *Id.* at 226-27.

action in the case also troubled the Court.[451] Congress had made no law regarding swimming pools. Instead, petitioners were asking the Court to reverse a municipal action. The Court simply was not willing to act absent both forced labor and congressional action, despite the clear discriminatory motivation behind the closures.

Work requirements represent a fitting opportunity to bring the reasoning of *Jones* to the forefront of Thirteenth Amendment jurisprudence. During slavery, the imposition of hunger as punishment was endemic, just as separating parents from their children was. In both contexts, these rules were not absolute. Slave owners sometimes used food as a reward. Some enslaved mothers were able to breastfeed their infants at least some of the time, although subject to the whims and dictates of slave owners.[452] Some enslaved women lived in the houses where they cared for children, especially infants, who required feeding and looking after around the clock.[453] There, they ate slave owners' food. Always, slave owners exercised control over these simple yet fundamental aspects of life. Continued use of the law to restrict access to food and to separate mothers from their infants are vestiges of slavery akin to housing discrimination.[454]

Unlike the municipal action at stake in *Palmer*, the PRWORA represents congressional action that the Thirteenth Amendment empowers the Court to consider and void if necessary. And, although Congress has successfully implemented laws against housing segregation, it has not done so for health discrimination. This failure to act on a longstanding harm makes judicial intervention even more urgent. The next Section argues that depriving mothers of the opportunity and choice to breastfeed their infants through TANF work requirements violates their substantive due process rights.

---

[451] *Id.* at 220.

[452] *See* Freeman, *Unmothering*, *supra* note 65, at 1556-57; *see also* DUNAWAY, *supra* note 65, at 138; SUBLETTE & SUBLETTE, *supra* note 73, at 24-25; Klein & Engerman, *supra* note 57, at 358.

[453] *See* FILDES, *supra* note 65, at 139; Freeman, *Unmothering*, *supra* note 65, at 1557.

[454] *See* Maria Sacchetti, *U.S. Has Taken Nearly 1,000 Child Migrants from Their Parents Since Judge Ordered Stop to Border Separations, ACLU Says*, WASH. POST (July 30, 2019), https://www.washingtonpost.com/immigration/aclu-us-has-taken-nearly-1000-child-migrants-from-their-parents-since-judge-ordered-stop-to-border-separations/2019/07/30/bde452d8-b2d5-11e9-8949-5f36ff92706e_story.html?utm_term=.7cf8092adfc1. The separation of mothers and infants has also occurred at the United States border — a related topic for another article.

C. TANF Work Requirements Violate Substantive Due Process

1. Reproductive and Parenting Rights

One of the first rights found by the Court to exist under the due process clause, despite a lack of textual grounding for this right, was a parent's ability to control their child's upbringing.[455] Although the initial cases pertaining to this right concerned control over education, specifically, teaching foreign languages[456] and home schooling,[457] the decision of what to feed an infant is even more fundamental. Diet determines a child's health and often their future, including their contributions to society. Infant feeding choice is particularly significant in light of the often-dramatic consequences linked to formula feeding.[458]

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[459] This dictate also applies to the federal government through similar language in the Fifth Amendment.[460] The Fifth Amendment Due Process Clause protects some intimate acts and decisions — including contraception,[461]

---

[455] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923).

[456] *Meyer*, 262 U.S. at 397.

[457] *Pierce*, 268 U.S. at 530.

[458] In the past, wet nursing or cross-nursing were satisfactory alternatives to maternal nursing, but anything else came with a high risk. *See* West & Knight, *supra* note 70, at 41 n.10 (citing Sally McMillen, *Mothers' Sacred Duty: Breast-Feeding Patterns Among Middle- and Upper-Class Women in the Antebellum South*, 51 J.S. HIST. 333, 348-49 (1985)) ("Until the advent of modern techniques of sterilization, artificial feeding frequently caused ill-health and death among babies. Animal milk, from cows or goats, lacked the natural immunities of breast milk, and people were not fully aware of bacteria and the importance of sanitation. Keeping milk cool remained a difficult task in hot summers."). In the present, formula feeding is still linked to high infant mortality rates. *See* Eisa Nefertari Ulen, *Black Women Do Breastfeed, Despite Intense Systemic Barriers in the US*, TRUTHOUT (Aug. 26, 2016), http://www.truth-out.org/news/item/37385-black-women-do-breastfeed-despite-intense-systemic-barriers-in-the-us (citing Kimberly Seals Allers, the project director of the First Food Friendly Community Initiative, for the proposition that breastfeeding in the Black community is a matter of life or death because of high infant mortality rates); *see also* Freeman, *First Food*, supra note 178, at 3064 (discussing breastfeeding's significance to the health of the Black community, specifically with Black infant mortality rates and deprivation of health benefits).

