

Mission Dissonance in the TANF Program: Of Work, Self-Sufficiency, Reciprocity, and the Work Participation Rate

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I. INTRODUCTION

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) was touted by President Clinton as transformative legislation that would “end welfare as we know it”¹ and “recreate the nation’s social bargain with the poor.”² Indeed, the reforms embodied in PRWORA did make major changes in the welfare program. Whereas previous reform efforts tinkered with the details of the program, following the incremental approach to change that is common in government, PRWORA was revolutionary legislation that created a whole new species of welfare program. Control of most aspects of program design and spending was ceded to the states through the block grant funding technique. In an even greater transformation, what had been an entitlement to income support for needy persons became a time-limited program focused on putting needy persons to work.

The idea of work as a condition of welfare receipt had played a role in reform legislation and proposals dating back to the 1960s.³ However, the centrality of work in PRWORA and the means for implementing the focus on work constituted revolutionary departures from prior efforts. Ending the entitlement status of welfare benefits enabled the government to use denial of those benefits as a sanction for failure to meet work requirements and to use time limits to motivate welfare recipients to prepare for and obtain employment. Unlike the work provisions of prior law, the work requirement in PRWORA was tough, it was universal, and it could be enforced.

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¹ Barbara Vobejda, *Clinton Signs Welfare Bill Amid Division*, WASH. POST, Aug. 23, 1996, at A01.

² *Clinton Signs Welfare Reform Bill, Angers Liberals*, CNN (Aug. 22, 1996), <http://www-cgi.cnn.com/ALLPOLITICS/1996/news/9608/22/welfare.sign/>.

³ The first work program under Aid to Families With Dependent Children (AFDC), WIN (Work Incentive), was instituted in 1967 and provided for skill assessments, job training, and placement. Pub. L. No. 90-248, 81 Stat. 821 (amending 42 U.S.C. §§ 602(a)(19), 630–44) (1968). In 1971 Congress enacted the Talmadge Amendment, which toughened the AFDC work requirements of the WIN program. Pub. L. No. 92-223, 85 Stat. 803 (1971). The Omnibus Budget Reconciliation Act of 1981 authorized states to establish community work experience and subsidized employment programs. Pub. L. No. 97-35, § 409, 95 Stat. 357 (1981).

PRWORA's emphasis on work was widely supported—by President Clinton,⁴ by the Republican majority in Congress,⁵ and by the public.⁶ The work ethic and the inherent value of work are among the most deeply held values in American society. However, the policy implications of a belief in work can vary when applied to a relief program. To President Clinton, for instance, the belief in work could be vindicated by using a time-limited period of welfare receipt to provide education, training, or services that would enable the welfare recipient to succeed in the job market when the time limit was reached, if not before.⁷ To the more conservative Republicans in Congress, valuing work meant something quite different—they believed that a welfare recipient should work *in exchange for* her welfare benefits.⁸ Thus there was a conflict between Clinton's "welfare *to* work" approach and the conservatives' "welfare *for* work" approach.

The welfare program created by PRWORA incorporated elements of both approaches without a unifying narrative. As a result, the signals and instructions sent to the states regarding the sort of program they were expected to implement were multidirectional.

The presence of multiple objectives was not a problem under PRWORA, as program requirements were sufficiently flexible to permit states to fashion a work program reflecting local conditions and priorities. This flexibility was substantially reduced, however, by modifications adopted when Temporary Assistance for Needy Families (TANF) was reauthorized in the Deficit Reduction Act of 2005 (DRA). These modifications, which purportedly related to consistency and reliability of data reported to the Department of Health and Human Services (DHHS) by the states,⁹ in fact disrupted the balance of competing objectives that had evolved under the original TANF program, depriving states of much of their flexibility and necessitating substantial program redesign in many states. The new program dynamic tilted sharply in favor of the "welfare *for* work" approach, which I will refer to as "reciprocity."

⁴ See, e.g., *The Welfare Bill: Text of President Clinton's Announcement on Welfare Legislation*, N.Y. TIMES, Aug. 1, 1996, at 24.

⁵ See, e.g., *Republican Contract With America*, <http://www.house.gov/house/Contract/CONTRACT.html>.

⁶ See, e.g., Press Release, Public Agenda, Americans and Welfare Reform: Work, Not Cost, Primary Issue (Apr. 24, 1996).

⁷ See, e.g., JASON DEPARLE, AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION'S DRIVE TO END WELFARE 114 (2004).

⁸ See *infra* notes 26–37 and accompanying text. Although not all welfare recipients are women, this pattern is sufficiently dominant to warrant use of the feminine pronoun.

⁹ The changes made by the DRA were heavily influenced by a Government Accountability Office (GAO) report focused on inconsistencies in state reporting of data related to work participation. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-821 WELFARE REFORM: HHS SHOULD EXERCISE OVERSIGHT TO HELP ENSURE TANF WORK PARTICIPATION IS MEASURED CONSISTENTLY ACROSS STATES 23 (2005), available at www.gao.gov/new.items/d05821.pdf.

As a result of the DRA modifications, states were forced to refocus their programs on caseload reduction or on keeping recipients busy in some sort of work or search for work,¹⁰ while reducing their emphasis on activities aimed at developing recipients' ability to become self-supporting. Moreover, the DRA modifications seemed to reject the long-held notion that some poor persons cannot be expected to work and are thus "deserving" of public assistance to meet basic needs.¹¹ The DRA changes effectively pushed persons incapable of self-support out of the federal TANF program. Finally, state flexibility to address local circumstances, which had been a key element of welfare reform in 1996, was substantially constricted, with fundamental priority-setting functions shifted from the state capitals to Washington, D.C.

The 2006 reauthorization of TANF expired at the end of 2010, requiring a new reauthorization for the program to continue. Congress has not introduced reauthorizing legislation to date, having extended the program until late 2012. The reauthorization process presents an opportunity for Congress to reconsider the goals of TANF, the competing visions of a work-based program, the continued viability of notions of the "deserving poor," and the implications of the creeping federalization that has in many ways superseded the state laboratories of innovation that gave birth to welfare reform in the first instance.¹²

This article will describe two competing visions of the role of work in a welfare program: a "reciprocity" paradigm and a "self-sufficiency" paradigm. Though these two paradigms reflect common values and seem consistent, their conflicts become apparent at the operational level because of the differing program strategies associated with each. Section III will demonstrate how PRWORA incorporated both paradigms, directing states to design their state plans around the self-sufficiency model, while using reciprocity as the model for the primary accountability measure, the work participation rate. Other features of PRWORA that had the effect of balancing the two paradigms and preserving state flexibility will be explained, along with the choices made by states in designing their programs. Section IV will show that most states have chosen to emphasize the self-sufficiency approach. The dramatic reconfiguration of the TANF program and its apparent objectives effected by the DRA requirements, and the effect of that reconfigura-

¹⁰ See *1995 Senate Welfare Revision: Hearing Before the S. Comm. on Finance*, 104th Cong. 5 (1995) [hereinafter *Mead Senate Testimony*] (statement of Prof. Lawrence M. Mead, Weinberg Visiting Professor, Princeton University) ("[T]he main goal of reform is simply to raise the level of activity . . .").

¹¹ This concept of the "deserving poor" has long been a part of discourse concerning government benefit programs. It underlies public support of programs providing assistance to persons who are elderly, disabled, and newly unemployed (through no fault of their own) among others. See, e.g., David T. Ellwood, *Anti-Poverty Policy for Families in the Next Century: From Welfare to Work—and Worries*, 14 J. ECON. PERSPS. 187, 187–88 (2000).

¹² For discussion of early state innovations, see, for example, Peter T. Kilborn & Sam Howe Verhovek, *Clinton's Welfare Shift Ends Tortuous Journey*, N.Y. TIMES, Aug. 2, 1996.

tion on state programs will be explored in detail in Section V. This analysis will demonstrate the need for a renewed commitment to important goals of PRWORA that have been lost amid the increasing emphasis on work participation by those receiving welfare. These goals include state flexibility, self-sufficiency for welfare recipients, and aid for the truly needy. Section V will also highlight the need to rethink the assumption that most welfare recipients are capable of becoming self-sufficient and to create program options appropriate for persons with significant barriers to employment.

II. COMPETING VISIONS OF WELFARE REFORM

While the welfare reforms of 1996 are often associated with Bill Clinton's campaign promise to "end welfare as we know it," the substance of these reforms was more closely tied to Newt Gingrich's Contract With America. As a result of delays in production of a welfare reform bill by the Clinton administration¹³ and the Republican takeover of Congress in 1994, the Republicans were firmly in control by the time welfare reform reached the front burner in Washington. Moreover, the new Republican majority was united behind the Contract With America, which pledged to reform welfare by cutting spending, penalizing illegitimate births, and imposing a "tough two-years-and-out provision with work requirements to promote individual responsibility."¹⁴ After vetoing two welfare reform bills fashioned to implement the Republicans' Contract With America, Clinton was ultimately forced by political considerations to sign a third such bill.¹⁵ This bill, PRWORA, resembled Clinton's original proposal in some ways,¹⁶ but most of the key provisions reflected the more conservative philosophies and priorities of the congressional Republicans.¹⁷

The welfare reform proposals of both the administration and the congressional Republicans, as well as the overwhelming preference of the American public,¹⁸ focused on putting welfare recipients to work. Much of the distaste for the welfare program in the latter part of the twentieth century can be associated with the centrality of work to the American value system. From the inception, receipt of public benefits in this country has been linked to notions of desert, and desert has existed only if the beneficiary had a

¹³ Jason DeParle, *Mugged by Reality*, N.Y. TIMES MAG., Dec. 8, 1996, at 64.

¹⁴ Republican Contract With America, *supra* note 5.

¹⁵ See RON HASKINS, WORK OVER WELFARE: THE INSIDE STORY OF THE 1996 WELFARE REFORM LAW 328–29 (2006).

¹⁶ For instance, one provision required that recipients work after receiving welfare for two years. 42 U.S.C. § 602(a)(1)(A)(2) (2011).

¹⁷ See, e.g., Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43; David T. Ellwood, *Welfare Reform As I Knew It: When Bad Things Happen to Good Policies*, AM. PROSPECT, May 1, 1996, at 22.

¹⁸ See Republican Contract With America, *supra* note 5.

legitimate basis for failing to support him or herself through work.¹⁹ Thus, early relief programs were directed toward persons who were not expected to work for one reason or another and hence were deserving of public assistance in meeting their basic needs. These “deserving poor” included the disabled, the elderly, those who became unemployed through no fault of their own, widows with children to support, and other single parents deemed “worthy” of assistance.²⁰

Post-New Deal changes in social mores altered public perceptions of who could be legitimately excused from work, and by mid-century, able-bodied, single mothers were no longer included in this category, regardless of their circumstances.²¹ Consequently, work has been a central feature of all welfare initiatives since 1967, as Congress sought to facilitate and encourage work by persons who were no longer considered deserving of unlimited public largesse.²²

The welfare reform debate of the 1990s continued this emphasis on able-bodied welfare recipients’ obligation to work. Policy differences tended to reflect differing perspectives on the type of measures that would be necessary to reconnect welfare recipients with the workforce. Many policy makers believed that jobs were plentiful and that welfare recipients’ unwillingness to take them signaled personal moral deficits.²³ From this perspective, strong measures to force recipients into the job market would be the hallmarks of successful reform of the welfare program.²⁴ Others ques-

¹⁹ See Joel F. Handler, *The Transformation of Aid to Families With Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 459–62 (1987–88); see also Mead Senate Testimony, *supra* note 10, at 6 (“People want to help families in distress provided the adults show that they are ‘deserving,’ above all by seeking to work.”).

²⁰ See DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 27–33 (1988).

²¹ See Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 THE FUTURE OF CHILD. 28, 30–31 (1997); DEPARLE, *supra* note 7, at 92.

²² Exceptions from work requirements continue to reflect sub-groups to whom the work expectation does not apply, such as mothers of preschool children for whom care is unavailable. See, e.g., 42 U.S.C. § 607(e)(2) (2011).

²³ See, e.g., Judith M. Gueron, *Work and Welfare: Lessons on Employment Programs*, 4 J. ECON. PERSPS. 79, 83–84 (1990); Liz Schott, *The Congressional Divide Over TANF Reauthorization*, 1 SEATTLE J. FOR SOC. JUST. 427, 433 (2002); HASKINS, *supra* note 15, at 10–11; DEPARLE, *supra* note 7, at 162. In addition to the lack of ambition of welfare recipients and their willingness to live off the public, the “moralists” pointed to the disincentive to work provided by the unlimited and unconditional entitlement to welfare benefits. See, e.g., Michael Wiseman, *Welfare Reform in the United States: A Background Paper*, 7 HOUSING POL’Y DEBATE 595, 604–05 (1996), available at http://www.knowledgeplex.org/kp/text_document_summary/scholarly_article/relfiles/hpd_0704_wiseman.pdf; ELLWOOD, *supra* note 20, at 19–20.

