

Welfare Discrimination and Child Welfare

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Welfare categorization, such as that contained in the Social Security Act of 1935, sets up individuals of equivalent need for differential treatment. Despite being regarded as "worthy," children as a category have suffered from such an approach. The Welfare "Reform" Act of 1996 compounds this maltreatment of impoverished children in a manner that amounts to double discrimination. Because the "reforms" are discriminatory, it would be wrong to evaluate them on the basis of any empirical evidence of aggregate success. Moreover, despite such possible aggregate success, they will push some children into deeper poverty, increase charges of "abuse and neglect" against their parents, potentially push more families into the arms of a coercive child welfare system and, in conjunction with the Adoption and Safe Families Act of 1997, will further accelerate the permanent separation of children from their parents. Rather than a return from welfare "reform" to the old welfare policies, a guaranteed minimal income for all individuals is recommended.

The Social Security Act of 1935,¹ in the tradition of the Elizabethan Poor Laws,² divided the needy into categories based on group characteristics, and not need alone. The result was that the program for the poor elderly, for example, provided for higher cash benefits than did the program for dependent children living with single parents.³ Moreover, able-bodied poor men (and poor women without children) were not even included in the Act. Thus a hierarchy of benefits was formed that implicitly judged the poor elderly to be more worthy than poor children, and poor nonelderly adults to be unworthy. Welfare categorization disperses those in need among different categories, thereby setting up individuals of equivalent need for differential treatment.

But why would children as a category suffer from such an approach? Historically, although needy children have been regarded as innocent without equivocation, their parents have been suspect. The predominant assumptions have been that they are lazy, ignorant, unintelligent, imprudent, impulsive, prone to gambling and drinking, irresponsible, and immoral. It

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¹ Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

² 39 Eliz. 1, ch. 3, § I (1597); An Act for the Relief of the Poor, 1601, 43 Eliz., ch. 2 (Eng.).

³ See JUNE AXINN AND HERMAN LEVIN, SOCIAL WELFARE: A HISTORY OF THE AMERICAN RESPONSE TO NEED 201–02 (1982).

would be impossible to assist their children without "rewarding" their own deviant behavior, if their children were to remain with them. We would be encouraging their parents to be freeloaders upon the community. The choice has always come down to leaving the children with suspect parents or removing them for separate treatment.

But when there came to be too many children to remove, and therefore most children of even those parents whose "worthiness" was suspect had to be dealt with while still with their parents, a compromise was reached. Benefits that would have been set higher if based solely on the worthiness of children had to be tempered by the suspect worthiness of their parents. Thus, benefits would fall at some in-between value. Proof of this is that communities have always been willing to support needy children more generously in institutions or foster homes than with their own parents.

Indeed, one of the more perverse aspects of the new federal welfare "reform" law, the so-called Personal Responsibility and Work Opportunity Reconciliation Act of 1996,⁴ is that although meeting pre-1996 AFDC (Aid to Families with Dependent Children)⁵ eligibility requirements will no longer insure a child's eligibility for welfare assistance in a parent's home, it will continue to qualify him or her for federal foster care assistance in someone else's home.⁶ Moreover, under welfare "reform," there are growing numbers of "child-only" cases, in which children who might otherwise have been cut off from welfare if continuing to live with their own parents, reside with grandparents or other relatives who collect welfare benefits, without time limits, on their behalf.⁷

Over the past several years, state-by-state welfare "reforms," culminating in the federal law of 1996, have been implemented that reduce public assistance benefits to mothers based upon their children's school attendance records,⁸

⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C., and 42 U.S.C.).

⁵ 42 U.S.C. §§ 601-687 (1994) (amended 1996).

⁶ See Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, § 103, 110 Stat. 2112, 2112-2161 (codified at 42 U.S.C. §§ 601-17, 619, 1308) 1998 (repealing pre-1996 eligibility requirements and replacing them with TANF block grants to states; as a result of this change, states now determine eligibility for assistance); Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, § 108(d)(3), 110 Stat. 2112, 2166 (amending 42 U.S.C. § 672(a)) (determining federal foster care assistance eligibility by referring expressly to pre-Act AFDC eligibility; as a result of this provision, meeting pre-1996 AFDC eligibility requirements still makes one eligible for federal foster care assistance).

⁷ See *Number of "Child-Only" Welfare Cases on Rise*, LAS VEGAS REV. J., Jan. 3, 1999 at 6A.

