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Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief

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ARTICLE

MEDIEVAL POOR LAW IN TWENTIETH CENTURY AMERICA: LOOKING BACK TOWARDS A GENERAL THEORY OF MODERN AMERICAN POOR RELIEF

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MEDIEVAL POOR LAW IN TWENTIETH CENTURY AMERICA: LOOKING BACK TOWARDS A GENERAL THEORY OF MODERN AMERICAN POOR RELIEF

Larry Catá Backer[†]

"Cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life. . . . In the sweat of thy face shalt thou eat bread, till thou return unto the ground."¹

"That which hath been is the same which will be, and that which hath been done is the same which will be done. So, there is nothing new under the sun."²

I. INTRODUCTION

The twentieth century has witnessed the continuing evolution of a variety of governmental programs³ aimed at providing aid of

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1. *Genesis* 3:17-19.

2. *Ecclesiastes* 1:9.

3. For an overview of the American welfare system, and a description of the programs in place, see LOW INCOME OPPORTUNITY WORKING GROUP, DOMESTIC POLICY COUNCIL, UP FROM DEPENDENCY: A NEW NATIONAL PUBLIC ASSISTANCE STRATEGY (Supp. 1 1986) (Report to the President) [hereinafter LOW INCOME OPPORTUNITY WORKING GROUP]; SAR A. LEVITAN, PROGRAMS IN AID OF THE POOR FOR THE 1980'S (4th ed.

some kind to the poor.⁴ There are also a number of such programs that are the creatures of private efforts;⁵ however, in contemporary America, the most significant sources of poor relief are provided by civil government at the local, state and, principally, at the federal level.⁶

For able-bodied unemployed men, for women without children, or for two-parent families, the only source of help, besides private charity, is state or local programs of general assistance.⁷ These

1980). For a brief discussion of the problems relating to the notion of a consistent or uniform definition of the term "poor," see CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, at 57 n.2 (1984); Victor R. Fuchs, *Redefining Poverty and Redistributing Income*, 8 *PUB. INTEREST* 88, 89-94 (1967).

4. Essentially, there exist two steady sources of poor relief in the United States which are publicly funded. The first, with which this article is concerned, is entirely local revenue which is administered by the state, county, or locality from which it is derived. The other is from the federal government, which matches funds contributed by the states. This latter form of poor relief is limited to certain categories of the poor (as defined in the particular federal statutes implementing the particular programs of federal matching grants); and, though administered at the state or local level, is subject to substantial administrative guidance from the federal government. See Irene Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 *CORNELL L. REV.* 825, 851-57 (1974).

The other general source is private charitable efforts. Although private charity is beyond the scope of this paper, it is an important element in the relief of the poor in the United States. See *infra* text accompanying notes 160-76. For a general discussion of private charity, see Robert H. Bremner, *Private Philanthropy and Public Needs: Historical Perspective*, in 1 *RESEARCH PAPERS: HISTORY, TRENDS AND CURRENT MAGNITUDES* 89-114 (1977); Wilbur J. Cohen, *Some Aspects of Evolving Social Policy in Relation to Private Philanthropy*, in 2 *RESEARCH PAPERS: PHILANTHROPIC FIELDS OF INTEREST* 657-62 (1975); Ellen Winston, *Some Aspects of Private Philanthropy in Relation to Social Welfare*, in 2 *RESEARCH PAPERS: PHILANTHROPIC FIELDS OF INTEREST* 662-97 (1975).

5. This is accomplished primarily through voluntary private charity. See *infra* text accompanying notes 410-17. See generally Bremner, *supra* note 4, at 89-114 (analyzing the development of private charity in America, examining the development of philanthropic ideas from the colonial period on).

6. These programs include all that we commonly associate with modern governmental "welfare" programs. On the significance of these programs, see generally LEVITAN, *supra* note 3, at 18-94; THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* 84-96 (1990); WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 284-339 (3d ed. 1984). In this category, too, perhaps, belong all experimental programs or programs which exist only as long as governmental or private grant funds are available. The federal government funds a great number of limited life programs. The purpose of the grants is to promote experimentation, the theory being that successful "experiments will generate a stable funding source." For an analysis of several current experimental programs, see JUDITH M. GUERON & EDWARD PAULY, *FROM WELFARE TO WORK* 107-20 (1991).

7. The term "general assistance," as used in this article, means public programs, financed from state or local funds, which furnish financial assistance or assistance in-kind to needy families or individuals, primarily, though not necessarily, in their homes. This definition is similar to that historically used by the federal government. See OFFICE OF

programs are the oldest of American systems of poor relief,⁸ and the least well understood.⁹ They have become, in certain states at

FAMILY ASSISTANCE, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, CHARACTERISTICS OF GENERAL ASSISTANCE IN THE UNITED STATES 3 (1978). Assistance is not limited to cash payments.

[A]ssistance may be given in the form of money payments, assistance in kind provided directly to recipients, vendor payments for medical or remedial care, or vendor payments for other goods and services. It may include assistance to recipients living in boarding or nursing homes or in certain public or private institutions, with the exception of transient care given through shelters or overnight lodging houses. It does not include cases in which only vendor payments for burials are made.

Id.

8. See discussion *infra* part IV.

9. State general assistance programs have yet to be extensively studied. Perhaps because they lack the *caché* of the study of federal efforts, relatively little work has been done recently respecting the general assistance provisions of the several states. For the few studies that have been done, see, e.g., Kerry R. Bensinger, *From Public Charity to Social Justice: The Role of the Court in California's General Relief Program*, 21 LOY. L.A. L. REV. 497 (1988) (California); Stephen E. Kravit, *Standards for General Assistance in New Hampshire: An Analysis and Proposal*, 16 N.H. B.J. 135 (1974) (New Hampshire); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964) (California); Nancy S. Blanton, Note, *General Assistance in California*, 12 SAN FERN. V. L. REV. 31 (1984) (California).

The most extensive research in recent years has been in the area of the rights of the homeless, which has focused generally on the right to benefits for all people in need. This study has, for the most part, focused on the right to shelter. See Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315 (1990-91); Robert C. Ellickson, *The Untenable Case For an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17 (1992); Eric Hirsch & Peter Wood, *Squatting in New York City: Justification and Strategy*, 16 N.Y.U. REV. L. & SOC. CHANGE 605 (1988) (discussing effectiveness and need for squatting strategies to solve the housing problem in New York City); Florence W. Roisman, *Establishing a Right to Housing: A General Guide*, 25 CLEARINGHOUSE REV. 203 (1991) (presenting an overview of statutory arguments in support of right to shelter).

However, an increasing body of work has focused on other areas of the homelessness problem. See, e.g., Kenneth M. Chackes, *Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor*, 31 WASH. U. J. URB. & CONTEMP. L. 155 (1987); Kim Hopper et al., *Economies of Makeshift: Preindustrialization and Homelessness in New York City*, 14 URB. ANTHROPOLOGY 213, 213-16 (1985) (describing the nature of homelessness and the possibility of providing public shelter); Michael I. Perlín, *Competency, Deinstitutionalization and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63 (1991) (arguing that because of the condition of some of the homeless, providing only shelter is insufficient to solve the homelessness problem); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 (1992); Donald E. Baker, Comment, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417 (1990-91) (suggesting that cities ought to concentrate on eliminating the causes of homelessness rather than expending resources on the enforcement of anti-homeless legislation); Camilla M. Cochrane, Comment, *The Homeless School-Age Child: Can Educational Rights Meet Educational Needs?* 45 U. MIAMI L.

least,¹⁰ the last resort of the homeless and destitute who are able-bodied but jobless.

These programs also form the basis for the elaborate system of federal/state welfare programs, of which Aid to Families with Dependent Children (AFDC) forms a significant part, and which provide the bulk of poor relief in the United States.¹¹ Unlike their state and local counterparts, most sources of federal governmental aid are available only to those who meet substantially restrictive threshold criteria.¹² Although the single-most important criteria was financial or medical need, the provision of aid has become increasingly contingent on other criteria.¹³ These other criteria can

REV. 537 (1990-91); Michael R. Smith, Note, *Limiting the Discretion of the Administrator of Poor Relief in Indiana*, 26 IND. L. REV. 631, 643-46 (1993) (arguing that the local administrators of relief in Indiana have too much discretion, concluding that state regulation is necessary to curb it).

10. See discussion *infra* part V; cf. GILBERT STEINER, *SOCIAL INSECURITY: THE POLITICS OF WELFARE 8-17* (1966) (explaining that the decline in competitors in the welfare market means that the dominant source of assistance is federal funding).

11. Federal programs account for the largest expenditures by far on aid to the poor. The largest program is Aid to Families with Dependant Children (AFDC), Title IV of the Social Security Act of 1935, amended by 42 U.S.C. §§ 601-615 (1988 & Supp. II 1990), which creates a system of federal grants to the states for programs formulated and administered by them in accordance with the fairly detailed requirements and supervision of the Department of Health and Human Services. Most other federal programs follow roughly the same pattern. For a general description of the available federal programs, see sources cited *supra* note 4.

12. The formal criteria employed for categorizing the poor in this manner vary considerably. These criteria can be as simple as proving a certain income level for eligibility under the Food Stamp Program. See Food Stamp Act of 1964, 7 U.S.C. §§ 2011-2030 (1988 & Supp. II 1990). For a description of the Food Stamp Program, see STAFF OF SENATE COMM. ON AGRIC., NUTRITION AND FORESTRY, 99TH CONG., 1ST SESS., *THE FOOD STAMP PROGRAM; HISTORY, DESCRIPTION, ISSUES AND OPTIONS* (Comm. Print 1985); Michael Lipsky & Marc A. Thibodeau, *Domestic Food Policy in the United States*, 15 J. HEALTH POLITICS, POL'Y & L. 319 (1990). Such criteria can also be based on a certain physical or mental condition for eligibility under the Supplemental Security Income Program (SSI). See Supplemental Security Income Program Social Security Amendments of 1972, 42 U.S.C. §§ 1381-1383 (1988 & Supp. II 1990) (providing monthly payments to people who meet the income and assets eligibility criteria and who are also over 65 years of age or blind or disabled). The criteria used to determine eligibility are codified at 20 C.F.R. § 416.920-4 (1992). See also The Medicaid Program, 42 U.S.C. § 1396 (1988 & Supp. II 1990) (providing in-kind medical benefits to people meeting the income eligibility criteria set forth in the statute).

13. Note, however, that even the ability to meet these eligibility criteria does not guarantee participation. As William Simon effectively argues, the formalization of entitlement, bureaucratization of administration, and the proletarianization of the work force has virtually made a game of attaining benefits, even by those qualified. See William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1198-99, 1200-22 (1983); cf. Smith, *supra* note 9 (arguing that township trustee's discretion is limited by due process and equal protection considerations). Simon's conclusion is pointed-

include marital and family status,¹⁴ physical or mental condition,¹⁵ age,¹⁶ and perhaps even race and ethnicity (although these criteria are not overt).¹⁷

ly demonstrated in litigation filed against the County of Los Angeles, alleging, in part, that the county effectively reduced its welfare caseload by implementing a complex system filled with traps for the unwary and unsophisticated applicant. See First Amended Complaint For Declaratory Relief, ¶¶ 6-41, *City of Los Angeles v. County of Los Angeles*, (No. C-655-274) (Cal. App. Dep't Super. Ct., L.A. County, Oct. 19, 1987) (unpublished, on file with author)[hereinafter First Amended Complaint], and discussion *infra* part III. Also, income eligibility criteria may vary from program to program. There does not even seem to be a uniform definition of poverty or need across programs. See, e.g., LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 62-66.

14. For instance, AFDC, the largest cash assistance program in the United States and a pillar of the American system of public assistance, excludes most indigent two-parent families and all indigents who are not responsible for minor children. Simon, *supra* note 13, at 1200-01. For a discussion of the other major federal categorical aid programs which discriminate on the basis of marital or family status, see MICHAEL BARTH ET AL., TOWARD AN EFFECTIVE INCOME SUPPORT SYSTEM: PROBLEMS, PROSPECTS, AND CHOICES 15-19, 36-42 (1974); SAMUEL MENCHER, POOR LAW TO POVERTY PROGRAM: ECONOMIC SECURITY POLICY IN BRITAIN AND THE UNITED STATES 388-403 (1967) (comparing the programs in Britain and the United States); TRATTNER, *supra* note 6, at 257-339 (providing a short history of welfare programs, including AFDC).

15. See, e.g., Supplemental Security Income Program, 42 U.S.C. §§ 1381-1383 (1988 & Supp. II 1990); Medicaid Program, 42 U.S.C. § 1396 (1988 & Supp. II 1990).

16. Social Security Act, 42 U.S.C. § 301 (1988 & Supp. II 1990) (providing benefits to aged persons who meet certain criteria).

17. "The standard interpretation, at least in liberal intellectual circles, is that the United States has always been an inegalitarian society in which the myth of equal opportunity has obscured a reality of submerged class conflict, racial discrimination, and tolerance of economic inequality." Paul E. Peterson, *The Urban Underclass and the Poverty Paradox, in THE URBAN UNDERCLASS* 3, 10 (Christopher Jencks & Paul E. Peterson eds., 1991). See also Peter B. Edelman, *Toward a Comprehensive Anti-poverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1743 (1993) ("Another aspect of the disproportionate poverty of African Americans, Latinos, and Native Americans is the continuing, pervasive racial discrimination in America.").

Writers stressing the racial considerations of poor relief systems and the delivery of aid include DOROTHY L. NEWMAN ET AL., PROTEST, POLITICS AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS 1940-1975, at 262-64 (1978); CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 127-28 (1974); Kenneth L. Karst, *Citizenship, Race & Marginality*, 30 WM. & MARY L. REV. 1, 8-24, 31-49 (1988); cf. DANIEL PATRICK MOYNIHAN, OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEPARTMENT OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965); STEINER, *supra* note 10, at 246-48 (observing that federal programs are set up in a manner to minimize federal intrusion in state handling of racial issues); Lynn R. Osborn, *Language, Poverty, and the North American Indian, in LANGUAGE AND POVERTY: PERSPECTIVES ON A THEME* 229, 229-47 (Frederick Williams ed., 1970) (providing an overview of how the lack of language skills contributes to the poverty of Native Americans); Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1017 (1989) (arguing that civil rights laws removed the racial barriers to success for Blacks in America and that race-specific remedies can do nothing to remove the remaining barriers which are economic).

American systems of poor relief¹⁸ are both a product of, and limited by, a precisely definable set of critical and fundamental assumptions which this article describes as the static paradigm. This paradigm¹⁹ is useful for understanding American approaches to the reform of poor law systems, and the limiting manner in which Americans conceptualize the notion of poverty and the approaches to its alleviation. It also provides a framework through which one can comprehend the actual effect and orientation of society's approach to the periodic reform of its poor relief system. "Reform" can thus be understood as the means by which society inflates the language of system reform in order to appear to implement lofty goals (the eradication of poverty) by recharacterizing traditional approaches as new, untried, or otherwise divinely inspired.²⁰

The ethnic bias of current public assistance is explored by a number of studies. See, e.g., UNITED STATES COMM'N ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY AND DISCRIMINATION (1 MOUNT PLEASANT REPORT) 91-101 (1993) [hereinafter MOUNT PLEASANT REPORT] (studying the delivery of services to a Hispanic community in Washington, D.C.). The study points out that "[e]qual access to public benefits is particularly problematic for the Latino residents of the Mount Pleasant and Adams Morgan communities, not only due to the dearth of bilingual personnel and materials but also to the geographical accessibility of the applicable service center." *Id.* at 147. See also Vera P. John & Vivian M. Horner, *Bilingualism and the Spanish-Speaking Child*, in LANGUAGE AND POVERTY: PERSPECTIVES ON A THEME 140, 140-50 (Frederick Williams ed., 1970) (arguing that the lack of bilingual education prevents poor children from achieving their potential); Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319, 1319 (1992) (arguing that the dependent care tax credit should be expanded beyond paid child care because this discriminates against many low-income minority families).

Other writers have emphasized the patriarchal underpinnings of the system of public assistance and its adverse effect on women. See, e.g., Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274; Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713 (1987-88); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983); Martha Minow, "Forming Underneath Everything that Grows": *Toward a History of Family Law*, 1985 WIS. L. REV. 819; Lucie E. White, *No Exit: Rethinking "Welfare Dependency" From a Different Ground*, 81 GEO. L.J. 1961 (1993).

18. The term "poor relief," for purposes of this article, will include all forms of aid made available to the poor, including governmental and private voluntary institutional aid as well as individual acts of charity. See *infra* note 30.

19. "Paradigm" refers to a system of interrelated fundamental and critical assumptions upon which theories and models of behavior can be derived. The word refers to critical assumptions which have been articulated and to others which may be critical but unrecognized. See JOHN D. STEINBRUNER, *THE CYBERNETIC THEORY OF DECISION: NEW DIMENSIONS OF POLITICAL ANALYSIS* 10 (1974).

20. See *id.* at 10, 25-27 (discussing the normative and positive value of paradigmatic thinking and the blinders that such thinking creates). In this sense, the parameters a poor

But the usefulness of the static paradigm is not limited to understanding the nature of American poor law reform; it should also provide insights about current systems of American poor relief. At a minimum, the insights derived from the static paradigm can take us beyond the confines of traditional analysis. Academic and political debate respecting the value of these programs and their utility has centered on the operation of the existing systems of poor relief: Whether the U.S. Constitution guarantees to each of its citizens the minimum necessities of daily living?²¹ If not, should the poor be provided with monetary or other forms of physical aid to meet these requirements?²² If so, who should give, and

law system builder relies on help shape and limit the range of plausible choices available. Once a generalized conception of societal ground rules for system building is accepted, certain ideas become out-of-bounds or outside the consciousness of the builders. For instance, the static perception accepts the notion that unemployment is a volitional act on the part of the unemployed: if an unemployed person would seek a job, that person would find one. As a result, it would be somewhat inconceivable for such a system to treat the problem of unemployment of the able-bodied by adjusting labor policy. Since the problem is the volitional choices of the unemployed, the problem could not be primarily one of lack of jobs, but, rather, one of providing incentives for the jobless to look for jobs. A non-static view might support adjusting labor policy. See FRANCES F. PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 345-46 (1971). The static view does concentrate on work incentives—job and interview training, financial incentives to work, etc. See, e.g., WHITE HOUSE WORKING GROUP ON THE FAMILY, *THE FAMILY: PRESERVING AMERICA'S FUTURE* (1987) [hereinafter WHITE HOUSE WORKING GROUP ON THE FAMILY] (Report to the President); MURRAY, *supra* note 3. For a discussion of the nature of the critical assumptions which make up the static paradigm and its effect on the manner in which Americans formulate the debate about "welfare reform," see 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).

21. Compare Berger, *supra* note 9 (arguing that all Americans should have a fundamental right to shelter); Daan Braveman, *Children, Poverty, and State Constitutions*, 38 EMORY L.J. 577 (1989) (concluding that state constitutions may guarantee certain rights to the indigent); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One's View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (arguing that a constitutional right to "welfare" should be recognized) with Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 (arguing that no entitlement to welfare can be read into the Constitution); Ellickson, *supra* note 9 (arguing against the creation of an unconditional constitutional right to material aid because such a right would discourage work); Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41 (arguing that the Equal Protection Clause should not be used as a vehicle for achieving greater income equality).

22. Compare MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 191-95 (1962) (arguing for the creation of a negative income tax as a means of providing for the poor; give them money and the freedom to spend or misspend it as they choose); ALLAN SHEAHEN, *GUARANTEED INCOME: THE RIGHT TO ECONOMIC SECURITY* (1983) (proposing a negative income tax); Thomas C. Grey, *Property and Need: The Welfare State and Theories of*

what and how much should be given?²³ How should the state determine eligibility or otherwise deliver to its poor relief services?²⁴ What is the nature of the rights of the poor to such relief as may be granted by the state?²⁵ Do those who receive aid want to work? Should they be encouraged or forced to work? Should they

Distributive Justice, 28 STAN. L. REV. 377 (1976) (arguing that each person has the right to have his basic material needs met by society to the extent he is unable to meet them by his own efforts) with MARMOR ET AL., *supra* note 6 (arguing that the system of categorical aid consisting of transfer payments and payments in-kind works better than generally supposed); Berger, *supra* note 9 (arguing that affordable shelter should be a fundamental right).

23. See TASK FORCE ON POVERTY AND WELFARE, STATE OF NEW YORK EXECUTIVE CHAMBER, A NEW SOCIAL CONTRACT: RETHINKING THE NATURE AND PURPOSE OF PUBLIC ASSISTANCE (1986) [hereinafter NEW YORK TASK FORCE] (arguing that government should provide financial assistance, education, and training to the poor while providing incentives for self-sufficiency); NORMAN FURNISS & TIMOTHY TILTON, THE CASE FOR THE WELFARE STATE: FROM SOCIAL SECURITY TO SOCIAL EQUALITY 192 (1977) (arguing that the purpose of American welfare policy should be to provide at least some degree of equal opportunity); MURRAY, *supra* note 3 (arguing for the dismantling of substantially all current systems of poor relief to force recipients to become self-sufficient); Richard A. Cloward & Frances F. Piven, *A Strategy to End Poverty*, 202 NATION 510 (proposing a right to a guaranteed annual income to alleviate poverty); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981) (setting forth a theory of national welfare based on distributional equality).

24. Compare HERBERT BISNO, THE PHILOSOPHY OF SOCIAL WORK (1952) (suggesting that social workers should be given more discretion); CHARLOTTE TOWLE, HELPING: CHARLOTTE TOWLE ON SOCIAL WORK AND SOCIAL CASEWORK 45-46 (Helen H. Perlman ed., 1969) (suggesting that social workers should have the discretion to make determinations of need and decisions about which programs are best in individual cases); Mildred Rein, *Social Services as a Work Strategy*, 49 SOC. SERV. REV. 515 (1975); Simon, *supra* note 13 (arguing that the welfare system has evolved into a routinized system of rules administered by robotized clerks and has lost much of its ability to respond to the individual needs of recipients who should be of primary importance); Norman L. Wyers, *Whatever Happened to the Income Maintenance Line Worker?* 25 SOC. WORK 259 (1980) (proposing that income maintenance workers do more than determine an applicant's eligibility by assuming more of the traditional duties of a professional social worker) with KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (arguing for a legally based, detailed, and routinized system of aid to the poor, with ultimate discretion left to the legislature or regulatory arm of government); Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479 (1966) (suggesting that statutory and administrative controls be exercised over welfare functionaries who determine the eligibility of applicants); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

25. Chackes, *supra* note 9 (examining situations where nonresidents may have a right to use state-run homeless shelters and situations where they may not); Richard A. Epstein, *The Uncertain Quest For Welfare Rights*, 1985 B.Y.U. L. REV. 201; Craig M. Fullen, Note, *A Home Away From Home: An Analysis of a State's Duty to Provide Services to Nonresident Homeless*, 23 RUTGERS L.J. 117 (1991).

be punished for refusing to work?²⁶ And, does or should society's determination of the place of certain members of society—for instance, women, the visually challenged, the educationally disadvantaged, ethnic or racial minorities—determine the manner in which society ought to respond to the needs of those segments of society?²⁷ Most such analyses have been based on an unconscious

26. Compare LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 51-58 (arguing that work requirements can save money, increase work experience, and raise earnings of welfare recipients); GEORGE GILDER, *WEALTH AND POVERTY* (1981) (arguing that a return to traditional economic and social organization will solve the problem of the permanence of poverty); MICKEY KAUS, *THE END OF EQUALITY* 136-48 (1992) (replacing cash welfare with work would end the indignity of receiving welfare; as such the state ought to distribute benefits based on labor); LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986) (arguing that the unemployed recipients of welfare are unlikely to work unless required as a condition to the receipt of benefits); MURRAY, *supra* note 3, at 227-33 (arguing that the able-bodied should be forced to work by denying them access to all welfare programs) with MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (2d ed. 1971) (observing that poverty is in part the result of cultural factors; therefore, work requirements would fail because they do not address the factors causing poverty); ROBERT HAVEMAN, *STARTING EVEN: AN EQUAL OPPORTUNITY PROGRAM TO COMBAT THE NATION'S NEW POVERTY* (1988) (arguing that the government can deal efficiently with economic inequality efficiently without creating the disincentives to work inherent in previous and present welfare programs); S.H. Danziger et al., *Antipoverty Policy: Effects on the Poor and the Nonpoor*, in *FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T* 50, 50-77 (S.H. Danziger & D.H. Weinberg eds., 1986) (proposing antipoverty policies that seek to reduce poverty and also reduce dependence on the welfare system); Francis Fox Piven & Richard A. Cloward, *The Contemporary Relief Debate*, in *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* (Fred Block et al. eds., 1987) (proposing a right to a guaranteed annual income).

27. See, e.g., UNITED STATES COMMISSION ON HUMAN RIGHTS, *WOMEN AND POVERTY* (1974) (arguing that women's place in society requires a special program, AFDC, to meet their needs); KEN AULETTA, *THE UNDERCLASS* (1982) (examining the social and cultural dynamics of a group of people receiving or eligible for public assistance); CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY AND THE UNDERCLASS* (1992) (arguing for welfare policy based on cultural conservatism and favoring traditional social norms about how people ought to behave, economic egalitarianism (moral obligation to distribute goods and services more equally), and incremental reform (a long-term strategy implemented in stages); on that basis exploring the problems of so-called ghetto culture and its contribution to poverty); Martin Kilson, *Black Social Classes and Intergenerational Poverty*, 64 *PUB. INTEREST* 58 (1981) (arguing that data on African American social mobility from the 1960s and 1970s reveals a pattern of social stratification characterized by a tendency toward intergenerational perpetuation of poverty among African Americans); Oscar Lewis, *The Culture of Poverty*, in *ON UNDERSTANDING POVERTY* 187 (Daniel P. Moynihan ed., 1987) (describing cultural sources of poverty); Anthony Monaco, *Blacks, Immigrants, and the Roots of Poverty in America*, 2 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 297 (1985) (exploring the basis for differences between African Americans and immigrant groups of other races and ethnic groups in economic achievement); Joanna K. Weinberg, *The Dilemma of Welfare Reform: "Workfare" Programs and Poor Women*, 26 *NEW ENG. L. REV.* 415 (1991) (implementing work requirements on AFDC recipients presumes the autonomy and independence of women, a presumption which may be at

acceptance of the fundamental critical assumptions of the static paradigm.²⁸ Questions are raised and answered within the context of the static paradigm itself; the paradigm provides the unseen limits on the scope of analysis. Analyzing the basis of American

variance with reality); *see also supra* note 17.

28. Not all academic analysis rests comfortably within the bosom of the paradigm. A number of commentators have struck out on different paths. Many have been characterized as welfare universalists. *See, e.g.*, Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in *THE URBAN UNDERCLASS* 411, 428 (Christopher Jencks & Paul E. Peterson eds., 1991) (arguing that "rather than devising new programs narrowly focused on low-income people or the urban poor, and rather than seeking to reform or expand aid to families with dependent children and other means-tested public assistance programs, policy makers should work towards displacing welfare with new policies that could address the needs of less privileged Americans along with those of the middle class and the stable working class."); *see also* SAR A. LEVITAN & CLIFFORD M. JOHNSON, *BEYOND THE SAFETY NET: REVIVING THE PROMISE OF OPPORTUNITY IN AMERICA* (1984) (arguing that governmental entitlements to the middle class ought to be reduced to fund programs designed to eradicate poverty, primarily training and public employment projects); Piven & Cloward, *supra* note 26, at 45-108 (arguing that current categorical relief programs should be eliminated and replaced by a uniform national system of social provision for the poor).

Other interventionists favor an approach based on redistributing income for the purpose of ameliorating or even eliminating income or wealth inequality. *See, e.g.*, FRIEDMAN, *supra* note 22, at 191-95 (advocating negative income tax to provide income supplements unrestricted as to use); HAVEMAN, *supra* note 26, at 156-71 (proposing the creation of guaranteed minimum income programs, a national child support program, employment subsidies, and capital accounts for youth to be used for education or training); William A. Klein, *Some Basic Problems of Negative Income Taxation*, 1966 *WIS. L. REV.* 776, 776-800 (advocating a negative income tax). A recently emerging group argues that simple solutions to poverty do not exist because there is more than one problem. They argue, instead, for comprehensive programs requiring a number of different approaches, ranging from universalist to targeted. *See, e.g.*, Edelman, *supra* note 17, at 1742-44 (advocating a holistic approach to combating poverty because of the multitude of factors that contribute to it).

Others argue that not only is redistributing wealth or income necessary, but that this redistribution can become permanent only with a substantial redistribution of political and economic power. *See, e.g.*, Anthony V. Alfieri, *The Antimonies of Poverty Law and a Theory of Dialogic Empowerment*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 659, 678-90 (1987-88) (arguing that poverty lawyers should address the marginalized social role of the poor to facilitate their empowerment); Martin Luther King, Jr., *Where Do We Go From Here*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 245, 245-52 (James M. Washington ed., 1991) (text of presidential address delivered in 1967 by King to the Southern Christian Leadership Council) (arguing that the attainment of economic and political power was essential to the struggle for civil rights and the amelioration of African American poverty). In this, certainly, one has travelled as far as one can from the fundamental assumptions and outlooks of the static paradigm. For that reason, perhaps, such proposals are viewed as quixotic. *See, e.g.*, Robert Greenstein, *Universalist and Targeted Approaches to Relieving Poverty: An Alternative View*, in *THE URBAN UNDERCLASS* 437, 437-59 (Christopher Jencks & Paul E. Peterson eds., 1991) (criticizing the universalist approach to poor relief reform as being unrealistically ambitious).

poor relief with a conscious understanding of the fundamentals animating such systems and approaches to their formation and continuity is essential for those who seek real understanding of such systems and their rhetoric, goals, and reformation.

This brings us to the purposes of this article. The first is to develop a theoretical discourse with which one can discuss American approaches to poor relief. For purposes of brevity I will refer to this discourse as a "general theory" of contemporary American poor relief. To develop this discourse, this article will explore the manner in which the critical assumptions of the static paradigm (our generally accepted objectivist and absolutist rendition of the reality of the condition of the poor) shapes the way we actually craft and implement poor relief programs and the implementation issues about which we seem to go round and round. This theoretical discourse will provide a contextually based method of analyzing, predicting, and explaining the nature and behavior of modern American systems of poor relief.²⁹ The second is to employ this

29. In doing this, I acknowledge the debate regarding the definition and existence of "theory," at least in its guise as general hermeneutics. See, e.g., Stanley Fish, *Consequences*, 11 *CRITICAL INQUIRY* 433, 437 (1984-85) (recognizing that defining theory as a procedure whose steps, if they are faithfully and strictly followed, will always yield correct results, is an impossible project because "the primary data and formal laws necessary to its success will always be spied or picked out from within the contextual circumstances of which they are supposedly independent"); Josué Harari, *Nostalgia and Critical Theory*, in *THE LIMITS OF THEORY* 168 (Thomas M. Kavanaugh ed., 1989) (conceiving of theory as an attempted negation or false ordering of reality); cf. MURRAY KRIEGER, *THEORY OF CRITICISM: A TRADITION AND ITS SYSTEMS* 7 (1976) (arguing against the possibility of being against theory: "Our choice is rather between having an awareness of those theoretical issues which our criticism inevitably raises or going along without such an awareness.");

Theory, as I use the term, is closest, perhaps, to the notion of antifundamentalist theoretical discourse which Stanley Fish describes as in contradistinction to fundamentalist theory that promises to put our calculations and determinations on a firmer footing than can be proved by mere belief or unjustified practice (an objectivist and absolutist hermeneutics). Mine is more a historicist theorizing that demonstrates "that the norms and standards and rules that foundationalist theory would oppose to history, convention, and local practice are in every instance a function or extension of history, convention, and local practice." Fish, *supra*, at 439. In this, my theoretical discourse owes much to Thomas Kuhn. THOMAS S. KUHN, *THE COPERNICAN REVOLUTION* 74 (1957) ("Logically, there are always many alternative conceptual schemes capable of bringing order to any *prescribed* list of observations; but these alternatives differ in their predictions about phenomena not included on the list."). By revealing the history, convention and local practice of poor relief, I seek to engage in explanatory and predictive discourse that might help clarify how American society understands its poor law and uses its understanding to fashion and justify those systems. My theory is not directed towards truth (*writ large*) but rather towards an understanding of an accepted conception of truth (reality) that is rooted in the circumstances of which it believes itself independent. "There is no wholesale,

general theory as a tool for understanding the dynamics of modern institutional systems of poor relief; the guinea pig, so to speak, for the examination is a critical, but generally ignored area of American institutional poor relief—state general assistance programs.³⁰ I articulate the critical set of assumptions making up the static paradigm in Part II.³¹ Part III is devoted to the exposition of the general theory of American poor relief. Parts IV and V test the explanatory and predictive potential of the general theory from both a historical and a contemporary perspective. Part IV critically examines the antecedents of modern American poor relief, medieval ecclesiastical poor relief and the Elizabethan Poor Law, in light of the general theory. Part V then examines contemporary systems of state general assistance on the basis of the theory.

The threads of the preceding analysis are woven together in Part VI. Unquestioning acceptance of the underlying notions of the static paradigm tends to create fuzzyheaded analysis of fundamental questions of poor relief. You tend to be what you believe, and if you control the mechanisms of popular culture, society, and government, what you believe tends to define and limit the reality in which issues are perceived and debated. Our reality is described by the general theory. The foundation of our modern, secular poor relief in the United States has much more in common with the hierarchic, religiously based medieval ecclesiastical poor relief systems fully developed almost a thousand years ago than it does with the mythological American poor relief which has formed a

epistemological way to direct, or criticize, or underwrite, the course of inquiry. . . . [I]t is the vocabulary of practice rather than of theory . . . in which one can say something useful about truth." RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM (ESSAYS 1972-80)* 162 (1982).

30. See *supra* note 7 for the definition of general assistance as used in this article. State general assistance programs have been somewhat neglected in the academic literature. I suspect this is because such programs are not "national" in scope, nor much debated in the more "important" national policy fora, and are therefore seen as less interesting or important (at least in terms of their impact). Such conceptualizations are shortsighted, as I attempt to demonstrate, since state programs tend to be fairly single-minded (with some local variation) and have had a significant effect on the limited, though more uniformly applicable, federally administered programs. Despite the differences between them, federal categorical relief programs can be characterized as merely complex elaborations of the basic systems created to distribute general assistance. Much, therefore, can be learned by studying state general assistance systems of relief, especially when considering that the current federal categorical aid programs do not meet their goals of eradicating poverty.