²⁴ See, e.g., Lawrence M. Mead, *The Logic of Workfare: The Underclass and Work Policy*, 501 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 156, 158–60, 164 (1989). The welfare reform bill introduced by House Republicans in 1994 was intended to “provide States with the resources and authority to help, cajole, lure, or force adults off welfare and into paid employment” Personal Responsibility Act of 1995, H.R. 4, 104th Cong. § 201(b)(1) (1995). The breakdown of the family was another cause often cited by those viewing welfare reform through a moral lens. Under this view, the dramatic increase in single parenthood was at the

tioned not only the availability of jobs, but also the employability of welfare recipients in such jobs as were available. Many believed that welfare recipients would willingly move into the job market if barriers to employment such as educational deficiencies and lack of childcare were addressed.²⁵

These perspectives coalesced into two general ideas of how work should be incorporated into the welfare program. The reform proposals ultimately enacted as PRWORA reflect an uneasy blending of these two approaches, which I will refer to as “reciprocity” and “self-sufficiency.”

A. *Reciprocity*

A reciprocity approach builds the work ethic into a relief program by demanding that recipients of public largesse perform work in exchange for the aid they receive. Programs of this type are often referred to as “workfare.” Many of those who viewed the flaws of the welfare program through a moral lens faulted the program for creating a “culture of entitlement” in which individuals expected to receive public support for which they did or gave nothing in return.²⁶ This perspective was not inherently concerned with forcing recipients off welfare and into the job market. Rather, its primary aim was assuring that recipients gave something in exchange for their benefits: as described by Michael Novak, “those who receive from the public good must also contribute to the public good.”²⁷

Relief programs reflecting notions of reciprocity can be seen as early as the American colonial era, when work requirements took the form of workhouses, apprenticing of poor children, and farming out able-bodied adults.²⁸ Even during the Great Depression, the dominant forms of emergency relief

root of the explosion of the welfare rolls. Thus, the welfare crisis could not be effectively addressed without attacking the underlying problems of illegitimacy and the decline of marriage. See ROBERT E. RECTOR, HERITAGE FOUND., BACKGROUND No. 1075, YET ANOTHER SHAM IN WELFARE REFORM: EXAMINING THE NGA PLAN (1996), available at http://thf_media.s3.amazonaws.com/1996/pdf/bg1075.pdf.

²⁵ See, e.g., Edelman, *supra* note 17; LADONNA PAVETTI, BROOKINGS INST., 31 WELFARE REFORM AND BEYOND, THE CHALLENGE OF ACHIEVING HIGH WORK PARTICIPATION RATES IN WELFARE PROGRAMS 3 (2004), available at http://www.brookings.edu/~media/Files/rc/papers/2004/10childrenfamilies_pavetti/pb31.pdf. For a full discussion of these barriers to employment, see *infra* notes 115–20 and accompanying text.

²⁶ See Handler, *supra* note 19, at 466–67 (citing existence of consensus “that somehow AFDC families have lost the sense that the social contract includes mutual obligations, that citizens of society ought to contribute as well as receive.”).

²⁷ HASKINS, *supra* note 15, at 125; see also Wiseman, *supra* note 23, at 628 (describing approach to work in House Republican welfare reform proposal: “welfare recipients are expected to work 35 hours a week in return for welfare benefits”).

²⁸ Wayne Vasey, *Recurring Themes in the Income Support Policy Debate—Obstacles to Change*, in INCOME SUPPORT: CONCEPTUAL AND POLICY ISSUES 283, 292 (Peter G. Brown et al. eds., 1981). See also William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 36 (1996); William P. Quigley, *The Quicksands of the Poor Law: Poor Relief Legislation in a Growing Nation, 1790–1820*, 18 N. ILL. U. L. REV. 1, 4 (1997). One objective of these work requirements was to assure that the condition of the recipient of relief was less desirable than that of the self-supporting laborer. Vasey, *supra* at 292.

for the unemployed involved an exchange of work for public support; e.g., the Civilian Conservation Corps, the Farm Security Administration, and the Works Progress Administration.²⁹ The view of work and welfare as interdependent retained its place in the public psyche even as concepts of social justice, welfare rights, and entitlement dominated much of the legal, academic, and policy discourse at mid-century. The subsequent rise in criticism of the welfare program sparked a revival of the reciprocity concept,³⁰ which played an important role in the welfare reform debates of the 1990s.

Prominent welfare theorist Lawrence M. Mead heavily influenced the form in which the reciprocity idea manifested itself during the welfare reform debates.³¹ Mead positioned the reciprocity idea within a contractarian view of citizenship and welfare. He contended that the success of the social contract that underlies our way of life demands that all citizens accept certain responsibilities, including the obligation to support oneself and one's family through socially useful activity. If an able-bodied person looks to the state for that support, he or she is obligated to reciprocate by performing such socially useful activity as the state may demand.³² Because of the inherent moral value of work and its dignitary value to the individual, Mead saw work as the form of activity that should be required from able-bodied welfare recipients.³³ Since the required work involved discharge of a debt to society, the concept was not broad enough to include receipt from the state of things of value such as education or medical treatment.³⁴ Thus the resources of a reciprocity program would be concentrated on job placement

²⁹ ADAM COHEN, *NOTHING TO FEAR: FDR'S INNER CIRCLE AND THE HUNDRED DAYS THAT CREATED MODERN AMERICA* 208–09, 311–13 (2009). Even these programs, however, were described by President Roosevelt as “a bridge by which people can pass from relief status over to normal self-support.” *Id.* at 271.

³⁰ *See, e.g.,* Baruch Brody, *Work Requirements and Welfare Rights*, in *INCOME SUPPORT*, *supra* note 28, 247, 247.

³¹ *See generally* Lawrence M. Mead, *The Politics of Conservative Welfare Reform*, in *THE NEW WORLD OF WELFARE* 201 (Rebecca Blank & Ron Haskins eds., 2001). Mead testified before Congress concerning welfare reform and was consultant to the City of New York during development of its large-scale workfare program. *See Mead Senate Testimony*, *supra* note 10.

³² “[T]he main point of the work test is not to help out the recipients. It is to discharge a debt to society.” *Work Versus Education and Training in TANF: Hearing Before the Subcomm. on Income Sec. and Family Support, H. Comm. on Ways & Means*, 111th Cong. 5 (2010) [hereinafter *Mead House Testimony*] (statement of Prof. Lawrence Mead, New York University); *see also Mead Senate Testimony*, *supra* note 10 (“The public wants welfare adults to work . . . [mainly to affirm the moral value of effort], whether or not economic gains result.”).

³³ Mead defined “able-bodied” to include all recipients who were not sufficiently disabled to qualify for federal disability benefits. In regard to the eligibility requirements for federal disability benefits, *see infra* notes 168–70 and accompanying text.

³⁴ *See, e.g., Mead House Testimony*, *supra* note 32, at 5 (referring with disapproval to “those who want to turn welfare into a scholarship”); Jason DeParle, *What Welfare-to-Work Really Means*, *N.Y. TIMES MAG.*, Dec. 20, 1998, at 59 (reporting assertion by Jason Turner that “welfare is not student aid”). Mead did not rule out provision of such services, which have the potential to increase the individual’s employability and earning power, so long as the individual was repaying his debt to society by working at least half-time. *Mead Senate Testimony*, *supra* note 10, at 10.

and accountability rather than on skill building or other measures to increase employability.

Mead disciple Jason Turner, who administered large-scale workfare programs in Wisconsin and New York City,³⁵ conceptualized the moral imperative in terms of assumption of responsibility for the subsistence needs of one's family.³⁶ Individuals could meet this obligation by repaying the public for assistance received from the welfare program but could also meet it by leaving the welfare program and relying on their own resources. Thus in his view, the objectives of a reciprocity-based program could be achieved through caseload reduction as well as workfare itself.³⁷

B. *Self-Sufficiency*

A second perspective on welfare and work, which I will refer to as "self-sufficiency," is less concerned with extracting contemporaneous recompense from recipients of welfare and more concerned with ending the individual's need for, and hence dependence on, welfare. The self-sufficiency approach seeks to further the social and moral values inherent in work through long-term integration of welfare recipients into the labor force. As with the reciprocity approach, the self-sufficiency model imposes obligations on those who accept public support; the nature of the obligation, however, is to strive for independence³⁸ rather than to perform community-benefiting work activities. Welfare is thus seen as a sort of vocational reha-

³⁵ Turner served as Governor Tommy Thompson's welfare administrator from 1993 through 1997, and was the chief architect of Wisconsin's W-2 workfare program. In 1998 he became New York City Mayor Rudolph Giuliani's Commissioner of Human Resources. Although some other states used limited workfare strategies as part of their welfare reform program, Wisconsin and New York City were the only jurisdictions with large-scale workfare programs at the time of the 2001 reauthorization debates. Wisconsin's program predated the enactment of PRWORA. See Jason A. Turner & Thomas Main, *Work Experience Under Welfare Reform*, in *THE NEW WORLD OF WELFARE*, *supra* note 31, at 291, 298.

³⁶ Turner saw work as "a redemptive force that can treat depression, order lives and stem moral disintegration." DeParle, *supra* note 34, at 6.

³⁷ See DeParle, *supra* note 34, at 6, 12; DEPARLE, *supra* note 7, at 129 ("Putting people to work was a discretionary activity. The core curriculum was getting them off the rolls."). The intake process of Turner's New York program was built around convincing the applicant to rely on his or her own resources rather than becoming dependent on welfare. See DeParle, *supra* note 34, at 8-9. The focus on diverting potential recipients was conjoined with harsh sanctioning policies that removed from the rolls persons who deviated even slightly from program requirements. See *id.* at 8. Like diversion, loss of welfare was seen as helping recipients by forcing them to deal with their own problems. Turner rejected the idea that it was the agency's role to "own every circumstance and problem a client faces." *Id.* at 6. Rather, the agency should "create, if you will, a personal crisis in individuals' lives" that will prompt them to take ownership of their own problems. Nina Bernstein, *New York City Plans to Extend Workfare to Homeless Shelters*, N.Y. TIMES, Feb. 20, 1999, at 1.

³⁸ See Erik Eckholm, *Solutions on Welfare: They All Cost Money*, N.Y. TIMES, July 26, 1992, at A1. See also Wiseman, *supra* note 23, at 627 (quoting President Clinton) ("Our approach is based on a simple compact designed to reinforce and reward work. Each recipient will be required to develop a personal employability plan designed to move that individual into the work force as quickly as possible. Support, job training, and child care will be provided to help people move from dependence to independence.").

bilitation program in which non-work-ready individuals receive support and rehabilitative assistance for a limited period of time in aid of their eventual independence. The obligation assumed by the recipient is to participate in good faith in the proffered rehabilitative interventions and to seek employment as soon as he or she is deemed work-ready.³⁹

A weak form of the self-sufficiency model was embodied in the Family Support Act of 1988 (FSA), which was in force at the time of the welfare reform debate. The Job Opportunities and Basic Skills Training (JOBS) program created by the FSA was aimed at providing Aid to Families With Dependent Children (AFDC) recipients with a range of education, employment, and training activities designed to lead them to work and thereby avoid long-term welfare dependence.⁴⁰ However, the JOBS program was inadequately funded, riddled with exceptions, and devoid of any real inducement to leave welfare, and hence was unsuccessful in achieving these goals.

Reform proposals based on self-sufficiency retain the general purpose and approach of the FSA, the primary innovation being imposition of time limits on rehabilitative services to assure that there would eventually be a transition to work. As described by then-candidate Clinton, “We’ll give them all the help they need for up to two years. But after that, if they’re able to work, they’ll have to take a job in the private sector or start earning their way through community service.”⁴¹

An approach of this sort was reflected in the reform proposal advocated by the National Governors Association (NGA). According to the NGA, welfare reform should be guided by the overarching goal of helping low-income families achieve economic security through sustainable employment. The NGA approach used a time-limited period of cash assistance to help families address barriers to employment, offer meaningful work and training activities that would lead to employment, and otherwise assist recipients in making the transition from welfare to work.⁴² The central goal of proposals reflecting the self-sufficiency idea was to move recipients into the labor force, thereby ending their need for welfare. The initial period of welfare

³⁹ Then-Representative Rick Santorum summarized and endorsed a self-sufficiency approach in describing a constituent who had utilized the job training and education available through the welfare program to obtain a job at a local manufacturing plant: “She viewed the welfare system as an opportunity to pull her family out of their unfortunate circumstances and take responsibility for her life. She is an example of a welfare mother success story that we must replicate.” Rick Santorum, *Welfare Reform Should Use the Carrot and Stick*, PHILADELPHIA INQUIRER, Feb. 12, 1995, at C7. See also HASKINS, *supra* note 15, at 47–48.

⁴⁰ *E.g.*, Family Support Act of 1988, Pub. L. No. 100-485, § 481, 102 Stat. 2343, 2360; President Ronald Reagan, Remarks on Signing the Family Support Act of 1988 (Oct. 13, 1988) [hereinafter Reagan, Family Support Act], available at <http://www.reagan.utexas.edu/archives/speeches/1988/101388a.htm>.

⁴¹ DEPARLE, *supra* note 7, at 103; JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 110 (1995).

