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PUNISHING THE POOR THROUGH WELFARE REFORM: CRUEL AND UNUSUAL?

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INTRODUCTION

In America's earliest days, punishment for being poor extended beyond poverty's unpleasant, concomitant circumstances—nagging hunger, tattered clothing, vagrancy—to include community-inflicted sentences such as banishment, whippings, and auctioning off the poor like slaves.[1] American attitudes towards the impoverished may have transitioned from this uncivilized state of affairs, but resentment towards the poor continues to fester.[2] Free choice, personal responsibility, and privilege are constant elements in an increasingly polarized national discourse on the appropriate balance between human compassion and accountability.[3]

In the 1960s, President Lyndon B. Johnson transformed this debate by launching a national "war on poverty" and insisting that America provide education and opportunities to citizens of lower socioeconomic status.[4] Expansion of welfare benefits through food

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1. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 10, 20–21 (1986) (describing the degrading treatment the poor often faced in nineteenth-century America).

2. *See infra* Part I.B.

3. *See infra* Part I.B.

4. *See* Lyndon B. Johnson, Message to Congress on the Economic Opportunity Act (1964), *reprinted in* WELFARE: A DOCUMENTARY HISTORY OF U.S. POLICY AND POLITICS 224

stamps and Aid to Families with Dependent Children ("AFDC") was a hallmark of the Johnson administration and provided considerable support to those below the poverty line. In the 1990s, however, welfare recipients' alleged abuse of taxpayer dollars sparked a wave of criticism for the poor and fueled debates in Congress over welfare reform. By 1996, Congress had eliminated many entitlement programs, including AFDC, and replaced them with strict work requirements and time limits on benefits through Temporary Assistance to Needy Families ("TANF"),[5] ostensibly to increase personal responsibility.[6] Although promoting self-sufficiency for able-bodied welfare recipients is a reasonable aim, many scholars contend that the restrictions actually punish the impoverished more than they provide incentives for advancement,[7] marking a shift in the balance between decency and personal responsibility.

This tension between compassion and accountability mirrors a similar balance discussed in Eighth Amendment jurisprudence between enforcing standards of human decency and upholding legitimate punishment. Eighth Amendment doctrine has transformed over time to accommodate contemporary standards of human decency and to prohibit punishment that is offensive to society's values, such as executing minors[8] or the mentally impaired,[9] or punishing the homeless for squatting in public when they lack adequate shelter.[10] An unanswered question in Eighth Amendment scholarship is exactly where on these scales the denial of welfare benefits to the needy falls. This work seeks to fill that analytical void by analyzing Eighth Amendment doctrine and applying it to the welfare reform context, where new TANF restrictions penalize certain recipients by revoking benefits upon job loss[11] and imposing

(Gwendolyn Mink & Rickie Solinger eds., 2003) ("The war on poverty is not a struggle simply to support people, to make them dependent on the generosity of others. It is a struggle to give people a chance.").

5. *See infra* Part I.B.

6. *See infra* Part I.B.

7. *See, e.g.*, Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 266–75 (2014) (explaining how TANF has punished the poor and caused significant strife within families that have lost invaluable benefits).

8. *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that executing minors violates the Eighth Amendment).

9. *See* Atkins v. Virginia, 536 U.S. 304, 521 (2002) (holding that it is a violation of the Eighth Amendment for states to execute the mentally impaired).

10. *See infra* Part I.A.

11. *See infra* Part I.B.

harsh time limits on benefits.[12] In the aggregate, this Comment contends that overly punitive welfare reforms represent unconstitutional punishment of a "status"[13] rather than an action, offend contemporary notions of human dignity,[14] and may, in fact, violate the Eighth Amendment.

This Comment will proceed in three parts. Part I will explore Eighth Amendment jurisprudence and its historical underpinnings and will provide background on the 1996 welfare reforms. Part II will explore whether welfare reforms penalize individuals for their status as "poor" or "unemployed" and whether this constitutes cruel and unusual punishment. Finally, Part III will show how welfare programs can be reformed for constitutional compliance. Overall, this Comment aims to show how the Eighth Amendment intersects with welfare reform and what constitutional limits exist vis-à-vis welfare restrictions for society's neediest citizens.

I. SETTING THE STAGE: HISTORICAL BACKGROUND ON THE EIGHTH AMENDMENT AND THE 1996 WELFARE REFORMS

American courts continue to analyze the Eighth Amendment in light of current standards of human dignity. Part A of this Section explores the evolution of Eighth Amendment doctrine, particularly as it relates to punishment for status crimes. Part B will examine welfare reform and its historical justifications to provide a framework for critically evaluating welfare restrictions in the latter portions of this piece.

A. Historical Analysis of Eighth Amendment Jurisprudence

The Eighth Amendment specifically prohibits state[15] and federal governments from inflicting cruel and unusual punishments on citizens.[16] Originating in the English Declaration of Rights of 1688, the Amendment was incorporated into the U.S. Bill of Rights in 1791

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12. *See infra* Part I.B.

13. *See infra* Part I.A.

14. *See infra* Part I.A.

15. *See* Justin F. Marceau, *Criminal Law: Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1287 (2008) (noting that, in its 1962 decision, *Robinson v. California*, the Supreme Court held that the Eighth Amendment was selectively incorporated into the Fourteenth Amendment and applied against the states).

16. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII, § 3.

to outlaw severe punishments offensive to human decency.[17] Historically, the Amendment was intended to forbid "torture and other barbarous methods" of punishment—such as disembowelment or decapitation[18]—that were used by states when imposing the death sentence.[19] Early Supreme Court litigation focused on defining the outer bounds of permissible punishment and determining whether a particular method complied with the Eighth Amendment.[20]

When the Court decided *Weems v. United States*[21] in 1910, however, it recognized for the first time that proportionality was an important factor in Eighth Amendment analysis.[22] Since this landmark case, the prohibition on cruel and unusual punishment has come to serve three vital purposes: "it limits [the] kinds of punishment that can be imposed of those convicted of crimes, it proscribes punishment grossly disproportionate to the severity of the crime, and it imposes substantive limits on what can be made criminal and punished as criminal."[23] In delineating the boundaries between constitutional and unconstitutional conduct in this realm, the Supreme Court relies upon evolving standards of decency, as reflected by society's customs and values.[24] More recently, the Court

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17. *See* Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636–37 (1966) [hereinafter *The Cruel and Unusual Punishments Clause*]. Eighth Amendment doctrine has inevitably shifted over time as the meanings of morality, decency, and human rights have evolved. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (declaring that it is the Supreme Court's duty to "say what the law is").

18. *The Cruel and Unusual Punishments Clause*, *supra* note 17, at 637.

19. Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 422 (1995).

20. *Id.*

21. Weems v. United States, 217 U.S. 349 (1910).

22. Bukowski, *supra* note 19, at 423 n.28.

23. Lonnie E. Griffith, Jr., *Construction and Application of Eighth Amendment's Prohibition of Cruel and Unusual Punishment—U.S. Supreme Court Cases*, 78 A.L.R. FED. 2d 1, 2 (2013) (summarizing and analyzing cases in which courts have interpreted the Cruel and Unusual Punishments Clause).

24. *The Cruel and Unusual Punishments Clause*, *supra* note 17, at 638. Although there is no precise legal standard for what suffices as "cruel and unusual," Juliette Smith suggests a framework for invalidating laws under this Amendment based upon: "(1) the severity of the punishment and its degradation to human dignity, (2) the probability that the punishment would be inflicted arbitrarily, (3) substantial rejection of the punishment by contemporary society, and (4) the availability of a less severe punishment that would serve the same purpose." *See* Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 309 (1996) (citing to the reasoning in Justice Brennan's concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 281–82 (1972) (Brennan, J., concurring)).

has taken judicial notice of international legal standards and *jus cogens* in evaluating the interaction of human rights and cruel and excessive punishment.[25]

A series of Supreme Court and lower federal court decisions pertaining to drug addiction, homelessness, and welfare in the last fifty years have called into question the state's ability to punish individuals based on their status. In 1962, in *Robinson v. California*,[26] the Supreme Court invalidated a statute that rendered it a crime to be "addicted to the use of narcotics."[27] According to the Court, the statute did not punish the act of *using* drugs, which would have been constitutionally permissible,[28] but it punished the status of *being* a drug addict. The Court likened this to punishing someone for being mentally ill, for being a leper, or even for suffering from a simple cold—all statuses beyond the reach of criminal sanction.[29]

A decade later, in *Papachristou v. City of Jacksonville*,[30] the Supreme Court found a Florida vagrancy statute unconstitutional on the grounds that it was overbroad, did not give residents proper notice regarding what conduct was impermissible, and placed too much discretion in the hands of police.[31] With this level of discretion, "the poor and the unpopular [were] permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.'"[32] Sympathetic to the needs of the poor, and wary of the involuntary nature of poverty and homelessness, a federal district court in Florida similarly enjoined Miami officials from enforcing loitering statutes against the homeless when such persons engage in harmless conduct because "resisting the need to eat, sleep, or engage in other life-sustaining activities is impossible."[33] Arresting or punishing innocent, inoffensive conduct,

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25. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–76 (2005) (holding that the Convention on the Rights of the Child and other human rights treaties and norms are relevant to the inquiry of whether the death penalty for minors should be prohibited as cruel and unusual in the United States).

26. Robinson v. California, 370 U.S. 660 (1962).

27. *Id.* at 660.

28. *See* Powell v. Texas, 392 U.S. 514, 532 (1968) (upholding an ordinance prohibiting public drunkenness on the grounds that the law banned a specific act rather than a status, and because the defendant was cited not for being an alcoholic, but for being drunk in public on the occasion in question).

29. *Robinson*, 370 U.S. at 666–67.

30. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

31. *Id*. at 165–71.

32. *Id.* at 170 (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)).

33. Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992).

such as sleeping in public when the homeless do not have shelter, violates the Eighth Amendment.[34]

As the above cases demonstrate, the Supreme Court and lower federal courts since the 1960s have begun to look askance at statutes that try to punish involuntary statuses or acts directly arising from poverty. Courts are cognizant of the fact that poverty and homelessness are usually not the products of free choice, but of unfortunate life circumstances.[35] The Supreme Court has also utilized other constitutional provisions to invalidate laws that seem to target impoverished individuals. In *Shapiro v. Thompson*,[36] for example, the Supreme Court ruled that a one-year waiting period before granting welfare benefits to someone changing residence from one state to another unconstitutionally infringed upon the individual's right to travel and due process protections.[37] The Court also ruled that a welfare agency may not terminate an individual's benefits without first affording the recipient an evidentiary hearing in compliance with the Due Process Clause.[38] Federal courts are often attuned to the

34. *Id.* In finding the police officers' conduct in *Pottinger v. City of Miami* unconstitutional, the Florida court cited several other federal and state court decisions that had previously found criminalizing homelessness and its concomitant activities cruel and unusual because "punish[ing] the unfortunate for this circumstance [homelessness] debases society." Parker v. Mun. Judge, 427 P.2d 642, 644 (Nev. 1967); *see also* Jones v. City of L.A., 444 F.3d 1118 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007) (preventing Los Angeles from arresting individuals for sitting, lying, or sleeping in public as a consequence of homelessness because doing so violates the Eighth Amendment, particularly when there are inadequate shelters available); Johnson v. City of Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994) ("The evidence demonstrates that for a number of Dallas homeless at this time homelessness is involuntary and irremediable . . . . [T]hey must be in public. And it is also clear that they must sleep. Although sleeping is an act rather than a status, the status of being could clearly not be criminalized under *Robinson*."); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987, 987 (1971) (holding a vagrancy statute unconstitutional because it was vague, overbroad, and punished mere status); Headley v. Selkowitz, 171 So. 2d 368, 370 (Fla. 1965) (holding Miami's disorderly conduct statue unconstitutional and expressing caution in enforcing vagrancy statutes generally); Alegata v. Commonwealth, 231 N.E.2d 201, 207 (Mass. 1967) (explaining that "[i]dleness and poverty should not be treated as a criminal offence [*sic*]"). *But see* Whiting v. Town of Westerly, 942 F.2d 18, 24 (1st Cir. 1991) (upholding a sleeping in public ordinance against First Amendment and equal protection challenges because sleeping is not per se a constitutionally protected activity).

35. *See* Smith, *supra* note 24, at 304–05 (discussing the "changing legal view of the poor"); *see also Jones*, 444 F.3d at 1137 (recognizing that "an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable").

36. Shapiro v. Thompson, 394 U.S. 618, 631, 642 (1969).

37. *Id*. at 631, 642.

38. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

plight of the impoverished and readily accept greater constitutional protections for the poor as part of America's aligning moral compass. Congress, however, has been more limited in granting aid to the poor since the mid-1990s, culminating in the elimination of AFDC and its replacement with TANF in 1996.

B. From AFDC to TANF and the 1996 Congressional Welfare Reforms

The modern welfare state can be traced back to the turn of the twentieth century, when many states supported young widows who had lost their husbands, often to industrial accidents. States created special "widows' pension plans" designed to provide widows with the means necessary to care for their children so that they would not have to place them in orphanages.[39] Economic strife and mass unemployment during the Great Depression generated the political will to expand these programs at the federal level and, accordingly, President Franklin D. Roosevelt signed the Social Security Act of 1935, establishing federal widows pension benefits, social security, unemployment insurance, and AFDC.[40] In the 1960s, President Johnson declared a "war on poverty," expanding previous welfare programs like AFDC and initiating new programs such as the Federal Food Stamp program and educational plans like the Elementary and Secondary Education Act of 1965.[41] These initiatives were largely in response to the increasing awareness of racial inequality in the United States and its contribution to poverty.[42]

By the late 1980s, however, many American taxpayers were increasingly dissatisfied with the federal welfare system, and Congress began launching campaigns for reform. Although some of the impetus for welfare reform likely originated out of a genuine desire to better

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39. WELFARE REFORM: SOCIAL IMPACT (Films Media Group 1997).

40. *Id.*

41. *See* Dylan P. Grady, *Charter School Revocation: A Method for Efficiency*, *Accountability*, *and Success*, 41 J.L. & EDUC. 513, 516–17 (2012) (explaining that the purpose of the Act was to give more resources, like textbooks, to underfunded schools so children in poverty could receive a better elementary and secondary education).

42. *See generally* Lyndon B. Johnson, Message to Congress on the Economic Opportunity Act (1964), *reprinted in* WELFARE: A DOCUMENTARY HISTORY OF U.S. POLICY AND POLITICS, *supra* note 4, at 224 ("The young man or woman who grows up without a decent education, in a broken home, in a hostile environment, in ill health or in the face of racial injustice—that young man or woman is often trapped in a life of poverty.").

incorporate lower-income citizens into the workforce,[43] many people lamented the number of never-married, single mothers receiving welfare benefits and AFDC checks.[44] Whereas most welfare recipients in the 1930s were widows with dependent children, by the 1990s, many individuals receiving AFDC benefits were single mothers who had never married.[45]

The welfare reform debate revived a stark distinction between what some have called the "deserving" and "undeserving" poor.[46] Many political efforts aimed at limiting or prohibiting federal money from going to teenagers giving birth to children out of wedlock,[47] furthering the stereotype of the "welfare queen"[48] and perpetuating the notion that some women "deliberately get pregnant and have babies in order to collect welfare and set up their own households."[49] Moreover, the growing number of women balancing careers with childrearing by the late 1980s began fostering the expectation that women on welfare should work.[50]

In this welfare-skeptical environment, Congress passed the Family Support Act of 1988,[51] which established a mandatory federal jobs program and employment training.[52] The most dramatic reform—the Personal Responsibility and Work Opportunity Act of

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43. *Hearings on the Work and Responsibility Act Before the H. Comm. on Ways and Means*, 103d Cong. (1994) (statements of Donna Shalala), *reprinted in* WELFARE: A DOCUMENTARY HISTORY OF U.S. POLICY AND POLITICS, *supra* note 4, at 578–86.

