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By Hook or By Crook:
Conformity, Assimilation and
Liberal and Conservative Poor Relief Theory

*Larry Catá Backer**

He who gives, dominates. The theory of the donor works not only at the level of individuals and societies but also for civilizations.**

I suspect that my role today is to play the part of Cassandra,¹ not the Cassandra whose prophecies go unheeded, but rather the Cassandra who tells people what they may not want to hear. That, after all, is the central irony of Cassandra's curse—there is no magic in getting people to ignore the obvious; it requires merely the exhibition of reality itself.

I want to reveal my intention here in fairly provocative terms. At their core, there are no *substantial* differences between the so-called liberal and conservative perspectives on welfare and welfare reform illustrated by the papers presented at this Symposium. All share the same basic normative socio-cultural assumptions—that is, the respect for those social taboos which define our society. Indeed, each perspective serves to affirm the

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** FERNAND BRAUDEL, II *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILLIP II* 826 (Sian Reynolds trans., 1st U.S. ed. 1973).

1. For those of you who do not remember your ancient cultural history, Cassandra was the daughter of King Priam of Troy who, endowed with the gift of prophecy, was fated by Apollo never to be believed.

basic taboos and the conduct norms which shape core traditional society, taboos and conduct norms which I have previously examined in some detail. And not just any old norms, but *that particular set of norms which currently constitutes modern American bourgeois culture*. Each perspective evidences and affirms a common set of core socio-cultural notions about the poor and poor relief.² In this, they each share much with that current *bete noir* of welfare reform, the Personal Responsibility and Work Opportunity ("PRAWO") Act of 1995 and its reincarnation as part of the welfare reform package signed into law on August 22, 1996 as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRAWORA").³ I will first explain why this identity of perspectives *must* be so, and why the seeming *variation* in perspectives is only a necessary corollary of the underlying normative model in which we all think about poor relief. The papers presented in this Symposium serve as my principal guinea pigs for this exercise.

I will then focus on one aspect of these social taboos, what I call the "assimilation imperative."⁴ Strong, dominant cultures absorb immigrant or culturally distinct groups into the prevailing culture.⁵ Even self-consciously multicultural societies assimilate. In fact, such societies *require* conformity. As long as a dominant culture is strong—is *at its core* satisfied that it is a good culture—non-conformity is subversive.⁶ At some level, non-

2. For an extended discussion of these core assumptions animating welfare, see Larry Catá Backer, *Medieval Poor Law in Twentieth Century America: Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871 (1995) [hereinafter *Medieval Poor Law*]; Larry Catá Backer, *Of Handouts and Worthless Promises: Understanding the Conceptual Limitations of American Systems of Poor Relief*, 34 B.C. L. REV. 997 (1993) [hereinafter *Of Handouts and Worthless Promises*].

3. Personal Responsibility and Work Opportunity Act of 1995, H.R. 4, 104th Cong., 1st Sess., 141 CONG. REC. 15317-15575 (1995) (vetoed 1996) [hereinafter PRAWO]. For a discussion of the House of Representatives version of what became PRAWO, see Larry Catá Backer, *Welfare Reform at the Limit: An Essay on the Futility of "Ending Welfare as We Know It,"* 30 HARV. C.R.-C.L. L. REV. 339 (1995) [hereinafter *Welfare Reform at the Limit*]. As this article was being readied for printing, Congress was passing and the President was signing into law, a welfare reform package which is substantially similar to the welfare reform provisions of PRAWO which was previously vetoed. See Robert Pear, *The Welfare Bill: The Overview; Senate Passes Welfare Measure, Sending it for Clinton's Signature*, N.Y. TIMES, Aug. 2, 1996, at A4. The Personal Responsibility and Work Opportunity Reconciliation Act can be found at Pub. L. No. 104-193, 110 Stat. 2105 (1996) [hereinafter PRAWORA].

4. For a discussion of the assimilation imperative in the context of what would become PRAWO, see Larry Catá Backer, *Essay: Poor Relief, Welfare Paralysis and Assimilation* 1996 UTAH L. REV. 223 (1996).

5. See, e.g., ANDREW M. GREELEY, ETHNICITY IN THE UNITED STATES: A PRELIMINARY RECONNAISSANCE (1974) (on the way in which assimilation works in the U.S.)

6. See, e.g., Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 362 (1992) (noting the existence of the view that difference in cultural norms is viewed as subversive).

conformity inevitably dooms a culture by substitution. Except perhaps in the rarified world of theory, a culture cannot *be* and *not be* at the same time. What varies over time is merely the consensus of what constitutes the minimum amount of conformity necessary to contain culture-threatening subversion. When the consensus of what constitutes an acceptable level of conformity is reduced, some speak of a tolerant culture.⁷ When the opposite occurs, some speak of repression.⁸

I will show how each of the papers presented, whether you can describe them as "liberal" or "conservative," is no less wed to the notion of the necessity of social conformity than is the conservative Republican PRAWORA. However, the drive to assimilate our poor is manifested in very different ways by the PRAWORA and by each of the presenters in this Symposium. This variation does not threaten social conformity, but rather is a necessary consequence of differences in the way in which the various papers conceive of an acceptable level of conformity within our social ordering. It is the way in which each of us gives value to all the rules which together comprise our social ordering; it is how we arrive at *policy*. Our social ordering, however, also constricts policy by establishing a set of boundaries. The boundaries allow variations on the "theme" but the basis of the "theme" remains the same, regardless of which political camp is taking center stage.

I end in Part III with a preliminary view of the possibility of communication. I want to explore how, and in what manner, these papers and critical academic writing can be significant within the discourse of dominant culture. I suggest that critical writing at once hides the normative values

7. Will even a minimally conformist culture tolerate all otherwise incompatible cultural practices or beliefs? Consider the acceptability of female circumcision. See, e.g., Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Fitnat Naa-Adjeley Adjetej, *Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1361 (1995); Daliah Setareh, *Recent Developments: Women Escaping Genital Mutilation — Seeking Asylum in the United States*, 6 UCLA WOMEN'S L.J. 123, 126 (1995).

Another important question, one which I do not explore in this article, relates to the question of who can speak for the culture. This question involves the intersection of popular culture, of mores and politics, and of power and identity. See generally, Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996) (discussed *infra* at note 145); Joseph W. Schneider, *Social Problems Theory: The Constructionist View*, 11 ANN. REV. SOC. 209, 214-19 (1985) (on the ways in which elites compete for ownership of issues, and how those issues are shaped as a result).

8. See, e.g., Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & CULTURE 23, 38 (1994) ("Linguistic assimilation has been a particularly effective instrument in cultural suppression and eventually obliteration."). These forces may work informally as well. See, e.g., Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 24-35 (1992).

held in common with subordinating groups, and yet, perversely misconceives the strength and focus of the dominating group discussion this scholarship seeks to interrogate. The result is the *silence* of internal communication within communities, and *noise* passing for dialogue between communities.

I. On the Necessary Conservatism of Our Criticism of Welfare Reform

People who think about poor relief argue that the welfare system is broken in some manner or other. The articles presented at this Symposium are no exception. Each has posited an alternative vision of welfare, ranging from something radically different to something very close to today's system. Each has also distanced the ideas or program described from those put forward by Republican Party "reformers" in Congress. Even if they do not argue that the current structure of poor relief is fundamentally flawed, most academics argue that current conservative reform proposals, and specifically those set forth in the PRAWO,⁹ are at best misguided and at worst fatally flawed. They particularly condemn, to a greater or lesser degree, the current Republican position that "[w]elfare entitlement must be replaced by limited benefits that are contingent on self-improvement and work."¹⁰

Like many others currently dealing with issues of welfare reform, the articles presented at this Symposium express a discomfort with "proposals . . . designed to punish welfare recipients for violating state-favored behavioral norms or values and to manipulate recipients not complying with these norms,"¹¹ and proposals which scapegoat other social subgroups, particularly immigrants and women of color. The current welfare reform literature tends to loudly decry "pernicious examples of value-intrusive welfare reform,"¹² the devaluation of the caretaking role of mothers,¹³

9. PRAWO, *supra* note 3, which became law as PRAWORA, *supra* note 3.

10. E. Clay Shaw, *Welfare: 'The Fight is Not Over,'* WASH. POST, NAT'L WKLY. ED., Feb. 12-18, 1996, at 26. Mr. Shaw, a Republican Representative from Florida, is the Chair of the Human Resources Subcommittee of the House Ways and Means Committee. He was one of the chief architects of the Personal Responsibility and Work Opportunity Act of 1995, *supra* note 3. But even President Clinton stated in his veto message, "I strongly support time limits, work requirements, the toughest possible child support enforcement, and requiring minor mothers to live at home as a condition of assistance, and I am pleased that these central elements of my approach have been addressed in H.R. 4." Letter from President Clinton to the House of Representatives (Jan. 9, 1996) (on file with author).

11. Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. J. 1, 3 (1995). On my use of the terms "we" and "us" and "our" in front of phrases like "poor relief" and "welfare," see *infra* note 158.

12. Barksdale, *supra* note 11, at 3; Deirdre English, *The Women's Committee of 100 Plus, and Our Advertisement in The New York Times*, 7 HASTINGS WOMEN'S L.J. 317 (1996).

and the way in which welfare tends to marginalize or ignore immigrants, and especially immigrants of color.¹⁴ The articles offer alternatives which might usher in a 'new legal order,'¹⁵ or which maximize the potential of the compassionate system which reached its greatest flowing in the "Great Society" programs of the 1960s and 1970s.¹⁶ We like to think that what we say about welfare is somehow different from, and irreconcilable with, proposals which seemed to capture the attention of the traditionalist forces in control of Congress after 1994, forces which produced the failed PRAWO Act in 1995 and then successfully pushed through the substantially similar PRAWORA in 1996.

Yet when we delve even a little beneath the surface of our current welfare system, the PRAWO/PRAWORA reform effort, and especially the alternatives proposed in the papers presented today, we discover what Pogo discovered long ago: *We have met the enemy and they is us.*¹⁷ The papers presented in this Symposium appear very different—different in focus, approach, and solutions. We might be tempted to conclude that they are irreconcilable in many respects.¹⁸ After all, how do we reconcile—how can we understand as a jurisprudential or socio-legal unity—proposals which seem to speak in different languages? Professor Gilbert seeks to distinguish between welfare recipients who become eligible in the aftermath of a decline in family income or following a change in marital status on the one hand, and unmarried women (especially young women) on the other, providing the former with aid for two years without state interference and

13. Joanna Weinberg, *The Marginalization of Women's Work: An Election Year "Cliffhanger,"* (1996) (on file with the *Hastings Women's Law Journal*); Marty M. Slaughter, *The Legal Construction of "Mother,"* in *MOTHERS IN LAW* 73 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

14. See Tanya Broder & Clara Luz Navarro, *A Street Without an Exit: Excerpts From the Lives of Latinas in Post-187 California,* 7 *HASTINGS WOMEN'S L.J.* 275 (1996).

15. See, e.g. Mark N. Aaronson, *Scapegoating the Poor: Welfare Reform All Over Again and the Undermining of Democratic Citizenship,* 7 *HASTINGS WOMEN'S L.J.* 213 (1996) (arguing for the need for a constitutionalization of social rights); MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) [hereinafter *FINEMAN, NEUTERED MOTHER*] (arguing that patriarchal norms in family formation, and therefore the thrust of behavior modification provisions in welfare discourse, must be replaced by a paradigm of family based on the child-mother dyad so that single mothers would no longer be treated as deviant).

16. See Neil Gilbert, *Welfare Reform: Implications and Alternatives,* 7 *HASTINGS WOMEN'S L.J.* 323 (1996) [hereinafter *Welfare Reform*], which is taken largely from Professor Gilbert's fuller exposition in NEIL GILBERT, *WELFARE JUSTICE: RESTORING SOCIAL EQUITY* (1995).

17. Pogo was a cartoon character invented by Walt Kelly. In one of his adventures he searched everywhere in the Okefenokee swamp for the source of society's litter problem before discovering to his chagrin that he was looking for an aspect of himself all along. See WALT KELLY, *OUTRAGEOUSLY POGO* 114 (1985).

18. For a discussion of my view of these similarities and differences, see *infra* Part III.

providing the others with a multi-phased program of progressive state intervention.¹⁹ The Committee of One Hundred would guarantee income to all women without the intrusive interference of the state.²⁰ Professor Aaronson seeks to guarantee social rights of equal dignity with the non-economic rights guaranteed by the federal constitution.²¹ Professor Weinberg would reorder wage labor markets to internalize the value of caregiving.²²

Let's take a closer look at how this works.²³ Think about poor relief as coordinates within a sphere, a small sphere. The boundaries of the sphere are defined by the normative substructure provided by the core assumptions of the way in which our society is ordered.²⁴ Each variant of poor relief, existing or proposed, occupies coordinates within this sphere.²⁵ The coordinates may overlap, or they may be separated by some distance. Within the boundaries of the sphere, the distances between coordinates appear large, the way the distance from bedroom to kitchen may appear large in a house. However, when viewing the boundaries from outside the sphere, those distances may appear rather small, the way the same distance between rooms may appear when seen from an airplane overhead.

The boundaries consist of the taboos or rules comprising our socio-cultural substructure. The prime postulate of our social ordering is grounded on three fundamental notions; each of which is taken as a given. First, all people are responsible for their own maintenance.²⁶ Second, all

19. See Gilbert, *Welfare Reform*, *supra* note 16, at 333-37.

20. See generally English, *supra* note 12, (considering the *Women's Pledge on Welfare Reform: Eliminating Poverty for Women and Their Children*, produced by the Committee of One Hundred).

21. See generally Aaronson, *supra* note 15.

22. See generally Weinberg, *supra* note 13.

23. For a more detailed discussion of what follows, see Backer, *Essay: Poor Relief, Welfare Paralysis and Assimilation*, *supra* note 4, from which this is largely taken.

24. I have elsewhere described the boundaries of this normative substructure which I have named the static paradigm. See Larry Catá Backer, *Of Handouts and Worthless Promises*, *supra* note 2.

25. In this sphere, poor relief operates as a self-organizing system in an environment of order and disorder from which it draws its essential qualities which then take on a life of their own, and with which it communicates. See Heinz von Foerster, *On Self-Organizing Systems and Their Environments*, reprinted in HEINZ VON FOERSTER, *OBSERVING SYSTEMS* 2, 5-8 (1981). The sphere comprises the postulates of our reality. These postulates cannot be proven. These *are*, by mutual agreement, "by postulating the reality of the world in which we happily thrive." *Id.* at 7. Of course, the fact that boundaries exist—that postulates drive analysis—does not mean that these postulates go unchallenged. It is to the nature, and, perhaps on some level, the futility of the communication of such challenge, that I devote the preliminary exploration in Part III, below.

26. This is a command from the God of the North African, Middle Eastern and European peoples. It is communicated explicitly as a Divine (immutable) command:

And unto Adam he said, "Because thou hast hearkened unto the voice of thy

people have free will.²⁷ Lastly, there have been and always will be sufficient jobs to employ all willing, able-bodied people who want to work.²⁸ Acceptance of a social ordering built on these notions requires acceptance of the existence, value, and immutability of income inequali-

wife, and thou hast eaten of the tree, of which I commanded thee, saying, Thou shalt not eat of it: cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life;

Thorns also and thistles shall it bring forth to thee and thou shalt eat the herb of the field;

In the sweat of thy face shalt thou eat bread, til thou return unto the ground; for out of it wast thou taken: for dust thou art and unto dust shalt thou return."

Genesis 3:17-19.

And this Divine command traditionally has been supplemented by the compulsion of the secular state. In England, France, and Spain it pre-dates the Renaissance. On English secular labor and poor law policy, see, e.g., JOHN POUND, *POVERTY AND VAGRANCY IN TUDOR ENGLAND* (1971). On French policy just prior to the 1789 Revolution, see THOMAS MCSTAY ADAMS, *BUREAUCRATS AND BEGGARS: FRENCH SOCIAL POLICY IN THE AGE OF THE ENLIGHTENMENT* (1990); OLWEN H. HUFTON, *THE POOR OF EIGHTEENTH-CENTURY FRANCE 1750-1789* 131-216 (1974). On Spanish attempts at poor relief prior to the modern age, see JEAN SARRAILH, *LA ESPANA ILUSTRADA DE LA SEGUNDA MITAD DEL SIGLO XVIII* 413-707 (Antonio Alatorre trans., 1957).