⁴² *States’ Perspective on Welfare Reform: Hearing Before the S. Comm. On Finance*, 104th Cong. 69–74 (1995) (statement of Hon. Tommy G. Thompson, Governor, State of Wisconsin); NGA CTR. FOR BEST PRACTICES, THE WAIT IS OVER, THE WORK BEGINS: IMPLEMENTING THE NEW TANF LEGISLATION 2–3 (2006) [hereinafter THE WAIT IS OVER], available at <http://www.nga.org/files/live/sites/NGA/files/pdf/0606TANFLegislation.pdf>.

receipt was seen as a time for improving job qualifications and addressing barriers to long-term employment rather than as a time for beginning immediately to work in order to “earn” the welfare check.⁴³ Indeed, from the self-sufficiency perspective, the requirement that recipients work during the initial years of welfare receipt would potentially impede recipients’ ability to remedy problems interfering with their ability to become long-term participants in the workforce.

III. WORK IN THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996

These two approaches to work and welfare are not inherently inconsistent, and can coherently be asserted by the same individual. In practice, however, there is an unavoidable potential for conflict due to the differing program strategies implicit in each idea. President Clinton’s welfare reform proposals addressed this problem by using a sequential approach to incorporating both perspectives. He would have allowed the receipt of welfare for up to two years under the conditions of the then-existing JOBS program,⁴⁴ which focused on education, training, and other work preparation activities. After two years, those recipients who failed to secure employment would be required to work in subsidized private, nonprofit, or public sector jobs.⁴⁵

The program ultimately enacted in PRWORA instead sought to implement both perspectives concurrently, creating the mission dissonance currently endemic to the TANF program. That this melding of disparate philosophies in PRWORA resulted in a workable program was the result of an unplanned synchronicity among various elements of the TANF program that enabled states to make and implement diverse policy choices without violating federal program requirements or incurring federal penalties.

⁴³ In practice, the self-sufficiency approach sometimes appears similar to the reciprocity approach because of the commonality of the “work-first” strategy for achieving self-sufficiency. The work-first approach called for immediate placement of work-ready applicants and recipients into jobs, regardless of job quality, on the theory that long-term employability can best be attained through immediate placement in a job where the recipient can build a work history, become familiar with the culture of the workplace, and make contacts that lead to better jobs in the future. See, e.g., Julie Strawn et al., *Improving Employment Outcomes Under TANF*, in *THE NEW WORLD OF WELFARE*, *supra* note 31, at 223, 224–26. Studies at the time indicated that this was the most effective strategy for achieving long-term self-sufficiency. In the self-sufficiency context, unlike the work requirement in a reciprocity program, a “work-first” approach is simply one element of a multifaceted approach to achieving long-term employability. Work is required only of recipients who are work-ready, is often supplemented by rehabilitative and supportive services, and usually does not take the form of “workfare.” Mead, however, uses the term “work first” to refer also to the requirement of immediate work in a reciprocity-based program. See, e.g., *Mead House Testimony*, *supra* note 32.

⁴⁴ See, e.g., Douglas J. Bersharov & Amy A. Fowler, *The End of Welfare as We Know it?*, *PUB. INT.*, Spring 1993, at 95, 100. President Clinton’s proposal, however, would have eliminated the broad exemptions that limited the effectiveness of JOBS.

⁴⁵ Ellwood, *supra* note 17. Although it contained a workfare component, the Clinton plan was more closely connected with the self-sufficiency philosophy.

A. Purpose and State Plan Provisions

The state plan requirements in PRWORA were structured primarily around the welfare-to-work concept of “two years to self-sufficiency.”⁴⁶ In order to receive federal TANF funds, each state must conduct a program that “provides parents with job preparation, work, and support services to enable them to leave the program and become self-sufficient.”⁴⁷ Work was to be required only after passage of twenty-four months, unless the recipient was ready earlier.⁴⁸ PRWORA’s explicit statements of purpose similarly focus on post-welfare self-sufficiency, preceded by a period of preparation to enter the workforce. In regard to work, the statute stated as the purpose of TANF: to “end the dependence of needy parents on government benefits by promoting job preparation, [and] work”⁴⁹ These provisions appear to envision a program in which the desired outcome is work and self-support, following a period of up to two years during which the recipient is publicly supported while preparing for entry into the workforce.

B. Work Participation Rate

The objectives of self-sufficiency and state flexibility evidenced in the statutory purposes, the block grant approach, and the state plan requirements are in tension with TANF’s primary performance measure, which reflects the reciprocity approach to work. This measure, the work participation rate, is an annual assessment of the proportion of welfare recipients who are working, looking for work, or participating in specified work-like activities⁵⁰ for an average of thirty hours per week in any given month.⁵¹ A state’s failure to achieve a work participation rate at or above a certain level results in reduc-

⁴⁶ Like many federal programs, TANF was created by Congress pursuant to the Spending Clause. Typically, Spending Clause legislation provides grants to states contingent on the state’s submission of a plan demonstrating the state’s current or anticipated compliance with conditions enumerated in the federal legislation. See generally *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁴⁷ 42 U.S.C. § 602(a)(1)(A)(i).

⁴⁸ *Id.* § 602(a)(1)(A)(ii).

⁴⁹ *Id.* § 601(2).

⁵⁰ Although the permissible “work activities” included some skill-building and other human capital oriented activities, the work requirement leaned sharply in the direction of actual work. Almost all of the preferred “work activities,” to which at least twenty of each recipient’s weekly hours must be devoted, involve some form of actual work. See *id.* § 607(c)(1). The preferred activities are: “(1) unsubsidized employment; (2) subsidized private sector employment; (3) subsidized public sector employment; (4) work experience . . . if sufficient private sector employment is not available; (5) on-the-job training; (6) job search and job readiness assistance; (7) community service programs; (8) vocational educational training [for no more than 12 months]; . . . and (12) provision of child care services to [another recipient] who is participating in a community service program.” *Id.* § 607(d).

⁵¹ The required number of hours began at twenty, rising gradually to thirty in 2000 and subsequent years. See *id.* § 607(c)(1). Single parents of children under age six are required to work only twenty hours per week, and states have the option of exempting altogether single parents of children under twelve months old. *Id.* §§ 607(b)(5), 607(c)(2)(B).

tion of the federal grant.⁵² At present, 50% of the state's welfare recipients must meet the participation requirement by working an average of thirty hours each week in order for the state to avoid a substantial decrease in its funding.⁵³

In contrast to provisions of PRWORA defining the block grant and its purposes, which appear to treat work as the end-point of the TANF program, the work participation requirement focuses on work throughout the time that the recipient is part of the welfare program.⁵⁴ The list of permitted "work activities" de-emphasizes, or even excludes, activities that would prepare non-work-ready recipients for the job market, such as education, training, treatment, and making transportation and child care arrangements. The "participation rate" provision thus represents a classic reflection of the reciprocity approach.⁵⁵

The work participation requirement, standing alone, could have substantially narrowed the programmatic discretion allowed to states under the block grant.⁵⁶ It could also have deprived them of the flexibility to make independent choices among the competing philosophies of work since the participation rate was so heavily infused with the reciprocity approach. However, PRWORA balanced the potential limiting effects of the participation rate both by allowing states to define the specified work activities and by creating an alternative performance measure that could offset the impact of the participation rate. Additional flexibility was provided to the states by making the work and other federal requirements inapplicable to benefits

⁵² The reduction would be five percent of the federal TANF grant for the first year. In subsequent years, the grant would be reduced by either twenty-one percent or by the previous year's penalty plus two percent, whichever is less. *Id.* § 609(a)(3)(B).

⁵³ Initially participation was required of twenty-five percent of all welfare recipients. This proportion gradually increased to fifty percent in 2002 and subsequent years. *Id.* §607(a)(1). For two-parent families, the participation rate began at seventy-five percent in 1997 and increased to ninety percent in 1999 and subsequent years. *Id.* §607(a)(2).

⁵⁴ *See id.* § 607(c)(1).

⁵⁵ Support for the work participation rate in PRWORA was not limited to reciprocity adherents. The broader support base may have reflected Congress' general dissatisfaction with the approach to work in the FSA, under which large segments of the caseload were exempt from the JOBS program and only twenty percent of non-exempt recipients were required to participate in work activities. As of 1995 when welfare reform was being considered, few participants had actually moved into the workforce, and caseloads had substantially increased. Both of these results were attributable more to the recession of 1990-1991 than to flaws in the FSA and JOBS, *e.g.*, Blank & Blum, *supra* note 21, at 34, but reformers saw them as discrediting key aspects of the FSA, including the broad exemptions, the emphasis on education and training, and the weak participation rate. Thus, although abolition of the entitlement, imposition of time limits, and use of block grant funding made TANF a fundamentally different program from FSA's AFDC/JOBS, the approach to work in TANF appears to focus as much on correcting the flaws in the FSA as on assuring the effectiveness of PRWORA's own new and different program. This may account for some of the disconnect between the participation rate and the block grant requirements.

⁵⁶ Although the work participation requirement demanded work by only half the caseload, it was extremely difficult for the states to achieve an average thirty hours of work by fifty percent of recipients each week throughout the year. *See infra* notes 119-160 and accompanying text. Thus, the impact of the participation rate extended to far more than half of the welfare population.

funded by state contributions to the TANF program as opposed to those funded by federal block grant funds.

C. Sources of Flexibility

1. Caseload Reduction Credit

The alternative criterion on which state performance could be measured was caseload reduction. PRWORA provided for a credit whereby the mandated participation rate for a state would be reduced by one percentage point for each percent by which the state reduced its caseload below that existing in 1996.⁵⁷ This provision, added to the bill in tandem with a provision strengthening the work requirement,⁵⁸ could have been intended to provide states with an incentive to help recipients find jobs and leave the welfare rolls,⁵⁹ or it may have reflected Turner's view that a reciprocity requirement could be satisfied either by working or by leaving the program and relying on one's own resources.⁶⁰ In any event, it provided states with an alternative compliance measure calibrated to the self-sufficiency goal, thus enabling them to choose which conception(s) of work to emphasize in their programs.

⁵⁷ 42 U.S.C. § 607(b)(3). States could not claim a caseload reduction credit for reductions attributable to policy changes, such as altered eligibility criteria or stricter sanctioning policies. *See id.* However, no distinction was drawn between those who left the rolls for work and those who left for other reasons, so long as no policy change was involved. *See id.* Nor did the credit distinguish caseload reductions attributable to policies that deterred potentially eligible persons from applying for welfare benefits. *See id.*

⁵⁸ HASKINS, *supra* note 15, at 144, 152–53.

⁵⁹ *Id.* at 153, 366. In states with a high eligibility cutoff, persons who obtained low-paying jobs might remain eligible for welfare, and thus count as recipients who were working for purposes of calculating the state's work participation rate. In a state with a low eligibility cutoff, however, the earnings of this same person could exceed the cutoff and make the individual ineligible for continued benefits. Because the person was no longer receiving welfare benefits, he or she would not be included in the participation rate calculation. The caseload reduction credit would provide a mechanism whereby the states in which recipients left the program upon obtaining employment could get credit for putting that person to work. In proposing the caseload reduction credit, Robert Rector noted that "the real effect of a work program is to reduce the caseload—that's what you want to measure." DEPARLE, *supra* note 7, at 129; *see* HASKINS, *supra* note 15, at 153.

⁶⁰ *See supra* notes 35–37 and accompanying text. The caseload reduction credit has been criticized on the grounds that credit is given regardless of whether the person leaving the rolls is employed. Thus, it is said, the caseload reduction credit is more closely tailored to the perspective of those for whom caseload reduction is an end in itself than to those supporting a welfare-to-work approach. *See* DEPARLE, *supra* note 7, at 129. Indeed, this is true, and the programs of some states have incorporated elements aimed at removing recipients from the program through sanctions or deterrence of applicants in order to reduce the caseload without regard to the work status of the affected individuals. It must be recognized, however, that an incentive to reduce the caseload in this fashion is also provided by the participation rate itself, since removal or deterrence of persons with significant barriers to employment makes it easier for the state to achieve the required level of work participation. *See infra* notes 119–160 and accompanying text. Indeed, it was anticipated by proponents of the work participation requirement that it would result in caseload decline by making the welfare program less attractive to eligible persons. *See, e.g.,* Turner & Main, *supra* note 35, at 300–01.

The caseload reduction credit thus gave states the flexibility to continue the self-sufficiency approach that many had already built into their welfare programs under the FSA. Because all states experienced substantial caseload reductions after implementation of TANF—some as great as eighty percent—the caseload reduction credit resulted in effective work participation rates far below the statutory percentage. For some states the effective participation rate was zero; the highest was thirty-eight percent.⁶¹ Thus, the caseload reduction credit assured states of the flexibility to design programs in accordance with local priorities.

2. *States' Power to Define Work Activities*

Another feature of PRWORA that enabled states to satisfy the reciprocity-focused participation rate, even while maintaining a self-sufficiency focus in their programs, was the statute's explicit delegation of power to the states to define the specified work activities.⁶² States that wished to use the time-limited period of welfare receipt as an opportunity to prepare the recipient for entry into the workforce were able to define the work activities in ways broad enough to encompass education, training, addictions treatment, and other interventions necessary to create or enhance the recipient's employability.⁶³ Moreover, for the first few years, many states continued to operate under AFDC waivers that contained more inclusive lists of the activities that would count as "work."⁶⁴

3. *Separate State Programs*

Neither the reciprocity approach embodied in the participation rate nor the self-sufficiency approach facilitated by the caseload reduction credit and the state power to define the work activities made adequate provision for recipients with significant and untreatable barriers to employment. These individuals were not attractive to employers, and many were physically or mentally unable either to consistently work the thirty hours required by the participation rate or to become self-supporting and leave the caseload as contemplated by the caseload reduction credit. PRWORA had little to say about this population, other than the apparent assumption that they would be included in the fifty percent of nonworkers permitted under the participation

⁶¹ THE WAIT IS OVER, *supra* note 42, at 5. The effective two-parent rate ranged from three percent to sixty percent. *Id.*

⁶² 42 U.S.C. § 602(a)(1)(A)(ii).