31. For a fuller treatment of the static paradigm and its utility in understanding the limitations on any attempt to reform American poor relief systems, see Backer, *supra* note 20.

staple in the diet of the American public since the days of the "New Deal." Anglo-American society, despite periodic protests to the contrary, is a society convinced of the soundness of its approach to poor relief. It is part of a larger society that has devoted the last thousand years to refining—not replacing—its poor relief institutions. Poor relief remains a reflection of the society from which it derives, and this society demands above all else that its members be productive. We do not question the need to provide for oneself and of the right to keep what one produces; our system of relief reinforces those notions. Any form of poor relief which fails to affirm these principles (for example, relief based on concepts such as a negative income tax, or an unconditional right to income) will be perceived as a threat to the stability of the social order and on that basis suppressed (if only by ridicule, silence, or inattention).

This state of affairs is not a bad thing if you subscribe to the critical assumptions of stasis (and it is hard not to in this culture). If, indeed, all people must toil for their bread (with certain limited exceptions) and may keep what they "earn" (as well as what their forbears earned), and if poor relief systems are a function of these critical social choices, then the fundamental patterns of poor relief are both fundamentally limited and inalterable and right. As long as the basic assumptions of the static paradigm itself remain unquestioned, there is unlikely to be anything substantially different in the manner in which our society relieves its destitute. It is unlikely that those assumptions will be questioned by society anytime soon. As such, for those uncomfortable with the message and implications of stasis, for those who actually believe the rhetoric of poverty, the picture is, therefore, quite gloomy.

II. THE CRITICAL ASSUMPTIONS AND PRINCIPLES OF THE STATIC PARADIGM

From the settling of the American colonies, the task of formally dealing with the poor in Anglo-American society has been delegated to the legislature, which, in turn, has devised and redevise*d self-contained* systems for the regulation, control, and elimination of the problem of the poor. The first visible manifestation of this legislative approach can be traced to the development in the medieval canon law of a self-contained system for identifying the poor

and regulating the manner of their relief.³² Its earliest modern manifestation was the Elizabethan Poor Law system inherited by the American colonies, which has passed essentially unchanged to the present.

At the core of this approach are a governing set of assumptions about the "poor" and their relief and maintenance. The static paradigm provides a coherent intellectual framework for the resolution of conflict or deficiencies respecting society's response to the "plight" of the "poor."³³ It should not be surprising, then, that whenever, in the course of Anglo-American history, a "welfare" crisis looms, the assumptions and modes of conceptualizing inherent in the static paradigm have framed (limited) the manner in which critical problems are "discovered" and debated by students of the subject. The debris of this debate litters the twists and turns of recent public policy. Ironically, the means of resolving all of these crises, the evidence of which is embodied in statutory systems for the regulation of the poor, has remained unchanged—identifying a group of people to be labelled "the poor," isolating this group, and applying legislated restrictions, benefits, and coercive measures to this group.

In an important sense, stasis affects unconscious notions of the limitations of the system. It also affects the characterizations, as reasonable or unreasonable, of the cognizable range of goals, strategies, and approaches to poverty and the poor, making what might appear reasonable to other societies anathema to this one.³⁴ My

32. See *infra* part III.

33. See Backer, *supra* note 20. In examining the symbolic and mythologizing effect of modern forms of welfare policy, primarily federal categorical relief, Joel Handler and Yeheskel Hasenfeld have argued that social welfare policy cannot be fully understood without recognizing that "it is fundamentally a set of symbols that try to differentiate between the deserving and undeserving poor in order to uphold such dominant values as the work ethic and family, gender, race, and ethnic relations." JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 11 (1991).

34. A good example, perhaps, is the irreconcilable difference in economic world view between a theoretical Marxist and an orthodox Calvinist. The former conceives of the world as striving towards a political economy of income equality, and on that basis assumes that poverty will be eradicated. See Karl Marx & Frederick Engels, *Manifesto of the Communist Party*, in *THE PORTABLE KARL MARX* 203, 218-28 (Eugene Kamenka ed., 1983). A Calvinist cannot conceive of a world where the sweat of the brow of one person is taken to provide sustenance for another person, except under very narrowly defined circumstances. Income inequality is a measure of the relative attainment of eternal salvation—an earthly sign of the favor of God on earth for those who heed the biblical commandments. Poverty will be eradicated not when all people are able to live alike, but

moral: Progress is an illusion. Reform is manipulation of system parameters within the bounds of the assumptions from which the system springs. Efficiency is indeterminate. Liberal and conservative discourse have far more in common than their respective rhetoric admits. All spring from and are bound to the paradigm vision to which I now turn.

The static paradigm, at the broadest level of generality, is meant to connote the unchanging, the passive, the inactive—the term implies the fundamental acceptance of stasis. Notions of stasis and passivity infuse the choices available in approaching the structuring of relief, and limit the perceived range of the possible. In other words, stasis implies a world view, a notion of action, which is limited to the existing, the actual, the traditional. It is a backward-looking conceptualization of the nature of things, at least in the sense that there is little faith in progress or the notion of the positive overall constancy of change for the character of humankind.³⁵ It is a view which finds contentment with the temporary amelioration of that which is otherwise unacceptable but cannot be changed.

In concrete terms, the social and economic order is taken as a given—poor law programs do not challenge the status quo.³⁶ In

when all people heed God's call and work for their keep. See *infra* notes 273-82 and accompanying text. Obviously, the type of eradication program which might be championed by the Marxist would appear destructive to the Calvinist. Likewise, the type of program best suited to the world view of the Calvinist might seem little more than a form of oppression and the institutionalization of poverty to the Marxist.

35. See, e.g., HANDLER & HASENFELD, *supra* note 33, at 15-43 (discussing the myths and ceremonies of welfare policy). There is an extraordinary sense of immutability running through the authors' analysis of these myths and ceremonies. See also Backer, *supra* note 20, at part III.A; Peterson, *supra* note 17, at 10 (noting how the American welfare system has lagged behind other countries' systems and suggesting reasons for America's resistance); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1509-10 (1991) (and articles cited therein) (stating that a central theme in the rhetoric of poverty is "helplessness," which is expressed by the societal feeling that poverty is an avoidable social condition).

36. This notion has a long pedigree going back in modern form at least to the ecclesiastical system of poor relief in Western Europe during the Middle Ages. See BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* 26-35 (1959) (detailing the various justifications offered by the church to allow it to hold private property). The notion has been popularly expressed in this century as well. President Harding, in opening the 1921 Conference on Unemployment, stated:

It is fair to say to you that you are not asked to solve the long controverted problems of the social system. We have builded [sic] the America of today on the fundamentals of economic, industrial and political life which made us what

contemporary guise, any argument that the economic and social system currently in place is not the best possible is substantially taboo. Argument, as a result, is reduced to conflicts between those who have different notions of the means by which this current social and economic system, shorn of its impurities, is to be implemented.³⁷ It also holds some logic for those who value social stability over other goals.³⁸ This is reflected in the enormous amount of literature devoted to the so-called "culture of poverty," which is meant to explain the medical or psychological or social basis for the inability of the poor to overcome their condition.³⁹ Poverty is thus primarily a function of the actions of the poor themselves, or of a host of other conditions, all of which could be remedied by them—for instance, the inability to speak or learn standard English,⁴⁰ or the tendency by some to bear "too many" children at "too early" an age.⁴¹ Indeed, culture of poverty rhetoric expresses

we are, and the temple requires no remaking now. . . . I would have little enthusiasm for any proposed relief which seeks either palliation or tonic from the public treasury.

Quoted in William L. Chenery, *Unemployment at Washington*, 47 SURV. 42 (1921). See also JILL QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE 6-7* (1988) (arguing that the social organization of production determines the nature and form of relief programs).

37. Compare GEORGE GILDER, *MEN AND MARRIAGE* 151-54 (1992) (arguing that poverty is a function of the abandonment of traditional notions of marriage and the gender roles of males and females; the result is the loss of the work ethic); MEAD, *supra* note 26, at 241-58 (arguing that poverty is a function of the failure to impose a work obligation on paupers); MURRAY, *supra* note 3, at 150-53 (arguing that poverty is a function of indiscriminate institutional charity) with HARRINGTON, *supra* note 26, at 1 (arguing that the cultural forces that create cyclical poverty need to be attacked to eradicate poverty); ROBERT J. LAMPMAN, *ENDS AND MEANS OF REDUCING INCOME POVERTY* 33-42 (1971) (arguing that poverty is a function of income inequality); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659-62 (1979) (arguing for the constitutionalization of the right to welfare); Charles Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (arguing that welfare entitlements ought to be treated as forms of property rights). Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 436-38 (3d ed. 1986) (arguing generally that government entitlements are a form of property). Of course, not everyone shares these views. Modern scholars have argued from a different perspective. See *supra* note 28.

38. PIVEN & CLOWARD, *supra* note 20, at 45-46 (arguing that welfare policy ensures social and political stability through income and work relief); Alfieri, *supra* note 28, at 678-80 (arguing that the practice of poverty law embodies particular assumptions and expectations about the poor which further the status quo).

39. See EDWIN C. BANFIELD, *THE UNHEAVENLY CITY REVISITED* (1974); DANIEL P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* (1969); JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975); Lewis, *supra* note 27, at 191-92; and discussion *infra*, part V.B.

40. See, e.g., Osborn, *supra* note 17.

41. See, e.g., STUART BUTLER & ANNA KONDRATAS, *OUT OF THE POVERTY TRAP: A*

society's belief that poverty is evidence of the failure to conform individual behavior to strongly held societal norms and expectations—evidence, indeed, of a fatal character flaw.⁴² The popular press and our political leaders are always interested in presenting anecdotal accounts of this "fact." Thus, the recent notoriety of Dwight Hobbes, a person who, homeless and destitute for a time, overcame his economic condition and in the process (and based on his experiences) began to publicize his view that the problem of poverty, at least as affects the archetypal homeless person, is a problem of the character of the person who finds himself in that condition.⁴³

CONSERVATIVE STRATEGY FOR WELFARE REFORM 138-39 (1987) (referring to AFDC, the authors argue that "now the program finances a subculture whose citizens argue . . . that they want children but not marriage, because 'you don't want the commitments' and 'male figures are not substantially important in the family.'"); Lorraine V. Klerman, *The Association Between Adolescent Parenting and Childhood Poverty*, in CHILDREN IN POVERTY: CHILD DEVELOPMENT AND PUBLIC POLICY 79, 87-91 (Aletha C. Huston ed., 1991).

42. Thus, in describing the manner in which states were beginning to fight the "narcotic" effect of the present state of welfare, former President George Bush explained the assumptions under which such programs ought to operate:

That when able-bodied adults receive government assistance they have responsibilities to the taxpayer. A responsibility to seek work, education, or job training. A responsibility to get their lives in order. A responsibility to hold their families together and refrain from having children out of wedlock. And a responsibility to obey the law.

George H. Bush, State of the Union Address, Address before the Congress of the United States (Jan. 28, 1992), in N.Y. TIMES, Jan. 29, 1992, at A16. Both President Clinton and the Congress have proposed to design a program that would induce the poor to act "responsibly" by forcing the poor into jobs after a limited number of years on the dole. 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, 342 n.16, 374-77 (1995). Thus, at the root of concerns about intergenerational transfers of poverty "is the paucity of employment among welfare mothers and how this affects attitudes of their children towards work." John D. Kasarda, *Urban Industrial Transition and the Underclass*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 44 (1989); 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) (describing as evidence of a change in the character of people in American society the fact that being on welfare is now seen not as a temporary and rather embarrassing expedient, but as a right from which recipients will not be deterred). But see HARRINGTON, *supra* note 26, at 171 (arguing that "being poor is not one aspect of a person's life in this country; it is his life. Taken as a whole, poverty is a culture.").

43. In Hobbes' own words:

The homeless in Minneapolis, America's social services nirvana, are for the most part blithely disinterested in solving their problems and are content to see their well-being as someone else's responsibility. You must be steadfastly dedicated to a down-and-out lifestyle to remain flat on your behind in the Twin

Acceptance of the immutability of the status quo has several important consequences for the parameters of poor relief. First, it implies an acceptance of the existence, value, and immutability of income inequality and its derivative notions.⁴⁴ Foremost among these is the notion that a person has the right to the substantially undisturbed enjoyment of the fruits of his or her labor. "There 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."⁴⁵ Second, it suggests that there exist generally ac-

Cities — a fact that the Captains of every city in America should take note of.

Dwight Hobbes, *Down, Out and Overindulged: The Case Against Helping Guys Like Me*, WASH. POST, Feb. 14, 1993, at C1. Political speeches are littered with examples of the well behaved and successful poor. President Clinton's speech announcing the introduction of his welfare reform attempt, the Work and Responsibility Act of 1994, H.R. 4605, 103d Cong., 2d Sess. (1994) ("WARA"), was peppered with references to other welfare success stories who had evidenced similar outlooks. William Clinton, Remarks at the White House by the President to Officials of Missouri and Participants of the Future Now Program (June 14, 1994) available in 1994 WL 258369.

44. This is not the place to argue the merits (or demerits) of income inequality. The debate is long standing. On one side are those who champion the notion that at least some form of income inequality is a societal good as it provides incentive to achieve, survive, and increase the net benefit of individuals and society. On the other side are those who view anything but the most limited income inequality as a societal wrong which creates exploitation, unfavorable advantage, waste of human resources and potential, and aggregate societal unhappiness. Compare HAVEMAN, *supra* note 26, at 156-71 (proposing the creation of a guaranteed minimum income program, a national child support program, employment subsidies, and capital accounts for youth to be used for education or training); LAMPMAN, *supra* note 37, at 33-42 (describing the causes of inequality, and the arguments in favor of reducing it) with ADOLF A. BERLE, *THE AMERICAN ECONOMIC REPUBLIC* 51 (1963) (suggesting that income and wealth inequality are a fundamental underpinning of American economic success); JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* 29-40 (3d ed. 1976) (arguing that Western competitive economies are based on inequality and poverty); cf. GILDER, *supra* note 26, at 64-74 (arguing that the number of poor can be reduced by creating incentive for the wealthy to invest).

45. GALBRAITH, *supra* note 44, at 68. The benefits of income or wealth inequality (at least based on productivity) are deeply embedded in certain segments of the American psyche, and are part of American mythology.

Neither the Founding Fathers nor the American economic system was so stupid as to assume that men should remain equal through life. The industrious should go farther than the idlers; men of integrity should outpace rascals. All, through their own efforts and in accordance with their own moral and intellectual capacity, should settle their inequality by achievement and result.

BERLE, *supra* note 44, at 51. This notion is more bluntly put by Charles Murray:

Some people are better than others. They deserve more of society's rewards, of which money is only one small part. A principal function of social policy is to make sure that they have the opportunity to reap those rewards. Government cannot identify the worthy, but it can protect a society in which the worthy can identify themselves.

ceptable methods for determining what bundle of necessities are important and ought to be possessed by all, and what is enough of each element of the bundle. This we call "poor relief."⁴⁶ As a corollary, we believe we can also objectively identify people who do not possess sufficient quantities, in the aggregate, of the elements of this bundle. These we style the "poor."⁴⁷

MURRAY, *supra* note 3, at 234. See also HAROLD L. WILENSKY & CHARLES N. LEBEAUX, *INDUSTRIAL SOCIETY AND SOCIAL WELFARE: THE IMPACT OF INDUSTRIALIZATION ON THE SUPPLY AND ORGANIZATION OF SOCIAL WELFARE SERVICES IN THE UNITED STATES* 33-48 (1958) (arguing that the basic notion of the American social and economic order is embodied in the concept of the rational, acquisitive, self-interested individual who is rewarded for his or her hard work with wealth and private ownership of the means of production and minimal interference by the government in its use); Ellickson, *supra* note 9, at 17-22 (arguing that people are entitled to what they earn through their efforts and that establishing such constitutional rights as the right to housing provides a disincentive to work); tenBroek, *supra* note 9, at 286-87 (arguing that poor law developed from a notion that the poor as a class will always exist, so when society decided to shoulder the burden of this class, it did not seek to eliminate poverty, but merely minimize the cost associated with helping the poor).

46. Thus, in the fourth century Ambrose, Bishop of Milan, devised an elaborate system of categorization of the poor for determining eligibility for aid. To decide whether aid was appropriate, Ambrose determined the social position of the recipient. For example, people of high station were worthy of aid to the extent that their standard of living fell to the point where they were unable to maintain their position in the community. This relational conception of need and poverty was carried over into the Canon Law system of poor relief, and then inherited by the colonies. TIERNEY, *supra* note 36, at 56-57.

This view finds modern expression in the writings of commentators such as Michael Harrington, who have argued that the key to eradicating poverty lies not in attacking absolute poverty, but in reducing relative poverty. Poverty, thus, is defined as an inevitable product of income inequality, and measured as a function of the income of society's most well off. See HARRINGTON, *supra* note 26, at 158-59 (arguing that although the poor in the United States "do not suffer the extreme privation of the peasants of Asia or the tribesmen of Africa, . . . the mechanism of the misery is similar"). Poverty viewed in this light is characterized as a deviation from social and economic norms in need of correction. Mencher quotes the pithy comments of I.M. Rubinow in that regard:

Luxuries become comforts, comforts become necessities; and repeated emphasis of the fact that in comparison with civilizations of the past or more backward contemporary cultures the poor in the United States now enjoy what would have constituted unusual luxuries a thousand or even a hundred years ago may lead to an entirely barren conception of the problem of poverty as an aspect of distribution of wealth. Thus an increase in perceived poverty is a phenomenon particularly characteristic of American life during periods of so-called prosperity.

I.M. Rubinow, *Poverty*, 12 *ENCYCLOPEDIA OF SOC. SCI.* 285 (1934), *quoted in* MENCHER, *supra* note 14, at 367.

This view is shared by some current scholars who argue for the eradication of poverty through some form of wealth redistribution. See, e.g., HAVEMAN, *supra* note 26 (arguing that government still bears the responsibility for economic inequality and proposing more efficient methods to handle the problem); LAMPMAN, *supra* note 37, at 33-42 (arguing that wealth redistribution is necessary to minimize income inequality).

47. But note the tenuousness of even this seemingly straightforward definition and the

Third, since wealth is necessarily a function of the ability of people, by their own efforts, to accumulate it, those who cannot or do not accumulate it in quantity sufficient to meet their needs are labelled (branded?) life's losers, social and economic deviants who cannot or will not conform their behavior to that generally prescribed. And what is generally prescribed is that people are personally expected to provide for their necessities from their efforts or wealth. *Genesis* 3:17-19 sets forth the basic American commandment to work and "earn their keep."⁴⁸ They are those who found it unnecessary to hold a job or to properly arrange their personal affairs to avoid unwanted pregnancy, drug addiction, and the like. The badge of their deviance is their poverty, to be worn (much like Hester Prynne's scarlet letter was to be worn as a badge of her sexual deviance),⁴⁹ until they "reform" themselves.⁵⁰

Thus, the desperately poor are not like the rest of the laboring population; they are akin to a different subspecies of humanity. The very labels society uses to "describe" the poor separate them from the rest of society and make it easier to decree the necessity of changing them (for their own good), to hold them responsible for the ills with which they are plagued, as well as those (societal or economic) ills which gave rise to their poverty in the first place; poverty is a matter of choice.⁵¹ They are the "lower classes," the

fundamental mutability of the concept. Having defined poverty in terms of income, the government continues to wrestle with the question of what ought to be included in the calculation.

The answer to that question is shaped by cultural assumptions so embedded that they are not even recognized. We do not, for example, consider the possibility of combining the income of parents and their adult children in reaching a judgment about whether either . . . should be considered impoverished. Other cultures would do so as a matter of course.

MURRAY, *supra* note 3, at 57 n.2. See also Backer, *supra* note 20, at nn.74-77; Fuchs, *supra* note 3, at 89-94 (suggesting a new definition of poverty due to the limitation of the present one); Note, *supra* note 17 (arguing for the expansion of the dependent care tax credit beyond child care).

48. See also Backer, *supra* note 20, at nn.96-102.

49. See NATHANIAL HAWTHORNE, *THE SCARLET LETTER* (Fredson Bowers ed., 1962).

50. For an interesting analysis of the direct effect of labelling the poor on the nature of relief crafted, see Ross, *supra* note 35, at 1499-1510 (exploring a number of ways in which the poor are isolated from the rest of society and recharacterized as a sort of pariah class); cf. David P. Farrington, *The Effects of Public Labelling*, 17 *BRIT. J. CRIMINOLOGY* 112, 117-20 (1977) (testing the hypothesis that increased deviant behavior occurs when one is labelled a criminal); David P. Farrington et al., *The Persistence of Labelling Effects*, 18 *BRIT. J. CRIMINOLOGY* 277, 277-80 (1978) (examining the persistence of delinquent behavior in those who have been adjudicated to be delinquent).

51. Ross, *supra* note 35, at 1509-10 (arguing that such notions make it easy to con-

"underclass," the "dangerous [classes], discontented and potentially revolutionary."⁵² The poor, especially those perceived to be able-bodied, have assumed an almost mythic quality. "While the traditional American folk-hero has been the self-made, rags to riches man, as deeply ingrained into the American system is the belief in a folk-villain, the self-made poor man, lazy, immoral and irresponsible."⁵³

And society has not failed to use the sciences to convince people of the inevitability of this inferiority. As Herbert Gans has noted, "Underclass is a particularly nasty label, however. Earlier terms such as pauper, vagrant, and tramp were openly pejorative, but underclass is a technical-sounding word that hides its pejorative

clude that poverty is irremediable). Consider in this light Charles Murray's story of Harold and Phyllis. MURRAY, *supra* note 3, at 156-66.

52. GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE* 381 (1984); *see also* AULETTA, *supra* note 27, at 272 (discussing the disassociation of the underclass from society); JENCKS, *supra* note 27, at 143-203 (examining whether the American underclass is growing); Peterson, *supra* note 17, at 10 (providing an overview of the urban underclass); Ross, *supra* note 35, at 1517-39 (analyzing the marginalizing rhetoric in judicial decision making which treats the poor as a class apart). As Gertrude Himmelfarb clearly demonstrated, this notion of separateness, of the barbarity of the poor, and their difference from the rest of society, has been well-developed in Europe for almost 200 years. Indeed, by the early 19th century, the isolation of the poor was substantially completed. HIMMELFARB, *supra*, at 390-93.

The lower classes are gradually expelled from the usage and laws of civilized life and are reduced to the state of barbarism through the sufferings and privations of destitution. Pauperism is tantamount to exclusion from society. The destitute resemble the bands of Anglo-Saxons who took to a nomadic life in the forests to escape the Norman yoke. They are outside society, outside law, outlaws, and almost all criminals come from their ranks. Once distress has brought its weight to bear on a man, it gradually presses him down, degrades his character, strips him of all benefits of civilized life one after another and imposes upon him the vices of the slave and the barbarian.

EUGENE BURET, *DE LA MISERE DES CLASSES LABORIEUSES EN ANGLETERRE ET EN FRANCE* (1840), *quoted in* HIMMELFARB, *supra*, at 393. Similar expressions are common in the late 20th century. *See* AULETTA, *supra* note 27, at 275 (citing a study that concluded that even guaranteeing a job would not lure all poor people out of the "culture of crime and hustling" to which they had grown accustomed); GILDER, *supra* note 26, at 64-74 (arguing that in response to being excluded from mainstream society, the poor develop their own culture); *see also infra* notes 90-92.

53. SHEAHEN, *supra* note 22, at 122-23. The reactive approach of stasis is, then, in a large sense, a means of reinforcing the perception that the aid-eligible poor are inferior, defective, or otherwise not like the standard American. Of course, to the extent that the plight of the able-bodied is caused by a temporary loss of work, such person might be considered the "helpless" or "deserving." Both state and federal governments have explicitly recognized this exception by creating and fairly generously funding programs of unemployment insurance. For a general treatment of unemployment insurance, and the work requirements of these programs, *see* MEAD, *supra* note 26, at 128-32.

meaning."⁵⁴ They are the type of people who worry us because they do not feel stigma, and because they cannot be prodded to productivity. "They seem to be passive, accepting, satisfied, and unable to take advantage of the few things that the AFDC program has to offer."⁵⁵ We despise them because they seem incapable of feeling the stigma of public assistance. We provide relief for them yet despise them for actually taking it.⁵⁶ "Every time I see a bag lady on the street, I wonder, 'was that an A.F.D.C. mother who hit the menopause wall—who can no longer reproduce and get money to support herself.'"⁵⁷ They are the poor, needy by their own hand; they have gotten what they deserve.

Fourth, it follows that poverty is a pathological condition of each individual pauper rather than a symptom of a malfunctioning society or economic system. Poverty is presumed to be as substantially ineradicable as individual free will. The poor, therefore, make up an inevitable element of the stable social and economic order.⁵⁸ Note that this view of the permanent state of poverty is different from the Marxist notion of the *lumpenproletariat*, the reserve army of the unemployed.⁵⁹ From the perspective of Marx-

54. Herbert J. Gans, *Fighting the Biases Embedded in Social Concepts of the Poor*, *CHRON. HIGHER EDUC.*, Jan. 8, 1992, at A56.

55. JOEL HANDLER & ELLEN J. HOLLINGSWORTH, *THE DESERVING POOR: A STUDY OF WELFARE ADMINISTRATION 177* (1971) (analyzing the characteristics of those welfare recipients in Wisconsin who seem to have significantly greater difficulty in escaping the need for state aid); see, e.g., AULETTA, *supra* note 27, at 225 (quoting the findings on a segment of women in a welfare study, "they are deeply passive and accept welfare as a stable feature in their lives").

56. Even administrators of the poor relief system in America are said to have "the same revulsion for the welfare wise as the ordinary citizen." Ken Neal, *The Welfare Prison: Society Punishes Rather than Rewards Those Who Find Jobs*, *TULSA WORLD*, June 13, 1993, at D1 (describing the sentiments of Jack Quinn, a housing administrator in Pueblo, Colo., and the President of the National Association of Housing and Redevelopment Officials).

57. Jason de Parle, *Counter to Trend, A Welfare Program in California Has One Idea: Get a Job!*, *N.Y. TIMES*, May 16, 1993, § 1, at 14 (describing a jobs program in Riverside County, Cal., and quoting Lawrence Townsend, Riverside County Welfare Director).

58. Herbert Gans recites the 13 purposes of poverty and the poor. These include a number which reinforce the status of the better of classes and which result in the ability of society to discard its cast-offs efficiently. For example, poverty makes possible the abundance of cheap labor for dirty, demeaning work, and in this manner permits the wealthier classes to keep a greater part of their wealth. HERBERT J. GANS, *PEOPLE, PLANS, AND POLICIES: ESSAYS ON POVERTY, RACISM, AND OTHER NATIONAL URBAN PROBLEMS 264-68* (1991). See also Ross, *supra* note 35, at 1510 (commenting on the poverty literature and the recurrence therein of the theme of the permanence of poverty).

59. The *lumpenproletariat* are the lowest section of the proletariat. They are dispossessed, displaced individuals who have been cut off from the socioeconomic class with

ists and macro-economists, the poor exist because the cycles of the market system produce periodic labor instability—sometimes more workers are needed, sometimes less. Since workers are not as easy to create as, say, sofas,⁶⁰ the economic system requires the presence of enough workers to meet the labor requirements of peak periods of demand, even during non-peak periods. During periods of inactivity, these excess workers are likely to constitute the destitute classes. Stasis rejects the notion of either the existence of or need for an excess of workers to jobs.⁶¹ The static paradigm is suffused with the notion that the immutable and unchangeable economic and social system has and will continue to provide sufficient occupations to employ all able-bodied people who actively seek employment.⁶²

which they would ordinarily be identified. For a discussion of the impact of the concept of the proletarianized poor in the English-speaking world in the 19th century, see HIMMELFARB, *supra* note 52, at 270-87 (discussing especially the impact of Friedrich Engels' work).

60. Assuming easy procreation, most people require a nine month gestation period and a number of years to mature sufficiently to be ready to enter the labor market. Note that with less regulation, the numbers of years between birth and suitability for the labor market might be far less. See, e.g., WAYNE FLYNT, POOR BUT PROUD: ALABAMA'S POOR WHITES 108-11, 126 (1989) (reporting that in the period before World War I, work in the coal mines began at about age 12, and work in the textile mills could begin as early as age seven). Such practices continue in many parts of the world.

61. Again, personal choice or choice within the context of a culture of poverty provides the more satisfactory explanation. See AULETTA, *supra* note 27, at 226 (citing a study which found that some able-bodied welfare recipients became extremely passive and remained on welfare even when work became available); MEAD, *supra* note 26, at 73 (arguing that excess labor is a function of people's refusal to work in low-wage jobs rather than a function of the market); *infra* text accompanying notes 96-112, 544-47.

62. This is an old notion with roots, at least in modern times, back to the labor policies of the Ordinance and Statute of Labourers of 1349-1351, which was designed to provide adequate cheap labor to employers at the time of the labor shortages caused by the Black Death. Society has tended to view the problem of the able-bodied idle not as a problem of want or poverty, but as a problem of "seepage from the supply of labor." KARL DE SCHWEINTZ, ENGLAND'S ROAD TO SOCIAL SECURITY 6 (1943); see also E. Merrick Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643 (1943) (discussing the ancient origins of labor regulation and its effects on labor supply and freedom of contract in labor situations); tenBroek, *supra* note 9, at 276 (pointing out that even in times of labor surplus, the jobs available might well have to be provided by the state). Correctly, Robert Burns explains this view as reflecting the notion that American labor market outcomes produce a just distribution for a substantial number of labor market participants. It would follow that no adjustments to a just system are necessary; providing relief for labor market participants would run counter to the belief in the justness of the current labor market system. Such a result is an unacceptable tampering with the low-wage portion of the labor market. Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 NW. U. L. REV. 184, 229 (1989). But see PIVEN & CLOWARD, *supra* note 20, at 123-80 (discussing the way in

As such, our paradigm provides a key assumption: income inequality is a function of productivity or wealth accumulation, and even a minimum of productive conduct would be sufficient to provide an adequate amount of wealth or income to meet one's needs.⁶³ Poverty and destitution follow only those who refuse or who are unable to be productive. Since no one is prevented from being productive or from accumulating wealth, destitution is the product of individual choice (refusal to work or the squandering of personal wealth), or bad luck (physical injury or disabling condition, or loss of wealth by reason of forces beyond one's immediate control)—not a systemic flaw of the American economy.⁶⁴ In a large sense, then, poverty is a problem caused by the poor,⁶⁵ not a deficiency of society in general.⁶⁶

which poor relief can be used to reinforce the mechanics of the labor market).

63. Of course, such jobs might have to be sought out with some effort, and might not be to the person's liking. However, the social and economic system is indifferent, in this regard, to the preferences of the able-bodied unemployed. The problem isn't the lack of work, but the attitude of those able-bodied who have not sought work out. "If you want to work, the program is there for you. But you've got to want to do it for yourself." AULETTA, *supra* note 27, at 226 (quoting Eric Lax, an interviewer for the Manhattan MDR program, the subject of the author's study); *see also id.* at 210-19 (discussing the case histories of the participants and noting that several participants dropped out of the program because they were bored or thought the work was dumb); MEAD, *supra* note 26, at 73 ("Turnover rather than lack of jobs largely explains why [the poor] are so often unemployed. Of course, as in musical chairs, if the turnover stopped there might not be enough jobs for everyone. Then government job-creation efforts would be more necessary than they seem now.").

64. This notion has been disputed from a variety of perspectives even within the static vision. Some argue that the right to be productive and accumulate wealth is a function of conditions other than the will to produce. Examples of other factors include: gender, LAW, *supra* note 17, at 1282-1317 (discussing some of the ways in which federal welfare and labor policy impede women's access to the wage labor market); race, NEWMAN ET AL., *supra* note 17, at 262-64 (describing the birth of the welfare rights reform movement and the discriminatory practices in the delivery of welfare to minorities; and ethnicity, THE MOUNT PLEASANT REPORT, *supra* note 17, at 80-90, 141-43 (discussing the effect of hiring discrimination against Hispanics in government and the private sector in Washington, D.C.). More fundamentally, these studies form part of the general argument that the social and economic order is set up so that only the dominant group, Caucasian males, are freely able to use the system to accumulate wealth.

65. *See, e.g.,* Asa Briggs, *The Welfare State in Historical Perspective*, 2 EUR. J. SOC. 221 (1961); Ross, *supra* note 35, at 1502-08 (describing the "societal feeling" that poverty is an avoidable social condition). Contrast this view to the universalist notion of certain modern scholars who take the position that poverty cannot be understood as an isolated problem, but that it is merely part of an overall correctable problem of a kind of societal disfunction or inefficiency. DAVID R. RIEMER, *THE PRISONERS OF WELFARE: LIBERATING AMERICA'S POOR FROM UNEMPLOYMENT AND LOW WAGES* (1988); *see* Skocpol, *supra* note 28, at 411.

66. Society's only deficiency, perhaps, is not its overgenerosity, but its tolerance and

In the face of an immutable status quo of income and wealth inequality founded on productivity, there arises a certain resistance to the redistribution of wealth as a negation of the "reward" principle of income or wealth inequality. Static society might well allow its indigents to fend entirely for themselves. And indeed, the thrust of the static notion of individual productivity creates incentives for all people to prepare for the worst by providing for a financial or physical disaster.⁶⁷ Society, after all, is no more than the sum of the production of the industrious, each of whom must plan for the occurrence of a "rainy day." However, even static society does not absolutely require all people to fend for themselves. Accidents or other unforeseeable events occur which can exceed the ability of even the best planners to cope financially. And, like the ants in the Disney version of the *Grasshopper and the Ants*, society will not permit even the most unproductive of its members to die from want. Static systems, therefore, tend to recognize that there exists a point of deprivation beyond which a person will not be permitted to exist (at least in theory).⁶⁸ Alleviation of

financial support of the deviance of economic and social non-conformists. See GILDER, *supra* note 37, at 97-98 (arguing that poverty, especially the poverty of the racial and ethnic ghettos, are a direct result of a "crippling plague of broken families" which followed naturally from the abandonment of traditional gender roles and the primacy of the traditional family). In a sense, Gilder argues that changing social norms have permitted the emergence of a deviance with significant economic effect. Note, however, that even if society has created the framework in which this problem can arise, the poor are left holding the proverbial bag—it is up to the victims to correct the problem that society created.