⁸ See WIS. STAT. ANN. § 49.26 (West 1997) (Supp. 1999); JOEL F. HANDLER, THE

disallow benefits for an additional child born to a mother while she is on welfare,⁹ require mothers to work or receive job training on penalty of having their public assistance benefits reduced or eliminated,¹⁰ and place a time limit on the receipt of public assistance benefits (now called Temporary Assistance to Needy Families, or TANF).¹¹

These "reforms" are aimed at controlling mothers' behavior, but hurt children in a discriminatory manner. Perhaps many women will be discouraged from having additional children while on welfare, but such children that are born on welfare, through no fault of their own, will be denied benefits. Perhaps many women who seek adequate-paying jobs will find them, but others will not. If mothers do not comply with job-training requirements, it is their children who will be kicked off welfare. And if children are derelict in attending school, or if their mothers are derelict in ensuring that they get there, of what relevance is this to the basic material needs of children?

A society that withholds welfare benefits from some needy individuals and not from others, on the basis of irrelevant differential behavior and circumstances, practices discrimination, and by doing so in regard to the members of one category of welfare (mothers and children) and not to those of others (such as the elderly or disabled), it practices double discrimination. This is no less discrimination than if we were to divide the poor into needy black people and needy white people, and then impose behavioral conditions and other limitations irrelevant to need upon the former but not the latter. In this process, equal treatment is not afforded to individuals based on individual need, because whether or not an individual's need will be met is partly a function of the group to which he or she belongs. When the irrelevant groupings of welfare reform conflate with other irrelevant de facto groupings, such as the fact that black and Hispanic women have comprised the majority of those on AFDC,¹² then the effect, if not the intent, is discrimination against members of those groups, also.

Although the problems that the "reforms" are meant to address are real ones—how to prevent the "freeloading" of some individuals upon the fruit of the

POVERTY OF WELFARE REFORM 99-100 (1995).

⁹ See N.J. STAT. ANN. § 44:10-35 (West 1993) *repealed* by Work First New Jersey Act, 1997 N.J. Laws c. 38 § 17 (codified at N.J. STAT. ANN. § 44:10-55 (West Supp. 1999)); HANDLER, *supra* note 8, at 105-07.

¹⁰ See MASS. ANN. LAWS ch. 118 (Law. Co-op. Supp. 1999) (as amended by 1995 Mass. Acts ch. 5 § 110(f), (1)); HANDLER, *supra* note 8, at 107.

¹¹ See MASS. ANN. LAWS ch. 118 (Law. Co-op. Supp. 1999) (as amended by 1995 Mass. Acts ch. 5 § 110); WIS. STAT. ANN. § 49.27 (West 1997) (Supp. 1999); HANDLER, *supra* note 8, at 97, 107.

¹² See generally U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS, FY 1993 (1995).

work of others, how to avoid rewarding some people for their unwillingness to work, and how to prevent a habit of dependency from arising among some people—it would be wrong to evaluate them on the basis of any empirical evidence of aggregate success, because they violate the first principle of a just society, that of nondiscrimination. These policies would deny benefits to some children and women in dire need for the sake of presumably benefiting society as a “whole.” Currently, social scientists throughout the country are hard at work “testing” the new social welfare policies. Do the family caps reduce the number of children born to mothers on welfare? Do the school attendance requirements reduce truancy? Do welfare-to-work programs succeed in moving welfare mothers into jobs? Is child poverty reduced? All of these questions will be answered in an aggregate manner, in a statistical-probabilistic sense, through group data.

Social science data, to the extent that they are used to form group constructs, are a poor basis for policymaking. Social scientists largely generate statistically valid stereotypes, but stereotypes nonetheless, since they are generalizations about arbitrarily constructed groups. If group data were to inform us, for example, that most mothers on welfare find adequate-paying jobs within a particular time period, a policy that places a time limit on the receipt of welfare benefits would still be wrong, in that it would address need in a discriminatory manner. Policies that address individually irrelevant factors on the basis of their statistical relatedness or “group relevance” are nonetheless discriminatory. In the area of welfare, group-based policies violate the right of the individual to be responded to on the basis of one’s need, rather than on the basis of group stereotypes formed out of ignorance or even through scientific group-difference findings.