44. PREVIEW OF REPUBLICAN PLANS TO REFORM WELFARE (1994), *reprinted in* WELFARE: A DOCUMENTARY HISTORY OF U.S. POLICY AND POLITICS, *supra* note 4, at 590–94.

45. WELFARE REFORM: SOCIAL IMPACT (Films Media Group 1997).

46. *See, e.g.*, A. Mechele Dickerson, *America's Uneasy Relationship With the Working Poor*, 51 HASTINGS L.J. 17, 18 (1999) (describing society's distinction between the "deserving" and the "undeserving" poor and how TANF requirements sought to limit benefits to those viewed as undeserving, including lazy, unmarried mothers who seek public assistance over work).

47. PREVIEW OF REPUBLICAN PLANS TO REFORM WELFARE, *supra* note 44, at 592.

48. Gilman, *supra* note 7, at 259 (highlighting President Reagan's description of many single mothers on welfare as "Cadillac driving 'welfare queens'" who cheat taxpayers out of their hard-earned money).

49. *Issues in Brief: Teenage Pregnancy and the Welfare Reform Debate* (Alan Guttmacher Institute 1995), *reprinted in* WELFARE: A DOCUMENTARY HISTORY OF U.S. POLICY AND POLITICS, *supra* note 4, at 624–30, 625.

50. WELFARE REFORM: SOCIAL IMPACT (Films Media Group 1997).

51. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified at 42 U.S.C. § 667).

52. WELFARE REFORM: SOCIAL IMPACT (Films Media Group 1997).

1996[53]—was passed shortly afterwards and is still in place today. Under this legislation, TANF replaced AFDC, creating a new federal welfare scheme that eliminated "welfare entitlement."[54] States are now required to impose a five-year lifetime limit when federal funds are used to provide assistance to families, but states can also set more stringent limits on receipt of federal or state TANF benefits.[55] States are also required to impose work requirements and to sanction individuals who are not working by revoking their benefits.[56] Federal guidelines require that at least 50 percent of families within a state work at least thirty hours per week, or twenty hours for families with a single parent and children, and states can lose federal funding if they do not comply with this baseline.[57] Generally, states cannot use federal funds to give additional benefits to women who give birth to children while receiving welfare benefits, capping the assistance provided based upon the number of children a single mother had prior to receiving TANF.[58] Furthermore, states under the new legislation maintain substantial discretion to impose additional work or community service requirements, or time limits; or to require the use of TANF funds for childcare, job training, or similar services without providing direct cash assistance to families as they did under AFDC.[59]

While the stated goals of TANF may be reasonable,[60] many believe Congress intended the strict time limits and work requirements to punish the poor and decrease America's responsibility for society's neediest individuals and families,[61] many of

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53. Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified in scattered sections of 7, 8, 20, 25 and 42 U.S.C.).

54. Under the new program, the federal government gives block grants to the states to be given to welfare recipients until funding evaporates for that fiscal year. RUTH SIDEL, KEEPING WOMEN AND CHILDREN LAST: AMERICA'S WAR ON THE POOR 105 (1998).

55. Liz Schott, *Policy Basics: An Introduction to TANF*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 4, 2012), *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=936.

56. Most of these sanctions are considered "'full-family' sanctions," meaning that an entire family loses their benefits as a result of one adult member's lack of employment. *Id.*

57. *Id.*

58. SIDEL, *supra* note 54, at 105.

59. Schott, *supra* note 55.

60. TANF's stated goals are to provide assistance to needy families, promote work and marriage, decrease dependency and out-of-wedlock pregnancies, and encourage two-parent households. *Id.*

61. *See* SIDEL, *supra* note 54, at 109 ("In reality, the current wave of legislation is a way of punishing the poor for being poor, punishing mothers who are single—whether through

whom were branded as "undeserving" of taxpayer-funded cash assistance.[62] Given that TANF has not been particularly successful in meeting its goals, but has instead eliminated a significant safety net for low-income households,[63] TANF certainly seems to have done more to alienate and penalize the poor for their status[64] than it has to provide them with vital assistance.

II. PENALIZING THE POOR: HOW WELFARE RESTRICTIONS CAN BE CRUEL AND UNUSUAL

This Section explores welfare reform in greater depth and explains how current restrictions could conflict with the Eighth Amendment's prohibition on cruel and unusual punishment, especially when viewed in the light of contemporary standards of human decency. As certain reforms penalize individuals who are unemployed and place time limits on relief, these restrictions often surpass legitimate and constitutional guidelines for welfare. While not all limits on welfare are unconstitutional, some of the current rules may unconstitutionally penalize the mere status of being poor.

A. *Poverty and Unemployment as a Status*

Two dichotomous views of the poor constantly collide in American legal and social discourse and influence whether one perceives poverty as a consequence of free choices or more of an involuntary status like homelessness or drug addiction. The first deeply ingrained American model, originating in the Elizabethan Poor Laws in the 1600s, supports assisting the poor, but largely blames them for their own plight.[65] Although English society aided its most destitute by providing shelter through "places of habitation," the Elizabethan Poor Laws required all able-bodied males, single

separation, divorce, death, or having children outside of marriage—for being single, and punishing those people who make us question the plausibility of the American Dream.").

