NEW YORK LAW SCHOOL

NYLS Law Review

Volume 44 | Issue 1 Article 8

January 2000

# CHOOSING BETWEEN AN EDUCATION AND A WELFARE CHECK: AN EXAMINATION OF THE NEW YORK CITY WORKFARE SYSTEM

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# CHOOSING BETWEEN AN EDUCATION AND A WELFARE CHECK: AN EXAMINATION OF THE NEW YORK CITY WORKFARE SYSTEM

> The surest way to move people from welfare to work is through education and training . . . yet, too often, students are being forced to choose between their benefits and their education, to no one's benefit.
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> Ruth Messinger, Manhattan Borough President, 1997

## I. INTRODUCTION

In response to President Bill Clinton's pledge to "end welfare as we know it,"[1] Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRA) on August 22, 1996.[2] The PRA represents a fundamental shift in ideology from the prior welfare law, the Family Support Act of 1988 (FSA).[3] Where the FSA promoted the use of educational and training programs as a means of expediting the recipient's permanent transition into the job market,[4] the PRA proposes that welfare recipients must work for their benefits.[5] Although the new law encourages some educational initiatives, the law leaves the responsibility for developing work programs predominantly to the states.[6]

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1. Craig L. Briskin, *The Waging of Welfare: All Work and No Pay?*, 33 HARV. C.R.C.L. L. REV. 559, 562 (1998).

2. Personal Responsibility and Work Opportunity Reconciliation Act (PRWOR) of 1996, 42 U.S.C.A. § § 601-1778 (1996).

3. *See* Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 20 (1998) (stating that the "FSA's work requirements were intended to supply welfare recipients with the skills, training and experience necessary to facilitate entry into the job market" and the PRA "adopts the approach that work requirements should serve as deterrents to receipt of benefits").

4. *See infra* notes 19-29 and accompanying text.

5. *See infra* notes 32-41 and accompanying text.

6. *See infra* notes 38-40 and accompanying text.

In response to the new federal law, the State of New York passed the Welfare Reform Act of 1997.[7] The state law, similar to the federal law, gave local social service districts tremendous flexibility to administer the work programs.[8] The City of New York, through Mayor Rudolph Giuliani, created the Work Experience Program (WEP), "one of the toughest welfare-to-work programs in the country."[9] WEP requires that everyone on public assistance "must either find a paying job or work for the City in order to receive his or her benefits."[10] The Mayor enforces this universal work requirement with few exceptions.

Mayor Giuliani's hard-line approach to welfare does have a number of advantages. It teaches recipients "to be responsible, to show up for work on time, to dress appropriately and to respect authority."[11] In some instances, it allows recipients to develop a skill. Despite these benefits, the policy has had a detrimental effect upon recipients who are pursuing an education.[12] In an effort to shrink welfare rolls quickly, the City refuses to accommodate, and even interferes with, students' efforts to obtain an education.[13]

This Note does not dispute the value of work and responsibility. The City, as a whole, would benefit if individuals worked in exchange for their welfare checks. However, the City's workfare program clearly places unfair, unreasonable and unlawful burdens on student recipients.[14] This Note evaluates the impact of the New York City workfare system on student recipients and the manner in which the program violates state statutory and constitutional requirements. Part Two of this Note discusses changes in the welfare law at the federal and the local levels. Part Three examines the legal challenges which have been raised to New York City's workfare program, and Part Four discusses the growing importance of education in state constitutional law and the right to education embodied in the New York State Constitution.

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7. *See* Timothy J. Casey, *Welfare Reform and its Impact in the Nation and in New York*, at http.//www.welfarelaw.org (last updated Aug. 15, 2000).

8. *See id.*

9. *All Things Considered: News* (NPR radio broadcast, Apr. 13, 1998), *available at* 1998 WL 36444526.

10. *Id.*

11. *Welfare Reform-For Now*, N.Y. POST, Dec. 13, 1998, at 74.

12. *See infra* notes 75-159 and accompanying text.

13. *See infra* notes 75-159 and accompanying text.

14. *See infra* notes 75-159 and accompanying text..

Statistics show that education is the cornerstone of a healthy and productive professional career.[15] Evidence of the state's interest in promoting education clearly can be seen in the New York State Constitution and the state Social Services Law.[16] Yet, the Giuliani Administration has blatantly disregarded this interest in favor of a workfare program which forces student recipients to choose between their welfare checks and their education.[17] The City's welfare policy makes it nearly impossible for students to balance a workfare activity and an education.[18] The coercion is unjustified, the approach counterproductive, and the policy unlawful.

## II. WELFARE REFORM: FEDERAL TO LOCAL

### A. *Federal Reform*

The FSA, which amended the long-standing Aid to Families with Dependent Children program (AFDC), promoted education, skills and training in order to prepare recipients for the job market and help them obtain long term employment.[19] The FSA required every state to implement a Job Opportunities and Basic Skills Training Program (JOBS).[20] Participation in JOBS was a condition to receive AFDC benefits.[21] In the list of JOBS activities, Congress included four mandatory activities which focused on long term employment, specifically high school or equivalent education, job skills training, job readiness training and job

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15. *See generally* Matthews v. Barrios-Paoli, 676 N.Y.S.2d 757, 763 (Sup. Ct. N.Y. County 1998) (citing a report by the New York City Comptroller which found that 62.8% of city residents who are high school graduates are employed as compared to only 44.6% of high school dropouts. The average monthly income for high school graduates is $1,380, while the average monthly income for dropouts is $906.).

16. *See* N.Y. CONST. art. XI, § 1; *see also* N.Y. SOC. SERV. L. § 336 (McKinney 1999).

17. *See infra* notes 75-159 and accompanying text.

18. *See infra* Part III.

19. *See* Diller, *supra* note 3, at 20.

20. *See* Lindsay Mara Schoen, *Working Welfare Recipients: A Comparison of the Family Support Act and the Personal Responsibility and Work Opportunity Reconciliation Act*, 24 FORDHAM URB. L.J. 635, 644 (1997).