Consequently, this emphasis on group-based data is contrary to the core moral values of liberalism. The focus of liberal political philosophy is on the individual. The core moral value of liberalism is the sanctity of the individual human life. In classical liberalism, this value is manifested in concern for protection of individual freedom, especially against the potential encroachment of a coercive government. In modern liberalism, it is additionally expressed in the use of government to actively promote equal opportunity for all. In some societies, government may exist to protect and enhance the well-being of some individuals only, or some groups of individuals. It follows that a *just* society must be one in which the government protects and benefits *all* of its individual members. Hence, its first responsibility toward its individual members is nondiscrimination. Social policies, therefore, must be nondiscriminatory in nature.

Yet social scientists, many considering themselves to be liberal, have advocated the notion that group constructs emerging from their data collection

should be used to inform public policymaking. It is interesting to me that when legal service organizations in Massachusetts asked me to prepare an affidavit concerning that state's federal waiver request for its welfare reform proposal, they welcomed my testimony citing aggregate group data indicating that the proposed policies would cause harm to children, but politely asked me to cut my arguments concerning discrimination. Other affidavits I have seen from around the country also emphasize aggregate group data. Liberal social scientists, legal experts, and child advocates readily accept the relevance of empirical group data to public policymaking but pay less attention to the relevance of moral values.

Remarkably, the history of liberal politics in this country has been one of group-based, and therefore discriminatory, social policy development. The Social Security Act of 1935, for example, although widely regarded as the foundation of modern liberalism, is riddled with group-based policies that are inconsistent with the principle of nondiscrimination. It is, in fact, a monumental example of group-based policymaking. It was designed largely to address people's needs, but only as confounded with group factors irrelevant to need itself, such as age, gender, or disability, and most pervasively, "worthiness" or "unworthiness" of arbitrarily constructed classes of people.

A society that aspires to be humane must be concerned with each and every individual within it, and not just with aggregate outcomes. People have the human right to be responded to as individuals, not as members of groups. We do not know whether child poverty rates will increase or decrease while welfare "reforms" are in effect. A vibrant economy could reduce such rates despite welfare-reduction policies. But the fate of those who remain *in* poverty is another matter. In past years, AFDC benefits in all states have been considerably below the poverty level,¹³ and not enough for any family to live on.¹⁴ Benefits under TANF, because of the block grants-to-states structure through which TANF operates,¹⁵ are likely to be reduced still further due to built-in incentives for states to do so.¹⁶ In fact, in order to make ends meet, most families on AFDC in recent years have had other sources of (unreported) income, often from low-paid work, and used their meager incomes as a means of supplementing their welfare benefits.¹⁷ With welfare benefits lowered or eliminated, families will become

¹³ See DAVID STOESZ & HOWARD JACOB KARGER, *RECONSTRUCTING THE AMERICAN WELFARE STATE* 136-37 (1992).

¹⁴ See generally KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* (1997).

¹⁵ Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 103, 110 Stat. 2112, 2112-2161 (codified at 42 U.S.C. §§ 601-17, 619, 1308 (1998)).

¹⁶ See Vicky Albert, *Reducing Welfare Benefit Levels: Consequences for Adequacy and Eligibility*, 45 SOC. WORK (forthcoming 2000).

¹⁷ See EDIN & LEIN, *supra* note 14, at 42-45.

more deeply submerged in poverty.

We must be concerned not only with how many families remain in poverty, but the extent of their material hardship and its impact on children. The fact that material hardship—and the severity of that hardship—is strongly related to child abuse and neglect is extremely well-documented.¹⁸ However, studies show that much (more than half) of what is defined as abuse and neglect comes under the heading of “deprivation of necessities.”¹⁹ But whether the parent (usually it is the mother who is accused)²⁰ was responsible for that deprivation, and to what degree she was responsible, is often a matter of highly questionable conjecture. Thus material hardship is not merely related to what we call child neglect; it is so intertwined with “neglect” as to often be indistinguishable from it.

Many parents have been exposed to the potential of being called neglectful simply due to the insufficiency of their AFDC grants. Research has indicated that AFDC families known to child protection agencies lived in more crowded and dilapidated housing, with significantly more individuals per room, with children more likely to share a bed, and with someone in the family more likely to have gone hungry for a day or more within the past month, than other AFDC families.²¹ On the other hand, research studies have found that increasing the family’s disposable income even in small amounts has a beneficial effect on child well-being. Counties in Texas providing higher average monthly AFDC expenditures per child had lower child abuse reporting rates than other counties.²² Counties in Washington State with higher proportions of single-

¹⁸ See Leroy H. Pelton, *The Role of Material Factors in Child Abuse and Neglect*, in PROTECTING CHILDREN FROM ABUSE AND NEGLECT 131, 132 (Gary B. Melton & Frank D. Barry eds., 1994) (“The finding that poor children are vastly overrepresented among incidents of abuse and neglect has been obtained across a range of methodologies and definitions, forms of abuse and neglect, and levels of severity.”).