62. *See supra* notes 47–49 and accompanying text.

63. *See* Danilo Trisi and LaDonna Pavetti, *TANF Weakening as a Safety Net for Poor Families*, CENTER ON BUDGET AND POLICY PRIORITIES (Mar. 13, 2012), *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=3700 (showing that, on average, AFDC lifted 62 percent of families out of deep poverty whereas TANF has only lifted 21 percent of families out of deep poverty).

64. *See supra* note 61 and accompanying text.

65. Larry Cata Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871, 953 (1995).

females, and children to work a full twelve-hour day.[66] Able-bodied individuals who failed to work were often placed in "houses of correction" and "[r]ogues, vagabonds, and vagrants were to be punished."[67] Under the common notions of the day, paupers were usually poor on account of their idle tendencies and this "failure to [work] was evidence of a social deviance significant enough to merit the attention of the civil and criminal law."[68]

The belief that many unemployed, able-bodied individuals are not only undeserving of public assistance but also are lazy, morally deficient, or repudiating the "Protestant Work Ethic"[69]—save a few carefully prescribed categories of individuals like widows and the temporarily unemployed—captures an important poverty paradigm in America. While debating the new TANF programs and requirements in the 1990s, several Congressional representatives and Senators spoke of welfare recipients with disdain and indecency, referring to some as "mules" or "wolves," and with one Congressman even displaying a sign: "Don't feed the alligators."[70] While an extreme example, these degrading insinuations reflect a common sentiment in American society that the impoverished, particularly the nonworking poor, are at fault for their poverty[71] whether due to "laziness [and] lack of motivation"[72] or moral depravity deriving from alcoholism, crime, promiscuity, or having children out of wedlock.[73] Under this model, welfare is a generous gift from society's honorable taxpayers and, as such, can easily be taken away at any time.[74] On such a view, work requirements and time limits would be both appropriate and proportional. Such requirements would not punish welfare recipients for their status, but would prod the poorest members of society into joining the workforce and earning their own living. On this view,

66. *Id.* at 955 (internal quotation marks omitted).

67. *Id.*

68. *Id.* at 959.

69. JOHN E. TROPMAN, DOES AMERICA HATE THE POOR? THE OTHER AMERICAN DILEMMA 19 (1998).

70. Gilman, *supra note* 7, at 262 (internal quotation marks omitted).

71. TROPMAN, *supra* note 69, at 33–34.

72. *Id.* at 34.

73. PREVIEW OF REPUBLICAN PLANS TO REFORM WELFARE, *supra* note 44, at 591.

74. Assuming, *arguendo*, that welfare could be taken away in its entirety, there are still constitutional limits on how it can be revoked once in place. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (holding that procedural due process requires a pre-termination hearing before revocation of welfare benefits can begin).

those who shy away from this laudable path should have to live with the consequences.

In contrast to this model, another conception of destitution exists in America that acknowledges the involuntariness of poverty and the factors outside one's control that can affect an individual's income. According to a 2014 CNBC survey, a majority of Americans now believe that poverty is generally the result of circumstances beyond one's control rather than a lack of drive or moral fiber.[75] Factors including gender and race,[76] lack of adequate educational opportunities,[77] growing up in an unsanitary or crime-ridden environment,[78] "the place or family" into which one is born,[79] one's mental and physical health,[80] and other circumstances can prevent economic advancement, regardless of aspirations. According to this paradigm, many welfare recipients are "caring mother[s]" or "hardworking student[s]," even if they have struggled with drug addiction, out-of-wedlock pregnancies,[81] or unemployment. For many Americans on welfare, they have "no hope, no other place to go, no other way to care for their children" and welfare provides an essential source of income that the recipients cannot supply on their own.[82] This model is less hospitable to rigid work requirements, responsibility forms, and time limits because it acknowledges that an individual's status in poverty may be involuntary.

As early as 1941, the Supreme Court recognized that "the Elizabethan [P]oor [L]aws no longer fit[] the facts" because "a person [] without employment and without funds [does not] constitute[] a moral pestilence . . . [as] [p]overty and morality are not

75. Steve Liesman, *Being Poor Not a Person's Fault: CNBC Survey*, CNBC (Mar. 26, 2014), http://www.cnbc.com/id/101524336.

76. TROPMAN, *supra* note 69, at 27.

77. *See* JONATHAN KOZOL, *Chapter 1: Life on the Mississippi: East St. Louis, Illinois*, *in* SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 7–39 (1991) (describing the dearth of school resources and the lack of safe, clean educational facilities in East St. Louis, Illinois public schools).

78. *Id.* at 10–13.

79. Liesman, *supra* note 75.

80. *See supra* note 35 and accompanying text (explaining that courts have come to realize that factors such as mental illness and domestic violence are more to blame for poverty and homelessness than one's moral makeup).

81. SIDEL, *supra* note 54, at 81–84.

82. *Id.* at 85.

synonymous."[83] Courts' frequent invalidations of many of the ordinances banning sleeping in public, vagrancy, and loitering rest upon the theory that homelessness and poverty are not normally chosen conditions, but are circumstances that affect people in difficult financial straits.[84] Although state and federal courts often stop short of fully embracing a constitutional "right to shelter,"[85] judges frequently recognize the involuntariness of unemployment and homelessness and the way in which factors outside one's control contribute to these phenomena.

