

# BUYING TIME FOR SURVIVORS OF DOMESTIC VIOLENCE: A PROPOSAL FOR IMPLEMENTING AN EXCEPTION TO WELFARE TIME LIMITS

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## INTRODUCTION

With the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996<sup>1</sup> (Personal Responsibility Act), states have unprecedented discretion in fashioning their social welfare programs. The Personal Responsibility Act eliminated the Aid to Families with Dependent Children<sup>2</sup> (AFDC) program and replaced it with block grants for states to use in designing their own assistance programs.<sup>3</sup> States therefore have a substantial opportunity to impact the lives of America's poorest families. The Act, however, imposes some restrictions on the states as a condition for receiving the money. Particularly notable is the Act's prohibition on state provision of benefits to any family that includes an adult who has received assistance for sixty months over her<sup>4</sup> lifetime.<sup>5</sup> The Personal Responsibility Act also contains guidelines that are merely discretionary on the part of the states. This Note discusses two such options, both exceptions to the sixty-month rule. First, the Act allows a state to exempt a family from the sixty-month limitation "by reason of hardship or if the family includes an individual who has been battered or subjected to extreme

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<sup>1</sup> Pub. L. No. 104-193, 1996 U.S.S.C.A.N. (110 Stat.) 2105 (codified as amended in scattered sections of 7, 29, 42 U.S.C.A.) [hereinafter Personal Responsibility Act].

<sup>2</sup> 42 U.S.C. §§ 601-87 (1994), amended by Personal Responsibility Act, 42 U.S.C.A. §§ 601-87 (West Supp. 1997).

<sup>3</sup> See Personal Responsibility Act, 42 U.S.C.A. § 603(a) (West Supp. 1997).

<sup>4</sup> This Note uses feminine pronouns to refer both to adult welfare recipients and survivors of domestic violence because women form the overwhelming majority of each category. See V. Michael McKenzie, *Domestic Violence in America* 9 (1995) (noting that 95% to 98% of battering cases involve men attacking women); *infra* note 14 and accompanying text (stating that adult AFDC recipients were typically mothers).

<sup>5</sup> See Personal Responsibility Act, 42 U.S.C.A. § 608(a)(7)(A) (West Supp. 1997) ("A State to which a grant is made . . . shall not use any part of the grant to provide assistance to a family that includes an adult who has received assistance under any State program funded under this part . . . for 60 months (whether or not consecutive) . . .").

cruelty.”<sup>6</sup> Second, the Act allows a state to waive time limits where the family includes an individual who has been victimized by or is at risk of domestic violence.<sup>7</sup>

This opportunity for states to create a waiver for welfare time limits raises challenging questions. States must decide whether to pursue such an option, taking into account questions about the incentives such a program will create for welfare recipients. Furthermore, states must confront the gender issues inherent in an exception targeted at survivors of domestic violence.<sup>8</sup> States that do create such an exception then must design an administrative structure to implement it.

Part I of this Note provides an overview of the AFDC program and the demographics of the population it served. It then examines the Personal Responsibility Act, focusing specifically on the statutory language and history of the sixty-month time limit on receipt of benefits and the two optional exceptions states may enact. This examination reveals that the Act contemplates that states have both the power and the support of Congress and the Department of Health and Human Services to implement exceptions for the benefit of survivors of domestic violence.<sup>9</sup>

Given that states may choose to assist survivors of domestic violence by waiving time limits, Part II asks the normative question: Should states do so? After describing the nature of domestic violence in Part II.A.1, Part II.A.2 examines the manner in which it can undermine the ability of a woman to enter the workforce successfully and permanently. Because domestic violence is particularly pervasive in the lives of welfare recipients, Part II.A.3 concludes that it is appropriate for states to prioritize allocations to survivors of such violence in defining available exceptions. Part II.B. then attempts to locate welfare time limits and an exception for battered women in the broader context of the welfare debate. It explores first whether exempting survivors of domestic violence from time limits is consistent with the overall goals and incentives of the Personal Responsibility Act. It

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<sup>6</sup> Id. § 608(a)(7)(C)(i).

<sup>7</sup> See id. § 602(a)(7)(A)(iii).

<sup>8</sup> See *supra* note 4 (noting that primarily women receive welfare benefits as adults and face domestic violence). Also, this Note uses the term “survivor” rather than “victim” to refer both to women who are currently being abused and who have been abused in the past.

<sup>9</sup> The focus of this Note is on exceptions that states grant—under the rubric of either the Hardship Exception or Family Violence Option—based on the petitioner’s having been “battered or subjected to extreme cruelty.” While the language of the Act indicates that states may grant a hardship exception on the basis of a claim of “hardship” unconnected with family violence, it is beyond the scope of this Note to examine in detail at whom such an exception should be targeted and how such an exception would be implemented. For a brief discussion of what may constitute “hardship,” see *infra* note 62.

then examines two potential problems with such an exception to time limits, but concludes that an exception for battered women does not necessarily reinforce categorical judgments about recipients of welfare or discourage debate over structural causes of welfare dependency.

Having concluded that states can and should implement exceptions to benefit survivors of domestic violence, this Note then explores how they should do so. Part III.A. examines the interests of potential petitioners and states in the design of a system that will administer an exception to welfare time limits. Because one key state interest will be an easy and efficient transition, states should draw from already existing procedures to the greatest extent possible in implementing their exceptions. Part III.B. then identifies two procedures—the AFDC's good cause exception to paternity determination cooperation requirements and self-petitioning procedures under the Violence Against Women Act for battered immigrant women—to which states can look in creating their own systems. After outlining the key features of both procedures, Part III.C. draws on their strengths and offers a specific proposal for implementing exceptions to welfare time limits.

## I

### THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996: TIME-LIMITED ASSISTANCE AND ITS RELATION TO DOMESTIC VIOLENCE

#### *A. Overview of AFDC and the Personal Responsibility Act*

The Personal Responsibility Act establishes the federal government's most recent program to provide financial assistance to needy families. This commitment began in 1935 with the creation of the Aid to Dependent Children program,<sup>10</sup> which provided financial support to children whose fathers were dead or had deserted the family.<sup>11</sup> In 1962, the scope of the program expanded and its name was changed to Aid to Families with Dependent Children.<sup>12</sup> Between 1962 and 1996, when the Personal Responsibility Act was passed, AFDC extended aid to all poor children and their caretakers,<sup>13</sup> allowing one relative—

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<sup>10</sup> See Social Security Act of 1935, ch. 531, tit. IV, 49 Stat. 620, 627-629 (codified as amended at 42 U.S.C.A. §§ 601-687 (West Supp. 1997)).

<sup>11</sup> See Helen Hershkoff & Stephen Loffredo, *The Rights of the Poor 5* (1997) (outlining history of AFDC).

<sup>12</sup> Public Welfare Amendments of 1962, Pub. L. No. 87-543, 76 Stat. 172, amended by Personal Responsibility Act, 42 U.S.C.A. §§ 601-687 (West Supp. 1997).

<sup>13</sup> See 42 U.S.C. § 602(a)(38) (1994), amended by Personal Responsibility Act, 42 U.S.C.A. § 602 (West Supp. 1997); Hershkoff & Loffredo, *supra* note 11, at 5.

usually the child's mother<sup>14</sup>—to receive AFDC benefits as the child's caretaker<sup>15</sup> until the child turned eighteen.<sup>16</sup>

AFDC was administered on a state level, and states retained discretion to define need, set benefit levels, and set income limits.<sup>17</sup> Operated under the theory of cooperative federalism, the federal government provided the majority of the funds for the program and retained the power to impose certain requirements on the states. For example, states that accepted federal funds had to provide aid to all eligible families in a reasonably prompt manner,<sup>18</sup> assure that funds were used to further the best interests of the child,<sup>19</sup> and provide for a birth control program to reduce out-of-wedlock births.<sup>20</sup> States also were required to apply their need standards uniformly and provide aid to all persons eligible under federal and state limits.<sup>21</sup> States were not required, however, to make payments equal to their need standard,<sup>22</sup> and, as a consequence, welfare benefits fell below the poverty level in every state.<sup>23</sup>

Total enrollment in AFDC rose sharply beginning in 1989.<sup>24</sup> By 1992, one in seven children lived in a household that participated in the program.<sup>25</sup> At the height of the AFDC program in 1994, over 14.2

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<sup>14</sup> See Christopher Jencks, *Rethinking Social Policy: Race, Poverty, and the Underclass* 3 (1992) (noting that AFDC served primarily unwed, separated, and divorced mothers).

<sup>15</sup> See 42 U.S.C. § 606(b) (1994), amended by Personal Responsibility Act, 42 U.S.C.A. § 606 (West Supp. 1997) (discussing who may receive payments).

<sup>16</sup> See id. § 606(a), amended by Personal Responsibility Act, 42 U.S.C.A. § 606 (West Supp. 1997) (defining "dependent child"); see also Staff of House Comm. on Ways and Means, 104th Cong., 2d Sess., 1996 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 385 (Comm. Print 1996) [hereinafter 1996 Green Book] (discussing basic rules of AFDC program and charting demographics).

<sup>17</sup> See 1996 Green Book, *supra* note 16, at 384.

<sup>18</sup> See 42 U.S.C. § 602(a)(10)(A) (1994), amended by Personal Responsibility Act, 42 U.S.C.A. § 602 (West Supp. 1997).

<sup>19</sup> See id. § 605, amended by Personal Responsibility Act, 42 U.S.C.A. § 605 (West Supp. 1997).

<sup>20</sup> See id. § 602(a)(15), amended by Personal Responsibility Act, 42 U.S.C.A. § 602 (West Supp. 1997).

<sup>21</sup> See 1996 Green Book, *supra* note 16, at 384.

<sup>22</sup> See 45 C.F.R. § 233.20(a)(2)(ii) (1997); see also *Rosado v. Wyman*, 397 U.S. 397, 413 (1970) (holding that states may make payments lower than calculated standard of need in order to "accommodate budgetary realities").

<sup>23</sup> See Center on Social Welfare Policy and Law, *Welfare Law Developments*, 26 Clearinghouse Rev. 1175, 1179 (1993) (observing that assistance available from AFDC and food stamps combined was below poverty level in every state and below 75% of poverty level in 41 states).

<sup>24</sup> See 1996 Green Book, *supra* note 16, at 466-67 tbl.8-25 (finding that between 1989 and 1992, approximately one million families (2.7 million people) entered AFDC program).

<sup>25</sup> See id. at 466.

million people (9.6 million children) in five million families received \$22.8 billion in AFDC benefits.<sup>26</sup> In that same year, almost half (46.4%) of AFDC households included a nonrecipient.<sup>27</sup>

The statistics of AFDC enrollment paint a complex and sometimes contradictory picture of the characteristics of those who receive government assistance, especially when compared to the stereotypical welfare family.<sup>28</sup> In 1994, almost 73% of all AFDC families had only one or two children.<sup>29</sup> Only 10% of AFDC families had four or more children.<sup>30</sup> The average AFDC family size was 2.8 persons in 1994, the lowest since 1969.<sup>31</sup> The racial composition of AFDC recipients was quite varied, although minorities were represented in disproportionately high numbers relative to their presence in the general population. In 1994, 37% of recipients were white, 36% African American, 20% Latina, 3% Asian American, and 1% Native American.<sup>32</sup> Almost 56% of children receiving AFDC lived with a parent who was

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<sup>26</sup> See *id.* at 459 tbl.8-22 (charting total federal and state AFDC expenditures); *id.* at 467 (charting trends in AFDC enrollment). The federal government has estimated that in 1996, 4.6 million families—13 million people, including 8.8 million children—received welfare in an average month. See *id.* at 467. Note that the total federal and state spending on AFDC—\$22.8 billion annually—is \$128 billion less than the federal government spent on the savings and loan bailout. See Charles Sennott, *Liberals Finding the Aid System is Broken*, *Boston Globe*, May 17, 1994, at 1; see also Joel F. Handler, *Two Years and You're Out*, 26 *Conn. L. Rev.* 857, 865 (1994) (comparing total federal and state budget for AFDC with that for health care (approximately \$900 billion annually)).

<sup>27</sup> See 1996 Green Book, *supra* note 16, at 474 tbl.8-28; *id.* at 475 (grouping AFDC recipients by various characteristics). The identity of the other household occupants is unclear. While it could be that women and children receiving welfare money are living with family members, many could also be living with abusive men, which might explain in part the prevalence of domestic violence in the lives of welfare recipients. See generally *infra* Part II.A.3.

<sup>28</sup> See *infra* notes 31-37 and accompanying text.

<sup>29</sup> See 1996 Green Book, *supra* note 16, at 473 tbl.8-28.

<sup>30</sup> See *id.*; Marion Buckley, *Eliminating the Per-Child Allotment in the AFDC Program*, 13 *Law & Ineq. J.* 169, 182 (1994) (outlining characteristics of AFDC recipients).

<sup>31</sup> See 1996 Green Book, *supra* note 16, at 473 tbl.8-28. These statistics indicate that the welfare mother who has a disproportionately high number of children in order to receive higher AFDC payments is largely a creature of myth. See Handler, *supra* note 26, at 861 (enumerating myths about welfare mothers and commenting that "[t]he image that most Americans have of welfare families is largely disconnected from reality"). Indeed, studies have demonstrated that the decisions of AFDC recipients to have children are based not on the desire for a bigger benefit check, but on "psychosocial" factors such as emotional immaturity, lack of self-esteem, and desire to escape abusive homes. See Buckley, *supra* note 30, at 183 n.87 (citing studies). But see Charles Murray, *Redefinition of Rights: Its Deforming Effect on Communities*, 1 *Mich. L. & Pol'y Rev.* 291, 294-95 (1996) (arguing that single, poor women have children because social welfare system has destroyed economic incentives and social attitudes that would counsel to contrary).

<sup>32</sup> See 1996 Green Book, *supra* note 16, at 474 tbl.8-28. This statistic contradicts the perception that most welfare recipients are African American. See Handler, *supra* note 26, at 871.

never married.<sup>33</sup> Most mothers receiving welfare, 69%, were over the age of twenty-five.<sup>34</sup>

While the majority of AFDC recipients generally left the program within twelve months,<sup>35</sup> many later returned, indicating that welfare recipients often cycled on and off welfare.<sup>36</sup> Approximately 50% of welfare recipients, however, received AFDC for no more than four years over the course of their lives.<sup>37</sup>

Welfare reform came to the forefront of national debate during the 1992 presidential campaign. Indeed, during his campaign, then-Governor Clinton coined the slogan that the country must "put an end to welfare as we know it."<sup>38</sup> When the 104th Congress entered office in November 1994, one of its top priorities was to overhaul the welfare system.<sup>39</sup>

The impetus to overhaul welfare came primarily from a belief that AFDC had failed in its mission and instead had fostered stagnation and dependency. Invoking statistics on the number of children

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<sup>33</sup> See 1996 Green Book, *supra* note 16, at 473 tbl.8-28 (evaluating basis for eligibility). These data indicate that the perception that welfare payments went largely to unwed mothers and their children was based on reality.

<sup>34</sup> See *id.* Only 6.3% of welfare mothers were under age 20 in 1994. See *id.* This statistic rebuts the common impression that welfare mothers are largely teenage mothers. See Handler, *supra* note 26, at 861.

<sup>35</sup> See 1996 Green Book, *supra* note 16, at 500 (noting that "[t]he question of how long families receive AFDC has more than one answer. The answer is affected by characteristics of the parent, whether repeat episodes of enrollment are taken into account, and whether annual or monthly data are examined."); *id.* at 502-03 tbl.8-43 (showing that 56% of AFDC episodes end within 12 months); see also Hershkoff & Loffredo, *supra* note 11, at 6 (claiming that 48% of people receive benefits for under two years).

<sup>36</sup> See 1996 Green Book, *supra* note 16, at 502-03 tbl.8-43 (estimating that 45% of former recipients return to AFDC within one year of exiting, 58% return within two years, and 69% within four years). At least part of this cycling can be attributed to part-time and seasonal employment opportunities.

<sup>37</sup> See *id.* at 505 (noting that "a significant percent of all persons on welfare will be enrolled for less than 2 years (30 percent) or less than 4 years (50 percent)"); see also Adele M. Blong & Timothy J. Casey, AFDC Program Rules for Advocates: An Overview, 27 Clearinghouse Rev. 1164, 1166 (1994) (characterizing AFDC recipients); Handler, *supra* note 26, at 861 (contrasting statistics with stereotype of long-term dependency and commenting that "[t]he essential point is that the vast majority of welfare mothers are adults who have no problem with the work ethic although, understandably, they have lots of problems getting good enough jobs"). Studies indicated that between 17% and 30% of AFDC recipients remained in the program for over eight years. Compare Hershkoff & Loffredo, *supra* note 11, at 6 (claiming that 17% of recipients remained for eight or more years), with Buckley, *supra* note 30, at 181-82 n.75 (estimating 30%).