21. *See id.*; *see also* Diller, *supra* note 3, at 20 (noting that Congress provided that only recipients actually engaged in JOBS activities for an average of twenty hours a week counted as participating).

development and placement.[22] Additionally, the states were required to implement two of four optional activities.[23]

The FSA also placed a heavy emphasis on educating certain classes of recipients, namely the young.[24] The Act mandated that teen parents who had not completed high school would receive educational placements.[25] Additionally, the FSA provided that enrollment in institutions of higher learning or courses of vocational training satisfied participation in the JOBS program.[26] A state could not assign an individual enrolled in an educational program to JOBS activities if it would interfere with their participation in the educational program.[27] Parents aged eighteen or nineteen could be assigned to job training or work activities in lieu of education only if an educational assignment was not in their best interests.[28] Finally, as a component of an individual's participation in the program, Congress required the states to assign each individual over the age of twenty who did not have a high school diploma to "educational activities consistent with his or her employment goals."[29]

The FSA's primary goals were to provide welfare recipients with the training and education necessary to expedite their transition into the job market and to promote self-sufficiency and responsibility.[30] Despite the FSA's commitment to education and training, welfare rolls continued to grow.[31]

In 1996, fulfilling his pledge to end welfare, President Clinton signed the PRA, whose approach directly contradicts the FSA.[32] The PRA repealed the JOBS program and replaced AFDC with Temporary Assis-

22. *See* Diller, *supra* note 3, at 21.

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.* at 33 n. 25

27. *See id.*

28. *See id.*

29. *Id.*

30. *See* Lisa Knott Garfinkle, *Two Generations at Risk: The Implications of Welfare Reform for Teen Parents and Their Children*, 32 WAKE FOREST L. REV. 1233, 1244 (1997); *see also* Diller, *supra* note 3, at 21.

31. Schoen, *supra* note 20, at 642.

32. *See* Garfinkle, *supra* note 30, at 1233; *see also* Diller, *supra* note 3, at 23 (stating that the PRA adopts an approach to work requirements that is the "antithesis of the FSA: it limits the ability of states to place recipients in educational and training assignments and removes all constraints on workfare assignments").

tance for Needy Families (TANF).[33] TANF is a block grant which conditions continued aid on a state's ability to get recipients off the rolls and into work.[34] Under TANF, the federal government provides money to the states, who are then responsible for creating and administering assistance programs, and establishing eligibility and work requirements.[35]

With a "work first" philosophy, the PRA discourages the use of educational and training programs.[36] Congress designed the plan to move individuals into the work force quickly and increase the amount of work over time.[37] The federal government still provides a list of activities that count as work requirements, but the states choose among those activities and define what constitutes work.[38] Although the federal law does not mandate any particular work approach, the TANF framework makes it nearly impossible for states to allow recipients to satisfy their work requirements through educational programs. For example, although the PRA lists a number of educational and training activities, participation in these activities does not count toward the first twenty hours per week of work activity.[39] Additionally, individuals may not be assigned to vocational training for more than twelve months.[40] In fact, "there is no instance where post-secondary education may be considered a work activity."[41]

The drafters of the PRA arguably viewed education and training as a means of avoiding work. Senator Phil Gramm (R-Texas) exemplified this outlook when he said, "Work does not mean sitting in a classroom. Work means work . . ."[42]

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33. *See* Briskin, *supra* note 1, at 563.

34. *See id.*

35. *See* Garfinkle, *supra* note 30, at 1245.

36. Briskin, *supra* note 1, at 563 (stating that the "PRA forwards a 'work first' philosophy, in that it does not count individuals in education or training for the purposes of calculating a state's participation rate").

37. *See* Schoen, *supra* note 20, at 646.

38. *See id.*

39. *See* Diller, *supra* note 3, at 24.

40. *See id.*

41. *Id.*

42. *Id.* at 25.

### B. *New York State Reform*

Although the PRA allows the states to establish workfare programs devoid of any educational and training components, New York opted to follow a different approach. New York responded to the PRA by passing the Welfare Reform Act of 1997 (WRA).[43] The 1997 law changed the names of two existing programs: (1) Family Assistance (FA) replaced AFDC; and (2) Safety Net (A) replaced Home Relief.[44] The new law mandated a switch from cash aid to "non-cash" aid after a household has received FA for five years or SA for two years.[45] The state welfare law also provides for statewide implementation of a "learnfare" program for children in first through sixth grade.[46] Under the program, a family's monthly grant will be reduced by sixty dollars for three months if a child has more than four unexcused absences in any academic quarter.[47] The funds will be restored if the child has no unexcused absences in the next quarter.[48]

The new state law also leaves existing provisions of the state social services law (SSL) unaltered. Numerous provisions of the SSL include educational and training components. For example, Section 332(c) of the SSL exempts from work requirements children who are under nineteen years of age and enrolled full-time in a secondary, vocational or technical school.[49] Section 336(a) of the SSL outlines the various educational activities that social services districts must make available to recipients of public assistance through the public assistance employment program.[50]

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43. *See* Casey, *supra* note 7, at 11.

44. *See id.*

45. *See id.* at 12 (stating that when non-cash aid is distributed, the welfare department may pay rent and utilities directly to the landlord and utility company, issue a small cash allowance of up to $1 a day for an individual, and issue any remaining benefits through an electronic benefit swipe card system- not yet operational- that can be used to purchase goods and services but not access cash).

46. *See id.*

47. *See id.*

48. *See id.*

49. *See* N.Y. SOC. SERV. LAW § 332(c) (McKinney 1999).