67. Popular fairy tales provide many clues about the nature of this incentive. Most telling, perhaps, is the apocryphal story of "The Grasshopper and the Ant," Aesop, *The Ants and the Grasshopper*, in *THE FABLES OF AESOP* 26 (Willis L. Parker ed., 1931), which was made into a very popular cartoon during the American Depression by the Walt Disney Studios. *THE GRASSHOPPER AND THE ANTS* (A Walt Disney Production 1935) (cartoon short film distributed by RKO Radio Pictures). In the film version of this fable, the grasshopper spends the summer in song and play (as reflected by the film's popular song, *The World Owes Me a Living*) while the industrious ants spend the summer toiling, gathering food and other materials for the winter. When winter comes, the grasshopper starves and freezes while the ants enjoy a long comfortable winter respite from work. The grasshopper is saved when he agrees to work for the ants by serving as their musician. Scholarly theorists have recast the tale of the grasshopper and the ant into more nuanced theories of roughly the same content. See, e.g., NATHAN GLAZER, *THE LIMITS OF SOCIAL POLICY* 128-39 (1988) (arguing that traditional community and family sources of relief should be the backbone of welfare efforts); MEAD, *supra* note 26 (discussing particular social and political obligations of adults, that, if fulfilled, would encourage the desirable goal of self-sufficiency).

68. Thus, in its purest form, it follows the exhortation of Gratian, "In hospitality there is to be no regard for persons, but we ought to welcome indifferently all for whom our resources suffice." GRATIAN, *DECRETUM*, Dist. 42 post c1, *quoted in* TIERNEY, *supra* note

deprivation, therefore, becomes the touchstone of the static response to the absolute (or relative) need of its members. Alleviation of this type requires a system of poor relief to do little more than to provide such material things as will increase the standard of living of the recipients to a level deemed acceptable by the donor, be it an individual, an entity, or the state. It requires nothing of the recipient other than that the person be in "need"—that he evidence an economic condition giving rise to some kind of societal obligation to correct or ameliorate. The trick, of course, is to give meaningful content to the term "need."

Stasis gives exceedingly precise content to this term based on its core assumptions. The static concept of need is founded on accepting the notion that one can provide relief for the need of another only by taking from other resources which were meant to provide the former with an economic cushion against his own potential need. As a result, the concept of need, at least in the static sense, becomes highly malleable, a function not of the lack of resources of the recipient, but of the resources which society is willing to devote to the relief of the poor.⁶⁹ Since the aggregate amount of resources available varies, to be acceptable the conditions constituting need will tend to be defined and redefined in a manner ensuring that only as many needy individuals as can be supported by available resources fall within the definition.⁷⁰ We feel badly for everyone else. They are truly society's unfortunates, but we will help them with material things. The manipulation of this concept of "need" and its restriction based on the paradigmatic assumptions implicit in stasis, therefore, lie at the heart of notions of approaches to American poor relief. Control of the definition of

36, at 55. However, blind open-handedness is not the end of the analysis, even in a system in stasis. The underlying theoretical imperative of universal aid on the basis of need, irrespective of the cause, is refined by imposing on it the possibility of discrimination, both in the hierarchy of needs, and the ordering of the satisfaction thereof. And on this basis arises the utility of classification. These notions were worked out to a considerable degree in the Canon Law. See TIERNEY, *supra* note 36, at 55-60.

69. This limitation of resources is both an absolute and a relative concept. In a world of finite resources, all resources are, by definition, limited. More importantly, for the static view, resources are limited in a cultural sense, based on the acknowledgement of a generally accepted resistance to income and wealth transfers.

70. Kerry Bensinger describes how the California courts struggled to limit the ability of California counties to set benefit levels almost exclusively by reference to the aggregate amount of the county budget allocated to that purpose. See Bensinger, *supra* note 9, at 521-40. Cases such as *Gardner v. County of Los Angeles*, 40 Cal. Rptr. 2d 271 (Ct. App. 1995), illustrate how such courts struggle to deal with the legislature's attempts to curb judicial interference with county relief obligations.

"need" in this sense becomes a primary weapon of those who seek welfare "reform." Consider the roughly thirty year debate over the federal poverty standard.⁷¹

Poor relief manipulates need by imposing queuing requirements on the destitute.⁷² Queuing, serving as the means of distributing limited resources, takes two primary forms: discrimination based on impermanent eligibility criteria, and shifting definitions of hierarchies of need.⁷³ By fine-tuning these forms of queuing, stasis reinforces the societal belief that not everyone in need is needy enough to be supported by other than his or her own efforts. Further, manipulation serves to enforce the cultural norm (obligation) to fend for oneself. Adjusting the definition of eligibility and need can also effectively "punish" deviance from accepted cultural mores and reinforce the established social order. Because the definition of need is a moving target, qualifying at one time does not guarantee continuing qualification.⁷⁴ As malleable concepts, stasis does not imbue need, eligibility, discrimination, or need hierarchies with

71. See, e.g., FURNISS & TILTON, *supra* note 23 (advocating reform proposals that center on the definition of need); MURRAY, *supra* note 3, at 270 n.2 (describing the debate about the standard for determining need and arguing that the definition of need warranting societal aid approaches a standard of absolute, extreme need); Bensinger, *supra* note 9 (chronicling efforts to use the courts to establish minimum criteria for determining need in California); Fuchs, *supra* note 3, at 89-94 (arguing that the definition of poverty should be replaced by one that changes with the growth of the American economy, and that income transfers to the poor be based on this more generous notion of need); Reich, *supra* note 37 (arguing that welfare entitlements ought to be treated as forms of property rights).

72. Queuing, of course, is not unique to stasis. Queuing is a concomitant of limited resources and high demand. The development of queuing as a component of relief systems underlying a static vision are unique. For elementary queuing theory and its application to the social sciences and economics, see, e.g., DONALD GROSS & CARL M. HARRIS, *FUNDAMENTALS OF QUEUING THEORY* (1974); LAJOS TAKACS, *INTRODUCTION TO THE THEORY OF QUEUES* (1962); HARVEY M. WAGNER, *PRINCIPLES OF OPERATIONS RESEARCH: WITH APPLICATIONS TO MANAGERIAL DECISIONS* 851-902 (2d ed. 1975).

73. For a discussion of the nature of eligibility discrimination and need hierarchies, see Backer, *supra* note 20, at 1017-20. For a discussion of the manner in which eligibility discrimination and need hierarchies shape American systems of poor relief, see discussion *infra* part III.

74. The shifting criteria of eligibility under AFDC provides a fascinating example of this type of manipulation by the state, supported always in the name of some higher goal. See Fineman, *supra* note 17 (describing how society has responded to perceived changes in the manifestation of motherhood in an effort to preserve traditional patriarchal values). The classic current examples are President Clinton's Work and Responsibility Act of 1994, H.R. 4605, 103d Cong., 2d Sess. (1984) [hereinafter WARA] and the Personal Responsibility Act, H.R. 4, 104th Cong., 1st Sess. (1995) [hereinafter PRA]. For a discussion of WARA and PRA in the context of the static paradigm, see Backer, *supra* note 42.

magical qualities; these concepts are not burdened with notions of absolute rights.⁷⁵ Both eligibility discrimination principles and need hierarchies are, in this sense, political concepts,⁷⁶ each infinitely manipulable to suit the needs of the providers and recipients.⁷⁷

Stasis, when applied to the problem of the amelioration of "need" as a special, political category or condition, has significant implications for the approach taken with respect to the manner and extent to which societal resources are diverted to contain (certainly not solve) the problem. The fundamental and critical assumptions of the static paradigm provide the basis on which a general theory of poor relief in the United States can be developed, which explains the limited palette from which society paints its picture of poor relief. These specific characteristics and motivational imperatives of the system in "ideal" form are easily derived from the fundamental acceptance of the notion of the permanent existence in society of a group of people (the composition of which may change) in constant need of aid, many of whom, but not all of whom, could or ought to fend for themselves. It is to an understanding of these specific characteristics with which American

75. The term "rights" is used here in both its legal and moral senses. See discussion *infra* part III. The only qualification, of course, is that those in imminent danger of physical harm (starvation) will always be eligible for whatever assistance is available and, in that way, will find their way to the top of the need hierarchy.

76. See discussion *infra* part III; cf. MENCHER, *supra* note 14, at 364-71 (arguing that need and eligibility are defined by economic theories). Let's look at need first. How are distribution determinations made? The easiest way is to create a hierarchy of the needy. To some greater or lesser extent, this hierarchy is the product of political choices. While the political choices may be based on basic political, moral, religious, or other assumptions about the ordering of society or the relative utility of its members or their conduct, they remain political choices at base. What about eligibility discrimination? Again, the easiest way to discriminate is to create a system based on the relative worthiness of potential recipients. Notions of worthiness are pregnant with political implications, which are influenced by the underlying ordering of society. In the West, worthiness is based on the inability to work. See discussion *infra* part III.

77. Need hierarchies are a political concept at least to the extent that they have power to influence the process of need determination. See, e.g., PIVEN & CLOWARD, *supra* note 20, at 177 (arguing that the "structure of American public welfare system meshes with and enforces the work system, not the least by excluding potential workers from aid"); STEINER, *supra* note 10, at 148 (noting that each of the groups with a stake in the welfare system—administrators, politicians, program advisors, and recipients—"has been less of an instrument of change than one of retaining the particulars of a program with which they all acknowledge dissatisfaction"); cf. Bruce Bolnick, *Toward a Behavioral Theory of Philanthropic Activity*, in ALTRUISM, MORALITY AND ECONOMIC THEORY 197 (Edmund S. Phelps ed., 1975) (arguing that an understanding of philanthropic activity requires broadening economic behavioral models to include social and psychological models).

systems of poor relief are necessarily imbued, that this Article will now turn.

III. A GENERAL THEORY OF AMERICAN POOR RELIEF

The static paradigm is a powerful tool for understanding contemporary American systems of poor relief. Fundamental to the construction of any program of poor relief is the underlying acceptance of the static notion of the permanence of the fundamentals of the current social and economic order and of income and social inequality (and the basis thereof). It is to be expected, in the first instance, that no matter what its form, no system of poor relief would either directly or indirectly effect significant changes in the social order.⁷⁸ Accepting this overarching postulate has significant

78. For instance, even so-called "liberal" visions of poor relief, such as the programs of the 1960s Great Society, have been described as attempting to provide the eligible poor with the tools to function within the economic system, and not to change the system itself. See MEAD, *supra* note 26, at 33. The notion that the poor will have to make their own way in the economy as presently constituted continues to be unquestioningly accepted by a number of commentators and those who seek to shape the course of government policy. See, e.g., LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 26-37 (arguing that dependency is a term used to imply a reluctance to participate in the national economy); NEW YORK TASK FORCE, *supra* note 23, at 63 ("The Task Force believes that work should be the cornerstone of the reform of welfare. The effectiveness of work-based reforms will depend not only on the economic and educational policies described in the previous chapter, but also on policies concerning the working poor."); Ellickson, *supra* note 9; Winter, *supra* note 21, at 85 (arguing that substantial redistribution of income to effect greater income equality "can be undertaken only after equality has been chosen as a transcendent purpose overriding the material well-being of the society").

Of course, this notion has been challenged. So-called universalists and economic libertarians, for instance, continue to argue that the whole basis on which relief is accorded must be changed. See discussion *infra* part VI. Significant voices in academia have argued for years that a national guaranteed income program would eliminate the need both to maintain the poor and to continue to employ a large bureaucracy of almsgivers. See, e.g., FRIEDMAN, *supra* note 22, at 192 (arguing for a negative income tax which would result in payment of a subsidy to those who fall below a certain income level); David Allen Larson, *Long Overdue: The Single Guaranteed Minimum Income Program*, 69 U. DET. MERCY L. REV. 353, 354 (1992) (advocating a negative income tax). Others have argued that there ought to exist a constitutionally mandated right to a certain minimum standard of living, or to housing. See, e.g., Berger, *supra* note 9; Dworkin, *supra* note 23, at 185; Michelman, *supra* note 37, at 660.

Academic scholars have also begun again exploring the utility of a universalist approach to poor relief, either as a means of fulfilling the potential of the current economic and social system, or as a means of overturning it. See PIVEN & CLOWARD, *supra* note 20 (discussing the universalist approach as a means of overturning it); RIEMER, *supra* note 65, at 135 (discussing the universalist approach as a means of fulfilling the potential). See generally Dodd, *supra* note 62 (tracing the development of the Anglo-American law of employment contracts from the 14th century to the present and the increasing trend to-

repercussions for defining the limiting characteristics of viable poor relief programs.

First, one should expect stasis to repeat the hierarchy of the established social and economic order in constructing systems of relief of the needy poor. The social and economic order produce a hierarchy based on wealth, productivity, and social position—social and economic inequality is accepted, and wealth redistribution is resisted. The social and economic ordering of people potentially eligible for maintenance produces hierarchy and status within the ranks of the poor which imitate this hierarchy.⁷⁹ This ordering is accomplished by identifying the economic level below which limited distribution is tolerated and identifying the individuals living below that level which society is willing to aid, then manipulating the order through queuing.⁸⁰ It is upon this ordering that the form and manner of relief is determined. Central, then, to the notion of need and its manipulation is the concept that poor relief systems mimic the immutable and accepted social and economic systems.

Among the poor, such ordering takes the form of eligibility discrimination and need hierarchies. Eligibility discrimination is simply prioritizing need. Thus, eligibility discrimination serves a gatekeeper function by determining who may line up for aid. Need is another way of referring to the means used to determine how much aid someone ought to receive, and the order in which that

wards regulation of the employment relationship). Most have derided the notion of social inequality, the fact of which continues to be confirmed in recent empirical works. *See, e.g., KAUS, supra note 26, at 16-24.* The argument over the basis of societal approaches to its political economy sometimes has had significant political repercussions in recent years, particularly with respect to the attempt by the Nixon Administration to pass a minimal form of negative income tax. This approach represented an attempt to fundamentally change the way society treated the problem of poverty. However, the Family Assistance Plan, even in the watered-down version considered by Congress, was defeated. For a history of the Family Assistance Plan, see DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN* (1973).

79. Note that to the extent that social ordering is a function of other things—race, ethnicity, language proficiency, religion, morals—the ordering of aid will reflect this as well. This, perhaps, is implicit in the arguments of commentators like Derrick Bell. *See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992). Thus, AFDC was acceptable when the archetypal AFDC recipient was a white widow with small children. It became far less acceptable when the perception (whether or not accurate) of the AFDC archetypal recipient became a young African-American woman with an “excess” of children born out of wedlock and to an “excess” of men. *See, e.g., JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY: 1900-85, at 101-03, 173-74* (1986).

80. *See supra text accompanying note 72.*

aid will be distributed. Thus, need determines quantity, and to some extent, order based on the immediacy of the need.

Static system builders employ eligibility discrimination and craft need hierarchies to create categories of aid-worthiness. Because society values productivity so highly, discrimination becomes a function of a perceived potential to produce. Those who could or ought to should; those who cannot need not. Not surprising, then, near the top rung are the disabled—those who are incapable of satisfying their needs through their own labor. Theirs is not so much the poverty of deviance as it is the poverty of chance or ill-luck. Traditionally, these have included the old, the blind, widows with young children, and the developmentally and physically handicapped.⁸¹ But even among those traditionally considered to be incapacitated, the societal imperative to work is strong. Thus, for instance, advocates of the rights of the disabled have recently urged the disabled to take advantage of federal programs providing monetary incentives to seek and obtain employment.⁸²

At the bottom rung are the able-bodied poor. Theirs is a poverty born of deviance from the accepted social and economic mores.

81. These categories form the bulk of the federally favored categories, the members of which traditionally formed the bulk of welfare recipients under federal welfare programs. See, e.g., Briggs, *supra* note 65, at 229 (tracing the development of the concept of a "welfare state" in Britain); Joel F. Handler, *The Transformation of Aid to Families With Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 470-83, 487-88 (1988) (describing the rise of federal categorical programs and arguing that there has always existed a disjunction between the rhetoric of federal programs in aid of poor mothers, the conception that women ought to stay home and care for their children, and the reality that poor women were expected to either work or get married). Notions about disability, or an inability to work, have undergone substantial change in recent years. There has been a shift away from the wholesale categorization of particular conditions as disabling, to a notion that conditions (for example blindness) might restrict, but not eliminate, the person's ability and therefore obligation to work. See, e.g., MEAD, *supra* note 26, at 132-35 (discussing the rise of work requirements for the disabled); James R. Sheldon, Jr., *PASS: SSI's Plan For Achieving Self-Support*, 25 CLEARINGHOUSE REV. 962, 963-72 (1991) (discussing the benefits and methods of the federal government's PASS program (Plan For Achieving Self-Support, Pub. L. No. 92-603, § 301, 86 Stat. 1329 (1972) (codified at 42 U.S.C. § 1382a(b)(4)(A)(iii), a(b)(4)(B)(iv), b(a)(4) (1988 & Supp. II 1990))) permitting the disabled to exclude certain income from eligibility determinations).

82. See Sheldon, Jr., *supra* note 81, at 972 (offering that the author "hopes that this article will stimulate many attorneys and paralegals who work in legal services to consider work related to the Plan for Achieving Self-Support (PASS) as a priority"). These programs are good, because for "individuals with disabilities, the PASS can offer a way out of the cycle of poverty, allowing them to move from dependence on social security or SSI [Supplemental Security Income] disability benefits [a bad thing] to a position of financial independence [a good thing]." *Id.* at 963.

As the most easily able to ameliorate their own economic predicament, and compelled by social and economic rules to do so, there is no reason to treat them like those with more limited options (such as the blind or the aged).⁸³ If, in fact, society provides enough employment to occupy all of the able-bodied—for that is what the static system builder believes—then the unemployed able-bodied person is a shirker, a person who seeks to satisfy his or her needs without using his or her own resources (that is, his or her labor).⁸⁴ In the stylized language of 1960s social science, this was explained as a product of the inevitable workings of the “free” market system. “In a competitive market economy, income is determined primarily by the demand and supply of different types of labor. The ethical basis for the ‘market’ solution is that a man’s income should be determined by his contribution to production.”⁸⁵ The exception to this view would include the able-bodied unemployed who are actively seeking work and find themselves temporarily unemployed.⁸⁶ One would expect all systems of poor relief to recognize these aid-worthiness categories and to structure relief

83. Irving Kristol makes this point in discussing his conservative approach to reform of the “welfare state.” The elderly (including the wealthy elderly), the children of the middle class, and the working, taxpaying poor should be more generously supported. “Welfare mothers,” defined as “[y]oung girls [who] permit themselves to get pregnant, and to bear a child, because the prospect of going on welfare does not frighten them,” should face a more unpleasant life, and able-bodied men should have no entitlement to welfare whatsoever. Irving Kristol, *A Conservative Welfare State*, WALL ST. J., June 14, 1993, at A14.

84. See *supra* text accompanying note 48. This view is expressed repeatedly in popular press opinion accounts of the “welfare problem.” One example will suffice:

When welfare came to be a substitute for a job, too many Americans adopted a lifestyle where work was irrelevant to survival and, soon thereafter, contrary to their values. So we see more welfare, not less; a permanent welfare underclass instead of families moving across FDR’s bridge to better times.

Pete Du Pont, *If Even Democrats Want Welfare Reform, Its Coming*, STAR TRIB., Sept. 29, 1992, at 15A (opinion of the chairman of the Committee for Republican Leadership writing for the Scripps Howard News Service). There is more than the whiff of status to this view of the poor and employment. This is perhaps best expressed in the notion that the function of the laboring classes is to labor, and the laboring classes include all individuals who are not members of any of the higher social and economic classes.

85. Fuchs, *supra* note 3, at 89, 93 (arguing that this ethical basis is weakened by the fact that not all people join the work force under equal conditions). On the earlier manifestations of this status view of labor and social class in the Elizabethan period, see tenBroek, *supra* note 9, at 276 n.88. The poor, themselves, have been taught to believe this as well. See Hobbes, *supra* note 43, at C1 (presenting one homeless man’s argument that the poor simply lack the will to work).

86. This exception is certainly recognized in the United States and provided for in the form of unemployment insurance, as opposed to poor relief. This category is one of the favored categories qualifying for governmental aid. See LEVITAN, *supra* note 3, at 43-46.

programs on the basis of these categories.

Now that we have created our intra-needy distinctions, what does the static paradigm suggest we do with them? We use them as principled bases for allocating resources, and perhaps more importantly, as means of justifying our core assumptions of social and economic inequality based on productivity and of the need to minimize income redistribution. On a record level, all of these notions find expression in the idea that any system of poor relief is meant to ensure that those who have less do not have so little that they are unable to live in a minimally acceptable manner. One should expect our system of poor relief to be crafted as a minimalist system, in the sense of providing minimal assistance to the smallest number of people belonging to the fewest categories of "poor." In that manner, institutional poor relief is useful only as a system of last resort and not to eradicate, or even ameliorate income inequality. The system is designed merely to sustain, to varying degrees, those without sufficient resources.

Eligibility discrimination and need hierarchies also punish those who are viewed as subversive, people who are potentially able or who disrupt the established social or economic order by their very being.⁸⁷ While static society is inclined to maintain those who try and lose, it is less inclined to support (especially with the productivity of others) those who do not try. Those who do not try are perceived as economic criminals. Their existence, in effect, is a function of their ability to effectively steal resources which could otherwise be applied to aid those with no alternative but to seek the help of the state. Indeed, since no person could truly be idle, those poor whose time was not taken up with work were suspected of doing far worse with their time—employing themselves in dishonest occupations, primarily robbery and theft.⁸⁸ In this way, the

87. For a similar conclusion from a different perspective, at least with respect to American systems of poor relief generally, see HIMMELFARB, *supra* note 52, at 381-400 (describing the development of the notion of the poor as dangerous and potentially revolutionary, and, therefore, in need of strict social control); BRUNO STEIN, *ON RELIEF: THE ECONOMICS OF POVERTY AND PUBLIC WELFARE* 5-14 (1971).

88. The notion has been popularized:

[T]hat even the promise of a guaranteed job did not guarantee that every young person would want to work. Some young people preferred to hustle. Some of those listed as unemployed were in fact earning a living in the underground economy. The notion that a job automatically equals less drug use and less crime is dismissed as naive; the MDRC found, for instance, that a guaranteed job for a year in supported work did not reduce drug use—though it did re-

poor further distance themselves from mainstream society. Idleness is the type of deviance that is thought to lead to significant anti-social behavior. Such conduct must be suppressed because it amounts to an illegitimate and arbitrary means of redistributing wealth. The link between poverty and lawlessness is routinely assumed by commentators. "While growing more numerous, the poor have also grown more divorced from middle-class culture, producing epidemics of violence, drug-abuse, idleness, illegitimacy and chronic dependency."⁸⁹

The need to control criminal activity (and the underlying assumption that the poor resort to crime to meet their needs) supplied the rationale for the criminalization of the state of idleness. Idleness was considered:

[M]other & rote of all vyces, whereby hathe insured & spronge & dayly insurgethe & spryngeth contynnall theftes murders and other haynous offences & great enormytes [I]n all places throughe out this Realme . . . Vacabundes & Beggers . . . dayly do increase in greate & excessyve nombres into great routs and companies . . . to the high displeasure of God the inquyetacon & damage of the Kyng's People & to the marvaylous disturbance of the Comon Weale of this Realme.⁹⁰

This perceived link between the poor and the "criminal class" thus

duce crime. But crime is caused by more than just unemployment. For the career criminal, crime becomes a way of life.

AULETTA, *supra* note 27, at 275. Idleness, thus, does not mean solely a lack of gainful activity; perhaps in the popular mind it means illicit and socially threatening activity as well.

89. Stephen Chapman, *Clinton, Bush and Welfare: Beyond the Promises*, CHI. TRIB., Sept. 6, 1992, at C3; see also Christopher Jencks, *Is the American Underclass Growing?*, in *THE URBAN UNDERCLASS* 28, 74-83 (Christopher Jencks & Paul E. Peterson eds., 1991) (discussing the perceived link between lawlessness, poverty, and membership in the "underclass"). This perceived connection between destitution and petty criminality is reflected in stories reported by the popular press. E.g., Robert Tier, *The Case Against Homeless Shelters: We Want Our Streets Safe and Clean*, LEGAL TIMES, Apr. 8, 1991, at 26 (arguing that adding a shelter would increase street crime, drugs, and litter, the author states that "because the police are all but powerless to do anything about it, the homeless carry out a life of solicitation, begging, verbal assaults, littering, and, all too often, public elimination").

90. 22 Hen. 8, ch. 12 (1530) (Eng.) quoted in tenBroek, *supra* note 9, at 277; see also JOHN POUND, *POVERTY AND VAGRANCY IN TUDOR ENGLAND* (Patrick Richardson ed., 1971). The link between idleness and criminal behavior was well-established during the 19th century. See HIMMELFARB, *supra* note 52, at 381-87.

has proven to be a powerful tool of policy in twentieth century America, supporting policies such as the affirmation of the traditional patriarchal family as a means of reducing poverty (and criminality).⁹¹ The perceived link between patriarchal families, crime, and social stability has been amplified in non-homogeneous societies like that of late twentieth century America, where the poor disproportionately may be members of non-majority racial and ethnic groups. "[T]he recurrent patterns of behavior among marginalized people seem predictable adaptations to the recurrent patterns of their circumstances — a "survival culture." Everyone needs respect; and if the usual middle-class avenues to respect seem closed, other avenues will be pursued."⁹²

91. "[T]he likelihood that a young Black man will engage in criminal activities doubles if he is raised without a father and triples if he lives in a neighborhood with a high concentration of single parent families." PRA, *supra* note 74, § 100(3)(0). Senator Moynihan, with some confidence, asserts that:

[T]here is one unmistakable lesson in American history: a community that allows a large number of young men to grow up in broken families, dominated by women, never acquiring any stable relationship to male authority, never acquiring any set of rational expectations about the future—that community asks for and gets chaos. Crime, violence, unrest, unrestrained lashing out at the whole social structure—that is not only to be expected; it is very near to inevitable.

Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17, 26 (1993).

92. Karst, *supra* note 17, at 18. Thus, poverty and crime are commonly thought of as a Black or Mexican-American or Puerto Rican problem, and not a problem of White America. The problem of the lawlessness of the poor who are not part of the dominant racial or ethnic group in America is characterized as one of individual irresponsibility, for which the victim is squarely to blame; or genetic deficiency, for which little can be done; or social maladjustment, for which society is to blame, but for which the poor themselves must take responsibility to alter. In this view, the blame for the poverty and criminality of the poor can be laid squarely on the deficiencies of the poor themselves. African-Americans are poor because they have not been able to reconstruct a basic nurturing family structure since slavery days, see OFFICE OF POLICY PLANNING AND RESEARCH U.S. DEPARTMENT OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965); or because they are genetically inferior to other races, see Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1, 81 (1969), discussed in Thomas Sowell, *Race and I.Q. Reconsidered*, in *ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS* 203, 205 (Thomas Sowell ed., 1977); or because they are socially maladjusted, see AULETTA, *supra* note 27, at 210-35; ELLIOTT LIEBOW, *TALLY'S CORNER* (1967).

Mexican-American families are unable to free themselves of the chains of generations of poverty because they stubbornly cling to the customs and language they brought with them from Mexico, and have deliberately failed to integrate themselves into mainstream society. See, e.g., OSCAR LEWIS, *LA VIDA: A PUERTO RICAN FAMILY IN THE CULTURE OF POVERTY-SAN JUAN AND NEW YORK* (1965); John & Homer, *supra* note 17, at 140-52; cf. RICHARD RODRIGUEZ, *HUNGER OF MEMORY* (1982) (discussing a child of Mexican and American parents who spoke no English until he went to school, yet who became a

The relief of the poor threatens society with two types of criminality, then. The receipt of aid by those who could work amounts to stealing from the productive. The idleness subsidized by poor relief creates incentives for criminal activity. Poor relief systems tend to try to control such direct and indirect criminality by punishment of certain conduct and by manipulating program "incentives." Thus, aid to the potentially employable should neither be generous nor readily available. Material aid should be limited to relieving immediate need. The bulk of aid to this category of the poor should be in the form of exhortation, positive and negative "incentives" to become productive. In this sense, perhaps, Herbert Gans is correct when he writes:

One of the ways that America and its policy makers avoid dealing with poverty is to label some of the poor as morally deficient or undeserving, and therefore not worthy of help. This line of reasoning presumes that everyone can rise out of poverty and become middle class (there being lots of well-paying jobs for them) if only they make the effort.⁹³

Indeed, during the 1992 presidential campaign, then-candidate Bill Clinton argued that welfare should be temporary; if able-bodied recipients were unable to obtain a job within two years, they would be required to take public-sector jobs.⁹⁴ "The issue being

scholar), Note, *supra* note 17, at 1320. See generally Karst, *supra* note 17, at 24-30 (arguing that the principle of equal citizenship means that America should not forbid the marginalized poor from participating in the community).

93. Herbert J. Gans, *Fighting the Biases Embedded in Social Concepts of the Poor*, CHRON. HIGHER EDUC., Jan. 8, 1992, at A56. Of course, the point of stasis is that policy makers are not avoiding dealing with the poor at all, rather they have solved the problem of the able-bodied poor by telling them to get a job. Aid, therefore, is reserved for those who, whether unable or unwilling to get a job, have moved beyond poverty or relative deprivation to extreme destitution. The tendency is to recharacterize the able-bodied pauper without children as the "homeless," that is, one who is utterly destitute. The less needy destitute, without children, are ignored. See also Chackes, *supra* note 9, at 157 (describing strategies for obtaining relief for people not eligible for categorical assistance and the progress in that respect in state court); Hopper et al., *supra* note 9 (describing the rise of public shelters as an important institutional resource for the poor who are unable to secure other forms of poor relief); Perlin, *supra* note 9 (describing the effect of deinstitutionalization on the problem of and "solution" to homelessness). Thus, shelters are provided to the homeless and food to the starving—but income maintenance runs out with the last unemployment compensation check; Fullen, *supra* note 25 (describing problems in the provisions of shelter to the homeless). See *infra* part V.A.

94. Julie Kosterlitz, *Reworking Welfare*, 24 NAT'L J. 2189 (1992). President Clinton's

discussed this year is not what we can do to help the poor, but what the poor . . . [can] do to help themselves."⁹⁵ Requiring the recipient to work or to train for work as the quid pro quo for even temporary assistance should be the norm.

Since work is "good" and unemployment is "bad," static systems will also tend to implement programs that make the provision of aid for unemployed able-bodied recipients as unpleasant as possible.⁹⁶ The very basis of the proposals of commentators like Charles Murray is that if you make the able-bodied poor person uncomfortable enough, that person will be induced to work for his or her keep.⁹⁷ Aid is always "too generous," and contributes to

proposals for "reshaping" welfare programs were presented to Congress as the Work and Responsibility Act of 1994, *see supra* note 43.

95. Stephen Chapman, *Clinton, Bush and Welfare: Beyond the Promises*, CHI. TRIB., Sept. 6, 1992, at 3 (describing the poor relief rhetoric of the presidential candidates in the 1992 presidential campaign).

96. In contemporary terms, the procedures devised for the determination of eligibility can be complex and drawn out. See the discussion of the intake procedures for general assistance in Los Angeles, California, described in First Amended Complaint, *supra* note 13, ¶¶ 6-41. Receiving aid is deliberately meant to be a humiliating experience, where a substantial amount of privacy is surrendered in return for aid. *See* PIVEN & CLOWARD, *supra* note 20, at 149-61 (describing the burdensome and humiliating procedures used in the "intake" process through the 1960s). For a description of the views of welfare recipients of the 1960s and 1970s, see RICHARD M. ELMAN, *THE POORHOUSE STATE: THE AMERICAN WAY OF LIFE ON PUBLIC ASSISTANCE* (1966) (providing observations of the manner in which aid was distributed in a Manhattan welfare agency during the 1960s); HANDLER & HOLLINGSWORTH, *supra* note 55, at 119-28, 177 (describing the welfare process in Wisconsin); SUSAN SHEEHAM, *A WELFARE MOTHER* 19-24, 60-66 (1976) (describing the relationship between a recipient and her caseworkers which became hostile whenever the client demanded services other than those that the caseworkers were willing to provide); Scott Briar, *Welfare From Below: Recipients' Views of the Public Welfare System*, 54 CAL. L. REV. 370, 374-77 (1966).

There has been little change over the past thirty or so years. *See, e.g.*, THE MOUNT PLEASANT REPORT, *supra* note 17, at 91-101 (studying the interaction of a Washington, D.C. hispanic neighborhood with the local social services agencies); MARIE VESELY ET AL., *FAIR PLAY: A REPORT OF A STUDY OF THE ADMINISTRATION OF AID TO FAMILIES WITH DEPENDENT CHILDREN IN SEVERAL MIDWESTERN STATES* 41-44 (1982) (studying the practices of welfare offices in several midwestern states); Handler, *supra* note 81, at app. II 529-33 (describing the effort of a lay advocate employed by a public interest law firm to secure general assistance for a developmentally disabled homeless person in Los Angeles County); Simon, *supra* note 13, at 1200-22 (describing the stultifying effects of the routinization and bureaucratization of welfare delivery).

97. MURRAY, *supra* note 3, at 227-33. This notion of the utility of degradation and humiliation reflects the views, much more starkly set forth, in connection with the theory behind the creation of workhouses as the primary means of dispensing aid in England after the 1830s.

If paupers are made miserable, paupers needs will decline in multitude. It is a secret known to all rat-catchers; stop up the granary-crevices, afflict with con-

the breakdown of the work ethic,⁹⁸ family traditional values,⁹⁹ and the decay of large cities.¹⁰⁰ Since the societal imperative is to work, we should also expect static poor relief systems to require the able-bodied poor to labor for whatever aid is provided.¹⁰¹

The tendency of stasis is to embrace a reactive methodology; the manifestation of this tendency is reflected by an implementation philosophy limited to a readiness to provide the most basic materi-

tinual mewing, alarm, and going-off traps, your "chargeable labourers" disappear, and cease from the establishment. A still briefer method is that of arsenic; perhaps even a milder, where otherwise permissible.

Thomas Carlyle, *Chartism*, in *ENGLISH AND OTHER CRITICAL ESSAYS 174-75* (Everyman ed., n.d.).

98. LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 36-37 ("Welfare recipients may come to have little regard for community standards and local institutions, because no matter what a community says or does, welfare is guaranteed. The community gradually loses its power to influence behavior or to enforce the mutual obligations that make a community livable."); *see also* MEAD, *supra* note 26, at 73-82 (advancing theories as to why welfare mothers and others consistently do not work); MURRAY, *supra* note 3, at 69-82 (discussing how unemployment rates for young Black males have increased disproportionately to other groups); Paul Taylor, *Carrots and Sticks of Welfare Reform: Author of Landmark Federal Bill Hears Why States Are Going Their Own Way*, WASH. POST, Feb. 4, 1992, at A13 (discussing New Jersey's plan to deny additional benefits to welfare mothers who have children).