<sup>38</sup> Michael Shanahan, Welfare: Bush grabs old campaign issue, *New Orleans Times-Picayune*, Apr. 25, 1992, at A11.

<sup>39</sup> See Richard Lacayo, Down on the Downtrodden, *Time*, Dec. 19, 1994, at 30, 32 (noting that goal of overhauling welfare system was prominent feature of House G.O.P.'s "Contract with America").

receiving AFDC benefits,<sup>40</sup> the rate of teenage and out-of-wedlock pregnancies,<sup>41</sup> and the correlation between single-parent families and poverty,<sup>42</sup> Congress abolished the AFDC program and enacted the Personal Responsibility Act<sup>43</sup> in its place, returning the locus of welfare planning to the states.<sup>44</sup>

There are three primary differences between the regime set up under AFDC and that under the Personal Responsibility Act.<sup>45</sup> First, AFDC was an entitlement program in which the federal government guaranteed benefits to all eligible families that applied, while the Personal Responsibility Act explicitly provides that no individual or family is entitled to any assistance under any state program.<sup>46</sup> Second, AFDC guaranteed the availability of funds, allowing for flexibility in times of economic recession, while the Personal Responsibility Act involves fixed block grants that are not variable.<sup>47</sup> Third, AFDC involved a matching fund program that encouraged states to spend their own money on programs for needy families, while each block grant under the Personal Responsibility Act is a fixed sum, providing no incentive for states to spend their own money on the poor.<sup>48</sup>

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<sup>40</sup> The numbers grew from 3.3 million in 1965 to 9.3 million in 1992. See Personal Responsibility Act, 42 U.S.C.A. § 601 note (listing legislative findings) (West Supp. 1997).

<sup>41</sup> Overall out-of-wedlock pregnancy grew by 14% between 1980 and 1991. Teenage out-of-wedlock pregnancy increased by 23% between 1976 and 1991. However, the number of married pregnancies dropped 7.3% between 1980 and 1991. See *id.* § 601 note (listing legislative findings).

<sup>42</sup> While 46% of single-mother families live below the national poverty line, only 9% of married-couple families live in poverty. See *id.* (listing legislative findings).

<sup>43</sup> Pub. L. No. 104-193, 1996 U.S.S.C.A.N. (110 Stat.) 2105 (codified as amended in scattered sections of 7, 29, 42 U.S.C.A.).

<sup>44</sup> There were, however, critics who argued that the welfare reform movement focused on incorrect assumptions about the stereotypical welfare mother, see *supra* notes 29-37 and accompanying text (discussing demographics of welfare recipients), and "reduced the entire poverty debate to the AFDC program," Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 *Yale L.J.* 719, 744 (1992); see also *infra* notes 166-73 and accompanying text (reviewing theories of welfare dependency and poverty).

<sup>45</sup> See Hershkoff & Loffredo, *supra* note 11, at 34-35 (enumerating and analyzing differences).

<sup>46</sup> See Personal Responsibility Act, 42 U.S.C.A. § 601(b) (West Supp. 1997) ("No individual entitlement.—This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.").

<sup>47</sup> See *id.* § 603(a). Commentators suspect that the contingency fund set up by the Personal Responsibility Act will not be sufficient to meet national crises. See Hershkoff & Loffredo, *supra* note 11, at 36 (citing Center for Budget and Policy Priorities prediction that "the 'contingency fund is almost certain to run out part way through the next recession'").

<sup>48</sup> See Hershkoff & Loffredo, *supra* note 11, at 35. Indeed, the Personal Responsibility Act allows states to use up to 30% of their grant for social programs that do not necessarily provide actual benefits. See Personal Responsibility Act, 42 U.S.C.A. § 604(d) (West Supp. 1997).

Also unlike AFDC, the Personal Responsibility Act provides explicit goals.<sup>49</sup> These goals include the provision of assistance to needy families so that children may be cared for in their own homes; the end of dependence by needy parents on government benefits; the promotion of job preparation, work, and marriage; the prevention and reduction of out-of-wedlock pregnancies; and the encouragement of two-parent families.<sup>50</sup> To meet these goals, the Personal Responsibility Act offers block grants to states that develop assistance plans for needy children and families, discourage poor women from having children out of wedlock, and establish programs to encourage employment and self-sufficiency among benefit recipients.<sup>51</sup> This new system is decentralized, allowing programs to "differ from city to city and state to state in terms of type of benefits, eligibility, application processes, and reporting requirements."<sup>52</sup>

While a hallmark of the Personal Responsibility Act is the flexibility it affords to states to design their own programs,<sup>53</sup> it does impose some general guidelines deemed to be essential to the ends sought. The Personal Responsibility Act mandates that states receiving grant funds require that parents or caretakers who receive assistance engage in work within twenty-four months of the first benefit received.<sup>54</sup> The Act also requires each state to achieve minimum work participation rates: twenty-five percent of all two-parent families receiving assistance must be working by the end of 1997 and fifty percent by 2002.<sup>55</sup> To ensure compliance, the federal government will reduce the block grant of any state that does not meet its work partici-

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<sup>49</sup> In contrast, the legislation establishing AFDC contained no precise language stating the program's aims.

<sup>50</sup> See Personal Responsibility Act, 42 U.S.C.A. § 601(a) (West Supp. 1997). Some commentators have noted that the goals of helping eligible mothers achieve self-sufficiency and providing a minimal standard of living for poor children may be contradictory at times and may argue for inapposite policy choices at some junctures. See Robert L. Tsai, Book Note, *The System Worked: Our Schizophrenic Stance on Welfare*, 106 *Yale L.J.* 929, 932 (1996) (noting that people are profoundly divided over goals of welfare).

<sup>51</sup> See Personal Responsibility Act, 42 U.S.C.A. § 602(a) (West Supp. 1997) (outlining elements of Family Assistance Program required of all participating states).

<sup>52</sup> Hershkoff & Loffredo, *supra* note 11, at 33.

<sup>53</sup> The Act devolves responsibility for welfare policy to the state level under the premise that states can deliver more creative, efficient, and effective aid to the poor. See George Rodrigue, *Budget Battle is about Vision, Analysts agree. They Say Rich vs. Poor is Key Issue*, *Dallas Morning News*, Jan. 7, 1996, at 1A, available in 1996 WL 2094882 (reciting argument for locating welfare planning in states).

<sup>54</sup> See Personal Responsibility Act, 42 U.S.C.A. § 602(a)(1)(A)(ii) (West Supp. 1997). The imposition of work requirements as a condition of welfare is not a new concept, but has existed since the advent of AFDC. See Handler, *supra* note 26, at 859.

<sup>55</sup> See Personal Responsibility Act, 42 U.S.C.A. § 607(a)(1) (West Supp. 1997) (imposing minimum participation rates for all families); *id.* § 607(a)(2) (imposing minimum participation rates for two-parent families). By the end of 1997, many states realized that they



pation rates.<sup>56</sup> The Act also gives states some discretion to impose financial penalties on families containing an individual who will not engage in work.<sup>57</sup>

### *B. The Personal Responsibility Act's Sixty-Month Limitation and Exceptions*

#### *1. Statutory Language*

A key provision of the Personal Responsibility Act is that no state may "provide assistance to a family that includes an adult who has received assistance under any State program funded under this part . . . for 60 months (whether or not consecutive)."<sup>58</sup> This change is a significant break from former welfare policy.<sup>59</sup> The Personal Responsibility Act, however, allows states at their discretion to enact two exceptions to this otherwise strict five-year time limit.<sup>60</sup>

A state's first option is to enact a Hardship Exception: "The State may exempt a family from [the sixty-month limitation] by reason of hardship or if the family includes an individual who has been battered or subjected to extreme cruelty."<sup>61</sup> The Hardship Exception leaves "hardship" undefined,<sup>62</sup> but defines "battered or subject to extreme cruelty" as the subjection of an individual to

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would fall short of their participation rates for two-parent families. See Jason DeParle, *Half the States Unlikely to Meet Goals on Welfare*, N.Y. Times, Oct. 1, 1997, at A1.

<sup>56</sup> See Personal Responsibility Act, 42 U.S.C.A. § 609(a)(3) (West Supp. 1997) (providing for grant reductions of 5% to 21%).

<sup>57</sup> See id. § 607(e)(1) (allowing state to reduce or terminate assistance). But cf. id. § 607(c)(2)(C) (deeming satisfactory school attendance by teen head of household as work participation); id. § 607(e)(2) (prohibiting state from reducing assistance where individual who refuses to work is single custodial parent of child under age six and is unable to obtain needed child care).

<sup>58</sup> Id. § 608(a)(7)(A). States are free to impose even shorter time limits on the receipt of benefits. See Hershkoff & Loffredo, *supra* note 11, at 47 (noting that sixty-month limit on benefits is cap).

<sup>59</sup> Under AFDC, the duration of benefits was limited only by the recipient child's age. See *supra* note 16 and accompanying text.

<sup>60</sup> The focus of this Note is on states that opt to implement these exceptions. While there is an ongoing debate regarding the wisdom and efficacy of time-limited welfare benefits in general, it is beyond the scope of this Note to explore this question in depth.

<sup>61</sup> Personal Responsibility Act, 42 U.S.C.A. § 608(a)(7)(C)(i) (West Supp. 1997).

<sup>62</sup> Two early drafts of the Personal Responsibility Act may provide some insight as to the meaning of "hardship." H.R. 2903, 104th Cong. § 402(c)(1)(B) (1996) and S. 1841, 104th Cong. § 401(c)(2)(B)(i) (1996) provided an exception for families meeting one of three criteria: families in which one adult was working part-time, families residing in high unemployment areas, or families experiencing "other special hardship circumstances." Other possible "hardship" cases include people with such low skill levels that they are unable to work, people caring for disabled children, or people living in areas with high unemployment. See Barbara Vobejda, *New twist for welfare law: Domestic violence, Sunday Star-Ledger* (Newark, N.J.), Apr. 13, 1997, at 24.

- (I) physical acts that resulted in, or threatened to result in, physical injury to the individual;
- (II) sexual abuse;
- (III) sexual activity involving a dependent child;
- (IV) being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities;
- (V) threats of, or attempts at, physical or sexual abuse;
- (VI) mental abuse; or
- (VII) neglect or deprivation of medical care.<sup>63</sup>

If a state does choose to enact the Hardship Exception, however, it may exempt at most twenty percent of the average monthly number of families to which the state provides benefits.<sup>64</sup>

A state's second option—the Family Violence Option<sup>65</sup>—is to waive, pursuant to a determination of good cause, . . . program requirements such as time limits (for so long as necessary) for individ-

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<sup>63</sup> Personal Responsibility Act, 42 U.S.C.A. § 608(a)(7)(C)(iii) (West Supp. 1997). The definition of "battered or subject to extreme cruelty" is ambiguous in a number of ways. First, it does not define the relationship between the perpetrator and victim. The exception thus could extend beyond intra-family violence to include survivors of assault by a stranger, of stranger or acquaintance rape, and even of severe sexual harassment in the workplace. Leaving the definition open in this way might reflect an understanding that many types of violence negatively impact a person's ability to participate successfully in the workplace. This Note argues, however, that because domestic violence is so prevalent in the lives of recipients of welfare and because it may have such a devastating impact on their ability to enter the workforce successfully, it would be appropriate for states to target exceptions at parents who struggle with domestic violence. See *infra* Part II.A.

Second, the definition does not specify whether the alleged violence must have a direct link to the adult petitioner's inability to enter the workforce successfully. This Note argues that in light of the language of another provision of the Personal Responsibility Act—the Family Violence Option—which explicitly ties exceptions to violence, see *infra* notes 65-70 and accompanying text, and the debilitating nature of domestic violence, see *infra* Part II.A.2, the target recipient of any exception to welfare time limits should be a parent whose inability to enter the workforce successfully is related directly to domestic violence.

Third, the text of both the Hardship Exception and the Family Violence Option would permit states to give an exception when the victim of abuse is the child, not the parent. Indeed, the parent of an abused child may need or want to delay entering the workforce for the safety and welfare of the child, and in some instances should be given that opportunity. However, a full analysis of the need for, and possible implementation of, such exceptions is beyond the scope of this Note, although in general, states will want to ensure that such exceptions are not granted to parents who played a role in abusing the child.

<sup>64</sup> See Personal Responsibility Act, 42 U.S.C.A. § 608(a)(7)(C)(ii) (West Supp. 1997).

<sup>65</sup> *Id.* § 602(a)(7)(A)(iii). While the Personal Responsibility Act does not entitle this provision the "Family Violence Option," it is commonly known by this name. See A Bill To clarify the family violence option under the temporary assistance to needy families program, S. 671, 105th Cong. (1997) (using title "family violence option"); U.S. Government Press Release, Wellstone, Murray, Activists and Survivors of Domestic Violence Hold Press Conference to Introduce Bill to Clarify Impact of Welfare Bill on Victims of Domestic Abuse, Apr. 28, 1997, available in 1997 WL 4432154 [hereinafter Press Release, Family Violence Option Clarification Bill] (terming this provision "Family Violence Option").

uals receiving assistance . . . in cases where compliance with such requirements would make it more difficult for individuals receiving assistance . . . to escape domestic violence or unfairly penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence.<sup>66</sup>

Unlike the Hardship Exception, the Family Violence Option provides that a waiver of time limits must be part of a broader program targeting survivors of domestic violence: A state that pursues this option must also "screen and identify individuals . . . with a history of domestic violence while maintaining the confidentiality of such individuals,"<sup>67</sup> and "refer such individuals to counseling and supportive services."<sup>68</sup> The section defines "domestic violence" as having the "same meaning as the term 'battered or subjected to extreme cruelty'"<sup>69</sup> as set forth in the Hardship Exception.<sup>70</sup>

The relationship between the Hardship Exception and Family Violence Option is not clear from the text of the Personal Responsibility Act. While their potential recipients overlap, the Act does not tell states whether the two provisions are meant to be independent and complementary or whether the Family Violence Option should be read in a limited manner as a subset of the Hardship Exception, subject to the latter's twenty percent cap.<sup>71</sup>

## 2. *Statutory History and Intent*

Both a sixty-month limitation on the receipt of benefits and an optional exception for hardship were present in almost every welfare reform proposal considered by the 104th Congress.<sup>72</sup> Though the

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<sup>66</sup> Personal Responsibility Act, 42 U.S.C.A. § 602(a)(7)(A)(iii) (West Supp. 1997). States also have the option of waiving residency requirements, child support cooperation requirements, and family cap provisions. See *id.* Note that neither this provision nor the Hardship Exception requires that "battery" or "extreme cruelty" have occurred during the 60 months in which the petitioner's family received benefits. This omission will allow states to give an exemption to a parent who, for example, experienced massive abuse as a child and continues to be debilitated.

<sup>67</sup> *Id.* § 602(a)(7)(A)(i).

<sup>68</sup> *Id.* § 602(a)(7)(A)(ii).

<sup>69</sup> *Id.* § 602(a)(7)(B).

<sup>70</sup> It is notable that while domestic violence is usually thought of as violence between co-habiting family members (i.e., spousal abuse or child abuse), its definition in the Personal Responsibility Act is not so limited. Thus, the expansive language of the Hardship Exception and, by extension, the Family Violence Option, indicates that time waivers should be available where violence, such as child sexual abuse, is perpetrated by non-resident family members or family friends.

<sup>71</sup> For a discussion of states' concerns, see *infra* note 87 and accompanying text; see also *infra* notes 88-91, 97-103 and accompanying text (describing proposals where states will not be penalized for granting exceptions for survivors of domestic violence).

<sup>72</sup> Compare, e.g., A Bill To restore the American family, reduce illegitimacy, control welfare spending, and reduce welfare dependence, H.R. 4, 104th Cong. (1995) (providing

framers of the Personal Responsibility Act viewed strict time limits as a pillar of their welfare reform strategy,<sup>73</sup> they also recognized that states should have flexibility to exempt hard cases from those limits. The conference report reflects this compromise, explaining that "[t]he legislation assures that welfare will be a helping hand, not a lifetime handout, by imposing a 5-year lifetime limit on benefits (although as many as 20 percent of families may be allowed exceptions for conditions of hardship)."<sup>74</sup>

Though this report also notes that "[s]tates are not required to exempt these persons,"<sup>75</sup> many congressional representatives seemed to assume that states would implement some type of hardship exception. Indeed, during congressional debates, proponents of the Personal Responsibility Act's time limits frequently justified the rigidity of those limits by invoking the Hardship Exception as insurance that those unable to work would not be abandoned.<sup>76</sup> A conference committee that approved mandatory time limits and an optional exception commented that "[t]he legislation does not abandon those Americans who truly need a helping hand. It retains protections for those who experience genuine and intractable hardship."<sup>77</sup>

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no exception), with H.R. 1157, 104th Cong. § 405(a)(6)(B) (1995) (allowing exceptions "by reason of hardship").