27. This notion is as old as our dominant religion. On the nature of free will as understood by the religious in the West, see, e.g., UNITED STATES CATHOLIC CONFERENCE, *CATECHISM OF THE CATHOLIC CHURCH* §311, at 82 (1994) ("Angels and men, as intelligent and free creatures, have to journey toward their ultimate destinies by their free choice and preferential love. They can therefore go astray. . . . [God] permits it, however, because he respects the freedom of his creatures and, mysteriously, knows how to derive good from it.") It remains popular in its modern form, clothed in the language of neutral principle, psychology, and socio-economic nostrums among both traditionalists and liberals. See, e.g., LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NON-WORKING POOR IN AMERICA* 157-158 (1992) (regarding traditionalists); KATHRYN EDIN & CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY AND THE UNDERCLASS* 204-205 (1992) (regarding liberals).

28. This last one sounds a bit strange, but its pervasiveness is readily demonstrated. Traditionalists have internalized this notion without much thought — it exists. See, e.g., MEAD, *NEW POLITICS OF POVERTY*, *supra* note 27, at 85-109; CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984); *but see* DAVID R. REIMER, *THE PRISONERS OF WELFARE: LIBERATING AMERICA'S POOR FROM UNEMPLOYMENT AND LOW WAGES* 29-34 (1988) (suggesting that job seekers exceed available jobs). Yet, even liberals believe in the possibility of full employment. Unlike traditionalists, however, liberals believe that full employment is possible only with some (with variations on the meaning of "some") intervention by the state. See, e.g., NORMAN FURNESS & TIMOTHY TILTON, *THE CASE FOR THE WELFARE STATE: FROM SOCIAL SECURITY TO SOCIAL EQUALITY* 164-166 (1977). Their belief underlies the thinking behind efforts like the Employment Act of 1946, 15 U.S.C. §§ 1021-1026. (1995). It may also underlie the basis of the Great Society intervention into the lives of the poor as well. See, e.g., MURRAY, *supra*, at 56.

ty.²⁹ It follows that income inequality must be a function of productivity or wealth accumulation—even a minimum of productive conduct is sufficient to provide an adequate amount of wealth or income to meet one's needs.³⁰ Destitution is thus primarily little more than social deviance, a condition within the control of the poor themselves, and, ultimately,³¹ directly a function of their refusal or inability to work.³² Poverty, as a pathological condition affecting the individual pauper, is not a symptom of a malfunctioning society or an economic system. Even for those with physical disabilities, there is a general understanding that such people can overcome their "disabilities" with the "right" kind of support and fend for themselves. If they do not, their "failure" is seen as an indication of their unwillingness to overcome their "handicaps."³³

29. A person has a right to the substantially undisturbed enjoyment of the fruits of his or her labor which constitutes the reward for productivity. This is the way in which our society has chosen to sort its members. See, e.g., MURRAY, *supra* note 28, at 234 ("Some people are better than others. They deserve more of society's rewards, of which money is only one small part."). John Galbraith perhaps echoed these sentiments more tactfully when he noted that "[t]here has always been the underlying contention that, as a matter of natural law and equity, what a man has received save by proven larceny is rightfully his." JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* 68 (3d ed. 1976).

30. Income inequality serves as a "neutral" form of discrimination in favor of the productive. On the lack of neutrality of this device, see, e.g., Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1479 (1994).

31. We accept the possibility of temporary unproductiveness. People get laid off or fired, but for that situation, alternative schemes of governmental charity are available — primarily through the unemployment compensation system. For a discussion of those programs, see JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY 1900-1980*, at 71-75 (1981); LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 128-32 (1986).

32. Consider in this light the arguments of Daniel P. Moynihan, who has spent a lifetime criticizing the tendency of "society" to accept poverty related deviance as normal. Daniel P. Moynihan, *Defining Deviancy Down*, 62 AMERICAN SCHOLAR 17 (1993). See also James Q. Wilson, *The Rediscovery of Character: Private Virtue and Public Policy*, in *ON CHARACTER: ESSAYS BY JAMES Q. WILSON* 11, 16-17 (1991); Nancy Wright, *Not in Anyone's Backyard: Ending the 'Contest of Nonresponsibility' and Implementing Long-Term Solutions to Homelessness*, 2 GEO. J. FIGHTING POVERTY 163, n.29 (1995) (describing popular views of the causes of welfare dependency).

33. Consider the now near apocryphal figure of Helen Keller. Frank Bowe has long made the point that people such as Helen Keller are routinely portrayed unrealistically to suggest that disabilities are something which can be 'overcome.' FRANK G. BOWE, *HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE* 111 (1978). See also Backer, *Medieval Poor Law*, *supra* note 2, at 947 & n.225 ("understand that one epoch's disabled person is another epoch's ordinary (although challenged) person").

Rather, the differing abilities of people ought to be accepted for what they are. A consequence of this rethinking of the nature and productivity limiting potential of abilities different from that of any dominant 'norm' has steadily eroded as society has come more and more to think that the 'traditionally' disabled ought to work. This is reflected in legislation such as the Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)), and related legislation.

Poor relief, therefore, is fundamentally contrary to the ordering of the social and economic system. It is a process by which the state takes from the productive the fruits of their productivity for distribution to the non-productive. Poverty indicates individual failure (intentional or not, it does not matter) within the social and economic fabric of life. The amelioration of poverty requires actions at once necessary and inimical to that fabric. As such, society will permit the transfer of resources from the productive to the non-productive only if the consequences of non-transfer are deemed worse than those of transfer.³⁴

But recall that our core norms, our social and religious mores, teach us that nothing comes without cost. Poor relief is not given—it is sold. The primary price the poor pay is *acceptance* and *conformity*.³⁵ Acceptance—assimilation of the postulates on which the social and economic system rests—acknowledges that there is a reason why some are wealthy and others are poor. It provides a justification for the existing social structure based on notions of merit and a modern form of primogenitor. Conformity—internalization of the specific conduct norms of the relief givers—assures stability as well as the potential for minimizing the need to give aid in the first place. And so, we arrive at the valuing of income transfers to the poor. Looming large in the valuation is the cost of socio-cultural subversion.³⁶ Income transfers to paupers are inherently subver-

See also Robert L. Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); R. Bales, *Once is Enough: Evaluating When a Person is Substantially Limited in the Ability to Work*, 11 HOFSTRA LAB. L.J. 203 (1993). *Cf.* School Board of Nassau County, Florida v. Arline, 480 U.S. 273, 284 (1987) (“Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”); Martha T. McCloskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 872 (1988) (“All people have physical limitations, and all can expect to have more disabilities as they grow older. The labels ‘able-bodied’ and ‘disabled’ only approximate the wide range of human physical activity. . . . An able-bodied norm is incorrect not only because it implies that disability is unusual, but because it also suggests that disability is inherently deviant and abnormal in a normative sense.”). Further discussion on this topic is beyond the scope of this article.

34. Only two situations qualify without controversy: death; and an absolute inability to be productive. Temporary unemployment may also qualify, but that is treated differently in the United States. *See* PATTERSON, *supra* note 31, at 67-71. Of course, given the recent shift in public policy, exemplified by federal legislation such as the Americans With Disabilities Act of 1990, *supra* note 33, the set of people who can claim total disability has been shrinking.

35. Herbert Gans provides a list of other types of “value” extracted from the poor in return for the provision of institutional relief. *See* Herbert J. Gans, *Positive Functions of the Undeserving Poor: Uses of the Underclass in America*, 22 POL. & SOC. 269, 271-79 (1994).

36. For those who find this hard to understand, I refer you to the sense of Congress memorialized in PRAWORA. *See infra* note 128 (citing PRAWORA, *supra* note 3, at §101(1), (2), and (8)). For those who think this is a problem of recent invention, I direct

sive because such transfers carry with them the potential to destabilize the existing social order. But income transfers to the poor produce social value exceeding the cost of its provision in two significant ways. First, it produces and maintains social stability; the failure to transfer any income to the destitute might be more destabilizing than its provision.³⁷ Second, the nature of the giving as fundamentally *conditional* provides a means of suppressing deviance by co-opting it, a subject I take up in more detail in Part II.

The primary rule of welfare and welfare reform is this: *We will give as long as we get what we pay for.* Poor relief is reduced to a search for the "optimum" amount of transfer. Society, therefore, will tend to spend a great deal of time and effort worrying about the taxonomy of poverty, based on notions of productivity both for its own sake and as a tool of assimilation to the values represented by productivity of the type deemed socially desirable.³⁸ This taxonomy employs two sorting devices—eligibility discrimination and hierarchies of need.³⁹ As a result, the receipt of undeserved institutional charity is strongly *taboo*.⁴⁰ Society concentrates on weeding out welfare "cheats" and fraud; we worry more about the

you to the descriptions of choking conformity common in this country in the 1920's. See, e.g., SINCLAIR LEWIS, *BABBITT* (1922).

37. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 341-47 (1971); MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 313-42 (1988) ("Although AFDC's harsh regulations intervene in the daily life of poor women on behalf of the *status quo*, the program also paradoxically contains the potential to counter social conditions on which capitalism and patriarchy depend. Herein lies its threat to the haves and its possibilities for the have nots.").

38. Recall that criminal activity can also be highly productive in the traditional sense of producing wealth sufficient to sustain oneself. However, that sort of activity is deemed wrong, perhaps immoral, and certainly destabilizing. In some instances it is destabilizing enough that society requires a declaration of "war" against it (consider, for example, the generation-long war on drugs).

39. Thus, society will tend to create taxonomies based on need. The term 'need' is constructed and reconstructed in its detail to suit the particular necessities of society at any one time. Frances Piven and Richard Cloward have examined this phenomenon from the perspective of social control. See PIVEN & CLOWARD, *supra* note 37, at 347. Gilbert Steiner and Daniel P. Moynihan have examined it from the perspective of politics. See GILBERT Y. STEINER, *SOCIAL INSECURITY: THE POLITICS OF WELFARE* (1966); Moynihan, *supra* note 32. Need is used to determine the *quantity* of aid made available to the individual pauper, and to some extent the *order* in which such quantities are distributed, based on the immediacy of the individual pauper's need.

40. The pathologically poor, it is assumed, would rather exaggerate the level of their economic distress than actually have to find and retain a job that does not suit them (because it requires work when either none is necessary for the accumulation of income or because illegal activities (reported as non-work) are more profitable). Cf. MEAD, *supra* note 27, at 151.

tendency to cheat than the cost of failing to provide for the eligible.⁴¹ But in this endeavor we are both sloppy⁴² and small minded.⁴³

Coming at welfare reform from radically different perspectives, Neil Gilbert and Dierdre English both exhibit a marked fidelity to the core normative notions of American culture. To that extent, they are "sisters" under the skin. Let's take a closer look at them from the perspective of our normative substructure.

First, let me consider Professor Gilbert's criticism of current traditionalist welfare reform efforts. Professor Gilbert argues that incentive oriented policies are wrongheaded because they produce perverse results.⁴⁴ Thus, Professor Gilbert argues that measures which penalize the poor for "bad conduct" generate high administrative costs. This would not be so bad except that the high costs exceed the savings generated by the penalties.⁴⁵

41. Consider, in this light, the decades long concentration by Congress and both Democratic and Republican Administrations on the problems of cheating. For example, the Carter administration initiated a "national conference on fraud, abuse and error" in 1979 to discuss solutions to the perennial problem of among other things, welfare fraud. See, e.g., UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, THE SECRETARY'S NATIONAL CONFERENCE ON FRAUD, ABUSE AND ERROR: PROTECTING THE TAXPAYER'S DOLLAR (U.S. Gov't Printing Office, 1979). See generally William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983). However, this appears to be a losing battle. See KATHRYN EDIN, THERE'S A LOT OF MONTH LEFT AT THE END OF THE MONEY: HOW WELFARE RECIPIENTS MAKE ENDS MEET IN CHICAGO 96 (1993).

42. See, e.g., Ronald Paul Hill & Sandi Macan, *Welfare Reform in the United States: Resulting Consumption Behaviors, Health and Nutrition Outcomes, and Public Policy Solutions*, 18 HUM. RTS. Q. 142, 151-154 (1996) (describing the extent of welfare "fraud" and the real reluctance of case workers to worry too much about it). "Even when fraud is obvious, the paperwork and official processes are lengthy and supervisors discourage the pursuit of all but the most iron-clad cases. Finally, case workers see little to be gained from the investigation of fraud because most recipients who are found guilty of fraud remain on welfare, with only a reduction in benefits to 'reimburse' the state." *Id.* at 153-54 (citing EDIN, *supra* note 41 (regarding the author's recent study of welfare practices in Chicago)).

43. See Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 HARV. C.R.-C.L. L. REV. 263, 273 (1993) (relating the story of Sandra Rosado, who was required to spend down about \$4,900 in savings earmarked for higher education in order to preserve her mother's eligibility for welfare benefits).

44. Gilbert, *Welfare Reform*, *supra* note 19, at 324-27.

45. *Id.* at 325. According to Prof. Gilbert, this excess occurs when the issue to be resolved revolves around the recipient's ability to apply for health reasons (especially mental or physical). But consider whether, for purposes of our normative standards, such costs are not more "valuable" than those otherwise incurred in succoring the undeserving. Compliance and administrative expense generate production of a positive sort; they employ people, they permit productivity to be squeezed out even from the necessity to provide for the unproductive, and each *story* generated by the hearing and administrative procedure provides yet another layer of fable for the edification of current and future generations of the poor. This layer of fable serves as a valuable socio-cultural teaching tool, much like the stories of pre-literate peoples. Cf. HERBERT J. GANS, PEOPLE, PLANS AND POLICIES: ESSAYS ON POVERTY, RACISM AND OTHER NATIONAL URBAN PROBLEMS 193-224 (1991).

Likewise, measures encouraging positive behaviors by providing services such as training or child day-care will, because of the inevitability of creaming, increase costs without statistically significant gains in objectives.⁴⁶ Measures that limit access to benefits merely shift costs and make long term integration into mainstream society by the beneficiaries that much harder (that is, more expensive).⁴⁷ Measures that reward beneficiaries for returning to work create a moral hazard. If the benefits are great enough, then people working in jobs whose benefits are less than those provided by institutional relief will have an incentive to prefer welfare to work.⁴⁸ Perhaps, worst of all, incentive-oriented policies rest on job availability.⁴⁹

46. Here, Prof. Gilbert argues that such services would disproportionately serve that portion of the eligible population which would have exited welfare whether or not such services had been provided. See Gilbert, *Welfare Reform*, *supra* note 19, at 325. On the other hand, as our history with wealth transfers in the twentieth century amply demonstrates, Americans tend to prefer to reward those who have been productive (social security) and those who we believe will soon be productive again (unemployment compensation) far more generously than those we believe have been or will be neither. Creaming may therefore be socially useful as a means of limiting the absolute size of the dependant population. That, at any rate, seems to have been the effect generally of the welfare reform programs of the last several generations. Sadly, this has generally served to disadvantage women. See, e.g., ABRAMOVITZ, *supra* note 37, at 362; Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983). Notions of creaming fit very well into distinctions we tend to make between poverty as a "status" (the chronically dependant poor and other euphemisms) and temporary disruption. Indeed, the belief in the significant normative distinction between status poverty and "temporary" or "event" poverty animates Professor Gilbert's proposal to divide AFDC recipients into two classes. See *infra* notes 109-17 and accompanying text.

47. Gilbert, *Welfare Reform*, *supra* note 19, at 325-326. The notion here is that while the limitation of access to benefits can initially reduce costs (if costs are measured as limited to the programs in question), it will actually increase systemic costs by shifting the expense of maintenance to other sectors of the institutional economy — the jails, homeless shelters, police manpower, and protective services. *Id.* Of course, as I have argued elsewhere, I think that Prof. Gilbert is partially correct. Some of the costs merely will be shifted to other public (taxation based) accounts. However, some of these costs will be shifted to *private* enterprises. See Backer, *Medieval Poor Law*, *supra* note 2, at 996-1001. Prof. Gilbert, I believe, suspects that the shift to private sources of institutional relief will be smaller than what the Congressional Republicans believe. For a discussion of the beneficial effects of cost shifting from the perspective of the Congressional Republicans in the 1995-96 legislative year, see Backer, *Welfare Reform at the Limit*, *supra* note 3, at 358-359.