99. GILDER, *supra* note 26, at 64-74, 259-69 (arguing that loss of faith and traditional values are at the core of the poverty problem); GILDER, *supra* note 37, at 79-98 (arguing that family values and traditional gender roles are the bedrock of a stable and independent working class); GLAZER, *supra* note 67, at 140-46 (arguing that the strength of traditional structures—family, church, ethnic group, neighborhood, and voluntary organizations—are essential and have been replaced by institutionalized forms of relief); George H. Bush, Address at the Republican Party Convention Accepting the Republican Party Nomination for President of the United States (Aug. 19, 1988), in *FACTS ON FILE WORLD NEWS DIGEST*, Aug. 19, 1988, at 605 F1 (seeking the replacement of governmental charity by traditional forms of voluntary efforts). William Clinton, State of the Union Address (Jan. 24, 1995), available in LEXIS, Nexis Library, Curnws file (Welfare "undermines family values, it lets millions of parents get away without paying their child support . . .").

100. George Skelton, *Wilson Says Welfare System is Chasing Jobs Out of State; Government: Governor Sees the Issue as a Choice Between a Healthy Business Climate and an Overly Generous Relief Program that Keeps Forcing Higher Taxes*, L.A. TIMES, Jan. 14, 1992, at A3 (address by the Governor of California) (arguing that the state will continue to lose jobs as long as welfare spending remains "out of control").

101. The able-bodied ought to reconsider their decision to forego working and comply with the societal obligation to labor, or face starvation. For a critical study of modern welfare to work programs, see GUERON & PAULY, *supra* note 6, at 79-125 (providing an analysis based on studies of a number of work inducing or enhancing programs; the data base is described). For the modern genesis of the language of this imperative, see HIMMELFARB, *supra* note 52, at 147-76. For the modern rendition of this argument, explicitly stated, see MURRAY, *supra* note 3; and for a more subtle exposition of the same theme, see MEAD, *supra* note 26. *But see* MARMOR ET AL., *supra* note 6, at 1-2 (arguing that welfare reforms of the 1960s have not resulted in failure).

al needs only to those who are desperate enough to seek aid from the state.¹⁰² The concept of "outreach," of an aggressive seeking for the potentially eligible, is alien to the static world view.

Criminal conduct is thus minimized by keeping the poor from idleness, through the manipulation of eligibility and need and more directly through the criminal law.¹⁰³ Poor law systems attempt eligibility and need manipulation by compelling the poor to work, train for work, or spend their time seeking work, even when there are no jobs for them to fill.¹⁰⁴ So-called "workfare" programs of

102. The active parties, then, are those in want. The reactive nature of this view assumes that those in need will be able to determine the severity of their need and to seek the aid of the state when their condition becomes intolerable. The state takes the passive role in the process. Its mandate, and the limitations of its usefulness, is to stand ready to prevent absolute deprivation—it is not to seek out those who might profit from material, economic, or other forms of aid. Piven and Cloward describe the passivity of a federal/state welfare system in which the applicant quite literally had to undertake a quest akin to an Arthurian legend in order to obtain the "prize"—or form of relief to which the applicant was probably entitled to in the first place. See PIVEN & CLOWARD, *supra* note 20, at 149-61. Federal categorical relief programs after the 1960s appeared to become more passive by becoming more "voluntary" and by separating the income-maintenance functions from the social services functions of such programs. See HANDLER & HOLLINGSWORTH, *supra* note 55, at 177 (analyzing data from a 1970s study of AFDC in Wisconsin); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 17-23 (1985) (examining the evolution in the social work jurisprudence perspective); Simon, *supra* note 13, at 1215 (discussing the separation of social services from financial assistance mandated in 1972 and the logic behind this decision). The problem with a system like this, at least for those who view welfare as a means of transforming the poor into productive citizens no longer dependent on the largess of the state, is that those who need and could benefit from the system the most are the least likely to know about the programs, or their potential benefits. HANDLER & HOLLINGSWORTH, *supra* note 55, at 177.

103. See PIVEN & CLOWARD, *supra* note 20, at 147-77 (describing the means by which welfare rolls are shrunk); Simon, *supra* note 9, at 632-33 (discussing punishments for vagrancy); Jodie Levin-Epstein, *Changes That Won't Serve the Public Welfare*, WASH. POST, July 12, 1992, at C8 (describing the amendments to Maryland's welfare rules imposing monetary sanctions when children of recipients fail to attend school, noting that a "key state official admitted that the change is 'punitive,' but declared it necessary, because 'families need more assistance in becoming responsible'"); *Mississippi Proposes Changes in Welfare* (National Public Radio, Morning Edition, Apr. 2, 1992) available in LEXIS, Nexis Library, NPR File (reporting that the Mississippi legislature is considering changes to the state welfare system that would condition benefits on the grades children of recipients receive in school (they must maintain a "C" average), and requiring welfare mothers with more than four children to use birth control).

104. "Reforms" of the public assistance systems in New Jersey, California, and Michigan, for instance, rely in large part on providing incentives; they tie benefits to seeking or obtaining or retaining employment. See Backer, *supra* note 20, at part V.B.1.; cf. Taylor, *supra* note 98, at A13. "Furthermore, aspects of some of the state reform projects appear merely to be attempts to reduce benefits under the guise of experimentation." Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare* "Re-

recent vintage, mandatory work requirements that are imposed as a condition of receiving assistance payments, provide a good example of the practice.¹⁰⁵ The effort to minimize criminal conduct also finds expression in the tendency of static systems to keep children from delinquency by keeping them in school or in the playground.¹⁰⁶ Thus, for instance, many states have recently proposed or implemented, at least with respect to federal categorical aid programs, so-called "learnfare," which requires, as a condition to the continued receipt of a certain level of benefits, that the children of the recipient attend school.¹⁰⁷

Because the static view holds that the unemployed able-bodied poor have made a vicious lifestyle choice, static systems also more directly punish those able-bodied poor who refuse to work for their keep, whether work is provided by the state or otherwise. The criminalization of begging and vagrancy has a long history.¹⁰⁸ It

form," 26 U. MICH. J.L. REF. 741, 745 (1993).

105. See, e.g., HANDLER & HOLLINGSWORTH, *supra* note 55 (studying the effects of a welfare program in certain Wisconsin counties); Weinberg, *supra* note 27, at 442-47 (arguing that current work requirements disadvantage women in particular, and that California workfare programs indicate that such programs do little to get the poor into the workforce or to raise their income); *The Family Independence Program: The Perils of Turning Welfare into Workfare*, 3 ISSUE BRIEF, Apr. 1987, at 1 (The Municipal League Foundation, Seattle, WA).

106. The welfare "reforms" effected in many states now require recipients' children to attend school on pain of losing some or all of the benefits otherwise provided to the recipient. See BACKER, *supra* note 20, at part V.B. On the benefits of education as a tool reinforcing the necessity of fending for oneself and the shame of taking charity from others, see *infra* notes 138-42.

107. This is the case under the proposed "Learnfare" programs proposed in several states. See Carolyn Colvin, *Maryland's Responsible Welfare Plan*, WASH. POST, Aug. 9, 1992, at C8 (author was the Secretary of the Maryland Department of Human Resources) (describing and defending Maryland's experimental behavior modification programs which would penalize AFDC recipients whose children failed to attend school over a certain minimum). But see Higher Attendance in Michigan's Schools Act, 1993 Mich. S.B. 140 (lowering AFDC payments to recipients whose children have more than two unexcused absences from school); Levin-Epstein, *supra* note 103, at C8 (arguing that the changes are not helpful). A number of these types of programs are critically examined in GUERON & PAULY, *supra* note 6, at 107-20.

108. Vagrancy laws were imposed as a means of ensuring labor stability, and later retained and revitalized as a means of coercing proper conduct from the idle, the idea being that the idle might be forced to work if they were punished for failing to work. See, e.g., FERNAND BRAUDEL, 2 THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II 739-43 (Sian Reynolds trans., 2d rev. ed. 1973) (1966); E.M. LEONARD, THE EARLY HISTORY OF ENGLISH POOR RELIEF 11-21 (1900); POUND, *supra* note 90, at 58-68; Margaret K. Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 CAL. L. REV. 511 (1966); tenBroek, *supra* note 9, at 265-79; Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 103-07

retains its vitality today in somewhat watered down form in many states.¹⁰⁹ Thus, while it may today be constitutionally impermissible to criminalize the status of beggar, it may well be constitutionally permissible to criminalize the act of begging at certain times and in certain places.¹¹⁰ Additionally, generally applicable criminal laws, such as those proscribing trespassing or stealing, are especially useful when targeted at controlling the most marginal of the poor, the homeless able-bodied male. Thus, for instance, resort by the poor to squatting in abandoned buildings is handled by

(1962); discussion *infra* part V.A.

Traditional vagrancy statutes usually punished a condition or status. Thus, the statute at issue in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), provided for conviction of the misdemeanor of vagrancy all "[r]ogues and vagabonds or dissolute persons who go about begging . . . persons wandering or strolling around from place to place without any lawful purpose or object . . . persons able to work but habitually living upon the earnings of their wives or minor children" *Id.* at 156 n.1 (citing Jacksonville, Fla., Code §§ 26-57 (1965)). Such statutes have been declared void principally on vagueness grounds. *Id.* at 162; see also *Kolender v. Lawson*, 461 U.S. 352 (1983); *Squire v. Pace*, 516 F.2d 240 (4th Cir.), *cert. denied*, 423 U.S. 840 (1975).

109. See *supra* note 103. Currently, vagrancy laws include broad provisions banning particular types of disorderly conduct such as lodging in public buildings without permission. See, e.g., CAL. PENAL CODE § 647(i) (1988) (a person who "lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control thereof" is guilty of disorderly conduct). Other types of vagrancy legislation proscribe more narrowly defined conduct, such as sleeping in parks after closing time. See, e.g., *Baker*, *supra* note 9, at 418-19 & nn.7-8 (describing various statutes of this kind). Vagrancy laws have been used recently as a potent tool against the homeless. See *id.* at 417-25. Such efforts have met with some success in the courts. See, e.g., *Young v. New York City Transit Auth.*, 903 F.2d 146, 164 (2d Cir.) (holding that the New York City ban on begging and panhandling in the subway was constitutional), *cert. denied*, 111 S. Ct. 516 (1990). Courts, however, are not always receptive to such restrictions. See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992) (declaring unconstitutional Miami's practice of arresting homeless individuals and seizing their property). The right of a state to proscribe conduct such as begging continues to come under attack, usually on constitutional grounds. See, e.g., *Baker*, *supra* note 9, at 435-48 (discussing how legislation that punishes the homeless for involuntary manifestations of their homeless status violates the Eighth Amendment); Scott D. Sitner, Note, *Beggar's Banquet: The First Amendment Right to Beg*, 1991 DET. C.L. REV. 795 (1991). Alternatively, others have argued that vagrancy statutes are anachronistic status crimes that are inconsistent with modern criminal theory. See Note, *supra* note 108.

110. *Young v. New York City Transit Auth.*, 903 F.2d at 164; see also Grace L. Zur, Note, *Young v. New York City Transit Authority: Silencing the Beggars in the Subways*, 12 PACE L. REV. 359, 383-93 (1992) (stating that banning begging does not violate the First Amendment). *But see* *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993) (striking down on First Amendment grounds a New York statute that criminalized loitering in a public place). On recent attempts by municipalities to curb begging, see Heather MacDonald, *The Homeless Rights Counterrevolution*, WALL ST. J., Nov. 30, 1994, at A20.

enforcement of anti-trespassing laws.¹¹¹ This, of course, makes it easier to formalize, bureaucratize, and proletarianize any system delivering aid.¹¹² Since expectations are low, there is little need for the kind of professional guidance that would be necessary if the accepted underlying notion of the purpose of the poor relief system were a transformative one.¹¹³

The sole rehabilitative goal of static systems is to force the able-bodied to fulfill the Biblical imperative to work.¹¹⁴ If the poor actually grow to like the work they are forced to accept, all the better, but it is not to be expected. Under a static system, then, the notion of rehabilitation means compulsion. Static system builders are comfortable with the notion that programs of poor relief must be designed to press solid middle-class behavior on the poor; they do not consider that rehabilitation might or ought to involve rehabilitating the social or economic system from which the poor arose.¹¹⁵

There exists no corresponding incentive to punish the incapacitated—or to motivate them to fend for themselves. Relief to them should be more open-handed. The incapacitated did not make a

111. See, e.g., Hirsch & Wood, *supra* note 9, at 611-16 (discussing organizing the homeless to squat in abandoned buildings in New York).

112. See, e.g., Simon, *supra* note 13, at 1200-21. On the necessity for formalism in the administration of American poor relief, see DAVIS, *supra* note 24; Handler, *supra* note 24; Smith, *supra* note 9, at 655 (discussing how general welfare could be administered more effectively and fairly if state-wide standards existed).

113. See Simon, *supra* note 102 (contrasting welfare jurisprudence developed by social workers with lawyers' welfare jurisprudence).

114. *Genesis* 3:17-19. Recall that the discrimination is based primarily on the refusal, when able, to work. Thus, while the poor include all who are in need, different classes of the poor, primarily the able-bodied, are singled out for different treatment. The basic notion is that people need aid either because they have become unable or are unwilling to support themselves. For those unable to support themselves, there is nothing to be done but care for them. Those unwilling to support themselves, on the other hand, are little better than thieves. While provision must be made for them, lest they starve, there is an underlying assumption that all an able-bodied person needs to do to support him or herself is to go out and work. If only the able-bodied would seek gainful work, they would find it: the jobs are waiting for them.

115. See DAVID WARD, *POVERTY, ETHNICITY, AND THE AMERICAN CITY, 1840-1925: CHANGING CONCEPTIONS OF THE SLUM AND THE GHETTO* xi (1989):

[W]henver they seem to be unresponsive to environmental improvements, they are judged to be part of a deviant subculture or the result of personal deviance. Assumptions about high levels of personal deviance among the poor and within the inner city have, therefore, encouraged a strong emphasis on clinical and therapeutic approaches at the individual or familial level.

Id. See also Backer, *supra* note 20, at part V; Taylor, *supra* note 98, at A13 (quoting the New Jersey legislator responsible for the passage of welfare reforms in that state).

deliberate choice to become unproductive, and are therefore more deserving of aid. Why? Perhaps because redistributing income in the form of aid to the incapacitated does not significantly disturb the social and economic system. Poor relief programs are meant to serve as long-term income maintenance programs only for those who lack any other means of meeting their material needs; for all others, aid is meant to be temporary (until another job can be secured) and to relieve only the most extreme want.¹¹⁶

As should be expected, the political definitions of eligibility are also suffused with race, gender, and ethnic considerations. In this, of course, the political determination of worthiness and need mirrors the general struggle in America for power as between a Caucasian, European Protestant majority, and the host of other groups, increasingly self-conscious about their group identity and anxious to translate this self-awareness into tangible power.¹¹⁷ Power, in this sense, is power to control the means of productivity, and therefore the means of acquiring wealth (and political power) in the United States.¹¹⁸ The struggle is evidenced by the manner in

116. See, for example, the study of the Wisconsin welfare system conducted by Joel Handler and Ellen Hollingsworth in the early 1970s. On the basis of that study, the authors concluded that for all of the potential transformative usefulness contained in the "idea" of AFDC as set forth in statute rules and the hortatory statements of people in command, "AFDC is basically a low-level income maintenance programs, and very little else; much more routine than flexible." HANDLER & HOLLINGSWORTH, *supra* note 55, at 203.

117. While it is important to understand the particular effects on non-majority peoples, and the powerless generally, such a study lies beyond the scope of this article. For a sampling of the writings of those who see these issues as paramount in the welfare "debate," see, e.g., Alfieri, *supra* note 28 (discussing the dominant traditions poverty law derives from and how this alienates poor minorities); Mary Jo Bane, *Politics and Policies of the Feminization of Poverty*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 381 (Margaret Weir et al. eds., 1988) (exploring the issue of the feminization of poverty resulting from the increasing number of women below the poverty line); Cloward & Piven, *supra* note 23, at 510 (advocating empowering the poor by informing them of their rights so they generate a "crisis" the federal government cannot ignore); Grey, *supra* note 22 (discussing and comparing liberation and equalitarian theories on social welfare to each other's and to Rawl's position); Handler, *supra* note 81, at 459 (arguing that the current social services consensus represents "a deep hostility to the female-headed household in poverty"); Karst, *supra* note 17 (reviewing the history of bias against minority groups and recent trends to change such bias); Kilson, *supra* note 27 (discussing the need for black, white, and blue-collar workers to help support conclusionary policies so that those in poverty may rise to stable employment positions); Law, *supra* note 17 (exploring how federal aid programs and law systematically disfavors women); Monaco, *supra* note 27 (tracing the history of poverty for minorities and immigrants and their rise to wealth through increased political participation); Note, *supra* note 17 (discussing the effects of the dependent care tax credit, especially on latinos).

118. The nature of this power struggle has long been recognized. King, *supra* note 28,

which questions of approaches to modifications of poor relief are framed. But it does not imply that empowerment is progress, it may merely affect outcomes as one system of equitable ordering and social valuation is replaced by another.¹¹⁹

The static paradigm, as it must, trivializes these concerns. Struggles for empowerment, and the recognition thereof are the province of those looking to empower themselves. Stasis recognizes

at 555 ("The problem of transforming the ghetto, therefore, is a problem of power—confrontation of the forces of power demanding change and the forces of power dedicated to the preserving of the status quo."); see also *id.* at 600-04 (discussing how African Americans can use their employee status and their role as consumers to effect change in the status quo). Fairly representative of (liberal) government's perception of the problem is the view of the New York State Task Force on Poverty and Welfare, one of whose members, Donna E. Shalala, is currently the Secretary of the Department of Health and Human Services. "Race- and gender-based discrimination are important causes of the low wages and the weak labor market position of women and minorities." NEW YORK TASK FORCE, *supra* note 23, at 44. Empowerment is seen by some as the means of reducing destitution. See, e.g., Woodson, *supra* note 17, at 1030-35, 1044-46 (advocating empowerment of African-American communities so they may deal with their own problems and the creation of "business development districts" to spur entrepreneurial growth). Conservative commentators tend to see no problem.

119. See ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 115-17 (1983) (characterizing society, in the aggregate, as a vast array of overlapping yet discrete sets of prerogatives establishing a system of social stations, each station being defined by its relation to all others and by the degree and character of its access to the favors of governmental power; politics, in this sense, and lawmaking as well, can be understood as a struggle among these groups for greater access to governmental favors). A current example: Should the amount of welfare payments made to single parents depend on the number of children in the household? This question could encompass issues of race; see, e.g., Morley D. Glick, *Transgenerational Welfare Dependency*, 32 J. CONTEMP. STUD. 31 (1981) (discussing the poverty cycle becoming more evident; children of welfare parents are more likely to receive welfare); gender, see Handler, *supra* note 81 (examining the trials and tribulations of female heads of household attempting to get aid); Hirsch, *supra* note 17 (explaining that labeling funds received under the AFDC as income will make poor women poorer); Kilson, *supra* note 27, at 60-63 (examining the plight of Black female heads of households compared to male-headed homes and two-parent homes); Law, *supra* note 17 (discussing how women are systematically prejudiced by federal law); Carole A. Corns, Note, *The Impact of Public Abortion Funding Decisions on Indigent Women: A Proposal to Reform State Statutory and Constitutional Abortion Funding Provisions*, 24 U. MICH. J.L. REF. 371 (1991) (discussing court decisions and legislation limiting the use of public money for abortions by indigent women); Patti E. Phillips, Comment, *Adding Insult to Injury: The Lack of Medically Appropriate Housing for the Homeless HIV-III*, 45 U. MIAMI L. REV. 567 (1991); disability, see Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833 (1976) (discussing that the ad hoc nature of social legislation has led to inconsistent and inequitable decisions regarding the disabled and their benefits); and ethnicity, see Note, *supra* note 17 (examining complications that arise among Latinos applying for aid due to Latin cultural attributes). The debate describes the groups attempting to attain, retain, or deny governmental favors of a socially favorable character.

no such struggle; it paints them over with words and phrases such as "welfare values," "single-mother families," "illegitimacy."¹²⁰ Productivity is the key; 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. Stasis sees at best a secondary connection between these impediments and the relief of the poor. What is of concern, then, is that the needy be maintained, not that people have the right to maximum productivity. Those who are able to work, but do not because they feel the work is beneath them, or is too difficult, or does not pay enough, are not needy—they are indulging a pickiness not permitted by the social and economic imperatives of current society.¹²¹

120. Robert Bonner, *Kicking the Poor While They're Down*, CHI. TRIB., May 13, 1992, at C18 (commenting on a letter written in support of an Illinois state proposal to deny welfare benefits to women who bear children while receiving welfare):

I don't know whether the Tribune realizes it, but the gist of Sobieski's resort to the bundle of stereotypes he used ("lifestyle," "habit," "legacy," "welfare values," "single-mother families," "stigma," and "illegitimacy") came within about half-an-inch of saying, outright, that the real problem with welfare is a racial one—a problem with the minority races, that is, particularly with blacks. In short Sobieski's message was a racist one, wearing the mask of welfare reform.

See also Rosemary L. Bray, *So How Did I Get Here*, N.Y. TIMES, Nov. 8, 1992, at 35 ("Welfare has become a code word now, one that enables white Americans to mask their sometimes malignant, sometimes benign racism behind false concerns about the suffering ghetto poor and their negative impact on the rest of us.").

121. This is articulated in the work of so-called conservative writers such as Murray and Mead. See MEAD, *supra* note 26, at 76-82 (explaining different theories regarding why some people will not work); MURRAY, *supra* note 3, at 156-64, 227-33 (examining a hypothetical case comparing 1960 to 1970 welfare and then suggesting the elimination of all welfare programs to force individuals to work). But see AULETTA, *supra* note 27, at 272 (arguing that "if there were an adequate number of jobs, members of the underclass would readily take them" based on the stories of 26 people participating in a jobs training program in Manhattan in 1979-80); RIEMER, *supra* note 65, at 34 (arguing that "the poor who are unemployed—together with their non-poor competitors—face a massive job shortage"). For the same reason, the fact that the only work available was exploitative, or perpetuated racial, gender, or ethnic discrimination patterns, is largely irrelevant. The important consideration is self-sufficiency. Those with the talent, drive and good fortune will quickly improve their financial circumstances. All other considerations were either irrelevant or of secondary importance.

In addition, the static paradigm makes the critical assumption that there always also exists sufficient means by which the poor could improve themselves, that is, make themselves marketable. Thus, schools are available for the young; vocational and language classes are available for adults. Where the private sector does not provide these, the state will make these available. See, e.g., GILDER, *supra* note 26; GILDER, *supra* note 37; MEAD, *supra* note 26; MURRAY, *supra* note 3. But see FURNISS & TILTON, *supra* note

As such, the assumptions comprising our core social orderings are not merely a legalism, or a transient political compromise or an imposition from some outside force. It is us. A static system does not depend on the underlying legal or constitutional basis of the aid provided. In this sense, "rights," such as the right to relief, either as a constitutional or moral or "natural" right is largely a marginal concern. Such rights exist, in the static world view, only as a code, an afterthought dependent on societal conceptions of rights to property and the personal obligation to labor or amass wealth, and not the other way around.¹²² Thus, in the context of static systems, the hotly debated question of whether relief to be afforded the poor is a right or a privilege—whether the state has the right to determine if benefits will be made available at all¹²³—is largely irrelevant; that is, it is relevant at best principally in connection with the (secondary) debate about how minimum benefit levels are determined.¹²⁴

23 (comparing the social states of Sweden and Great Britain to the United States and advocating that the United States move closer to these two countries in its social welfare policy); MARMOR ET AL., *supra* note 6 (discussing the general misunderstanding of welfare in the United States and its consequences); RIEMER, *supra* note 65 (discussing how government should not expand its role to wipe out poverty). For earlier versions of this view, which has been a part of the culture of ideas in Britain and the United States for centuries, see HIMMELFARB, *supra* note 52, at 42-304 (discussing Adam Smith and "political economy" through the industrial revolution).

122. Physical maintenance, therefore, does not stand as an independent concept—worthy, somehow, of special consideration. It is a derivative concept in the sense that the right to aid is conceived as flowing from the obligation to work. This connectedness is most clearly evidenced in the work of self-styled conservative writers. See, e.g., GILDER, *supra* note 37; MEAD, *supra* note 26, at 1 (asserting that part of the welfare problem is that the government has not required employable recipients to work); MURRAY, *supra* note 3 (asserting that working age poor who refuse to work should not receive aid). It is sometimes more masked in the work of others. See, e.g., NEW YORK TASK FORCE, *supra* note 23 (outlining a plan based on mutual responsibilities of the State and individuals to help the poor avoid dependence on welfare); MARMOR ET AL., *supra* note 6. That is not to say that this state of affairs is either good or bad in an absolute or relative sense. Certainly, the current state of affairs has many supporters as well as detractors. This debate mirrors the general debate in American society as groups holding different views vie for power—that is, the power to control the legislative machinery, or the debate, or the very conception of the problem.

123. See *supra* note 21 (discussing whether the right to benefits is a constitutional right or not).

124. For a discussion of the merits of a constitutional right to relief, see, e.g., Braveman, *supra* note 21 (examining state constitutions to determine if more authority arises there for a constitutional right to relief than in the U.S. Constitution); Michelman, *supra* note 37 (responding to critics of the constitutional right to relief). But see Ellifickson, *supra* note 9 (explaining that a right to shelter or to income discourages work while our Constitution encourages work); Winter, *supra* note 21 (discussing Supreme

The *manner* in which aid is dispensed is also a secondary consideration; it is a point relating to the relative conveniences of different bureaucratic approaches and not a matter of fundamental concern to the static system builder. A static system is as well served by a system of professional case workers as it is by a proletarianized workforce shorn of all discretionary authority whose only function is to apply the rules relating to the provision of aid to applicants.¹²⁵ Both are driven by the core assumption that the poor need fixing.

Given the system's indifference, we would expect that the manner in which relief is styled (as a privilege or as a right) and services are dispensed will be dictated by expediency; the form of relief will be driven by costs¹²⁶ and the impositions of higher au-

Court decisions regarding economic equality as alarming and in need of constraint). For a discussion of the entitlement to relief as a matter of state law, see, e.g., Bensinger, *supra* note 9 (discussing that California courts should announce that there is a statutory right to relief); Burns, *supra* note 62 (arguing that identification of need does not impose a legal obligation upon state legislatures or agencies to give this need priority over other equally valid social welfare goals); Chackes, *supra* note 9 (discussing the judicial enforceability of the governmental duties owed to assisting the poor). For a general discussion of the nature of modern fundamental rights analysis, see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

125. Recall that the fundamental goal of such systems is relieving physical want at some minimal level. This is a very modest goal. To the extent that people are provided with whatever minimum society deems adequate, and this minimum tends to be quite small, all else is extra. Perhaps for this reason, federal categorical grant programs quickly abandoned even the attempt to institute a grant delivery mechanism allowing the professional caseworker some discretion to make determinations of need on a case-by-case basis. See Simon, *supra* note 13, at 1200-21 (discussing that, over the past two decades, rules have been substituted for standards for social worker decision-making). For an application of these notions in the context of a particular state welfare program, see Smith, *supra* note 9, at 642-55 (exploring several Indiana cases where the judiciary limited discretion of the trustee). For a discussion of the benefits of limited the discretion welfare delivery systems, see, e.g., Handler, *supra* note 24, at 500-10 (explaining that this limited discretion begins with the federal government's permissive legislation). For a discussion of social work jurisprudence, see Simon, *supra* note 102, at 14-23. Poor relief systems with transformative or redistributive goals might well have other imperatives. As I attempt to demonstrate, however, despite statements to the contrary, American systems of poor relief are neither fundamentally transformative nor redistributive (except, perhaps, in the most marginal sense).

126. Costs, not more abstract matters, tend to shape the characteristics of modern relief. Jacobus tenBroek has examined the manner in which cost minimization helped shape the Elizabethan Poor Law. See tenBroek, *supra* note 9, at 267 (discussing how poor law developed when the Tudors encouraged charity as both an alternative to public expenditure and a cost-cutting measure). The importance of cost minimization follows from the contingent nature of society's view of its obligation to relieve the poor. Since there exists no independent relief imperative, the notions affecting its implementation are derivative as

thority—in the United States today that normally means by the federal government. Indeed, states now generally structure their relief programs to meet the requirements of federal law, although it is applicable, as a technical matter, only to programs receiving federal funds. As a result, as William Simon has demonstrated, the rules applicable to the needy under such systems tend to resemble the proverbial Pharisaic codex interpreted not by learned priests but by a proletarianized workforce devoid of both substantial discretion, and the desire or the ability to work on a case-by-case basis.¹²⁷ Static system builders are relatively indifferent (except for potential cost savings in a particular case) to how benefits are dispensed. Static systems can as easily dispense aid in the form of cash or in-kind benefits, or both; aid can be provided on an institutional (indoor) or non-institutional (outdoor) basis. Static systems will provide for both.¹²⁸

A static system isolates those of its destitute on the dole.¹²⁹ I have explained how our core social realities dictate that the provision of relief be passive, oriented to providing aid to those who turn to it, those who have exhausted all other avenues of relief; it will, thus, be designed and implemented as a residual system, the

well.

127. See Simon, *supra* note 13 (discussing the demoralization of social workers and advocating that they be given greater discretion); Simon, *supra* note 102 (explaining the need for responsible states that allow public workers to function "responsibly and effectively"); see also DAVIS, *supra* note 24 (exploring all aspects of discretionary law as opposed to rule-based law); Wyers, *supra* note 24 (discussing erosion in the skills of social workers and advocating increased discretion for the income-maintenance line worker); Smith, *supra* note 9, at 632-33 (outlining the criteria trustees must use to determine if aid should be given).

128. Thus, for instance, California's general assistance provisions permit both indoor and outdoor relief at the discretion of the county. CAL. WELF. & INST. CODE §§ 17000, 17002 (West 1991) (stating that first is outdoor relief, then comes indoor relief through almshouses and county farms to care for the poor). *But see* Robbins v. Super. Ct., 695 P.2d 695 (Cal. 1985) (issuing writ of mandamus to prevent the county from refusing welfare benefits based on the "strong likelihood" that the policy violates the statute).

129. Anecdotal accounts of this isolating tendency of statically oriented systems abound in the popular press. The isolating effect is acknowledged even when criticized by governmental officials charged with administering the system. Thus, Jack Quinn, a public housing administrator and President of the National Association of Housing and Redevelopment Officials (NCHRO), stated in an address given at a meeting of the Southwest Regional Council of NCHRO, "We've set up a protected class of people. We punish them when they make a move to get off welfare. It's almost like a penal system. We ought to be rewarding them instead of punishing them." Neal, *supra* note 56, at D1. The marginalization of the poor can also be augmented by considerations of race and ethnicity. See, e.g., Karst, *supra* note 17, at 3-7 (explaining that while whites typically move in and out of poverty, racial and ethnic minorities seem to remain poor).

system of last resort.¹³⁰ Reactive sensibilities reinforce the tendency to compartmentalize poverty and to treat the poor (those in need of aid) as a separate, inferior component of the population.¹³¹ This compartmentalization of poverty is evidenced by the way in which poverty is defined, by reference to a poverty line, for instance—an income wall separating one kind of person (a person in need), from the rest of us. It is also evidenced by our sense (anecdotal for the most part) that the poor remain poor and pass their poverty on to their children—the apocryphal “cycle of poverty.”¹³²

130. See *supra* note 102 (describing the American general assistance systems). The very recipients of aid also have traditionally shared this view. See, e.g., Briar, *supra* note 96, at 374-77 (“Thus the stance these recipients adopt toward the welfare agency is not that of a rights-bearing citizen claiming benefits to which he is entitled by law but that of a suppliant seeking . . . ‘a little help to tide us over until we can get back on our feet again.’”).

131. See HIMMELFARB, *supra* note 52, at 288-304, 371-400 (discussing the development of this notion of separateness and inferiority in 19th century Britain); PIVEN & CLOWARD, *supra* note 20, at 165-75 (arguing that degrading the non-productive able-bodied person serves as an effective means of reinforcing the work ethic); Alfieri, *supra* note 28, at 683-89 (examining also the tendency of advocates of the poor to treat the poor as sub-status individuals and give short shrift to their concerns); Karst, *supra* note 17, at 3-7 (describing how the modern welfare system separates the poor from the rest of society and treats them as inferior); Ross, *supra* note 35, at 1509-10 (reciting the common notion that there have always and will always be poor people).

132. For a fairly nonideological discussion, see Peter Gottschalk et al., *The Dynamics and Intergenerational Transmission of Poverty and Welfare Participation*, in *CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 85* (Sheldon Domziger et al. eds., 1994). Commentators in the popular press continuously provide anecdotal evidence of the existence of this constancy of poverty.

Citizens raised with a strong work ethic—working parents and all that implies—probably do have that kind of desire for self-sufficiency. But what if you were raised by a welfare mother who was raised by a welfare mother?

That’s not uncommon. Quinn has the same revulsion for the welfare wise as the ordinary citizen. He told of another case in which a 32-year-old mother and her two daughters, age 16 and 14, showed up for their annual review.

Both of the girls had been born in welfare and both were pregnant themselves.

Neal, *supra* note 56, at D1 (Jack Quinn is a public housing administrator and president of the National Association of Housing and Redevelopment Officials) (commenting in an address given at a meeting of the Southwest Regional Council of NCHRO); see also Georgie A. Geyer, *Why Won't U.S. Poor Take Jobs Illegals Take?*, *TULSA WORLD*, Jan. 31, 1993, at D1; cf. Gertrude Himmelfarb, *A De-Moralized Society*, *FORBES*, Sept. 14, 1992, at 120 (explaining the consequences of moral neutrality as realizing that problems of poverty are unseverable from morality). A number of studies, however, suggest that the cycle of poverty is more apparent than real—more an effect at the margin than the common fate of the destitute. See, e.g., Mary Jo Bane & David T. Ellwood, *Slipping Into*

It follows from this that static systems tend to be self-contained and focused on directly manipulating the target population. We tend to speak of different systems—for instance, employment systems, insurance systems, welfare systems, and property systems, each only loosely related to the others.¹³³ And static poor law systems tend to respect these boundaries.¹³⁴ An identifying characteristic of such systems should be the lack of formal or informal connection between the state's poor relief program and other state policies or agendas, including a state's labor and commercial policy.¹³⁵

and Out of Poverty: The Dynamics of Spells, 21 J. HUM. RESOURCES 1 (1986) (explaining that a large portion of those falling into poverty stay for a short time while a small portion stay poor for extended periods); Jencks, *supra* note 89, at 36 (explaining that consolidation of the poor in cities reinforces misconceptions regarding a cycle of poverty).