<sup>73</sup> See H.R. Conf. Rep. No. 104-725, at 262 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2650 (stating that welfare reform strategy rested on following five principles: "Welfare Should Not Be a Way of Life," "Work, Not Welfare," "No More Welfare for Noncitizens and Felons," "Power and Flexibility to the States," and "Encouraging Personal Responsibility to Halt Rising Illegitimacy Rates").

<sup>74</sup> *Id.*; see also H.R. Rep. No. 104-81, pt. 1, at 6 (1995) ("Destroying the narcotic effect of welfare while preserving its function as a safety net for families experiencing temporary financial problems is the major intent of the Committee bill. Based on the fact that it is precisely the permanent guarantee of benefits that induces dependency, the Committee fundamentally alters the nature of the AFDC program by making its benefits temporary and provisional.").

<sup>75</sup> H.R. Conf. Rep. No. 104-725, at 288 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2676.

<sup>76</sup> See, e.g., 142 Cong. Rec. S8077 (daily ed. July 18, 1996) (statement of Sen. Santorum) ("The Senator [D'Amato] from New York said we are going to put these rigid time limits on people of 2 years, and after 5 years no more benefits. The Senator from New York knows very well within this bill there is what is called a hardship exception. What the State can do is exempt 20 percent, 20 percent of the people in this program from the time limit."); *id.* at S9398 (daily ed. Aug. 1, 1996) (statement of Sen. Jeffords) ("Five years of benefits allow adequate time for most people to get their feet under them and get back on the road to supporting themselves. But even after 5 years the line is not a hard and fast one. There can be exceptions. The bill allows a 20 percent hardship exemption for the really difficult cases. So even though we say '5 years and you're off,' even then there's some leeway.").

<sup>77</sup> H.R. Conf. Rep. No. 104-725, at 261 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2649.

Though a hardship exception was included in every proposal, it came in a variety of forms. After debating variations on the theme, Congress adopted a permissively worded, optional time limit exception,<sup>78</sup> allowing states to give a limited number of exemptions<sup>79</sup> to individuals who have already received benefits for sixty months<sup>80</sup> on the basis of hardship or battery/extreme cruelty.<sup>81</sup>

The Family Violence Option,<sup>82</sup> on the other hand, was not included in most drafts of what became the Personal Responsibility Act, but instead was added at the last minute by Senators Paul Wellstone and Patty Murray.<sup>83</sup> According to its proponents, the provision "was intended to give states the ability to grant temporary waivers from certain work requirements for abuse survivors to insure that their

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<sup>78</sup> See Personal Responsibility Act, 42 U.S.C.A. § 608(a)(7)(C)(i) (West Supp. 1997) (providing that states "may" provide exception). Both the House and Senate considered versions of the bill that required states to implement a hardship exception. See H.R. 2903, 104th Cong. § 402(c)(1)(B) (1996) (using word "shall"); S. 1841, 104th Cong. § 402(c)(2)(B) (1996) (stating that "the State plan shall provide for hardship exceptions").

<sup>79</sup> See Personal Responsibility Act, 42 U.S.C.A. § 608(a)(7)(C)(ii) (West Supp. 1997) (capping number of exceptions at 20% of caseload). The 20% limitation grew from prior proposals of 10%, see H.R. 1157, 104th Cong. § 405(a)(6)(B)(ii) (1995), and 15%, see H.R. 2903 § 402(c)(1)(B)(iii) (1996). The Department of Health and Human Services estimated that each five percent increase could translate into benefits for up to 500,000 children. See 141 Cong. Rec. S19,167 (daily ed. Dec. 22, 1995) (statement of Sen. Boxer).

<sup>80</sup> See Personal Responsibility Act, 42 U.S.C.A. § 608(a)(1) (West Supp. 1997). One proposal envisioned a hardship exception to be invoked on an as-needed basis to keep the month in which the exception was claimed from counting toward the sixty-month total. See H.R. 2903, 104th Cong. § 402(c)(1)(B) (1996) (stating that "the State plan shall not include in the determination of the 60-month period . . . any month in which . . . the family is experiencing other special hardship circumstances which make it appropriate for the State to provide an exemption for such month"); see also NOW Legal Defense and Education Fund, Sample Outline of Comment on Federal Family Violence Option Regulations 6 (1997) [hereinafter NOW LDEF Sample Comment] (advocating exceptions that would "stop the clock" during recipient's stay on welfare).

<sup>81</sup> See Personal Responsibility Act, 42 U.S.C.A. § 608(a)(7)(C)(i) (West Supp. 1997). The language of "battery or extreme cruelty" was not always included in the text of the exception. Some early drafts used just the word "hardship" to describe the circumstances creating eligibility for the exception. See, e.g., H.R. 1157, 104th Cong. § 405(a)(6)(B)(i) (1995) (exempting family "by reason of hardship").

<sup>82</sup> See Personal Responsibility Act, 42 U.S.C.A. § 602(a)(7)(A) (West Supp. 1997).

<sup>83</sup> See Jennifer Gonnerman, *Welfare's Domestic Violence*, *The Nation*, Mar. 10, 1997, at 21 (giving history of Family Violence Option). The provision was drafted by Martha Davis, Legal Director of the NOW Legal Defense and Education Fund, and Joan Meier, Professor at George Washington School of Law. See Felicia Kornbluh, *Feminists and the Welfare Debate: Too Little? Too Late?*, *Dollars & Sense*, Nov./Dec. 1996, at 24, 39 (noting that "[f]eminists and liberals did win an amendment in the welfare law that provides some buffer for women who have been physically abused"). As originally proposed, the provision would have required states both to establish procedures to identify survivors of domestic violence and to waive time limits. See H.R. Conf. Rep. No. 104-725, at 267 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2655 (recording Senate amendment to list of required state certifications and conference agreement that family violence option instead would be included as state option).

transition to employment is a permanent one.”<sup>84</sup> Senator Wellstone said, “Make no mistake—work is the goal, we want to give these women the support to get there and stay there.”<sup>85</sup>

As noted above, the relationship between the Family Violence Option and the Hardship Exception is unclear. Of most concern is the relationship between the Family Violence Option and the twenty percent cap on exceptions in the Hardship Exception. States wanting to incorporate family violence programs into their welfare regimes<sup>86</sup> may have concerns that exempting survivors of domestic violence from time limits would leave no exceptions available to other types of hardship cases. The states also may fear that giving either type of exception will result in reductions in the amount of their block grants because of failure to meet their work participation requirements.<sup>87</sup>

A bill introduced by Senators Wellstone and Murray and a rule recently proposed by the Department of Health and Human Services (HHS) both suggest that the federal government does not intend to penalize states that grant exceptions for survivors of domestic violence. Senators Wellstone and Murray have drafted a bill that would clarify the Family Violence Option.<sup>88</sup> The bill states that it is Congress’s intent to allow states to waive time limits and work requirements temporarily for victims of domestic violence.<sup>89</sup> It further would amend the Personal Responsibility Act to provide that states will not

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<sup>84</sup> Press Release, Family Violence Option Clarification Bill, *supra* note 65. A group of 36 congressional representatives, recognizing that domestic violence can be a major factor in the ability of welfare recipients to find and keep jobs, signed a resolution calling for, among other things, the states to toll time limits for recipients of benefits who are survivors of domestic violence. See H.R. Con. Res. 195, 104th Cong. 4 (1996) (enacted); see also Carolyn Skorneck, Lawmakers reject time limits on welfare for domestic violence victims, Associated Press, July 29, 1997, available in 1997 WL 4877208 (reporting statement by Rep. Lucille Roybal-Allard that “the provision has always been intended and described as an additional exemption, and as such got the unanimous support of the House Budget Committee”).

<sup>85</sup> Press Release, Family Violence Option Clarification Bill, *supra* note 65.

<sup>86</sup> See *infra* notes 176-79 and accompanying text (discussing which states have adopted Family Violence Option or similar provision).

<sup>87</sup> See Temporary Assistance for Needy Families Program (TANF) Proposed Rule, 62 Fed. Reg. 62,124, 62,128 (1997) (to be codified at 45 C.F.R. pts. 270-75) (proposed Nov. 20, 1997) (“[T]here is legitimate concern among States and others that election of the [Family Violence Option] might put States at special risk of incurring financial penalties.”); Sarah Pekkanen, Amendment added to HHS spending bill would protect domestic violence victims, Gannett News Service, Sept. 18, 1997, available in 1997 WL 8837018 (noting that states “are hesitating because they fear that without a congressional go-ahead, it might cost them federal funds”); Vobejda, *supra* note 62 (assuming waivers for domestic violence fall under Hardship Exception and noting competing interests).

<sup>88</sup> See A Bill To clarify the family violence option under the temporary assistance to needy families program, S. 671, 105th Cong. (1997).

<sup>89</sup> See *id.* § 1(1) (discussing intent of Congress in passing Personal Responsibility Act); Skorneck, *supra* note 84 (“Critics argue that the [Hardship Exception] was meant to in-

be subject to any numerical limitations in granting such waivers<sup>90</sup> and that the number of family violence waivers granted will not be included for the purpose of determining a state's compliance with work participation rates.<sup>91</sup>

According to Senator Wellstone,

What we were asking for was simple: a clear statement that states can *and should* waive victims of domestic violence from time limitations and work requirements . . . without being penalized . . . This clarification will ensure that thousands of women and their families escape violence and leave the welfare rolls in both a timely and permanent manner.<sup>92</sup>

While the Wellstone-Murray bill has received widespread support on the Senate floor,<sup>93</sup> it never has survived conference committee.<sup>94</sup> Senator Arlen Specter, however, has promised to work for Senate hearings,<sup>95</sup> and Senator Murray promises to attach the bill "to every appropriate piece of legislation from now until it is law."<sup>96</sup>

In November 1997, HHS promulgated a proposed rule<sup>97</sup> that speaks, in part, to the relationship between the Family Violence Option and both work participation rates and the twenty percent cap on Hardship Exceptions. HHS has attempted to balance the Personal

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clude domestic violence victims and worry the provision would open up a giant loophole in the law . . .").

<sup>90</sup> See S. 671 § 2(a) (proposing amendment to Personal Responsibility Act, 42 U.S.C.A. § 602(a)(7) (West Supp. 1997)).

<sup>91</sup> See *id.*

<sup>92</sup> U.S. Gov't Press Release, Wellstone-Murray Amendment on Domestic Violence, Sept. 10, 1997, available in 1997 WL 12102498 (emphasis added). Note that the language of the Wellstone-Murray amendment does not require states to implement a waiver. However, Senator Wellstone's comments make it clear that the idea behind the bill is to tell states they should implement a waiver.

<sup>93</sup> When attached to a Labor-HHS appropriations bill in September 1997, the Wellstone-Murray bill passed by a vote of 98 to 1. See NOW Legal Defense and Education Fund, Action Alert, Family Violence Option (Oct. 14, 1997) [hereinafter NOW LDEF Action Alert] (on file with the *New York University Law Review*). Senator Jesse Helms was the lone dissenter. See Pekkanen, *supra* note 87.

<sup>94</sup> See NOW LDEF Action Alert, *supra* note 93 (describing how bill passed in Senate three times and then was stripped in conference committee). Most recently, the bill languished and died in a Senate conference committee on October 30, 1997. See NOW Legal Defense and Education Fund, Family Violence Option Alert, House Republicans Still Don't Get It! (Nov. 3, 1997) (recounting that some Republican senators would have allowed temporary waiver to be granted only if woman was "bruised and bleeding in front of a caseworker").

<sup>95</sup> See NOW Legal Defense and Education Fund, *supra* note 94 (noting that "the issue is not over").

<sup>96</sup> Skorneck, *supra* note 84.

<sup>97</sup> See Temporary Assistance for Needy Families Program (TANF) Proposed Rule, 62 Fed. Reg. 62,124 (1997) (to be codified at 45 C.F.R. pts. 270-75) (proposed Nov. 20, 1997).

Responsibility Act's objective of self-sufficiency<sup>98</sup> with the recognition that time-limited welfare benefits could "make it difficult for individuals to escape domestic violence, unfairly penalize victims, or put individuals at further risk of domestic violence."<sup>99</sup> It therefore has proposed a rule that would waive a state's penalty<sup>100</sup> for failing to achieve work participation rates<sup>101</sup> or exceeding the twenty percent cap on exceptions<sup>102</sup> when such failure or excess is attributable to the provision of "good cause domestic violence waivers," defined as waivers "under the Family Violence Option that [are]: (1) Granted appropriately, based on need, as determined by an individualized assessment; (2) Temporary, for a period not to exceed six months; and (3) Accompanied by an appropriate services plan designed to provide safety and lead to work."<sup>103</sup> While this rule is still a proposal<sup>104</sup> and the authority of HHS to prescribe these requirements for time limit

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<sup>98</sup> See *id.* at 62,128 ("[W]e are reflecting the statutory language and maintaining the focus on moving families to self-sufficiency.").

<sup>99</sup> *Id.*

<sup>100</sup> Unlike the Wellstone-Murray bill, where exceptions for survivors of domestic violence are not subject to any numerical limitations, see *supra* notes 90-91 and accompanying text, HHS reads the current Personal Responsibility Act to require that survivors of domestic violence be included in the pool of welfare recipients used to calculate work participation rates, see Temporary Assistance for Needy Families Program (TANF) Proposed Rule, 62 Fed. Reg. at 62,128, and that the number of exceptions granted to survivors of domestic violence be counted toward the 20% limit set forth in the Hardship Exception, see *id.*

<sup>101</sup> See *id.* at 62,188 (to be codified at 45 C.F.R. § 271.52) (stating that HHS "will not impose a penalty . . . if [a state] demonstrates that failure to meet the work participation rates is attributable to its provision of good cause domestic violence waivers").

<sup>102</sup> See *id.* at 62,196 (to be codified at 45 C.F.R. § 274.3) (stating that HHS "will not impose the penalty [for failing to meet the five-year limit] . . . if [a state] demonstrates that it exceeded the 20 percent limitation on exceptions to the time limit because of good cause waivers provided to victims of domestic violence").

<sup>103</sup> *Id.* at 62,182 (to be codified at 45 C.F.R. § 270.30). This definition still gives each state broad discretion to determine how to administer such an exception. For a detailed proposal, see *infra* Part III.C.

<sup>104</sup> While lauded for its recognition of the link between domestic violence and poverty, see, e.g., NOW LDEF Sample Comment, *supra* note 80, at 1, the proposed rule also has been criticized for several reasons. For example, its provision that waivers may not exceed six months contravenes the language of the Family Violence Option. See *id.* at 2-3 (criticizing this aspect of HHS rule and proposing that waivers should not be subject to any time limits). Compare Temporary Assistance for Needy Families Program (TANF) Proposed Rule, 62 Fed. Reg. at 62,127 (providing six-month waivers), with Personal Responsibility Act, 42 U.S.C.A. § 602(a)(7)(A)(iii) (West Supp. 1997) (providing that states may grant waivers "for so long as necessary"). Also, only 21 states (plus the District of Columbia and Puerto Rico) have adopted Family Violence Option provisions that satisfy HHS. See NOW Legal Defense and Education Fund, Analysis of Family Violence Option Proposed Federal Regulations: Possible Areas of Comment 1 (1997) [hereinafter NOW LDEF Possible Areas of Comment]. Exceptions granted under state welfare plans that provide services for survivors of domestic violence but do not do so under the heading "Family Violence Option" will not be recognized by HHS. See *id.*



exceptions under the Family Violence Option is unclear,<sup>105</sup> the proposed rule highlights the federal government's support for exceptions to welfare time limits for survivors of domestic violence. Indeed, in the discussion preceding the proposed rule, HHS states that the Clinton administration "is strongly committed to reducing domestic violence, and [encourages] all States to consider adopting the Family Violence Option."<sup>106</sup>

While the Wellstone-Murray bill and the proposed HHS rule both provide strong evidence that the federal government believes that states should provide exceptions to time limits for survivors of domestic violence, it is, of course, too soon to regard either as a definitive or binding statement that states should do so. Such a policy, however, also is consistent with the emphasis that current federal law places on combating domestic violence. This priority is displayed most prominently in the Violence Against Women Act of 1994<sup>107</sup> (VAWA). VAWA criminalizes some activity related to domestic violence<sup>108</sup> and provides federal funds for a multitude of state programs to combat violence, including strengthened legal enforcement and advocacy,<sup>109</sup> a battered women's hotline,<sup>110</sup> and battered women's shelters.<sup>111</sup> VAWA indicates that Congress believes that survivors of domestic violence have a compelling claim on federal resources, and further suggests that Congress wants to encourage states to expend their resources to aid survivors of domestic violence.<sup>112</sup>

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<sup>105</sup> Compare Temporary Assistance for Needy Families Program (TANF) Proposed Rule, 62 Fed. Reg. at 62,128 (claiming authority to regulate "where Congress has charged HHS with enforcing penalties, even if there is no explicit mention of regulation"), with NOW LDEF Possible Areas of Comment, *supra* note 104, at 1 ("[I]t is not clear that HHS has the authority to limit the definition of good cause waivers under the [Family Violence Option] in the way that they have."), and NOW LDEF Sample Comment, *supra* note 80, at 2-5 (arguing that HHS lacks authority to limit Family Violence Option waivers to six months or to require that states have service plans for survivors of domestic violence).