50. *See* N.Y. SOC. SERV. LAW § 336 (McKinney 1999)(The activities offered that deal with education are vocational educational training, job skills training directly related to employment, education directly related to employment, satisfactory attendance at secondary school or a course of study leading to a certificate of general equivalency, and educational activities pursuant to §366. Section 366(a) defines such activities as high school education or education designed to prepare a participant for a high school equiva-

Section 362(a) of the SSL provides that any participant who is under age eighteen shall be required to attend educational activities designed to prepare the individual for a high school degree or equivalency certificate.[51] Additionally, a social services official shall not assign a participant to any activity which "interferes with the educational activities assigned...."[52]

Section 336-a(5) of the SSL mandates that a public assistance recipient pursuing any of the educational programs described in 336-a, including high school, "shall not be assigned to any other activity prior to conducting an assessment and developing an employability plan."[53] The assessment must be based on the participant's educational level, skills, prior work experience, training and vocational interests.[54] Based on the assessment, the local welfare agency must develop a written employability plan for each participant.[55] The plan must set forth the services that will be provided by the social services district and an employment goal for the participant.[56] Section 335-2(a) provides guidance for the development of the employability plans, explaining that the plan shall reflect the preferences of the participant while taking into account the participant's "supportive needs . . . and educational activity assignment."[57] The WEP assignment must comply with this statutorily mandated employability plan.[58]

### C. *New York City Reform*

Through various provisions of the SSL, New York State clearly demonstrates an interest in promoting education and, in fact, allows considerable flexibility for the implementing social services district to build on this interest.[59] The Giuliani Administration has, however, repeatedly

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lency certificate, basic and remedial education, education in English proficiency, community college, licensed trade school, registered business school or a two-year college.)

51. *See id.* § 362(a).
52. *Id.* § 336(a)(4).
53. *Id.* § 336(a)(5).
54. *See id.* § 335(a)(5).
55. *See id.*
56. *See id.*
57. *Id.* § 335-2(a).
58. *See id.*
59. *See* Casey, *supra* note 7, at 12.

ignored the State's obvious desire to educate the public.[60] Since taking office in 1994, Mayor Giuliani has made welfare reform a top priority.[61] Even before the federal law changed, New York City required welfare recipients to work for their benefits.[62] The New York City Human Resources Administration (HRA), which administers the City's public assistance employment program, has assigned a large part of recipients to the Work Experience Program (WEP).[63] Initiated in 1995 by Giuliani, WEP is a workfare program where participants "work off their cash and Food Stamp benefits at a government or non-profit office, with the hours of work calculated based on the minimum wage rather than the prevailing wage."[64]

HRA exempts from employment programs all recipients who are under nineteen years of age and in high school.[65] HRA does not, however, exempt the large number of recipients who are over the age of nineteen and still pursuing an education.[66] Although the SSL prohibits HRA from assigning a student recipient to work that will interfere with all "educational activities,"[67] the City's implementing regulation radically restricts and alters the meaning of the state statute. It provides that: "An individual who is assigned to educational activities . . . shall not be assigned to any activity that might interfere with *attendance at class*."[68] "Attendance

60. *See infra* Part III.

61. *See* All Things Considered, *supra* note 9.

62. *See id.*

63. *See The City's Work Experience Program*, THE NEW YORK BEACON, August 6, 1997, at 2 (stating that in 1997, WEP forced over 38,000 recipients of public assistance to report to work sites designated by the City in order to continue receiving benefits); *see also* Casey, *supra* note 7, at 13 (As of August 1998, monthly participation in WEP exceeded 35,000.).

64. Casey, *supra* note 7, at 13.

65. *See* N.Y. SOC. SERV. LAW § 332(1)(c) (McKinney 1999)(providing that a person sixteen years old or under nineteen years old and attending a secondary, vocational or technical school full time is exempt from work requirements); *see also* Liz Willen, *Workfare Confusion Remains*, NEWSDAY, Dec. 10, 1998, at A3 (quoting an HRA official who said that the obligation of students up to age nineteen is to complete high school and not to perform workfare).

66. *See* Matthews v. Barrios-Paoli, 676 N.Y.S.2d 757, 763 (Sup. Ct. N.Y. County 1998) (noting that the City applies the implementing regulation, N.Y. COMP. CODES R & REGS. Tit. 12 § 1300.7(a)(5) (2000), to nineteen year olds who only have one year or one term or even less remaining to complete high school).

67. N.Y. SOC. SERV. LAW § 336(a)(4)(d).

68. N.Y. COMP. CODES R. & REGS. tit.12 § 1300.9(c)(5) (2000) (emphasis added).

at class" is narrowly defined to include only time spent in the classroom or in the lab.[69] Thus, the City does not take into account crucial components of an education such as homework and extra-curricular activities.[70]

The SSL mandates that the social services district develop an employability plan before assigning a student recipient to a work activity.[71] Despite this clear state directive, city officials administering WEP assignments to students continuously ignore this requirement and claim that the City has up to one year to complete the assessment,[72] at which time the employability plan serves very little purpose.[73] Instead, HRA forces over 35,000 recipients per month to abandon their educational pursuits and work in parks or buildings, performing such jobs as street cleaning, maintenance and/or clerical tasks.[74]

## III. CHALLENGES TO WEP

Mayor Giuliani's implementation of WEP has had detrimental effects on student recipients, and these effects have not gone unnoticed. Education and training providers throughout the City recognize that the City's policies have caused drastic declines in the number of people participating in educational activities like "English as a Second Language, basic literacy, GED and vocational training."[75] High school students who

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69. State Defendants Memorandum of Law in Support of Cross Motion for Summary Judgment at 4, Matthews v. Barrios-Paoli, 676 N.Y.S.2d 757 (N.Y. Sup. Ct. 1998) (No. 404575/97).

70. *See generally Matthews*, 676 N.Y.S.2d at 763 (stating that the City insists on their right to disclaim any responsibility for allowances for homework).

71. *See* N.Y. SOC. SERV. LAW § 336-a(4)(b); *see also Matthews*, 676 N.Y.S.2d at 763 (Plaintiffs allege that not one of them have been assigned to a work pursuant to an employability plan.).