133. See, e.g., BARTH ET AL., *supra* note 14, at 9-14 (discussing relations between different systems that affect the welfare of the poor); NEW YORK TASK FORCE, *supra* note 23, at 30-44 (recognizing that some type of coordination is necessary between labor policy and welfare policy to minimize the size of the welfare-eligible population).

134. See, e.g., FURNISS & TILTON, *supra* note 23, at 164-66 (noting that while the notion of full employment has been embraced as an ideal, the government has taken a minimalist attitude to its achievement, relying on the private sector to achieve the goal). Even the New York Task Force on Poverty and Welfare, in recommending a more interventionist approach to labor policy, remained fairly conservative in its suggestions, concentrating on a call for more responsive fiscal and monetary policy and making America more competitive in foreign trade. See NEW YORK TASK FORCE, *supra* note 23, at 43. Again, both the separateness of these areas and the correctness of keeping approaches to policy in these areas separate have come under increasing criticism. Cf. BARRY BLUESTONE & BENNETT HARRISON, THE JOINT ECONOMIC COMMITTEE, 99TH CONG., 2D SESS., THE GREAT AMERICAN JOB MACHINE: THE PROLIFERATION OF LOW WAGE EMPLOYMENT IN THE U.S. ECONOMY (1986) (discussing wage trends in the United States); FOLKE DOVRING, INEQUALITY: THE POLITICAL ECONOMY OF INCOME DISTRIBUTION 146-48 (1991) (arguing that the United States should take a more active role in achieving full employment through public works projects, using the unemployed for infrastructure repair and environmental clean-up); RIEMER, *supra* note 65 (discussing the relationship of job shortages to poverty); Larson, *supra* note 78 (criticizing the United States system for income maintenance because of its lack of coordination); Skocpol, *supra* note 28 (advocating the creation of good systems to implement welfare programs to avoid political infighting between different agencies).

135. Recall that since the static paradigm assumes that poverty is the fault of the poor, the cure ought to address the conduct or skills of the poor. However, there is a certain futility in job training and education programs if there is no demand for the workers and poverty programs in the United States have failed to address the demand side of the unemployment problem. See, e.g., MARMOR ET AL., *supra* note 6, at 121-23 (arguing that unemployment causes poverty and that state training programs will not solve the problem until jobs are available); RIEMER, *supra* note 65, at 28-34 (asserting that most organizations, the federal government included, overlook the role of job shortages on poverty).

But note that while there may be a lack of cohesive planning, there might well be some attempt at tying the efforts. Thus, for instance, many states currently are attempting to link the receipt of federal categorical aid to the attendance of recipients' children in

Educational policy is different. In one of its guises—indoctrination—education policy provides the key means for inculcating each generation with the proper order of things. This is a concept that dictators of the twentieth century—Adolph Hitler, Josef Stalin, Fidel Castro—understood quite well when they boasted of their educational policies.¹³⁶ It is also a concept that might well have been learned from the English example of the early nineteenth century, a time when Protestant religious education was used to teach the children of the poor to accept the notion that a life of hard work and poverty was their due.¹³⁷ Even after the advent of

school. This learnfare is the subject of intense debate in several states. In addition, many state programs require recipients to actively look for work, or make themselves available on some kind of state employment availability roster. See *infra* part V.A. However, the push here is distinctly one-sided. The relation of the poor to labor policy is one requiring them to work harder to get a job. Of course this is not to say that the labor policy itself must create and maintain jobs sufficient to employ all the potentially employable. See, e.g., RIEMER, *supra* note 65, at 4-10 (advocating a new poor relief system that focuses on jobs for those unemployed, but able to work). Likewise, the push to keep children in school might also be an effort to indoctrinate the goodness of work and self-discipline, and of the acceptance of a life of hard work and poverty. This notion underlies Charles Murray's suggestion that America abolish its governmental welfare programs. See MURRAY, *supra* note 3, at 227-28.

136. On the experience in Germany after 1933, see, e.g., GEORGE L. MOSSE, NAZI CULTURE: INTELLECTUAL, CULTURAL AND SOCIAL LIFE IN THE THIRD REICH 263-318 (1966) (discussing Nazi educational techniques and containing many excerpts of original classroom materials from the Nazi period); WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 249 (1960) ("The German schools, from the first grade through the universities, were quickly Nazified. Textbooks were hastily rewritten, curricula were changed, *Mein Kampf* was made . . . 'our infallible pedagogical guiding star' and teachers who failed to see the new light were cast out.").

On the creation of the machinery for the education of the party and the masses in the former Soviet Union, see JOSEF V. STALIN, *Report to the Eighteenth Congress of the C.P.S.U.(B.) on the Work of the Central Committee* (Mar. 10, 1939), in JOSEF STALIN: PROBLEMS OF LENINISM 746, 788 (State Publishing House of Political Literature ed., 1953) ("The task of Party propaganda, the task of the Marxist-Leninist training of cadres, is to help our cadres in all branches of work to become versed in the Marxist-Leninist science of the laws of social development.").

On the experience in Cuba after 1959, see Gerald H. Read, *The Cuban Revolutionary Offensive in Education*, 14 COMP. EDUC. REV. 131, 134 (1970) ("In June, 1965, the Minister of Education, Armando Hart Dávalos, proclaimed the start of a new phase in educational development which would be marked by an aggressive effort to secure an ideological transformation in the moral and social consciousness of every citizen.").

137. Indoctrination to the habits of work and the acceptance of a life of poverty was central to the Sunday-school education of 19th century English poor (substantially the only education provided to children of the poor during the first part of the century). This is luridly described in connection with the effect of 19th century Methodism in E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 375-78 (1963). The modern view tends to treat the education of the children of the poor as the way to create self-sufficient adults. See Aletha C. Huston, *Children in Poverty: Developmental and Policy Issues*, in

compulsory education in Britain in 1880, the primary purpose of education was to discipline future workers and prepare them for a life of low-wage factory work.¹³⁸ In this sense, education is central to the dominance of any culture, paradigm, or system of social ordering. For us, it is essential to teach the young to accept without question the central tenets of the paradigm, and especially that each individual must learn to fend for himself.¹³⁹ This is good

CHILDREN IN POVERTY: CHILD DEVELOPMENT AND PUBLIC POLICY 1, 9-10 (Aletha C. Huston ed., 1991) (explaining that the children of poorly educated, unwed, teenage mothers are at the highest risk for long-term poverty); Craig T. Ramey & Frances A. Campbell, *Poverty, Early Childhood Education, and Academic Competence: The Abecedarian Experiment*, in CHILDREN IN POVERTY: CHILD DEVELOPMENT AND PUBLIC POLICY 190 (Aletha C. Huston ed., 1991) ("Low resource children are at increased risk for retention in grade, for special education placement, and for failure to complete high school. Dropping out of school is linked, in turn, to increased rates of juvenile delinquency, increased likelihood of teenage pregnancy, and intergenerational economic dependency.") (citations omitted); cf. Stanley S. Herr, *Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337, 348-58 (1991) (discussing problems faced by homeless children attempting to enroll in school).

138. See DAVID S. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* 341-45 (1968) (asserting that most of the wealthy viewed education according to one's lot in life; if you were working class, you received an education suitable to what you would need for factory work). This, of course, was not a purely British preoccupation. Cf. FLYNT, *supra* note 60, at 109 (describing the efforts of a female Alabama mill stockholder to justify child labor in the early part of the 20th century: "When you know more of these people, you'll see that they're just like animals. In the mill they have some chance of getting civilized. If we make laws restricting labor we should frighten away capitalists and wreck our very surest chances of progress and prosperity."). Certainly, Karl Marx was well aware of the place of lower-class education in traditional society, and of the gulf between its stated purposes and real effect. See KARL MARX, *Education for the Workers*, in THE KARL MARX LIBRARY (ON EDUCATION, WOMEN, AND CHILDREN) 25 (1975) (arguing that the education of workers "altogether depends on life conditions" and that the bourgeois understand the moral education of the workers to be "the drumming into the head of [workers] bourgeois principles, and that . . . the bourgeois class has neither the means nor, assuming it had them, (even the desire to) apply them so as to offer the people a real education"). Of course, the essential contradictions of education are not specific to traditional European or American society. It appears in many other systems as well, liberal and conservative. See *infra* text accompanying note 139.

139. LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 53 (describing one of the goals of the Reagan administration welfare programs: the creation of "opportunities for self-reliance through education and enterprise. For those who can work, public assistance should be a temporary means of support and skill improvement, until employment can be obtained."); NEW YORK TASK FORCE, *supra* note 23, at 9-10, 41-42 (arguing that society should expect people to be self-sufficient and must "help citizens take advantage of employment opportunities by creating an education system that prepares citizens to be productive members of a first-class work force"); THE MOUNT PLEASANT REPORT, *supra* note 17, at 122-38, 150-52 (arguing for greater outreach to Hispanic students in the District of Columbia, the Report argues that: "Access to equal opportunity in the United States depends to a large degree on the ability to attain an education."); WHITE HOUSE

irrespective of ideological perspective. Thus, "the 'public' education of the State is rather the rational and public existence of the State. Only the State trains its members in that it makes them into political members; in that it transforms individual aims into public aims, raw drives into ethical tendency, natural independence into spiritual freedom."¹⁴⁰

A system of isolation, itself resembling the poor, who are also said to be unconnected with the mores of mainstream America,¹⁴¹ the physical manifestation of the system should be its bureaucracy—physical spaces which the needy must seek out filled with waiting processors who the needy must appease as a prerequisite for relief. Its other physical manifestation should be the means used to discover who among the population of seekers is actually worthy of aid in accordance with then-current criteria. And because we are dealing with people that society does not favor, the incentive of stasis is to make the discovering process itself a test of the desperation of the applicants. The waiting processors are equipped with a variety of complex tests and trials—unpleasant, difficult, stigmatizing—to be overcome by the applicant (much like the twelve labors of Hercules) before aid is made available.¹⁴² This

WORKING GROUP ON THE FAMILY, *supra* note 20, at 41-42 ("Education has caused waves of American immigrants to rise out of poverty, and it remains the most effective vehicle today for breaking the cycle of dependency.").

140. MARX, *supra* note 138, at 17.

141. Anecdotal characterizations of this kind are common. An example: "To repeat, the goal of welfare programs should be to help needy people help themselves. Instead, Congress has devised a system that traps society's weakest members in a cycle of misery. Worse, it permeates the rest of society, contributing to class hatred, crime and political unrest." Neal, *supra* note 56, at D1; Hobbes, *supra* note 43, at C1 (describing the author's experiences as a resident of homeless shelters in New York and Minneapolis).

142. The extremes this static tendency takes are perhaps best exemplified by the poor relief bureaucracy and the process to which the poor must submit in order to obtain relief in Los Angeles County, Cal. See Handler, *supra* note 81, at 524-33 (describing byzantine intake and screening procedures). Applying for federal categorical relief is little better. The application for Food Stamps was recently simplified, from 18 pages to 12 pages. And yet, the Secretary of Agriculture (a lawyer), on attempting to complete the form, still found it difficult to understand. Local welfare offices had to hire personnel specifically to help applicants fill in the forms. See *Food Stamp Applications Confusing, Official Says*, TULSA WORLD, June 15, 1993, at A20. The humiliating and difficult process of securing relief has been widely recognized. See, e.g., LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 19 ("[W]orkers complain about the hundreds of rules that are difficult to interpret and require mountains of documentation Recipients say the rules and reporting demands strip them of dignity and stigmatize them as lazy and dishonest."); Simon, *supra* note 13, at 1205-06 (explaining that Massachusetts requires AFDC applicants to produce up to 30 different documents in order to successfully complete the AFDC application).

passivity, this incentive to require the poor to prove their worthiness for relief, serves not only to isolate the neediest poor, but also increases the likelihood that fewer than all of the potentially eligible will take advantage of the system, reducing the overall cost of aid to those who provide it.¹⁴³ In a system which favors any productive alternative to institutional relief, this set up is both natural and good.

The need to provide a means of giving these tests of "eligibility," the need for physical manifestation, for interacting with a separable and identifiable class of people not like the rest of us, creates incentives for localized administration. Local administration, it is believed, tends to simplify the process of discriminating between classes of the needy, eliminating effectively all who do not qualify for aid.¹⁴⁴ Local administration also has some cost con-

143. For instance, in Massachusetts, failure to meet the smallest technical requirements can result in the rejection of the application, forcing the applicant to begin the process again.

For example a letter verifying a child's enrollment at school may be rejected if not signed by the right official or not dated within the appropriate number of days. The workers are encouraged, through training and supervision, to insist on strict compliance with the documentation rules, and they are discouraged from relying on the claimant's undocumented statements even when the rules do not expressly require documentation.

Simon, *supra* note 13, at 1205-06. This habit of welfare workers has been documented in other states as well. See, e.g., VESELY ET AL., *supra* note 96, at 44 (describing how in Milwaukee, Wisconsin, a recipient received an appointment letter two days before a scheduled hearing and was away at the time; when she called in to explain, the welfare worker refused to reschedule, her case was closed and she was required to reapply for assistance); THE MOUNT PLEASANT REPORT, *supra* note 17, at 93 (documenting instances where the caseworkers attended employee parties rather than attend to registered applicants, and where an applicant who had an appointment with a caseworker who was on vacation was not informed that her caseworker was out until a large part of her day was spent waiting).

144. See LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 51 (holding that the cornerstone of a new national strategy for public assistance must be rooted in "long term experimentation through demonstrations that are both community-based and state-sponsored. . . . Throughout American history, the state governments have played a unique role in serving as laboratories for policies that can blend national goals with this community energy and support."); NEW YORK TASK FORCE, *supra* note 23, at 93:

State and local governments tend to be closer and more responsive to communities and individuals than the federal government. They are able to provide a variety of diverse approaches to problems that respond to local needs. The costs of programs that invest in the poor, however, are appropriately borne at least partly at the federal level.

Local administration makes it easier for the providers of relief (taxpayers) to politicize the granting of aid. See Bensinger, *supra* note 9, at 506 (discussing how political pressure from tax-paying citizens affects elected officials in their budgetary decisions regarding

tainment potential. The theory is that local administration is more efficient than administration from afar, since local administrators are closer to local problems, and that local taxpayers are more likely to keep close watch on the munificence of local administrators.¹⁴⁵ Local administration may also reduce the administrative costs of welfare provision by eliminating the need for a large state administrative apparatus.¹⁴⁶

Questions of cost, and of the transfer and allocation of resources, have run through the preceding discussion as a sort of undertone. Let us examine the effect of cost under the static world view more closely. Stasis, when applied to the problem of poverty, has implications for the approach taken with respect to the allocation of societal resources. Since the expenditure of public funds has a necessarily redistributive effect which runs counter to the notion of the rewards of individual productivity, institutional programs of poor relief under a static view will tend to be crafted in a manner that minimizes the cost of providing poor relief to the extent possible.¹⁴⁷ Understand, of course, that the lack of resources, though

several relief programs). This notion has very old roots. See LEONARD, *supra* note 108, at 133 (arguing the nature of the administrative system set up under the Elizabethan Poor Law is representative of the unthinking "thinking" in this respect, where the notion is uncritically accepted that "the relief of the poor is a matter which can only be efficiently administered by men who have a great knowledge of detail. The action of the Privy Council would have had very little effect unless there had been an efficient system of local government."); cf. tenBroek, *supra* note 9, at 257-91 (discussing why administration of relief was kept local in the Elizabethan age).

145. See STEIN, *supra* note 87, at 45 (arguing that local responsibility for relief funding and administration leads to more efficient allocation); Kravit, *supra* note 9, at 140-41 (stating that local officials have "every incentive" to reduce town spending); tenBroek, *supra* note 9, at 262-65 (discussing the Elizabethan system of each locality taking charge of relief for its residents).

146. See *infra* notes 367-89.

147. See tenBroek, *supra* note 9, at 262-65 (discussing measures taken by the Elizabethans to minimize cost of aid to the poor). This notion is by no means confined to late medieval England. See, e.g., Theda Skocpol & John Ikenberry, *The Political Formation of the American Welfare State In Historical and Comparative Perspective*, 6 COM. RES. 87, 124 (1983) (chronicling the development of welfare policy in the United States since the late 19th century and arguing that one of the principal reasons that universal welfare state programs were never institutionalized has been the fear that such programs "might result in politically uncontrollable, easily expandable handouts from the public treasury to masses of individual citizens"); Wayne Green, *Board Kicks Off New Philosophy of Welfare*, TULSA WORLD, Sept. 1, 1992, at A1 ("The state Commission for Human Services . . . started a new era of lean budgets, program reviews and new thinking about welfare that puts taxpayers' concerns at the forefront."); cf. James I. O'Hern, Note, *Aid to Families With Dependent Children and Emergency Assistance: New Jersey's Aid to Homeless Families*, 13 SETON HALL LEGIS. J. 181 (1990) (arguing that having too

quite real, is perhaps more a function of the political limitations society has placed on public expenditure than on the actual inability of any government to raise taxes sufficiently to provide the services. Thus, there may well be no governmental resources because of a political determination that to increase tax burdens would result in (politically) unacceptable distributive effects, and alter the social and economic order of the system. This type of unacceptable action, with its dynamic repercussions, is precisely incomprehensible as a viable alternative for a society subscribing to the static ideal. Thus understood, the driving force of aid distribution is the scarcity of resources—not the needs of the indigents.¹⁴⁸

Eligibility is not the stuff of lofty, principled determinations. Rather, it is largely a function of the manner in which society chooses to recognize poverty from among the infinitely nuanced conditions of poverty.¹⁴⁹ And that is driven, in part, by cost, by the need to minimize the redistributive effects of poor relief. Governmental systems of poor relief concern themselves primarily with limiting the pool of eligible recipients. Determining eligibility will also likely be defined as narrowly as possible, thereby restricting

many agencies administering aid is not effective and that one agency should be given control). The notion of cost containment affects all areas of relief to the poor. It has become especially acute in the area of medical assistance to the indigent. *See, e.g.,* Randall R. Bovbjerg & William G. Kopit, *Coverage and Care for the Medically Indigent: Public and Private Options*, 19 *IND. L. REV.* 857, 896-905 (1986) (comparing the costs and benefits of hospital and insurance-based options for extending care to the medically indigent).

148. This is most clearly illustrated in the contemporary example of states' attempts to ration the availability of health care among the pool of the eligible poor, all of whom are considered deserving. For instance, Florida has attempted to divide its poor into seven ranked categories, each based on status (i.e., the elderly, pregnant women, and infants), and provide health care based on the rankings. *See Florida Plan Would Ration Health Care*, *TULSA WORLD*, Oct. 17, 1992, at A8. Oregon has enacted a similar plan. The need to establish need hierarchies, such as those in Florida and Oregon, are based primarily on the perceived scarcity of resources. Thus, Dr. Leslie Beitsch, the head of Florida's family health services division, stated that "[t]his is not pretty. It's reprehensible and we don't like it. But to ignore it is to do what government has been doing for too long—ignore hard choices." *Id.* A change in administration at the federal level permitted Oregon to proceed with its plan, previously rejected, subject to oversight and direction from the federal government. On March 19, 1993, the federal government granted the state a waiver, allowing Oregon to ration Medicaid services in accordance with the plan which had been rejected by the prior administration in August, 1992. *See Clinton Allows Oregon to Implement Medicaid Health-Care Experiment*, *ASSOCIATED PRESS*, Mar. 19, 1993, available in *LEXIS*, Nexis Library, AP file.

149. *See, e.g.,* STEIN, *supra* note 87, at 5-14 (discussing definitions of poverty and different standards that are used to determine poverty); STEINER, *supra* note 10, at 108-31 (discussing the politics of eligibility in the context of federal categorical aid programs).

aid to the able-bodied, if it is made available at all.¹⁵⁰ Other potentially eligible recipients might be disqualified by requiring each to count the income of family or friends with whom they live or co-habit.¹⁵¹ And, as should be expected, eligibility criteria might tend to focus on concerns which may be race, gender, and ethnicity sensitive.¹⁵²

Cost reduction incentives thus tend to focus on minimizing aid—providing the least amount necessary for maintenance to the smallest number of people. From the perspective of stasis, resources devoted in excess of those necessary to keep the poor from destitution are poorly spent. The goal of poor relief is not to achieve a more equal distribution of wealth to all members of society; embracing such a goal would violate a significant taboo of static paradigm poor relief system building. Finely crafted definitions of income units charged with the obligation of mutual maintenance, usually family units however broadly defined, and the attempt to directly link the indigent and those taxed to support them (i.e., local administration) provide common bases for effecting the cost reductive imperatives of the static view.¹⁵³

Manipulation can thus occur only at the boundaries of the categories created. It involves drawing and redrawing definitional queues. It is as simple as defining eligibility to exclude for aid all persons who are potentially employable,¹⁵⁴ or excluding certain child care support given to families with children.¹⁵⁵ In this manner static systems manifest the tendency to eschew an absolutist definition of need in favor of a political definition.¹⁵⁶ It is politi-

150. See *infra* part V.A.

151. See Bensinger, *supra* note 9, at 514-18 (arguing that several California cases taken together allow courts to determine relief needs independent of personal needs.); see *infra* part V.A.

152. Redistribution is power. Those empowered through redistributive programs, when disproportionality of a group seeking greater power, may tend to make reductions in redistributions as attempts to reduce their power. Sadly, the rhetoric of the debate is rarely framed as starkly. See *supra* notes 118-23 and accompanying text.

153. For the application of this principle in state general assistance programs, see *infra* part V.A.3.

154. For the practical application of this approach, see *infra* part V.A.2.

155. See, e.g., Proposed California Law: The Governmental Accountability and Taxpayer Protection Act of 1992, §§ 6, 7 (rejected Nov. 2, 1992) (prohibiting grant increases to grant recipients who bear children while receiving aid); see also Backer, *supra* note 20, at part V.B (analyzing California's system in the larger context of analyzing the limits of the static system).

156. See STEINER, *supra* note 10, at 108-75 (explaining the political reasons behind aid programs and contending the current stability in these programs are due more to lack of

cal in the sense that the amount of resources society can extract from the productive determines the broadness (or narrowness) of the definitions of disability (worthy of long-term, open-handed aid) and others (those who really do not need substantial or long-term state aid and with whom we can be brusque). The underlying work imperative of the static view also manifests itself in political terms in an acceptance of the concept that "better" systems err on the side of finding that the potential recipient is able to work. Thus, a person unable to walk might still be fit for work as a typist.¹⁵⁷ We should expect the static poor relief system to create a broader definition of capacity for work.¹⁵⁸ Obviously enough, the broader the definition of incapacity, the larger the aggregate obligation of the state to the members thereof.¹⁵⁹ Since the federal categorical

innovations resulting from lack of access to political groups than to general approval of the programs); Liebman, *supra* note 119, at 855-67 (discussing the reasoning behind current Social Security Income definitions of "disabled" and "on welfare"); *cf. supra* text accompanying notes 87-91 (discussing how idleness implies criminality, so 20th century politics chose the family to reduce both).

157. "Persons with physical disabilities hold down jobs of almost every description, and many more could if more were done to remove barriers to participation." NEW YORK TASK FORCE, *supra* note 23, at 85. The federal government has attempted to create programs to induce the partially disabled to work. See Plan for Achieving Self-Support (PASS), Pub. L. No. 92-603, Title III, § 301, 86 Stat. 1329 (1972) (codified as amended at 42 U.S.C. §§ 1382a(b), 1382a, 1382b(a) (1988 & Supp. II 1990)); Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 20 C.F.R. § 416.1180 (1992) (explaining that one objective of SSI is to induce disabled persons to be self-supporting); SSA Program Circular No. 05-90-OSSI (Sept. 28, 1990). PASS permits a person to exclude certain income and resources otherwise counted in determining Supplemental Security Income Program eligibility, but only to the extent such income or resources are used to achieve vocational goals. For a practical discussion of how the PASS program works, see Sheldon, *supra* note 81.

158. Thus, for example, when examining the problem of work and the disabled, the New York State Task Force on Poverty and Welfare expressed its belief that having a disability is different from not being able to work. It recommended that eligibility for disability payments be more finely tuned to take into account the degree of disability of the recipient. "In other words, if people are too disabled to continue in their present occupation but could perform another with training and assistance, then support should be provided that enables such persons to make the transition." NEW YORK TASK FORCE, *supra* note 23, at 86.

159. The Reagan administration understood this concept quite well. As a result, that administration fought a long battle to narrow the definition of incapacity in connection with federally administered categorical aid programs in support of the incapacitated disabled population through the Supplemental Security Income Program. Thus, in order to be eligible for SSI disability payments, a person must be so disabled that he or she cannot do any job that exists in the economy, even if the job is not available in the area or the person would have to be completely retrained to do it. See 42 U.S.C. §§ 1381-1383 (1988 & Supp. II 1990) (discussing qualifications and requirements for individuals to be eligible for aid). *But see* NEW YORK TASK FORCE, *supra* note 23, at 85-86 (advocating

aid programs cover certain classes of the incapacitated, we might also expect states seeking to minimize expenditures to conform their definitions of incapacity to the federal definition, and in that way pass along a substantial cost of state poor relief programs.

Cost minimization has several other consequences. First, voluntary charitable programs conducted by private institutions or other alternative sources of private aid are encouraged. Private charity thus becomes an integral part of any static program of poor relief, whether administered under conservative¹⁶⁰ or more liberal regimes.¹⁶¹ At the heart of the static system's integration of charity are a number of statutes and programs designed to facilitate the giving of charity. In the United States, the most potent of these include a favorable tax policy, primarily the charitable deduc-

expanded coverage to the temporarily disabled including those retraining for other jobs). In addition, the Reagan administration attempted to shrink the size of the eligible population administratively by narrowly interpreting the eligibility criteria for SSI and vigorously prosecuting all cases brought for review. The result was an attempt to cut the aid of about 485,000 claimants. And 30,000 lawsuits were brought by claimants for wrongful denial of benefits. In the ensuing political storm, the Reagan administration abandoned this approach. This chapter in the administration of SSI is described in MEAD, *supra* note 26, at 134; *see also* Bovbjerg & Kopit, *supra* note 147 (discussing why there was a rise in the number of uninsured people during Reagan's term as President); Liebman, *supra* note 119 (examining the history of SSI and criticizing the current status of the law); Perlin, *supra* note 9 (discussing homelessness and its causes); Michael Diehl, Comment, *Screening Out Worthy Social Security Disability Claimants and Its Effects on Homelessness*, 45 U. MIAMI L. REV. 617 (1991) (explaining that beginning in 1978 the Department of Health and Human Services instituted a more restrictive set of criteria, thus denying benefits to many who would have received aid under old tests).

160. For example, former President Bush, in accepting the Republican Party nomination for President in 1988, characterized community-based private charitable efforts as the backbone of the nation's poor relief efforts. "[A] brilliant diversity spread like stars, like a thousand points of light in a broad and peaceful sky. Does government have a place? Yes. Government is part of the nation of communities — not the whole, just a part." Bush, *supra* note 99, at 605 F1.

The Reagan Administration had earlier worked hard to popularize private charitable giving as a significant means of fighting poverty. *See, e.g.*, LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 43-47 (demonstrating the manner in which private charitable and volunteer efforts have been more effective than institutional relief). Modern scholars have not ignored the political urgings for a return to a system of poor relief based on private charitable efforts. Thus, for instance, Nathan Glazer, has advocated refocusing welfare to concentrate more on traditional sources of help such as community charitable organizations and the like. GLAZER, *supra* note 67, at 128-39.

161. Thus, even for the builders of the programs leading to the Great Society, private charity was welcomed as an important component of the welfare state. *See* SARAH C. CARY, COMM'N PRIVATE PHILANTHROPY PUB. NEEDS, U.S. TREASURY DEPT., *Philanthropy and the Powerless*, in 2 RESEARCH PAPERS 657-92 (1977) [hereinafter COMM'N PRIVATE PHILANTHROPY PUB. NEEDS].

tion,¹⁶² and the exclusion from income of much of the monies received by charitable organizations.¹⁶³ Other methods are also available, including Good Samaritan provisions.¹⁶⁴ These provisions have afforded substantial benefits to the donor class.¹⁶⁵ Such types of governmental subsidies are not unique to the twentieth century in this country. In creating the Tudor system of poor relief in sixteenth century England, the government was quite concerned about the need to promote and facilitate the operation of private charitable foundations.¹⁶⁶ Private giving has none of the coercive redistributive effects of governmental programs, and complements the notion that the social and economic system is unchangeable.¹⁶⁷ Private giving is least likely to threaten the social order

162. I.R.C. § 170 (1988 & Supp. II 1990).

163. I.R.C. § 501 (1988 & Supp. II 1990).

164. See, e.g., N.J. STAT. ANN. § 2A:53A-7 (West 1993) (exempting charitable organizations from damages for negligence to its beneficiaries); Charitable Immunity and Liability Act of 1987, TEX. CIV. PRAC. & REM. CODE ANN. § 84 (West Supp. 1995).

165. For instance, it was recently estimated that the charitable deduction results in a loss of about \$3 billion in foregone tax revenues. Christopher Edley, Jr., *Season's Seethings: I am Not a Point of Light*, LEGAL TIMES, Dec. 18, 1989, at 26.

166. See tenBroek, *supra* note 9, at 259-60 (discussing the encouragement of charitable foundations and the oversight by the court to ensure proper use of these funds).

167. This notion has generated some support, and even greater interest, among economists. Mainstream economic theory hypothesizes that governmental transfers, in the form of institutional poor relief, has two effects: a "substitution effect," and an "income effect." With respect to the former, the hypothesis holds that, assuming the combination of private and public transfers in the aggregate optimally meet the aggregate social need for poor relief, increasing governmental transfers lowers the social need for additional contributions, everything else being equal, thereby encouraging the substitution of public goods for private charitable transfers. The "income effect" is fairly intuitive; the more the government takes from a person in the form of taxes, the lower that person's disposable income and the less able the person will be to contribute to charity. Thus as taxes are raised to meet public poor relief obligations, the level of private giving should decrease. See Burton A. Abrams & Mark D. Schitz, *The "Crowding-Out" Effect of Governmental Transfers on Private Charitable Contributions*, 33 PUB. CHOICE 29, 30-31 (1978) (explaining that increases in government welfare spending will lead private sector to substitute goods for charitable donations).

As a result, it would seem that the lower governmental expenditures on poor relief, the larger the amount of voluntary private charitable transfers available for distribution to the poor. This general notion has been formalized as three alternative models: (i) the Ultrarational Model (arguing that there exists a perfect correlation between governmental transfers and private giving—for every additional dollar of public aid, private aid should decrease by a dollar, see Paul A. David & John L. Scadding, *Private Savings; Ultrarationality, Aggregation, and "Denison's Law,"* 82 J. POL. ECON. 225 (1974) (occurring under full employment)); (ii) the Interdependent Utility Functions Model (arguing that the value of contribution is based on the perceived well-being of the recipients, to the extent that increased governmental transfers increase the well-being of the recipients, the utility of private contributions decrease and an actual decrease in contributions

or to empower the poor—"He who gives, dominates. The theory of the donor works not only at the level of individuals and societies, but also of civilizations."¹⁶⁸ Indeed, private charity is viewed from some theoretical perspectives as conforming poor relief to the requirements of the economic status quo.¹⁶⁹

The encouragement of private charitable efforts might be indirect—for example, requiring by statute or regulation that the applicant be referred to local non-governmental charitable institutions,¹⁷⁰ or referring in statutes, such as that of Texas, to the role

should result, *see* Abrams & Schitz, *supra*, at 31-32); and (iii) the "Better-to-Give-Than-To-Receive" Model (arguing that the rate of governmental contributions or the well-being of the targeted recipients are irrelevant to the determination of the desire to give; satisfaction is derived from the act itself or some other motive, so that, governmental transfers have little crowding out effect on the level of private giving). Abrams and Schitz have argued, on the basis of their study, that private charitable giving has some positive effect on the level of private giving, but that the effect is less than one for one. *Id.*

168. BRAUDEL, *supra* note 108, at 826. On charity and disempowerment. *see, e.g.,* Alfieri, *supra* note 28 (arguing that private giving does not empower the poor). *But see* COMM'N PRIVATE PHILANTHROPY PUB. NEEDS, *supra* note 161, at 1109 (explaining the manner in which private philanthropic activity might well provide a vehicle for empowering minority groups, the poor, the institutionalized, and other groups considered powerless in American society).

Some have argued, though, that private charity is, in a democratic society, profoundly anti-democratic. To the extent that the wealthy control a significant portion of the funds used to alleviate the plight of the poor, the funds will be used only as that portion of the population directs. Thus, voluntary charity substitutes decision making and the preferences of the donor class, usually small and wealthy, for the collective preferences of the nation, at least as represented in the nation's legislative bodies. GANS, *supra* note 58, at 264-68 (discussing the functions the poor serve in society); *see also* Edley, *supra* note 165, at 28 (discussing how individual giving influences public allotment of aid).

169. Thus, the value of private non-profit entities has been explored from the perspective of its utility for providing the best value for the money to the recipients. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980) (discussing advantages and disadvantages of nonprofit organizations as compared to their for-profit counterparts). *But see* Ira M. Ellman, *Another Theory of Nonprofit Corporations*, 80 MICH. L. REV. 999 (1982) (arguing that Hansmann's theory is flawed because it fails to distinguish between different types of non-profit organizations while proposing a framework to correct the theory). Such theories neatly tie private charity into the overall economic ordering of things, and confirm the more primitively felt Tudor notion that cost efficiencies could be maximized by resorting to private charities taking on some of the burdens of institutional relief. On definitions of a charitable organization, *see, e.g.,* Burton A. Weisbrod, *Private Goods, Collective Goods: The Role of the Non-Profit Sector, in THE ECONOMICS OF NONPROPRIETARY ORGANIZATIONS* 139 (Kenneth W. Clarkson et al. eds., 1980); Laura B. Chisholm & Dennis R. Young, *Introduction*, 39 CASE W. RES. L. REV. 653 (1988) (discussing authors' notion of the nature of charity).