Therefore, viewing poverty and unemployment as more analogous to an involuntary status rather than a choice is appropriate in many situations and echoes the legal doctrine in this realm.[86] American children offer a prime example because they lack free choice over their circumstances and live in poverty in high numbers. According to the U.S. Census Bureau statistics from 2012, 25.1 percent of children under five live in poverty and 9.7 percent live in "extreme poverty," or on a family income that is less than half of the poverty line.[87] This income disparity disproportionately impacts children of color, particularly African-Americans and Hispanics.[88] TANF sanctions usually revoke benefits from an entire family when one adult member is failing to meet his or her work obligations, regardless of the impact these sanctions will have on the family's children.[89] As such, the mandated penalties in the federal guidelines are constitutionally suspect as they often force states to indirectly punish children through parental or family sanctions.

83. Edwards v. California, 314 U.S. 160, 174–77 (1941) (quotation marks omitted); *see also* Smith, *supra* note24, at 304–05 (describing the "changing legal view of the poor").

84. *See supra* notes 34–35 and accompanying text.

85. *See* Jonathan L. Hafetz, *Homeless Legal Advocacy*, *New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1231–34 (2003) (describing a few 1980s court decisions that recognized a right to shelter, but showing how more recent cases have lessened or eliminated this right).

86. This is not to say that these conditions could never be the products of free choice, but a recognition of the fact that they rarely are.

87. Valerie Strauss, *New Census Data: Children Remain America's Poorest Citizens*, THE WASHINGTON POST (Sept. 17, 2013), http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/09/17/new-census-data-children-remain-americas-poorest-citizens.

88. *Id.*

89. *See supra* note 56 and accompanying text.

B. Welfare Reform as "Cruel and Unusual" Punishment

Assuming that poverty and unemployment *are* analogous to the aforementioned involuntary statuses of homelessness and drug addition,[90] revoking welfare benefits from individuals and their families for losing their jobs, being fired, or being unable to maintain stable employment due to personal difficulties can be disproportionate and cruel.[91] Many scholars and advocates agree that the 1996 Congress intentionally sought to punish certain sectors of poor Americans—those perceived as "hoarding" taxpayer dollars—through this legislation. Wendell Primus, a former secretary at the Department of Health and Human Services under the Clinton Administration, resigned after President Clinton signed the 1996 Act because the "bill turned very punitive," especially by limiting or denying federal funds to unwed minor mothers, instituting family caps, and limiting federal funds to families, all while the brunt of these new, restrictive policies would fall upon needy children.[92]

What makes these restrictions potentially cruel and unusual is not only their inability to lift families out of poverty, but also their ironic tendency to disincentivize work, render the impoverished more destitute, and reverse AFDC progress.[93] Many welfare recipients are severely restricted in their ability to find work or stay employed, facing such obstacles as "lack of education, mental or physical disabilities, substance abuse or alcoholism, limited work experience, and caregiving responsibilities for disabled children,"[94] only a few of which are considered valid excuses for unemployment in most states under TANF.[95] Unforeseen life circumstances that reduce work

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90. This is not to say that idleness or criminality could not contribute to poverty or cause impoverishment for some segments of the population, but rather to say that the newer poverty paradigm holds that these are not sufficient explanations of poverty for a large majority of lower-income citizens.

91. Other provisions of the 1996 bill seem to be aimed at punishing the impoverished for their status as "poor," "unemployed," or "welfare recipients" based on outdated, Elizabethan notions that the nonworking impoverished should suffer the consequences of their choices. These provisions include lifetime caps, limiting money to single mothers, revoking benefits for legal immigrants, and restricting food stamps and social security income on the whole. WELFARE REFORM: SOCIAL IMPACT (Films Media Group 1997).

92. *Id.*

93. Gilman, *supra* note 7, at 271.

94. *Id.* at 270.

95. *See, e.g.*, Pam Silberman, *North Carolina Programs Serving Young Children and their Families*, N.C. INST. OF MED. 13 (1999) (explaining that the exemptions from work requirements in North Carolina are only applicable to single parents with children under one

potential can result in severe sanctions, such as partial loss of already meager benefits or even permanent revocation of benefits[96]—an unmistakable irony given that welfare's purpose is to foster a "safety net" for struggling Americans.[97] Although some states label caring for sick children as "community service" in order to satisfy the work requirement, other states are not as generous.[98] Even if a state grants partial or complete community service credit to recipients caring for a sick relative, welfare generally has a five-year maximum lifetime limit.[99] Given the rise of extreme poverty in the United States and the lack of eligible, needy families receiving benefits post-TANF,[100] the program has arguably increased poverty rather than reduced it.

Meanwhile, several Supreme Court and lower federal court decisions have recognized that depriving prisoners of vital necessities, such as shelter, food, or exercise, violates the Eighth Amendment.[101] In 2000, in *Johnson v. Lewis*,[102] the Ninth Circuit declared that prison guards have an affirmative obligation to provide prisoners with life's necessities, including food, water, and medical care, in compliance with the Eighth Amendment.[103] Therefore, although the Eighth Amendment traditionally only applied to punishment for "crimes," the prison deprivation cases show that sanctions and maltreatment

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year of age, un-emancipated minors, and adults with children under six years of age where adequate childcare cannot be found, whereas all other adults are deemed "mandatory work families").