¹⁹ See *id.* at 154 (“In 1986, more than half of all reports [of child abuse or neglect] indicated deprivation of necessities, a category including inadequate supervision and neglecting to provide nourishment, shelter, clothing, and health care.” (citing AM. HUMANE ASS’N, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING: 1986 at 26, 53 (1988))).

²⁰ See LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 117 (1989).

²¹ See Isabel Wolock & Bernard Horowitz, *Child Maltreatment and Material Deprivation Among AFDC Recipient Families*, 53 SOC. SERVICE REV. 175, 175, 181 (1981) (reporting a study whose “results support the centrality of material and social deprivation as factors leading to child maltreatment.”).

²² See James L. Spearly & Michael Lauderdale, *Community Characteristics and Ethnicity in the Prediction of Child Maltreatment Rates*, 7 CHILD ABUSE & NEGLECT 97, 99 (1989) (“The inclusion of the average monthly AFDC expenditure per child into the original predictive equation added significantly to the prediction rates of abuse, but not to the prediction

parent AFDC families who received child care income deductions (and therefore retained more disposable income) had lower child neglect reporting rates than those with lower proportions receiving such deductions.²³ Mothers determined to have “neglected” their children reported less material supports available to them through informal networks than did non-neglecting mothers of comparably low socioeconomic status.²⁴ Of parents who received intervention through programs based on the Homebuilders model, aimed at preventing out-of-home placement of children through social casework methods with the family, those who were provided with concrete services were more likely to have avoided child removal than those who were not provided such services, and such provision was associated with improved school performance and self-esteem of the children.²⁵ Provision of small cash grants (of a few hundred dollars or less) to families in child protection cases, through a statewide emergency cash fund in New Jersey, prevented imminent harm to children, as well as the need to place them in foster care.²⁶

However, even helpful meager material supports have seldom been forthcoming from the child welfare agencies to which poor families are reported.²⁷ Yet it is material hardship that harms children, whether construed as “child abuse and neglect” or not. In *For Reasons of Poverty*,²⁸ I extensively documented the long history of our nation’s efforts to “rescue” children from the poorest families within our society. Children have continued to be removed from

rates of neglect The greater the amount of monthly expenditure per child in a given county the lower that county’s rate of child abuse.”).

²³ See Paule McNicoll, *The Social and Economic Precursors of Child Maltreatment* (1989) (unpublished doctoral dissertation, University of Washington (Seattle)) (on file with author).

²⁴ See Norman A. Polansky et al., *The Psychological Ecology of the Neglectful Mother*, 9 CHILD ABUSE & NEGLECT 265, 269–70 (1985) (reporting a study, as part of which mothers were asked five questions about access to “rather concrete”—as opposed to “emotional”—types of help from informal networks. Generally, neglectful mothers reported having one or two possible sources, while nonneglectful (control) mothers reported three or more.).

²⁵ See Mark Fraser & David Haapala, *Home-Based Family Treatment: A Quantitative-Qualitative Assessment*, 12 J. APPLIED SOC. SCI. 1, 18 (1987–1988) (“In this study and others, treatment that incorporated concrete assistance resulted in more successful outcomes.”); *id.* at 7 (“Treatment was considered successful only if children had remained in the home from the initiation of treatment through the three month, post-termination follow-up.”); see also MARK FRASER ET AL., *FAMILIES IN CRISIS* 53–54, 246–54 (1991).

²⁶ See generally LEROY H. PELTON & E. FUCCELLO, N.J. DIVISION OF YOUTH AND FAMILY SERVICES, *AN EVALUATION OF THE USE OF AN EMERGENCY CASH FUND IN CHILD PROTECTIVE SERVICES* (1978).

²⁷ See generally PELTON, *supra* note 20.

²⁸ *Id.*

parents because of impoverished living conditions,²⁹ homelessness,³⁰ and lack of food³¹ or adequate heating.³² Such circumstances have not uncommonly been construed as “neglect,” prompting removal of the children rather than provision of needed resources.