<sup>106</sup> Temporary Assistance for Needy Families Program (TANF) Proposed Rule, 62 Fed. Reg. at 62,128.

<sup>107</sup> Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.) [hereinafter VAWA].

<sup>108</sup> See 18 U.S.C. §§ 2261-2262 (1994) (criminalizing crossing state line with intent either to injure or intimidate spouse or intimate partner or to violate order of protection); see also 42 U.S.C. § 13981(b)-(c) (1994) (declaring right of all people to be free from gender motivated violence and creating federal civil rights cause of action for victims of such crimes).

<sup>109</sup> See, e.g., 42 U.S.C. § 3796hh (1994) (encouraging states to implement pro-arrest policies, improve tracking of domestic violence cases, strengthen legal advocacy programs, and educate judges).

<sup>110</sup> See *id.* § 10416 (establishing grant for national domestic violence hotline).

<sup>111</sup> See *id.* §§ 10402(f), 10409 (providing funds for battered women's shelters).

<sup>112</sup> It is possible to criticize this reasoning for being underinclusive. Federal law recognizes that citizens have the right to be free not only from gender based violence, but also

Given this extensive concern with survivors of domestic violence, it seems unlikely that Congress would provide states with the Hardship Exception and the Family Violence Option and then punish them for adopting these provisions. Therefore, despite some uncertainty about the exact contours and availability of a waiver program, the existence of both the Hardship Exception and the Family Violence Option in the Personal Responsibility Act, the still-pending Wellstone-Murray bill, the proposed HHS rule, and the priority evidenced in VAWA combine to argue persuasively that states should be able to waive time limits for survivors of violence without negative repercussions.

## II

### DOMESTIC VIOLENCE IS A WORTHY BASIS FOR AN EXCEPTION FROM TIME LIMITS

All of this, however, begs the normative question: *Should* states implement an exception targeted at survivors of abuse? Part II of this Note explores this issue and concludes that states should create a welfare regime that takes special account of survivors of domestic violence. Part II.A. defines domestic violence and explores what it is about such violence that gives survivors a superior claim to scarce state welfare resources. Part II.B. then examines how allowing an exception for survivors of domestic violence may have deeper ramifications on our thinking about the values and incentives implicated by our welfare system. It argues that an exception to welfare time limits for this group is consistent with the various theories of welfare reform and welfare dependency that motivated the Personal Responsibility Act.

#### A. *Domestic Violence Survivors Have Unique Needs that Deserve Special Treatment*

##### 1. *Nature of Domestic Violence*

Domestic violence has been defined as "a pattern of coercive behavior that includes the physical, sexual, economic, emotional, and

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from discrimination on racial, religious, and ethnic grounds. Yet, it has never been suggested that these other categories should form the basis for an exception to welfare time limits, even if an exception so formulated would withstand constitutional challenge. It is the contention of this Note that gender motivated violence distinguishes itself as a basis for an exception to welfare time limits, because such violence not only violates the civil rights of its victims but also severely undermines their ability to enter the job market successfully. See *infra* Part II.A.

psychological abuse of one person by another."<sup>113</sup> Widespread public awareness of domestic violence began just over twenty years ago.<sup>114</sup> The intervening years have seen the growth of psychosocial theories explaining domestic violence<sup>115</sup> and a growing awareness that it is a

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<sup>113</sup> Karla M. Digirolamo, *Myths and Misconceptions About Domestic Violence*, 16 *Pace L. Rev.* 41, 44 (1995); see also Del Martin, *Overview—Scope of the Problem*, in U.S. Comm'n on Civil Rights, *Battered Women: Issues of Public Policy* 205, 219 (1978) (arguing that husband-wife power relationship is defined more by economics than by psychology or biology). Many commentators frame the issue of domestic violence in terms of the individual dynamics of power and control. See, e.g., Digirolamo, *supra*, at 44 ("The 'goal' of this abuse is to help one person achieve and maintain power and control over the other."). However, some commentators see domestic violence as a systemic problem, "rooted primarily in the structure of the social order, rather than the pathological psyches of individual men." Kathleen J. Ferraro, *Cops, Courts, and Woman Battering*, in *Violence Against Women: The Bloody Footprints* 165, 165 (Pauline B. Bart & Eileen Geil Moran eds., 1993); see also Martin, *supra*, at 216 (arguing that institution of marriage socializes women and men to act in dominant and submissive roles and that "[t]hese roles are incorporated into the culture by its philosophy, science, social and psychological theory, morality, and law"). Under this view, criminal justice, with its aim of punishing individual deviants, is "fundamentally at odds with a structural, gendered analysis of woman battering." Ferraro, *supra*, at 165.

<sup>114</sup> See William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 *Rutgers L. Rev.* 1139, 1162 (1996) (noting that "as recently as 1974 there were no effective legal remedies and little public acknowledgment that family violence was a serious problem"); Digirolamo, *supra* note 113, at 43 (noting that "[t]hings have changed in the last seventeen years"); Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 *J.L. & Pol'y* 237, 239 (1994) (describing advent of effective movement against domestic violence). For much of our history, abusing one's wife was an accepted practice and privilege of being a husband. See *id.* (outlining import of English common law on marital relations into American law). For example, a husband was permitted to beat his wife as long as he did not use a switch any thicker than his thumb. See Martin, *supra* note 113, at 209 (reporting that North Carolina Supreme Court ruled in 1874 that as long as husband inflicted no permanent injury on his wife, "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." (quoting Robert Calvert, *Criminal and Civil Liability in Husband-Wife Assaults*, in *Violence in the Family* 88, 89 (Suzanne K. Steinmetz & Murray A. Straus eds., 1974))).

<sup>115</sup> Dr. Lenore E. Walker's *The Battered Woman* (1979) was the groundbreaking work on the dynamics of domestic violence. Dr. Walker argued that a battering relationship progresses through three cycles: the tension-building phase, the acute battering incident, and the loving phase. See *id.* at 55-70. Additionally, she claimed that this process results in "learned helplessness," where women become passive and cease trying to leave the relationship. See *id.* at 42-54.

Walker's work, however, has been criticized as trapping women in victimhood, robbing them of their autonomy, and failing to empower them. See, e.g., Evan Stark, *Representing Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 *Alb. L. Rev.* 973, 973-76 (1995) (arguing that battered women must be viewed as survivors, whose fundamental human rights are being violated and who are entitled to justice). Others have pointed out that not all domestic violence follows a cycle; violence may come "out of the blue" and the batterer may not be contrite at all. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 *Hofstra L. Rev.* 1191, 1208 (1993) (arguing that battered women may live in "state of siege").

serious problem that should not be left to intra-family resolution. Both the social service and legal worlds have developed services and protections for battered women.<sup>116</sup> However, despite these efforts, domestic violence remains one of the leading causes of injury to women in this country.<sup>117</sup> It has been estimated that in the United States between two and four million women are battered each year.<sup>118</sup>

## 2. *Domestic Violence Is a Major Impediment to Job-Readiness*

While every battering relationship has its own unique dynamics, observers have been able to identify reactions common among battered women.<sup>119</sup> Many experience similar psychological distresses, including fear and anxiety, depression, nightmares and flashbacks, anger, difficulty concentrating, dissociation, and addictive behaviors.<sup>120</sup> Many battered women have low self-esteem, feel responsible for the violence, and fail to see alternatives to staying in a violent relationship.<sup>121</sup> Furthermore, in battering relationships, which occur in

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<sup>116</sup> See Bassler, *supra* note 114, at 1162 (listing legal reforms, including civil protection orders, arrest and law enforcement, mediation of custody disputes, and civil damages for family violence). One controversial legal development is the admission of testimony on the "battered woman syndrome" as an element of self-defense when women are charged with murdering their partners. See, e.g., Dutton, *supra* note 115, at 1195 (arguing that battered woman syndrome is currently too narrowly defined); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379, 387-88 (1991) (arguing for uniform application of self-defense doctrine in trials of battered women for murder).

<sup>117</sup> See Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 Clearinghouse Rev. 420, 423 (1991); *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1501 (1993). Domestic violence leads to more injuries than those caused by auto accidents, muggings, and rapes combined. See Evan Stark and Anne Flitcraft, *Violence among Intimates: An Epidemiological Review*, in *Handbook of Family Violence* 293, 301 (Vincent B. Van Hasselt et al. eds., 1988). Although some men also are victims of abuse, 95% to 98% of victims of spousal abuse are women. See McKenzie, *supra* note 4, at 9.

<sup>118</sup> See *Women and Violence: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary*, 101st Cong. 117 (1990) (statement of Angela Browne, Ph.D., University of Massachusetts Medical School). Approximately 1350 women are murdered by their partners each year. See FBI, *Uniform Crime Reports for the United States* 19 (1994).

<sup>119</sup> But see Dutton, *supra* note 115, at 1225 (arguing that there is no single battered woman profile because psychological reactions of battered women differ in type and severity).

<sup>120</sup> See *id.* at 1221-23 (reviewing psychological effects of physical and sexual violence). Often, but not always, the psychological effects of battering will rise to the level that the woman will be diagnosed with post-traumatic stress disorder. See *id.* at 1222.

<sup>121</sup> See Digirolamo, *supra* note 113, at 46 (commenting that low self-esteem makes women vulnerable to, and perhaps also responsible for, violence); Dutton, *supra* note 115, at 1218-20 (discussing cognitive reactions to violence and abuse).

every socioeconomic class, the woman is often financially dependent on the batterer.<sup>122</sup>

The dynamics of domestic violence make it extremely difficult for many currently and previously battered women to join the workforce successfully. Indeed, domestic violence has been identified as "the 'biggest issue for successful transition into the workplace.'"<sup>123</sup> An abuser may not allow his partner to work at all out of jealousy that she would meet another man or fear that she would become emotionally and financially independent.<sup>124</sup> When a battered woman does attempt to establish herself in a permanent job, her batterer may sabotage her efforts by increasing violence at home,<sup>125</sup> using tricks to prevent her from studying or being on time for work,<sup>126</sup> or harassing her at work.<sup>127</sup> Furthermore, if an abused woman does enter the workforce,

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<sup>122</sup> See Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 *Fordham Urb. L.J.* 1141, 1150-51 (1995) (finding that batterers deprive women of access to cash, checking, and charge accounts and noting that high level of economic dependence puts women at risk of serious injury); Digirolamo, *supra* note 113, at 45 (finding that battered women are "controlled through a sophisticated pattern of economic abuse").

<sup>123</sup> Davis & Kraham, *supra* note 122, at 1151 (quoting Sue Boyd of Denver Family Opportunity Program).

<sup>124</sup> See Ruth A. Brandwein, *Viewpoint, Cut in Aid Perils Curbing of Abuse*, *Newsday*, Jan. 8, 1997, at A31 (citing findings of Chicago's Taylor Institute on survivors of abuse).

<sup>125</sup> It is common for women to drop out of job training programs or not show up for work because they have visible bruises, black eyes, or cigarette burns. See Jody Raphael, *Recent Development, Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 *Harv. Women's L.J.* 201, 205-06 (1996) (reporting Taylor Institute findings).

<sup>126</sup> A man may engage in a multitude of "non-violent" tactics to keep a woman from doing well: he may turn off an alarm clock so that she misses an appointment; he may quarrel with her all night before an interview or exam so that she cannot perform well; or he may fail to provide needed and promised child care. See *id.* (listing common stories related by abuse survivors to researchers). The story of Bernice Haynes is typical: She was on welfare and enrolled in a program to become a licensed nurse. Her boyfriend tossed her textbooks into the garbage. He refused to watch their two children while she was in class. He would pick fights with her when she tried to study, and fought all weekend with her before her final exam. She failed her exam and consequently was kicked out of the program—which she had been attending for a year—just twelve weeks before graduation. See Gonnerman, *supra* note 83, at 21 (reporting that Haynes is now case manager at welfare-to-work program).

<sup>127</sup> See Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 *Clearinghouse Rev.* 383, 384 (1994) (reporting Oklahoma study that 96% of women who worked while involved in abusive relationship experienced trouble at work). Abusers also can harass a woman over the phone. See Davis & Kraham, *supra* note 122, at 1152 (noting that over half of women who worked while involved in abusive relationship were harassed over telephone); Raphael, *supra* note 125, at 206 (noting some abuse victims' frequent receipt of harassing phone calls at work). This may be problematic not only because it is threatening to the woman but also because some jobs forbid personal phone calls. See *id.* at 206 (indicating that such calls can sound "death knell" for employment). Abusers also

her own psychological scars may keep her from success.<sup>128</sup> She may be too anxious or angry to relate well to co-workers or clients, or she may not be able to take orders from superiors or follow complex instructions.<sup>129</sup>

Women who have escaped violent relationships also are at a disadvantage in the job market. At a minimum, they might have to take time from work to pursue therapy<sup>130</sup> or to meet court dates to enforce orders of protection or custody orders. For some, safe escape requires that they leave their lives behind completely. Without any possessions and little money, and without any references from old employers, it is extremely hard for these women to reestablish themselves and to find immediate employment.<sup>131</sup>

### 3. *Time Limits on Welfare Could Be Particularly Devastating to Survivors of Violence*

Studies indicate that between fifty and eighty percent of women who receive welfare benefits are past or current victims of physical or

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may come directly to a woman's place of work and threaten her or her co-workers. See *id.* (noting embarrassing and threatening nature of such encounters).

<sup>128</sup> See Brandwein, *supra* note 124 (stating that post-traumatic stress disorder makes it impossible for some survivors of domestic violence to interview or go out in public); see also NOW Legal Defense and Education Fund, Executive Summary, Report from the Front Lines: The Impact of Violence on Poor Women 5 (1996) (on file with the *New York University Law Review*) ("[A]fter years of being told by their abusers that they are worthless and incompetent, . . . women have difficulty presenting themselves well in interviews and other employment situations.").

<sup>129</sup> See Brandwein, *supra* note 124.

<sup>130</sup> While therapy certainly is an option for some survivors of violence, some commentators question whether it is an appropriate treatment. See Martin, *supra* note 113, at 222 (arguing that one-on-one therapy is harmful because it is based on patriarchal structure and implies that survivors are sick); Gonnerman, *supra* note 83, at 22 ("[W]ork is often a stronger therapeutic tool than counseling . . . . It improves their self-esteem and can make them feel in control of their lives." (quoting Lucy Friedman, Executive Director, New York City's Victim Services)).