48. Gilbert, *Welfare Reform*, *supra* note 19, at 326. Of course, this is the core notion of conservative theorists, especially since Charles Murray's work in the early 1980's. See MURRAY, *supra* note 28. It continues to be echoed today. See, e.g., MEAD, *NEW POLITICS OF POVERTY*, *supra* note 27, at 206-09; REPUBLICAN NATIONAL COMMITTEE, *CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION* (Ed Gillespie & Bob Schellhas eds., 1994) [hereinafter *CONTRACT WITH AMERICA*].

49. On the availability of such work, see REIMER, *supra* note 28, at 29-34, 43-56. For an argument that government intervention in the labor markets necessarily produces higher rates of unemployment, see RICHARD VEDDER & LOWELL GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* (1993).

But this grounding is inherently perverse because when jobs are readily available the incentives are unnecessary; when they are unavailable, incentive oriented policies serve to *discourage* necessarily unsuccessful job seekers.⁵⁰ Moreover, the notion of fixing things through the device of block grants will create a "race to the bottom" as states seek to narrow eligibility standards and reduce grant size.⁵¹

For Professor Gilbert, the problem of eliminating the indignities of poverty and poor relief does not arise from any fundamental flaw within our society. Our core social ordering is healthy and worth maintaining. What *is* wrong are the ways in which we are attempting to "reform" welfare. Professor Gilbert accepts the basic scope and focus of poor relief in the United States; he proposes changes which would ameliorate the problem of institutional alms-giving. The power to ameliorate poverty, however, is in the hands of the poor—the state can provide structure, but the effort must be that of the poor. The poor can be guided and fed; were they but to exercise their free will in the "correct" manner, the poverty "problem" would disappear.

Perhaps, more importantly, the measurement of success by cost and cost reduction points back to the notion that income transfer from the productive to the unproductive is inherently suspect. Professor Gilbert proposes that a different way to attain the goal is self-sufficiency, not fostering income or wealth equality. But self-sufficiency is defeated as much by "confiscatory" redistribution as it is by overgenerous or misdirected alms. Cost becomes a significant factor in any welfare reform analysis.

Consider, for example, Professor Gilbert's criticism of the efficiency and effectiveness arguments supporting the push to use community based organizations as a means of delivering social services to the poor.⁵² Community based organizations may be no more responsive to their clients than the state bureaucracy because too many of the beneficiaries are too dysfunctional to effectively participate. These organizations tend to exacerbate the problems of the working poor by underpaying their

50. Gilbert, *Welfare Reform*, *supra* note 19, at 326-27.

51. *Id.* But the race to the bottom has been going on for some time now. See, e.g., Note: *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, 1994-97 (1996). States have not been waiting for welfare reform at the national level to impose some greater or lesser portion of the reforms of PRAWORA. See Barbara Vobejda, *Going Their Own Ways: The Nation's Governors Aren't Waiting for Clinton and the GOP to Agree on Welfare Reform*, WASH. POST, NAT'L WKLY. ED., Feb. 12-18, 1996, at 29 ("Once other states see what is happening, that there is a reasonable success in doing that . . . we will see even more states move in that direction.") (quoting LaDonna Pavetti, a welfare specialist at the Urban Institute). And, indeed, the new welfare reform package will preserve the status of state waiver based poor relief programs. See *Highlights: Changes in Welfare*, N.Y. TIMES, July 31, 1996, at A8.

52. Gilbert, *Welfare Reform*, *supra* note 19, at 327-31.

staff—they tend to exploit labor as skillfully as any non-union employer. Community based organizations also tend to be political and exclusionary, competing with functionally based groups, such as labor unions. “[E]xperience with various forms of neighborhood organization suggest that they can become just as institutionalized, rigid, inaccessible, unresponsive, and undemocratic as professionalized bureaucracies.”⁵³ In effect, community based organizations, the private institution through which commentators believe democracy can be promoted and civil society revitalized,⁵⁴ may well be better at mimicking the institutional responses of society than at reshaping it. The normative substructure remains the same even as the holders of power shift at some level.

And so, the taxonomy of poverty becomes important. Creaming and moral hazards are to be avoided as wasteful—society does not get what it wants to pay for. Cost shifting and increased administrative expense may also be bad. Yet, I have argued that the negative effect may be less intense, in part, because both generate income transfers to productive members of society—police, social service professionals, and lawyers.⁵⁵ Work and time limit don’t work, not because they are unfair or vehicles for domination and subordination, but because they do not efficiently or effectively advance the basic goal of poor relief—that is, the minimization of the number of unproductive members of society and the cost of their maintenance. Work and time limits provisions provide examples for Professor Gilbert of the kind of perverse incentives he earlier illustrates. Thus, lifetime eligibility rules serve primarily to shift costs: those unemployed after two years are likely to be the most economically deviant,⁵⁶ the social and economic costs of public works is “staggering,”⁵⁷ and compliance may

53. RALPH M. KRAMER, VOLUNTARY AGENCIES IN THE WELFARE STATE 284 (1981) (citing NEIL GILBERT & HARRY SPECHT, DIMENSIONS OF SOCIAL WELFARE POLICY 174-77 (1974)). However, it also promotes the myth of the devolution of power to the “representatives” of the poverty communities.

54. For a discussion of the utility of traditional private organizations as the means of saving poor relief from a traditionalist perspective, see, e.g., NATHAN GLAZER, THE LIMITS OF SOCIAL POLICY 125-27 (1988).

55. These professionals and workers must eat too, but must they eat at the taxpayers’ expense? That is the question of policy which we debate. The poor are even marginalized in the debate over cost because they may not be its primary beneficiary or object. Perhaps not good but certainly predictable, it is neither “their money” nor “their services” which are at issue. The voices of the productive always carry more weight than those of deviants. For an interesting discussion of the credibility of stories, see Kim Lane Scheppelle, *Foreword to Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

56. These are identified under the rubrics of teenage mothers and addicts. Gilbert, *Welfare Reform*, *supra* note 19, at 332. Teenage mothers and addicts are most likely not to possess those skills or mores necessary to survive in our culture.

57. *Id.* It is more expensive for the state to provide a job than to provide a grant. On the other hand, as I earlier suggested, to the extent that these programs siphon off funds to administration, the perceived cost may be less than the actual dollars spent since there is

be an impossible project.⁵⁸ Professor Gilbert argues, convincingly I think, that in all of this, the children of the poor get lost in the shuffle. It is to them that Professor Gilbert directs his proposed reform, which I discuss below.

But what about the program of the Committee of One Hundred ("COH") as related by Dierdre English?⁵⁹ On the one hand, the COH urges opposition to "punitive measures that assume that the behavior, attitudes, and values of women on welfare are the problem."⁶⁰ On the other, COH also speaks of the importance of deterrents to behavior which is not in the best interests of young women.⁶¹ These deterrents are important if one is to conform one's behavior to maximize opportunities within the system of existing cultural signals. Yet, as even the COH obliquely admits, that requires conformity to dominant norms *to some significant extent*.

Consider also the COH approach to work and productivity. There appears to be no question that women on welfare ought to become productive in the socially conventional way.⁶² Women work. The only question revolves around the conditions of that labor,⁶³ and perceptions

value in productivity.

58. See *Id.* at 332-33. The administrative expense may leave little for aid to the poor. Moreover, crafting the appropriate offense and punishment may be quite difficult. Ultimately, the real effect of compliance may be cost shifting—to private institutional providers of relief, as well as to police, child protective services and the like.

59. The Committee of One Hundred [COH] is a private organization of women "concerned about the impending legislation on welfare." Letter from Eva Feder Kittay and COH pledge intended for circulation to people invited to join the COH 1 [hereinafter COH Letter and Pledge] (June 19, 1995) (on file with the *Hastings Women's Law Journal*).

60. *Id.* at 3.

61. Thus, the *Women's Pledge on Welfare Reform: Eliminating Poverty for Women and Their Children* provides:

Access to and funding for contraception, family planning counseling, and abortion services should be improved. Early teen pregnancy and childbirth can be harmful to the health, education, and training of young women. Educational opportunities, family planning, contraceptive access, and hope for the future are the best and most humane deterrents.

Id. It is not clear to me that there is a fundamental difference between the compulsion of the Republican behavior modification proposals and the deterrence of the COH. In either case, they look on welfare women (and especially young women) as children who must be educated in the ways of proper behavior. Professor Gilbert's proposals, in this regard, are the most honest in their judgment of the objects of their focus.

62. "A great many welfare recipients want paid employment and often have labor market experience, but lack the skills, education, or English proficiency to obtain jobs that pay adequate wages to support their families." *Id.* at 4.

63. "Achieving pay equity, increasing the minimum wage, creating incentives for employers to provide fringe benefits in contingent and other low-wage jobs, and encouraging collective bargaining should be integral parts of an effective and comprehensive welfare reform strategy." *Id.* at 4. Thus, the problem isn't that work is not valued, it is instead that the traditional structure of *valued* work excludes much of what women do or have

about the real opportunity for work.⁶⁴ Given the correct set of incentives, all women could internalize the economic values of solid middle class people. In this sense, the COH approach gives far more weight to the “gendered obstacles that poor women face in the labor market”⁶⁵ than does Professor Gilbert. Like Professor Gilbert, the COH approach does not question the *core* notion animating welfare reform discussion—that the poor must be conventionally productive. However, the COH approach may implicate the question of what it means to be conventionally productive—a topic largely untouched by Professor Gilbert and the COH, but at the core of Professor Weinberg’s paper, discussed below at Part II.B. In the end, and whatever way one defines productivity, the papers suggest that even the poor must “grow up” and become good citizens in the traditional conventional sense.

The difference, and perhaps an important difference, between COH’s approach and that of Professor Gilbert (and certainly that of the Congressional Republicans) is the extent to which each values the use of compulsion.⁶⁶ And yet, all seek the same thing—fully, economically integrated

traditionally been permitted to do. That, of course, is the point Joanna Weinberg addresses. See generally Weinberg, *supra* note 13; cf. Lucie E. White, *On the “Consensus” to End Welfare: Where Are the Women’s Voices?*, 26 CONN. L. REV. 843, 849 (1994) (“The welfare reform conversation never really faces up to the gender-specific disadvantages that women — all women, but especially the poor — confront in a labor system that was historically constructed to favor males.”).

64. “The labor market conditions women face, including gender- and race-based discrimination, limit opportunities. Women face unstable employment that pays low wages and lacks health and retirement benefits, inaccessible paid work, and no paid work at all.” COH Letter and Pledge, *supra* note 59, at 3.

65. White, *supra* note 63, at 850. For a discussion of the ways in which gendered discrimination affects the employability of women, see *id.* at 849-51.

66. As I have argued elsewhere,

Welfare reforms, therefore, focus poor relief on the poor themselves. Since the able-bodied have made deliberately vicious (though somewhat tepidly described by some as self-serving, or at least unenlightened) life-style choices the cure for poverty lies not with the system but with the recipient. Poor relief reforms are “people-oriented” in the sense that incentive, punishment, and compulsion are directed to altering unacceptable behavior. This orientation remains constant, whatever the political allegiance of the reform, and whether or not, as is currently customary, the reform is couched in the therapeutic language of self-sufficiency, mutual responsibility, or the eradication of poverty.

Backer, *Welfare Reform at the Limit*, *supra* note 3, at 355-56. Like the Clinton administration programs for welfare reform, introduced in 1994 and forgotten by Congress in 1995, the COH “appears most comfortable with hortatory and educational programs to deal with the problem of teenage and out-of-wedlock pregnancies.” *Id.* at 387. Their reliance on persuasion, rather than compulsion, rests on the notion that compulsion may not be necessary given the proper incentives — training, job availability, and the elimination of structural impediments to (commonly valued) work. *Id.*

women who do not violate core socio-cultural taboos.⁶⁷

II. Welfare, Culture, and Conformity

My conclusion that the approaches taken in the papers presented are all premised on the same core set of norms does not mean that there are not differences between them. Each paper applies our socio-cultural ground rules differently. But this, as I will show below, is a function of interpretation within the parameters of our social "ground rules," and not evidence of core differences in vision. As such, these papers evidence the tensions and instability *within the bounds* of American postulates of fundamental socio-cultural norms.

These tensions exist primarily between two central sets of conflicting notions within our established socio-cultural universe. The first is *social conformity*; the need to facilitate assimilation into the dominant culture.⁶⁸ The second is *toleration* (not approval) of dissent or non-conformity.⁶⁹ All of us, and each in our own way, want the poor (along with everyone else) to conform to some set of norms—my point is that for the most part, they are the same norms.⁷⁰

67. It is true that COH also advocates income redistribution of a kind not contemplated by more traditionalist versions of our normative substructure. But there is nothing in our underlying system that limits the amount of the benefit conferred on the poor. What our system requires is that we *value* the redistribution more than we value the forgone income "reward" to the productive. And, the COH perspective reflects a value judgment that within the framework of an outlook that treasures productivity and self sufficiency, current welfare system "grants are meager and stigmatizing; its provisions are restrictive; it does not address crucial social problems of endemic unemployment, poor education, and the absence of support systems." COH Letter and Pledge, *supra* note 59, at 1.

68. The assimilation imperative has been noted by scholars who acknowledge its importance. See, e.g., Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 102-03 (1996) ("If limited by moral principle rather than driven by social fashion, assimilation, far from being the enemy of diversity, is perhaps the only means for reconciling this country's commitment to pluralism with its commitment to justice."). It has also been noted by those who condemn the assimilation principle as, for example, a tool of a repressive patriarchy. See FINEMAN, NEUTERED MOTHER, *supra* note 15, at 101-18 (on single mothers).

69. Until the end of the Second World War in this country, toleration never meant approval. With the rise of the rhetoric of rights and the drive to "equality," rhetoricians have taken this word to new dimensions of meaning far removed from its traditional moorings. For a traditional exposition of toleration (regarding religion), see John Locke, *A Letter Concerning Toleration* (1689), in GREAT BOOKS OF THE WESTERN WORLD 1, (Robert M. Hutchins ed., 1952). For a radical critique of the notion of toleration, see Herbert Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81 (1965). Justice Antonin Scalia, perhaps, has most succinctly expressed this traditional notion in a different context when he noted that "the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful." *Romer v. Evans*, 64 U.S.L.W. 4353, 4359 (U.S. May 20, 1996) (Scalia, J., dissenting).

70. See *supra* text accompanying notes 27-43.

I will first suggest a theory of assimilation, conformity, and tolerance as an abstract possibility within our normative poor relief structure. In Part B, I will show how each of the papers presented at this Symposium, though very different from each other, adhere to the same set of normative constructs of toleration and conformity. Ironically, the papers are similar to the very systems which they describe as substantially incompatible with their notions of 'good' poor relief.

A. ASSIMILATION SHALL MAKE YOU FREE

Groups exist. Groups have habits. Group habits evidence custom; such habits in the aggregate form mores—the postulates underlying group norms. Habits help maintain group cohesion and group identity. Group habits are the sum of the *good* of the group. The sum of group habits is culture. And culture is communal identity at its most basic; it permits separation of a group from others. All cultures either exist or they do not. No culture can exist long in a state of self-loathing. Cultures exist while they retain the conviction of their *goodness*.

Groups cannot survive as such without enforcing their core norms. Maintenance of the social ordering serves as the primary focus of enforcement, the principal weapon is the power of "tradition." In the absence of enforcement, the group disappears. But such disappearances do not produce a "groupless" state. A group (the sum of the characteristics of a unity) disappears only to be replaced by another sum of unifying characteristics. This new set may or may not embrace the people who came within the definition of the group in its prior iteration. Enforcement of culture (group norms) and the policing of group identity (those core characteristics that serve as a metaphysical group tattoo), is bound up in the group's every act, in every form of group social behavior. It is also bound up in every act between groups.

Thus, everything done serves to perpetuate culture. Cultural activity also serves to perpetuate cultural boundaries—the distances between cultures. And enforcement becomes more acute where a group is challenged, for instance by the spurning of its norms in what it considers its (metaphysical) space. Every group/culture has geographic as well as metaphysical territory. Groups absorb everyone presumed to be part of the group—dominant group/culture dominates. If it does not, the dominant group/culture ceases to exist. It subordinates competing groups/cultures which cling to incompatible norms. It makes life uncomfortable for those who live within the geographical or metaphysical space of the dominant group/culture but who do not or cannot belong.