The *Third National Incidence Study of Child Abuse and Neglect*³³ revealed an increasing readiness on the part of community professionals to attribute child injury to abuse and neglect, and to confuse poverty with neglect. Indeed, social scientists have been all too ready to mix apples with oranges in their vague operational definitions of child abuse and neglect for their research, designed to produce large numbers to draw attention to the issue they are studying. The resultant statistics are meant to alarm the public, and do serve the purpose of attracting increased government funding for coercive approaches. By labeling as “abuse and neglect” broad spheres of child welfare problems that families may be experiencing, we have helped to create the erroneous impression that many impoverished parents do not care much about their children’s welfare.

The categorical construction of social problems leads to categorical and group-discriminatory policies. Such policies ignore the true needs of individuals while squeezing them into artificially constructed categories. If individuals are placed in the category of “child abuse and neglect” on the basis of vague definitions, behavior vaguely related to the wrongdoing in question, or the identification of loosely correlated factors such as alcohol abuse, then they are prejudicially singled out for coercive treatment. For those poor people caught in the overly-spread web of the concept of child abuse and neglect, such characterization is no less prejudicial than any other prejudice. Policies must speak to individual need, not to abstract categories of blame, such as that which “child abuse and neglect” has become.

We might imagine that one of the functions of the public child welfare system should be to break the fall of families who have fallen through all other “safety nets.” It is a system, however, that is obsessed with the concepts of child abuse and neglect, which carry implications of accusation and blame that rationalize the system’s coercive orientation toward impoverished parents.

When placed under the cover of benevolent intervention, the ability of a coercive system to take on a life of its own, and to expand independently of necessity, is facilitated. Due to its incorporation of a “preventive” orientation

²⁹ See generally *id.*

³⁰ See *id.* at 52, 103, 151.

³¹ See *id.*

³² See *id.* at 151.

³³ See A.J. SEDLAK & D.D. BROADHURST, U.S. DEP’T OF HEALTH & HUMAN SERVICES, *THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: FINAL REPORT* (1996).

(and “family preservation” rhetoric), “child protection” gains the support of liberals as well as conservatives. Child welfare advocates, many considering themselves to be liberal, had already helped to demonize the poor through the great child abuse crusade they began in the 1960s and that continues unrelenting at the present time. Unwittingly or not, and despite their adherence to a transparent myth of classlessness,³⁴ they contributed to the negative stereotypes of impoverished parents and the political atmosphere that paved the way for punitive AFDC “reform” to become the law of the land. Indeed, an alliance between liberals and conservatives maintains and supports the child welfare system as currently structured. The liberal notion of big government comes to fuse with the conservative notion of it: long on coercion and short on prevention.

Despite a professed policy of “family preservation” since the beginning of this century, we are closing out this century (if recent trends have continued) with the highest number and rate of children in foster care than at any previous time in the century.³⁵ Yet even if poverty and its consequences were to be more adequately addressed through other systems, child removal activity would continue at current rates so long as we allow the child welfare system to continue in its present form, masquerading as a benevolent helping institution. Our current child welfare policies are so perverse that the coercive system overpowers any aggregate preventive effect that reduced poverty and increased material aid may have on foster care placement.

For example, the surprising fact is that although most children in foster care come from poverty, there is no apparent relationship between trends in the rate of children in foster care and child poverty rate trends over time. During the 1960s, the child poverty rate was almost halved, yet the foster care population rate increased.³⁶ Moreover, AFDC benefits were to no avail. From 1955 to 1975,

³⁴ See Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608, 616 (1978) (“Both evidence and reason lead to the unmistakable conclusion that, contrary to the myth of classlessness, child abuse and neglect are strongly related to poverty, in terms of prevalence and of severity of consequences.”).

³⁵ See Leroy H. Pelton, *Child Welfare Policy and Practice: The Myth of Family Preservation*, 67 AM. J. ORTHOPSYCHIATRY 545, 546 (1997); VOLUNTARY COOPERATIVE INFORMATION SYSTEM RESEARCH NOTES (American Public Welfare Association), Mar. 1997, at 3 (estimating 1996 statistics).