170. Thus, for example, Michael Espy, a Secretary of Agriculture during the Clinton Administration, discovered when he sought to apply for Food Stamps in West Virginia on June 14, 1993, that, depending on his employment status, it would take from three days to one month to "process" his Food Stamp application. In the meantime, the local poor

of state government (and its funds) as the backup of private and local governmental efforts, to be relied on only in extreme conditions.¹⁷¹ More likely, the approach will be direct. Maintenance of the poor will be privatized, for example, by shifting the responsibility for job training and creation to the private sector.¹⁷² More financially strapped jurisdictions might well privatize the entire burden of relieving certain portions of the population in the belief that the reduction in governmental expenditures will be made up by private voluntary contributions.¹⁷³

Encouraging charity at the end of the twentieth century is exceedingly easy. It takes advantage of millennia-old religious teachings and social habits respecting the obligation of those with income or wealth in excess of their needs to make at least a portion of this excess available for poor relief.¹⁷⁴ At least in Western Europe, the notion of private charity has deep roots, grounded in the religious teachings of Christianity.¹⁷⁵ And yet, private charity is not necessarily an indispensable component of poor relief. That it remains so attests to the strength of our adherence to the "rules"

relief office was authorized to provide him with a "food voucher at a local charity to help tide him over." *Food Stamp Applications Confusing, Official Says*, TULSA WORLD, June 15, 1993, at A20.

171. See TEX. HUM. RES. CODE ANN. § 3401 (West 1990 & Supp. 1995).

172. Former President Bush's program for the revitalization of the federal welfare programs—the so-called "thousand points of light" campaign—is a good example of the trend in this respect. Alan Houseman argues that a significant trend that developed during the 1980s was the increased role of the private sector through privatization of governmental services and through the creation of a number of public-private joint ventures. Alan W. Houseman, *The Vitality of Goldberg v. Kelly to Welfare Advocacy in the 1990s*, 56 BROOK. L. REV. 831, 839 (1990). Nathan Glazer has suggested that the best means to deal with social problems, such as poverty, is to "think of ways to meet needs with a lesser degree of dependence on public action." GLAZER, *supra* note 67, at 139. This need is driven in large part by the perceived necessity of cost containment and has given rise to interest in privatization of social services, and reliance on private philanthropic efforts. *Id.* at 125-26, 139; see also Bovbjerg & Kopit, *supra* note 147, at 892-93 (discussing the limitations of privatizing health care to the medical indigent); Weinberg, *supra* note 27, at 431-32 (arguing that the workfare requirements imposed under the Family Support Act of 1988 effectively privatizes the responsibility to assist the indigent).

173. See, e.g., Abrams & Schitz, *supra* note 167, at 36 (arguing that increased governmental expenditures crowd out, at least to some extent, private charitable giving).

174. See, e.g., *infra* part IV.

175. TIERNEY, *supra* note 36, at 44-67; TRATNER, *supra* note 6, at 3-6; see also *infra* part IV.A. It is not surprising, then, that, as a recent Gallop Organization study revealed, membership in religious organizations seems to be related to the tendency to donate to charity or volunteer in charitable endeavors. Thus, 78% of members of religious organizations reported donations to charity, 58% stated they volunteered, and 40% reported that they gave both to religious institutions and other charities. Anita Manning, *Charitable Spirit Survives Hard Times*, USA TODAY, Oct. 16, 1992, at D1.

and assumptions of the static paradigm which describe the inclination of static-oriented governmental institutions to respond to the needs of the poor in this manner.¹⁷⁶

The poor, themselves, may contribute to cost minimization. A characteristic of the static approach is to impose work requirements on the recipients of aid—not as a means of reforming the recipients or dealing with general commercial or labor policy, but purely as a means of reducing costs.¹⁷⁷ This dovetails nicely with the static notion of the need to work for one's keep. A significant cost reduction can also be effected by requiring family members to be responsible for the maintenance of each other—principally parents and children, including illegitimate children.¹⁷⁸ What makes this

176. Indeed, where one hypothesizes a non-static system, one might well argue that private charity becomes inefficient and, ultimately, superfluous. *See, e.g.*, Abrams & Schitz, *supra* note 167, at 37 (discussing how the crowding out effect of private charitable contributions increased government welfare spending); Edley, *supra* note 165, at 28 (discussing ramifications of private giving on organizations receiving the donations). *But see* COMM'N PRIVATE PHILANTHROPY PUB. NEEDS, *supra* note 161, at 662-75 (explaining the increasing proportion of public funding of social welfare services and the necessity for private social agencies to have a variety of funding sources to avoid dependency on federal funding and federal oversight); GLAZER, *supra* note 67, at 118-39 (arguing that the best way to deal with poverty and other social ills is to strengthen traditional charitable and voluntary endeavors). *Cf.* GANS, *supra* note 58, at 267 (arguing that among the many important functions of poverty in American society is that of helping "to keep philanthropy busy, thus justifying its continued existence. . . . [I]ndeed, some sectors of the upper class depend on the poor to demonstrate their superiority over other elites who devote themselves solely to making money.").

177. *See* tenBroek, *supra* note 9, at 276-77 (reviewing history of labor policies under the Tudors and how these policies related to the welfare recipients).

178. Currently, state law almost uniformly imposes a duty on parents to support their minor children. *See, e.g.*, FLA. STAT. ANN. § 856.04 (West 1993) (requiring parents to support their children and/or each other or face prosecution); N.J. STAT. ANN. § 2C:24-5 (West 1993) (same); OKLA. STAT. ANN. tit. 10, § 4 (West 1991) ("The parent entitled to the custody of a child must give him support and education suitable to his circumstances."); TEX. FAM. CODE ANN. § 4.02 (West 1990 & Supp. 1995) (same).

For a discussion of the development of the general support obligation, at least as between parent and child, and its relationship to the development of the support obligations imposed under poor relief statutes, see tenBroek, *supra* note 9, at 287-91, 298-317 (tracing familial relationships and the resulting economic consequences in both feudal England and early New York common law and statutes). For a general discussion of the history of the derivation of legal obligations and expected roles between family members, see Minow, *supra* note 17, at 827-85. For discussion of issues relating to support obligations, see, e.g., Braveman, *supra* note 21, at 579-85 (describing the nature of poverty among children and arguing that state governments ought to have an obligation to make available minimally adequate assistance to poor children); Judith G. McMullen, *Family Support of the Disabled: A Legislative Proposal to Create Incentives to Support Disabled Family Members*, 23 U. MICH. J.L. REF. 439 (1990) (arguing that current eligibility standards provide a disincentive to pay partial support to families who cannot afford to pay

concept quite effective is the power of the state to define, for the purpose of family responsibility, the term "family." It likely includes parents and children, but might also include grandparents and grandchildren, aunts and uncles, nieces and nephews, by blood or marriage, and cousins.¹⁷⁹ Indeed, the obligations of certain family members to support each other has been legally recognized in the poor law of twenty-two states.¹⁸⁰ The obligations extend not only to current support, but also to reimbursing the state for prior support.¹⁸¹

The importance of cost minimization in the static scheme of things also permits a separation of the determination of minimal needs from any actual funding decision. The focus of the static system is on the ability or willingness of the state to pay rather than on meeting the perceived needs of the eligible population. Thus, for instance, while the state may determine that a certain amount of money is necessary to maintain a family of four in a certain place, it may choose to provide only some percentage of that amount through its assistance programs.¹⁸² AFDC is notorious

the full cost of support). On the origins of the obligation to support minor children, particularly fathers' support of bastards, see tenBroek, *supra* note 9, at 284-86 (discussing liability of both parents for financial support of bastard children). For modern commentary on the necessity for such obligation and the efficacy of its enforcement, see Donald M. Payne, *The Abandoned Infants Assistance Act: Improvements to Help "Boarder Babies" and Their Families*, 16 SETON HALL LEGIS. J. 455 (1992) (discussing New Jersey's enactment of legislation to help reunite "Border Babies" with their families); Charles D. Creech, Note, *Legislating Responsibility: North Carolina's New Child Support Enforcement Act*, 65 N.C. L. REV. 1354 (1987) (outlining the problems of enforcing parental obligations to children and North Carolina's new approach to the problem).

Jacobus tenBroek argues that the notion of primary family responsibility to maintain destitute relatives was part of the state's effort to minimize the public burden for support of the poor, especially the impotent poor who could not be put to work. tenBroek, *supra* note 9, at 285-86. Stefan Riesenfeld notes that the rules concerning primary family responsibility were first created after the powers of ecclesiastical law and the jurisdiction of the ecclesiastical courts in these matters were superseded by those of the monarchy. Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 199 (1955). There is much in the observations of both. Certainly, the Canon Law incorporated a rudimentary form of family responsibility drawn from the categories of deserving poor first developed by Ambrose and adopted by Canon Lawyers. See TIERNEY, *supra* note 36, at 56-57. This problem remains one for state and federal systems of poor relief. See, e.g., Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty to Support And Right To Control Their Children*, 69 OR. L. REV. 689 (1990) (discussing child support duties, control rights, and parental autonomy); Hirsch, *supra* note 17 (discussing the aid to families with dependent children program rules and its imposition of more extensive family obligations on the poor).

179. See *infra* part V.A.

180. *Id.*

181. *Id.*

182. This occurs even when the program is designed to take into account the varying

for recognizing the poverty line as a measure of poverty and yet for permitting the states to establish maximum grants that fail to raise eligible families to this minimum level.¹⁸³ Making up the difference between the amounts funded and the amounts necessary to meet the anticipated need would fall to the private sector. Perhaps the poor will find some other way to make ends meet, adversity being the mother of invention;¹⁸⁴ in any case, that is not a concern of static system builders.

This article has talked about what a static system is and what it is supposed to look like when implemented. To augment this description it should also say a few words about what it is not.¹⁸⁵ At the core of what a static system is not, predictably enough, is the notion of change, which is fundamentally a dynamic concept. The distinguishing feature of a dynamic approach is its acceptance of the notion that as a result of intervention, the problem of poverty, destitution and the like can be eradicated.¹⁸⁶

cost of living in different parts of the state. Thus, for instance, when California attempted to reform the manner in which federal categorical aid is distributed in that state to account for the fact that it is more expensive to live in the urban areas of the state, benefit levels were still set well below the actual cost of living in certain areas. Thus, while average fair market rent in Orange County was \$764.00 per month, total monthly benefits available in Orange County was set at \$633.00. While the poor obviously would rent at the lower end of the market, it is hard to believe that the average aid recipient will not spend more than 50% of his allotted benefit solely for housing, especially as the number of children in the family increases. See Virginia Ellis, *Senate OKs Regional Rates For Welfare*, L.A. TIMES, Aug. 30, 1992, at A1; cf. HANDLER & HOLLINGSWORTH, *supra* note 55, at 89-102 (surveying aid levels and whether recipients feel these are adequate amounts).

183. Daan Braveman highlighted, in 1987, the difference between the poverty line and the maximum grants set by the various states. Braveman, *supra* note 21, at 595-614.

184. This, one might argue, is at a fundamental level the ultimate position that people like Charles Murray would take. See MURRAY, *supra* note 3, at 227-28 (advocating elimination of all welfare programs and outlining the possible effects of this action). Whether or not adversity is the best means of reducing the incidence of poverty is another question. For directly contrary views, of which there are many proponents taking a variety of positions and offering a variety of solutions to currently perceived problems of welfare state implementation, compare, FURNISS & TILTON, *supra* note 23, at 183-99 (suggesting "negative tax rate" or "incremental reform" as a means to provide incentive for the poor to escape poverty while at the same time ensuring them at least a minimum income) with MARMOR ET AL., *supra* note 6, at 114-27 (supporting the Family Support Act of 1988 as moving in the right direction).

185. For a fuller treatment, see Backer, *supra* note 20, at part IV.A.

186. Commentators have, over the years, urged or argued for the adoption of this type of approach to solve the problem of American poverty. See, e.g., HAVEMAN, *supra* note 26, at 44-50 (describing how the equality-with-efficiency view of reform will move toward abolishing poverty); LAMPMAN, *supra* note 37, at 135-45 (describing three strategies to eliminate poverty).

A dynamic approach need not necessarily affect all potential recipients of aid—its concern is principally with unemployed, able-bodied people who are capable of becoming self-sustaining; those who are incapable of employment are relegated to mere maintenance under more traditional models, or not thought of much at all.¹⁸⁷

At its core, the dynamic approach clearly distinguishes itself from traditional approaches by embracing the need for fundamental social change. The fundamental goal of the dynamic approach is to make the poor disappear, which necessarily requires the poor not to be poor. The easiest way to achieve this is to require the better-off to support their less-well-off brethren through one or more forms of income redistribution. Thus, negative income tax proposals,¹⁸⁸ increasing income transfers or entitlements based on income levels and related proposals¹⁸⁹ are all fundamentally dynamic.

But dynamic proposals are not necessarily limited to the problems of relative poverty, which can be corrected by income redistribution. Such programs also tend to be universalist—tied to various programs calling for the restructuring of society, including the

187. There is, after all, little that society can require of people incapable of retaining any kind of employment. Under a dynamic approach, the notion of need based on condition—lack of a job, disability, age, and the like—becomes the foundation for the creation of programs which have the effect of eliminating the possibility for the condition. Thus, for instance, rather than provide maintenance for the respectable poor—old age, physical disability, school enrollment, and steady work that does not pay enough to cover one's needs—a family security program could be developed, providing benefits for all members of the family in a way that reinforces "fundamental values such as rewards for work, opportunities for individual betterment, and family and community responsibility for the care of children and other vulnerable people." Skocpol, *supra* note 28, at 429.

188. Proposals for programs of income redistribution were first seriously considered in the 1960s with the introduction of proposals for a negative income tax, which basically were meant to provide income supplements unrestricted as to use. See, e.g., Sheldon S. Cohen, *Administrative Aspects of a Negative Income Tax*, 117 U. PA. L. REV. 678, 678-98 (1969); Larson, *supra* note 78, at 356 (describing the major conceptual problems of the early negative income tax proposals). More current proposals stress the creation of guaranteed minimum income programs as part of a general strategy for the elimination of poverty. Thus, for instance, Robert Haveman's program includes the creation of a guaranteed minimum income program, a national child support program, employment subsidies, and capital accounts for youth to be used for education or training. HAVEMAN, *supra* note 26, at 149-87; see also Larson, *supra* note 78, at 359-61 (discussing Haveman's proposal).

189. See, e.g., DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 231-43 (1988) (offering suggestions for improving poor relief systems); WILSON, *supra* note 42 (advocating the integration of a comprehensive labor policy for all classes and the melding of social and economic classes); Piven & Cloward, *supra* note 26, at 99-100 (advocating the creation of a comprehensive national system of social provision for the poor).

redistribution of political and economic power.¹⁹⁰ Such a restructuring is needed because poverty is the inevitable and ineradicable by-product of our society as currently organized.¹⁹¹

Thus, the fundamental assumptions and world-view of the static paradigm give rise to a complex system of rules for crafting and implementing any system of poor relief. The system severely constrains the options for devising such programs of poor relief. Our cultural and societal preconceptions unconsciously dictate the form of our approaches to our relief of the poor. Within the acceptable modes of system construction, however, the theory permits a substantial amount of discretion. The discretion, however, is one of detail, not of fundamentals. We can spend an eternity arguing about the most effective manner for "ending the dependency" of the destitute. There is, however, virtually no serious discussion of the assumption that people must work. The complex picture of theoretical poor relief derived from the static paradigm does not necessarily translate into a complex and ever-mutating system of poor relief. Quite the contrary, examining the most significant features of Anglo-American poor relief methodologies from the Norman Conquest in 1066 through the present reveals that the fundamentals of contemporary American poor relief systems are only highly sophisticated versions of ancient European poor relief.

IV. THE GENERAL THEORY AND ARCHETYPAL ANGLO-AMERICAN POOR RELIEF SYSTEMS

In this part, I test the explanatory and predictive potential of the theory developed in part III by analyzing Anglo-American poor relief systems. This analysis will focus on the development of Anglo-American systems from their origins in the medieval system of ecclesiastical relief to their modern manifestation as state general assistance systems, which are the only catch-all governmental sys-

190. See, e.g., PIVEN & CLOWARD, *supra* note 20, at 345-46 (advocating reforms in economic policy that would "lead[] to full employment at decent wages"); see also Alfieri, *supra* note 28, at 695-711 (advocating dialogues between poverty lawyers and the poor so that poverty can be abolished); Woodson, *supra* note 17 (discussing how Blacks viewed the war on poverty as an extension of the civil rights movement). But see FRANCES F. PIVEN & RICHARD A. CLOWARD, *THE NEW CLASS WAR* (1982) (taking the position that the welfare state is here to stay and, with it, the transformation of the American political economy; this is in effect the less desirable alternative they recognized in PIVEN & CLOWARD, *supra* note 20, at 345-48).

191. See, e.g., PIVEN & CLOWARD, *supra* note 20; Piven & Cloward, *supra* note 26, at 45-108.

tems available in America.¹⁹²

American general assistance programs evidence the current iteration of traditional, and perhaps archetypal, Western European systems of poor relief. The Western European systems were adopted essentially unchanged in purpose, from the Elizabethan Poor Laws.¹⁹³ The Elizabethan Poor Laws, in turn, arose in substantial part, from the ecclesiastical system of poor relief operating in Britain until the sixteenth century Protestant Reformation. The historical antecedents of American general assistance provisions are first briefly described, and each then is examined in light of the model set forth in part III.

A. Ecclesiastical Poor Relief

The theoretical structure of medieval poor relief¹⁹⁴ under Canon Law¹⁹⁵ has been the subject of a number of studies. An under-

192. Actually, private voluntary charity is the most ancient of the systems of poor relief surviving in the United States today. Its origins can be traced back to the rules and concepts codified in the Canon Law. Voluntary charity is shaped, to a large extent, by the need to provide a measure of satisfaction to the donor. This, however, is not one of the primary articulated reasons for private voluntary charity. Instead such reasons include: fostering innovation in the creation and implementation of poor relief programs; providing recipients with a choice between private and public assistance; encouraging competition, efficiency and cost control; providing a means to meet emergency needs in a more flexible manner than that available from public sources of relief; and promoting increased responsiveness to the problems of the poor. See Cohen, *supra* note 4, at 657-62 (describing the purposes of private charity). At least since the 17th century, private voluntary charity has also been shaped by government efforts to foster private giving as a means of reducing the cost of poor relief. Regulation, to the extent it has existed, is aimed at assuring that charitable aid is not misapplied. See Richard Steinberg, *Economic Perspectives on Regulation of Charitable Solicitation*, 39 CASE W. RES. L. REV. 775, 775-79 (1989) (discussing the need to regulate against fraudulent solicitations for charitable endeavors). Regulation also seeks to assure that private and public charitable works are interrelated administratively and financially (public matching funds for "demonstration projects" complying with governmentally established guidelines in the area of job training, education, and social services for the poor). See Winston, *supra* note 4, at 687-93 (discussing the benefits and detriments of the financial entanglement of private and public charitable efforts). Finally, regulation seeks to assure that private charitable activities are encouraged in areas covered by public responsibility, such as poor relief. Thus, for example, tax rules provide detailed regulation respecting the types of charitable foundations which are to be tax advantaged and the type of giving which is to be encouraged.

193. An Acte for the Reliefe of the Poore, 1601, 43 Eliz., ch. 2 (Eng.). See *infra* part IV.B.

194. Tierney's work, TIERNEY, *supra* note 36, remains the most useful treatment of medieval poor relief. E.M. Leonard's now nearly century old study of English poor relief, LEONARD, *supra* note 108, also remains timely. This Article draws extensively from both for the factual material which follows.

195. The Roman Catholic Church in the period after the fall of the Western Roman Empire, and at least until the 16th century, asserted jurisdiction over the care and protec-

standing of the structure of medieval European poor relief is essential for appreciating both the age and strength of the static paradigm and the major features of modern poor relief which devolve from that paradigm. It is in the crafting of poor relief during this period that the static paradigm first found its modern expression was created.

Unsophisticated by contemporary standards, especially with respect to implementation, ecclesiastical poor relief does encompass a complete system not dissimilar to our own. Canon Law accepted, as a fundamental part of the divinely ordained system, the existing structure of property and social relationships. This system was based on the ownership of property and was hierarchical in nature. Every person was thought to have a well-defined place in society, a place which was defined in terms of income, social status, and other expectations. Different styles of living were appropriate for people holding different ranks within society, and, as such, people occupying different rungs of the hierarchy were expected to make do with different amounts.¹⁹⁶ There was, though, little social or economic mobility in medieval society. Rather, one held one's place within the hierarchy with little hope of upward mobility.¹⁹⁷ The notion of poverty, therefore, was not restricted to a concern with absolute need, but also encompassed notions of unacceptable relative deprivation as well.¹⁹⁸ Canon Law accepted unquestion-

tion of the poor. Such matters were to be administered by the ecclesiastical government—parish priests, bishops, and the hierarchy of the church ultimately leading to the Pope in Rome—and regulated by ecclesiastical law. Poor law, as such, prior to the Reformation, was a matter of church law. Church law, in turn, was contained in the *Corpus Iuris Canonici*, which are made up of GRATIAN'S DECRETUM (c. 1140) and subsequent works containing church law appearing after 1140 through roughly the end of the 14th century. This was the law of the church, which imposed obligations on the faithful, and was applicable to the resolution of disputes governed thereby and over which the church claimed jurisdiction. For a short history of the Canon Law, see R.C. MORTIMER, WESTERN CANON LAW 40-55 (1953); TIERNEY, *supra* note 36, at 6-9.

196. See THOMAS AQUINAS, THE SUMMA THEOLOGICA OF SAINT THOMAS AQUINAS II-III, at 546 (Fathers of the English Dominican Province trans., 1941) (revised Daniel J. Sullivan, 1952) ("Yet it would be inordinate to deprive oneself of one's own in order to give to others to such an extent that the remainder would be insufficient for one to live in keeping with one's station and the ordinary occurrences of life; for no man ought to live unbecomingly.").

197. Of course, movement between the social classes was not completely frozen, though it may appear so from the perspective of late 20th century America. Generally, such social mobility was initiated from above, by act of king or noble. See Karl Bosl, *On Social Mobility in Medieval Society: Service, Freedom, and Freedom of Movement as a Means of Social Ascent*, in EARLY MEDIEVAL SOCIETY 87, 88 (Sylvia L. Trupp ed. & trans., 1967) (1964).

198. Thomas Aquinas defined need in a manner anticipating modern notions of relative

ingly Ambrose's notion that poverty was not an absolute concept, but was determined, in part on the social and economic station of the person in need of aid.¹⁹⁹ Each person was expected to live in a style in accordance with his or her rank and status in life. Therefore, it was inconceivable that a Bishop would be required to live in the style of a parish priest, or that a noble be reduced to the living standard of a serf. Thus, quoting Ambrose, Thomas Aquinas suggests that: "[W]hen you give an alms to a man, you should take into consideration his age and his weakness; and sometimes the shame which proclaims his good birth; and again that perhaps he has fallen from riches to indigence through no fault of his own."²⁰⁰

The benefits of status and property, however, carried with them a spiritual and quasi-legal duty of charity.²⁰¹ Canon Law established not only a duty to give charity, but also regulated the manner in which charity was to be given.²⁰² While a person was not bound to deprive himself of his own necessities in order to help another in need, or even periodically determine and donate for charitable purposes whatever "superfluities"²⁰³ they possessed, in a

deprivation. Thus:

[A] thing is said to be necessary, if a man cannot without it live in keeping with the condition or state either of his own person or the persons of whom he has charge. The 'necessary' considered thus is not an invariable quantity, for one might add much more to a man's property, and yet not go beyond what he needs in this way, or one might take much from him, and he would still have sufficient for the decencies of life in keeping with his own position.

AQUINAS, *supra* note 196, at 545.

199. See TIERNEY, *supra* note 36, at 56-57 (discussing the relative deprivation of the old and sick and those who fell from riches to want).

200. AQUINAS, *supra* note 196, at 550 (quoting AMBROSE, *DE OFFICIIS*, reprinted in 16 *PATROLOGIAE CURSUS COMPLETUS*; AMBROSE OPERA 74 (Series Latina, J.P. Migne ed., Paris 1844-55)).

201. TIERNEY, *supra* note 36, at 33-35; see also AQUINAS, *supra* note 196, at 544-45 (arguing that giving alms from out of surplus is a precept; however, the failure to give alms is a mortal sin when (i) the recipient is in evident need and is unlikely to be relieved otherwise, and (ii) the giver knowingly refuses to give of his superfluities).

202. See Jean-Louis Roch, *Le jeu de l'aumône au Moyen Age*, in 44 *ANNALES: ÉCONOMIES, SOCIÉTÉS, CIVILISATIONS* 505, 506-11 (1989) (stating that charity was to be offered without insulting or disparaging the recipient, with humility and without mockery, and in a timely manner).

203. Superfluities or surplus were, in the Canon Law, a relative term, generally referring to wealth in excess of that necessary for a person to maintain his social status and social and economic obligations to his superiors. AQUINAS, *supra* note 196, at 544 ("On the part of the giver, it must be noted that he should give of his surplus."); TIERNEY, *supra* note 36, at 34-35 (emphasizing that men could retain superfluities provided others were not in want).

time of necessity all persons were expected to share their superfluous wealth with those in need.²⁰⁴ What constituted superfluities, and the determination of when conditions gave rise to a state of need were matters largely left to the conscience of the donors.

In addition to the timing and extent of the duty of charity, Canon Law enumerated different kinds of permitted charity through a crude system of eligibility discrimination: "[T]o feed the hungry, to give drink to the thirsty, to clothe the naked, to harbour the harbourless, to visit the sick, to ransom the captive, to bury the dead."²⁰⁵ There was no unitary system of eligibility determination. Rather eligibility under this system was determined in the context of relative deprivation as between social classes since, among other things, the very mark of differences between social classes included different standards of living. Permitting a noble or high cleric to live like a peasant was the only kind of relative deprivation with which the system was concerned; it was thought a good thing that peasants did not live like kings. Conversely, even impecunious aristocrats without any means of support could not be permitted to live like peasants, at least as long as they continued to provide the necessary service (usually military) to their superiors. Determining eligibility under this criteria was left to the parish priest and the donor. Each exercised the kind of discretionary informed decision making which several hundred years later was thought more appropriate for a professionalized cadre of social workers.²⁰⁶

The Canon Law further refined eligibility criteria by creating a fairly sophisticated need hierarchy system, based on an interpretation of the writing of the early church fathers—John Chrysostum, Ambrose, and Augustine.²⁰⁷ Canon Law limited discretion only to

204. AQUINAS, *supra* note 196, at 544 ("Accordingly we are bound to give alms of our surplus, as also to give alms to one whose need is extreme; otherwise almsgiving, like any other greater good, is a matter of counsel."); TIERNEY, *supra* note 36, at 34-35 (stating that in times of want superfluous wealth was to be treated as common property).

205. AQUINAS, *supra* note 196, at 541.

206. On the importance of poverty linked to status, see *supra* notes 198-200. On modern social work theory, see BISNO, *supra* note 24, at 1 (providing a working definition of social work); see also TOWLE, *supra* note 24, at 235 (describing the purpose of social work); Simon, *supra* note 13, at 1200-19 (describing the transformation of public assistance); William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1437 (1986) (discussing the role of social workers during and after the New Deal).

207. TIERNEY, *supra* note 36, at 54-61 (describing the need policies of Chrysostum, Ambrose, and Augustine). On the manner in which charity was to be dispensed by donors, see Roch, *supra* note 202, at 511-15.

the extent of requiring the distribution of aid to be amounts "due and customary,"²⁰⁸ with local churches providing more details for meeting local needs.²⁰⁹ If there were sufficient resources to meet the perceived need in the locality, all who sought aid would receive it.²¹⁰ If there was a shortage of resources, a system of preferences was devised by Ambrose to meet the needs of the poor in fifth century Milan.²¹¹ The Ambrosian system of preferences adopted by the Canon Law stressed the obligation, in the first instance, of a person to support, by distribution of superfluities, his or her own parents and children, then members of the extended family, then other members of the household,²¹² and, finally strangers.²¹³ Irrespective of the sufficiency of local resources, aid

208. *E.g.*, TIERNEY, *supra* note 36, at 78.

209. Tierney, for instance, describes the efforts to regulate the details of poor relief in England in the 13th and 14th centuries. *Id.* at 89-109.

210. *Id.* at 60.

211. Thomas Aquinas cites to both Ambrose and Augustine in relating the principle of charity that favors those most closely united to the giver than to strangers. He also describes the exceptions of that rule:

For we ought to give alms to one who is much holier and in greater want, and to one who is more useful to the common good, rather than to one who is more closely united to us, especially if the latter be not very closely united, and has no special claim on our care then and there, and who is not in very urgent need.

AQUINAS, *supra* note 196, at 549; *see also* TIERNEY, *supra* note 36, at 60 (noting that Ambrose's *De Officiis* forms the backbone of the Canon Law pronouncements on poor relief).

212. Presumably, this would apply with more practical force to the local elite who would be responsible for the welfare of serfs, workers, and other retainers under their control. *See, e.g.*, AQUINAS, *supra* note 196, at 549 (stating that, according to Ambrose, "[i]t is with commendable liberality that you should forget not your kindred, if you know them to be in need, for it is better that you should yourself help your own family, who would be ashamed to beg help from others").

213. Having satisfied family obligations, the Ambrosian hierarchy of charitable discrimination favored faithful Christians. Among those, the traditional deserving poor (the aged or sick) were to be given first place in line. Due regard was also to be paid to the relative destitution of people of good birth who fall on hard times. *See* TIERNEY, *supra* note 36, at 56-57. This hierarchy of need satisfaction was not meant to be a shield. Aquinas notes that the essence of charity required a constant weighing of relative need, only one of the weights being the relationship between the donor and the donee. He states:

Nevertheless in this matter we must employ discretion, according to the various degrees of connection, holiness and utility. For we ought to give alms to one who is much holier and in greater want, and to one who is more useful to the common good, rather than to one who is more closely united to us, especially if the latter be not very closely united, and has no special claim on our care then and there, and who is not in very urgent need.

AQUINAS, *supra* note 196, at 549.

to the poor, including the able-bodied idle, was to be limited to a sufficient amount to prevent starvation or utter destitution.²¹⁴ Again, the parish priest served as a ready source of guidance to those who wished to give, but were not sure in what order to do so.

The obligation to provide charity did not include an obligation to seek out the poor. The charitable person was permitted a strictly passive role that only required meeting the needs of those who sought aid. Once sought out however, a person under an obligation who refused to give an appropriate amount of charity could be compelled to do so through the Canon Law procedure of *denunciatio evangelica*.²¹⁵ Although it was the rare indigent who could resort to this procedure, the procedure was not entirely dead letter, since any person had "standing" to bring the complaint, including parish priests and fellow parishioners.²¹⁶ In England, after 1552, the Bishop's power under the *denunciatio evangelica* procedure was supplemented by secular law.²¹⁷ After 1563, the

214. Thus, Aquinas argued that an indigent was entitled to aid sufficient to meet his immediate needs; aid in excess of this amount was to be discouraged, it being "better to give to several that are in need. . . . 'Thus we are warned to be careful in giving alms, and to give, not to one only, but to many, that we may profit many.'" AQUINAS, *supra* note 196, at 549 (quoting GLOSSA LOMBARDI, reprinted in 191 PATROLOGIAE CURSUS COMPLETUS 1660 (Series Latina, J.P. Migne ed., Paris 1844-1855)).

215. TIERNEY, *supra* note 36, at 38-39. Under the process of *denunciatio evangelica*, any person could renounce a recalcitrant parishioner to the Bishop. That parishioner was one who refused to contribute his superfluous wealth to the relief of the poor. See *supra* note 203 (explaining the notion of superfluous wealth). Originally, the *denunciatio* process only gave the Bishop power to exhort a contribution from the recalcitrant donor; he could not compel a contribution, except perhaps indirectly by threatening excommunication. By the 15th century, the general opinion of the Canonists had reversed itself. By the beginning of the 16th century, the commonly accepted Canon Law position was that a recalcitrant parishioner could be compelled to fulfill his charitable obligations. See TIERNEY, *supra*, at 127.

216. TIERNEY, *supra* note 36, at 125. Understand that uneducated village parish priests were wholly beholden to the local aristocracy and would hardly be in a position to publicly denounce their benefactors to the Bishop. However, members of the same social class, and independent clerics, might be in a better position to do so. While there exist recorded instances of Bishops ordering changes to the manner in which relief is dispersed in parishes during this period, see LEONARD, *supra* note 108, at 6 n.1, such action was probably extraordinary. Thus the process held more promise in theory than in practice.

217. An Acte for the Provision and Releife of the Poore, 1551-1552, 5 & 6 Edw. 6, ch. 2 (Eng.); see TIERNEY, *supra* note 36, at 127 (providing that alms for the poor were to be collected in each parish church and that those who refused to give were to be reported, most likely by the parish priest, to the Bishop, who could then call the recalcitrant parishioner to induce and persuade him to make the proper contribution); see also LEONARD, *supra* note 108, at 58 & n.3 ("The part taken by the bishops must have been of very considerable importance, . . . and it often happened that the bishops took a con-

English secular law provided that if the exhortations of the Bishop were unsuccessful in extracting a contribution, a compulsory contribution could be assessed and collected.²¹⁸

Because the poor were obligated to seek out those dispensing charity, charitable efforts tended to be local affairs. This complemented the locally based administration of formal ecclesiastical poor relief, the other major means of succoring the poor in the medieval period. It also complemented the organization of social and religious institutions, and perhaps also reflected the technological impediments to centralization of that day. It is to the institutional (official) means of poor relief that I briefly turn to next. The institutional delivery of aid to the poor was the responsibility of the Church. The three sources of institutional poor relief under Canon Law were the parish, the monastery, and the charitable hospital.²¹⁹ Under Canon Law, each Bishop was responsible, in the first instance, for supervising the care of the poor of the diocese, and specifically for allocating a portion of the diocese's total revenue for the care of such diocese poor.²²⁰

siderable share in the general organization of relief.").

218. An Acte for the Releife of the Poore, 1562-1563, 5 Eliz., ch. 3 (Eng.); LEONARD, *supra* note 108, at 57-59; TIERNEY, *supra* note 36, at 131.

219. See LEONARD, *supra* note 108, at 3, 6-10, 17-20 (indicating the three sources of poor relief under Canon Law). This article will concentrate solely on parish relief. The reader should understand, however, that both monasteries and charitable hospitals were significant sources of charity in the medieval period. Monasteries were not required to give aid except to the extent that they appropriated the revenues of parishes, a relatively common practice during the period. In case of appropriation, the monastery had the obligation to use a portion of the appropriated revenues to aid the parish poor, either by directly providing the aid, or by appointing a perpetual vicar, endowed with sufficient revenue, to provide such relief. See TIERNEY, *supra* note 36, at 83-85.