The dominant group/culture defines itself, and the territory over which it dominates, by reference to those who do not and cannot belong either within or without the dominant group's/culture's physical and metaphysical

space. In doing so, it also defines to some extent the characteristics of subordinate groups. These are groups which occupy the same (meta)physical space controlled by the dominant group. In this sense one can understand how European bourgeois culture can define core economic conduct rules, by reference to what it means to be productive and "self-sufficient." On the same basis, one can begin to understand how race can be defined in the United States by reference to what it means to be "white."

I have suggested that culture can be viewed as a function of the power to define and control its metaphysical space. Control itself is a complex process. As enforcement, it is conscious and unconscious. Conscious assimilative programs are easy to spot. They are also pervasive. Law, after all, is the ultimate tool of enforcing conformity, operating at the micro and macro levels.⁷¹ Its compulsion is actual—we enforce the criminal law, as well as hortatory—but we tend not to enforce the criminal law either uniformly or consistently (for example, we tend not to enforce the prohibitions against private consensual sexual activity).⁷² The same sorts of compulsions are at work in our poor relief programs.⁷³ Statutes define the programs and specify eligibility criteria. People representing society apply these rules to promote acceptance of dominant social norms. A central theme of this article has been that law is inherently the creature of ulterior motives.⁷⁴

The force of unconscious assimilation is more effective and more pervasive. The unconscious force of conformity has been the especial target of feminist and critical race scholars, in large part because they are such strong forces, and in part, because of the inevitable *imperialism* of dominant

71. Consider something as simple as the law of tort. The unstated but pervasive social rules tort law enforces are at the core of notions of obligation and injury cognizable at law. For a critical discussion of law as coercive ordering, see, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84 (1995).

72. See, e.g., Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37 (1993).

73. See, e.g., KATHRYN EDIN, *THERE'S A LOT OF MONTH LEFT AT THE END OF THE MONEY: HOW WELFARE RECIPIENTS MAKE ENDS MEET IN CHICAGO* (1993); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983). Consider the stories in THERESA FUNICIELLO, *TYRANNY OF KINDNESS: DISMANTLING THE WELFARE SYSTEM TO END POVERTY IN AMERICA* 16-17 (1993).

74. See, e.g., Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 741-46 (1992) (demonization of welfare mothers through the structure of current welfare diverts attention from the failure of the economy to provide for the needs of all people); cf. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, at 154 (1984) (welfare law creates incentive to sloth and ought to be reformed to induce good conduct); PRAWO §§ 101(1)-(2) ("Marriage is the foundation of a successful society. Marriage is an essential institution of a successful society . . .").

group norm enforcement.⁷⁵ Like the culture, the unconscious enforcement of group norms operates everywhere. It is internalized in the actions of all group members. It governs even the least significant action or habit; it exhausts resistance.⁷⁶ It is meant as an automatic, constant, endless reaffirmation of the strength and integrity of the group. They are particularly strong when core behavioral norms are affected,⁷⁷ or when intergroup status is challenged.⁷⁸ Women, and especially poor women, are forced to conform to dominant social norms by a group social pressure almost more compelling than the "black letter" of the pharisaic pronouncements of law and regulation.⁷⁹ To ignore the pressure, to resist assimilation, is to declare independence from the group—to fall outside of it, to participate in "outlaw culture," and to accept the consequences of such action.⁸⁰ For example, the "work requirements imposed on mothers who receive welfare 'work' in the sense of expressing and perpetuating negative views about

75. See generally ABRAMOVITZ, *supra* note 37 at 362; FINEMAN, NEUTERED MOTHER, *supra* note 15; Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1199-1200 (1993) (reviewing RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996) (reviewing LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE; JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY); Eleanor Marie Brown, Note, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 YALE L.J. 513 (1995); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

76. Yvonne Cherena Pacheco has illustrated how even the naming patterns of our culture — personal identification within a group — is enforced informally even when no formal enforcement mechanism exists. Professor Cherena Pacheco considered the way in which unofficial conduct acts to suppress the use of Latin naming patterns in favor of our own. "The United States' tradition of one surname is so well entrenched that any deviation from it is unfamiliar and alien; it is immediately deemed awkward and odd, and subtle — but pervasive and quite powerful — forces will operate to change it." Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 15 (1992).

77. Certainly this is one of the lessons we can draw from the work of modern feminists. See, e.g., Law, *supra* note 46.

78. The recognition that unconscious assimilative forces are particularly strong when intergroup status is challenged is among the most significant contributions of the scholarship of critical race theorists for my analysis. See, e.g., Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996).

79. Consider the perspectives of people who live with the consequences of social policy in FUNICIELLO, *supra* note 73. Traditionalists discovered the power of social pressure about a generation ago and have used it to their advantage ever since. See, e.g., GEORGE GILDER, MEN AND MARRIAGE (1992) (on the importance of enforcing customary sexual norms to reduce poverty and social deviance).

80. See, e.g., Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 HARV. C.R.-C.L. L. REV. 263 (1993) (regarding the benefits and detriments from the perspective of the object of the dominant group assimilative force).

poor people, single mothers, and African-Americans.”⁸¹ This is nothing new.⁸²

And what of dissent in this scheme—conduct which does not conform to cultural norms? Tolerance of difference is built into the system. That, perhaps, helps explain the survival power of our core cultural norms. Our dominant culture accepts the notion that it can never be completely effectuated, and so it provides vehicles for the management of its own imperfection. Dissent is the expression of the failure to fully inculcate group norms within a targeted population. Toleration is the name we give to a necessary cultural safety valve; toleration advances political stability and permits social modulation within the parameters of underlying basic social conventions (which I described earlier as they touch on welfare reform). Dissent is tolerated because, like the difference between venial and mortal sin, some cultural taboos are more important than others.

Efficiency in a world of limited resources militates against strict enforcement of dominant norms in most societies. The larger and more complex the society, the less likely enforcement can be either constant or uniform. Society will turn a blind eye where it can (when it can afford to). More importantly, perhaps, social rules do not invariably result in a unitary interpretation of conduct norms, even core norms. To the extent ambiguity exists and will not interfere with core social norms, variation will be tolerated. Both interpretative efficiency and enforcement resources vary over time.

Beyond variation from interpretive ambiguity and *de minimis* violation of taboo, society will tolerate no deviation without punishment. Dissent is subversive; it is deviance of a kind which might threaten to substitute an orthodoxy of deviance for that of the current standard. Dissent is guarded, it is analyzed, and it is catalogued. Dissent is tolerated to the extent it is judged not to be dangerous. It is otherwise suppressed with an exquisitely complex palette of forms, as the papers presented in this Symposium illustrate. It is in this world that society considers its institutional response to the poor.

For the academic, especially, the assimilation imperative of dominant groups has other consequences as well, which the papers presented at this Symposium readily demonstrate. Politically credible liberal or conservative programs *must* remain true to the same singular set of basic assumptions about how society ought to work and what it ought to expect from

81. Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 838 (1994).

82. See STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992) (noting parallels in the means used to interpret and enforce social behavior norms at the turn of the 19th and 20th centuries).

individuals.

Equality of tolerance becomes abstract, spurious. With the actual decline of dissenting forces in the society, the opposition is insulated in small and frequently antagonistic groups who, even where tolerated within the narrow limits set by the hierarchical structure of society, are powerless while they keep within these limits. But the tolerance shown them is deceptive and promotes coordination. And on the firm foundations of a coordinated society all but closed against qualitative change, tolerance itself serves to contain such change rather than to promote it.⁸³

What Herbert Marcuse never realized, however, and what I have been arguing especially in the world of poor relief, is that *it has always been so*. What Marcuse sees as decline is better understood as change in the manner in which toleration is expressed in society. No society tolerates radical dissent if that society means to survive. Such dissent will either be co-opted or destroyed.⁸⁴ In this process, the assimilation imperative serves society well. The thrust of this imperative is to subordinate, as a matter of necessity, individuals and groups who are judged system-threatening, as such judgments are made from generation to generation. This subordination is the way in which toleration is tempered by assimilation, even as toleration tempers conformity.

This last notion can be reiterated to make a related point: radical dissent is usually not viewed *merely* as such. Subversion has a specific purpose—to replace one dominant group of people with another. This is so whether the normative structure on which the dominant group rests resembles that of the replaced group or not. Dissent is political; it is a dialogue of power.⁸⁵ People, and especially groups, tend to use power narrowly, primarily for their own benefit. We readily accept that notion as a characteristic of dominant groups (thus the idiom of subordination in “outsider” scholarship); it applies equally, and perhaps with more force, to

83. Marcuse, *supra* note 69, at 116.

84. Consider the observation of Professor Richard Delgado: “There is actually a body of emerging writing that says empathy only goes so far, that we cannot identify with or love anyone who is too different from us, cannot resonate to a ‘story’ too unlike the one we usually hear.” Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387, 413 (1993).

85. Consider the dialogue for the power of influence — voice. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1284-88 (1992) (explaining that a free market of racial depiction resists change because the dominant-group-generated pictures of the subordinated group are usually negative, and that these negative pictures are internalized by both the dominant and the subordinated group, creating an atmosphere in which, when the subordinated group speaks, they have little credibility).

“outsider” groups. As parochial groups (at best) *within* a dominant culture, outsiders are easily caricatured not as the harbingers of universal change, but rather as the heralds of a new feudal society. They are today’s version of the Jews in medieval Poland, where, within the same macro-political unit and the same physical space (the Kingdom of Poland), the Christian and Jewish peoples occupied different metaphysical spaces, remaining culturally separate and physically segregated (on a macro level), and each dominant within their own sphere (though not necessarily equal).⁸⁶

B. ON THE OPTIMAL MIX OF CONFORMITY AND TOLERANCE

The give and take of assimilation and tolerance in our poor law theory ultimately produces only small movements between acceptable alternatives.⁸⁷ These movements look large to us because we have internalized the limited vision of the *possible*. Our political institutions are incapable of accepting the real possibility of alternatives which violate core social taboos. These taboos define our world. Thus, we can talk about the great gulf between the Republican approach in PRAWO, the approach of the architects of the Great Society, and the approaches described in this Symposium. But, from a higher altitude, the apparent differences seem small indeed. In this section, I will demonstrate that each of the very different papers presented in this Symposium evidences both an allegiance to the core normative imperatives of conformity and toleration, and to the possibility of difference between the approaches *within* that normative structure against which most commentators claim to struggle. These allegiances explain why the great gulf that exists between the papers presented here is far narrower than one would expect and why this must be so.

The interplay between tolerance and assimilation can occur because of the interpretive potential of our core socio-cultural structural conduct norms. These rules do not prescribe an optimal set of behaviors. Rather, they allow for a range of possibility within which the group can identify. It is in this

86. See generally ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1991); RICHARD J. HERRENSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). But this is not merely the nightmare of traditionalists like Schlesinger. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 61 (1992). Western political units do not have a happy history with this sort of politically sanctioned polyculturalism (not that this is unique to the West). Poland (in the period of the Second World War), Spain (during the sixteenth century), and the region formerly known as Yugoslavia (during the 1990’s) provide examples of the fragility of polyculturalism and the violence with which it can be flushed out of a dominant cultural system.

87. See Backer, *Essay: Poor Relief, Welfare Paralysis and Assimilation*, *supra* note 4, (discussing the nature of the theoretical constraints of welfare theory in the U.S.).

sense that the core assumptions of the dominant culture act as a meta-system. Culture contains within it all possibilities and all combinations conceivable given the set of basic assumptions which define a group as "distinct." The core rules provide the box within which any particular expression of group norms is implemented and reimplemented as popular culture, over and over again.⁸⁸ Beyond culture is *outside*—the inconceivable. Within culture is an infinite variation.⁸⁹ "Outside" carries multiple meanings—it can describe *alternatives*, and it can define the *inconceivable*. Each iteration of culture negates the other possibilities. In this sense, each of them is outside—the "other." Yet, all are possible at some time or other, and in some form or other, without compromising the culture from which all spring. None of the iterations implicate the "other" as outside culture—as *not* culture. Though known through the writing of academics and others, arguments for change which compromise culture, as a practical matter, are excluded, denied, and concealed. This limitation does not necessarily confine the choices we believe are available within the boundaries of dominant culture. We can choose to persecute or ignore

88. Popular culture is the way in which we replicate culture. In this sense, *culture* serves as a meta-system, immutable in its totality, yet preserving a certain indeterminacy and fluidity, a certain play in its expression. As such, popular culture, the temporal expression of culture, represents merely an implementation of the *possibilities* inherent within culture, not the totality of the possibilities of culture itself (an impossibility); we *practice* culture through endless attempts at applying the normative rules of that culture. It is in this sense, precisely that of temporal fluidity within an undergirding meta-system, that I speak of popular culture. In the context of alternative visions of the welfare state within the confines of American political "culture," Herbert McClosky and John Zaller have made the point that "[w]hen the norms are contested, individuals adopt, from the range of alternatives being argued among opinion leaders, those attitudes that best reflect their own ideological tendencies." HERBERT MCCLOSKY & JOHN ZALLER, *THE AMERICAN ETHOS* 262 (1984); see also *id.* at 161-88 (on the conflict between the core parameters of "democracy" and "capitalism" which the authors suggest shapes and reshapes the optimal American system of political economy).

89. Popular culture is the way in which we selectively and collectively evidence culture in practice. We practice popular culture through a filtered power/politics. Popular culture is always in conflict with its alternative forms, and its iterations and reiterations depend on the power of norm-influencing groups to impose a particular order of things. Popular culture is always selective because popular expression cannot at *any one time* reflect all of the possible forms of cultural expression; we necessarily discriminate among the possibilities. In this sense the possibilities of culture are evidenced over generations. It is collective because it necessarily expresses the domination of a particular way of practicing culture. In this sense, I find Bourdieu's notion of induced misunderstanding ironic: "miscognition is structurally necessary for the reproduction of the social order, which would become intolerably conflicted without it." Richard Terdiman, *Translator's Introduction*, 38 HASTINGS L.J. 805, 813 (1987) (translating Pierre Bourdieu, *The Force of Law: Toward A Sociology of the Juridical Field*, 38 HASTINGS L.J. 814). From this perspective of popular culture, Derrida's "Other" can exist both within culture and outside of it. Derrida's notion that the "other" provides the definition or marks the space of the outside is perhaps far too limiting. Cf. JACQUES DERRIDA, *OF GRAMMATOLOGY* 30 (Gayatri Chakravorty Spivak trans., 1976) (describing writing as the "outside").

unproductive women with small children who conceive outside of marriage, we can pay them to raise their children, we can take their children away, we can celebrate their independence, and persecute their sexual partners. All of this we can do *within* our culture—any of these will do—all have been done and will be done again.⁹⁰

There is the problem for welfare reform and its rhetoric. We search for permanence and the immutable. We believe that there exists the one answer, the formulation of which, when implemented, will see society through its “problem” for all time. Discussion of welfare reform is much like a rhetoric in search of God. But there is no ultimate, immutable, and permanent relationship between tolerance and conformity. Setting the contours of that relationship requires the infusion of value—that is, the value of tolerance of particular actions or states of being relative to the value of conformity to majority norms. Valuation also suggests the societal importance of that variable (tolerance/conformity) in its own right, as well

90. Frances Fox Piven recently underscored the changeability, within the limited parameters of our core social norms, of welfare reform in a recent editorial condemning the enactment of the federal welfare reforms of 1996.

Eminent English social thinkers developed a justification for an 1834 law that eliminated relief for the poor. Learned arguments showed that giving them even meager quantities of bread and coal harmed both the larger society and the poor themselves.

The misery and reduced life spans that ensued were well-documented not only by historians but ultimately by Parliament, which investigated the workhouses and the riots against them. England came to learn that the theory that relief itself caused poverty was wrong, and replaced the Poor Law with a modern system of social assistance.

No matter what England learned, the United States Government is eagerly following the 1834 script by ending Federal responsibility for welfare and turning it over to the states. The arguments are the same. . . .

We may have to relive the misery and moral disintegration of England in the 19th century to learn what happens when a society deserts its most vulnerable members.

Frances Fox Piven, *From Workhouse to Welfare*, N.Y. TIMES, Aug. 1, 1996, at A27. For a discussion of the history of the idea of poor relief in Britain at the time of the enactment of the New Poor Law in the nineteenth century, see GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE* 147-76 (1984). For a discussion of the history of poor relief in this country, see MICHAEL KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989). For a description of common approaches to the ways in which behavioral norms traditionally have been enforced in English speaking countries, see, e.g., ABRAMOVITZ, *supra* note 37, at 358-62; Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1963-64).

as relative to other variables which may be factored into a decision.