<sup>131</sup> See Davis & Kraham, *supra* note 122, at 1153 (commenting that when women go "underground," fear of revealing new location or informing potential employers of violent history dissuades women from giving references and thus keeps them from getting new jobs). It has been estimated that between 50% and 90% of battered women try to escape. See *id.* at 1146 (citing Patricia Horn, *Beating Back the Revolution*, Dollars & Sense, Dec. 1992, at 12, 21). At best, leaving a violent partner may require a woman to move great distances, find new housing, develop new work skills, seek psychological counseling, and obtain legal aid. See Sheryl L. Howell, Recent Development, *How Will Battered Women Fare Under the New Welfare Reform?*, 12 Berkeley Women's L.J. 140, 145-47 (1997) (discussing expected negative impact of certain Personal Responsibility Act provisions on domestic violence survivors). At worst, leaving a violent partner can result in injury or death. See Martin, *supra* note 113, at 215 (noting that "[s]ome ex-husbands continue to stalk and hunt down 'their' women for years after a divorce, forcing their victims to move and change jobs continually").

sexual abuse.<sup>132</sup> The prevalence of domestic violence among poor women and the detrimental impact of violence on the ability of battered women to work for a sustained period, taken together, indicate that any strict time limit on the receipt of welfare benefits could result in grave harms to a substantial number of women and children.<sup>133</sup> For some battered women, loss of the last resort of public assistance may force them "to remain in or return to dangerous or life-threatening situations."<sup>134</sup> For others, the work requirements may have the effect of triggering or exacerbating domestic violence.<sup>135</sup> For still others, the effect might be to enmesh them further in poverty because their abus-

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<sup>132</sup> See Brandwein, *supra* note 124 (arguing that new welfare law must take violence toward women into account); see also Contract with America—Welfare Reform, Part 2: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means, 104th Cong. 1693-94 (1995) (statement of Taylor Institute) (finding that over half of women in welfare-to-work programs are or have been abused); Greg Weeks & Carol Webster, Washington State Institute for Public Policy, *Over Half of the Women on Public Assistance in Washington State Reported Physical or Sexual Abuse as Adults 1* (Oct. 1993) (on file with the *New York University Law Review*) (calculating that 60% of women on public assistance in Washington state had been physically or sexually abused as adults); Implementation of the Federal Personal Responsibility Act of 1996: Hearing Before the State Assembly Standing Comm. on Ways and Means, the State Assembly Standing Comm. on Soc. Servs., the State Assembly Standing Comm. on Children and Families, and the State Assembly Standing Comm. on Labor, Legis. Sess. 220, at 180 (N.Y. Feb. 7, 1997) (statement of Sherry Leiwant, Staff Attorney, NOW Legal Defense and Education Fund) [hereinafter NOW LDEF Testimony] (on file with the *New York University Law Review*) (estimating that between 30% and 75% of women who receive public assistance in New York City are victims of domestic violence); *id.* at 6 (reporting that between 82% and 92% of welfare mothers in Massachusetts had experienced severe physical or sexual violence in their lives). The congressional findings listed in the Personal Responsibility Act include the recognition that "a majority of [teen] mothers have histories of sexual and physical abuse," and that "[c]hildren born out-of-wedlock are more likely to experience . . . more child abuse, and neglect." Personal Responsibility Act, 42 U.S.C.A. § 601 note (listing legislative history) (West Supp. 1997).

<sup>133</sup> Furthermore, the prevalence of domestic violence in this population suggests that the 20% cap on hardship exceptions may be grossly inadequate. The Family Violence Option, however, seems to offer a more flexible framework. See *supra* notes 88-91, 97-103 and accompanying text (discussing Wellstone-Murray bill and proposed HHS rule). At the same time, the prevalence of domestic violence also indicates that an exception to time limits accorded on this basis could have significant fiscal consequences for the states—a factor they surely will take into account in designing their welfare programs. See generally *infra* Part III.C.

<sup>134</sup> Davis & Kraham, *supra* note 122, at 1144; cf. Melinda Henneberger, *Welfare Bashing Finds Its Mark*, reprinted in H.R. Rep. No. 104-75, pt.1, at 416 (1995) (recounting story of woman, unable to work because she was nine months pregnant, who was so ashamed of being on welfare that she returned to home of previously abusive father and stayed until abuse resumed).

<sup>135</sup> See Raphael, *supra* note 125, at 221 (evaluating potential impact of welfare time limits).

ers will forbid them to enter the job market.<sup>136</sup> Even for those who have escaped violent relationships, the effect might be to drive them into poverty because they have lost their safety net, or to force them to forego the time and services needed to recover from the abuse.<sup>137</sup>

The Hardship Exception and Family Violence Option of the Personal Responsibility Act give states an opportunity to mitigate these potential consequences. States should recognize that an inflexibly enforced sixty-month limit may not provide enough time for survivors to establish independent lives,<sup>138</sup> especially if they received welfare before leaving their abuser.<sup>139</sup> Further, the availability of such exceptions also may help states to understand dependency in women's lives and to recognize that the availability of employment is only one of a number of factors that will influence women's decisions to enter the job market. The pervasive presence and crippling influence of domestic violence in the lives of America's poorest families and the potential positive policy implications of giving them additional time on welfare thus offer compelling reasons for states to provide exceptions to the time limits for families struggling with domestic violence.<sup>140</sup>

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<sup>136</sup> [W]elfare reform policies intended to push girls and women into the labor market after a short period of time will have an unintended effect: welfare dependency will be eliminated, but their partners may not allow these girls and women to work, making them more economically dependent upon their abusers and more enmeshed in poverty than before.

*Id.* at 203 (citing anecdotal evidence suggesting that some men would be threatened by their partner receiving education and training and therefore would prevent their partner from working despite the loss of benefits).

<sup>137</sup> See Brandwein, *supra* note 124 (commenting that if battered women fail to comply with work requirements and time limits, they will lose Medicaid coverage and, therefore, access to necessary medical and mental health care); Raphael, *supra* note 125, at 221 (noting that abuse victims may "need more time and specialized services than will be available under time-limited programs").

<sup>138</sup> See NOW LDEF Testimony, *supra* note 132, at 8 (advocating state adoption of Family Violence Option for aid extensions).

<sup>139</sup> See *id.* at 8 (noting difficulty for abuse victims to establish independent life within time limits); Davis & Kraham, *supra* note 122, at 1157 (noting that "[w]omen may experience violence throughout their lifetimes and, depending upon the individual circumstances, may need to rely on [welfare] longer than any arbitrary time limit").

<sup>140</sup> "The rigidity of time limits . . . is not going to be workable" . . . [It] 'is likely to result in human tragedy if women are stalked in the workplace but feel they can't change jobs or stop going to work . . . because they'll lose their benefits—or if women in abusive relationships feel they can't leave because there is no safety net for them any longer.'"

Gonnerman, *supra* note 83, at 21 (quoting Martha Davis, Legal Director, NOW Legal Defense and Education Fund).



*B. Exempting Survivors from Time Limits Is Consistent with the Theories of the Personal Responsibility Act and Welfare Reform in General*

While providing assistance to survivors of domestic violence generally receives wide support, providing cash benefits to welfare mothers for unregulated periods of time has been condemned roundly.<sup>141</sup> Indeed, the Personal Responsibility Act was designed to push recipients from their perceived life of dependence into one characterized by self-sufficiency.<sup>142</sup> As Part II.A. made clear, however, the categories of "welfare recipients" and "abused women" are not mutually exclusive and, indeed, overlap significantly.<sup>143</sup> It is possible, then, that there exists a latent tension between what on its face is likely to be an unobjectionable and popular recognition of a state's humanitarian duty to aid citizens who are impeded by violence and the economic perspective that forms the basis for current welfare reform theory. Thus, it is important to examine the landscape of theories of welfare dependency and reform to see how an exemption for survivors of family violence can be integrated.

*1. An Exception for Battered Women Is Consistent with the Moral and Economic Vision of the Personal Responsibility Act*

The impetus for the Personal Responsibility Act was the perception that the AFDC program actually undermined personal responsibility and initiative.<sup>144</sup> This conclusion was based in large part on generalizations about welfare recipients. Specifically, mainstream America found fault with "typical" welfare mothers—single, young, promiscuous, uneducated African American women who assumed

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<sup>141</sup> See *supra* notes 38-43 and accompanying text (outlining political support for overhaul of welfare system).

<sup>142</sup> See *supra* text accompanying note 50 (listing goals of Personal Responsibility Act); see also Henneberger, *supra* note 134, at 417 (quoting Rep. E. Clay Shaw, Jr.: "It's going to be scary for them—no question about it—to come over from a life of receiving a check for doing nothing' . . . . 'That's why people have to be pushed off. But in the long run they'll be much better off and their self-esteem will be raised considerably.'").

<sup>143</sup> In the words of one commentator, "Domestic violence victims receive our sympathy and support. Mothers on welfare receive our disapproval and disdain. How ironic that these are often the same people . . . ." Brandwein, *supra* note 124.

<sup>144</sup> See Mary Bryna Sanger, *Welfare Reform Within a Changing Context: Redefining the Terms of the Debate*, 23 *Fordham Urb. L.J.* 273, 275 (1996) (noting that for many Americans, welfare became symbol of what was wrong with America); Williams, *supra* note 44, at 725 (recounting thesis that availability of public assistance "creates immorality and dependence, undermines values, and increases poverty"). But see Sanger, *supra*, at 275 (iterating alternative view of welfare as "social tool to cushion the economic shocks of unpredictable and adverse personal events and labor market fluctuations").

that AFDC benefits would always be available to sustain them and who had numerous children to increase the amount of benefits.<sup>145</sup>

The Personal Responsibility Act was passed to modify the behavior of these welfare recipients so as to reflect the values of "mainstream" society.<sup>146</sup> The Act's clearly stated goal is to create a culture in which families headed by married, educated, working parents are the norm, and where the primary values are individual responsibility, self-reliance, and hard work.<sup>147</sup> These goals are based on the long-standing premise that work fosters dignity<sup>148</sup> and that the traditional family unit is the proper place to impart a pro-work, pro-family ethic to children.<sup>149</sup>

Having identified its desired ends, the Personal Responsibility Act creates a seemingly simple set of economic incentives to shape the

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<sup>145</sup> See Handler, *supra* note 26, at 865 (describing stereotypical welfare recipients); Williams, *supra* note 44, at 743-44 (same). However, AFDC demographics demonstrated that in reality, recipients of AFDC did not match the stereotypes. See *supra* notes 29-37 and accompanying text. Some commentators therefore have characterized the welfare reform debate as racist and sexist because it feeds on a "deeply embedded stereotype of the Black single mother—and the slurs of patriarchy, dependency, and promiscuity from which it springs." Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 Conn. L. Rev. 879, 881 (1994).

<sup>146</sup> In a speech endorsing the Family Support Act of 1988, which created the JOBS program and required welfare recipients to make attempts at self-sufficiency, Senator Daniel Patrick Moynihan stated, "[T]he problems of children in the United States are overwhelmingly associated with the strength and stability of their families. Our problems do not reside in nature, nor yet are they fundamentally economic. Our problems derive from behavior." 136 Cong. Rec. S14,416-17 (daily ed. Oct. 3, 1990) (statement of Sen. Moynihan).

<sup>147</sup> See Personal Responsibility Act, 42 U.S.C.A. § 601(a)(2) (West Supp. 1997) (listing as one of primary goals: "promoting job preparation, work, and marriage"); Sanger, *supra* note 144, at 291 (finding need to return to traditional American values at heart of welfare reform proposals).

<sup>148</sup> See Williams, *supra* note 44, at 722 (discussing federal legislators' historical belief that work fosters dignity).

<sup>149</sup> Critics charge that welfare reform is a race and gender biased attempt to impose a middle class value system on all Americans at the expense of the welfare of poor women and children. See Raphael, *supra* note 125, at 213 (describing AFDC as support for women rejecting traditional marital roles). A feminist critique of welfare reform emphasizes that it perpetuates gender bias by encouraging mothers to seek economic security through men and marriage, see Mink, *supra* note 145, at 882 (calling reform "a 'shape up in the home or ship out to work' principle"), and by reinforcing a patriarchal family structure that undervalues the capacity of women to raise children alone, see Nancy E. Dowd, *Stigmatizing Single Parents*, 18 Harv. Women's L.J. 19, 73-74 (1995) (arguing that failure to raise benefits is based on presumed superiority of nuclear family); cf. Raphael, *supra* note 125, at 214 (noting tension between wanting to avoid endorsing single, teenage motherhood and wanting to criticize traditional family values). One critic has charged that by characterizing welfare recipients as deviant people with bad values, political leaders have been able to divert attention from the failure of supply-side economics and political programs that redistributed money to the rich and increased poverty rates. See Williams, *supra* note 44, at 741-42 (exploring origin of placement of blame on welfare recipients).

behavior of benefits recipients.<sup>150</sup> The Act makes it clear that no person has an entitlement to any benefits.<sup>151</sup> Instead, to receive benefits, individuals must make strides to conform to the Act's pro-work, pro-family vision. For example, adult recipients must work within twenty-four months of first receiving benefits.<sup>152</sup> Finally, and most controversially, the Act seeks to force welfare recipients into sustained employment by imposing a sixty-month lifetime limit on the receipt of benefits.<sup>153</sup>

Granting time limit exceptions for survivors of abuse might seem inconsistent with the Personal Responsibility Act's emphasis on work and independence, since continued benefits would allow battered women to remain out of the workforce longer than other welfare recipients.<sup>154</sup> However, the alternative—cutting battered women off from benefits—would not provide an incentive to work in many cases,

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<sup>150</sup> The Act also creates economic incentives to shape state behavior. For example, states' block grants will be reduced or eliminated if they do not meet certain quotas. See Personal Responsibility Act, 42 U.S.C.A. § 609(a)(3) (West Supp. 1997) (providing for grant reductions of 5% to 21% for failure to meet work participation rates). The Act also provides positive incentives by creating certain bonus payments. See *id.* § 603(a)(2) (providing bonuses for states that reduce out-of-wedlock births); *id.* § 603(a)(4) (giving bonuses to states that have high percentage of recipients engaged in work). It is becoming increasingly clear that states have no economic incentives not to provide exceptions for survivors of domestic violence. For example, under the Wellstone-Murray bill and the proposed HHS rule, giving exemptions under the Family Violence Option will not impact a state's block grant. See *supra* notes 88-91, 97-103 and accompanying text. Thus, fear of losing block grant funds should not influence a state's decision regarding whether to grant such an exception and how many to grant.

<sup>151</sup> See *supra* note 46 and accompanying text. Critics estimate that by 2001, the Personal Responsibility Act will bar 3.5 million poor children from any federal cash assistance. See Hershkoff & Loffredo, *supra* note 11, at 32 (citing Welfare Reform: An Analysis of the Issues 36 (Isabel V. Sawhill ed., 1996)). By 2005, that number will reach 4.86 million poor children. See *id.*

<sup>152</sup> See Personal Responsibility Act, 42 U.S.C.A. § 602(a)(1)(A)(ii) (West Supp. 1997).

<sup>153</sup> See *id.* § 608(a)(7)(A).

<sup>154</sup> One other potential objection to giving exceptions to survivors of domestic violence might be that doing so would undermine the Personal Responsibility Act's vision of two-parent families, since providing continued benefits would give women resources with which to leave their abusers, thus resulting in one-parent homes. However, even its most ardent supporters likely would agree that this objection takes the Act's pro-family vision to an unwarranted extreme. The Act favors two-parent families because it indicates that they are generally the best environment in which to raise children. See *id.* § 601 note (listing legislative findings) ("Marriage is an essential institution of a successful society which promotes the interests of children."). However, a violent home is far from a desirable environment for children. Rates of child abuse in homes where there is spousal violence are much higher than average, see Panel on Research on Violence Against Women, National Research Council, *Understanding Violence Against Women* 84-85 (Nancy A. Crowell & Ann W. Burgess eds., 1996), and male children raised in such homes frequently grow up to be abusers themselves, see *id.* at 62 (stating that one-third of children who have been abused or witnessed abuse become violent adults). If a goal of the Personal Responsibility Act is to encourage stable homes for children, then an exception from time limits that

but an incentive to remain mired in a violent relationship.<sup>155</sup> Given the reality of the impact of domestic violence on work preparedness,<sup>156</sup> allowing continued benefits would not undermine the goals of the Personal Responsibility Act, but would promote independence in an important sense by providing battered women with the time and resources they need to heal.<sup>157</sup>

Furthermore, the premise that work gives dignity historically underlies this nation's welfare legislation.<sup>158</sup> Requiring abused women to choose between working in order to continue to receive benefits and returning to abusive relationships forces them to make choices that may undermine both their dignity and safety. Returning to work may open these women to continued physical and mental abuse by their batterers.<sup>159</sup> Forcing battered women to give up their benefits and perhaps return to their batterers obviously undermines their dignity and autonomy. An exception to time limits for survivors of violence, therefore, actually would further the goals of dignity and independence that underlie the Personal Responsibility Act.

## 2. *An Exception for Battered Women Does Not Necessarily Endorse Categorical Thought About Welfare Recipients*

One enduring criticism of social assistance programs in this country is that they reinforce a categorical and hierarchical distinction between "deserving" and "undeserving" poor.<sup>160</sup> The "deserving" poor—those with legitimate, socially acceptable reasons to stay out of the labor force—are "entitled" to public assistance, while the "undeserving" poor—those who are absent unjustifiably from the

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would support battered women in removing their children and themselves from an unstable, violent atmosphere is entirely appropriate.