⁶³ A number of states were able to use even broader definitions of "work" that had been approved in waivers granted prior to enactment of PRWORA. See *State Efforts to Reform Welfare*, 7 THE FUTURE OF CHILD. 138 app. (1997).

⁶⁴ Cf. HASKINS, *supra* note 15, at 317–18 (discussing use of waivers under earlier AFDC program).

rate and the twenty percent of the caseload that could be exempted from the time limit.⁶⁵

The ability of state TANF programs to accommodate these persons despite their neglect by the federal legislation was facilitated by another feature of PRWORA—the distinction drawn between TANF block grant funds and the “maintenance of effort” (MOE) funds put into the program by the state. Under the AFDC, the states had been required to provide matching funds in order to draw down a proportionate amount of federal funds for the welfare program. Shifting to the block grant form of funding eliminated the need for state matching funds. In order to avoid the loss of state financial contributions to the program, PRWORA required as a condition of the block grant that each state annually contribute MOE funds in the amount of eighty percent of the state’s fiscal year 1994 welfare expenditures.⁶⁶

Expenditure of MOE funds was not subject to all requirements applicable to federal block grant funds, including the work participation rate. Thus any individual whose benefits were paid entirely from MOE funds would not be considered in calculating the state’s participation rate. This enabled the state to exclude from the participation rate calculation any categories of recipients who were particularly difficult to employ by funding their benefits from MOE rather than TANF funds, essentially an accounting maneuver.⁶⁷ State accountability under the participation rate could thereby be limited to persons who were potentially employable, enabling states to continue providing benefits to disabled persons and others who could not realistically be expected to meet the thirty-hour-per-week work requirement without risking federal penalties.

IV. WELFARE REFORM PROGRAMS AND PHILOSOPHIES IN THE STATES

The states had begun implementing work-focused welfare reforms well before the enactment of PRWORA, pursuant to waivers of federal program requirements.⁶⁸ The backdrop for these programs was, necessarily, the version of the AFDC in the Family Support Act (FSA). As noted, the work provisions of the FSA were built around the self-sufficiency idea, with the goal of arming welfare recipients with the tools needed for workplace success. The FSA required each state to create a JOBS program that would provide welfare recipients with education, training, and job readiness programs, as well as work-related activities such as job search, on-the-job train-

⁶⁵ See 42 U.S.C. § 608(a)(7)(c). It is important to note that because this exemption from the time limit was framed as a percentage of the caseload, the number of persons who could be exempted decreased as the caseload declined. Yet those needing the exemption were unlikely to be among those leaving the rolls unless they left due to time limits or harsh sanctioning policies. See generally *THE WAIT IS OVER*, *supra* note 42.

⁶⁶ See 42 U.S.C. § 609(a)(7). The required percentage would drop to seventy-five percent for any year in which the state met the federal work participation requirements.

⁶⁷ See *THE WAIT IS OVER*, *supra* note 42, at 6.

⁶⁸ See *id.*; *State Efforts to Reform Welfare*, *supra* note 63, at 138.

ing, subsidized employment, and community work experience.⁶⁹ States had substantial discretion to design their JOBS programs and assign recipients to program activities, subject to FSA's very weak participation requirement. Under the FSA, however, states were bound by the entitlement feature of the AFDC, which prevented the use of program elements such as time limits, family caps, loss or reduction of benefits as a sanction for non-participation and work requirements for the large exempt population. Waivers could free states from the necessity of adhering to one or more of these requirements, thus enabling them to be the proving grounds for various reform ideas that were under consideration. By the time Congress began work on the bill that became PRWORA, forty-four states had obtained waivers allowing them to experiment with varying packages of reform measures not unlike those being discussed by Congress.⁷⁰

By and large, the choices made by states in implementing the FSA and in developing and implementing waiver programs reflected FSA's self-sufficiency orientation. The education, training, and job readiness programs required by the FSA remained at the center of most states' programs.⁷¹ The effectiveness of these programs was enhanced, however, by broader participation requirements and stronger sanctions for nonparticipation.⁷² Many states also addressed personal barriers to employment, providing services such as treatment for mental and physical health problems. Another common type of reform was addition of incentives to encourage participants to eventually move into the workplace.⁷³ These included time limits, income disregards,⁷⁴ and expansion of post-employment childcare and Medicaid.⁷⁵

⁶⁹ U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE WELFARE WAIVERS: AN OVERVIEW 2 (2001) [hereinafter STATE WELFARE WAIVERS], available at <http://aspe.hhs.gov/hsp/isp/waiver2/waivers.htm>. States had discretion to choose which two of the latter four activities would be included in their JOBS programs. *Id.* In addition to the activities noted in the text, states were expressly given the option of providing post-secondary education. *Id.*

⁷⁰ See *State Efforts to Reform Welfare*, *supra* note 63, at 138.

⁷¹ A 1995 GAO survey of county welfare administrators showed that participants were being placed in high school, GED programs, adult basic or remedial education, post-secondary education (which would include many skills training programs), English as a second language, and job skills classroom training. U.S. GOV'T ACCOUNTABILITY OFFICE, WELFARE TO WORK: MOST AFDC TRAINING PROGRAMS NOT EMPHASIZING JOB PLACEMENT 38 (1995).

⁷² The waivers of twenty-nine states required participation in work or training. *State Efforts to Reform Welfare*, *supra* note 63, at 138-44. Often exemptions for pregnant women, parents of young children, and disabled persons were narrowed. STATE WELFARE WAIVERS, *supra* note 69, at 2.

⁷³ The waivers of thirty-seven states incorporated strategies to encourage employment. *State Efforts to Reform Welfare*, *supra* note 63, at 138-44; R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 131-32 (2000).

⁷⁴ An "income disregard" allows the agency to disregard a certain amount of welfare recipients' earnings when calculating eligibility for benefits. *State Efforts to Reform Welfare*, *supra* note 63, at 139.

⁷⁵ The FSA provided for one year of transitional childcare and Medicaid. Pub. L. No. 100-485, §§ 301-03, 102 Stat. 2343, 2382-93 (1988). A number of states increased the post-employment period during which these benefits might be received. *State Efforts to Reform Welfare*, *supra* note 63, at 139-40, 143-44.

Although the self-sufficiency approach was predominant in state waiver programs, a small number of states experimented with the reciprocity idea by requiring work or work-like activities while the individual was receiving welfare. These included Wisconsin's large-scale workfare program, which was developed during the waiver period.⁷⁶ It is notable, however, that states tended to adopt one or the other of the two dominant approaches, indicating their recognition of the inherent conflicts between the two that would arise at the operational level.

There was no indication that Congress disapproved of the choices being made at the state level. Indeed, Congress applauded the reforms initiated by state waiver programs,⁷⁷ and many of these reforms were incorporated into PRWORA either as mandates or as state options. Indeed, a provision was included in PRWORA allowing states the option of continuing to operate the programs they had developed under their waivers rather than shifting to the new TANF requirements.⁷⁸

After enactment of PRWORA, most states continued to interpret and pursue the central goal of work in accordance with the priorities they had developed in their waiver programs. Most commonly, this meant a continuing emphasis on preparing recipients for work and self-sufficiency,⁷⁹ with states' ability to do so now enhanced by block grant resources freed up by declining caseloads. However, a small number of states continued to include reciprocity elements in their programs, and Wisconsin was joined by New York in implementing a large-scale reciprocity program.⁸⁰

Not surprisingly, many early state strategies emphasized caseload reduction.⁸¹ However, caseload reduction goals were generally pursued in ways believed to be compatible with the ultimate goal of substituting paid work for welfare as the individual's primary source of income.⁸²

After the initial precipitous caseload declines, many states began adapting program requirements and services to better meet the needs of recipients

⁷⁶ Wisconsin's W-2 program was developed during the waiver period but was not implemented until after enactment of PRWORA. See DEPARLE, *supra* note 7, at 164–65.

⁷⁷ See, e.g., Reagan, Family Support Act, *supra* note 40 (citing the success of state welfare-reform initiatives as having made possible the redirection of the welfare program in the Family Support Act).

⁷⁸ 42 U.S.C. § 615.

⁷⁹ Susan Golonka, Comment, *Personal Responsibility Act of 1996*, in THE NEW WORLD OF WELFARE, *supra* note 31, at 65, 67; Clifford M. Johnson, Comment, *Work Experience Under Welfare Reform*, in THE NEW WORLD OF WELFARE, *supra* note 31, at 307, 308 (stating that state and local officials have “voted with their feet” and “shunned the [workfare] approach . . .”). See Thomas L. Gais et al., *Implementation of the Personal Responsibility Act of 1996*, in THE NEW WORLD OF WELFARE, *supra* note 31, at 52–56.

⁸⁰ Turner & Main, *supra* note 35, at 298.

⁸¹ See Julie Strawn et al., *Improving Employment Outcomes Under TANF*, in THE NEW WORLD OF WELFARE, *supra* note 31, at 223, 224.

⁸² See Joel F. Handler, “Ending Welfare As We Know It”: *The Win/Win Spin or the Stench of Victory*, 5 J. GENDER RACE & JUST. 131, 137–38 (2001). Cf. Kilborn & Verhovek, *supra* note 12 (discussing pre-PRWORA state programs).

who were less easily employed.⁸³ For instance, a number of states began to expand the education and training elements of their programs.⁸⁴ Although program activities changed during this period, there was no evident change in the dominant state view that the primary goal of the program was to assist recipients in achieving self-sufficiency. Rather, changes reflected research and experience that altered states' perceptions⁸⁵ of the best ways to achieve this goal. As contemplated by PRWORA, they used their flexibility to adapt and experiment and to match program activities to the changing needs and characteristics of their recipient pool and the realities of the local economy.

There are numerous reasons for most states' preferences for the self-sufficiency approach. A self-sufficiency program can demand personal responsibility, reduce dependency, and inculcate work-related norms without undermining the traditional welfare goal of providing assistance to the truly needy. Further, this approach is consistent with the idea of time-limited welfare that was so central to the reform movement, as it focuses on preparation of the recipient for the time when welfare is no longer available. Finally, a self-sufficiency approach has the potential to be more cost-effective in both the short and long term. Services such as education, training in job skills or English language proficiency, or treatment of health or substance abuse problems can enable recipients to leave the welfare program prior to the legislated time limit and reduce recidivism.⁸⁶ Recipients who are successful in becoming self-sufficient become contributors to, rather than drains on, tax revenues. A time-limited reciprocity program, on the other hand, can pay cash benefits throughout the time-limited period of eligibility without improving employability, thus leaving recipients no better off than they were when they entered the program. The focus on assuring that recipients engage in sufficient work to justify their welfare checks demands substantial expenditures on administration and verification.⁸⁷ Further, the federal focus on assuring compliance by both recipients and states causes the federal government to demand from the states detailed evidence of recipients' work activities, forcing the states to divert substantial resources from services to data collection and reporting, and undermining the central premise of the block grant approach.

⁸³ Golonka, *supra* note 79, at 67.

⁸⁴ *Id.*

⁸⁵ See GAYLE HAMILTON, U.S. DEP'T OF HEALTH & HUMAN SERVS., MOVING PEOPLE FROM WELFARE TO WORK: LESSONS FROM THE NATIONAL EVALUATION OF WELFARE-TO-WORK STRATEGIES (2002), available at <http://www.mdrc.org/publications/52/print.html>; *What Is the Best Way to Move Welfare Recipients Into Work?*, MDRC (2005), www.mdrc.org/area_fact_18.html (last visited Apr. 21, 2012).

⁸⁶ Provision of this type of service is not new to either the state or the federal government.

⁸⁷ A significant commitment of financial and administrative resources is needed to manage and communicate with work sites, monitor participation, and assure that supervisors understand and provide the workplace acculturation needed by participants. Turner & Main, *supra* note 35, at 297–300; Johnson, *supra* note 79, at 308–09.

The TANF block grant had empowered states to implement a broad range of programs aimed at preparing recipients for the workforce, placing and retaining them in jobs, and helping them to achieve long-term economic success. These programs had dramatically reduced the number of persons receiving welfare concurrently with both a reduction in poverty and an increase in employment of never-married mothers.⁸⁸ Welfare reform was widely touted as a success.⁸⁹ Nonetheless, when the TANF program was reauthorized in the Deficit Reduction Act of 2005 (DRA), Congress either deliberately or unthinkingly effected a dramatic change in the program by narrowing the work participation requirement and removing the options that had enabled states to achieve these results. In effect, if not in purpose, Congress was rejecting most states' choices of a guiding philosophy for their welfare programs as well as the idea fundamental to PRWORA that states should be free to design programs best suited to the conditions and perspectives of their citizenry.