[459] *See* U.S. CONST. amend. XIV, § 1.

[460] *See* U.S. CONST. amend. V.

[461] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

marriage,[462] abortion,[463] and parents' right to control their children's upbringing[464] — as fundamental, individual privacy rights. In 1981, in *Dike v. School Board*, the United States Court of Appeals for the Fifth Circuit held breastfeeding to be a constitutional right protected by the Fifth Amendment's substantive due process clause.[465]

Janice Dike was a kindergarten teacher in Florida who, after giving birth to her child and returning to work, wanted to continue breastfeeding.[466] To accomplish this, during her one-hour lunch break, her husband or a babysitter brought the baby to school, where Dike nursed in a closed room behind a locked door.[467] If she needed to do something for work, her husband or babysitter watched the baby while she attended to the task. Despite there never being a problem associated with this routine, after three months, her principal told her that she had to stop because teachers were not allowed to bring their children to school, because of the potential for disruption or liability.[468] Dike then began to pump milk at school for a caregiver to feed the baby in her absence. The baby did not take well to the bottle. Dike therefore asked for permission to resume feeding the baby at school or across the street in a van. The school board denied both her requests, citing a rule that teachers could not leave school premises during the day.[469]

Shortly after, Dike's baby stopped taking a bottle at all. Dike was compelled to take an unpaid leave of absence so that she could feed her child. She then sued the school board for interfering with her constitutionally protected right to breastfeed.[470] The district court dismissed her claim. Dike appealed to the Fifth Circuit. The circuit court looked favorably upon Dike's claim that breastfeeding was a constitutional right aligned with other intimacy rights including marriage, procreation, contraception, abortion, and family relationships.[471] It also viewed her case as similar to the ones upholding a parent's right to control their child's upbringing in the educational

462 Loving v. Virginia, 388 U.S. 1, 12 (1967).

463 Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 163 (1973).

464 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

465 Dike v. Sch. Bd. of Orange Cty., Fla., 650 F.2d 783, 786 (5th Cir. 1981), *overruled by* Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).

466 *Id.* at 784-85.

467 *Id.* at 785.

468 *Id.*

469 *Id.*

470 *Id.*

471 *Id.* at 786.

context.[472] It found the right to breastfeed to be a natural extension of the existing substantive due process rights, stating that "[b]reastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is 'intimate to the degree of being sacred.'"[473]

The court explained, "[n]ourishment is necessary to maintain the child's life, and the parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health. In light of the spectrum of interests that the Supreme Court has held specially protected we conclude that the Constitution protects from excessive state interference a woman's decision respecting breastfeeding her child."[474] The appeals court sent the case back down to the trial court to determine whether the school board had a compelling reason to infringe on Dike's constitutionally protected right to breastfeed.[475]

The Fifth Circuit correctly included breastfeeding among the privacy rights protected by substantive due process.[476] Parental-child relationships are arguably closer than marriages. A parent is charged with their infant's survival. Society should therefore provide parents with the latitude to make choices that will further this goal as they see fit. If every circuit court adopted this reasoning, all laws, policies, or government practices that restrict breastfeeding would be subject to strict scrutiny, the highest level of review.[477] Strict scrutiny requires the government's action to be necessary to achieve a compelling interest. "Necessary" means that there is no alternative that would be less restrictive of the right — here, to breastfeed. Most laws fail to meet this demanding standard.

To date, the Supreme Court has been reluctant to extend the list of fundamental rights arising under substantive due process. This stems in part from the fact that they do not appear in the text of the

---

[472] *Id.*

[473] *Id.* at 787 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

[474] *Id.* at 787.