These values are grounded in the normative restraints of our culture. As such, values do not exist, finite and substantially immutable. Valuation reflects a judgment of the way in which our social norms ought to be interpreted at any given moment; and this interpretation can change from moment to moment. Even if our valuation originates in a Divine source (or the twentieth-century reasonable equivalent of Truth), its application requires the interpretation of the infinitely ambiguous.⁹¹ Regardless, the way in which we infuse societal variables with meaning or value provides the engine of change for altering the societal consensus of what is "best" for the group. However, that alteration is always limited to the space permitted by our paradigmatic parameters.

We sometimes call the process of valuing "politics." Consider the explanations for the January 1996 veto of the conservative Republican welfare reform bill (PRAWO), and its resurrection six months later as PRAWORA. "[W]hat has changed since the Senate acted is not the bill but the politics of the situation,"⁹² Republicans having moved beyond what the average voter thinks of as welfare.⁹³

What happened in my view is that the issue became politicized. Welfare symbolizes to the public what they think has gone wrong with our society. It symbolizes the decline in responsibility for supporting yourself and your children, the failure of parents to act responsibly, the decline of the work ethic. It is an easy target.

But there was a backlash because the proposals did go too far.

91. What, after all, does toleration or conformity *mean*? Implicit in the definition is a judgment of the appropriateness of one definition over another more or less similar to the one chosen, any one of which could be chosen the next time the question of meaning is posited. This is the nature of *hermeneutics* in an original sense — the science and methodology of interpretation, especially of the Bible.

92. Judith Havemann, *The End of Welfare as We Might Have Known It? Congress and Clinton Came Close, But Don't Hold Your Breath Waiting for It to Happen*, WASH. POST NAT'L WKLY. ED., Jan. 22-28, 1996, at 33 (quoting Douglas Beshav, a social policy specialist at the conservative American Enterprise Institute). The thrust of the Mr. Beshav's quote applied with even more force when, six months after vetoing PRAWO, President Clinton indicated a willingness to sign PRAWORA, a bill substantially similar to the rejected measure, and commonly perceived as such. See *The Welfare Bill: Dole's Statement on the Measure*, N.Y. TIMES, Aug. 1, 1996, at A24 ("Now, as the election nears, the President has finally chosen to endorse our welfare reform bill, a bill so similar to legislation that he has already twice vetoed."). "'The President vetoed essentially this same bill twice before,' Mr. Inhofe said. 'Clinton stands for nothing, except his own re-election.'" Pear, *supra* note 3, at A1.

93. Havemann, *supra* note 92.

People generally become concerned about the risks.⁹⁴

The effect of valuing (politics and “expediency” in its popular manifestations) is that any place within the sphere may be located by giving specific values to tolerance (which permits the existence of non-subversive deviance) and conformity (which requires assimilation to the core normative behavior patterns of the dominant culture).⁹⁵ The optimum place within the sphere will depend on these values. As these values change, so does the perception that welfare programs have achieved the optimal relationship between tolerance and conformity. Welfare *reform* which changes the balance between tolerance and conformity consists of movements between coordinates in the sphere. Movement requires some reweighing of the

94. *Id.* (quoting Isabel V. Sawhill, a former official in the Clinton Administration). Ironically, six months later, the process of political valuing in the President agreeing to sign a new version of PRAWO. *The Welfare Bill: Text of President Clinton's Announcement on Welfare Legislation*, N.Y. TIMES, July 31, 1996, at A24 (“I will sign it into law.”). President Clinton’s statement is telling on this point: “The legislation is, however, far from perfect. There are parts of it that are wrong, and I will work — I will address those parts in a moment. But on balance, this bill is a real step forward for our country, our values, and for people who are on welfare.” *Id.*

95. Compare the assessments of the recently enacted welfare reform legislation by the editorial staff of the New York Times, stressing the value of toleration: “President Clinton’s defense . . . of his decision to sign an atrocious welfare bill exaggerated its tiny virtues and ignored some large faults. . . . It is not fair to cut parents off welfare unless they are provided an opportunity to work. It is not humane to remove a Federal guarantee of welfare aid A bill that creates child poverty is not an acceptable way to end welfare as we know it.” *A Sad Day for Poor Children*, N.Y. TIMES, Aug. 1, 1996, at A16. In contrast, stressing the value of conformity, Senator Nickles (R-OK), expressed the view that: “I think welfare had become a way of life for far too many families. And maybe that was their fault, maybe it was Congress’s fault. I think most of the welfare programs that we’ve had have been well-intentioned, but many of which have had very suspect results.” *The Welfare Bill: Excerpts from the Debate in the Senate on the Welfare Measure*, N.Y. TIMES, Aug. 2, 1996, at A10.

Compare the following assessments of the (liberal) Clinton welfare proposal (WARA) and the (conservative) Republican proposal (PRAWO) the later of which ultimately became the basis for the welfare reforms of 1996. See Thomas Brazaitis, *Both Sides Assault Clinton's Welfare Plan*, THE PLAIN DEALER, June 15, 1994, at 14A, (quoting in part Kevin M. Aslanian, facilitator of the California-based National Welfare Rights & Reform Union) (“The Clinton plan is a take-it-or-leave-it ultimatum that ‘punishes poor children and families and satisfies the hate that some in our society have for the poor.’”); *Personal Responsibility Act: Hearings on H.R. 4 Before the Committee on Ways and Means*, 104th Cong., 1st Sess. (1995) (prepared Statement of Rep. Lynn Woolsey, Jan. 10, 1995) available in LEXIS, News Library, Curmws File (“The Personal Responsibility Act cuts off welfare benefits for millions of poor children who, through no fault of their own, are born to young unmarried mothers.”). Cf. CONTRACT WITH AMERICA, *supra* note 48, at 65 (“Our Contract will achieve what some thirty years of massive welfare spending has not been able to accomplish: reduce illegitimacy, require work, and save taxpayers money.”); The White House, Work and Responsibility Act of 1994: Detailed Summary 30 (June 1994) (unpublished manuscript, on file with the author) (“the fact remains that welfare dependency could be significantly reduced if more young people delayed childbearing until both parents were ready to assume the responsibility of raising children”).

relative values of each of the variables. Welfare reform becomes radical as it approaches, and even pushes the walls of the sphere. But reform never pushes through the sphere walls; there are no coordinates corresponding to points outside the sphere (although such points *must* exist, at least in theory). That is dangerous space. To locate coordinates outside the sphere explodes the sphere boundaries themselves, and substitutes a new set of locating parameters in its stead. This is not permitted. "This is a conservative system; it is not easy to make bold changes."⁹⁶ Indeed, I would argue that it is nearly impossible.

This explains why discussions of welfare conformity and tolerance of socio-economic deviance are both perverse and yet paralyzed—why poor relief is both mobile and immobile. Consider the nature of the mobility of welfare: only a balancing of conformity and tolerance in welfare programs which occupy the optimum coordinates are "right" or "good" or "working." We think all others are "bad" or "wrong." They have to be, and we can prove it. Such programs are a function of a valuation (the importance) which we as a society assign the paradigmatic assumptions with which we disagree, or with respect to which the "valuation" consensus has shifted.

It has been demonstrated over and over during the 1994-95 debate over PRAWO, and then again during the 1996 debates leading to the passage (and the eventual "reluctant" signing) of PRAWORA, that politics is a substantially subjective enterprise in setting the optimum balance of conformity and tolerance. "Republicans are now directly challenging the basic liberal assumption that able-bodied people who don't work and often have illegitimate children are entitled to the permanent and guaranteed benefits provided by welfare."⁹⁷ Conservatives in Congress have lately congratulated themselves on having given significant priority to the power of law to compel changes in behavior.

96. Havemann, *supra* note 92 (quoting Richard Nathan, of the Rockefeller Institute in Albany, New York). But it is a system in which change remains possible and readily available within its constraints.

97. Shaw, *supra* note 10, at 26. Senator Gramm (R-TX) echoed these sentiments on the eve of the passage of the 1996 welfare reform package.

I think if each of us looks back in our own family to a period where our first ancestors came to America or where our families looking back at those who have gone before us found themselves poor that we are going to find that there are two things that get individuals and that get nations out of poverty. Those two things are work and family. And I think it is instructive to note that in the last 50 years, those are the two things that we have never applied to the welfare program of the United States of America.

The Welfare Bill: Excerpts from the Debate in the Senate on the Welfare Measure, N.Y. TIMES, Aug. 1, 1996, at A16. In contrast, Senator Moynihan (D-NY) expressed conclusions based on a very different valuation, asserting that the welfare bill was based on the false premise that "the behavior of certain adults can be changed by making the lives of their children as wretched as possible." Pear, *supra* note 3, at A1.

The recently vetoed PRAWO and its enacted 1996 iteration both speak of "the crisis in our Nation." The Republican Congress asserted that "prevention of out-of-wedlock pregnancy and out-of-wedlock birth are very important Government interests,"⁹⁸ which this legislation was intended to address. President Clinton provided yet another view: "Taking \$60 billion in budget cuts and massive structural changes in a variety of programs . . . is not welfare reform. . . . We must demand responsibility from young mothers and young fathers, not penalize children for their parents' mistakes."⁹⁹ And commentators articulated yet a different balance:

The proposals generally reflect the value that it is poor planning, bad judgment, an irresponsible lifestyle choice, or generally immoral behavior for poor persons to have children they cannot support. By refusing to 'reward' welfare recipients for their disapproved childbearing choices, the proposals use the club of welfare benefits to impose this value choice upon them. The state, not the parent, determines whether a welfare recipient should have additional children.¹⁰⁰

For these commentators, then, the focus of the 1994-96 welfare debates in

98. PRAWO, *supra* note 3, at § 101(9). This statement was retained substantially verbatim in the welfare reform provisions enacted in 1996. See PRAWORA, *supra* note 3, at § 4101(9).

99. Letter from President Clinton to the House of Representatives (Jan. 9, 1996) (copy on file with author). For similar views, see, e.g., MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 143-62 (1994). In announcing his decision to sign the 1996 version of PRAWO, President Clinton stated: "I've always thought that the Democratic Party should be on the side of creating opportunity and promoting empowerment and responsibility for people. And a system that was in place 60 years ago, that worked for the poverty population then, is not the one we need now." *The Welfare Bill: Text of President Clinton's Announcement on Welfare Legislation*, N.Y. TIMES, Aug. 1, 1996, at A10.

To these comments, perhaps the most appropriate gloss is that of Senator Moynihan (D-NY) on the passage of PRAWORA and its signing by the very person who had vetoed the earlier version:

We are putting those children at risk with absolutely no evidence that this radical idea has even the slightest chance of success. . . . I have pointed out that the principal, and most principled, opponents of this legislation were conservative social scientists who for years have argued against liberal nostrums for changing society with the argument that no one knows enough to mechanistically change society. Typically liberals think otherwise, to the extent that liberals can be said to think at all. The current batch is in the White House, now busily assuring us they were against this all along, are simply lying, albeit they probably don't know they are lying. They have only the flimsiest grasp of social reality, thinking all things doable and equally undoable. As, for example, the horror of this legislation.

The Welfare Bill: Excerpts from the Debate in the Senate on the Welfare Measure, N.Y. TIMES, Aug. 2, 1996, at A10.

100. Barksdale, *supra* note 11, at 4-5.

Congress reflect a limited set of bad choices. Even worse, they represent an erroneous interpretation of the ground rules of *law* memorialized in the federal Constitution.¹⁰¹ Worse than that, they wrongly pathologize non-conforming poor women.¹⁰² However, the current choice would not necessarily pathologize the need for conformity at some other (optimal) level. "Certainly, some governmental means to discourage socially troublesome behavior should be permissible."¹⁰³

I emphasize that the movements within the matrix of our socio-cultural substructure, which must pass for welfare reform in this country, are not *mere* patriarchal politics, although that exists.¹⁰⁴ Nor are they anything more than an unworkable ballet for the entertainment of the masses, a mere fantasy based on the duality "us" (good) and "them" (bad), though there is much of that as well.¹⁰⁵ Nor are these movements anything more than a conscious/unconscious attempt to subordinate non-white peoples in the United States, though that certainly has followed from traditional forms of relief.¹⁰⁶ Rather, each movement represents another iteration and expression of what we consider to be the better configuration of the values which make up our culture. Each finds its expression in policy, formally through law.¹⁰⁷ Each movement serves as a validation of the underlying system

101. *Id.*; see also Julie A. Nice, *Welfare Servitude*, 1 GEO. J. FIGHTING POVERTY 340 (1994).

102. See, e.g., FINEMAN, NEUTERED MOTHER, *supra* note 15.

103. Barksdale, *supra* note 11, at 61. Cf. CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY AND THE UNDERCLASS (1992); Moynihan, *supra* note 32, at 17-26.

104. For this argument, see, e.g., Law, *supra* note 46; Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274. See generally FINEMAN, NEUTERED MOTHER, *supra* note 15.

105. For a discussion of the notion that welfare reform is basically an exercise in the unworkable, see JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 7, 11, 16-17 (1991); Backer, *Of Handouts and Worthless Promises*, *supra* note 2, at 1058-70. For a discussion of the social fantasy aspects of the welfare debate, see Marty M. Slaughter, *Fantasies: Single Mothers and Welfare Reform* 95 COLUM. L. REV. 2156, 2179-88 (1995) (reviewing MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995)).

106. See, e.g., Williams, *supra*, note 76; Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994). For a powerful argument that racism is a substantial force in shaping poor relief policy in the United States, see JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

107. And our law is necessarily blind to patriarchy, racism, and other means of directly or indirectly subordinating or marginalizing people whose membership in the dominant group is either contingent on conduct or only fragmentary (for instance formal membership in the polity but not in the dominant society). On the blindness of the law from the perspective of the "other" see, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 Stan. L. Rev. 1 (1991); cf. Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987). Our core (internalized) assumptions of the way our social ordering must work presuppose racial, ethnic, and gender neutrality, but not because such neutrality exists. Rather, the

which it replicates and implements. Welfare reform always works—it is confirmation of the identity of society and affirmation of the value of its underlying structure.

In this sense, I quarrel with Professor Slaughter's application of Lacanian fantasy theory to poor relief reform. That application, fundamentally sound as far as it goes, misunderstands the utility of change in our normative universe. Professor Slaughter sees welfare and its reform in terms of the incoherence and incompleteness of society. In contrast, Lacanian theory falls into the trap of political theory, equating apparent instability for incoherence and fragility. When it is applied, not to particularizable groups—like the Jewish people of fact or fantasy—but to conduct norms involving state fiscal responsibility, Lacanian theory requires a sort of inward imperialism in order to stave off eventual collapse.¹⁰⁸

Both the need for social conformity and the disagreements about the optimal mix of conformity and tolerance are well demonstrated by several of the papers presented in this Symposium, as well as some of the comments. I will focus on the very different approaches presented at this Symposium by Neil Gilbert, Tanya Broder and Clara Luz Navarro, Joanna Weinberg and Mark Aaronson.

Neil Gilbert's article illustrates a significant valuing of socio-cultural conformity. It demonstrates the ways in which welfare reform can be used as an important vehicle for the assimilation of deviant groups. Professor Gilbert's article also evidences the effect of the acceptance of poverty as ineradicable on policy implementation primarily because it is an expression of individual will. Such an acceptance carries with it the portentous corollary notion that absent the control of free will (a taboo that will not easily be overcome in our culture), there may always exist a group of socio-cultural deviants for whom social institutions will have to care.

The portentousness of this corollary notion is evidenced by the

substructure does not register the possibility of the absence of neutrality and its effect on the burden of governmental relief. Productivity is the key, not productivity maximization; we remain blind to other possibilities. Racism, sexism, ethnocentrism, and heterosexism are merely impediments to full productivity — they do not affect a person's ability to be at least minimally productive. Thus, Lawrence Mead can insist that African-American forms of resistance to racism, the expression of "hostility by devious refusals to cooperate, a passivity that infuriates whites—as it is intended to—without challenging them directly," MEAD, *supra* note 27, at 157, makes them far more "vulnerable to poverty," *id.* at 148, amounting to a deliberate secession from the culture and social life of the nation as a whole, which "is no less threatening to the country than the more formal rupture of 1861." *Id.* at 246. See also MURRAY, *supra* note 28, at 156-62 (discussing hypothetical couple, Harold and Phyllis).