96. Yoanna X. Moisides, *I Just Need Help . . . TANF*, *the Deficit Reduction Act*, *and the New "Work Eligible" Individual*, 11 J. GENDER RACE & JUST. 17, 25 (2007).

97. *See* KATZ, *supra* note 1, at 285 (referring to the safety net as a "rhetorical illusion").

98. *See* Moisides, *supra* note 96, at 29–30 (describing the situation of a Maryland woman, Hope, who fought in court to reinstate her benefits after the welfare office sought to close her case for being late to work or missing work while she was taking care of her ill son who suffered from asthma, diabetes, and respiratory infections).

99. *See supra* note 55 and accompanying text.

100. *See* Peter Edelman, *Welfare Reform and Extreme Poverty: What to Do?*, 42 CLEARINGHOUSE REV. 349, 350 (2008) (demonstrating that prior to welfare reform, the majority of children in extreme poverty benefitted from some cash assistance, whereas in 2006, less than one-third of families in extreme poverty were receiving TANF).

101. Bukowski, *supra* note 19, at 434; *see* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (while holding that putting two prisoners in the same cell is not *per se* cruel and unusual punishment, "deprivation[] of basic human needs" or medical care can be unconstitutional).

102. Johnson v. Lewis, 217 F.3d 726 (9th Cir. 2000)

103. *Id*. at 731. Although the routine discomfort inherent in the prison setting is inadequate to satisfy the objective prong of an Eighth Amendment inquiry, "those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* (quoting *Rhodes*, 452 U.S. at 347) (internal citations omitted). Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety. *Id.*

can also rise to the level of "cruel and unusual punishment" if they are akin to "a fine, penalty, or confinement inflicted upon a person by the authority of the law."[104] When comparing prison deprivation cases to welfare recipient sanctions, punishing individuals for unemployment in the context of welfare reform seems to violate the Eighth Amendment—especially when sanctions directly result in a similar denial of necessities. Critics of this view would argue that welfare sanctions are different from prison deprivation cases because welfare is more akin to charity and because welfare recipients are free to provide for their own needs in ways that prisoners cannot.

There are grounded reasons, however, to more scrupulously compare the life situations of welfare recipients with that of prisoner confinement before dismissing the Eighth Amendment welfare claim. Extensive poverty research shows that most welfare recipients are plainly "trapped in the cycle of poverty"—the vast majority do not own cars, some lack simple furniture or even a bed on which to sleep, and most cannot procure vital necessities without welfare benefits.[105] Moreover, data shows that the number of families in extreme poverty continues to rise[106] and that TANF can be blamed for an additional 800,000 children in extreme poverty since 1995, children who would have been significantly better off under AFDC.[107] Based on Justice Brennan's "human dignity" metrics for cruel and unusual punishment[108] and the reciprocal notion that prisoners are *constitutionally* entitled to life necessities, punitive welfare sanctions based on employment status or work capacity could equally violate the Eighth Amendment.

If this understanding of Eighth Amendment jurisprudence and TANF sanctions gained traction in the courts or Congress, it would have profound implications for America's welfare system and how work requirements operate. Not all work or community service requirements would necessarily be prohibited under the Eighth

104. Bukowski, *supra* note 19, at 419–20, 429.

105. Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 WIS. L. REV. 1221, 1224–25, 1279 (2000).

106. *See supra* note 100 and accompanying text.

107. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-164, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES: FEWER ELIGIBLE FAMILIES HAVE RECEIVED CASH ASSISTANCE SINCE THE 1990S, AND THE RECESSION'S IMPACT ON CASELOADS VARIES BY STATE 35 (2010).

108. *See* Smith, *supra* note 24, at 313–14 (quoting Justice Brennan's "human dignity rationale" in *Furman v. Georgia*, 408 U.S. 238, 272–73 (1972): "the true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded" (internal quotations omitted)).

Amendment, only highly punitive ones that seek to punish impoverished Americans for their status in poverty and deny recipients life-sustaining resources. Especially problematic would be work requirements for those who face life circumstances rendering it difficult if not impossible for them to work,[109] and sanctions that deprive welfare recipients of vital resources, like food, water, and medical care.[110] Sanctions that punish impoverished children for their parents' "misdeeds" are particularly suspect, as are restrictions that terminate benefits for truly needy persons without just cause.

C. Constitutional Challenges: Positive v. Negative Rights

One glaring criticism of labeling welfare sanctions unconstitutional under the Eighth Amendment centers upon the traditional distinction between positive and negative rights. Under traditional interpretations, the Constitution only protects its citizens from government intrusion, but it does not establish any "positive" rights or require the government to follow any particular course of action to ensure that rights are recognized.[111] Thus, if welfare benefits are positive, statutory rights that are not *per se* constitutionally required, then revoking them cannot give rise to constitutional challenges because the Constitution only protects negative, not positive rights.

There are two significant problems with this theory, however. First, the dichotomy between positive and negative rights has begun to crumble as many legal scholars have recognized that courts must enforce negative rights with positive rights; thus, scholars have argued that this deeply ingrained legal distinction is actually quite flawed.[112] A prisoner, for example, cannot be free from cruel and unusual

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109. *See supra* note 94 and accompanying text.

110. *See supra* note 105 and accompanying text.