<sup>155</sup> See *supra* notes 134-36 and accompanying text.

<sup>156</sup> See *supra* notes 123-31 and accompanying text.

<sup>157</sup> This is especially true in light of the fact that the Personal Responsibility Act's Family Violence Option advises states which adopt it to couple continued benefits with counseling and other services that empower women to leave abusive relationships and establish independence. See Personal Responsibility Act, 42 U.S.C.A. § 602(a)(7)(A) (West Supp. 1997).

<sup>158</sup> See Williams, *supra* note 44, at 722.

<sup>159</sup> See *supra* notes 125-27 and accompanying text.

<sup>160</sup> See, e.g., Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. Rev. 361, 366, 372-74 (1996) (discussing categorical, hierarchical approach to public assistance programs); Williams, *supra* note 44, at 725 (discussing exclusion of "undeserving" poor women from AFDC rolls). For a general discussion of how the poor have been "labeled," see Herbert J. Gans, *The War Against the Poor: The Underclass and Antipoverty Policy* 14-18 (1995) (discussing various labels for poor and origins of such labels).

workforce—receive government “handouts.”<sup>161</sup> This distinction is problematic because it allows policymakers to levy moral judgments upon individuals regarding what constitute socially acceptable reasons for staying out of the labor market.<sup>162</sup> The Personal Responsibility Act has been charged with revitalizing and reinforcing this distinction, labeling single minority mothers who do not work as “other” and “immoral.”<sup>163</sup>

Therefore, one possible concern implicated by allowing an exception to time limits for battered women is that doing so could perpetuate this hierarchical and categorical evaluation of those in our society who need public assistance: Such an exception could be seen as a categorical statement that poor battered women are among the “deserving poor” because their condition is a “disability”—akin to being blind, for example—which justifies their absence from the workplace and entitles them to continued public assistance. Understood in this way, such an exception would be problematic because it could disempower survivors of abuse and send the message that theirs is a “condition” that makes them chronically unemployable. Further-

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<sup>161</sup> See Diller, *supra* note 160, at 366, 372 (discussing views of social welfare as social insurance and public assistance). The clearest members of the category of “deserving poor” are the elderly and disabled people who receive benefits under programs such as the Supplemental Security Income program. See *id.* at 362, 384-85 (discussing disability category).

<sup>162</sup> For example, the creation in 1935 of the Aid to Dependent Children program indicated that single motherhood and the concomitant need to care for one’s children was a justifiable reason for not entering the workplace, and thus that single mothers could number among the “deserving poor.” See Handler, *supra* note 26, at 858 (summarizing perspectives on “undeserving poor” and “deserving poor”). Most states, however, manipulated their Aid to Dependents programs to provide benefits only to white widows and to deny benefits to single mothers who were divorced, deserted, never married, or members of racial minorities. See *id.* at 859. The latter category of women remained regarded as “undeserving” and “morally suspect.” See *id.* Paradoxically, such mothers were forced to work outside of the home and then condemned for doing so because it violated the social code of the time and “evidenced” immorality, intemperance, and vice. See *id.*

While the AFDC program implemented benefits for unwed, minority mothers, it imposed work requirements upon them. See *id.* at 859. This not only indicated that they still were regarded as “undeserving poor,” but also shifted the emphasized vice to that of not working. See *id.* at 859. This categorical condemnation has been heightened under the Personal Responsibility Act.

<sup>163</sup> See, e.g., *id.* at 858 (describing how early Twentieth Century reformers argued that only single mothers who were “otherwise fit and proper” according to dominant values deserved aid); Mink, *supra* note 145, at 883 (“Today’s proposed work requirements, time limits, and marriage incentives reproduce the welfare stigma. Such requirements differentiate ‘them’ from ‘us,’ the ‘deviant’ from the ‘responsible,’ and thereby reinforce social discipline through the work ethic and patriarchal family life.”); Williams, *supra* note 44, at 721-25 (charting notion of undeserving poor and finding that current welfare policy identifies as undeserving those who do not adhere to middle class values). The Personal Responsibility Act thus sends the message that women who are unmarried and unable to find work—and their children—no longer deserve financial support.

more, it would place, in a sense, a moral and societal stamp of approval on women who are "victims."

An exception to time limits for survivors of violence, however, does not need to be viewed as a categorical statement implicating value judgments. Instead, it can be seen as a way to reconcile a strong pro-work policy with the need, in a market economy, to have a pool of workers who are skilled and job-ready.<sup>164</sup> An exception for survivors of violence, which would give them the time and resources they need to enter the workforce successfully, is a justifiable and realistic way to create such a pool.<sup>165</sup>

### 3. *An Exception for Battered Women Embodies Essential Dialogue About the Causes of Welfare Dependency*

Different aspects of the Personal Responsibility Act reflect different theories regarding poverty and welfare dependency. For example, rational choice theory is the background paradigm for provisions such as the sixty-month limitation on welfare benefits.<sup>166</sup> Proponents of rational choice theory claim that welfare mothers are rational actors who purposefully choose to stay on welfare because pursuing the alternative of low wage, low benefit employment will place them in a worse financial position.<sup>167</sup> Charles Murray, a leading rational choice theorist, has advocated for the elimination of welfare benefits entirely,

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<sup>164</sup> Whether the economy can generate a sufficient number of well-paying, low-skill jobs to employ former welfare recipients is a debated topic. Compare Hershkoff & Loffredo, *supra* note 11, at 46 (stating that "numerous studies make clear that there are not nearly enough jobs to supply employment for all the families that will lose public assistance because of the new law's time limits" and citing studies by David T. Ellwood, Christopher Jencks & Katherine Edin, Gordon Lafer, and Katherine Newman & Chauncey Lennon), with Murray, *supra* note 31, at 291-92 ("[P]eople who follow the data on this issue rarely say that the real reason we have people on welfare is that there are not enough jobs.").

<sup>165</sup> There are, of course, issues other than domestic violence that can render people chronically unemployable. See Jason DeParle, *Newest Challenge for Welfare: Helping the Hard-Core Jobless*, N.Y. Times, Nov. 20, 1997, at A1 (noting that "barriers to employment" include drug addiction and mental illness in addition to family violence). While such populations also seem to be deserving recipients of benefits extensions, they are not specifically targeted in the Personal Responsibility Act as battered women are (although the phenomena of substance abuse and domestic violence often overlap). The goal of this Note is not to imply that drug addicts or the mentally ill are morally blameworthy and undeserving of public support, but instead, recognizing the pernicious impact of domestic violence on the lives of the poor, to suggest ways in which the current framework of the Personal Responsibility Act can be implemented effectively.

<sup>166</sup> See Raphael, *supra* note 125, at 210-12 (summarizing rational choice theory).

<sup>167</sup> See *id.* at 210 (discussing how rational choice theorists rejected "culture of poverty" theory). The credibility of this theory has been questioned, however, because so many recipients cycle on and off welfare, indicating that many recipients do feel the desire to leave welfare. See *id.* at 211-12 (summarizing critique of social scientists David Ellwood and Mary Jo Bane); see also *infra* note 173 (discussing attitudes of welfare recipients towards work).

reasoning that the existence of a safety net softens the otherwise harsh social and economic pressures that would counsel women against becoming single mothers and staying out of the workforce.<sup>168</sup> While the Personal Responsibility Act does not accept Murray's proposal that welfare should be eliminated entirely, the time limits provision surely reflects the idea that unlimited availability of a safety net skews the incentives of the poor.

Other features of the Personal Responsibility Act, however, can be understood as giving operational force to both the rational choice idea and the culture of poverty theory, the other principal theory of welfare dependency.<sup>169</sup> The culture of poverty theory postulates that people are poor not because they choose to be, but because they feel isolated and alienated from mainstream society and lack opportunities.<sup>170</sup> This culture of poverty perpetuates itself from generation to generation because poor children are raised to be passive and hopeless<sup>171</sup>—"not psychologically geared to take full advantage of . . . increased opportunities."<sup>172</sup> Proponents of the culture of poverty model emphasize that only major structural changes to the economy—for example, restoring the industrial base of cities, creating jobs in the inner city, dispersing concentrations of poverty, and generating jobs that provide sufficient income to workers—can result in sustained employment for the underclass.<sup>173</sup>

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<sup>168</sup> See Murray, *supra* note 31, at 294-95 (arguing for elimination of welfare system). In Murray's view, private charity would be available to provide services to those who still do not enter the workforce. See Raphael, *supra* note 125, at 211 (discussing Murray's "behavioral development theory").

<sup>169</sup> See Raphael, *supra* note 125, at 208-15 (summarizing theories and noting existence of third theory—feminist anti-patriarchy theory—that welfare provides important safety net so that women do not have to depend on men).

<sup>170</sup> See *id.* at 208-09 (tracing evolution of culture of poverty theory). The underclass has been described as "more and more hopelessly set apart from the nation at large . . . not shar[ing] in its life, its ambitions and its achievements." Gans, *supra* note 160, at 28 (quoting original definition of "under-class" from Gunnar Myrdal, *Challenge to Affluence* 10 (1963)). This definition evolved into one in which race and gender were interwoven. See *id.* at 28-31 (describing evolution of "underclass" to describe primarily black, female-headed families). But see *id.* at 24-26 (arguing that term "underclass" has replaced "culture of poverty" and that "culture of poverty" has become pejorative label).

<sup>171</sup> See Raphael, *supra* note 125, at 208-09 (discussing tenets of "culture of poverty" theory). Note, however, that rational choice theorists have criticized this view as stigmatizing the poor as deviant. See *id.* at 210 (noting rational choice theorists' objection to culture of poverty theory).

<sup>172</sup> Gans, *supra* note 160, at 24 (alteration in original) (quoting Oscar Lewis, *The Culture of Poverty*, in *On Understanding Poverty* 188 (Daniel P. Moynihan ed., 1968)).

<sup>173</sup> See Raphael, *supra* note 125, at 208-10. Indeed, some surveys of welfare recipients provide support for this idea. In such surveys, most recipients have indicated that they want to work and believe that it is fair to require them to do so. See Sanger, *supra* note 144, at 313. They say that the true hurdles to sustained employment include lack of child-care, lack of education and training programs, and fear that low-paying jobs may not pro-

The provisions allowing states to create an exception to time limits for battered women can be interpreted as consonant with both theories of welfare dependency. Considering the difficulty for survivors of domestic violence in entering the workforce quickly and successfully, the absence of a time limit exception could force a woman to choose between returning to an abusive relationship, on one hand, and a complete lack of income and homelessness, on the other.<sup>174</sup> Neither choice is "rational" when considered against the pro-family, pro-work tenets of the Personal Responsibility Act.<sup>175</sup> An exception to time limits would allow a survivor of domestic violence the more rational choice of extricating herself and her children from violence and eventually returning to work. However, it is also possible to view exceptions as reflecting the understanding that remaining in prolonged poverty is not a "rational response" at all, but a complex reaction to social and economic factors by those mired in a culture of poverty.

Therefore, no matter what the controlling theory, an exception to time limits for survivors of abuse is an essential component of the current welfare scheme because it recognizes that some portion of the poor population—for whatever reason—will not be able to achieve independence within five years of receiving benefits. Furthermore, because such an exception can be framed and justified under either theory, it can serve as a vehicle for an important dialogue about the causes of poverty and welfare dependency.

In sum, the Hardship Exception and the Family Violence Option are means by which states can exempt battered women from the Personal Responsibility Act's sixty-month time limit. States not only can provide such exceptions, they should. Exceptions are a necessary corollary to the work incentives of the Personal Responsibility Act and the realities of a market economy. Exceptions also recognize the special struggle of poor abused women and their need for more time to settle their lives, and thus should be a central component of a state's welfare regime as the debate over how to break the cycle of welfare dependency continues. Therefore, with the view that states can and should implement an exception to welfare time limits for survivors of abuse, the next question is how they should do so.

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vide them with adequate health benefits. See *id.* at 304-08, 313 (noting that benefits of working would be non-economic for many welfare recipients).

<sup>174</sup> See *supra* notes 134-39 and accompanying text.

<sup>175</sup> See *supra* notes 147-49 and accompanying text.



## III

WHAT PROCEDURES SHOULD STATES IMPLEMENT  
TO EXEMPT SURVIVORS OF DOMESTIC VIOLENCE  
FROM TIME LIMITS?

Thus far, states have been quite responsive in drafting the Hardship Exception and/or Family Violence Option provisions into their welfare legislation. Twenty-seven states have adopted the Family Violence Option in their welfare plans<sup>176</sup> and seventeen others have included some provision to benefit survivors of domestic violence.<sup>177</sup> Six states have not included any domestic violence provisions in their welfare plans,<sup>178</sup> although two of those states have legislation pending that would adopt the Family Violence Option.<sup>179</sup>

Adopting a provision that establishes the availability of an exception to time limits for survivors of domestic violence, however, is not the end of the story. States also must develop procedures to govern the application and decisionmaking processes for their time limit exceptions.<sup>180</sup> The ways in which states shape their standards regarding what constitutes a meritorious application will determine whether their exceptions are real guarantees of extra time for survivors of vio-

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<sup>176</sup> See NOW Legal Defense and Education Fund, Summary of state activity regarding Family Violence provisions in their state welfare plans (Sept. 9, 1997) [hereinafter NOW LDEF Family Violence Summary] (on file with the *New York University Law Review*) (listing as "[s]tates that have adopted or enable the Family Violence Option provisions in their welfare plans": Alabama, Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, and Wyoming). Guam and Puerto Rico also have adopted the Family Violence Provision. See *id.* However, only 21 states have adopted Family Violence Option to the degree required by proposed HHS rule. See NOW LDEF Possible Areas of Comment, *supra* note 104.

<sup>177</sup> See NOW LDEF Family Violence Summary, *supra* note 176 (listing as "[s]tates which have not adopted the Family Violence Option provisions, but have some domestic violence language or provisions in their welfare plans": Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Maine, New Mexico, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin). The District of Columbia and the Virgin Islands also have incorporated some sort of domestic violence language in their legislation. See *id.* Idaho and Oregon's provisions are almost identical to the Family Violence Option. See *id.* n.5.

<sup>178</sup> See *id.* (listing Kansas, Michigan, Nebraska, Ohio, Oklahoma, and Vermont).

<sup>179</sup> See *id.* n.6 (listing Michigan and Vermont).

<sup>180</sup> Compare, e.g., An Act Concerning Welfare Reform and the Expenditures of the Department of Social Services, No. 97-2, §§ 2-3, 1997 Conn. Acts 1645, 1650-1652 (Spec. Sess.) (allowing extensions of benefits where domestic violence is of sufficient magnitude to render applicant unemployable and providing that evidence of domestic violence may include, but is not limited to, police records, documentation from social service, legal, or medical professionals, and sworn statement of individuals—including benefits recipient—with knowledge of circumstances of domestic violence), with Mont. Code Ann. § 53-4-212 (1997) (providing for exemption but failing to set forth procedures for implementation).

lence or merely theoretical abstractions. Therefore, this section outlines a procedural scheme that states can use as they implement their exceptions.

*A. General Desirable Characteristics of a System  
to Implement Exceptions*

Having discerned that each state can and should provide exceptions to time limits for survivors of domestic violence, each state now must design procedures that both offer easy access to families struggling with violence and adequately protect the state's interest in administering scarce resources properly. Before exploring in a more detailed manner the legal and procedural mechanisms available to states, it is appropriate to evaluate in general terms how the system should be structured to effect the interests of both the applicants and the states.

In general, those who apply and qualify for an exception will be poor, unemployed, and relatively uneducated women faced with the imminent loss of income. All will have young children needing their attention, and many will have long histories of abuse. Few will have the assistance of counsel or even social service workers in preparing the application.<sup>181</sup> Some may not be fluent in English. Accessibility and simplicity, therefore, must be hallmarks of the application process for an exception for survivors of domestic violence. The application process should be informal, uncomplicated, and expedited.<sup>182</sup> Because many survivors of violence have had limited interactions with

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<sup>181</sup> Survivors of domestic violence often do not have the means to obtain representation. For example, petitioners for orders of protection, often survivors of domestic violence, frequently appear pro se. See Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 *Hastings Women's L.J.* 339, 350 n.38 (1995) (citing statistics that in three different jurisdictions, 80%, 80.03%, and 65.8% of petitioners for orders of protection appeared pro se).