V. THE DEFICIT REDUCTION ACT OF 2006: THE PARTICIPATION RATE TAKES CENTER STAGE

When TANF was reauthorized in the DRA,⁹⁰ the program was modified in ways that forced states to make achievement of the participation rate the central feature of their programs. The effect of this change in focus was magnified by provisions that gave a new rigidity to the work requirement. Whether or not these changes were intended to give a new primacy to the reciprocity goal, they had that effect, as the provisions that had given the states flexibility to implement a self-sufficiency approach and to serve those for whom work participation was not a realistic goal were weakened or removed from the statute.⁹¹

⁸⁸ E.g., Ron Haskins, *Welfare Check: The Doomsayers Were Dead Wrong About Reform*, WALL ST. J., July 30, 2006, at A12.

⁸⁹ See, e.g., *id.*; Bill Archer, *Welfare Reform's Unprecedented Success*, WASH. POST, Aug. 10, 1998, at A17; *Tough Love Works: Why America's Pathfinding Reform Holds Lessons for Other Countries*, ECONOMIST, July 27, 2006, at 13; Thomas E. MaCurdy & Jeffrey M. Jones, *How Not to Mess Up a Good Thing*, 2 HOOVER DIG. (2003), available at www.hoover.org/publications/hoover-digest/article/6591; Bill Clinton, Op-Ed., *How We Ended Welfare, Together*, N.Y. TIMES, Aug. 22, 2006, at A19; LaDonna Pavetti, *Helping the Hard-to-Employ*, in WELFARE REFORM AND BEYOND: THE FUTURE OF THE SAFETY NET 135 (Isabel V. Sawhill et al. eds., 2002) (citing decrease in welfare rolls and increase in number of never-married mothers who are working).

⁹⁰ Deficit Reduction Act of 2005, Pub. L. No. 109-171, §§ 7101-03, 403-09, 120 Stat. 4, 135-40 (2006).

⁹¹ Some criticism of PRWORA had referred to the caseload reduction credit as a "loophole." See, e.g., Jennifer Zeigler, *Implementing Welfare Reform: A State Report Card*, 529 POL'Y ANALYSIS 10 (2004), available at www.cato.org/pub_display.php?pub_id=2477. The caseload reduction credit is a loophole, however, only if caseload reduction is not a significant goal of the program, a supposition which is inaccurate under both the reciprocity and self-sufficiency approaches.

A. *Statutory Elevation of the Participation Rate*

The option of excluding recipients with low employment potential from the participation rate calculation by funding their benefits from state MOE funds was eliminated by a DRA provision including MOE-funded recipients in the participation rate.⁹² In addition, the DRA minimized the utility of the caseload reduction credit by moving forward to 2005 the date from which the caseload reduction would be measured.⁹³ Caseload reductions in this later stage of TANF tended to be far smaller than in the first few years when the combined impact of the new program requirements, the economic boom, and a backlog of employable recipients was being felt.⁹⁴ By 2005, caseloads were quite low, and further reductions were harder to achieve absent measures specifically designed to accomplish this result, such as harsh sanctioning policies. Indeed, as the national and state economies succumbed to the “great recession,” caseloads began to rise again⁹⁵ prompting Congress to enact ameliorative legislation that allowed states to use their fiscal year 2007 or fiscal year 2008 caseload reduction credit rather than one reflecting the current recessionary conditions.⁹⁶

An additional DRA modification significantly constricted the states’ program options by depriving them of the authority to define the parameters of each of the required work activities.⁹⁷ This authority was transferred to the federal DHHS,⁹⁸ which adopted narrow definitions substantially constricting the states’ ability to count barrier removal activities as “work activities” when calculating the participation rate.⁹⁹

⁹² Deficit Reduction Act of 2005, Pub. L. No. 109-171, §§ 7102(b), 409(a), 120 Stat. 4, 136 (2006).

⁹³ *Id.* § 7102(c).

⁹⁴ THE WAIT IS OVER, *supra* note 42, at 5.

⁹⁵ A 2009 survey conducted by the National Conference of State Legislatures found caseload increases in thirty-eight states during the prior twelve months. *TANF Caseloads Increase in Most States, 2008–2009*, NAT’L CONF. OF STATE LEGISLATURES, www.ncsl.org/default.aspx?tabid=17772 (last visited Apr. 4, 2012).

⁹⁶ American Recovery & Reinvestment Act, Pub. L. No. 111-5, §§ 2101(b), 407(b)(3)(A)(i), 123 Stat. 115, 449 (2009).

⁹⁷ *See* 42 U.S.C. § 602(a)(1)(A)(ii).

⁹⁸ Deficit Reduction Act of 2005, Pub. L. No. 109-171, §§ 7102(c)(1), 407(i), 120 Stat. 4, 136–37 (2006).

⁹⁹ For instance, the DHHS allowed mental health and substance abuse treatment and other rehabilitative activities to be counted only in the “job search/job readiness” category, 45 C.F.R. § 261.2(g), which was statutorily limited to six weeks (or twelve weeks if the state met a federal definition of neediness). *Id.* at § 261.34. Basic education and ESL were included only in the “vocational education training” category, and then only when they constitute a “necessary and integral part of the vocational education training.” Further, no more than twelve months of all forms of vocational education training were countable in calculating the participation rate. *Id.* § 233.01(a)(3)(iv). *See generally* LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, SUMMARY OF FINAL TANF RULES: SOME IMPROVEMENTS AROUND THE MARGINS (2008), available at www.cbpp.org/files/2-20-08tanf.pdf.

B. Effect of the DRA on Program Resources

Many of the programmatic changes necessary to achieve compliance with DRA's more rigid participation rate impose substantial costs without commensurate programmatic benefits. However, DRA's greatest drain on TANF resources may come from its mandate concerning detailed verification of participation in work activities.

Although it has always been incumbent upon states to implement reasonable measures for assuring the accuracy of the reported hours of work participation, the DRA formalized this expectation and imposed new federal standards defining permissible methods of documenting participation.¹⁰⁰ The regulations issued to implement this mandate require documentation of each hour of participation for each recipient.¹⁰¹ Methods previously used by states—such as self-reporting by the recipient;¹⁰² reporting of scheduled hours;¹⁰³ and “exception reporting,” whereby recipients are presumed to participate in all scheduled hours unless the service provider reports to the contrary¹⁰⁴—are no longer allowed. Rather, the state must obtain from each employer, activity supervisor, or service provider an official or signed document attesting to the recipient's hours of participation.¹⁰⁵

As noted by many persons who commented on the interim regulations,¹⁰⁶ these requirements are costly and burdensome, not only for states and recipients, but also for educational institutions, service providers, and employers.¹⁰⁷ While acknowledging that the verification requirements “may pose challenges in some situations,”¹⁰⁸ the DHHS expressed the view that these challenges are justified, as the new requirements “serve to substantiate actual hours of participation and protect the State in the event of an audit.”¹⁰⁹ Essentially, this position means that assuring that no recipient gets benefits

¹⁰⁰ 42 U.S.C. § 607(i).

¹⁰¹ 45 C.F.R. §§ 261.60, 261.61.

¹⁰² Self-reporting was particularly likely to have been used in regard to self-employment and to homework time in connection with an educational program. While the new regulations allowed the state to count up to one hour of homework time for each hour of class time, they required that any additional homework time be in a supervised setting where attendance could be monitored and documented. *Id.* § 261.60(e). Even supervised homework time could not be counted if it exceeded the hours required or advised by the educational program, whose requirements and expectations must also have been documented. *Id.* Regarding self-employment, the regulations did not specify permissible forms of verification, but only stated that self-reporting without additional verification was not sufficient. *Id.* § 261.61(d).

¹⁰³ *See* 73 Fed. Reg. 6810 (Feb. 5, 2008).

¹⁰⁴ *See id.* at 6812–13. Exception reporting is disallowed even where the provider is operating under a contract with the state that requires reporting of absences. *Id.* at 6813.

¹⁰⁵ 45 C.F.R. § 261.61; 73 Fed. Reg. 6810 (Feb. 5, 2008).

¹⁰⁶ *See* 73 Fed. Reg. 6809, 6813–14 (Feb. 5, 2008).

¹⁰⁷ *E.g.*, Letter from The Sargent Shriver Nat'l Ctr. on Poverty Law, to Office of Family Assistance, Administration for Children & Families, DHHS (August 28, 2006), *available at* <http://www.povertylaw.org/advocacy/publications/2006-tanf-comments.pdf> (noting that verification requirements are not only time consuming, costly, and overly burdensome, but also unnecessary and insulting to participants, service providers, welfare departments, and states).

¹⁰⁸ 73 Fed. Reg. 6813 (Feb. 5, 2008).

¹⁰⁹ *Id.*

for which they have not worked is more important than funding work opportunities, work supports, and barrier removal activities.

C. *Difficulties in Meeting the Participation Rate*

As noted previously, the authors of PRWORA and the DRA did not regard the requirement that half the caseload participate in work activities for thirty hours each week as a particularly onerous burden on the states. Congress believed that most welfare recipients were capable of work and that jobs were plentiful.¹¹⁰ From this perspective, and from the distance of Washington, D.C., the fifty percent participation rate appeared quite reasonable.¹¹¹ The states and others who were familiar with program operations on the ground knew otherwise. Judith Gueron, president of Manpower Demonstration Research Corporation (MDRC), the primary organization performing evaluations of welfare reform programs for DHHS, stated in 1992, “[t]here are a great many welfare recipients who are very marginal in terms of their ability to work This is not a group that just needs a good kick to get their act together.”¹¹² She believed that fifty to sixty percent participation was the maximum that was administratively feasible, and this only if participation was broadly defined and the required hours not too demanding,¹¹³ limitations not present in the DRA participation requirement. David Ellwood, an architect of President Clinton’s welfare reform proposal, commented that the work requirement adopted in PRWORA, which was less stringent than the DRA requirement, had been “strengthened to the point of being almost unachievable.”¹¹⁴ A number of factors contribute to the difficulty of achieving thirty hours of work per week from fifty percent of the caseload.

1. *Personal Barriers to Employment*

First, as Gueron noted and at least some of the architects of PRWORA seemed to accept, the lives of many welfare recipients involve circumstances or conditions that limit their ability to work and make them unattractive to potential employers. As observed by former Clinton advisor Peter Edelman

¹¹⁰ *E.g.*, HASKINS, *supra* note 15, at 10; *cf.* Press Release, Kaiser Family Found., Survey Shows “Two Faces” of Public Opinion on Welfare Reform (Jan. 12, 1995), available at <http://www.kff.org/kaiserpolls/1001-welfrel.cfm> (noting that seventy-two percent of Americans in Kaiser/Harvard survey believed there were jobs for most welfare recipients who really wanted to work).

¹¹¹ Similarly, in two-parent families where work by one parent was not dependent on external child care and it seemed unlikely that serious barriers to employment would affect both parents, the higher seventy percent rate seemed reasonable.

¹¹² Eckholm, *supra* note 38.

¹¹³ Gueron, *supra* note 23, at 90; *accord* Blank & Blum, *supra* note 21, at 35. Gueron’s opinion was shared by reciprocity proponent Lawrence Mead, who testified in 1995 that a fifty percent participation requirement was probably too tough for states unless nonwork activities were allowed to count. *Mead Senate Testimony*, *supra* note 10, at 8.

¹¹⁴ Ellwood, *Reform As I Knew It*, *supra* note 17, at 5.

in 1997, “[t]he labor market, even in its current relatively heated state, is not friendly to people with little education and few marketable skills, poor work habits, and various personal and family problems that interfere with regular and punctual attendance.”¹¹⁵

A number of studies have documented the numerous barriers to employment that are common among TANF recipients. Among the most prevalent of these are educational deficiencies, learning disabilities, limited English proficiency, lack of work experience, physical and mental health problems, domestic violence, chemical dependency, and disabled family members for whom the recipient provides care.¹¹⁶ Nationally, almost half of welfare recipients face two or more such barriers.¹¹⁷

Some of these barriers are amenable to therapy or educational interventions that can increase the individual’s employability.¹¹⁸ It is generally unrealistic, however, to expect that this population will be able to immediately engage in thirty hours of work activities each week. A number of the most common barriers, such as serious physical or mental disabilities or addictions, are severe and chronic, and will present continuing obstacles to employment.¹¹⁹ Persons suffering from these conditions are of little interest to most employers and find it difficult to sustain any type of work activity. Nor can their deficiencies be readily remedied within the context of the time-limited TANF program, if at all. These persons cannot be expected to meet

¹¹⁵ Edelman, *supra* note 17; accord Daniel P. McMurrer et al., *Welfare Reform and Opportunity in the Low-Wage Labor Market*, in 5 OPPORTUNITY IN AMERICA 3 (Urban Inst., July 1997), available at <http://www.urban.org/publications/307018.html>. Studies have consistently shown the high correlation between barriers such as those cited here and poor employment prospects. One 1999 study, for instance, found that only twenty-two percent of recipients with two or more barriers were working, and only three percent of those with three or more barriers. *Temporary Assistance for Needy Families and the Hard-to-Employ: Hearing Before the S. Comm. on Finance*, 107th Cong. (2002) [hereinafter *Butler Testimony*] (testimony of David Butler, Vice President of MDRC), available at http://www.mdrc.org/testimony/ButlerTestimony/Testimony_HardtoEmploy_Butler.htm.