[475] *Shahar v. Bowers* overruled *Dike* on other grounds. *See* Shahar v. Bowers, 114 F.3d 1097, 1102 (11th Cir. 1997). A Mississippi case involving an incarcerated woman and her infant distinguished *Dike*. In *Southerland v. Thigpen*, the court held that prisoners enjoy fewer rights than other individuals, and that the state's interest in deterrence and retribution outweighed the plaintiff's privacy right to breastfeed her infant through suspension of her sentence or housing of the infant. 784 F.2d 713 (5th Cir. 1986).

[476] *See Dike*, 650 F.2d at 787.

[477] Freeman, *Unmothering*, *supra* note 65, at 1600. *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992) (strict scrutiny requires the government to demonstrate that a law or act necessary to achieve a compelling government interest).

Constitution.[478] The Court has also narrowed some of the privacy rights over time. Although laws restricting abortion rights initially received strict scrutiny under *Roe v. Wade*, the law now protects a woman's right to an abortion only to the extent that the state does not place an "undue burden" on her ability to have one.[479] The lower courts do not agree on what exactly constitutes an undue burden. Nonetheless, if the Supreme Court adopted this standard for breastfeeding rights, courts would invalidate any laws or state practices that put a substantial obstacle in the way of women's ability to breastfeed, such as work requirements.[480]

Reproductive autonomy, the umbrella that includes contraception, sterilization, and abortion, extends to breastfeeding, a reproductive bodily function.[481] The state has no place in this decision, which belongs to the person whose body will be used as the instrument for feeding, if that is what they desire to do. In most cases, the parent will be in the best position to determine the best interests of the child. The government has competing priorities and mandates that can conflict with an infant's best interest, such as reducing the number of unemployed mothers receiving welfare or disposing of a surplus of milk through formula sales.[482]

Food consumption may also be a privacy right that due process should protect from unwarranted governmental intrusion in the form of SNAP work requirements. This is a much more difficult argument to make than the one against TANF work requirements. A better way to ensure that the government provides sufficient food for all citizens would be to add a right to food to the Constitution.[483] Other countries have done this,[484] but the U.S. Constitution has yet to grant positive

[478] Freeman, *Unmothering*, *supra* note 65, at 1600; *see, e.g.*, Troxel v. Granville, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 528 (1965) (Steward, J., dissenting).

[479] *See Casey*, 505 U.S. at 878-79.

[480] For further discussion of the advantages and disadvantages of using the same legal standard to evaluate restrictions on the right to have an abortion and the right to breastfeed, see Freeman, *Unmothering*, *supra* note 65, at 1600, and ANDREA FREEMAN, SKIMMED: RACE, BREASTFEEDING AND INJUSTICE (2019).

[481] *See Dike*, 650 F.2d at 787.

[482] *See* Freeman, *First Food*, *supra* note 178, at 3068; *see also* JoAnne M. Youngblut et al., *Factors Influencing Single Mother's Employment Status*, 21 HEALTH CARE WOMEN INT'L 125, 126 (2000).

[483] Mathilde Cohen, *Of Milk and the Constitution*, 40 HARV. J.L. & GENDER 115, 175-79 (2017); Eve E. Garrow & Jack Day, *Strengthening the Human Right to Food*, 7 U.C. IRVINE L. REV. 275, 283 (2017).

[484] Cohen, *supra* note 483, at 180.

rights. The next Subsection argues that TANF work requirements violate the unconstitutional conditions doctrine.

2. The Unconstitutional Conditions Doctrine

In the United States, the safety net of social assistance is not a right. Instead, welfare is a benefit that the government chooses to confer in some circumstances. Many people view it as an entitlement afforded to individuals who too often take advantage of the government's generosity, using it as an excuse not to contribute to society through gainful employment. Welfare fraud is extremely rare, yet it provides the ideological motivation for strict work requirements. Unreasonable fear of fraud also lines the pockets of companies who capitalize on it.