108. Slaughter, *supra* note 105, at 2179-82. It fails to appreciate the value and permanence of states of change as an instrument of stability and coherence *in fact*. For what we see with the permanent state of rhetorical welfare reform is the display of changing popular manifestations of underlying, and unchanging, norms. Welfare reform reflects popular (not political) culture. See *supra* notes 88-89.

programs which such ideas generate—programs inevitably based on suggestions of containment and instruction. Thus, Professor Gilbert's approach is eminently reasonable once within the framework of the normative values which animate it. For Professor Gilbert, assimilation is valued well over deviance. Deviance is permitted; but to the extent the state is expected to intervene financially, deviance must be both contained and controlled. The deviance of which we speak here is deviance with economic effect—deviance which reduces productivity. Deviance in its other forms may well be a matter of indifference.

The core of Professor Gilbert's proposal is based on an underlying value determination that assimilation and substantial core social conformity are the most important factors in reducing the likelihood of long term dependence on institutional relief. The key to his proposal lies in the determination that poor people have to be treated differently based on their level of acculturation. Welfare must distinguish between classes of welfare recipients. The separation is based on the extent to which a woman has demonstrated socio-cultural assimilation and conformity.¹⁰⁹ The proxy Professor Gilbert uses for determining the assimilative potential of recipients is past behavior patterns. Motivation and competence can be presumed when recipients have been "independent citizens abiding by social conventions."¹¹⁰ For this group, the benefits of the current system, at least for two years, is in order. They can be expected to get their lives organized and become productive in a short amount of time.¹¹¹

Lack of motivation and socio-cultural incompetence can be presumed from conduct evidencing non-conformity with social conventions. The social convention Professor Gilbert highlights is out-of-wedlock pregnancy.¹¹² For the group exhibiting this trait, work incentives are not viable because women (and especially young women) who bear children out-of-wedlock can be presumed to have neither the social nor educational skills

109. The separation into two groups is based on the commonly cited data: 48% of AFDC spells last less than two years (including 70% of initial spells), but at any one time about 50% of recipients are in the midst of a spell lasting more than eight years. The result, of course, is that while the typical recipient receives aid only for a short period of time, at any one time a large number of recipients are in the midst of a long term spell on welfare. Gilbert, *Welfare Reform*, *supra* note 16, at 333-34. The formal basis on which Professor Gilbert would separate classes of recipients is based on notions of the socio-economic competence and motivation (eagerness to conform to dominant group norms) of the recipients. *Id.* at 334-35.

110. *Id.* at 334. Because Professor Gilbert presumes that this group is motivated and competent, he would expect a high proportion of short spell recipients to be in this group. This is the group which normally takes advantage of the current programs' perverse incentive to cream, and on whom far too much poor relief money is needlessly wasted.

111. *Id.* at 334-35.

112. *See id.* at 335. This may also serve as a proxy for other social dysfunctions, all of which together may make holding a job unrealistic. *Id.* at 336-37.

to get and keep a job. For them, a long term program of acculturation and assimilation is more appropriate, if only to save their children.

The proposed program of acculturation is divided into two phases. The first involves supervision of mother and child by caseworkers with the power to remove mother and child to more closely supervised environments for the protection of the child.¹¹³ Phase two is particularly interesting in terms of its fidelity to the structural importance of conformity as well as to core dominant group notions of cost savings and fraud containment. In the second phase, recipients emerge as "wards of the state" rather than "temporary dependents."¹¹⁴ According to Professor Gilbert, while phase two might raise costs initially, welfare recipients themselves could perform the role of caseworker in phase one and thereby mitigate a substantial part of the expense of this program.¹¹⁵ Moreover, the real effect of abandoning punitive provisions for non-conformity in favor of substantial public monitoring of the conduct of this portion of the recipient population will be a reduction in overall costs by limiting fraud.¹¹⁶

There is no expectation that recipients in a "phase two" environment will ever escape the supervision of the state. The inevitable existence of the permanent poverty of these deviants must be accepted. "[W]elfare did not create this unhealthy pattern of behavior, and forces larger than those generated by welfare reform will be required to eliminate it."¹¹⁷ Phase two recipients constitute a population that will remain wards of the state—treated like children until they "grow up."¹¹⁸ In other words, by

113. Interestingly, this echoes William Simon's suggestions for a return to a more professionalized view of the work of social workers in the delivery of welfare benefits. See William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV 1 (1985). I suspect, however, that the nature of the monitoring advocated by Professor Gilbert is different from that Professor Simon had in mind.

114. Gilbert, *Welfare Reform*, *supra* note 16, at 336. Phase two involves the supervision provided under phase one and, in addition, assigns to each recipient a caseworker with significant control over the recipient's family finances. Additionally, phase two provides for increased monitoring of outside resources which can be used to decrease the amount of the AFDC payment available to the recipient. There is an echo here of the notion that as long as people can choose not to work, as long as behavioral norms provide incentives to idleness (or an inability to find and maintain a job), poverty will exist. Cf. MEAD, *NEW POLITICS OF POVERTY*, *supra* note 27, at 259-61 (on the author's version of human nature).

115. Gilbert, *Welfare Reform*, *supra* note 16, at 336.

116. *Id.* at 337.

117. *Id.* at 337. Contrast the suggestion by COH of the forces necessary to eliminate this problem. See White, *supra* note 63. The difference, of course involves differences in the relative valuing of conformity and the danger of tolerance of deviance.

118. Ironically, this more humane means of open-ended aid for the "helpless" (socio-culturally speaking) recalls the period of welfare provision prior to the welfare rights revolution of the 1960s, when caseworkers actively supervised the morals and conduct of the recipient population. It would be interesting to speculate on whether phase two supervision might not spark the same kind of reaction to and mobilization against it by the recipient population as the old intrusive discretionary system of welfare. For a sample of

classifying them as children and their socio-cultural deviations from the dominant group norm as child-like, we add to the normative mode of appropriate 'adult' or 'mature' behavior, and reinforce the informal power of dominant norms. This is new only in the sophistication of the way in which the approach will classify the poor; it reflects traditional patterns of affirmance (of norms) and enforcement (of compliance).

Very different is the approach described by Tanya Broder and Clara Luz Navarro, in a paper responding to immigrant baiting in the context of a number of legislative proposals, at the federal and state level, to severely limit benefits to the immigrant population in the United States.¹¹⁹ On the surface, one should conclude that this paper rejects all conventional (and certainly currently fashionable conservative) notions of welfare reform and the scapegoating of immigrants.¹²⁰ And yet, this paper, in its own way

the scholarly criticism of the old discretionary approach, see, e.g., KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479 (1966). *But see* William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985) (arguing in favor of a more modulated and professionalized form of "helping"). Professor Gilbert, however, does not directly address the potential for racism and gender stereotyping inherent in intrusive systems of control. In the past, welfare programs have been marred by overtones of direct and indirect racism and gender stereotyping, especially intrusive welfare programs involving social worker intervention at the federal and the state level. Where the reality of participation indicates that such a class will consist substantially of women, and disproportionately women of color, the impact on the personal lives of the recipient class is especially significant. *See* LINDA GORDON PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935, at 209-51 (1994) (describing the feminist reform efforts of the early part of the twentieth century which laid the foundations for New Deal welfare programs, and examining the patriarchal norms of women's place in the social order which infused such reform efforts); QUADAGNO, *supra* note 106 (exploring the racist basis of the dismantling of the poverty programs of the 1960s). It is not clear how Professor Gilbert's monitoring program can protect itself against these dangers, nor is it clear that such programs can avoid conformity to underlying norms which incorporate notions of preferred gender roles and race hierarchies.

119. *See generally* Broder & Navarro, *supra* note 14.

120. PRAWO and PRAWORA punish immigrants in a variety of respects. Each reflects a belief, not universally shared, that immigrants cause the "problems" of welfare in the United States. The policy underlying the restrictions are set out in the statute itself. For example, see PRAWO, *supra* note 3, at §§ 400-41. PRAWO § 400, states that while self-sufficiency has been the basic principle of immigration law in the United States, aliens have been applying for public relief at increasing rates. "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." *Id.* at § 400(6). Current eligibility rules make enforcement of basic immigration policy difficult and must be changed. *Id.* at § 400(4)-(5). Except for a small number of emergency programs, and programs designed to prevent the spread of communicable diseases to the population, undocumented aliens (defined negatively as not a "qualified alien") are entitled to no federal benefits. *See id.* at § 431. Qualified aliens are entitled to limited benefits, *id.* at §§ 402-403, and states are given authority to eliminate most state benefits to non-"qualified aliens," *id.* at § 411, and to limit the benefits to qualified aliens. *Id.* at § 412. Mindful of the benefits of cost shifting, PRAWO would have amended the Immigration and Nationality Act to make sponsorship agreements fully enforceable as contracts. *Id.* at § 423.

is as norm affirming as Professor Gilbert's. Ms. Broder and Ms. Navarro clearly value the freedom of dissent, perhaps to a greater extent than it is valued for Professor Gilbert's socio-economic deviants.¹²¹ But this is valuing *within* the confines of conventional norms. "As the testimony of the women interviewed for this article will demonstrate, immigrants come here to work, join their families, create a better life for their children, and flee persecution in their homelands, not to seek welfare benefits."¹²² This conformist valuation is especially apparent in the eloquent pleas of the women profiled in the study for the extension to them of dominant group norms and institutional programs of protection against domestic violence and gender discrimination.¹²³

The dissent valued by Ms. Broder and Ms. Navarro is cultural dissent;¹²⁴ but this is a notion long internalized in the United States.¹²⁵

The purpose is to permit recovery by state officials of benefits paid to "qualified aliens." See 141 CONG. REC. H. 15435 (Dec. 21, 1995) (Conference Committee report). PRAWORA retains a number of similar provisions affecting immigrants. See PRAWORA, *supra* note 3, at §§ 400-435. See also *Highlights: Changes in Welfare*, N.Y. TIMES, July 31, 1996, at A9.

121. Broder & Navarro, *supra* note 14, at 282-83.

122. *Id.* at 282.

123. See *id.* at 286-88. Thus, the assimilative allure of American notions of appropriate male-female relations has attracted some of the women interviewed for the study away from the cultural norms of their countries of birth, at least to some extent. But, contrast the expressed desire for protection from domestic violence with the embrace of traditional latin patriarchy. See *infra* note 128 (norms expressed in the material quoted). This highlights the state of cultural contradiction of immigration and the intercultural tension in which Latina women may live. For a sensitive illustration of the tensions, see Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L. J. 185 (1994). See also Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & CULTURE 23 (1994)

124. "I want to give them my message, to tell them that just as North Americans are human beings with blood flowing from their veins, we Latinos, the same blood flows in us." Broder & Navarro, *supra* note 14, at 312 (quoting Rosa). The valuing of cultural tolerance *does* have political limitations. As such, even among the group which is the subject of the Broder/Navarro paper, some cultural dissent is more problematic.

Some prejudices brought to the United States from the home nations become problematic here, at least for some. "In the past, Latinos saw each other differently; we discriminated against each other. . . . In the past we would say, 'aah, those Salvadorans! aah, those Mexicans! Always those people, these people.' No longer. Now [after Proposition 187] we say our Mexican brothers, our Nicaraguan brothers, our Salvadoran brothers. Because that is what we are, brothers." *Id.* at 306 (quoting Rosa).

125. The internalization of cultural dissent is theoretically available for all cultures. It is also limited for practical purposes as applied to different groups (for example, perhaps, African-Americans). Thus, the level of tolerance of cultural difference of immigrant groups has risen slowly for most European sub-groups over the course of the last 150 years. Consider the anti-Irish and anti-German violence of the last century, and the slow internalization of cultural prohibitions of violence against Jews, Italians, and Eastern Europeans in the latter part of this century. See, e.g., MILTON GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* (1964). The various and quite diverse cultures of Latin America have begun the road down this well

It represents a struggle over the definition of group, but a struggle whose aim is inclusion within the dominant substructure. If given a chance, it is clear that the members of this group, illogically excluded, would quickly and successfully join the productive mainstream.¹²⁶ No economic deviants here. "My hopes? Nothing more than to continue working in this country and to demonstrate to people that we came here to work and to forge a better future. We didn't come here to be a burden on anyone."¹²⁷ Indeed, no social deviance either. Consider the words of Clara Luz Navarro, which might well have come from the authors of the Republican Contract with America:

For many Mexican women, family reunification is key. Their husbands come to the United States first, leaving the rest of the family at home. In all cultures, the family consists at least of the father, mother and their children. The ideal is that they can live together, grow, and support each other and the children mutually. It doesn't work to have pairs separated. This is the goal of many women: to come and reunite with their husbands.¹²⁸

Professor Weinberg also argues for inclusion.¹²⁹ Professor Weinberg's call is not for inclusion of groups, but inclusion of particular kinds of labor within the conventional framework of labor markets and the *value* for such work derived therefrom. In a sense, the notion is that women, especially who provide caregiving, are productive.¹³⁰ They have been deprived of the value of their productivity by a system which treats women's caregiving *work*, especially, as invisible. But, she rightly notes,

worn (and difficult) route in which success is never guaranteed. It is a road that is blocked by nativism of both European and non-European peoples already resident. "My son at school, feels as if other people of color . . . like him less. They tell him that because he is undocumented, he doesn't have a right to be here." Broder & Navarro, *supra* note 14, at 300 (quoting Irma).

126. See generally *id.* at 306-08.

127. *Id.* at 306 (quoting Veronica).

128. *Id.* at 285-86. Compare the language of the traditionalist Republican Contract With America: "The American family is at the very heart of our society. It is through the family that we learn values like responsibility, morality, commitment, and faith." CONTRACT WITH AMERICA, *supra* note 48, at 79. "It is the sense of the Congress that marriage is the foundation of a successful society, marriage is an essential social institution which promotes the interests of children and society at large. The negative consequences of an out-of-wedlock birth on the child, the mother, and society are well documented." PRAWO, *supra* note 3, at § 100(1)-(3); PRAWORA, *supra* note 3, at § 101(1), (2), and (8). Note also the difficulty that modern feminist theorists, like Martha Fineman, might have with what might be considered the rigidly conservative and patriarchy-affirming cultural and social aspirations of the Latina women whose stories file the pages of Ms. Broder and Navarro's article. See FINEMAN, NEUTERED MOTHER, *supra* note 15.

129. See Weinberg, *supra* note 13.

130. *Id.* (manuscript at 20-26).

under our normative system, there ought to be no such thing as free work. Free work amounts to unjust exploitation which would be intolerable if, for instance, the concept was applied to the work of corporate executives.¹³¹ In effect, the normative system was on the right track the first time around, when caregiving was valued enough that the government agreed to supplement the income available to women engaged in this caregiving job who had no other sources of income.¹³² While some argue that productivity as a core norm is suspect, or that people ought not to be self-sufficient, that is not Professor Weinberg's point. Rather, she illustrates what can be characterized as a fundamentally unfair disjunction in the way in which we understand our labor markets, the correction of which will reduce its most glaring negative effect—the problem of welfare as currently conceived.

A subtext of Professor Weinberg's approach is one that has been noted by other commentators more directly: the effect of women's exclusion from the discussion about welfare reform.

Given the absence of women's voices in the conversation about ending welfare . . . the welfare reform consensus [pushing poor women into the workforce] misses two important patterns in the typical experience of poor women's lives. The first of these patterns relates to the complexity of arranging care for children, and the second to the gender-specific obstacles that all poor women face at work.¹³³

As Lucie White notes, women in the welfare reform debates often find themselves on the dissenting side of the debate; this exclusion affects the social valuing necessary to arrive at a consensus of welfare system "optimality."¹³⁴

131. *Id.* (manuscript at 43-44). "[T]he social structure of relationships, as well as the legislative structure of the welfare state, presumes the unpaid labor of female relatives . . ." *Id.* (manuscript at 39). This "interpretation suggests that social policies may need to be restructured to provide for compensation for caregiving." *Id.* (manuscript at 40). On attempts at the end of the 19th century to compensate women for their "domestic" contributions to the family economy, see Reva B. Siegal, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L.J.* 1073 (1994).

132. For a comprehensive description of both the approach and the practical and theoretical problems of poor relief for women even at the beginnings of "Aid to Dependant Children", see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); Jill Duerr Berrick, *From Mother's Duty to Personal Responsibility: The Evolution of AFDC*, 7 *HASTINGS WOMEN'S L.J.* 257 (1996). This is an especially radical approach when applied to African-American women whose maternal responsibilities might well have been devalued by the dominant society. See Roberts, *supra* note 106.