<sup>182</sup> Applicants also have a due process interest in having fair and objective procedures. While *Goldberg v. Kelly*, 397 U.S. 254 (1970), held that AFDC recipients were entitled to a full and fair hearing before the government reduced their benefits, see *id.* at 267-68, the applicability of *Goldberg* in the Personal Responsibility Act regime is unclear because welfare is no longer viewed as an entitlement, see *Hershkoff & Loffredo*, *supra* note 11, at 53-54. The Personal Responsibility Act implicitly recognizes, however, that states must continue to conform to due process in its requirement that states provide "an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process." Personal Responsibility Act, 42 U.S.C.A. § 602(a)(1)(B)(iii) (West Supp. 1997). Because the Act does not impose any specific requirements on states and therefore leaves the exact scope of due process rights in this area unsettled, see *Hershkoff & Loffredo*, *supra* note 11, at 54 (calling on states to guarantee adequate notice and hearing rights and on courts to hold such rights constitutionally mandated), they are not the focus of the regime proposed in this Note, see *infra* Part III.C.4. (recommending limited review of adverse decisions).

social service agencies, police, or courts,<sup>183</sup> it is in their interest to have an application procedure that honors evidence of abuse from sources other than "official" ones.

Because states have limited resources to allocate for administration of their programs,<sup>184</sup> they will need to create easily administrable systems, characterized by time- and personnel-efficient procedures. An application process in which applicants present their petitions and supporting evidence in the form of affidavits and documents is preferable, so that time-consuming personal appearances are kept to a minimum. States likely will want to set time limits to govern the period in which a petitioner must file a complete application and in which the agency must make its decision. They will want to set evidentiary hurdles low enough so that decisionmakers have discretion to award exceptions when they believe that evidence of domestic violence is truly compelling, and yet high enough to deter fraudulent claims.<sup>185</sup>

Because states have had to create and implement an entire regime of welfare and work-preparation programs in a very short period of time,<sup>186</sup> it is in their best interest to draw from experience in creating a system to administer an exception to welfare time limits. For example, to the greatest extent possible, states will want to use personnel previously trained in evaluating claims of violence. They also should look to procedures already developed in other areas of the law in which state officials evaluate allegations of domestic violence. The following section outlines two such procedures.

### *B. Two Models of Administration*

#### *1. The Good Cause Exception to the AFDC Paternity Cooperation Requirement*

A procedure that states can look to for guidance is one that was developed under AFDC to administer the good cause exception to paternity cooperation requirements.<sup>187</sup> Under AFDC, mothers were

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<sup>183</sup> See, e.g., Ferraro, *supra* note 113, at 172 (finding that abusers intimidate and manipulate women to drop charges).

<sup>184</sup> See Personal Responsibility Act, 42 U.S.C.A. § 604(b)(1) (West Supp. 1997) (limiting to 15% portion of block grant that may be allocated for administrative purposes).

<sup>185</sup> For a discussion of the actual likelihood of fraudulent claims, see *infra* notes 236-37 and accompanying text.

<sup>186</sup> See Personal Responsibility Act, 42 U.S.C.A. § 601 note (West Supp. 1997) (setting transition date at later of either July 1, 1997 or six months after submission of state plan to Secretary of Health and Human Services).

<sup>187</sup> While the Personal Responsibility Act rejected AFDC as a flawed and failed system, see *supra* notes 40-43 and accompanying text, and encouraged states to experiment with new ideas and programs, see *supra* notes 51-53 and accompanying text, for states to discard every aspect of the AFDC regime would be indiscriminate and inefficient. While states

required to establish the paternity of their children so that child support payments could be levied from the father. Good cause for non-compliance existed when a petitioner's cooperation in establishing paternity was reasonably anticipated to result in physical or emotional harm to the child or to the child's parent or caretaker relative.<sup>188</sup> When a mother did not comply with cooperation requirements, the agency would advise her in writing of her duties, the penalties for non-cooperation, and the availability of the good cause exception.<sup>189</sup> If she then claimed to be eligible for the exception, she was not required to appear in person at the agency, but had twenty days to provide corroborative evidence of her claim to the agency.<sup>190</sup> The agency, at the request of the petitioner, would assist her in obtaining such evidence,<sup>191</sup> but ultimately, the petitioner had the burden of proof.<sup>192</sup>

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should not overlook the system's shortcomings, they also should not refuse to recognize its merits.

Federal regulations implementing AFDC's good cause exception are a valuable resource because they provide states with an example of a detailed procedural system that received and evaluated allegations of domestic violence. Further, the general structure of AFDC paternity cooperation requirements parallels the time limit system Congress established under the Personal Responsibility Act, involving overarching state discretion, certain federal requirements, and a good cause exception to an otherwise strict rule. See 42 U.S.C. § 654(3)-(4) (1994), amended by Personal Responsibility Act, 42 U.S.C.A. § 654 (West Supp. 1997) (giving substantial power to states to develop and administer plans for establishing paternity); *id.* § 602(a)(26)(B), amended by Personal Responsibility Act, 42 U.S.C.A. § 602 (West Supp. 1997) (requiring states to terminate benefits of any parent who refused to cooperate in establishing paternity and/or securing child support payments and allowing noncompliant parents to retain benefits upon showing of good cause).

<sup>188</sup> See 45 C.F.R. § 232.42(a)(1) (1996) (requiring anticipated harm to be so severe as to reduce caretaker's capacity to care for child adequately). The purpose of the exception was to protect the best interests of the child involved. See *id.* § 232.42(a) (defining good cause circumstances as those under which cooperation would be against child's best interests).

<sup>189</sup> See *id.* § 232.40(b) (requiring notice to applicant). The regulations require that a copy of the notice be delivered to the parent by hand and that the parent sign another copy to verify its receipt. See *id.* § 232.40(b)(1)(ii)-(iii).

<sup>190</sup> See *id.* § 232.43(b) (setting time limitations for production of evidence with reasonable extensions in extraordinary cases). In practice, the good cause exception was rarely invoked. Less than one percent of AFDC recipients applied for it. See Raphael, *supra* note 125, at 222 (citing 60 Fed. Reg. 33,211 (1995)). Of those who did apply, just over 64% had their applications granted. See Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's Story of the Duty to Establish Paternity*, 3 *Am. U. J. Gender & L.* 247, 248 n.2 (1995) (citing Office of Child Support Enforcement, Sixteenth Annual Report to Congress 108 (1991)). Observers attribute the dearth of applications to several factors, including insufficient publicity about the existence of the exception, see *id.*, and fear that claims and information about intra-family violence would not be kept confidential, see Raphael, *supra* note 125, at 222.

<sup>191</sup> See 45 C.F.R. § 232.40(b)(2)(ii)(B) ("[U]pon request, the State or local agency will provide reasonable assistance in obtaining the corroborative evidence . . ."). The petitioner received this information in writing from the agency. See *id.* § 232.40(b)(1)(ii).

Acceptable corroborative evidence was defined broadly.<sup>193</sup> If the petitioner made a claim of anticipated physical harm but lacked any corroborative evidence, she could still prevail. However, in such a situation, the agency not only had to be satisfied that her claim was credible, but also had to contact the putative father to verify her claims.<sup>194</sup> To avoid this notice to the abuser, the petitioner had to withdraw her claim.<sup>195</sup>

The agency would render its final decision within forty-five days of the initial claim.<sup>196</sup> If the petitioner's application was granted, supervisory personnel within the agency automatically would review the decision, with the discretion to accept or reject the outcome.<sup>197</sup> If the petitioner's application was denied initially or by supervisors, she had no right of appeal.<sup>198</sup>

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<sup>192</sup> See id. § 232.43(a) (stating that if agency found that corroborative evidence "actually verifie[d]" claim, petitioner would be excused from cooperation requirement). In practice, it seems that state agencies adhered to stringent evidentiary standards and largely were unwilling to grant uncorroborated claims. For example, one Minnesota court held that a mother/applicant who had been raped by her child's father but did not report the rape to the police for fear of further harm to herself and her child did not qualify for the good cause exception because she lacked corroborative evidence. See *Waller v. Carlton County Human Servs. Dep't*, No. C6-89-1116, 1989 WL 145393 (Minn. Ct. App. Dec. 5, 1989).

<sup>193</sup> Acceptable corroborative evidence included:

- (3) Court, medical, criminal, child protective services, social services, psychological, or law enforcement records which indicate that the putative father . . . might inflict physical or emotional harm on the child or caretaker relative;
- (4) Medical records which indicate emotional health history and present emotional health status . . . or, written statements from a mental health professional indicating a diagnosis or prognosis . . . ;
- (6) Sworn statements from individuals other than the applicant or recipient with knowledge of the circumstances which provide the basis for the good-cause claim.

45 C.F.R. § 232.43(c)(3)-(4), (6).

<sup>194</sup> See id. § 232.43(f)(1), (h)(1) (requiring agency to investigate and defining investigation as contacting putative father). This rule in effect removed the possibility of prevailing on a credible but uncorroborated claim. Many abused women would rather have withdrawn their claims and lost their benefits than risked being located again by their abusers. By contacting a father to corroborate an application, the state imperiled, rather than insulated, an abused mother or child.

<sup>195</sup> See id. § 232.43(h)(2)(ii).

<sup>196</sup> See id. § 232.41(c) (requiring decision within 45 days unless additional time is needed to gather corroborative evidence).

<sup>197</sup> See id. § 232.43(f)(3) ("A determination that good cause exists will be reviewed and approved or disapproved by supervisory personnel . . .").

<sup>198</sup> See id. § 232.41(d) (stating that if agency determines good cause does not exist, applicant may cooperate or face sanctions).

## 2. *Self-Petitioning Procedures for Battered Immigrant Spouses Under the Violence Against Women Act*

A second procedure states may draw from is the system created by the Immigration and Naturalization Service (INS) to allow battered immigrant spouses to self-petition for adjustments to their residency status.<sup>199</sup> The Immigration Act of 1990<sup>200</sup> created a "battered spouse waiver" that was designed to allow battered immigrant women with conditional residency to receive permanent residency without the sponsorship of their abusive husbands if they could show that they or their children had been "battered by or . . . the subject of extreme cruelty perpetrated by" their husbands.<sup>201</sup> Regulations promulgated in 1991 by the INS to interpret this provision included an expansive definition of domestic violence<sup>202</sup> but imposed very exacting evidentiary requirements on claimants: While the regulations allowed the INS to receive any evidence of physical abuse,<sup>203</sup> they preferred and assigned weight to "expert testimony" and documentary proof from state agencies.<sup>204</sup> Claims of extreme cruelty had to be accompanied by an affidavit from a licensed mental health professional.<sup>205</sup> However, this emphasis on expert testimony and evidence from governmental and quasi-governmental agencies proved to be unworkable.<sup>206</sup>

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<sup>199</sup> Federal regulations implementing self-petitioning procedures are instructive for states primarily because they are the product of experimentation with varied evidentiary standards. States' decisions about what constitutes acceptable evidence will be one of their principal means of determining how many exceptions they will give. See *infra* note 228 and accompanying text.

<sup>200</sup> Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

<sup>201</sup> 8 U.S.C. § 1186a(c)(4)(C) (1994).

<sup>202</sup> "Battered" or "subject to extreme cruelty" was defined as including, but not limited to,

being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence.

8 C.F.R. § 216.5(e)(3)(i) (1997). While it is expansive and not exclusive, this definition has been criticized for not explicitly including neglect and deprivation. See Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 *Berkeley Women's L.J.* 99, 113 (1996).

<sup>203</sup> See 8 C.F.R. § 216.5(e)(3)(iii) (stating that "[e]vidence of physical abuse may include, but is not limited to expert testimony").

<sup>204</sup> See *id.* (listing possible evidence as "reports and affidavits from police, judges, medical personnel, school officials and social service agency personnel").

<sup>205</sup> See *id.* § 216.5(e)(3)(iv), (vii).

<sup>206</sup> See Franco, *supra* note 202, at 128-29 (noting that many women prefer to turn to alternative sources of support); Sandra D. Pressman, *The Legal Issues Confronting Conditional Resident Aliens Who Are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 *Md. J. Contemp. Legal Issues* 129, 143 (1994-95) (noting hurdles as reluc-

In 1994, Congress passed the Violence Against Women Act<sup>207</sup> (VAWA). One section of VAWA allows battered immigrants to self-petition either for an initial residency classification or for unconditional permanent resident status without having to rely on their abusive partners to sponsor them through a joint petition.<sup>208</sup> In light of VAWA, the INS has recently promulgated new and improved regulations regarding evidentiary standards to be employed in evaluating claims of battery and extreme cruelty.<sup>209</sup> The regulations indicate that credible evidence of abuse includes not only the reports and affidavits of "state actors" (including police, judges, medical personnel, school officials, clergy, and social service agency personnel) and official documents (such as orders of protection and documents relating to legal actions taken against the abuser),<sup>210</sup> but also evidence that the petitioner sought refuge in a battered women's shelter, photographs of injuries, and affidavits from any parties with knowledge of the abuse.<sup>211</sup>

### *C. A Proposal for Implementing an Exception to Time Limits for Survivors of Domestic Violence*

#### *1. Publicize Availability of Exception and Encourage Applications*

The first step in creating an effective regime is to ensure that welfare recipients know that an exception to time limits is available to survivors of domestic violence and to inform them of what they need to do to receive one.<sup>212</sup> For example, information on the availability of and general requirements for an exception could be distributed

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tance to confide in "outsiders," confidentiality concerns, and access—financial and linguistic—to professionals); Tien-Li Loke, Note, Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women, 6 B.U. Pub. Int. L.J. 589, 598-99 (1997) (critiquing 1991 INS regulations).

<sup>207</sup> Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-1955 (codified as amended in scattered sections of 8, 18, 28, 42 U.S.C.).

<sup>208</sup> See 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv) (1994) (allowing spouse or child of U.S. citizen to self-petition for classification as immediate relative).

<sup>209</sup> See 8 C.F.R. § 204.2 (1998) (West, WESTLAW through Mar. 9, 1998; 63 Fed. Reg. 11,550).

<sup>210</sup> See id. § 204.2(c)(2)(iv).

<sup>211</sup> See id. While this language does not preclude the INS from granting a petition based on a single affidavit from the petitioner herself, in their proposal form, these regulations provided that "[t]he Service is not precluded from deciding . . . that the self-petitioner's unsupported affidavit is credible and that it provides relevant evidence of sufficient weight to meet the self-petitioner's burden of proof." Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061, 13,066 (1996) (to be codified at 8 C.F.R. pts. 103, 204, 205 & 216) (proposed Mar. 26, 1996).

<sup>212</sup> The 60-month limit on benefits has been a heavily publicized aspect of the new regime. While it is fair to assume that most benefit recipients are aware of at least the major

along with benefit checks. The state welfare agency's efforts must be sufficient to break through the isolating shield that often surrounds violent homes and relationships. This may require action in addition to mailings, such as personal contact between case workers and welfare recipients.<sup>213</sup>

States should focus these efforts particularly on families who are nearing the sixty-month limit, perhaps starting around the forty-eighth month. Potential applicants must have sufficient time and opportunity to assess the likelihood of needing such an extension and to begin to gather evidence to support their application.<sup>214</sup> For families receiving their fifty-eighth and fifty-ninth months of benefits, the state welfare agency should provide written notice, perhaps modeled on that provided for in the good cause exception,<sup>215</sup> explaining that their benefits will be terminated soon, that an exception is available, and how to take advantage of that exception.

## 2. *Provide Confidentiality Guarantees to Applicants*

When a mother reveals that there is violence in her home, she opens herself to several risks. The violence may escalate if her abuser learns that she is seeking help. Also, if her children are being abused by her partner as well, as is likely in many cases,<sup>216</sup> she could be opening herself to liability for not shielding them from abuse.<sup>217</sup> Thus, the

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features of welfare reform, it is incumbent on states to notify welfare recipients of all the features of their new welfare programs, including both the limitations and exceptions.

<sup>213</sup> Under the Family Violence Option states are advised to identify violent homes. See Personal Responsibility Act, 42 U.S.C.A. § 602(a)(7)(A) (West Supp. 1997). A state should make particular efforts to communicate information about the exception to families so identified.

<sup>214</sup> Sufficient advance notice may allow an applicant not only to gather records surrounding her prior reports of abuse, but also to generate evidence—by seeking the help of legal or social service agencies, by reporting injuries and collecting medical documentation, or even by informing others of her situation so that they will be able to corroborate her story.

<sup>215</sup> See *supra* note 189 and accompanying text.

<sup>216</sup> See Panel on Research on Violence Against Women, *supra* note 154, at 84-85 (citing studies indicating that three million children are exposed to battering each year and therefore are at risk of physical or sexual abuse, and emotional and behavioral problems).