72. *See Matthews*, 676 N.Y.S.2d at 763 (noting that the City's position is that a pre-work assignment assessment/employability plan is required only if the City concludes that a nineteen year-old who is attending high school should not be permitted to continue in school).

73. *See id.* at 764.

74. *See* Casey, *supra* note 7, at 13 (noting that under Mayor Giuliani's leadership, HRA has placed the highest priority on assignments to the WEP program); *see also* Alan Finder, *Little Evidence That Workfare Leads to Full-Time Jobs*, SUNDAY GAZETTE-MAIL, Apr. 12, 1998, at P2A (stating that since the initiation of workfare in 1995, 200,000 people have passed through the WEP program. There were more than 34,000 enrolled as of April 1998).

75. Casey, *supra* note 7, at 13.

are over the age of nineteen and on public assistance are forced to choose between compromising their studies and/or dropping out of school to comply with their assignments.[76] This burden extends to higher education as well. City University of New York (CUNY) students on public assistance face the same burdens in their attempts to obtain an education. CUNY officials report that the number of welfare participants in the CUNY system has declined steadily from about 26,000 to 13,000[77] and continues to fall.[78]

Despite these alarming statistics, the City has continuously refused to accommodate student recipients' efforts to obtain an education by forcing them to report to assignments at hours which conflict with school or at locations far from their educational institution.[79] The City has even gone so far as to sanction students for not complying with WEP assignments even when the assignments directly interfere with their educational pursuits.[80] Furthermore, the Mayor has refused to comply with legislation that makes it feasible for students to work and attend school at the same time.[81] When President Clinton expressed concern about the City's policy of forcing students out of school, the Mayor replied that students "have to work in exchange for their welfare benefits like everyone else."[82]

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76. *See Matthews*, 676 N.Y.S.2d at 763; *see also* In re Hesthag, 173 Misc.2d 131 (Sup. Ct. N.Y. County 1996).

77. *See* Casey, *supra* note 7, at 13.

78. *See* Wayne Barrett, *Rudy's Milky Way*, THE VILLAGE VOICE, Jan. 26, 1999, at 41 (stating that since 1995, "the number of CUNY students on home relief has plummeted 86 percent, from 10, 512 to 1,459" and "since 1996, their CUNY ranks dropped 46.3 percent, from 17,108 to 8,836.").

79. *See Matthews* , 676 N.Y.S.2d at 759; *see also* In re Hesthag, 173 Misc. 2d at 131.

80. *See* In re Hesthag, 173 Misc.2d at 132 (stating that DSS discontinued petitioners' benefits because she failed to comply with the employment requirements of WEP even though the work assignment interfered with her two-year associate's degree program); *see also Viewpoints*, NEWSDAY, May 8, 1998, at A57. (In most cases, the workfare assignment has no relationship to future job prospects. Workfare is primarily a sanctioning tool to reduce the number of welfare participants. Even the smallest alleged violation of a workfare rule will result in a participant's benefits being suspended or terminated.).

81. *See infra* notes 128-139 and accompanying text.

82. Diller, *supra* note 3, at 31; *see also* Adam Nagourney, *In Surprise Confrontation During Visit, President is Criticized on Welfare Law*, N.Y. TIMES, Feb. 19, 1997, at B6.

There have been three basic criticisms of the City's workfare program: absence of employability plans; interference with education; and confusion regarding rules and policy.

### A. *Employability Plans*

In recent years, recipients of public assistance have challenged the City's failure to provide assessment and employability plans as mandated by state law. In June of 1997, a New York Supreme Court Justice, Jane S. Soloman, ordered the Giuliani Administration to stop requiring welfare recipients, who are in college, to participate in WEP without completing an "individualized assessment to ensure that the workfare job does not unreasonably interfere with education."[83]

In *Matthews v. Barrios-Paoli*,[84] the plaintiffs, nineteen year-old high school students, brought a class action suit claiming that their WEP assignment interfered with their pursuit of education.[85] The plaintiffs allege that not one of them has been assigned to work pursuant to an employability plan.[86] Justice Goodman, in certifying the class and granting an injunction, found that the City was "woefully deficient in encouraging young people to finish high school."[87] She went on to add that the City's practice clearly violates the state statute requiring an assessment and employability plan.[88] She stated: "Instead of making use of this statutory mandate in a way that will teach, mentor and assist these young people . . . the [City] failed to create any plan and claim[s] the right to not develop a plan for a year."[89]

In September of 1998, Mayor Giuliani's strict workfare program faced another legal setback when Acting Supreme Court Justice Richard Braun prohibited the City from making referrals to WEP until it assesses each student's skills and work history.[90] Braun recognized that "individ-

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83. *School Comes First*, THE ATLANTA CONSTITUTION, June 6, 1997, at 10.

84. *See Matthews*, 676 N.Y.S.2d at 757.

85. *See id.* at 759.

86. *See id.* at 764.

87. *Id.*

88. *See id.*

89. *Id.*

90. *See* Robert Polner, *Judge Gives Students Reprieve*, NEWSDAY, Sept. 19, 1998, at A16.

ual assessments are required by state law."[91] He then criticized the workfare program as a whole:

> The rules of the City's Work Experience Program stood in the way of the students' goal of gaining a degree and training for a job of their own . . . If they had to give up their college studies in order to enter the WEP Program as required by the city, that would irreparably injure them in their attempts to better their academic and training skills.[92]

Judge Braun ruled that the City's WEP program is "misguided" and contrary to state goals of making individuals self-sufficient.[93] Even though the state law is clear in its mandate of an assessment and employability plan, the City has repeatedly evaded this requirement in an attempt to get students to work as quickly as possible.[94]

The state clearly intended employability plans to define student recipient's goals and skills early in the assignment process.[95] By ignoring the state mandate of an assessment and employability plan, the City assigns the student to a workfare activity that bears no relationship to future job prospects.[96] If carried out according to state law, the assessment would serve a dual purpose: the student's skills would be fostered and enhanced while the City would receive the benefit of their work. The City subverts these goals when it favors a policy where students pick up garbage and clean the subways.[97]

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91. *Id.*

92. *Id.*

93. *Id.*

94. *See* N.Y. SOC. SERV. LAW § 335-a (McKinney 1998).