Charitable hospitals were both hospitals for the sick and almshouses for the destitute. They included leper colonies, orphanages, rest homes for aged, and other similar institutions. Hospitals were founded by grant of wealthy individuals and administered under the rules of its charter. While largely unregulated, by the 14th century Canon Law gave the Bishop the power to investigate and correct abuses in hospital administration. The charitable hospitals were the forerunners of the almshouses and workhouses that emerged after the Reformation and persist into the present. See LEONARD, *supra*, at 19-20; TIERNEY, *supra*, at 85-87; TRATTNER, *supra* note 6, at 5. It is, thus, the first effort to implement a program of "indoor" relief, in contradistinction to relief accorded to the destitute in their own homes, referred to as "outdoor" relief. Debates about the relative benefits of indoor or outdoor relief have raged in modern form for well over a century. For an example of a modern discussion of this issue, see, e.g., *Robbins v. Superior Court*, 695 P.2d 695 (Cal. 1985) (discussing the propriety of providing only in-house relief).

220. TIERNEY, *supra* note 36, at 69-70. The revenues of the church included all income and wealth of the particular diocese. This would include income and revenue from the operation of church lands, bequests, and, increasingly more important, revenues from tithes. Tithes were a form of compulsory ecclesiastical taxation, corresponding roughly to

Relatively early in Church history, each diocese was divided into several parishes, local units of administration presided over by a priest, each of which was a separate economic unit. The parish priest was responsible for the administration of the revenues derived from Church assets in the parish and the tithings of parishioners. In practice, in addition to providing for the poor, the parish priest was expected to allocate a portion of the revenues for the priest's own maintenance and to the maintenance of certain local church property. In this respect, it was expected that the amount necessary for personal maintenance would depend on the social status of each cleric. Thus, a younger son of a noble with university training would not be expected to live the same way as the parish priest drawn from the local peasantry.²²¹

Another part of parish revenues were to go to the Bishop, who oversaw all of the parishes in the diocese. This money was projected for the Bishop's personal maintenance, the maintenance of his household, and the upkeep of diocene property. This revenue was extracted in the form of various taxes. After allocation of funds for the maintenance of the church's personnel and property, all of the remaining revenues, to the extent necessary, were to be allocated for the relief of the poor. The Bishop was responsible for ensuring that sufficient revenues were available for the relief of the poor. Upon complaint, the Bishop had the authority to rectify any perceived abuses.²²²

As such, the essence of institutional aid was local administration. The primary responsibility for the relief of the poor resided in the parish priest, who was expected to keep close watch over the parishioners, and know the extent and "reality" of their needs. Local administration, therefore, served as a means of minimizing potential abuses of poor relief by those not entitled to aid, and of efficiently administering the proper expenditure of church revenue. Local administration also resulted in the vesting of a substantial amount of discretion to the parish priest to determine the needs of particular parishioners and the manner in which relief was to be

10% of the produce of each parishioner. *Id.* at 70.

221. Where the revenues of the parish were assigned to an absentee, such as a monastery or other institution, the absentee holder of the benefice was required to appoint, in addition to an employee priest, a perpetual vicar, removable only by judicial process, to whom a suitable income was to be assigned and used, among other things, for the relief of the poor. *Id.* at 83-84.

222. *Id.* at 79.

given. Recall that aid was to be given to all in need and up to the extent of such need. Accordingly, a local administrator might most cost-effectively determine the extent of real need and the availability of local resources, including private charitable resources. As previously discussed, Canon Law limited discretion only to the extent of requiring the distribution of aid to be amounts "due and customary," with local churches providing more details on local needs.²²³

Thus, the assumptions of stasis appear full blown at a germinal stage of the development of our culture. The distinguishing feature of the medieval system of poor relief was its acceptance of the notion that the social and political order was both good and immutable. This social and economic ordering also necessarily resulted in a social, political, religious, and economic hierarchy. Along with hierarchy came acceptance of the notion that hierarchy demanded inequality between people occupying different social stations. Thus, Canon Law both internalized and sought to rationalize and explain the necessity of wealth inequality, and its purpose in the divinely ordained world order. "If you acknowledge them, namely, your temporal goods, as coming from God, is He unjust because He apportions them unequally? Why are you rich while another is poor, unless it be that you may have the merit of good stewardship, and he the reward of patience?"²²⁴

An accepted consequence of hierarchy and its attendant social and economic inequality was an acceptance of the notion that at the bottom rungs of this society necessarily existed a group of people in a constant potential state of need, through famine, personal misfortune, or a refusal to work. Who were these people? Generally, they consisted of people who could not provide for themselves in a manner deemed sufficient in accordance with the norms of the time. These people included young orphans, the old, the sick, and the handicapped.²²⁵ But the poor, eligible for aid

223. See *supra* notes 208-09 and accompanying text (noting the local control of distributions to the needy).

224. AQUINAS, *supra* note 196, at 545 (quoting Basil, *Hom super Luc.* 12.18, reprinted in 31 PATROLOGIAE CURSUS COMPLETUS (SERIES GRAECA) 275 (J.P. Migne ed., 1857-1866)). For the modern Catholic view, see NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY 26-29 (1986) (discussing the modern Catholic views on poverty, riches, and the challenge of discipleship).

225. By "handicapped," I refer to a condition that is at least severe enough to render the person incapable of work. Understand that one epoch's disabled person is another

also included able-bodied males and females, who for whatever reason, did not have the resources to provide for themselves. The divisions between rich and poor, productive and idle, worthy and unworthy, were not merely honored metaphysically. Society ensured that every person understood the limits of luxuries to which they might be entitled in a variety of ways. The most artificial, perhaps, was the sumptuary laws.²²⁶ In this manner, society was starkly able to segregate its poor from the rest of society. Twentieth century America, of course, has adopted more subtle means to the same end.²²⁷ Thus, true to its static nature, the Canonical system of poor relief tended to isolate and regulate identifiable economic and social groups.

Ecclesiastical poor relief reflected the general patterns of the social and economic order in creating hierarchies of need and in limiting society's obligation to satisfy needs to some, but not all of, the need categories created. Just as the general society was rigidly hierarchical, so too were hierarchies of need fashioned to mimic those of society in general. At the top of the hierarchy were those who were incapable of earning a living because of age, illness, or physical or mental condition.²²⁸ At the bottom of the hi-

epoch's ordinary (although challenged) person. Good examples of the transition in perception of the disutility of handicap include the blind, once treated as totally disabled, and the hearing impaired, whose rehabilitation has proceeded substantially in this century. See MEAD, *supra* note 26, at 132-35 (describing the work requirements creeping into aid for the disabled historically thought of as incapable of work); Liebman, *supra* note 119, at 842-47 (discussing the requirement of a medical disability for disability income benefits purposes); Sheldon, *supra* note 81, at 963-72 (describing the means under which disability recipients might take advantage of federal programs to encourage work); Diehl, *supra* note 159, at 628-34 (discussing the Social Security Administration's requirement that disabilities no longer be slight);

226. The regulation of the dress of the various social classes as a means of identification in this period is reviewed in F.E. BALDWIN, *SUMPTUARY LEGISLATION AND PERSONAL REGULATION IN ENGLAND* (1926).

227. See discussion *infra* part V.A.3.

228. In addition, people of the higher social stations who fell on hard times were accorded a place high in the hierarchy of need. That these people did not perform manual labor or pursue other types of labor made no difference. In a society where class distinctions were rigid and the occupations of each firmly established, it was no more acceptable for an impoverished noble to hire out his labor than it was for a peasant to live like a noble. See, e.g., PIERRE GOUBERT, *THE ANCIEN RÉGIME: FRENCH SOCIETY, 1600-1750*, at 163 (Steve Cox, trans., 1973) (stating that as late as the time of the French Revolution, there existed a "specifically noble life-style . . . [which] above all [meant] never working with one's hands at profitable, base and 'mechanical' occupations (to do so is to 'derogate')"; potentially, to do so is also to lose noble status); LANDES, *supra* note 138, at 129 (discussing the effects of social regulation in business enterprises). This aversion of the nobility to pecuniary occupations was less troublesome in England by the time of the

erarchy was, as we would expect, all people who were deemed capable of fending for themselves.²²⁹ And, as the model would predict, such need hierarchies are used as a means of allocating the available aid. In this case, as in contemporary America, need hierarchies necessarily resulted in discrimination against the able-bodied poor.²³⁰ For those unable to support themselves, there was nothing to be done but care for them. Those unwilling to support themselves were provided for, lest they starve, but there was an underlying assumption that all an able-bodied person needed to do to support himself was to go out and find work.²³¹

Industrial Revolution. See *id.* at 70-71 (describing the reduction of social regulation in the business context).

229. Recall from the earlier discussion that a societal determination of what conditions are sufficient to fit within this definition was, to a large extent, political. See discussion *supra* part III. A gross example might suffice to bring home this point. A blind, deaf quadriplegic might be considered incapable of performing any known jobs, and on that basis be characterized as totally and permanently disabled. On the other hand, such a person could be deemed employable as, for example, a doorstop, and on that basis be treated as an able-bodied out-of-work person for purposes of determining the level of response to his maintenance. The modern version of this essentially political story was dramatized during the early years of the Reagan Presidency when an effort was made to reduce costs by aggressively scrutinizing claims of disability. MEAD, *supra* note 26, at 134. On the problem generally, see ROBERT G. DIXON, JR., *SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION* (1973) (discussing the problems in the years prior to the Reagan Administration's attempts to reduce caseloads).

230. Of course, this is a different way of saying that, in a world of limited resources, society has determined that the marginal utility of helping the incapacitated is greater than that of aiding the capable. Why? Because, as earlier noted, the static world view accepts the notion that there is a job for every person. All he or she need do is look. In the medieval period, the notion was accepted that a laborer was supposed to labor, a merchant to sell, and a craftsman to make crafts. Such labor was available and readily obtainable. The failure to secure work was thus, to use modern terminology, a "lifestyle choice" for which the state or other aid-giving institution would not provide additional incentive. The modern counterpart to this notion is the idea of social obligation: the obligation to provide for oneself (by legal means). This idea has been the object of lively debate in recent years. Compare MEAD, *supra* note 26, at 194-200 (espousing a conservative perspective) with JENCKS, *supra* note 27, at 87-91 (articulating a more liberal perspective) and MARMOR ET AL., *supra* note 6, at 1-2 (taking a liberal perspective and commenting on the success of American social welfare policies). Perhaps the only real difference in the modern period with respect to this notion is that it is usually unstated. Sometimes, however, especially in the writings of self-styled conservative writers, this notion is made explicit. See, e.g., GILDER, *supra* note 26, at 65.

231. This notion is not merely a historical curiosity; it remains central to the debate over the eradication of poverty in our own day. For instance, it forms the core of Murray's argument for dismantling the entire welfare system for the able-bodied. MURRAY, *supra* note 3, at 195-237. Indeed, the belief that all the able-bodied poor needed was information and training in order to successfully obtain the jobs waiting for them was one of the fundamental forces driving the Kennedy-Johnson War on Poverty. See, e.g., *id.* at 18-23. For a discussion of the genesis of this notion in the old feudal, agrarian economy,

As expected, then, the primary purpose of ecclesiastical poor relief was to prevent destitution. The notion that a system of poor relief could actually end the dependency of the poor was neither part of the consciousness nor even the vocabulary of the creators of that system. Rather, the creators of ecclesiastical poor relief assumed a general population of industrious laborers who, in periods of adversity, might require the aid of those in the locality with more resources. As such, the concept of rehabilitation was alien to the universe of the Canon lawyers. The basic notion was that people were to be given aid, whether the need arose as a result of an inability or an unwillingness to support themselves.²³² There was little risk in this kind of open-handedness under ecclesiastical law. In a society where religious commandments carried more weight than perhaps even the civil law, the unambiguous Biblical commandment, that the able-bodied members of the laboring class were required by their Creator to labor for their sustenance,²³³ provided a strong incentive to provide for one's own needs. Failing that, the limited aid available to the able-bodied would ensure that resources were spent on needier folk.²³⁴ Accordingly, the notion of the un-

see POUND, *supra* note 90, at 79-85 (describing the nature of the old feudal rights enjoyed by the peasantry, which made survival in hard times easier than for their urban neighbors); TIERNEY, *supra* note 36, at 110-13. For a discussion of the work available to the able-bodied in colonial America, see generally Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931); Riesenfeld, *supra* note 178, at 201-35; Robert J. Steinfield, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 346 (1989); tenBroek, *supra* note 9, at 291-317.

232. The amount of aid might vary, and the circumstances triggering the obligation to give aid might differ, but ultimately the fundamental assumption was that no person was to be allowed to starve to death if by the provision of aid, a death could be prevented, and each person was to be aided in accordance with his social station.

Alms may be considered abundant in relation to either the giver, or to the recipient; in relation to the giver, when that which a man gives is great as compared with his means. To give thus is praiseworthy. . . . Nevertheless those conditions must be observed which were laid down when we spoke of giving alms out of one's necessary goods [art. 6].

On the part of the recipient, an alms may be abundant . . . by relieving his need more than sufficiently; this is not praiseworthy, and it would be better to give to several that are in need. . . . 'Thus we are warned to be careful in giving alms, and to give, not to one only, but to many, that we may profit many.'

AQUINAS, *supra* note 196, at 549.

233. See *Genesis* 3:19 (setting forth God's commandment to Adam that he work for his keep).

234. While the able-bodied might be required to work, such work would be repayment for the expense of their maintenance and not the provision of permanent employment.

employed able-bodied person as a social deviant was strongly reinforced by a theology which taught that the voluntarily unemployed were also religious deviants, sinning by failing to fulfill the divine work commandment.

As such, institutional charity, consisting of the aid available through the parish priest, the charitable hospital, and the monastery was conceived as a residual system, the system of last resort. It had to be, for God had commanded that all people work for their sustenance. To take from one person the sums derived from that person's labor in order to sustain another person who did not labor for his keep was to go against the will of God as explicitly set forth in Genesis. Therefore, any system of maintenance had to be implemented in a manner that minimized the amount taken from others, and did not reward those who could labor for their sustenance, but did not. Ecclesiastical poor relief was not driven by the imperative to meet all of the needs of the poor. Poor relief is quintessentially a matter of superfluities, of excess, of the residential, of that which remains after provision is made for donor, be it individual, church or state. From whatever is left will the poor be succored.

In the language of the static paradigm, such a system was fundamentally geared to create systems of poor relief based on maximizing cost savings, and reinforcing the social order. The Canonical system of poor relief minimized the collective institutional costs of relief in a number of ways. The most important of these was the encouragement of private voluntary charity, which was supposed to provide a substantial amount of the resources necessary to aid in the local relief of the destitute. Charitable work conducted by private institutions, or other alternative sources of private aid, were central to the administration of relief and assumed theological importance. It was backed by the authority of religious command. This, in a sense, complemented the theological and practical command that the poor work. Like the indigent who refused to work, the rich person who refused to give alms was deemed a social and religious deviant who could be compelled to comply with their obligations by applying to the rudimentary enforcement provision of the *denunciatio evangelica*. Additional encouragement was provided by constructing charitable need hierarchies in a manner which imposed the obligation of mutual maintenance on relatives.

And what of the villain who scoffed at the word of God and refused to eat by the sweat of his brow? Canon Law offered as

punishment only a reduced obligation of sustenance, no obligation to aid except to the extent necessary to prevent actual starvation. But these people mocked the law of humankind as well as that of God. At least in England, the state imposed a secular obligation to work, on pain of imprisonment.²³⁵ As such, reinforcement of the social order through the poor relief system found expression, as the model would predict, in the tendency of medieval poor law systems to criminalize vagrancy as a violation of compulsory work laws, to reduce the incentives of an unemployed adult populace to engage in anti-social activities (robbery, public drunkenness, prostitution, etc.), and to train the children of the destitute in an "honest" trade. Thus, the ecclesiastical poor law system tended to rely on secular criminal law to penalize the able-bodied, who were supposed to be working for their bread instead of begging for it, for the sin of nonproductivity.²³⁶

Since the primary purpose of aid was to do little more than tide able-bodied persons over during short periods of destitution, and do so as cheaply as possible, the ecclesiastical system was indifferent to the manner in which relief was provided. Accordingly, maintenance only required the provision of food, shelter, clothing, or the money with which to purchase such necessities. This aid could be provided on an institutional (indoor) basis through the charitable hospitals, or a non-institutional (outdoor) basis through private charitable efforts or parish poor relief.

It is in the context of this fully developed ecclesiastical system that the English poor law system arose. As a secularized form of ecclesiastical poor relief, it shared with the old religious system its internalization of the basic cultural postulates which taken together comprise the paradigm in which we now operate.²³⁷ The Elizabe-

235. Ordinance and Statute of Labourers, 1350-1351, 25 Edw. 3, st. 2 (Eng.) (repealed 1863) (calling for both compelled employment and punishment for failure to work). In other emerging Protestant jurisdictions, work might not be required, but failure to work might limit the pauper to the right to receive only the barest aid essential to physical survival. See discussion *infra* notes 281-88 (discussing early Puritan beliefs regarding poverty).

236. See Rosenheim, *supra* note 108, at 512-13 (providing an historical account of English vagrancy crimes); tenBroek, *supra* note 9, at 270-79 (discussing the rise of civil penal approaches to the control of vagabonds).

237. And, indeed, the secularization might only be skin deep. Many of the first attempts at creating "secular" poor relief borrowed heavily from the religious teaching and perceptions of the dominant group in the community. These views were heavily infused with the dictates of religiously derived "right conduct." See, e.g., the poor law ordinances of Martin Luther and Ulrich Zwingli, discussed *infra* note 280, and reproduced in SOME EARLY

than Poor Law represents, in effect, the culmination of the English Crown's efforts to absorb the entire system of ecclesiastical poor relief. These longstanding efforts began in earnest during the reign of Henry VIII, when the functions of the Roman Catholic Church were absorbed by the state.²³⁸ The Elizabethan Poor Law has been properly characterized as the attempt to fuse the ecclesiastical system of poor relief with the civil statutes that the English monarchy enacted to supplement the ecclesiastical system.²³⁹ Thus, while the major characteristics of the system of poor relief did not change much, the administrative mechanism for the implementation of the programs substantially changed.²⁴⁰

B. Elizabethan Poor Law

American general assistance is essentially a modern version of the secular institutional poor relief system which was implemented in England during the reign of Elizabeth I.²⁴¹ A brief description of the significant features of traditional English governmental poor relief from the late Tudor period will add an additional level of understanding concerning the utility of the general theory, and the links between the historicism of contemporary American general assistance and the governing framework that supplies the details of poor relief programs.

The major characteristics of the Elizabethan system of poor relief included primary family responsibility for the maintenance of its members, public responsibility for the relief of the poor at the local level, encouragement of private charity, and relief tied to

TRACTS ON POOR RELIEF 92-93 (F.R. Salter ed., 1926). There are several excellent studies of the English poor law system from the time of Elizabeth I. See generally, e.g., LEONARD, *supra* note 108; MENCHER, *supra* note 14; SIDNEY & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY: PART I, THE OLD POOR LAW (1927); tenBroek, *supra* note 9.

238. See TIERNEY, *supra* note 36, at 131 (detailing Elizabethan Poor Law); tenBroek, *supra* note 9, at 258 (same).

239. See, e.g., LEONARD, *supra* note 108, at 10 (discussing the development of Elizabethan poor law).

240. TIERNEY, *supra* note 36, at 109-31. Tierney, however, argues that a substantial distinction between ecclesiastical poor relief and secular (Elizabethan) poor relief was the latter's concern with the suppression of vagrancy and begging. The latter, though, was linked to the problem of a rising crime rate, and increasingly absorbed the energies of the English monarchy after the 15th century. *Id.*; see POUND, *supra* note 90, at 53-57 (stating that the Elizabethan poor laws changed the methods, not the underlying characteristics); Rosenheim, *supra* note 108, at 512-17 (describing the changes in England's poor relief system from 1349 to 1937).

241. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2 (Eng.).

residency.²⁴² The core of the Elizabethan system of poor relief was the concept that impotent poor were to receive direct relief from funds collected from taxation.²⁴³ This represented a significant change from the old ecclesiastical system, and was the most visible manifestation of the secularization of poor relief. Rather than providing for the poor from the money levied by the Church through its system of tithings, the state relied on its power to tax the citizenry.

The administrators of this system of poor relief were to be the "Churchwardens of everie Parish, and fower . . . substantial Householdiers there . . . [who] shall be called Overseers of the Poore of the same Parishes."²⁴⁴ These administrators, with the consent of the Justices of the Peace,²⁴⁵ were to determine, on a case-by-case basis, the amounts necessary to maintain the poor and the manner of this relief. They were responsible for "settinge to worke all such [poor persons], married or unmarried havinge no meanes to maintaine them," as well as for providing "the necessarie Releife of the lame impotent olde blinde and suche otherse among them, beinge poore and not able to work."²⁴⁶ Thus, while legislation creating a non-ecclesiastical system of poor relief was national in scope, the administration of the system and the obligation to raise sufficient revenues was strictly local.²⁴⁷ Indeed, to the extent that the administration and funding of poor relief was centered at the parish level, the Elizabethan system continued the ecclesiastical system's method of administration.²⁴⁸ However, there was a vari-

242. Jacobus tenBroek provides the best short description of the salient features of the seminal English civil Poor Law system. See tenBroek, *supra* note 9, at 262 & n.27. Much of the description of the Elizabethan Poor Law system which follows is derived from his work.

243. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2, § 1 (Eng.); An Acte for the Releife of the Poore, 1597-1598, 39 Eliz., ch. 3, § 1 (Eng.); An Acte for the Punishment of Vacabondes and for Releife of the Poor & Impotent, 1572, 14 Eliz., ch. 5, § 16.

244. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2 (Eng.).

245. See tenBroek, *supra* note 9, at 262 & n.27 (stating that "the Maiors, Bailiffs, or other Head Officers of everie Towne and Place Corporate and Citie within this Realme" were normally appointed Justices of the Peace by royal commission (quoting An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2 § 7 (Eng.))).

246. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2 (Eng.).

247. See LEONARD, *supra* note 108, at 133; Riesenfeld, *supra* note 178, at 178-81 (discussing the manner in which Elizabethan Poor Law was received in the American colonies).

248. See LEONARD, *supra* note 108, at 48 (showing how local people were responsible for assisting church wardens and constables and no payment was given for their services);

ety of substantive differences between the two systems.

In addition to permitting the local administrators to provide outdoor relief, "places of habita[tion]" were to be erected for the poor on the wastes and commons within the parish.²⁴⁹ County hospitals and almshouses were to be tax-supported in amounts determined by the Justices of the Peace in quarter sessions.²⁵⁰

In general, begging was forbidden.²⁵¹ All of the able-bodied males and unmarried females were required to labor for at least twelve hours per day in order to provide for their needs.²⁵² Unless they came within certain categories, all males were required to become agricultural laborers, all others were to serve in specified occupations. They were required to serve an apprenticeship for a number of years, and then make themselves available to work for whomever required their services.²⁵³ Employable poor were also put to work in manufacturing projects organized by overseers of the poor.²⁵⁴ The able-bodied who refused to work were to be sent to houses of correction.²⁵⁵ Rogues, vagabonds, and vagrants were to be punished.²⁵⁶ Poor children were put to work or apprenticed.²⁵⁷ Relatives were made responsible for the mainte-

TIERNEY, *supra* note 36, at 109-33 (discussing why ecclesiastical poor law became ineffective from the middle of the 14th century on).

249. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2, § 4 (Eng.).

250. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2, § 12 (Eng.); An Acte for the Releife of the Poore, 1597-1598, 39 Eliz., ch. 3, § 13 (Eng.). See LEONARD, *supra* note 108, at 207-15 (discussing the kinds of aid distributed to Elizabethan poor.).

251. See, e.g., An Acte for the Punishment of Vacabondes and for Releife of the Poore & Impotent, 1572, 14 Eliz., ch. 5 (Eng.); An Acte for the due execution of diverse Lawes and Statutes heretofore made against Rogues Vacabondes and Sturdye Beggars and other lewd and idle parsons, 1609, 7 Jac., ch. 4 (Fr.); see also LEONARD, *supra* note 108, at 25-26 (observing that the methods of punishing beggars included whippings, beatings, and being held in stocks).

252. tenBroek, *supra* note 9, at 272-73.

253. POUND, *supra* note 90, at 45-46.

254. An Acte for the Releife of the Poore, 1597, 39 Eliz., ch. 3, § 1 (Eng.); see also LEONARD, *supra* note 108, at 76-78 (discussing the significance of these statutes).

255. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2, § 2 (Eng.); An Acte towchyng the punysshement of Vacabondes and other Idle Parsons, 1549-1550, 3 & 4 Edw. 6, ch. 16, § 6 (Eng.); An Acte for the punysshement of sturdye vacabondes and beggars, 1535, 27 Hen. 8, ch. 25, §§ 6, 10 (Eng.). See also LEONARD, *supra* note 108, at 3-5 (discussing the rise in vagrancy during the latter part of the 16th century).

256. An Acte for the Punishment of Vacabondes and for Releife of the Poore & Impotent, 1572, 14 Eliz., ch. 5 (Eng.); An Acte for punysshement of sturdye vacabondes and beggars, 1535, 27 Hen. 8, ch. 25 (Eng.).

257. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2, §§ 1, 3 (Eng.); An Acte for punysshement of sturdye vacabondes and beggars, 1535-1536, 27 Hen. 8, ch. 25, § 6 (Eng.).

nance of their destitute kinsmen, including parents, grandparents, and children of paupers.²⁵⁸ The legal liability incurred by relatives of paupers was subject to the discretion of the local poor relief administrators.²⁵⁹

Every English subject had a settlement roughly corresponding to a person's place of residence. Only those who had a settlement in a community were entitled to its aid.²⁶⁰ The elements of this settlement and the methods of its acquisition were carefully circumscribed. Paupers who remained in a community in which they were not settled were to be excluded or expelled from the community and returned to the community of settlement. "An adequate sum of money to be paid by every county and parish" was to be fixed by the Justices of the Peace in quarter sessions for the support of the poor prisoners of the King's bench and marshalsea; a minimum of twenty shillings per year was sent from each county for prison use.²⁶¹ In addition, special provisions were made for destitute, ill, and maimed soldiers and mariners.²⁶²

Local provision of institutional relief was to be significantly supplemented by private charitable efforts.²⁶³ In order to facilitate charitable donations, or at least their effectiveness, the law on charitable uses was refined and expanded to provide a mechanism to better ensure that charitable foundations allocated their resources in accordance with the wishes of the founder.²⁶⁴ The distribution

258. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2, § 6 (Eng.).

259. See tenBroek, *supra* note 9, at 282-85.

260. An Act for the better Releife of the Poore of this Kingdom, 1662, 13 & 14 Car. 2, ch. 12 (Eng.) (repealed 1927) (providing that any two Justices of the Peace may remove any poor person from a settled parish); An Acte for punysshement of sturdye vacabondes and beggars, 1535-1536, 27 Hen. 8, ch. 25 (Eng.) (repealed 1863) (enumerating numerous levels of punishment for beggars, including forced labor); An Acte agaynst vacabondes and beggars, 1495, 11 Hen. 7, ch. 2 (Eng.) (repealed 1623-1624) (vagabonds were to be set in flocks for three days and three nights); see also Riesenfeld, *supra* note 178, at 178-81 (discussing the Elizabethan Poor Law conception of settlement).

261. 43 Eliz., ch. 2, §§ 1, 14 (1601) (Eng.) (repealed 1967); see also 39 Eliz., ch. 3 (1597) (Eng.) (repealed 1863) (stating the general provision for overseers of the poor).

262. 43 Eliz., ch. 3, §§ 1, 15 (1601) (Eng.) (repealed 1863) (establishing a special relief program and its administration for soldiers and mariners).

263. See LEONARD, *supra* note 108, at 210-15 (noting that the years 1550 to 1650 saw an enormous increase in new almshouses); MENCHER, *supra* note 14, at 37 (noting that public authorities often supported private charities, which helped lessen the public tax burden); POUND, *supra* note 90, at 69-76 (noting that private charity might have, in the aggregate, even exceeded total state expenditures on relief); tenBroek, *supra* note 9, at 259-60 (considering the encouragement of private charity and the creation of charitable corporations).

264. Thus, charitable corporations could create an endowment in perpetuity, and a corpo-

of private charitable giving tended to mirror that of institutional relief.²⁶⁵

Thus summarized, Tudor poor relief was built on the same paradigmatic foundations as the system it displaced. Underlying the system was the fundamental notion that the socio-economic status quo was to be accepted as a given. Indeed, there is no notion of empowerment of the poor; maintaining the poor remained a responsibility of community members most interested in preserving the status quo, specifically the people of substance and the local political leadership. The system was to be driven by the imperatives of cost minimization, the toleration of localities for income redistribution, and the goal of driving the able-bodied to employment.²⁶⁶ The mentality was the same as that of the fourteenth century Statute of Labourers—poverty could be alleviated if people were compelled to work, because employment was available for those who sought it.²⁶⁷

ration could be empowered to receive property for the purpose of dispensing it according to the wishes of the founder. To ensure that the founder's will was followed, the Chancellor was empowered to appoint commissions "to enquire . . . of all . . . such gifts . . . and of the abuses . . . [and] . . . defrauding" of the original intent. An Acte for the Reliefe of the Poor, 1601, 43 Eliz., ch. 4 (Eng.) (repealed 1888). See also 39 Eliz., ch. 5 & 6 (1597) (Eng.) (repealed 1960) (providing similar rules for the organization of charitable hospitals); 14 Eliz., ch. 14 (1572) (Eng.) (repealed 1960) (same); cf. tenBroek, *supra* note 9, at 259 (noting that many hospitals and almshouses received public rather than private support in the form of tax revenues). However, the ability of the state to regulate private charities was important during the 16th century, largely due to the significant amount of money placed in private charitable institutions as a result of the abolition of both the monasteries and the Pope's authority in Rome. *Id.* at 266-67.

265. See POUND, *supra* note 90, at 69-76 (describing the uses to which charitable contributions were put, and noting in particular that contributions were used primarily for direct household relief to prevent paid destitution, though funds for social rehabilitation were also made available to temporarily unemployed tradespeople). Important aspects of this notion carried over in many respects to colonial America, thus providing the foundation for the current approach to private American philanthropy. See Bremner, *supra* note 4, at 103-11 (citing several examples of instances where private and public welfare efforts coincided and blended together). Bremner notes that "throughout the greater part of American history, governmental and voluntary forces have cooperated and collaborated in meeting public needs." *Id.* at 103.

266. Jacobus tenBroek has persuasively demonstrated the manner in which the Elizabethan Poor Law was shaped by cost considerations. See tenBroek, *supra* note 9, at 262-87 (discussing various means employed to curtail public costs and to place more liability on private entities).

267. This explains the striking similarity between the Elizabethan Artificers Act, 1562, 5 Eliz., ch. 4 (Eng.) (repealed 1875), and the Ordinance and Statute of Labourers, 1350-1351, 25 Edw. 3, st. 2 (Eng.) (repealed 1863) (calling both for compelled employment and punishment for failure to perform these duties). See tenBroek, *supra* note 9, at 270-74 (arguing that the administration of poverty law did not change greatly between the

In essence, the Elizabethan system was merely an adoption of the medieval ecclesiastical system of relief to which a series of substitutions were made. Its impetus was as much practical—the government needed to fill the vacuum it created when it eliminated church governance of poor relief—as theoretical. Indeed, the very structure of the “new” system of poor relief demonstrates more a desire to appropriate past practices than to “transform” them.

Institutional relief was still intended to be delivered locally, and the funds for such local relief were still to be provided by the obligated locality. Such funds were to be obtained from local taxation and from the charitable endeavors of the local citizenry, the latter being further supported by the power of the state.²⁶⁸ These ideas of private charity and local institutional obligations to fund relief efforts were already embedded in English custom in the form of the tithe and the procedure for *denunciatio evangelica* under Canon Law.²⁶⁹

Institutional poor relief was not only meant to be supplemented by local charitable activity, it further relied on the ancient Ambrosian need hierarchy system to impose mutual support obligations on members of the traditional family.²⁷⁰ The difference under the English secular statutes is that the normally hortatory obligations inherent in the Canon Law were, under the Elizabethan scheme, made obligatory and enforceable through the power of the state. In this sense, at least, Elizabethan Poor Law represents more of an installation of an aggressive administrator in place of a pas-

14th century and the Elizabethan era). Moreover, there is also little difference between the spirit behind those acts and that of conservatives, such as Irving Kristol, today; both urge that all forms of welfare to the able-bodied should be abandoned on the theory that there is employment for all who seek it. Kristol, *supra* note 83, at A14 (arguing that able-bodied and mentally healthy men should have no entitlement whatsoever to welfare).

268. In this manner, the state appropriated one of the two significant portions of the Canonic system, with the institutional system of parish poor relief providing the remainder of the formal aid apparatus. The other portion of ecclesiastical poor relief, private charitable efforts, was left to the continued ministrations of religious organizations, now emanating from the Church of England, and not the Roman Catholic Church. See LEONARD, *supra* note 108, at 210-20 (detailing the efforts of almshouses and parish efforts to educate and provide for children); MENCHER, *supra* note 14, at 25-26, 95-96 (noting the tension between private charity and public control, and the fear that an overexpansion of private charity would lead to dependency and sloth).

269. See *supra* notes 215-20 and accompanying text (discussing the obligation to donate one's superfluous wealth).

270. This notion of family responsibility for the maintenance of its members is still very much with us today. See, e.g., McMullen, *supra* note 178; see also discussion *infra* part V.A.5.

sive one, and not a change in the underlying goals and assumptions of the system.

Although Elizabethan Poor Law did not impose a new method of distinguishing between the poor and the vagrants, it did significantly refine the approach to dealing with the able-bodied who did not work. Similar to the pre-Tudor ecclesiastical system of relief, the underlying assumption was that all people should work, and that failure to do so was evidence of a social deviance significant enough to merit the attention of the civil and criminal law. Only those who society deemed incapable of working were excepted from this scheme. Of the others, those who were temporarily unemployed were deemed most deserving of maintenance and support. The archetypal situation was that of the farmer who had no means of feeding his family before harvest, or the artisan experiencing temporary financial difficulties.²⁷¹ All others who failed to work were shirkers. These people were to be maintained to the extent necessary to prevent starvation, but, unless they found work on their own, were likely to be incarcerated and reformed. Their maintenance was to be determined solely from the value of their own labor during the period of their destitution and incarceration.²⁷² Alternatively, the obligation to work might be temporarily met by forcing recipients of aid to work for the locality as payment for their maintenance until they could return to their old jobs or professions (or perhaps until it was time to work the fields again).²⁷³

Thus, it is in connection with the able-bodied poor that the Elizabethan Poor Law, as the first significant generalized state-sponsored system of poor relief, made the most significant modification of past practices. Vagrants, beggars, and the idle in general, were characterized as social deviants, and as such were to be suppressed by the imposition of criminal penalties unprecedented in

271. See POUND, *supra* note 90, at 74 (noting that many contributions went for immediate relief and for the temporarily unemployed). As would be expected, however, the aid was meant primarily to be temporary; recipients were expected to find some honest way of supplementing their income at the earliest opportunity. *Id.*

272. See 7 Jac., ch. 4, § 4 (1609) (Fr.) (providing for the incarceration of the idle in houses of correction where they might be reformed by punishment, starvation, and hard work, receiving as an allowance for their maintenance only what they were able to "earn" by their own labor); see generally tenBroek, *supra* note 9, at 277-78 (discussing various forms of punishment and compelled labor of vagrants).