¹¹⁶ See, e.g., *Butler Testimony*, *supra* note 115; HEIDI GOLDBERG, CTR. ON BUDGET & POLICY PRIORITIES, IMPROVING TANF PROGRAM OUTCOMES FOR FAMILIES WITH BARRIERS TO EMPLOYMENT (2002), available at <http://www.cbpp.org/files/1-22-02tanf3.pdf>; Rebecca M. Blank, *Improving the Safety Net for Single Mothers Who Face Serious Barriers to Work*, 17 THE FUTURE OF CHILD 183, 188 (2007). A 1987 California welfare program was surprised to find that forty to fifty percent of participants were so poorly educated that they could not fill out job applications, read an employer’s instructions, or make change at a cash register. Work assignments were delayed by the necessity for prior remedial education. Carl Ingram, *Workfare Slowed by Participants’ Need for Schooling*, L.A. TIMES, Feb. 23, 1987.

¹¹⁷ *Butler Testimony*, *supra* note 115. There is substantial variation in the numbers reported by different studies because of differences in the lists of barriers. For instance, a study of the District of Columbia found seventy-four percent of welfare recipients with two or more barriers, using a list that included structural barriers such as transportation and child care problems as well as personal barriers of the type cited in the text. GREGORY ACS & PAMELA LOPREST, URBAN INST., A STUDY OF THE DISTRICT OF COLUMBIA’S TANF CASELOAD ii–iii (2003).

¹¹⁸ See, e.g., *Butler Testimony*, *supra* note 115; Martha R. Burt, *The “Hard-to-Serve”*: Definitions and Implications, in WELFARE REFORM: THE NEXT ACT 163, 164–65 (Alan Weil & Kenneth Finegold eds., 2002).

¹¹⁹ See, e.g., Pavetti, *supra* note 89, at 138–39; Burt, *supra* note 118, at 165–67.

work requirements and thus pose a challenge to the states' participation rates for as long as they remain in the program.¹²⁰

2. *Job Availability*

Even for those clients who are work-ready or could be made work-ready through education, treatment, or training, maintaining thirty hours of weekly participation on a continuing basis is challenging at best. The assumptions about job availability on which those expectations rested were based on a time of economic boom, and even then were unrealistic. Noting that jobs would be needed for four million adults who were receiving AFDC, Edelman observed in 1996, "[t]he fact is that there are not enough private-sector jobs in appropriate locations even now, when unemployment is about as low as it ever gets in this country."¹²¹

Furthermore, the data on which proponents of the work requirement relied did not speak to the distribution of available jobs. Rural areas, in particular, suffer from a dearth of employment opportunities,¹²² and the "spatial mismatch" affecting jobs in urban areas leaves the inner city poor with limited access to the many jobs that have moved to the suburbs.¹²³ Thus, to the extent that jobs exist, they often are not situated proximate to the welfare recipients who are subject to the federal mandate.

Congress, and particularly the reciprocity proponents, appear to have anticipated that any job shortages could be cured by placing welfare recipients in publicly created jobs denoted as "work experience" or "community service."¹²⁴ However, these alternative forms of "work" are costly,¹²⁵ and Congress provided no funds to support such programs. Indeed, cost was a primary obstacle that caused earlier work-based welfare reforms to

¹²⁰ KAREN SECCOMBE, "SO YOU THINK I DRIVE A CADILLAC?": WELFARE RECIPIENTS' PERSPECTIVES ON THE SYSTEM AND ITS REFORM 202 (2006); Burt, *supra* note 118, at 176.

¹²¹ Edelman, *supra* note 17, at 16; accord SECCOMBE, *supra* note 120, at 202; Frances Fox Piven, *Welfare Reform and the Economic and Cultural Reconstruction of Low Wage Labor Markets*, in *THE NEW POVERTY STUDIES: THE ETHNOGRAPHY OF POWER, POLITICS, AND IMPOVERISHED PEOPLE IN THE UNITED STATES* 142 (Judith G. Goode & Jeff Maskovsky eds., 2001). The validity of Edelman's concerns was attested to by TANF recipients attempting to comply with the demands of the new program: "You can apply and apply, but you can't make someone hire you," said one recipient in frustration. SECCOMBE, *supra* note 120, at 183, 202.

¹²² See Gueron, *supra* note 23, at 91 (attributing failure of West Virginia's WIN demonstration program to increase employment and earnings to this rural state's exceptionally high unemployment rate).

¹²³ See Michael A. Stoll, *Job Sprawl, Spatial Mismatch, and Black Employment Disadvantage*, 25 J. POL. ANALYSIS & MGMT. 827 (2006).

¹²⁴ See generally Turner & Main, *supra* note 35.

¹²⁵ Douglas J. Besharov & Amy Fowler, *The End of Welfare as We Know It?*, THE PUB. INT., Apr. 1, 1993, at 4, available at http://www.welfareacademy.org/pubs/welfare/endofwelfare_93_0401.pdf; DEPARLE, *supra* note 7, at 206. The Congressional Budget Office has estimated that administrative and child care costs rise by about twenty million dollars per year for each percentage point increase in the work requirement. HASKINS, *supra* note 15, at 144. Estimates focused specifically on community service jobs have placed the cost of a work slot and care for one child at approximately \$11,700. DEPARLE, *supra* note 7, at 106.

founder¹²⁶ It was not until welfare was recast as a block grant program—which meant that the states rather than the federal government would have to wrestle with cost issues such as these¹²⁷—that Congressional approval was obtained.¹²⁸

3. *Structural Barriers to Employment*

Even where jobs exist, their availability to welfare recipients may be dependent on recipients' access to supports such as transportation and child care. Those services are not available in many communities, particularly during the evening and weekend hours when many low-wage jobs demand work.¹²⁹ An exception from the work requirement acknowledges the unavailability in some areas of childcare.¹³⁰ However, the fact that the recipient will not be penalized for not working does not mean that he or she is not counted as a non-working recipient in calculating the state's participation rate.¹³¹ Most TANF programs have sought to address these structural barriers by funding the creation or use of childcare and transportation services, though limited resources have restricted states' capacity to meet the needs of all recipients.¹³²

4. *Achieving the Requisite Number of Hours*

In order to be counted as “engaged in work” for purposes of the participation rate, a recipient must participate in work activities for an average of thirty hours per week during any given month,¹³³ or approximately 120 hours during the month. Thus, recipients could spend a substantial amount of time in required activities, yet not count as “participants” for purposes of the participation rate. Several factors contribute to the commonality of this situation.

¹²⁶ DEPARLE, *supra* note 7, at 117–21; Wiseman, *supra* note 23, at 640.

¹²⁷ Because federal program costs are fixed when a block grant approach is used, it was unnecessary for the Congressional Budget Office to prepare a cost estimate for the program. Thus, costs were hidden from public and congressional view when PRWORA was being considered. Wiseman, *supra* note 23, at 640.

¹²⁸ DEPARLE, *supra* note 7, at 124–25. The size of the block grants to states reflected prior program costs in each state. 42 U.S.C. § 603. There was no increase to cover the additional costs associated with the work mandate.

¹²⁹ *E.g.*, Burt, *supra* note 118, at 163.

¹³⁰ States are prohibited from sanctioning the refusal to work of a single custodial parent of a child under six for whom suitable childcare is unavailable. 42 U.S.C. § 607(e)(2).

¹³¹ *Compare id.*, with 42 U.S.C. § 607(b)(5) (state option to both exempt from the work requirement and exclude from the participation rate the single parent of a child under twelve months).

¹³² *See* Burt, *supra* note 118, at 164.

¹³³ 64 C.F.R. § 261.31.

a. *The Low-Income Labor Market*

The jobs that are available to welfare recipients often do not provide the thirty hours of weekly employment required by the participation rate. Jobs for low-skilled workers, particularly females, tend to be part-time, insecure, and often outside normal business hours, when childcare is particularly hard to find.¹³⁴ Indeed, at the time PRWORA was enacted, the labor market was well into a restructuring that was marked by wage stagnation, increasingly impermanent and part-time employment, and widening income disparities.¹³⁵ The increasing expendability of low-wage workers not only depresses wages, but also increases employers' unwillingness to tolerate the tardiness, absences, and distractions that are inevitable in the life of a low-income single parent.¹³⁶

These forces impede work participation in at least two ways. First, the work options available to many TANF recipients are limited to part-time jobs. As noted by Gordon Berlin of MDRC, "it is often impractical [for states] to try to add 5 or 10 hours of activities" to the recipient's schedule in order to meet the thirty-hour work participation requirement.¹³⁷ Second, job insecurity means that the recipient is subject to frequent job loss, resulting in periods of inactivity before commencement of a new job.¹³⁸

b. *Family Obligations*

Other obstacles to achieving the required hours are inherent in the normal incidents of family life.¹³⁹ Family obligations can interfere with completion of scheduled hours in a variety of ways. All families without a stay-at-home parent struggle with unexpected events such as a personal or family

¹³⁴ Piven, *supra* note 121, at 136; SECCOMBE, *supra* note 120, at 204, 209.

¹³⁵ See Piven, *supra* note 121, at 136. Manpower, a temporary employment agency, is one of the largest private employers in the United States. SECCOMBE, *supra* note 120, at 205. Welfare reform would itself contribute to this trend by forcing thousands of additional unskilled workers into the labor market to compete for less-skilled jobs. Piven, *supra* note 121, at 142.

¹³⁶ See Piven, *supra* note 121, at 136–37; Randy Albelda, *Fallacies of Welfare-to-Work Policies*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72–73 (2001). Seccombe relates workers' accounts of mechanisms by which employers reduce the expected hours of work. One TANF client who informed a fast-food restaurant before she was hired that she needed thirty to forty hours per week was routinely dismissed early and unpaid when business was slow. SECCOMBE, *supra* note 120, at 206. Another, hired by a hospital to provide home personal care, found her paid hours substantially reduced by the employer's exclusion of time spent traveling between patients' homes. *Id.* at 207.

¹³⁷ GORDON L. BERLIN, MDRC, WHAT WORKS IN WELFARE REFORM: EVIDENCE AND LESSONS TO GUIDE TANF REAUTHORIZATION 42 (2002), available at http://www.mdrc.org/Reports2002/TANF/TANFGuide_Full.pdf.

¹³⁸ Toby Herr, who founded an employment program in Chicago, coined the phrase, "[l]eaving welfare is a process, not an event," to refer to the frequency of job loss. DEPARLE, *supra* note 7, at 190.

¹³⁹ SHARON PARROTT ET AL., CTR. ON BUDGET & POLICY PRIORITIES, ADMINISTRATION'S TANF PROPOSALS WOULD LIMIT—NOT INCREASE—STATE FLEXIBILITY 5 (2002), available at <http://www.cbpp.org/archiveSite/2-26-02tanf.pdf>.

illness, failure of childcare or transportation arrangements, and school cancellations. Low-income families face additional emergencies such as threatened eviction, food shortages, and cessation of utility services.¹⁴⁰ Absences caused by these problems can result not only in failure to work the required hours, but also in termination of employment.¹⁴¹

c. Logistics of Program Administration

The logistics of program administration also result in temporary periods of nonwork. For instance, the state is required to perform an assessment of the skills, experience, and employability of each new welfare recipient,¹⁴² and is allotted thirty to ninety days to perform the assessment.¹⁴³ Further assessments may be needed at a later date—e.g., after loss of a job or an unsuccessful search for work. While assessments are being performed, the recipient normally is not participating in federally recognized work activities.¹⁴⁴ Other gaps in participation result from delays while waiting for scheduled activities to begin,¹⁴⁵ or time needed to make childcare and transportation arrangements.¹⁴⁶ Further, difficulties in monitoring and documenting participation may prevent the state from claiming hours that were in fact worked.¹⁴⁷

5. “Earning Out” of the Welfare Program

Placement of recipients in full-time employment presents its own impediment to achieving the participation rate—the departure from the welfare rolls of working recipients due to earnings that exceed the welfare eligibility cutoff. Since the inception of the AFDC program, and continuing under TANF, states have been allowed to set their own eligibility standards.¹⁴⁸ As of 2003, monthly income eligibility criteria ranged from \$256 in Alabama to

¹⁴⁰ See Albelda, *supra* note 136, at 72; SHARON PARROTT, CTR. ON BUDGET & POLICY PRIORITIES, THE NEW TANF REQUIREMENTS AND INDIVIDUALS WITH DISABILITIES 5 (2007), available at <http://www.cbpp.org/files/3-1-07tanf.pdf>; THE PEW CHARITABLE TRUSTS, IMPLICATIONS OF RECENT FEDERAL CHANGES TO THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROGRAM (2006) [hereinafter IMPLICATIONS], available at http://www.pewtrusts.org/our_work_report_detail.aspx?id=30747. Lawrence Mead, himself a strong proponent of work requirements, testified in 1995 that the hours of work demanded of welfare mothers must accommodate their continuing family responsibilities. *Mead Senate Testimony*, *supra* note 10, at 8.

¹⁴¹ Only twenty-three percent of workers in the lowest wage quartile get paid sick leave. SECCOMBE, *supra* note 120, at 207.

¹⁴² 45 C.F.R. § 261.11 (1999).

¹⁴³ *Id.* § 261.11(b).