95. *See* N.Y. SOC. SERV. LAW § 335.2(a) McKinney 1999)(". . . the employability plan shall reflect the preferences of the participant . . . [it] shall take into account the participant's supportive service needs, available program resources, local employment opportunities . . .."). *Id.*

96. *See* Matthews v. Barrios-Paoli, 676 N.Y.S.2d 757, 764 (Sup. Ct. N.Y. County 1998).

97. *See id.*

### B. *Interference with Education*

Challengers of the Work Experience Program have also criticized its deliberate interference with students' educational goals. They maintain that student recipients are left with little or no time for homework or extra-curricular activities because the City refuses to accommodate their school schedules.

In the 1996 case, *Matter of Kristin Hesthag v. Marva Hammons, Commissioner of New York City Department of Social Services*,[98] the Supreme Court of New York County prohibited the City from interfering with a nursing student's educational program.[99] Petitioner, Kristin Hesthag, enrolled in a two-year associates degree program in nursing, in the same year that she began receiving public assistance.[100] The Office of Employment Services (OES) exempted her from WEP participation for two years, but then decided to revoke her exemption.[101] In an attempt to comply, petitioner requested to work at night because her program only offered day classes.[102] OES refused to accommodate her studies.[103] When petitioner choose to continue her education, OES terminated her benefits on the ground that she had "willfully and without good cause failed and refused to comply with the employment requirements of WEP."[104] The Department of Social Services upheld the termination claiming that petitioner's reason for non-compliance did "not constitute a valid reason."[105] Based on New York's SSL,[106] the court held that OES could not lawfully assign petitioner to work that interfered with her nursing schedule.[107] Accordingly, the court found the department's grounds for termination "plainly erroneous."[108]

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98. *See* In re Hesthag, 173 Misc. 2d 131, (Sup. Ct. N.Y. County 1996).

99. *See id.* at 133.

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *Id.*

105. *Id.*

106. *See* N.Y. SOC. SERV. LAW § 336(a)(5)(c) (McKinney 1999)(prohibiting DSS from assigning individuals who are participating in approved educational programs to activities in JOBS which interfere with such attendance).

107. *See* In re Heshtag, 173 Misc.2d 131, 132 (Sup. Ct. N.Y. County 1996).

108. *Id.* at 133.

Likewise, in *Matthews v. Barrios-Paoli*,[109] the court found that the City's WEP policy violated New York SSL § 336-a(4)(d) which "prohibits the assignment of a nineteen-year-old who is pursing her high school education to any other activity which interferes with the pursuit of her education."[110] Justice Goodman found in that case that the Mayor established "unconscionable obstacles" for young people to complete their education.[111] One of the five plaintiffs, Yasmin Matthews, was a nineteen year-old senior high school student. She attended classes from 3:00 p.m. until 9:00 p.m., Monday through Thursday.[112] OES informed Matthews that she had to work twenty-three hours every two weeks in the City's WEP program in exchange for her family's welfare benefits.[113] Her work schedule was from 7:00 a.m. until 2:00 p.m., Monday through Wednesday, and from 7:00 a.m. until 1:00 p.m. on alternate Thursdays.[114] Her work assignments consisted of mopping, cleaning and picking up garbage, and it forced her to travel to two different boroughs, both far from her school.[115] With her WEP assignment, Matthews had to leave her home before 7:00 a.m. and, as a result, she barely had enough time to eat lunch and get to school after her WEP assignment.[116] Her work schedule forced her to do homework when she got home from school which left her less than five hours of sleep each day.[117] Because OES required her to work until 1:00 p.m., Matthews had no time for homework, tutoring or participating in after school activities.[118] Noncompliance with her WEP assignment jeopardized her portion of her family's welfare grant, ninety-seven dollars a month.[119]

In certifying the class and granting an injunction, Judge Goodman recognized that "homework is an essential component of attending and completing high school, as are independent studies and tutoring."[120] She

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109. 676 N.Y.S.2d 757 (Sup. Ct. N.Y. County 1998).
110. *Id.* at 763.
111. *Id.*
112. *See id.* at 758.
113. *See id.*
114. *See id.*
115. *See Matthews,* 676 N.Y.S.2d. at 759.
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*
120. *Id.* at 763.

added that the City's approach to "workfare does not encourage nor even consider other extra-curricular activities that should be part of every high school experience, such as student government, sports, and community service."[121] These activities, she added, enhance a young person's "chance to get into college and/or the workforce, develop social skills and self-esteem and become productive, contributing members of society."[122] Despite the importance of homework and extra-curricular activities, the City insisted on their "right to disclaim any responsibility for allowances for homework."[123] Justice Goodman found the City's approach and rationale to be "punitive, cynical and counterproductive."[124]

The public has also criticized the City's WEP program because it forces student recipients to travel far distances for work assignments leaving them little time for homework and extra-curricular activities. Although public officials have attempted to make it feasible for student recipients to work and attend school, the City has repeatedly stonewalled their efforts to accommodate students. In August of 1997, the State Legislature passed the Marchi-Ramirez Bill[125] written by Assemblymember Roberto Ramirez (D-Bronx) and Senator John Marchi (R-Staten Island). The bill's basic premise is that "welfare recipients who are trying to get an education ought to be encouraged."[126] It requires workfare sites on City University of New York (CUNY) and State University of New York (SUNY) campuses. The purpose is to help students save time and money on travel.[127]

The Giuliani administration has refused to fully implement the Marchi-Ramirez Bill and instead has implemented numerous administrative obstacles to it. In order for students to be assigned to an on-campus workfare site, the City's welfare agency must approve the site as an acceptable substitute for its own assignment, like cleaning streets and parks.[128] The City has approved only two small pilot program sites at

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Karen W. Arenson, *Measure Seeks Campus Workfare, but City Balks,* N.Y. TIMES, Aug. 6, 1997, at B1.