<sup>217</sup> See, e.g., Mary E. Becker, Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for the Acts of Others, 2 U. Chi. L. Sch. Roundtable 13, 26 (1995) (noting that mothers may be subject to criminal or civil liability for not preventing abuse); V. Pualani Enos, Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children, 19 Harv. Women's L.J. 229, 236-38 (1996) (discussing "failure to protect" doctrine); Linda J. Panko, Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse, 6 Hastings Women's L.J. 67, 90-91 (1995) (recognizing that fear of legal action is factor encouraging silence in face of abuse); Joan Zorza, Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women, 29 Fam. L.Q. 273, 294-99 (1995)



uses to which information an applicant provides can be put will be a significant factor affecting the willingness of women to self-identify as eligible recipients of an exception to welfare time limits.<sup>218</sup>

In general, the Personal Responsibility Act allows states to fashion their own rules concerning the disclosure of information about benefit recipients.<sup>219</sup> The Family Violence Option and the proposed HHS rule, however, both call for states to maintain the confidentiality of individuals who have been identified as having histories of domestic violence.<sup>220</sup> States should adopt this approach and provide a clear policy on confidentiality in order to ensure that an exception designed to assist families will not become a vehicle for separating mothers from their children as well.<sup>221</sup> Such a policy should guarantee that

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(discussing application of confidentiality laws to battered women and relation to child abuse reporting requirements).

<sup>218</sup> Indeed, the good cause exception procedures did not make confidentiality promises explicit, which may have dissuaded petitioners. See *supra* note 190.

<sup>219</sup> See Personal Responsibility Act, 42 U.S.C.A. § 602(a)(1)(A)(iv) (West Supp. 1997) (requiring states to "[t]ake such reasonable steps as the State deems necessary to restrict the use and disclosure of information about individuals and families receiving assistance"). Under the AFDC regime, there was a "shield of confidentiality over information regarding AFDC applicants and recipients." *Wisconsin ex rel. Dombrowski v. Moser*, 334 N.W.2d 878, 880 (Wis. 1983). The AFDC statute, 42 U.S.C. § 602(a)(9) (1994), amended by Personal Responsibility Act, 42 U.S.C.A. § 602 (West Supp. 1997), and its corresponding federal regulation, 45 C.F.R. § 205.50 (1997), allowed states to disclose information about benefit recipients only for limited purposes. See *id.* § 205.50(a)(1)(i). These purposes included:

[t]he administration of the plan . . . [such as] establishing eligibility, determining the amount of assistance, and providing services for applicants and recipients[.] . . . [a]ny investigation, prosecution, or criminal or civil proceeding conducted in connection with the [welfare plan,] . . . [and t]he reporting to the appropriate agency or official of information on known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child receiving aid under circumstances which indicate that the child's health or welfare is threatened.

*Id.* § 205.50(a)(1)(i)(A)-(B), (G).

<sup>220</sup> See Personal Responsibility Act, 42 U.S.C.A. § 602 (a)(7)(A)(i) (West Supp. 1997); see also Temporary Assistance for Needy Families Program (TANF) Proposed Rule, 62 Fed. Reg. 62,124, 62,128 (1997) (to be codified at 45 C.F.R. pts. 270-75) (proposed Nov. 20, 1997) ("[W]e also encourage States to pay special attention to the need for maintaining the confidentiality of case-record information and the victims' own assessments of their safety needs and their abilities to meet program requirements."). But cf. NOW LDEF Sample Comment, *supra* note 80, at 3 (noting that call for confidentiality in preamble to proposed rule was not incorporated in rule itself and urging final rule to include confidentiality protections in their definition of "good cause domestic violence waiver").

<sup>221</sup> For an example of a potential confidentiality policy, see NOW Legal Defense and Education Fund, Model Language for New York State Legislation Implementing the Family Violence Option under TANF (1997) [hereinafter NOW LDEF Model Language] (on file with the *New York University Law Review*). The policy states:

This information shall be used by the state agency solely for the purpose of referral to services [including shelter, medicine, legal counseling, mental health care, support groups, and financial assistance] or determining eligibility for

petitioners will not be subjecting themselves to custody battles with the state or to civil or criminal charges of failure to protect their children.<sup>222</sup> However, states that offer confidentiality should require that those who do receive an exception participate in programs specially designed to help survivors of violence move towards safety and work-readiness.

### 3. *Create Simple Application Procedures and Admit Evidence Freely*

States should spell out in detail what information they require for a successful application and the time frame for filing for an exception. States should be generous in setting such time limits. For example, if an abused woman enters a job immediately upon exhausting her sixty months of benefits, it may take her months to realize that she is not yet capable of long-term employment because of prior or continuing abuse. Thus, allowing the petitioner to apply for a waiver of time limits for up to one year after benefits have been terminated, with extensions as needed, would give her a reasonable amount of time to assess her situation and the necessity of an exception.

An informal,<sup>223</sup> "paper-based" application, where a petitioner presents her case through affidavits and other documents instead of through personal testimony, is preferable from all perspectives because it is less intimidating for a petitioner and easier for administrators to evaluate.<sup>224</sup> The good cause exception and VAWA's self-petitioning procedures demonstrate the advisability of this course, since both rely on paper-based applications.<sup>225</sup>

In implementing exceptions to welfare time limits for survivors of violence, states should set a low evidentiary hurdle, akin to a prepon-

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waivers . . . Information with respect to victims of domestic violence . . . shall not be released to any outside party or parties or other governmental agencies, unless the information is required to be disclosed by law . . . This includes but is not limited to information on the applicant or recipient's current address, workplace or work placement, that the individual has been identified as the victim of domestic violence or any details concerning the domestic violence.

Id. at 4.

<sup>222</sup> See *supra* note 217 and accompanying text.

<sup>223</sup> Requiring formal pleadings with legalistic wording would be impractical.

<sup>224</sup> For example, administrators will have the entire application in front of them at once, without having to wait for witnesses. State agencies, however, may want to reserve the possibility of speaking with the applicant directly in some circumstances.

<sup>225</sup> See *supra* note 193 (listing records and affidavits constituting acceptable evidence for good cause exception); *supra* notes 210-11 and accompanying text (describing acceptable evidence for self-filed petitions).

derance of the evidence standard,<sup>226</sup> and allow a wide range of acceptable evidence. The evolution of the VAWA regulations suggests that stricter evidentiary requirements prevent many battered women from successfully documenting their abuse, thereby denying them desperately needed assistance because of the lack of "official" proof.<sup>227</sup> Further, the mark of a state's commitment to providing exceptions for survivors of violence will be the number of exceptions it grants. Publicity and ease of application will mean little if a state holds the petitioner to such a high burden of proof as to achieve the result of actually granting very few exceptions.<sup>228</sup> A state therefore must create procedures that will serve its interests both in protecting survivors of abuse and in identifying and dismissing fraudulent applications.

Limiting the category of credible proof to documents from state actors (such as court documents or police reports) would fail to recognize that many women do not turn to such actors for relief.<sup>229</sup> Some confide in no one at all. Therefore, states should provide petitioners with a detailed, yet open ended list of acceptable evidence of abuse.<sup>230</sup> The regulations implementing both the good cause exception<sup>231</sup> and the self-petitioning procedures<sup>232</sup> are viable examples. Such a list could include court papers (orders of protection and other legal actions taken against the abuser), medical records, police files, records of social service agencies (including shelters), psychologists' files, school records, photographs of injuries, and affidavits from community and religious leaders, neighbors, family, friends, and the petitioner herself.

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<sup>226</sup> In general, there are three formal burdens of proof: "beyond a reasonable doubt," "by clear, strong and convincing evidence," and "by a preponderance of evidence." 2 Kenneth S. Broun et al., *McCormick on Evidence* § 339, at 437-38 (John William Strong ed., 4th ed. 1992) (citations omitted). "Preponderance of the evidence" is defined as proof which leads the factfinder to find the existence of the contested fact to be more probable than its nonexistence. See *id.* at 439.

<sup>227</sup> See *supra* notes 203-06 and accompanying text.

<sup>228</sup> States frequently use evidentiary standards to encourage and reward favored claims and discourage disfavored claims. See Dale A. Nance, *Civility and the Burden of Proof*, 17 *Harv. J.L. & Pub. Pol'y* 647, 670 (1994) (discussing ways of disfavoring claims).

<sup>229</sup> See *supra* note 206 and accompanying text (discussing inaccessibility of official actors for many survivors of domestic violence).

<sup>230</sup> It is important to provide applicants with a detailed list because such a list may give them direction regarding what evidence to collect. An "any credible evidence" rule, while all-inclusive, would not provide applicants with ideas.

<sup>231</sup> See 45 C.F.R. § 232.40(c)(1)(i)-(iii) (1997).

<sup>232</sup> See 8 U.S.C. § 1154(a)(1)(H) (1994) (creating self-petitioning procedures for battered immigrant women, listing examples of acceptable evidence of abuse, and calling for all credible evidence); see also 8 C.F.R. § 204.2(c)(2)(iv) (1998) (West, *WESTLAW* through Mar. 9, 1998; 63 *Fed. Reg.* 11,550) (listing acceptable evidence of abuse).

Situations where a petitioner's only evidence of abuse is her uncorroborated affidavit obviously will be problematic for states because of the increased possibility of fabrication and fraud. While states could refuse wholesale to accept uncorroborated allegations of violence, such a policy effectively would ignore the isolating nature of domestic violence. Three other options are available. First, the state could adopt the method used by the good cause exception: to seek to corroborate the affidavit by contacting the alleged abuser.<sup>233</sup> Such a policy, however, would violate confidentiality requirements<sup>234</sup> and potentially imperil the safety of the applicant. A second, less troublesome option would be for the state agency to evaluate an uncorroborated affidavit and, if it has a ring of authenticity, to interview the petitioner personally to judge her credibility. A third option would be to adopt a rule that an uncorroborated affidavit is sufficient evidence of abuse to warrant an exception absent any independent reason to find it not credible.<sup>235</sup>

At first glance, concerns about fraud might argue against the third option. However, fear that benefit recipients seeking a "free ride" will file a substantial number of fraudulent applications should not yet unduly influence the systems states create. While states obviously have no experience in this precise area, studies indicate that the number of fraudulent AFDC applications was low<sup>236</sup> and that allegations of abuse in child custody disputes, where the stakes are quite high, are rarely deliberately false.<sup>237</sup> Given that states retain the dis-

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<sup>233</sup> See *supra* note 194 and accompanying text (describing policy of contacting putative abuser/father to verify uncorroborated claim).

<sup>234</sup> See *supra* Part III.C.2.

<sup>235</sup> See, e.g., NOW LDEF Model Language, *supra* note 221, at 7 (providing that "[a]llegations of domestic violence by a victim shall be sufficient to establish domestic violence where the agency has no independent, reasonable basis to find the recipient not credible"); see also *supra* note 211 (noting that new INS regulations on self-petitioning procedures do not preclude granting petitions based on single affidavit of petitioner).

<sup>236</sup> For example, the state of California estimated that only 9.4% of AFDC cases involved errors. "Error" included not only fraud, but also welfare department mistakes and honest client errors. See Stephen Bingham, *Replace Welfare for Contingent Workers with Unemployment Compensation*, 22 *Fordham Urb. L.J.* 937, 938 n.7 (1995) (citing State Department of Social Services, AFDC Quality Control Corrective Action Plan: Oct. 1990-Sept. 1991).

<sup>237</sup> Although generally they are viewed with great suspicion, allegations of child abuse made during custody disputes are actually rare. See Nancy Thoennes & Jessica Pearson, *Summary of Findings from the Sexual Abuse Allegations Project, in Sexual Abuse Allegations in Custody and Visitation Cases: A Recourse Book for Judges and Court Personnel* 1, 4 (E. Bruce Nicholson & Josephine Bulkley eds., A.B.A. 1988) (concluding that sexual abuse allegations are likely to occur in 2 to 15 of every 1000 divorces). When such allegations are made, they typically are made in good faith. See *id.* at 20-21 (finding that only 15% of 160 cases of alleged child sexual abuse were deliberately false).

cretion to reevaluate and alter their system for exceptions, they initially should not shape their systems around unfounded suspicion.

#### 4. *Expedite Decisionmaking and Provide for Limited Review*

Petitioners whose applications are denied face an almost immediate loss of income. Therefore, states should evaluate applications for exceptions at a relatively rapid pace and inform applicants of the outcome of their petitions quickly. Ideally, states should attempt to reach their decisions within ten to fourteen days. Of course, some applications may take longer to evaluate.<sup>238</sup> For example, if the state agency wishes to interview an applicant who submitted a credible but uncorroborated affidavit, two weeks likely will be too short a period.

States also should develop some sort of formal review process. Here, states should deviate from the good cause exception model, as it provided only for intra-agency review of decisions favorable to the petitioner.<sup>239</sup> Because the denial of an exception to welfare time limits will have a massive impact on the petitioner's family, states should create at least an intra-agency process for appeal and review for petitioners whose applications are denied.<sup>240</sup>

#### 5. *Schedule Evaluation in 2003*

The earliest date on which states could receive block grants and assume administration of their own welfare programs was July 1, 1997.<sup>241</sup> Therefore, the earliest possible date on which a welfare recipient could reach her benefit limit and therefore be eligible for an exception is July 1, 2002.

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<sup>238</sup> Nevertheless, the 45-day response time mandated by the good cause exception regulations, see 45 C.F.R. § 232.41(c) (1997), seems too prolonged.

<sup>239</sup> See *supra* note 197 and accompanying text.

<sup>240</sup> Establishing a process of appeal is particularly important because experience under AFDC shows that most denials of welfare benefits were reversed after a fair hearing. See Hershkoff & Loffredo, *supra* note 11, at 29 (stating that "[m]ost AFDC families win their hearings" and recalling that in 1983, 75% of New York City families prevailed in fair hearings).

Again, although due process concerns also are implicated by an appeal process, see *supra* note 182, it is beyond the scope of this Note to explore in depth the potential impact of the Due Process Clause on applications for exceptions for survivors of violence. See *id.* For a proposal incorporating the constitutionally required fair hearing process established by *Goldberg v. Kelly*, 397 U.S. 254 (1970), see NOW LDEF Model Language, *supra* note 221, at 6-7 ("Denials of requests for waivers . . . shall be in writing and shall state the reason for denial. . . . Such denials may be appealed through the fair hearing procedure applicable to other determinations of TANF eligibility, progress or status.").

<sup>241</sup> See Personal Responsibility Act, 42 U.S.C.A. § 601 note (West Supp. 1997) (setting transition date at later of either July 1, 1997 or six months after submission of state plan to Secretary of Health and Human Services).

Critics of the relaxed standards proposed above may claim that an exception so conceived will invite present benefit recipients to continue in a lifestyle of dependency under the assumption that they will be able to petition successfully for an exception in sixty months. However, the availability of exceptions does not exist in a vacuum. In the next five years, states will be experimenting with and implementing myriad programs to end dependency, identify and assist families destroyed by violence, and prepare today's welfare recipients for education and work. If the states have the success envisioned by the Personal Responsibility Act, there should be little need for exceptions.

In the experimental spirit of the Personal Responsibility Act, it seems appropriate that states choosing to implement an exception to welfare time limits for survivors of violence modeled on the proposals of this Note commit to evaluating whether a system so implemented actually has achieved its intended effects. It would be appropriate for states to engage in such an evaluation after at least a year of implementation and observation, in 2003.

### CONCLUSION

In this time of welfare reform, states must balance programs that transition benefit recipients into the workplace with programs that provide support for those who cannot yet become independent, such as those trapped in the cycle of domestic violence. The Personal Responsibility Act established a sixty-month cap on benefits on the view that time-limited welfare benefits will encourage self-sufficiency. This Note contends that, whatever the effect of such a cap generally, it will cause great harm to survivors of domestic violence because of their diminished capacity to enter the workforce successfully. It examines arguments—grounded in the Personal Responsibility Act and in policy—supporting and opposing the creation of an exception for survivors of domestic violence and concludes that states can and should implement an exception to time limits. Drawing from AFDC regulations implementing a good cause exception to paternity cooperation requirements and VAWA's self-petitioning procedures for battered immigrant women, this Note proposes that states create an exception regime characterized by the encouragement of applications, confidentiality guarantees to applicants, simple application procedures and low standards of proof, broad categories of admissible evidence, expedited decisionmaking, and availability of review. Such a regime should be but one of the ways in which states manifest a concrete commitment to survivors of domestic violence. The ultimate goal, of course, is the creation of a society in which families can live healthy, whole lives, free from the specters of poverty and violence.