133. White, *supra* note 63, at 848-49; cf. Law, *supra* note 46.

134. See White, *supra* note 63, at 847 & note 17 ("I do suggest that when a public conversation is substantially dominated by men, everyday routines that are largely restricted

Mark Aaronson argues for what appears to be a radically different approach to welfare and income distribution in the United States.¹³⁵ To Professor Gilbert's more technical criticisms of current welfare reform proposals, Professor Aaronson counters with policy and politics.¹³⁶ He argues that poor relief reform serves to scapegoat the poor and distract and discipline the rest of the population.¹³⁷ Welfare reform neither responds to the underlying causes of poverty, nor does it provide adequate subsistence for the poor in an efficient and humane manner.¹³⁸ His response to these problems is to suggest the establishment of constitutional recognition of social rights.¹³⁹ Social rights are necessary to protect "individuals, not only from arbitrary government, but also from a capricious society and economy."¹⁴⁰ We must also "pay the most attention to the structural causes of poverty, especially the unavailability of jobs paying a living wage."¹⁴¹

Interestingly, the underlying normative goal of Professor Aaronson's proposal is the same as that of Professor Gilbert's substantially more traditionalist proposal, and echoes the underlying goals of the arguments of Professor Weinberg and Ms. Broder and Ms. Navarro. The drive here is towards *self-sufficiency* and personal responsibility—the assimilation into the core normative conduct rules of our society. Those goals drive even the Republican proposals presenting a far harsher version of what Professor Aaronson would see implemented. The difference is the value which Professor Aaronson would give to the economic effect of deviance. For Professor Aaronson, the negative value of socio-cultural deviance is far smaller than the positive value of tolerance. Given the right atmosphere, an acceptable level of socio-cultural conformity would be achieved, and that

to women in our society . . . are not likely to weigh very heavily in the conversation.").

135. See Aaronson, *supra* note 15.

136. See *id.* at 214-17.

137. *Id.* at 216. To some extent these notions parallel those developed in the work of Piven and Cloward, and Joel Handler. See JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* (1995); HANDLER & HASENFELD, *supra* note 105; PIVEN & CLOWARD, *supra* note 37.

138. Aaronson, *supra* note 15, at 216.

139. The recent history of this notion goes back at least to the failed attempt to constitutionalize the right to welfare in *Dandridge v. Williams*, 397 U.S. 471 (1970), in which the Supreme Court held that the federal Constitution does not create an entitlement (absolute right) to poor relief (subsistence). For a discussion of the utility and possibility of constitutionalizing the right to poor relief, see also Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979); but see Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41 (1972).

140. Aaronson, *supra* note 15, at 219.

141. *Id.* Of course, this does not mean that jobs are not available for all able-bodied people who want to work. It might more correctly imply a belief in the need for governmental intervention to achieve that result. See discussion *supra* note 28.

is all to which society is entitled. In this sense, perhaps, one can appreciate the traditional liberal notion that tolerance breeds (minimally necessary) conformity. This is so, in part, because the liberal enterprise is not concerned as a conscious matter with conformity, in part because the value of conformity is low, and in part because the assumption is (at least in the context of poor relief theory) that the "problem" is not that poor people do not want to conform (become "self-sufficient"), but that they are prevented by personal (education, training, life skills) and structural (the unavailability of a job paying a living wage, racism, sexism, homophobia) impediments which it is the task of government to ameliorate.

In the end, however, the world envisioned by Professor Aaronson does not look much different from that envisioned by Professors Gilbert and Weinberg, and Ms. Broder and Ms. Navarro. It is a world of free will, where people take responsibility for their lives and devote themselves, to the best of their abilities, to the maintenance of themselves and those to whom they believe they have an obligation to support. It is a world that preserves income inequality, the power of "meritocracy," and the core structure of the labor market system. The differences, very real and with significant effect on particular individuals in particular ways (ways which might be deemed unfair or unwise by some of the papers I discussed), do not destroy the ultimate goals. After all, we all live in the same normative world whether we like it or not. Understanding that limitation may help us better hone our analysis of fairness and the possibilities within the constraints of our world order.

III. Sketching Lessons for Poor Relief: Liberal and Outsider Scholarship

The papers delivered at this Symposium have raised one other issue—communication—which I would like to deal with here, at least in a very preliminary way. Symposia, articles and the like are meant to engage people in dialogue. Each is directed, ultimately, to the society as a whole, and each is meant to affect that society in some way. I want to begin to explore here the possibilities and limitations of such an attempted discourse.

The scholarship produced at this Symposium, and, generally, the work of activist poor relief scholars as well as both critical race theorists and feminist theorists, to a certain extent, have helped expose the coercive power of culture and social norms on people, practices, and especially law.¹⁴² Their scholarship rightly gives voice to the "other," and to the

142. See, e.g., GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (exemplifying activist race scholarship); Anthony Alfieri, *The Antimonies of Poverty Law and a Theory of Dialogic Empowerment*, XVI N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88); Edgar S. Cahn & Jean C. Cahn, *The War*

fairness of extending to all "others" the group dignity which the dominant group extends to its own. It is a scholarship which necessarily concentrates on the power of the "other," and celebrates its potential ascendancy as a result of its exposure of the unfairness and non-neutrality of dominant norms and discourse.

As if the mere exposure of a thing for what one thinks it is can, alone, bring fundamental change! By concentrating on the "other," their scholarship may misperceive the real underlying strength and vitality of the dominant normative substructure that is so discomfiting. On both a political and socio-cultural level, "[o]ur political system is a change-resistant system, designed by the founders not to move quickly and strongly in new directions."¹⁴³ I have tried to illustrate that strength and resilience by looking at the papers presented in this Symposium and exposing their ultimate obedience to the basic taboos of our culture. To ignore these taboos is to fall outside, to be an outlaw.¹⁴⁴ Perversely, to place oneself outside dominant group norms both strengthens the conscious identity of the "other," and weakens the ability of this "other" to communicate with the dominant group. This compounds the incentive to marginalize and subordinate non-dominant groups within the metaphysical space occupied by the dominant group. Those are the necessary consequences of falling *outside*.

The scholarship of these theoretical schools presents powerful arguments for change based on the long suppressed perspectives of the objects of dominant culture in its various legal guises. As a group, they

on Poverty: A Civilian Perspective, 1 D.C. L. REV. 1 (1992). See also Delgado, *Rodrigo's Second Chronicle*, *supra* note 75 (exemplifying race critical scholarship); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1 (1993); cf. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992). There is a tremendous amount of feminist literature which touches on the subjects of women and institutional relief. Like the feminist movement itself, feminism does not speak with one voice. Acknowledging that while many feminist scholars may share in a form of analysis, for the purposes of this article, I focus on the normative implications of the analytical framework of feminist scholars such as Martha Fineman. See e.g., FINEMAN, NEUTERED MOTHER, *supra* note 15. This "categorization" scheme is not meant to be either. The categorization is meant for convenience. Consider the work of bridge scholars, such as Dorothy Roberts and Lucie White. See, e.g., Roberts, *supra*; Lucie E. White, *No Exit: Rethinking "Welfare Dependency" From a Different Ground*, 81 GEO. L.J. 1961, 1965-67 (1993); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); White, *supra* note 63, at 850.

143. Havemann, *supra* note 92 (quoting Richard Nathan, an assistant budget director under President Nixon, now a director of the Rockefeller Institute of Government in Albany, New York).

144. On the positive aspect of the *outlaw* from the perspective of the "other", see, e.g., Dorothy E. Roberts, *Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179, 182 (discussing the notion of African-Americans as the outlaws of dominant culture, and suggesting that deviance sometimes constitutes an act of resistance to the hegemony of the dominant group).

rationally argue that liberal notions of formal equality and neutral law have provided no protection against, and in fact reinforce, the dominant group's subordination of the poor, women, and people of color. Critical scholars tend to confront dominant culture and its norms as a series of logical propositions dependant wholly on the internal logic of their ordering for their viability. In this, critical scholars perform the role last played by eighteenth century white, male, European Enlightenment rationalists who, through reason, sought to overturn the illogical world in which they lived.¹⁴⁵

Although, in so doing, many marginalize (and to some extent demonize) the dominant culture against which they battle. How can the value of dominant culture, even to its adherents, *not* be underrated by those who have rejected it, the way people reject some God in whom all faith is lost? The *faith* of the converted in the truth of the new covenant necessarily blinds the convert to the allure of the old covenant to those not smitten with the new. It is natural to minimize the strength of the faith of those "left behind." And it is this *misunderstanding*, this blindness to the *faith* of the dominant culture in the *value* of their normative substructure that inhibits the critical theories of these theoretical schools from being treated as more than an academic game.

I cannot emphasize the point enough: Faith . . . faith . . . faith . . . faith . . . faith. The rationalist, Western, Enlightenment oriented approaches of critical theory, as well as that of liberal welfare reform theorists, underrate the power of faith. Core social norms are not the stuff of rationalist exercises. White, patriarchal, European—dominant—culture

145. Consider the rationalism inherent in Professor Richard Delgado's culture-subverting notion of "race treason." Professor Delgado puts forward the notion that *all* the dominant culture needs to implode is a "few good white men" who, induced to commit continuing and fundamental acts of "treason" against the racial ordering foundations of their culture "by identifying themselves with blacks when other whites ask for their help in reinforcing white supremacy[,] . . . would seriously jeopardize the system of white-over-black hegemony that has reigned in this country for over four hundred years." Delgado, *Rodrigo's Eleventh Chronicle*, *supra* note 7, at 96-97. The overthrow of a dominating culture (in this case racially based) appears so easy. "If the police and courts could not be sure that every person who looks white is loyal to the system, that system would fall." *Id.* at 97. Accord Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969-79 (1993).

As a logical proposition this may be true. But the emotive significance of the culture is ignored, as is the power of race traitors. See discussion *infra* notes 166-70. It also seems to contradict Professor Delgado's understanding of the conflation of culture and religion. See discussion *infra* note 150. If race treason has had so little success in the African-American community over the last several centuries at a time when such treason would be rewarded, then why should it work any better when attempted by those who would subvert the *dominant order*. For unlike Professor Delgado, I believe that whites as well as blacks "know by a kind of instinct that these folks won't be with us when trouble comes down." Delgado, *supra*, at 71.

is not a logical exercise. Like the normative framework of the "other," it represents a non-rational, emotive ordering. And that is the ultimate blind spot of critical theory. All miss an essential point which their delving lays bare: dominant culture is both powerful and thinks itself G(o)d. There is a strong *faith* in the verities of dominant culture, at least in its core configuration. "And ye shall know the truth, and the truth shall make you free."¹⁴⁶ I speak here of faith in the classic sense, as something understandable to Aquinas,¹⁴⁷ as the basis of something as simple and powerful as the formal profession of the Catholic Credo,¹⁴⁸ and as in the basis of fundamental Protestant belief.¹⁴⁹ Professor Delgado, for example, can see the intensity, but not the *power* of that blind(ing) faith.¹⁵⁰ Critical theorists of welfare reform forget this faith, they ignore it, at their peril.

146. John 8:32.

147. II THE SUMMA THEOLOGICA OF SAINT THOMAS AQUINAS 548-49 (Fathers of the English Dominican Province trans. 1941, Daniel J. Sullivan rev. ed. 1951).

Faith implies an assent of the intellect to that which is believed. Now the intellect assents to a thing in two ways . . . Secondly, the intellect assents to something, not because it is sufficiently moved to this assent by its proper object, but through an act of choice, by which it turns voluntarily to one side rather than to the other. And if this be accompanied by doubt and fear of the opposite side, there will be opinion, while, if there be certainty and no fear of the other side, there will be faith.

Id. at 382-83. This survives in modern form in the Catholic Catechism. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 27, §176, at 48.

148. "Communion in faith needs a common language of faith, normative for all and uniting all in the same confession of faith." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 27, § 185, at 51.

149. See, e.g., JOHN CALVIN, CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION, Bk. III, ch. II (1559), reprinted in XX THE LIBRARY OF CHRISTIAN CLASSICS 542 (John T. McNeill ed. & Ford Lewis Battles trans., 1960). "[W]e hold faith to be a knowledge of God's will toward us, perceived from his Word." *Id.* at 549. "For, as faith is not content with a doubtful and changeable opinion, so it is not content with an obscure and confused conception; but requires full and fixed certainty, such as men are wont to have from things experienced and proved." *Id.* at 560. "Here, indeed, is the chief hinge on which faith turns: That we do not regard the promises of mercy that God offers as true only outside ourselves, but not alt all in us; rather that we make them ours by inwardly embracing them." *Id.* at 561. This is indeed internalized conviction, absolute, confident, immutable and flowing from a source well beyond the power of humankind to command. Such a faith in a socio-cultural system cannot be breached by human proof alone. And that is the problem for the rationalism of critical scholarship. Rationalist critique must fall on deaf ears since they would have the faithful trade faith for something less. As an alternative vision, critical analysis assumes the role of competitor. See *infra* text accompanying note 159.

150. "It's like a certain type of religiosity. If you believe you are saved, you can easily come to believe that you can do no wrong. Because you believe in God, you will believe you are God, or at least that you're in tight with Him." Delgado, *Rodrigo's Eleventh Chronicle*, *supra* note 145, at 78. The irresistible force of faith sustains the drive to assimilation of and conformity by the not yet "saved." And yet, Professor Delgado would limit the application of its principles to dominant group culture — no others suffer this infection. I am not convinced this is so, especially, for example, given the vibrant separatist traditions of African-Americans in this country.

The consequence is oblivion. In the face of this faith, and as an oppositional force, transformative critical theory can easily be dismissed by dominant culture as the noble gesture buried in the paperwork of institutional implementation of poor relief.¹⁵¹ What appears as arrogance to a dissenter,¹⁵² may be an aggressive expression of faith by dominant culture.¹⁵³

Marginalized by dominant culture, consigned to the zoo of exotic (but dangerous) endeavors, transformative *critical* (outsider) theory at times best serves the very members of the dominant culture which this theory seeks to recast. Critical theory can be the dominant culture's theoretical bogeymen. It assumes its greatest social utility as fairy stories evoking images of the evil (witches, goblins, little people, spirits, deformities—you choose) which live in the dark, apocryphal forest just outside the safe clearing of current dominant norms. These are the kind of stories used by a dominant culture to reinforce its cultural norms. As our welfare reform debates since 1994 make clear, these images are more useful than ever, especially now that communism is no longer readily available for scapegoating.

There is a lesson here for outsider theorists as well as for liberal theorists. It is impossible to engage the dominant culture in a language unintelligible to it, using, for example, what Professor Balkin calls "cultural software" unknown to the dominant group.¹⁵⁴ It is impossible to persuasively argue to the dominant culture in favor of polyculturalism using the very language of chauvinism and dominance which critical theory utilizes

151. Consider in this light Lucie William's story of Mrs. G. in White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes*, *supra* note 142.

152. "Unilateral power can beget arrogance, including the arrogance of insisting that one's worldview, one's interests, and one's way of framing an issue, are the only ones." Richard Delgado and David H. Yun, *Essay II, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 890 (1994).

153. Consider the resulting difficulty of dialogue which results. See, e.g., Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation — Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994). Even within the dominant group, communication can be difficult. See, e.g., Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J., 989, 1077-87 (1994) (liberals and communitarians find it hard to communicate because of emphasis on different meaning of responsibility).

154. See J.M. Balkin, *Ideology as Cultural Software*, 16 CARDOZO L. REV. 1221, 1225 (1995) (cultural software is the processes, contexts and understandings we employ in the process of understanding and evaluation). Ultimately, then, the absurdists are right, and with a vengeance, when it comes to debating social policy involving the poor. I refer to that movement in French and English theater, at its height in the 1950s and 1960s, that lamented and exposed the senselessness of the human condition. Generally, absurdist writers hold that human beings exist in an unpredictable universe in which their actions tend to compound the general unpredictability of phenomena. Forging predictability is futile in this universe because humans are innately incapable of communicating with each other at any but the most superficial level. Cf. SAMUEL BECKETT, *WAITING FOR GODOT* (1954) (a play expressing the absurdity of, as well as the need for, some external rational guide).

as an indictment against the dominant culture.¹⁵⁵ From the mere existence and recognition of "others," one cannot necessarily cede power from an aggressive dominant culture to aggressive "other" cultures that share a common space. Cultures are not yet nation-states; there can be no treaty relationships between them.¹⁵⁶ A dominant culture will tolerate, and to that extent recognize, others, but no farther.¹⁵⁷

Thus, to a certain degree, critical theorists can sometimes fall into the very old Marxist-Leninist trap: it is one thing to identify racism and patriarchy (just as it was to identify capitalism) as an evil; it is quite another to assume or argue that it inevitably follows that *naming the evil* will result in its destruction or transmogrification.¹⁵⁸ It is error to assume that

155. See, e.g., FINEMAN, NEUTERED MOTHER, *supra* note 15, at 5, 227-37 (redefining family to extirpate patriarchy); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989) (proposing a legal jurisprudence grounded in the voices of African-American females).