³⁶ See PELTON, *supra* note 20, at 5–7, 21 n.2, 108 (1989) (citing U.S. CHILDREN’S BUREAU, CHILDREN’S BUREAU STATISTICAL SERIES NO. 66, CHILD WELFARE STATISTICS—1961 at 30 (1962); U.S. CHILDREN’S BUREAU, CHILDREN’S BUREAU STATISTICAL SERIES NO. 75, CHILD WELFARE STATISTICS—1963 at 9 (1964); U.S. CHILDREN’S BUREAU, CHILDREN’S BUREAU STATISTICAL SERIES NO. 84, CHILD WELFARE STATISTICS—1965 at 15 (1966)); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS SERIES P-60, NO. 140, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1982 at 21(1983).

there was a fivefold increase in the number of children covered by AFDC,³⁷ yet the foster care population climbed sharply throughout that period.³⁸ Nor did increased social services matter. The size of the foster care population doubled³⁹ precisely during the same time, 1963 to 1977, that federal spending for social services grew more than twelve-fold.⁴⁰ Indeed, many western European countries maintain at least as many children in foster care (proportionate to their overall child populations) as we do in the United States,⁴¹ despite the fact that they have far lower child poverty rates⁴² and far more progressive and extensive social welfare supports for families and children than we do.⁴³

How can this be so? There has always been a sufficient "pool" of children living in poverty to yield a potential supply of large numbers of children to the

³⁷ See Pelton, *supra* note 35, at 546 (citing *Current Operating Statistics: Monthly Tables*, SOC. SECURITY BULL., July 1985, at 74).

³⁸ See PELTON, *supra* note 20, at 5-7, 21 nn.2-4 (1989) (citing JANE KNITZER ET AL., CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES 191 (1978); U.S. CHILDREN'S BUREAU, CHILDREN'S BUREAU STATISTICAL SERIES NO. 66, CHILD WELFARE STATISTICS—1961 at 30 (1962); U.S. CHILDREN'S BUREAU, CHILDREN'S BUREAU STATISTICAL SERIES NO. 75, CHILD WELFARE STATISTICS—1963 at 9 (1964); U.S. CHILDREN'S BUREAU, CHILDREN'S BUREAU STATISTICAL SERIES NO. 84, CHILD WELFARE STATISTICS—1965 at 15 (1966)).

³⁹ See PELTON, *supra* note 20, at 5-7, 21 nn.2-4 (citing JANE KNITZER ET AL., CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES 191 (1978); U.S. CHILDREN'S BUREAU, CHILDREN'S BUREAU STATISTICAL SERIES NO. 75, CHILD WELFARE STATISTICS—1963 at 9 (1964); CHILDREN'S BUREAU, CHILDREN'S BUREAU STATISTICAL SERIES NO. 84, CHILD WELFARE STATISTICS—1965 at 15 (1966)).

⁴⁰ See Pelton, *supra* note 35 at 546 (citing MARTHA DERTHICK, BROOKINGS INST., UNCONTROLLABLE SPENDING FOR SOCIAL SERVICES GRANTS 8 (1975) (indicating an expenditure of \$194,304,000 for fiscal year 1963)); Ann Kallman Bixby, *Social Welfare Expenditures, FY 1979*, SOC. SECURITY BULL., Nov. 1981, at 3, 5 (indicating an expenditure of \$2,461,200,000 for fiscal year 1977)).

⁴¹ See Pelton, *supra* note 35, at 547 (citing Sven E. Olsson Hort, *Sweden: Towards a Deresidualization of Swedish Child Welfare Policy and Practice?*, in *COMBATting CHILD ABUSE: INTERNATIONAL PERSPECTIVES AND TRENDS* 105, 119 (Neil Gilbert ed., 1997); Tarja Pösö, *Finland: Child Abuse as a Family Problem*, in *COMBATting CHILD ABUSE: INTERNATIONAL PERSPECTIVES AND TRENDS* *supra* at 143, 155; Vita L. Bering Pruzan, *Denmark: Voluntary Placements as a Family Support*, in *COMBATting CHILD ABUSE: INTERNATIONAL PERSPECTIVES AND TRENDS* *supra* at 125, 137; Reinhart Wolff, *Germany: A Nonpunitive Model*, in *COMBATting CHILD ABUSE: INTERNATIONAL PERSPECTIVES AND TRENDS* *supra* at 212, 223).