126. *See id.*

127. *See id.*

128. *See id.*

Lehman College and LaGuardia Community College in Queens.[129] Debbie, one of four students who participated in the program, stated that she would not "have been able to continue with school without this program."[130] In Debbie's case, her on-campus workfare job resulted in a permanent position.[131] Despite the success of the program and the four million dollars in funding already set aside, the on-campus jobs program has yet to expand beyond these two small pilot programs.[132]

Many students at CUNY have not been as fortunate as Debbie. Emma Mena, age 20, was pursuing an associate degree in microcomputers at Hostos Community College in the Bronx.[133] The city assigned her to a work activity in Manhattan, forcing her to drop out of the degree program and work at a clothing store to support her four year-old son.[134] "I told them working was fine, I want to work," said Mena, "but they couldn't give me any work that was at or near school."[135]

In April 1998, almost a year after the passage of the bill, Jack Deacy, a mayoral spokesman, stated that the City is "still reviewing the performance of the two pilot programs to determine whether or not they are effective . . . Given the administration's problems with academic performance at CUNY, we don't have the greatest confidence that they can implement an effective workfare program."[136] The Mayor himself expressed doubt in the competence of the City University by stating that "if you don't run an accountable education program, you won't run an accountable work program."[137] Seth Diamond, an HRA official, claimed that the city is not required to use the funding for the program.[138] Stephen DiBrienza, Council Welfare Committee Chairman, however, accused the

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129. *See* Shanon O'Boyle, *Workfare Works for Her: Lehman Student Praises Program*, N.Y. DAILY NEWS, Apr. 19, 1998, at 1.

130. *Id.*

131. *See id.*

132. *See id.*

133. *See* Rafael A. Olmeda, *Workfare vs. CUNY*, N.Y. DAILY NEWS, Nov. 18, 1998, at 1.

134. *See id.*

135. *Id.*

136. O'BOYLE, *supra* note 129.

137. Dan Janison, *CUNY Demoted Mayor: Unqualified to Run Student Workfare*, NEWSDAY, July 9, 1998, at A28.

138. *See* Robert Polner, *Campus Workfare Money Unspent*, NEWSDAY, March 17, 1998, at A25.

HRA of "dragging its feet because [the HRA] wants as many people as possible off the City's welfare rolls."[139]

The City's refusal to allow sufficient time for homework and extra curricular activities is counterproductive to the state's interest in educating the public. New Yorkers, as a whole, would benefit if students received support and encouragement to finish school and get their degrees. Student recipients on workfare are faced with a difficult and unfair choice: they must either accept a WEP assignment which directly interferes with their education, or lose their public assistance benefits. Either choice deprives students of valuable experiences and inflicts irreparable harm on their futures.

### C. *Confusion with WEP Rules and Policy*

Critics of WEP also argue that City officials are confused by the workfare rules and, as a result, commit grave mistakes that adversely affect students.[140] In December of 1998, evidence of this confusion manifested itself when HRA officials threatened to terminate Keith Keough's welfare benefits unless he reported to a workfare assignment.[141] Keough was an eighteen year-old senior at Grover Cleveland High School in Ridgewood, New York.[142] His mother had recently died leaving him an orphan.[143] In order to support himself while finishing high school, Keough went on welfare.[144] Keough was a star basketball player, averaging 20 points a game for his high school team, and a first baseman and pitcher for his school baseball team.[145] He dreamed of graduating from high school and going to college where he could continue to enhance his athletic and academic skills.[146] These dreams were almost destroyed when a city official from HRA informed him he would receive "no more checks" and that he should "finish his schooling at night and go to

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139. *Id.*

140. *See* Dennis Duggan, *Back in the Game: Orphan Gets to Stay in School*, NEWSDAY, Dec. 10, 1998, at A3.

141. *See id.*

142. *See id.*

143. *See* Dennis Duggan, *Back in the Game: Orphan Gets to Stay in School*, NEWSDAY, Dec. 10, 1998, at A3.

144. *See id.*

145. *See id.*

146. *See id.*

work."[147] HRA eventually restored Keough's benefits, but only after Queens Borough President Claire Shulman and school officials from Grover Cleveland High School got involved and supported Keough.[148]

HRA officials called Keough's case an "isolated incident."[149] "If by chance that policy was not applied or applied inappropriately, we're glad it was corrected," said Debra Sproles, an HRA spokeswoman.[150] However, several advocates were convinced that this incident was more than a simple oversight. Legal Aid attorney Christopher Lamb said, "kids like Keough are slipping through the cracks because the city is not following its own policies . . . Officials are confused by the rules . . . State law recognizes the lessons high school students should be learning are in the classroom."[151]

One reason for the confusion is that the Mayor's policy contradicts state and city welfare laws. New York State law clearly states that students up to the age of nineteen are obligated to finish high school.[152] However, the Mayor has often referred to work as "a privilege" and praised workfare because it is a "good thing" when a young person learns that "at some point work is going to be required" of him/her.[153] In response to the Keough incident, the Mayor commented that ". . . it wasn't a bad idea that this youngster was confronted with the idea that you've got to work in exchange for benefits."[154]

Critics doubt the City's support of education.[155] "If the Mayor truly believed that high school was so important, he wouldn't continue to fight this policy tooth and nail," said Marc Cohen, director of litigation for the Welfare Law Center.[156] The problem, as Lamb recognized, is that "not every kid who gets a work assignment from the City ends up with Claire Shulman going to bat for them."[157]

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147. *See id.*
148. *See id.*
149. Willen, *supra* note 65.
150. *Id.*
151. *Id.*
152. *See* N.Y. SOC. SERV. LAW § 332(1)(c) (McKinney 1999).
153. Willen, *supra* note 65.
154. *Id.*
155. *See id.*
156. *Id.*
157. *Id.*

With considerable confusion surrounding workfare rules, Keough's case may not be the only "isolated incident."[158] Not every student recipient who is a victim of the City's confusion will be as fortunate as Keith Keough. As Shulman recognized, "[y]ou can easily get lost in this huge city, and . . . if I have trouble with the bureaucracy, what chance is there for the average citizen?"[159]

## IV. RIGHT TO PUBLIC EDUCATION

The State recognizes the importance of education, as expressed in the Education Article of the New York State Constitution.[160] However, the Giuliani administration has disregarded the state's obvious desire to promote and encourage education in favor of a plan to shrink the welfare rolls as quickly as possible.[161] This approach is not only irrational and counterproductive, but also unlawful.