156. And yet, critical discourse begins to dissolve the classical definitional differences between nation-state, group, and class. For me, there is an eerie sense of *volks*-driven national socialism embedded in this enterprise. It is perhaps unconscious, perhaps uninvited, and unexcused by the fact that it is what is being done to others. Consider Duncan Kennedy's affirmative action enterprise based on the "need to be able to talk about the political and cultural relations of the various groups that compose our society without falling into racialism, essentialism, or a concept of the 'nation' tied to the idea of sovereignty. We need to conceptualize groups in a 'post-modern' way, recognizing their reality in our own lives without losing sight of the partial, unstable, and contradictory character of group existence." Duncan Kennedy, *Frontier of Legal Thought III: A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 705. See also Charles Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) (suggesting the utility of the replacement of individual with group based remedies/rights theories to combat the subordinating tendencies of the dominant race/culture group using the South African model).

157. "Human beings possess an inexhaustible drive to evaluate, to pronounce what is good and bad, beautiful and ugly, advantageous and disadvantageous. Before culture, human values are inchoate and indeterminate; through culture they become differentiated, articulated, and refined." Balkin, *supra* note 154, at 1225. Calls for recognition of multiple cultural evaluative processes will fall on deaf (dominant group) ears. Transformative models remain "defeated dreams." Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1565 (1996) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* and JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY*). Other transformative agendas fare no better. See, e.g., Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 309 (1992) (calling for recognition of linguistic polyculturalism); Reginald Leamon Robinson, "The Other Against Itself": *Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 21 & n.13 (1993).

158. But there is *power* in a name. Labelling theory has taught us that we tend to become what we are called. See, e.g., David P. Farrington, *The Effects of Public Labelling*, 17 BRIT. J. CRIMINOLOGY 112 (1977). Yet, it also reveals the possibility of alternative shared truths which may well have the effect of beginning a transmogrification. On the notion of naming and truth, and the relationship of both to law and culture, see Larry Catá Backer, *Constructing the 'Homosexual' of Constitutional Theory: Sodomy, Narrative and Antipathy*

something like the normative substructure of our law and society is weak, unsupported, decrepit, decadent, or inevitably (and quickly) doomed to oblivion, only to be replaced by a new world order.¹⁵⁹

This point implies another aspect of the central lesson of this paper—we have met the enemy and “they is us.” I have tried to show the way in which even critical scholarship can at times adopt the language and vision of the normative substructure which is criticized as fundamentally “bad.” Critical scholars sometimes use the language of polyculturalism to mask another—that of substitution. Consciously or unconsciously, what may be sought is the *substitution* of one system of *judgments* for another, the transposition of subordinated and subordinating groups.¹⁶⁰ The critical

in *U.S. and British Courts*, 71 TUL. L. REV. (forthcoming 1996).

159. Consider classic Marx, whose work modern political Hegelians tend to internalize if consciously forget.

The history of all hitherto existing society is the history of class struggles. . . . [O]ppressor and oppressed stood in constant opposition to one another. . . . The modern bourgeois society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones.

Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, in GREAT BOOKS OF THE WESTERN WORLD 419, (Robert M. Hutchins ed. & Samuel Moore trans. 1952).

Modern bourgeois society . . . is like the sorcerer who is no longer able to control the powers of the nether world whom he has called up by his spells. . . . The weapons with which the bourgeoisie felled feudalism to the ground are now turned against the bourgeoisie itself. But not only has the bourgeoisie forged the weapons that bring death to itself; it has also called into existence the men who are to wield these weapons—the modern working class, the proletarians.

Id. at 422. *But see* Robinson, *supra* note 157.

Consider the modern critical variations—some are tied directly to a racial-economic analysis with Marxist-Hegelian transformative overtones. *See, e.g.*, Robinson, *supra*, at 22-24, 33, 108-09 (explaining, in a rich analysis, how the “logic of monopoly capitalism properly explains the *violent discourse* between African and Korean Americans”). Some apply the pattern of revolution following from conflict and resulting in the replacement of the decadent “Old” covenant by the “New.” *See, e.g.*, FINEMAN, NEUTERED MOTHER, *supra* note 15 (on the replacement of patriarchy with a new social order); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U.P.A. L. REV. 1349 (1982) (on the life cycles of legal distinctions). Social constructivists fall into the same trap. *See, e.g.*, William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994). For a discussion, see Larry Catá Backer, *Storytelling, Deviance and Revolution in Law* (1996) (unpublished manuscript, on file with author).

160. “Whiteness” is one name frequently given to a set of normative cultural assumptions in need of reconstruction/destruction. The literature is enormous and not monolithic. *See generally* Lawrence, *supra* note 156, at 835-39; Delgado, *Rodrigo’s Eleventh Chronicle*, *supra* note 145. “Patriarchy” is another name given to this set of governing norms. Again the literature is enormous and not monolithic. *See, e.g.*, FINEMAN, NEUTERED MOTHER, *supra* note 15. However, substitution critique is not lost on the dominant group. The notion of replacement (for that is how it can easily be misinterpreted, elevated and distorted) can then be used to dismiss the critical genre in its entirety. But then, that is the danger of

juncture arrives when one presses not merely for "a place at the table" or for "voice," but when one also insists that one must speak for others and that others must accept what is spoken, for it is "good." At this point the transfiguration becomes complete—all groups have their "Napoleon."¹⁶¹ I am not sure that in a stable socio-cultural system polyculturalism is possible—hermeneutics requires a singular text.¹⁶²

This point underscores another repercussion of my observation that there is no enemy "outside" in the battles over the manner of succoring our poor. We must keep firmly in mind that the enemy we each carry (if, after all, you deem "it" an enemy at all) eliminates the utility of an analysis based on the existence of some mythical "other" who is the source of everything that is "bad" about American welfare. There is no international conspiracy of fascists, bankers, and communists who together, and from secret cells within and without government, are manipulating welfare reform for their own (and by definition not *our*) ends on the basis of *their* (not *our*)

groups — both subordinating and subordinated groups. Groups *must* exclude, otherwise they lack definition. Political groups will define and by defining both judge and exclude. The issue of the particular judging and exclusion is a matter of politics and power. Our academic language cloaks these imperatives in the soothing language of principle and reason. But the result is always the same. For basic studies on groups, see Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993). Consider what troubles Professor Slaughter about a potential response to patriarchy and its effects especially on welfare mothers:

Fineman responds to patriarchy with a maternalist fantasy. It is her belief that a social order favoring mothers can only be established by redefining socially valuable intimacy as nurturing rather than sexual. This, however, erases the erotic from public and legal sight. It works to a similar end as patriarchal proposals and requires a similar denial of public recognition of feminine sexuality. Fineman envisions the mother/child dyad as the core of her maternal utopia, but just like the patriarchal figure of the welfare queen, the mother/child dyad presents harmonious social identity by masking irresolvable antimonies.

Slaughter, *supra* note 105, at 2180.

161. For a perceptive analysis of the inevitability of this process, see GEORGE ORWELL, *ANIMAL FARM* (1946).

162. In this sense, I take seriously a point made by Professor Steve Feldman:

Thus, we constantly constitute and reconstitute our tradition, our culture, and our community as we engage in hermeneutic actions. Most important, this constant reconstitution is always simultaneously constructive and destructive. It is constructive in the sense that we constantly build new traditions and communities, constantly adding to our already existing traditions and communities through interpretation and understanding, thus including new concepts, interests, prejudices and significantly, participants. Yet the reconstitution is also destructive — distortive and exclusive — insofar as we weaken or eliminate previously existing traditions and communities and exclude concepts, interests, and participants.

Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. (forthcoming Fall 1996) (manuscript at 26, on file with author).

cultural norms.¹⁶³ Nothing that happens in welfare reform occurs except in conformity with the basic values of our society (whether we, as individuals, agree with the value mix that resulted in the particular form of the reform or not).¹⁶⁴

It is foolish to believe in the pervasiveness of such conspiracies as the grounding of dominant norms in one form or another—to believe in the passive or active manipulation of socio-cultural norms exclusively by a hidden, small band of this or that type of group within dominant culture, whose norms do not reflect those of the majority of peoples inhabiting a particular place, and who are able to get people and groups to act against their own best interests. That reeks of National-Socialist, Maoist or Stalinist paranoia. It implies, at its worst, a kind of culturally hypocritical revolution we have seen, for instance, in Cuba—the land of fungible tyrannies.¹⁶⁵ It posits a dictatorship of a proletariat of the correct thinking—of those who would substitute their vision for those of the *other*. What makes this somewhat more troubling is that this *otherness*, as I have suggested, exists culturally anyway, perhaps no more than “skin” deep. That is especially true in poor relief.

The dominant majority will tend to ignore writings which marginalize its views and seek to sweep away (without much ado, but with much scorn) its core normative values. Such writings do not communicate with the

163. The allusion I make here is to the “Protocols of the Elders of Zion,” a tsarist fabrication purportedly documenting the international conspiracy of a worldwide network of Jews planning take over the world by stealth. See NORMAN COHN, *WARRANT FOR GENOCIDE: THE MYTH OF THE JEWISH WORLD CONSPIRACY AND THE PROTOCOLS OF THE ELDERS OF ZION* (1966). For a sampling of these types of notions, see TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* (1995) (failures of the left are in part a fabrication by a conspiracy of conservative white male social critics funded in particular by the John M. Olin Foundation). In any case, I am not convinced that all groups, dominant and “other” are done ascribing to Jewish people, as an essentialized collective, blame for much that is “wrong” with the world. See generally STEPHEN FELDMAN, *DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY AND ANALYSIS OF THE SEPARATION OF CHURCH AND STATE* (forthcoming 1997) (on the nature of the Christian domination of American society and culture).

164. As I have remarked in another context:

There is no running away from American poor relief — no shirking of responsibility for its contours. There is no blaming of the system’s faults on “Republicans,” or “liberals,” or someone else’s “culture,” or people who are not “us.” In this case, physical presence cannot be combined with metaphysical isolation. Each of us has been touched by the assumptions of the static paradigm, willingly or not, irrespective of our ideologies of separation.

Backer, *Welfare Reform at the Limit*, *supra* note 3, at 343.

165. On the socio-cultural conservatism of the current dictatorship in Cuba, see, e.g., MARVIN LEINER, *SEXUAL POLITICS IN CUBA: MACHISMO, HOMOSEXUALITY, AND AIDS* (1994) (on the sexual prejudice of the revolutionary “Communist” regime in Cuba).

dominant group.¹⁶⁶ They cannot. The dominant group will not engage in dialogue on the basis of its acceptance of the notion that it must be destroyed or swept aside. Hermeneutics as suicide is rare, for most cultures, especially dominant cultures.

And so, one might wonder whether the one-sided and demonizing dialogue is not indeed the kind of dialogue which the dominant culture expects of its minorities. The mutual incomprehensibility of narrative becomes apparent—people don't listen except to what they want to hear. That truism, applied to the dominant group, is applicable to the voices of the "other" as well.¹⁶⁷ As the excerpts recounted in the Broder/Navarro paper suggest, both dominant and subordinated groups celebrate the primacy of their respective core norms. Each will enforce those norms, punish deviants, and seek to convert or control "others" existing within the same metaphysical space.¹⁶⁸ Tolerance and deviance are thus reduced to issues of power and identity (and the power to control the latter), a necessary analysis at which critical scholars have excelled. But the perception that this sort of reductionist explanation provides the full source of understanding, in turn, can reduce the interpretation of outsider dialogue to the cynically political. It is not race or culture or respect, but power and

166. See, e.g., Eleanor Marie Brown, Note: *The Tower of Babel: Bridging the Divide Between Critical Race Theory and 'Mainstream' Civil Rights Scholarship*, 105 YALE L.J. 513, 515 (1995) ("When it comes to legal scholarship addressing race, by contrast, it is striking that despite the existence of critical race theory for nearly a decade, the response to it has generally been a conversation among those who identify themselves as critical race theorists.").

167. Consider the oppositional perspectives of groups through the eyes of Richard Delgado: *They conclude that, because the world is fair yet we are poor and despised, there must be something wrong with us individually, or with our culture or family — we are not among the Elect. We, by contrast, having the same belief in a fair world but knowing that we are normal — like everyone else — interpret differences in the distribution of social goods like jobs, longevity, wealth, and happiness as evidence of malevolence or neglect on the part of those in power, or else as basic defects in the social system.*

Delgado, *Rodrigo's Second Chronicle*, *supra* note 75, at 1199 (reviewing RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)).

168. Thus, Richard Delgado can echo the call of some academics to white people "who want to help can become traitors to the white race." Delgado, *Rodrigo's Eleventh Chronicle*, *supra* note 7, at 95. In critical scholarship, that may be seen as "good." Other sorts of race treason, especially treason to the norms or at least the political aspirations of subordinated groups, is "not good" in the literature. See, e.g., Wendy Brown, *In the 'folds of our own discourse': The Pleasures and Freedoms of Silence*, 3 U. CHI. L. SCH. ROUNDTABLE 185, 192-93 (1996); Diana C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1120-21 (1994) (on the conflict between cultural/racial solidarity and the perpetuation of patriarchal subordination of women). But each is actively controlled by the socio-economic matrix within groups. See Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1093-95 (1996) (especially the stories with which she starts the article).

placement on the socio-economic (and institutional) hierarchy which is the real topic of negotiation. And the solution? Like the problem, it is ephemeral and elusive. As I have tried to show in Part II, it is also a moving target. My focus here, however, is not on a solution, but on the limitations of communication on issues touching core social norms.

What remains is a kind of dialogue based on mutual non-recognition. This is a dialogue which breeds subordination as groups apply the normative principles of conformity and assimilation to as large a group of people as possible. Social cohesion, the discipline of the group in the face of mutual incompatibility, requires choice. From the perspective of the dominant group, subordination means reducing contrary cultural norms to a silence in the public (though not the private) space. Polyculturalism can exist in theory—in reality it describes a transitional period between the dominance of one set of socio-cultural norms and another. A set of norms must govern, and yet all norms are subordinating of those who are defined as outsiders—and every group has its outsiders. As such, a dominant group can hear outsider scholarship as the strident attempt by one group to impose its norms on all others—norms which will subordinate and exclude in ways different from that of the current norms, but exclude and subordinate regardless. Perversely, much of the rhetoric of the outsider may hide the shared normative values of all such groups in the West, those values which I described in Part I of this paper, which might well facilitate dialogue at some level. Perceived as imperialist and threatening, of “outsiders” vying for the role of “dominant,” outsider discourse is rendered meaningless noise in the ears of the dominant.

IV. Conclusion

Mere exposure of the racist or patriarchal underpinnings of culture and law, alone, cannot change either. Nor are chauvinism, patriarchy, or racism peculiar to this culture. Groups, and their cultures, define and exclude to survive. They are “a set of collectively created tools of understanding”¹⁶⁹ and are not lightly discarded or changed. The papers presented at this Symposium clearly illuminate both the possibilities and the limitations of welfare reform in our country and in our century. The papers demonstrate quite forcefully the radical dependance of each on the other and their oppositions, all within a singular core normative framework: immigrant baiting and the productivity of immigrants; wrongheaded punishments and public monitoring; bad parent and good parent; good parent and wrongheaded punishment; bad parent and public monitoring; immigrant baiting and bad parent; immigrants are productive and nice parents; public monitoring

169. Balkin, *supra* note 156, at 1224.

and immigrant baiting.

Those whose business it is to think through the problems of welfare and the poor must move away from the ancient infatuation with binaries, toward notions of opposition based on a mutable continuum of variation. The only real permanence *within* the borders of our normatively limiting world is infinite variation and constant struggle.