⁴² See Pelton, *supra* note 35, at 547 (citing *INTERNATIONAL CHILD WELFARE SYSTEMS: REPORT OF A WORKSHOP* (S. A. Pires ed., 1993)); T. Smeeding & L. Rainwater, *Cross-National Trends in Income, Poverty and Dependency* (Sept. 1991) (Paper presented at the Joint Center for Political and Economic Studies Conference on Poverty, Inequality, and the Crisis of Social Policy, Washington, DC) (on file with author).

⁴³ See Pelton *supra* note 35, at 547.

foster care system, even in western European countries. The limits of the capacity of the foster care system are far below the numbers of poor children, so that the fluctuating size of the child poverty pool matters little.⁴⁴ But when coercive systems are placed under cover of helping, as they have been in western European countries as well as in the United States,⁴⁵ then they will thrive by gaining increased funding and resources. There is always an ample number of parents in poverty to be judged, and child removal is a way to serve "innocent" children without "rewarding" their "undeserving" parents. In a similar vein, it has been suggested that the social service orientation of public welfare departments under the new public welfare policies, although designed to prepare clients for work and help them find employment, will be "exploited as a symbol to justify punitive, restrictive, and discriminatory welfare policies toward the poor."⁴⁶

Mindful of the criticisms that the new welfare "reform" policies will hurt innocent children, some conservatives have advocated that children be placed in "orphanages"⁴⁷ and that we should encourage single women to give up their children for adoption at birth.⁴⁸ Indeed, such suggestions are merely the end result of the logic inherent in current welfare "reforms," but also in past policies. If we cannot defend the societal neglect of innocent children, let us separate them in a manner that they can be treated differently than their mothers. Since the national foster care system is already stretched to its limits, let us expand other alternatives.

In conjunction with TANF, which already reduces the likelihood that single mothers living in poverty will have the means to provide "suitable" homes for the return of their children, the Adoption and Safe Families Act⁴⁹ is likely to

⁴⁴ See generally Pelton, *supra* note 35.

⁴⁵ See generally COMBATTING CHILD ABUSE: INTERNATIONAL PERSPECTIVES AND TRENDS (Neil Gilbert ed., 1997) (considering, *inter alia*, some child welfare systems in European nations, and supporting the inference that these systems are, at least potentially, as coercive as systems currently in place in the United States).

⁴⁶ Y. Hasenfeld, *Welfare Reform and Social Services: Myth and Reality*, Lecture at the University of Michigan School of Social Work Visiting Scholars Program (Mar. 31, 1998).

⁴⁷ See Tom Morganthau et al., *The Orphanage*, NEWSWEEK, Dec. 12, 1994, at 28, 30 ("Rep. Newt Gingrich's newly announced welfare-reform bill would allow (but not direct) state governments to use federal funds to establish orphanages if they chose.").

⁴⁸ See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* 416 (1994) ("[W]e want to return to the state of affairs that prevailed until the 1960s, when children born to single women—where much of the problem of child neglect and abuse originates—were more likely to be given up for adoption at birth.").

⁴⁹ The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 2 U.S.C. and 42 U.S.C.).

further accelerate the permanent separation of children from their parents. The Act sets arbitrary time limits for the termination of parental rights for children in foster care⁵⁰ and provides states with financial incentives to increase the number of adoptions of children out of the foster care system each year.⁵¹ Family reunification services under this Act are time-limited, and include counseling, therapy, and "treatment,"⁵² but not the concrete and material aid that would address the issues often preventing reunification, such as homelessness or inadequate housing. Although the Act equates adoption with "permanency,"⁵³ increased permanence for many children is doubtful. The majority of children in foster care awaiting adoption are over age six.⁵⁴ Yet studies have shown that adoption disruption rates increase dramatically with age at adoptive placement, with rates as high as forty-seven percent for children over age twelve, within the first two years of adoptive placement alone.⁵⁵

What, then, are the likely consequences of reducing material supports to below-poverty-level families, as TANF will do? More children in families living in poverty will be reported to child protection agencies for having been "abused and neglected," and more children living in poverty will be harmed by increased material hardship. If poverty rates do not decline, then the resultant increased overall numbers of "abuse and neglect" reports will prompt legislators to increase funding and staff size of the coercion-oriented child welfare system.

⁵⁰ See *id.* § 103(a)(3), 111 Stat. at 2118 (amending 42 U.S.C. § 675(5) 1998) (requiring a state, with limited exceptions, to terminate parental rights "in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . .").