111. STEPHEN HOLMES & CASS R. SUNSTEIN, THE COSTS OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 40 (2000) (explaining the deeply held American dichotomy between positive and negative rights and providing that "[n]egative rights typically protect liberty; positive rights typically promote equality").

112. *See id.* at 43 (explaining that "all legally enforced rights are . . . positive rights" or alternatively, "almost every right implies a correlative duty, and duties are taken seriously only when dereliction is punished by the public power drawing on the public purse"). *But see* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 866–67, 915–24 (2001) (suggesting a framework for distinguishing between positive and negative rights based on whether the right would affirmatively exist without any government at all and, subsequently, arguing that judges are not likely to give the poor a right to necessities because this is a role for the legislature, not the courts).

punishment unless prison staff members provide him or her with basic necessities. Likewise, a welfare recipient cannot be free from cruel and unusual welfare sanctions without receiving adequate benefits for his or her survival. Second, even if one accepts the traditional distinction between negative and positive rights and the premise that welfare is only a statutory right, revocable at Congress's whim, the Supreme Court has still recognized constitutional limits on *how* welfare can be provided, revoked, and reinstated. Neither Congress nor the states can deny welfare benefits in a way that violates an individual's freedom of association[113] or freedom to travel,[114] and welfare cannot be denied without a full and fair hearing.[115] Likewise, welfare cannot be instituted or revoked in a way that violates the Eighth Amendment.

III. A CONSTITUTIONALLY COMPLIANT WELFARE SCHEME

There are a plethora of ways in which Congress could alter and revitalize the current welfare system to reflect evolving "standards of [human] decency."[116] Since Eighth Amendment doctrine reflects normative judgments about society's current standards of decency, there is ample room for policy analysis within the jurisprudential framework. There are several viable alternatives to the current regime that would provide immediate relief to families and restore the safety net concept, both of which are essential to maintaining a healthy balance between personal responsibility and decency. Although encouraging able-bodied, healthy individuals and their families to become self-sufficient is a reasonable legislative goal, Congress should avoid withdrawing life-sustaining resources from citizens who depend on welfare for their survival.

At a minimum, "full-family sanctions"[117] should be eliminated and children in lower-income households should be independently entitled to welfare payments separate and apart from their parents to

113. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973) (holding that welfare agencies cannot deny eligible food stamp recipients for living with "unrelated persons" because this violates one's right to association).

114. *See* Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969) (holding that welfare restrictions cannot inhibit one's constitutional right to travel).

115. *See* Goldberg v. Kelly, 397 U.S. 254, 264–265 (1970) (requiring an evidentiary hearing before terminating a recipient's welfare benefits).

116. *The Cruel and Unusual Punishments Clause*, *supra* note 17, at 638 (internal quotations omitted).

117. *See supra* notes 55–56 and accompanying text (internal quotations omitted).

avoid punishing children for their parents' work histories. Although these checks could be sent to parents for the benefit of their children, they could also be given to individuals like Guardians Ad Litem,[118] who would ensure that children get access to the benefits, especially in situations in which parents are suspected of misappropriating the funds. Another improvement would be to eliminate the "one-size-fits-all" benefits plan in favor of a case-by-case approach.[119] Under this model, states would still need to provide a minimum level of benefits to needy families, preferably without time limits or lifetime caps.[120] While excessive state discretion could lead to abuse,[121] a case-by-case approach may be useful in many circumstances—particularly in helping certain individuals to find jobs and in helping others to receive alcohol or drug treatment.[122]

Although the current work requirements deeply impact poor families—often negatively—welfare should strive to lead recipients to stable employment and self-sufficiency when possible. Converting this system from its existing sanctions-based approach to an incentive-driven scheme would likely lead to better results in improving the employment situations of welfare recipients and in eliminating poverty. Eligible individuals could receive minimum benefits to cover necessary expenses—such as shelter, nutritious food, and clothing—as well as additional benefits or "bonuses" for maintaining steady employment, participating in community service, elevating their job skills, or searching for work. These additional benefits could be held in trust for recipients until they become self-sufficient. These examples are certainly not exhaustive, but they provide a starting point for making welfare reform an adequate safety net that is compliant with the Eighth Amendment.

CONCLUSION

The proliferation of hunger, malnutrition, unsanitary living conditions, inadequate heat and shelter, and denial of medical care in

118. Guardian ad litem programs have been successful in child abuse and custody cases, as these guardians represent a specific child's interests in court. *See generally* Mary Kay Kisthardt, *Working in the Best Interests of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REV. 1 (2006) (discussing this point).

119. Gilman, *supra* note 7, at 277–78.

120. Edelman, *supra* note 100, at 354.

121. *See supra* note 32 and accompanying text.

122. *Id.*

contemporary American society represents a failure of welfare reform to adequately uplift society's neediest members. Sanctions placed upon unemployed TANF beneficiaries, limiting their ability to obtain vital resources, can hinder recipients' advancement into the workforce and place many needy individuals, including children, in unsafe or unsanitary living conditions. The Eighth Amendment, however, has historically ensured that another population in need—individuals in prison—has a *constitutional* right to adequate food, clothing, and shelter. Reconciling the distinction in treatment between these paradigms requires distinguishing between legitimate means of administering welfare to the poor, and the punitive, retaliatory measures that deprive them of life-sustaining resources in violation of the Constitution.