¹⁴⁴ See THE WAIT IS OVER, *supra* note 42, at 10; PARROTT, *supra* note 140, at 5; IMPLICATIONS, *supra* note 140.

¹⁴⁵ PARROTT, *supra* note 140, at 5; BERLIN, *supra* note 137.

¹⁴⁶ PARROTT, *supra* note 140, at 5; IMPLICATIONS, *supra* note 140, at 5.

¹⁴⁷ BERLIN, *supra* note 137, at 41.

¹⁴⁸ U.S. DEPT OF HEALTH & HUMAN SERVS., *Aid to Families With Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF): Overview* (last updated Nov. 30, 2009), <http://aspe.hhs.gov/hsp/abbrev/afdc-tanf.htm>.

\$1993 in Alaska.¹⁴⁹ Persons with incomes above that level are ineligible for welfare benefits. In states with the lower eligibility cutoffs, a recipient who obtains a job, even at minimum wage, may receive an income in excess of the maximum eligibility level, depending on the number of hours worked.¹⁵⁰ Recipients who become employed for thirty hours or more, as required by the participation rate, thus may have to leave the welfare program and will not be counted toward achievement of the state's participation rate.

6. *Combined Effect*

The combination of these factors results in large numbers of welfare recipients who do not meet the thirty-hour work requirement during any given month,¹⁵¹ regardless of the state's commitment to work. The national average of actual work participation rates in fiscal year 2004, the year before the DRA went into effect, was thirty-two percent for all families and forty-seven percent for two-parent families. Only nine states met the fifty percent participation rate for all families; in eighteen states the participation rate was less than twenty-five percent.¹⁵² These figures are often misunderstood as indicating a lack of diligence by the states in promoting work or a prevalence of idleness among welfare recipients.

The confusion is well illustrated by a 2002 Heritage Foundation report calling for tougher enforcement of work requirements.¹⁵³ The report credited work requirements with the TANF program's success in moving families into self-sufficiency and out of poverty, and argued that tougher enforcement of these requirements was needed if the goal of self-sufficiency was to be achieved for those remaining on the rolls.¹⁵⁴ The report assumed that TANF recipients who failed to meet the work requirement were simply "idle,"¹⁵⁵ overlooking the fact that many recipients who spent substantial time in work activities, but less than the required thirty-hour average, were not reflected in

¹⁴⁹ VEE BURKE & MEREDITH WALTERS, CONG. RESEARCH SERV., BW-810, TANF BENEFITS AND EARNINGS LIMITS (last updated Dec. 8, 2003).

¹⁵⁰ In 2003 the minimum wage was \$5.15 per hour. *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938–2009*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/minwage/chart.htm> (last visited Apr. 22, 2012). At this wage, an individual working thirty hours per week as required by the participation rate would earn \$618 per month, more than twice the eligibility cutoff in Alabama, and above the cutoffs of a number of other states as well. Since 2003 the minimum wage has been increased to \$7.25 per hour, *id.*, while state eligibility cutoffs have changed little.

¹⁵¹ A state's participation rate for the fiscal year is the average of its monthly participation rates. 45 C.F.R. § 261.22(a) (1999).

¹⁵² THE WAIT IS OVER, *supra* note 42, at 5. Note that this statistic does not mean that the non-participants were idle. Many may have been participating in uncountable activities or for less than the required thirty hours, searching for a job, in assessment status, or in other ways spending time in program-related activities.

¹⁵³ ROBERT RECTOR & BRIAN RIEDL, HERITAGE FOUND., BACKGROUNDER NO. 1568, WHY SUCCESSFUL WELFARE REFORM MUST STRENGTHEN WORK REQUIREMENTS (2002), available at <http://www.heritage.org/Research/Reports/2002/07/Why-Successful-Welfare-Reform-Must-Strengthen-Work-Requirements>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

the participation rate. The report also assumed that those who were not meeting work requirements were not making progress toward self-sufficiency.¹⁵⁶ In fact, as demonstrated above, there is little correlation between meeting the participation rate and either recipients' level of relevant activity or their progress toward self-sufficiency. Instead, a focus on the participation rate, as in the DRA, diverts attention and effort away from those goals.

VI. PROGRAMMATIC EFFECTS OF THE NEW CENTRALITY OF THE PARTICIPATION RATE

The increased rigidity of the participation rate post-DRA meant that states would have to focus their TANF programming on achievement of the participation rate and its reciprocity goal even if this must be accomplished at the expense of activities aimed at achieving the goals enunciated in PRWORA and on which states placed a higher priority.

The proponents of the DRA changes seemed to believe that the states could simply force a larger number of non-participants to engage in the required work activities for thirty hours per week. As discussed previously, this represents a simplistic view of both the welfare caseload and the welfare program. Obstacles such as unavailability of jobs, limited program resources, personal and structural barriers to employment, and administrative delays make it unlikely that states can achieve the necessary level of work participation simply by engaging a larger number of recipients in thirty hours of required work activities.

A. *Increasing the Number of Recipients Who Are Working*

Some states have been able to achieve limited increases in the number of participating recipients through program modifications such as reducing the amount of time spent on assessment and other pre-work activities.¹⁵⁷ There have also been renewed efforts to establish workfare and subsidized

¹⁵⁶ *Id.* (“[Thirty-four] percent of adults on TANF worked in 2000, leaving millions of people unable to progress toward self-sufficiency.”).

¹⁵⁷ Initially, some states characterized benefits during the assessment period as “nonrecurrent, short-term benefits,” recipients of which are not included in the participation rate calculation. 45 C.F.R. § 260.31(b)(1); NGA CTR. FOR BEST PRACTICES, ENTERING THE NEXT PHASE OF WELFARE REFORM: STATE RESPONSES TO CHANGES IN FEDERAL TANF LAW AND REGULATIONS 6–8 (2008) [hereinafter ENTERING], available at <http://www.nga.org/files/live/sites/NGA/files/pdf/0807WELFAREREFORMRES.PDF>. This allowed them to shorten new recipients' period of non-participation in work activities while still allowing sufficient time for a careful assessment and appropriate arrangements for childcare and other work supports. The DHHS eliminated this option in 2008 by restricting “nonrecurrent, short-term benefits” to true emergencies. U.S. DEPT' HEALTH & HUMAN SERVS., NO. TANF-ACF-PI-2008-05, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM INSTRUCTION (2008), available at <http://www.acf.hhs.gov/programs/ofa/policy/pi-ofa/2008/200805/pi200805.htm>.

employment programs when funding allows.¹⁵⁸ However, the effect of these initiatives on overall work participation rates has been small.

Another way of increasing the proportion of recipients who are working does not involve putting more recipients to work, but rather making sure that working recipients remain in the program so that they can be counted in the participation rate. In states with a high eligibility cutoff,¹⁵⁹ it has been common from the inception of the TANF program for many recipients to remain eligible for benefits and stay in the program after obtaining employment. This has not been true in states with a low eligibility cutoff where special mechanisms needed to be created if employed recipients were to be kept in the program. Most common is the “income disregard,” whereby a certain portion of a recipient’s new income is disregarded when determining his or her continued eligibility for benefits.¹⁶⁰ A number of states had incorporated income disregards into their waiver programs and later into their TANF plans as an incentive to workforce entry and as a means for continuing oversight and post-employment supports intended to contribute to long-term workplace success.¹⁶¹ The enactment of the DRA created a new impetus for use of this device, and multiple states adopted income disregards or increased the amount or duration, or both, of existing disregards after its passage.¹⁶²

Increases in the participation rate resulting from program modifications such as these entail costs for both the TANF program and its beneficiaries. For the program, the cost is seen in resources and funds diverted from activities deemed more likely to achieve outcomes that, while desirable, are not reflected in “work participation” numbers. For beneficiaries, the cost is in lost opportunity and misuse of their limited time in the program. When it

¹⁵⁸ Some states used supplemental appropriations made available through the American Recovery and Reinvestment Act (ARRA) in 2009 to support work experience programs. “Transitional job” programs, which have been tried with encouraging results, use subsidized employment placements of six to twelve months to provide work experience that more closely “replicate[s] the expectations and rewards of regular employment.” Johnson, *supra* note 79, at 308; ALLEGRA BAIDER & ABBEY FRANK, CTR. FOR LAW & SOC. POLICY, *Transitional Jobs: Helping TANF Recipients With Barriers to Employment Succeed in the Labor Market* (2006), available at www.clasp.org/admin/site/publications/files/0296.pdf.

¹⁵⁹ For additional discussion of states’ varying eligibility cutoffs and their relationship to the participation rate, see *supra* notes 59, 147–49 and accompanying text.

¹⁶⁰ It might seem that the same result could be achieved by simply raising the eligibility cutoff. However, this would accomplish too much. It would increase the number of persons eligible for welfare benefits, perhaps substantially, thus increasing the cost of the program. Further, these newly eligible persons would include non-workers and hard-to-employ persons as well as employed persons, and thus would not necessarily have the desired effect on the participation rate. An income disregard can be limited to persons already in the program.

¹⁶¹ See BURKE & WALTERS, *supra* note 149.

¹⁶² At the time of the NGA survey, six states had taken this step, and nine more were considering doing so. Another seven were providing “transitional assistance,” a monthly stipend to persons leaving the rolls because their wages exceed the eligibility level. For present purposes, the effect is essentially the same. NGA & APHSA, *STATE CHOICES ABOUT TANF PROGRAMS UNDER DRA: FINDINGS FROM JOINT NGA/APHSA SURVEY 21–23* (2007), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/0709WEBCASTTANFSLIDES.PDF>; see ENTERING, *supra* note 157, at 10.

placed a five-year lifetime limit on receipt of TANF benefits, PRWORA made this limited amount of time an important resource for the welfare recipient attempting to make a successful transition into the job market. Assigning recipients to work activities without adequate assessment and preparation fails to maximize the value of recipients' limited period of eligibility. Likewise, retention of a recipient in the program to meet the needs of the agency rather than the needs of the recipient squanders his or her program time, which may be needed for future periods of unemployment.

B. Removing Nonworkers¹⁶³ From the Program

The most difficult challenge for states in meeting the participation rate is the presence on the welfare rolls of large number of recipients who cannot realistically be expected to work the thirty hours per week demanded by PRWORA. Current participation requirements create a strong incentive for states to remove these persons from the TANF program, and hence the participation rate calculation, either by denying them benefits or by creating for them a separate, independent benefit program to which the federal work participation requirements do not apply.

Removal of nonworkers from the TANF program can be readily accomplished by strict application of time limits on welfare receipt and "full-family sanctions," which terminate a family's benefits as a penalty for noncompliance with work requirements.¹⁶⁴ Similar effects can be achieved by deterring persons unlikely to obtain employment from applying for benefits.¹⁶⁵ Formal rules and processes aimed at discouraging application for benefits¹⁶⁶ are supplemented in some states by policies intended to delay or discourage eligible persons from applying for the program. While an effective way to achieve the required participation rate, these approaches turn a blind eye to the social and humanitarian effects of denying aid to those least

¹⁶³ References herein to workers and nonworkers mean those who are and are not satisfying the TANF work requirement.

¹⁶⁴ "Twenty-two states use a full (100 percent) family sanction the first time a family fails to meet [work] participation requirements." MARY MURPHY, URBAN INST., HIGHLIGHTS OF STATE TANF PROGRAMS IN 2008 (2008), available at http://www.urban.org/uploadedpdf/TANF_summary.pdf. The NGA survey showed ten states had responded to DRA by speeding the imposition of full-family sanctions, and seven others were considering following suit. ENTERING, *supra* note 157, at 6.

¹⁶⁵ See, e.g., DEPARLE, *supra* note 7, at 119, 166–68; SECCOMBE, *supra* note 120, at 12 (New York City's elaborate and cumbersome application process); LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, GEORGIA'S INCREASED TANF WORK PARTICIPATION RATE IS DRIVEN BY SHARP CASELOAD DECLINE 5–6, 8 (2007), available at <http://www.cbpp.org/files/3-6-07tanf.pdf>; cf. Handler, *supra* note 19, at 520 (noting that work requirements and sanctions used to deter applicants in General Relief programs); *id.* at 467 (describing existence of policy since the time of Henry VIII that the conditions of relief had to be made less desirable than the conditions of the lowest paid work); RECTOR, *supra* note 24, at 9 (stating strongest effect of serious work requirements is reduction in number of persons "who bother to apply for welfare").

¹⁶⁶ A 2008 analysis by the Urban Institute found that 42 states discouraged enrollment through formal diversion or job search requirements. MURPHY, *supra* note 164.

able to support themselves through work¹⁶⁷ and distort the purpose of a program created to provide assistance to needy families.

An alternative approach removes certain groups of nonworkers from the TANF program while continuing to provide them with benefits entirely paid for with state funds. So long as these state funds are not counted toward the state's MOE obligation, these benefit programs are beyond the reach of federal mandates, including the participation rate. This technique has proven useful with disabled persons and others with significant barriers to employment.¹⁶⁸ While this option does not deny benefits to needy individuals, it negates the role of TANF and the federal government as a source of assistance to the needy, leaving the availability of benefits to the discretion and funding capacity of the individual states.¹⁶⁹

Whether accomplished by sanctions or by creation of separate state-funded programs, the removal of hard-to-employ populations from the TANF caseload is an inevitable consequence of the structure of the current work requirement. The steps taken by states to exclude these persons from the federal TANF benefit program amount to a tacit acknowledgement that the TANF program as presently structured can no longer serve as a source of aid for persons with chronic impediments to employment, two-parent families, and others for whom the demands of the work participation requirement are unrealistic.