⁵¹ See *id.* § 201(d), 111 Stat. at 2123 (amending 42 U.S.C. §§ 670-679 (1998)).

⁵² See *id.* § 305(b)(2), 111 Stat. at 2131 (amending 42 U.S.C. § 629a(a) (1998)).

⁵³ See § 107, 111 Stat. at 2121 (amending 42 U.S.C. §§ 675(1) (1998)). This section reads, in relevant part:

(E) In the case of a child with respect to whom the permanency plan is *adoption or placement in another permanent home*, documentation of the steps the agency is taking to find an *adoptive family or other permanent living arrangement* for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. . . .

Id. (emphasis added).

The use of the phrase "or other permanent home" in relation to adoption is a clear indication that the Social Security Act, as amended, regards adoption as a permanent solution. In fact, Title II is called "Incentives for Providing Permanent Families for Children."

⁵⁴ See PELTON, *supra* note 20, at 91.

⁵⁵ See PELTON, *supra* note 20, at 94 (citing J. Boyne et al., *Log-Linear Models of Factors Which Affect the Adoption of "Hard-to-Place" Children*, in 1982 PROCEEDINGS OF THE SOCIAL STATISTICS SECTION, (Social Statistics Section, American Statistical Ass'n, ed., 1982).

Increased staff size will allow the system to place even greater numbers of children in foster care than they do now. Yet there are limits to the number of foster families that can be recruited. Thus, other alternatives, such as kinship foster care, child-only TANF cases, and adoption will be increasingly resorted to, and "orphanages" may rise again. However, large numbers of adopted children will return to an already-overloaded foster care system, and "orphanages" will prove too expensive. Thus, the ongoing child welfare "crisis" in our country will continue indefinitely.

Our child welfare and welfare policies constitute mutually reinforcing approaches to social problems that are coercive, paternalistic, and discriminatory. They must be rethought. If a society is to be judged by the way it treats its poor, our current child welfare and welfare policies are a disgrace, and should be an embarrassment to us all.

The coercive and categorical approaches to social welfare are deeply and morally flawed. They no doubt curtail freeloading, but only at the price of violating a higher value, that of a community fulfilling its basic obligations to children and other "innocent" people. In regard to children, the categorical approach leads a community to neglect their needs to a large extent or, in lieu of that, to the extreme measures of separating children from their parents.

Group-based policies, which in fact pervade our entire public policy arena, are also inconsistent with the liberal value of respect for the individual and the principle of nondiscrimination. Liberalism must move beyond group-based policies and return to its core values. We should not advocate for a return to AFDC, which shares with TANF discriminatory and arbitrary characteristics. All public policies must be re-examined to insure that they meet the criterion of fairness to individuals. In the area of welfare, this would mean that all individuals similarly situated in regard to need must be afforded equal treatment. If we decide that poor people should receive welfare benefits, then such benefits must be made available to *all* poor people, whether they be children, the elderly, or able-bodied adults.

In arguing against the categorical approach, what we are really saying is that all children are minimally worthy of some basic provision of need, as are all individuals. A just community cannot allow anyone within it to go hungry, shelterless, unclothed, or without medical attention. The only truly liberal option is to advocate for a guaranteed minimal income for every individual. A just community must establish a floor of compassion to meet the needs of all individuals. By providing a minimal floor of compassion, a community addresses dire need while at the same time preserving a system of incentives for merit, productivity, and accomplishment. Supportive and preventive services can be seen as promoting opportunities for individuals (through, for example, education, provision of day care, and health care) to be rewarded for working

hard. Such provisions as public health care and education are basic supports that affirm that the reason for the existence of the community is to protect and benefit every individual within it.

Several decades ago, the eminent economist, Milton Friedman, recognized the arbitrariness of group categorization of need, and recommended the negative income tax, which would set a floor under which no individual's net income would fall.⁵⁶ Several proposals have been made since. In current times, it would not be unreasonable to consider a guaranteed minimal income of ten thousand dollars per year for a single-individual household, with gradual reductions in that provision up to an earned income of twenty thousand dollars. Complications arise, of course, in computing provision for households with more than one individual. Yet such complications are trivial compared to the variations, unfathomable intricacies, and unfairness produced by a patchwork quilt categorical approach to social welfare. Any new welfare reform, however, should be carried out in the context of rethinking our social policies in general.

⁵⁶ See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 191-95 (1962) (re-issued in 1982).