Generally, there are no restrictions on the government's ability to tie conditions to beneficiaries' receipt of welfare. However, the unconstitutional conditions doctrine prohibits the government from attaching conditions to benefits that require recipients to relinquish a constitutional right.[485] This limitation exists even if the government could choose to withhold the benefit entirely.[486]

The Supreme Court has found unconstitutional conditions in only a handful of cases. In one, it ruled that the government could not deny unemployment benefits to a woman who decided not to work on her Sabbath.[487] The denial deprived her of her First Amendment right to the free exercise of religion. In another, the Court held that World War II veterans could not lose a property-tax exemption because they failed to take a loyalty oath.[488] It asserted that a contrary decision would violate their First Amendment free speech rights.[489] The Court also found that a state's one-year residential requirement for welfare benefits violated applicants' privileges and immunities right to travel.[490]

Conditioning new mothers' receipt of benefits on their work outside the home violates their due process rights of reproductive autonomy and ability to control their children's upbringing. It also violates the logical extension of these rights recognized by the Fifth Circuit, their right to breastfeed. The Fifth Circuit describes the choice to breastfeed

485 Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989).

486 *Id.*

487 Sherbert v. Verner, 374 U.S. 398, 410 (1963).

488 Speiser v. Randall, 357 U.S. 513, 528-29 (1958).

489 *Id.*

490 Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

as one that goes beyond nutrition.[491] It represents a fundamental decision about both the mother's and the child's body.[492] Although this is not a universally recognized right, it is as or more important than the ones the court has previously protected with the unconstitutional conditions doctrine.[493] Infant feeding is directly connected to health outcomes for mother and child. Putting either of them at risk represents higher stakes than compelling an individual to take a vow of loyalty or making it more affordable to live in one state than in another.

Both TANF and SNAP work requirements put program participants in untenable positions. SNAP recipients who cannot work twenty hours a week risk hunger and malnutrition. New mothers who receive welfare and cannot meet work requirements risk their and their babies' health. These risks represent unconstitutional conditions attached to social assistance.

CONCLUSION

At the heart of these constitutional arguments is an urgent need to eradicate all forms of food and "first food" oppression.[494] The fact that so many people in the United States go hungry[495] is a product, not of the food supply, but of food politics. Through SNAP work

[491] *See* Dike v. Sch. Bd. of Orange Cty., Fla., 650 F.2d 783, 787 (5th Cir. 1981) ("Breastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is 'intimate to the degree of being sacred[.]' Nourishment is necessary to maintain the child's life, and the parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health. In light of the spectrum of interests that the Supreme Court has held specially protected we conclude that the Constitution protects from excessive state interference a woman's decision respecting breastfeeding her child." (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965))), *overruled by* Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).

[492] *See id.*

[493] *See id.*; Brian Hodges, *Reexamining the Doctrine of Unconstitutional Conditions*, PAC. LEGAL FOUND. (May 29, 2012), https://pacificlegal.org/re-examining-the-doctrine-of-unconstitutional-conditions/.

[494] *See generally* Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1253-54 (2013) ("Food oppression is institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group . . . . [i]n the long term, food oppression diminishes already vulnerable populations in numbers and in power," and "[f]ood oppression arises from institutionalized, food-related policies and practices that undermine the physical strength and survival of socially marginalized groups.").

[495] Nicole Aber, *15 Million – One in Ten – Working Adults in U.S. Struggle Against Hunger, Says New Report,* HUNGER FREE AMERICA (Dec. 5, 2018), https://www.hungerfreeamerica.org/blog/15-million-%E2%80%94-one-ten-%E2%80%94-working-adults-us-struggle-against-hunger-says-new-report.

requirements, the government leverages hunger to compel participation in the low-wage labor market that rarely leads people out of poverty. TANF work requirements devalue motherhood. The immoral underpinnings of these requirements arise from their relationship to racialized views of welfare and food stamp recipients.

Bipartisan agreement on the unconstitutionality of work requirements should be within reach. Prioritizing work over family, food security, or health does not reflect popular rhetoric on either side of the political aisle. A policy shift is also economically appealing. There are practical solutions to poverty that cost less than the expenditures on medical care that hunger and food-related illness necessitate. The framing of work requirements as unconstitutional provides a rallying cry for anti-hunger, anti-racist, anti-poverty, and food justice advocates.