### A. *The Increasing Acceptance of Education as a Fundamental Right*

In *San Antonio Independent School District v. Rodriquez*,[162] the Supreme Court reviewed the Texas education financing system which had been attacked as violating the Equal Protection Clause of the U.S. Constitution.[163] The *Rodriquez* court adopted a special test for determining whether education constitutes a fundamental constitutional right:

> [T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether

158. *See* Willen, *supra* note *65.*

159. Duggan, *supra* note 140.

160. N.Y.S. CONST. art. XI, § 1. ("The Legislature shall provide for the maintenance and support of a system of free common schools.").

161. *See supra* PART III.

162. *See* SAN ANTONIO INDEP. SCH. DIST. V. RODRIQUEZ, 411 U.S. 1 (1972).

163. *See id.*

> there is a right to education explicitly or implicitly guaranteed by the Constitution.[164]

In a 5 to 4 decision, the Court concluded that education is not a fundamental right because the U.S. Constitution does not make explicit or implicit mention of a right to education and, accordingly, the Court declined to apply the strict scrutiny standard.[165]

Following the "explicit-implicit" test announced in *Rodriquez*, a number of courts have been reluctant to confer fundamental status on education.[166] However, the discussion does not end with *Rodriquez* because some state constitutions do make explicit mention of a right to education.[167] Recognizing the growing importance of education to society, a number of state courts have examined their education articles and found that their citizens have a "legally enforceable constitutional guarantee to public education."[168] Although most of the cases dealt with school financing challenges brought under the Equal Protection or the Due Process Clauses of the United States Constitution, the holdings demonstrate the increasing willingness of state courts to confer fundamental rights status on education.[169]

A dramatic deviation from *Rodriquez* came from the Supreme Court of California in 1976. In *Serrano v. Priest*,[170] the plaintiffs brought an action challenging the constitutionality of the California public school financing system.[171] Using the *Rodriquez* standard for determining whether an interest is fundamental, the trial court concluded that the "interest of children in education was explicitly and implicitly protected and guaranteed" by the California Constitution.[172] On review, the Supreme

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164. *Id.* at 33.

165. *See id.* at 37.

166. *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1326, 1330 (1992).

167. *See id.* at 1325 (recognizing that although education is not mentioned in the U.S. Constitution, state constitutions provide for the establishment of state-wide school systems. Thus, the Rodriquez test would have great potential strength if applied to state constitutions because courts could more easily recognize an implied or explicit right to education in the state constitutions' lengthy discussion about school systems.)

168. *Id.* at 1326.

169. *See id.*

170. *See* Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

171. *See id.* at 728.

172. *Id.* at 749.

Court of California affirmed the trial court's ruling and added that "education is a fundamental interest, even though it is not so in the light of the Equal Protection provisions of the Fourteenth Amendment."[173] The court concluded that the decisions of the United States Supreme Court defining fundamental rights are "persuasive authority and must be afforded respectful consideration, but they need be followed by California Courts only when they provide no less individual protection than is guaranteed by California law."[174] The court stated that the equal protection provisions of the California Constitution "possess an independent vitality, that . . . may demand an analysis different from that which would obtain if only the federal standard were applicable."[175]

The California Supreme Court's rationale is substantially in accord with a number of other state courts. Following closely behind *Serrano*, the Supreme Court of Connecticut made another dramatic departure from *Rodriquez*. In *Horton v. Meskill*,[176] plaintiffs brought a declaratory judgment action challenging the constitutionality of a public school financing system.[177] After a thorough discussion of *Rodriquez*, the *Horton* court concluded that, in Connecticut, "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."[178] The court noted that Connecticut has recognized "her right and duty to provide for the proper education of the young for centuries."[179]

In *Robinson v. Cahill*,[180] the New Jersey Supreme Court examined the history of New Jersey's Constitution and found that the framers intended education to be a fundamental right.[181] The education provision, similar to New York's, states that "the Legislature shall provide for the maintenance and support of a thorough and efficient system of free pub-

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173. *Id.* at 730.

174. *Id.* at 732.

175. *Id.*

176. *See* Horton v. Meskill, 172 Conn. 615 (1977).

177. *See id.* at 646.

178. *Id.*

179. *Id.* at 647 (quoting State *ex rel.* Huntington v. Huntington, 82 Conn. 563, 566(1909)).

180. *See* Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), *cert. denied*, 414 U.S. 976 (1973).

181. *See id.* at 290-92.

lic schools."[182] The Court held that the state constitutional "guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[183] Recently, in *Abbott v. Burke*,[184] the New Jersey Supreme Court affirmed the holding of *Robinson* by stating that the New Jersey Constitution requires that the State provide to all students the opportunity to achieve a thorough and efficient education.[185]

The Supreme Court of West Virginia also found education to be a fundamental right in *Pauley v. Kelley*.[186] The Court interpreted the West Virginia Constitution's "thorough and efficient" clause by looking to the debates of the drafters of the Ohio Constitution, as Ohio's Constitution served as a model for that of West Virginia.[187] The court found that the intent of the Ohio framers in adopting such a standard was to "achieve excellence and to make education of the public a fundamental function of state government and a fundamental right of Ohio citizens."[188]

Although these state courts have approached the issue with varying interpretations, the Supreme Court's pronouncement in *Rodriquez* did not restrain state courts from conferring fundamental rights status on education under their respective constitutions.[189] State courts generally recognize the importance of education to a democratic society,[190] and their interpretations of state constitutional law demonstrate that the public has a legitimate and fundamental right to pursue an education without governmental interference.