Some of the hard-to-employ recipients may be eligible to receive income support from another program, such as disability benefits available through the Supplemental Security Income (SSI) program administered by the Social Security Administration. Indeed, many state welfare agencies assist disabled recipients with the SSI application as a means for removing them from the participation rate calculation.¹⁷⁰ However, the eligibility stan-

¹⁶⁷ Studies have found that unemployment rates are high among those who left welfare because of sanctions. *E.g.*, SHAWN FREMSTAD, CTR. ON BUDGET & POLICY PRIORITIES, RECENT WELFARE REFORM RESEARCH FINDINGS: IMPLICATIONS FOR TANF REAUTHORIZATION AND STATE TANF POLICIES (2004); JACK TWEEDIE ET AL., NAT'L CONFERENCE OF STATE LEGISLATORS, TRACKING RECIPIENTS AFTER THEY LEAVE WELFARE 2 (1999).

¹⁶⁸ In addition to recipients with barriers to employment, solely state-funded programs are often used for two-parent families, which are subject to a ninety percent participation rate. In 2009, the most recent year for which data is available, almost half of the states reported having no two-parent families in their TANF/MOE-funded programs. *Combined TANF and SSP-MOE Work Participation Rates: Fiscal Year 2009*, U.S. DEP'T HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/ofa/particip/2009/tab01a.htm> (last updated May 5, 2011). Also, states desiring to provide recipients with post-secondary education, which is not accepted as a work activity under current rules, may place these recipients in a state-funded program. ENTERING, *supra* note 157, at 8–9.

¹⁶⁹ One mechanism used by states to free up agency funds for solely state-funded programs is to use spending by other agencies that furthers the TANF goals to meet the state's MOE requirement, leaving the funds appropriated as MOE by the state legislature available for a solely state-funded program.

¹⁷⁰ At the time of the NGA survey, twenty-six states had responded to the DRA by increasing their emphasis on assisting with SSI applications and appeals. ENTERING, *supra* note 157, at 9.

dards for SSI are strict,¹⁷¹ and many disabled TANF recipients who are unemployable or unsuited for full-time work are nonetheless ineligible for SSI. These persons, like other hard-to-employ recipients, find themselves excluded from the federal safety net even though many of them have characteristics traditionally associated with the “deserving poor.”¹⁷²

C. *Effect on Self-Sufficiency Goals*

By rigidifying the “work activity” definitions and forcing most adult recipients of aid into the population covered by the work requirement, Congress undermined states’ ability to pursue an effective strategy aimed at moving recipients to self-sufficiency. The new participation rate, even more so than the original, is a measure of recipients’ fulfillment of obligations related to reciprocity. Only to a very limited extent does it reward activities aimed at improving recipients’ employability.¹⁷³ By diverting both agency resources and recipient activity away from assessment and targeted barrier-removal activities, the emphasis on work participation seriously impedes states’ ability to implement the approach that has been found most effective in reducing dependency.¹⁷⁴ Moreover, by creating strong incentives for caseload reduction by any means possible, this emphasis works against achievement of PRWORA’s stated goal of providing assistance to needy families.¹⁷⁵

¹⁷¹ In particular, it is required that the individual be unable to perform substantial gainful activity—that is, any job or work-like activity—for at least one year. SOC. SEC. ADMIN., NO. 05-10029, DISABILITY BENEFITS 9–10 (2010), available at <http://ssa.gov/pubs/10029.pdf>.

¹⁷² Concerns about disabled recipients were raised in comments submitted in response to the DHHS Interim Final Regulations implementing the DRA. Commenters suggested that work requirements for disabled persons be modified to reflect employment limitations resulting from the disability. This suggestion was rejected by the DHHS, which stated, “There was no suggestion in PRWORA that the activities or hours that count toward the work participation rate should vary for clients with disabilities. By limiting the maximum participation rate to 50 percent, Congress recognized that some individuals would not be able to satisfy the full requirements.” Reauthorization of the Temporary Assistance for Needy Families (TANF) Program, 73 Fed. Reg. 6772-01, 6775 (Feb. 5, 2008); see SCHOTT, *supra* note 165, at 2–4.

¹⁷³ Reciprocity advocates have been known to say that workfare prepares recipients for the paid workforce. *E.g.*, Turner & Main, *supra* note 35, at 291. It is not certain whether such statements reflect disingenuous perceptions of what it takes to make welfare recipients employable, or rather whether they represent post hoc attempts to avoid federal labor laws that would apply if workfare were a “job” rather than a “service.” Granted, for some recipients—those who are work-ready but lack recent workplace experience—workfare may provide training in the mores of the workplace that will prove valuable in their ultimate transition into the paid workforce. A work experience program, however, does nothing to address personal problems or characteristics that limit employment potential. Nor is it inherent in the reciprocity/workfare concept that structural barriers be addressed by the program, though assistance with transportation and child care has generally been provided in modern workfare programs.

¹⁷⁴ Studies have shown that a “mixed approach,” combining employment-related and barrier-removal strategies, is more successful than a strictly “work first” approach at increasing welfare recipients’ employment and earning and reducing dependence on welfare. HAMILTON, *supra* note 85; *What Is the Best Way to Move Welfare Recipients Into Work?*, *supra* note 85.

¹⁷⁵ 42 U.S.C. § 601(a)(1).

The only thing that the participation rate does reasonably well is to force state programs to focus more on reciprocity and less on self-sufficiency. Yet there is no evidence in the history of PRWORA to suggest that Congress intended this result. That the impact on the self-sufficiency orientation of state programs has not been greater is, once again, largely due to states' use of various techniques for increasing the caseload reduction credit, thereby substantially reducing the adjusted participation rate requirement and lessening the pressure to move further than they wish toward a reciprocity approach.

Nonetheless, the fact remains that the DRA has compromised the ability of states to pursue the program activities they believe most likely to accomplish their chosen policy goals. Techniques to minimize administrative impediments to work, such as the use of abbreviated assessments, can lead to work assignments, work supports, and service packages that are inappropriate for the individual recipient. Income disregards can unnecessarily delay self-sufficiency, while consuming the individual's time-limited period of welfare eligibility. In order to continue providing appropriate services to persons with barriers to employment, many states find it necessary to remove these persons from the TANF benefit program altogether, instead providing them with state-funded assistance.

Few states are able to fully implement a reciprocity approach, even if they favor it as a matter of policy, because of the high cost of workfare programs.¹⁷⁶ However, some have embraced an alternative goal equally favored by many reciprocity proponents: caseload reduction. Indeed, one state held up as a model by the DHHS has achieved its participation rate largely through deterring new applicants and implementing harsh sanctioning policies against hard-to-employ recipients.¹⁷⁷

VII. CONCLUSION

From the start the TANF program pursued two goals that were often at war with one another, though this tension was obscured by the fact that they both paraded under the mantra of "work." The preferable approach, and the one most commonly found in practice, was that expressed in PRWORA's mandate, that states conduct programs that "provide[] parents with job preparation, work and support services to enable them to leave the program and become self-sufficient."¹⁷⁸ The phrases most often used to describe the new approach to welfare also captured this notion—phrases such as "moving recipients from welfare to work" and "ending the cycle of dependency." The alternative conception of work, as a means for earning one's welfare benefits, though not specifically articulated in PRWORA's description of the TANF program and its purposes, has been equally influential in shaping the

¹⁷⁶ See sources cited *supra* note 124.

¹⁷⁷ SCHOTT, *supra* note 165.

¹⁷⁸ 42 U.S.C. § 602(a)(1)(A)(i).

program because of its incorporation into PRWORA's primary performance measure, the work participation rate.

The extent of the conflict between these two notions of work did not become clear until the DRA eliminated mechanisms that had moderated the effect of the participation rate. Intentionally or not, the reciprocity goal of demanding work from recipients of welfare benefits, and the correlative incentive to remove from the program those who could not work in the required ways or for the required number of hours, dominated the federal message to the states after passage of the DRA in 2006.

States that had designed programs around the goal of moving recipients to self-sufficiency—including provision of education, training, treatment, or other services deemed necessary to establish or improve the recipient's employability—attempted to devise measures that would enable them to meet the newly stringent participation rate without totally eviscerating their existing programs. Inevitably, however, there were substantial programmatic costs. One of the most troubling of these was the conclusion reached by many states that they could not satisfy the participation rate unless hard-to-employ populations such as disabled persons were removed from the TANF benefit program altogether.

In its current form, the TANF program serves no goal well. States attempting to provide recipients with the tools for self-sufficiency, and to ensure that persons unable to become self-sufficient nonetheless receive basic subsistence, struggle to meet a performance measure that is ill-suited to the outcomes toward which they strive. Actions necessary to satisfy that measure often undermine achievement of the states' policy objectives. At the same time, demonstrating compliance with that measure consumes substantial resources, reducing the amount available for achieving substantive goals.

Before making any decisions about the shape of the reauthorized program, Congress needs to develop a clearer vision of the purpose for its investment in TANF. Any realistic set of goals must recognize and accommodate the variations in work-readiness among persons receiving welfare. Persons who are essentially work-ready, the proper targets of a workfare strategy, make up only one segment of the welfare caseload. One could legitimately conclude that there is no longer a policy basis for providing these individuals with unconditioned assistance. Policy choices regarding this population might include, in addition to workfare, exclusion from the program altogether or provision of services designed to improve their earning power and their chances of escaping poverty.

For portions of the caseload that do not fit this profile, approaches based on an assumption of employability are incoherent and destined to fail. For instance, a large number of persons eligible to receive welfare benefits are and will remain unable to work. It was to provide support to families in such situations that Aid to Dependent Children (ADC) was originally designed, and no argument has been advanced for stripping this function from

the program, which would be the result if recipients were required to work in exchange for their benefits.

The third, and probably the largest, portion of the welfare population consists of persons who are, at some level, able to work, but who are not employable in any practical sense. While a work-for-welfare approach is at least theoretically possible for this group, their ability to perform in a workfare setting will be hampered by the same human capital deficiencies that limit their employability. Further, they can be expected to remain in such a program for the full duration of their time-limited period of eligibility, eventually leaving that program no better equipped to support themselves than when they began. The most logical and constructive approach for this group is to use the time and resources of the TANF program to address their human capital deficiencies, thus making them more attractive to potential employers.

Given the makeup of the welfare caseload and the types of interventions appropriate for each segment, the utility of the current work participation rate in measuring state performance is extremely limited. The only outcome it measures is whether recipients are working in exchange for their benefits. Hence the participation rate as currently constructed may be an appropriate outcome measure in regard to that portion of the caseload that is work-ready but not employed. To the extent that the desired program outcome is to move recipients into the workforce, however, the participation rate is essentially irrelevant.

Instead of measuring achievement of desired outcomes, a performance measure can track achievement of steps that contribute to achieving those outcomes, in which case it is called a "process measure." A "work" participation rate could function as a process measure in regard to the goal of increasing employment/employability, but only if the list of acceptable "work activities" were expanded to include the various forms of intervention needed to prepare non-work-ready individuals for the workforce.

The coming reauthorization of TANF presents an opportunity not only to correct the mistakes of the DRA, but also to create a more internally consistent work strategy. Congress needs to reassess the way that it measures state performance in administering the TANF program. The participation rate is an inapt measure of the quality and achievements of state programs, and has the effect of promoting program distortions that in fact detract from program quality. A more effective performance measure would be directed at either the employment/employability outcomes that form the heart of the TANF program, or at activities (process measures) that increase the employability of program participants.

APPENDIX A: CALCULATING THE PARTICIPATION RATE

To determine a state's participation rate, the number of TANF recipients who have satisfied the work requirement in a given month is divided by the total number of TANF-funded welfare recipients in that month.¹⁷⁹ Thus, the participation rate is a fraction, of which the total welfare population is the denominator and the working welfare population is the numerator. If 400 of the 1,000 welfare recipients in a state satisfied the work requirement by working for thirty hours each week during the month, the participation rate would be 400 divided by 1000, or forty percent.

There are two methods for increasing the participation rate from forty to the required fifty percent: either increase the numerator to 500, or decrease the denominator to 800. In either case, the fraction would become one-half, or fifty percent. The numerator can be increased by, e.g., (1) involving additional recipients in countable work activities, (2) increasing the time spent in countable activities to thirty hours for a number of recipients, or (3) finding ways to keep recipients in the program whose employment has pushed their income above the eligibility threshold.

Decreasing the denominator can be accomplished by removing non-working recipients from the TANF program, either by denying them financial assistance, or by providing such support from a source other than TANF funds. Under PRWORA, state MOE funds could be used for this purpose, since persons whose benefits were funded from MOE were not included in calculating the participation rate. This was no longer the case after passage of the DRA. In order to exclude a population of nonworking recipients from the participation rate, they must be removed from the TANF/MOE-funded benefit program altogether.

¹⁷⁹ *Id.* § 607(1)(b). This calculation excludes child-only cases, families in sanction status, and (subject to state option) single parents of children under twelve months.