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182. N.J. CONST. art. VIII, § 4(1).

183. *See* Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), *cert. denied*, 414 U.S. 976 (1973); *see also* Hubsch, *supra* note 166, at 1339.

184. *See* Abbott v. Burke, 153 N.J. 480 (1998).

185. *See id.* at 530.

186. *See* Pauley v. Kelley, 255 S.E.2d 859 (W.Va. 1979); *see also* Hubsch, *supra* note 166, at 1337.

187. *See* Hubsch, *supra* note 166, at 1337.

188. *Id.*

189. *See* San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 37 (1972).

190. *See generally* Hubsch, *supra* note 166, at 1325, 1341 (stating that in the past two decades, many state supreme courts have addressed the meaning of the education articles of their state constitutions. As a result, a new body of state constitutional law regarding the right to education has emerged.).

### B. *New York State*

Article XI, Section 1 of the New York State Constitution provides: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all children of this state may be educated."[191] In *Board of Education, Levittown Union Free School Dist. v. Nyquist*,[192] the court examined the language and history of the Education Article of the New York State Constitution.

In *Levittown*, the plaintiffs, twenty-seven school districts and a number of school children and their parents, alleged that the school-financing scheme of New York, which was based on property values in each school district, was unconstitutional because it resulted in grossly disparate financial support which, in turn, resulted in grossly disparate educational opportunities.[193] In order to satisfy the Education Article's mandate, the court found that the State must ensure the availability of a "sound basic education."[194]

The New York Court of Appeals recently expanded on the *Levittown* holding in *Campaign for Fiscal Equity, Inc. v. State of New York*.[195] The plaintiffs in that case alleged that the State's educational financing scheme failed to provide public school students in the City of New York with an opportunity to obtain a sound basic education as required by the state constitution.[196] The Court concluded that the Education Article of the state constitution requires the State to offer all children the "opportunity of a sound basic education . . . Such an education consists of basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[197] The court concluded that the State must provide some essentials: ". . . minimally adequate physical facilities and

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191. N.Y.S. CONST. art. XI, § 1.

192. *See* Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27 (1982).

193. *See id.* at 35-36.

194. *Id.* at 48 (rejecting the equal protection challenge, the court held that the "unevenness of the educational opportunity did not render the school financing system constitutionally infirm, unless it could be shown that the system's funding inequities resulted in the deprivation of a sound basic education").

195. *See* Campaign for Fiscal Equity, Inc. v. New York, 86 N.Y.2d 307 (1995).

196. *See id.* at 314.

197. *Id.* at 316.

classrooms which provide enough light, space, heat and air to permit children to learn . . . minimally adequate instrumentalities of learning such as desks, chairs, pencils and reasonably current textbooks."[198] Surely then, the court would agree that students are entitled to adequate time to complete their homework, eat their lunch and attend class on time.

In *Matthews v. Barrios-Paoli*, Justice Goodman explicitly stated that the "New York State Constitution establishes the right to public education."[199] Additionally, the court found that the City, through the workfare program, engages in practices that

> set up unconscionable obstacles for these young people who are completing high school . . . by not giving them time to do homework; requiring them to travel late at night on subways to empty trash baskets in deserted municipal buildings; assigning them work that bears no relation to their education or educational goals . . ..[200]

The crucial word is "opportunity." The State must allow its citizens the "opportunity" to obtain a sound, basic education.[201] The City of New York, through WEP, has taken this opportunity away from student recipients. These students no longer have the opportunity to obtain such fundamental skills as literacy, and to have such fundamental experiences as sports and extra-curricular activities.[202] Thus, WEP policies violate the education articles of the New York State Constitution.

## V. CONCLUSION

"The importance of education to society and the legitimate concern that the public has in seeing that the educational process is properly administered cannot be disputed."[203] The State of New York clearly recog-

198. *Id.* at 317.

199. Matthews v. Barrios-Paoli, 676 N.Y.S.2d 757, 763 (Sup. Ct. N.Y. County 1998).

200. *Id.*

201. *See* Campaign for Fiscal Equity, Inc., 86. N.Y.2d at 316.

202. *See id.*

203. Jee v. N.Y. Post Co., 176 Misc.2d 253, 259 (N.Y. Sup. Ct. 1998).

nizes the importance of education to society as evidenced by the Education Article of the state constitution and the Social Services Law. Governor Pataki extolled the educational initiatives of New York, commenting that New York's "commitment to educational excellence is critical to ensuring that New York becomes more attractive . . . and New York is now focusing attention where it belongs-on children . . ."[204]

Despite the state's obvious interest in education, the Giuliani administration has implemented a workfare system that deprives students of the opportunity to obtain a basic education[205] in violation of New York's statutory and constitutional law. The New York City workfare policy forces students to choose between their education and their welfare benefits.[206] This coercion is unjustified and irrational. The policy harms the student's future as well as the City as a whole. Forcing students out of the classroom and into work will not solve the welfare problem. An educated citizenry is essential to a healthy and productive economy. As Thomas Jefferson recognized: "Establish the law for educating the common people. This it is the business of the state to effect and on a general plan."[207]

*Catherine Ciarletta*

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204. *New York State Homepage, at* http://www.state.-ny.us/enewdoc/final/-improveedu-52.html#access.

205. *See Matthews*, 676 N.Y.S.2d at 763.

206. *See generally,* Polner, *supra* note 90, at A16.

207. Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution,* 29 WILLAMETTE L. REV. 279 (1993) (quoting a letter from Thomas Jefferson to George Washington, in Paris France, January 4, 1786).