273. For a description of the economics of the laboring classes and the poor law in Tudor England, see HIMMELFARB, *supra* note 52, at 24-28 (describing the rise of mercantilism and the ethics of productivity); LEONARD, *supra* note 108, at 22-46 (detailing the administration of government efforts to find and create work for the unemployed).

number and variety.²⁷⁴ In a society intent on preserving the status quo, where the obligation of every able-bodied person was to work, and where it was believed that work was available to all who sought it, idleness among the able-bodied could justifiably be considered the result of personal choice and not economic condition.

Moreover, because the obligation to work was both secular and religious, and necessarily rejected the notion that unemployment is caused by a lack of employment opportunities, the able-bodied who did not work engaged in criminal conduct.²⁷⁵ And like criminals

274. This conceptualization of the poor, and the corresponding obligation of "good" citizens to work, had existed in one form or another for several centuries. It was the natural result of accepting the view that work was to be had by all who sought labor, and that refusal to work was a personal choice, freely made and easily rectifiable by command of the law. The Elizabethans took the implications of this conceptualization further than their predecessors. *See generally* tenBroek, *supra* note 9, at 270-79 (noting that the Elizabethan system evolved into a paternalist system with no freedom of labor).

This belief resulted in two types of ordinances. The first mandated that all able-bodied people were to work. This type of command was not thought of as extraordinary, since it was clear to all that any person who wanted to work could find it and thereby prevent dependence on the state for his or her maintenance. *See* The Ordinance and Statute of Labourers, 1350, 25 Edw. 3, st. 2 (Eng.), preceded by the Statute of Labourers, 1349, 23 Edw. 3, chs. 5-7 (Eng.) (requiring all people below a certain age to labor for whomever would hire them at a wage set forth in the statute). The second type of ordinance prohibited begging.

Early in her reign, Elizabeth I adopted a comprehensive ordinance compelling labor from all able-bodied people. 5 Eliz., ch. 4 (1562) (Eng.) ("containing divers orders for artificers, labourers, fervants of husbandry and apprentices"). The purpose of this statute was to eliminate "idleness" through compulsory labor. All men between the ages of 12 and 60 and all unmarried women between the ages of 12 and 40 were required to work. In addition, all youths under the age of 21 were obligated to apprentice themselves. To the extent that a person was unable to obtain work, the state stood ready to supply the work. For further examples of this theme, see 14 Eliz., ch. 5 (1572) (Eng.); 3 & 4 Edw. 6, ch. 16 (1549) (Eng.); 1 Edw. 6, ch. 3 (1547) (Eng.); 27 Hen. 8, ch. 25 (1535) (Eng.). These statutes commanded all able-bodied poor people to be provided with work of one kind or another by local officials so that they might earn their keep and reduce the burden of their maintenance.

Since labor was compulsory, it followed that idleness, vagrancy, and begging could be suppressed as a means of enforcing the general command to labor in honest work. Suppression generally took the form of criminal penalties for the failure or refusal to work. *See, e.g.*, 39 Eliz., ch. 4 (1597) (Eng.); 1 Edw. 6, ch. 3 (1547) (Eng.); 22 Hen. 8, ch. 12 (1530) (Eng.). Idleness was punished by public humiliation and physical punishment including stocks and whippings, 22 Hen. 8, ch. 12 (1530) (Eng.), followed by enforcement of the compulsory labor ordinances. By the time of the late Elizabethan period, the punishment for idleness included mutilation, 1 Edw. 6, ch. 3 (1547) (Eng.) (including branding with a hot iron on the breast), slavery, and death. 39 Eliz., ch. 4 (1597) (Eng.).

275. *See* Rosenheim, *supra* note 108, at 512-13 (noting that criminal statutes were enacted to maintain a steady labor force and prevent vagrants from wandering between jobs); tenBroek, *supra* note 9, at 270-79 (describing early efforts to control the supply of

who are convicted of non-capital criminal offenses and sentenced to a period of incarceration, this group was to be punished, and compelled to correct their conduct while being physically maintained at the barest level possible.²⁷⁶ To question the soundness of the socio-economic system that might have produced the vagrant was unthinkable or seditious at best. Indeed, the better opinion was that there was nothing wrong with the system, rather, there was something wrong with the character of the poor that needed correction. And for that, the compulsion of the law was thought to suffice. The purpose of the poor law, as contemporaries saw it, was to provide "work for those that will Labour, Punishment for those that will not, and Bread for those who cannot."²⁷⁷ Furthermore, this goal was to be undertaken with as little interference to the productivity of the working population as possible, thus minimizing the income redistributive effects of the program to levels that would not be perceived as a threat to the socio-economic order.²⁷⁸

This article characterizes the Tudor efforts at poor relief as substantially civil. Indeed, a distinguishing characteristic of Anglo-American poor relief from the seventeenth century onward is the assumption by the civil government of primary responsibility for relief. However, by *civil*, I do not mean to convey the impression that this new civil administration was in any way *secular*, nor that religion and relief had parted company. They had not. For the

labor through enforced labor and harsh criminal punishment).

276. This practice, as will be demonstrated in part V.A, *infra*, remains a significant part of our system of poor relief. Modern forms of punishment include coercion by imposing conditions on the receipt of aid, or the complete denial of aid. See POUND, *supra* note 90, at 47-48 (describing 16th century coercion as including incarceration, whipping, and boring through the ear); STEIN, *supra* note 87, at 5-14 (noting that policies geared toward poor relief have changed little; they use mostly repressive and coercive tactics); Rosenheim, *supra* note 108, at 518-23, 530-41 (detailing the various means of modern punishment and their goal of encouraging employment).

277. JOYCE OLDHAM APPLEBY, *ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH CENTURY ENGLAND* 131 (1978) (quoting RICHARD DUNNING, *A PLAIN AND EASIE METHOD OD SHEWING HOW THE OFFICE OF OVERSEER OF THE POOR MAY BE MANAGED*, PREFACE (1686)).

278. According to Jacobus tenBroek:

Once the public agreed to pay the bill, it acquired a pressing concern about the size of the bill and an active interest in finding methods for reducing it. The impulse to invent and apply devices which did so was implicit in the poor law principle itself, and the devices invented and adapted for this purpose, originally and from time to time thereafter, were as characteristic of the poor law as the public acceptance of the basic responsibility.

tenBroek, *supra* note 9, at 286.

static assumption that the poor are responsible for their own condition,²⁷⁹ implicit in the Elizabethan Poor Law, merges imperceptibly with the Anglo-American Protestant vision of poverty and work. From the formative period in the sixteenth century to the present, Protestant theologians assert that hard work and frugality are close to divine commandments. Early European Protestant thinkers constructed their welfare systems on this foundation, advanced notions of poverty and the obligation to aid the destitute that were based on the moral worthiness of the recipients and that equated moral worthiness with productivity.²⁸⁰ In the absence of compelling circumstances beyond the control of the recipient, the able-bodied who refused to work were to be treated like those who failed to attend sermons, blasphemers, and those who indulged "in any other kind of wantonness and frivolity."²⁸¹ These notions carried over to the American colonies, where they provided a basis

279. See Backer, *supra* note 20, at part III.A.; *supra* part II. Thus, social reformers of the late 19th century lectured the destitute about thrift and frugality, without regard to the cause of their destitution. At least in the minds of poor law administrators, the causes of poverty were the bad habits of the poor themselves. See HIMMELFARB, *supra* note 52, at 147-90, 323-32 (detailing the risk of paternalism within the framework of a moral economy). But see *id.* at 191-287 (noting the rise of oppositional voices, chartism, Marxism, and "radical Toryism"); MENCHER, *supra* note 14, at 269-73 (stressing the difficulty of reconciling the existence of poverty with beliefs that anyone willing to work could earn a living); TIERNEY, *supra* note 36 (examining the early history of English poor law, and the influence of the church on the law); Goebel, *supra* note 231 (portraying these attitudes as they evolved within early New England settlements).

280. See Backer, *supra* note 20 (discussing the attempts at poor relief in Europe during the early years of the Protestant Reformation); see also MENCHER, *supra* note 14, at 23-37 (illustrating early efforts at poor relief, from work programs to emigration to the American colonies). Religion stressed the notion that the right to aid was based on the moral character of the applicant—and the refusal to work for one's keep constituted a great immorality. Thus, minimal relief was to be accorded "any persons, whether men or women, of whom it is known that they have spent and wasted all their days in luxury and idleness, and will not work, but frequent public-houses, drinking-places and haunts of ill-repute." Ulrich Zwingli, *Ordinance and Articles Touching Almsgiving*, in SOME EARLY TRACTS ON POOR RELIEF, *supra* note 237, at 100-01. Such unworthy folk were to be given aid only when they arrived "at the last stage of destitution, and even then reference must be made to the Mayor and City Council before settling what is to be done for them." *Id.* at 101. Martin Luther notes that:

Those folk in our parish who have become poor through no fault of their own and who have been left without help from their friends (if they had any), and also those who cannot work because of sickness or old age and who are distressingly poor, shall be sustained and provided for.

Martin Luther, *Ordinance for a Common Chest*, in SOME EARLY TRACTS ON POOR RELIEF, *supra* note 237, at 92.

281. Zwingli, *supra* note 280, at 101.

for ascertaining the extent of the societal obligation to aid the poor.²⁸² For American Puritans, “[p]overty, like wealth, demonstrated God’s hand, and while riches were proof of goodness and selection, insufficiency was proof of evil and rejection.”²⁸³ American attitudes towards poor relief were and have remained consonant with this immutable, divinely ordained notion.

It was not only early Protestant religious theory that served to cement the view of the stasis respecting the nature of society, the economic order, and the poor. Nineteenth century Methodism provides an extreme example of the congruence of religious teaching and the static paradigm. Methodists were taught that they could remain graced through service to the church, cultivation of one’s own soul, and in keeping a methodical discipline in every aspect of life. This last method of maintaining grace was best met through labor. “Moreover, God’s curse over Adam, when expelled from the Garden of Eden, provided irrefutable doctrinal support as to the blessedness of hard labour, poverty, and sorrow ‘all the days of thy life.’”²⁸⁴ The Protestantism of England and America might well serve as the ultimate workplace disciplinary theory.²⁸⁵ Poverty is the godly person’s lot in life, to be borne with patience in the expectation of an eternal reward. Destitution, on the other hand, is the outward mark of inward sin. The means by which the able-bodied destitute were relieved might, therefore, serve an important instructive purpose. It could provide the idle with a taste of the

282. For a discussion of charitable theories in the colonies, see Bremner, *supra* note 4, at 89-94 (ranging from Cotton Mather to Alexis de Tocqueville). The blending of early Protestant theology with the poor law of the American colonial period is explored in Goebel, *supra* note 231, at 427 n.19 (discussing the notions of fundamental law and covenant in Puritan thought); Riesenfeld, *supra* note 178, at 201-14 (specifying the experiences of the New England colonies); see also MENCHER, *supra* note 14, at 43-44 (noting the predominance of Puritan thought in colonial poor law). Cotton Mather, the early New England Divine, was noted for stating that the best charity for the idle was work, and for maintaining that “for those who Indulge themselves in Idleness . . . the Express command of God unto us, is, That we should let them Starve.” *Id.* at 44.

283. MENCHER, *supra* note 14, at 43. This concept was adopted by other groups as well. In addition, many modern economic approaches to alleviating poverty are grounded, to a significant extent, on these notions. Thus, Galbraith quotes the Calvinist precept, “[t]he only sound way to solve the problem of poverty is to help people help themselves.” GALBRAITH, *supra* note 44, at 251.

284. THOMPSON, *supra* note 137, at 365. For a discussion of the interrelationship between Methodism and the early Industrial Revolution in England, see *id.* at 350-400.

285. See *id.* at 379 (“As a dogma Methodism appears as a pitiless ideology of work.”). However, the dogma was softened by the “needs, values and patterns of social relationship of the community within which it was placed.” *Id.*

eternal damnation which awaited them, absent repentance by becoming productive, and as a result becoming "merely" poor.

The system of English poor relief instituted by the Elizabethan Poor Law of 1601²⁸⁶ remained one of the formal bases of British public assistance until the adoption of the National Assistance Act in 1948²⁸⁷ although there were countless amendments, reforms, and a substantial recodification of the Elizabethan Poor Law with significant substantive revisions in 1927.²⁸⁸ These systems were primarily static in their underlying assumptions. They adopted the limitations of stasis in determining the proper scope and purpose of poor relief, especially for the able-bodied poor. These included prevention of disturbances of the peace, general malcontent, and famine.

More importantly, the Elizabethan Poor Law system and English local practice subsequently provided the institutional foundation for the construction of poor relief systems in the United States.²⁸⁹ All of the original colonies, whether originally settled by the British or not, ultimately embraced most of the inherent notions of the paradigm as expressed in the institutions of the Elizabethan Poor Law.²⁹⁰ Subsequently transmitted through the law of the original

286. An Acte for the Releife of the Poore, 1601, 43 Eliz., ch. 2 (Eng.).

287. Large portions of Elizabethan Poor Law were repealed by the Poor Law Act, 1927, 17 & 18 Geo. 5, ch. 14 (Eng.) (repealed 1939). Also, the Elizabethan Poor Law was superseded in 1948 upon passage of the National Assistance Act, 1948, 11 & 12 Geo. 6, ch. 29, § 1 (Eng.), and officially repealed that same year. Riesenfeld, *supra* note 178, at 177 & n.10. For a history of English poor relief, see, e.g., DE SCHWEINITZ, *supra* note 62 (detailing poor law in England from 1349 to 1942); FURNISS & TILTON, *supra* note 23, at 94-121 (exploring years of poor relief law in England, ranging from 1601 to the 1970s); HIMMELFARB, *supra* note 52 (concentrating on poor relief during the early industrial age); LEONARD, *supra* note 108, at 21 (discussing three major factors in the development of English poor relief: orders of municipal governors, regulations of Parliament, and inducement of Justices of the Peace to implement the law.); Briggs, *supra* note 65, at 232-46, 251-58 (describing the political and philosophical background leading to changes in British poor relief in the 19th and early 20th centuries).

288. Poor Law Act, 1927, 17 & 18 Geo. 5, ch. 14 (Eng.) (repealed 1939); see, e.g., *id.* sched. 11 (repealing substantial portions, but by no means all of the core provisions of the Elizabethan Poor Law of 1601). See also DE SCHWEINITZ, *supra* note 62 (tracing the history of English poor relief and its stagnancy to modern times); Riesenfeld, *supra* note 178, at 181 (noting that the Elizabethan poor law remained highly influential until post-World War II reforms); cf. FURNISS & TILTON, *supra* note 23, at 94-121 (contending that English poor law can be divided into four distinct periods of reform).

289. See MENCHER, *supra* note 14, at 39-48 (noting that the English system was most influential during the colonial period); Goebel, *supra* note 231 (describing English legal and local practices during the American colonial period and the early development of poor relief institutions in the United States); Riesenfeld, *supra* note 178, at 176-77 (arguing that colonial poor law emulated the poor law of Tudor England).

290. See MENCHER, *supra* note 14, at 44-48 (describing how the colonies borrowed

colonies, this system was later adopted by virtually every state in the Union.²⁹¹ And, unlike Britain, which abandoned the forms if not the underlying assumptions of stasis when the National Assistance Act was adopted,²⁹² American systems of state and federal poor relief continued to build on these notions, and were subject to the constraints inherent in the underlying system.²⁹³ It is to the modern versions of these ancient forms that I turn next.

V. THE GENERAL THEORY AND ARCHETYPAL ANGLO-AMERICAN POOR RELIEF SYSTEMS: A PRELIMINARY ASSESSMENT

In this section, state and local general assistance programs are examined, and the descriptive and predictive strength of the model is again tested. State and local governmental systems of general assistance preserve a pure form of the structure of poor relief

heavily from the ideas developed in the administration of Elizabethan poor relief and vagrancy law); Riesenfeld, *supra* note 178, at 201-33 (detailing the development of poor law within each American colony).

291. In this respect, the adoption of the Elizabethan Poor Law traced the adoption of the English common law in the United States. See generally Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791 (1951) (accounting the reception of common law in the United States). The English model continued to be closely followed through the middle of the next century. See MENCHER, *supra* note 14, at 147 (stating that post-revolutionary policy continued to "stagnate" and reflect old English policies for many years).

292. See National Assistance Act, 1948, 11 & 12 Geo. 6, ch. 29 (Eng.); see also FURNISS & TILTON, *supra* note 23, at 104-21 (observing the broad change in English poor law in the post-World War II era); MENCHER, *supra* note 14, at 399-400 (arguing that the National Assistance Act reflected an abandonment of assumptions underlying previous poor relief administration).

293. For a description of a fairly standard poor relief system in America during the 1930s, that of Alabama, and the striking parallels of that system to that of 17th century England, see FLYNT, *supra* note 60, at 281-320 (describing the imposition of residency requirements, a form of settlement, and noting that the nature of relief involved primarily the provision of food and shelter to the poor). Flynt notes that the poor resented the patronizing attitude of relief workers and decried the ineffectiveness of relief; the well-to-do criticized the entire notion of relief as a handout to people who never intended to work, and argued that the need for relief would be eliminated if laborers were prevented from unionizing and challenging the way employers set wages. *Id.* at 292-93. Poorhouses were not uncommon as the last resort of the indigent, feeble, old, and illiterate poor in Alabama through the Great Depression. Indeed, the Department of Public Welfare was created in 1935 in Alabama with a federal grant, in part to close the almshouses. *Id.* at 318-19. For an overview of state and federal programs, see generally FURNISS & TILTON, *supra* note 23, at 154-64 (depicting poor relief efforts during the progressive and New Deal eras); Bensinger, *supra* note 9 (examining California's general assistance provisions); Kravit, *supra* note 9 (examining the general assistance provisions of New Hampshire and its derivations from Elizabethan Poor Law); tenBroek, *supra* note 9 (emphasizing the law of California).

which, in a more complicated (but not different) form, constitutes the structure of federal categorical programs. State general assistance programs are examined in the first section of Part V to determine how accurately the theory predicts and explains the actual characteristics of such systems. The examination is broad in scope; the nature and functioning of state general assistance programs remain largely unexplored. Even this preliminary application of the general theory to American general assistance systems confirms that such systems remain anchored to a static conception of poor relief, and that centuries of reformation have done little to alter the basis upon which society creates and maintains its poor relief systems. There follows a comparative examination of the systems of poor relief considered thus far. I conclude that the general theory helps us understand the (phony) nature of the evolution of poor relief is substantially rhetorical. Indeed, the only evolution that public welfare has experienced since the fourteenth century has been the general (hyper)inflation of the words used to describe the remaining system, which at its core, is essentially unchanged.

A. *The Characteristics of American General Assistance Systems*

Studying the pattern of state general assistance within the static paradigm contributes greatly to understanding American systems of poor relief. Such study reveals that a fundamental component of all such systems is the unquestioning acceptance of income and social inequality. Programs which advocate a significant amount of income redistribution are considered radical and, are therefore, outside of contemporary debate.²⁹⁴ Likewise, poor relief programs reinforce the behavior expected of members of society.²⁹⁵ The

294. See, e.g., HANDLER & HASENFELD, *supra* note 33, at 8-9 (noting the power of symbols to thwart significant structural changes to welfare policy); SHEAHEN, *supra* note 22, at 229-38 (supporting an extensive guaranteed income program, but acknowledging that fundamental traditional notions must be overcome before such a program could be seriously considered); Larson, *supra* note 78, at 356 (noting that several proposals for a negative income tax as a means of income redistribution lost public appeal and were never implemented). Advocates of systems relying in large measure on substantial redistributions of income have attempted to "market" these programs as cheaper than current programs because the elimination of a large number of administrators under such programs make them *less* redistributive than the programs they would replace. In effect, the proponents of such programs are required to sell them as compatible with the basic notions of the static paradigm, i.e., cost and savings.

295. Martha Fineman has explored the manner in which welfare policies pressure poor women to adhere to the patriarchal model of the family, and how these policies provide a basis for determining worthiness for poor relief. See Fineman, *supra* note 17, at 277-85.

most readily acceptable programs are those which neither directly nor indirectly effect significant changes in the social order. This reluctance to disturb the status quo is reflected in the manner in which we frame the state's obligation to its destitute the primary effect of which is to limit the characteristics of *acceptable* poor relief programs. The repercussions of the acceptance of societal immutability and the value of self-sufficiency and its rewards (income inequality) form the basis for constructing the general theory of poor relief. It is to an explanation of the ways in which American systems of general assistance reflect and reinforce our paradigmatic cultural assumptions that I turn to.

1. The Categorization Imperative

American general assistance systems do not make relief available to all who might wish to apply. In the first instance, aid is provided only to those who lack something. What is it that they need? The statutes generally tell us or imply that the needy lack things necessary to sustain life at a level thought to be minimally suitable. Definitions of need eligibility fall within three broad groups. The first includes those jurisdictions that define eligibility as a function solely of "need."²⁹⁶ What does this mean? Many

Indeed, both liberal and conservative commentators link female self-sufficiency to marriage. *See, e.g.*, GILDER, *supra* note 37 (arguing that poverty is a function of the abandonment of traditional notions of marriage and the gender roles of males and females, which further results in the abandonment of the work ethic); WILSON, *supra* note 42, at 104-05 (linking the rise in African-American female-headed families to a rise in African-American male joblessness). Punishing the deviance of females who depart from the social status quo may be the intended or unintended result of governmental policy as well. *See, e.g.*, The Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.) (providing for immediate income withholding for child support). This establishment of paternity and support obligations for out-of-wedlock children reinforces the traditional notion of male responsibility for the provision of support for minor children. WHITE HOUSE WORKING GROUP ON THE FAMILY, *supra* note 20. *See generally* HANDLER & HASENFELD, *supra* note 33 (detailing several government efforts to control alleged social deviance through welfare policies).

296. Fifteen states base eligibility on an applicant's "need." *See* ALASKA STAT. § 47.25.130 (1990) (tying assistance to objective needs, not to exceed \$120 per month per person); IDAHO CODE § 31-3401 (1983 & Supp. 1995) (requiring an evaluation of need before nonmedical aid can be administered to an indigent person); IOWA CODE ANN. § 252.25 (West 1994) (providing county relief where a person's needs are not fully met by state and federal aid); KY. REV. STAT. ANN. § 205.200 (Baldwin 1991) (holding that the secretary is to promulgate need-based eligibility requirements); MD. CODE ANN., SOC. SERV. § 65A(a) (1992) (offering aid to those temporarily in need, but not eligible for other state or federal assistance); MASS. GEN. LAWS ANN. ch. 18, § 2 (West 1994) (providing financial assistance as needed); MONT. CODE ANN. § 53-2-602 (1994) (holding that grants of financial aid are to be need-based); N.J. STAT. ANN. § 44:8-121 (West 1993)

jurisdictions don't tell us for sure; but a safe assumption is that need means financial assistance.²⁹⁷ Another group of statutes narrow the potential definition of the need for financial assistance in other ways—temporary need;²⁹⁸ immediate need;²⁹⁹ or economic

(stating that the director of welfare is to inquire into direct and indirect causes of an applicant's needs); N.D. CENT. CODE § 50-01-01 (Supp. 1995) (listing eligibility requirements for needy applicants); OR. REV. STAT. § 411.710(1) (1993) (stating that general assistance is to be provided on the basis of individual need); PA. STAT. ANN. tit. 62, § 432 (Supp. 1995) (defining three classes of needy persons who are eligible for aid); R.I. GEN. LAWS § 40-5-1 (1990) (mandating town relief for those in need); WASH. REV. CODE ANN. § 74.04.005 (West Supp. 1995) (providing aid to unemployable persons in need); WIS. STAT. ANN. § 49.032(1)(c) (West Supp. 1994) (mandating monthly agency relief payments to needy persons); *Page v. City of Auburn*, 440 A.2d 363 (Me. 1982) (upholding Maine's statutory scheme that mandates consideration of need only in a welfare application).

297. See ALASKA STAT. § 47.25.130 (1990) ("The amount of assistance for a needy person shall be determined . . . with regard to the . . . needs of the person."); KY. REV. STAT. ANN. § 205.200 (Baldwin 1991) ("A needy aged person, a needy blind person, a needy child, a needy permanently and totally disabled person, or a person with whom a needy child lives shall be eligible to receive a public assistance grant."); MONT. CODE ANN. § 53-2-602 (1994) ("[T]he staff of the county department shall determine grants and changes in grants, based on the needs of each applicant."); N.J. STAT. ANN. § 44:8-124 (West Supp. 1995) ("Continued assistance . . . may be provided in such a manner as to meet any or all of the several needs of . . . the . . . persons to whom assistance is to be granted such as the provision of food, milk, shelter, fuel, clothing or medical care."); see also *Harris v. Emory*, 350 A.2d 325, 328 (N.J. Juv. & Dom. Rel. Ct. 1975) (showing eligibility under New Jersey General Public Assistance Law requires a showing that need was not self-created).

For a discussion of the difference between public and general assistance and their general requirements, see N.D. CENT. CODE § 50-01-01 (Supp. 1995) ("[E]ach county in this state is obligated . . . to relieve and support persons who are residents of the county and who are in need of poor relief."); OR. REV. STAT. § 411.710(1) (1993) ("General assistance shall be granted . . . on the basis of need."); PA. STAT. ANN. tit. 62, § 432(3) (West 1995) (holding that chronically needy or transitionally needy persons shall be eligible for assistance); R.I. GEN. LAWS § 40-5-1 (1990) ("Every town shall be required to relieve and support all poor and indigent persons . . . whenever they shall stand in need of relief and support."); WASH. REV. CODE ANN. § 74.04.005(1) (West Supp. 1995) (defining public assistance as "[p]ublic aid to persons in need thereof."); WIS. STAT. ANN. § 49.032(1)(c) (West Supp. 1994) ("Each general relief agency shall determine need."); *East Orange v. McCorckle*, 238 A.2d 489 (N.J. Super. Ct. App. Div. 1968) (holding that hospital care provisions are public assistance and are not to be categorized as general); *Castleberry v. Commonwealth of Pennsylvania Dep't of Pub. Welfare*, 387 A.2d 1360 (Pa. Commw. Ct. 1978) (holding that need and dependency are the sole criteria for eligibility for public assistance); *State ex rel. Sell v. Milwaukee County*, 222 N.W.2d 592, 595 (Wis. 1974) (interpreting general assistance statutes as only requiring the assets of an applicant to be eligible for benefits).

298. See IDAHO CODE § 31-3401 (Supp. 1995) ("The boards of county commissioners in their respective counties shall . . . evaluate the need and provide to the indigent person(s) nonmedical assistance in a temporary situation only when no alternatives exist."); MD. CODE ANN., SOC. SERV. § 65A(a) (1992) ("The Social Services Administration shall promptly establish, implement and modify as necessary a program of State funded assis-

need.³⁰⁰

A third group of jurisdictions provide a more narrow definition of need-based eligibility as a function of some state-determined level of subsistence.³⁰¹ The statutory definitions retain their general characteristics, speaking in terms of inability to provide for or support oneself,³⁰² insufficiency of income or resources,³⁰³ an in-

tance payments to residents of the State of Maryland who are temporarily in need.”).

299. See IOWA CODE § 252.25 (West Supp. 1995) (“The board of supervisors of each county shall provide for the assistance of poor persons in its county who are . . . in immediate need.”).

300. See MASS. GEN. LAWS ANN. ch. 18, § 2(A) (West 1994) (“The department shall provide and administer throughout the commonwealth a comprehensive public welfare financial assistance program, including the following services: the provision of financial assistance to those in economic need.”). The Maine Supreme Court held in *Page v. City of Auburn*, 440 A.2d 363 (Me. 1982), that municipalities may not prescribe eligibility standards which permit initial consideration of factors other than immediate financial need. See also *Blouin v. City of Rockland*, 441 A.2d 1008 (Me. 1982) (holding that the general assistance program requires an investigation of the financial condition of an applicant with mortgage payments); *Beaulieu v. City of Lewiston*, 440 A.2d 334, 346-47 (Me. 1982) (holding that the municipality may look no further than an applicant’s immediate financial needs in determining eligibility).

301. See ARK. CODE ANN. § 20-76-401 (Michie 1991) (providing public assistance to those who cannot maintain a level compatible with decency and health); CAL. WELF. & INST. CODE § 17000 (West 1991) (furnishing aid where subsistence cannot be achieved through relatives, friends, or other state means); DEL. CODE ANN. tit. 31, § 503(a) (1985) (accordng aid to those who cannot meet minimum sustenance levels); FLA. STAT. ANN. § 409.185(1)(a) (West 1993) (bestowing aid to those who are unable to comport with decency and health); ILL. ANN. STAT. ch. 23, para. 6-1 (Smith-Hurd 1993) (granting aid for health and well-being, plus any necessary treatment due to illness); KAN. STAT. ANN. § 39-709(d)(A) (1993) (detailing numerous conditions on subsistence that must be met in order to be eligible for general assistance); MINN. STAT. ANN. § 256D.01 (West 1994) (conferring assistance to those who cannot maintain a given subsistence level).

302. See CONN. GEN. STAT. ANN. § 17-273 (West 1992 & Supp. 1995) (“Each person who has not estate sufficient for his support, and has no relatives of sufficient ability who are obliged by law to support him, shall be provided for and supported . . . at the expense of the town.”); GA. CODE ANN. § 36-12-2 (1993) (“No person who is able to maintain himself by labor or who has sufficient means shall be entitled to the benefits of the provision for the poor.”); HAW. REV. STAT. § 346-71 (1985 & Supp. 1992) (“The department of human services shall administer and provide public assistance to eligible persons who are disabled, or are at least fifty-five years of age, or have dependent children in the home . . . and who are unable to provide sufficient support for themselves or those dependent upon them.”); MINN. STAT. ANN. § 256D.01 (West 1994) (“It is declared to be the policy of this state that persons unable to provide for themselves and not otherwise provided for by law and who meet the eligibility requirements . . . are entitled to receive grants of general assistance necessary to maintain a subsistence reasonably compatible with decency and health.”); MO. ANN. STAT. § 205.590 (Vernon 1983) (“Aged, infirm, lame, or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons.”); N.Y. SOC. SERV. LAW § 62 (McKinney 1992) (“[E]ach public welfare district shall be responsible for the assistance and care of any person who resides or is found in

ability to meet basic maintenance requirements,³⁰⁴ incompetence, poverty, and indigence.³⁰⁵

Thus, need-based statutory distinctions tell us much and little at the same time. In the more ponderous language of academia, "need" is at once vastly indeterminate and yet quite clear in the direction in which it points policy. While need is quite malleable, a useful tool of policy and control, the minimalism implicit in this choice clearly demonstrates the precision of the tone of policy, as well as its direction. We agree that American general assistance systems operate on the basis of large-scale and significant distinc-

its territory and who is in need of public assistance and care which he is unable to provide for himself."); OKLA. STAT. ANN. tit. 56, § 26.5 (West 1991) ("[T]hose persons who are unable to secure employment . . ."); S.C. CODE ANN. § 43-5-310 (Law. Co-op. 1985) ("General assistance in the form of money payments shall be granted . . . to handicapped and unfortunate persons in need who are not eligible for other forms of assistance . . . and are unable to support themselves because of physical or mental infirmity and would suffer unless so provided for."); S.D. CODIFIED LAWS ANN. § 28-13-1.1 (1992) ("[A]n indigent or poor person is any person who does not have sufficient money, credit, or property to furnish support or does not have anyone able to support him to whom he is entitled to look for support or is unable to work because of illness or injury."); W. VA. CODE § 9-1-2 (1990) ("The term 'indigent person' shall mean any person who is domiciled in this state and who is actually in need . . . and has not sufficient income or other resources to provide for such need."); WYO. STAT. § 42-2-103(a) (1994) ("The department shall provide and administer programs for public assistance and social services in Wyoming to those individuals lacking sufficient income or resources to provide themselves or their families with a reasonable subsistence compatible with decency and health or with services necessary for their well-being.").

303. See COLO. REV. STAT. § 26-2-111 (1989) ("No person shall be granted public assistance in the form of assistance payments under this article unless . . . [h]e has insufficient income, property or other resources to meet his needs."); DEL. CODE ANN. tit. 31, § 503(a) (1985) ("Assistance shall be granted under this chapter to any needy person who has not sufficient income or other resources to provide a reasonable subsistence compatible with decency and health."); FLA. STAT. ANN. § 409.185 (West 1993) ("The department shall provide financial assistance to needy persons who . . . [d]o not have sufficient income or other resources, as determined by the department, to provide reasonable subsistence compatible with decency and health."); KAN. STAT. ANN. § 39-709(d)(A) (1993) ("To qualify for general assistance in any form a needy person must have insufficient income or resources to provide a reasonable subsistence compatible with decency and health . . ."); NEB. REV. STAT. § 68-129 (1990) ("The Director of Social Services shall . . . [determine] need for public assistance on the basis of available resources.").

304. See ILL. ANN. STAT. ch. 23, para. 6-1 (Smith-Hurd 1993) ("Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being . . ."); N.H. REV. STAT. ANN. § 165.1 (1994) ("Whenever a person in any town is poor and unable to support himself, he shall be relieved and maintained by the overseers of public welfare of such town, whether or not he has residence there.").

305. See CAL. WELF. & INST. CODE § 17000 (West 1991) (directing city and county to "support all incompetent, poor, indigent persons, and those incapacitated" where subsistence cannot be achieved through relatives, friends, or other state means).

tions between people. American systems of poor relief distinguish between people in material need of some kind (we explore this a bit more later), and people who are not. General assistance systems are not concerned with the latter. The former are the special and exclusive objects of the systems' concerns. The statutes identify them and single them out—poor people³⁰⁶ and the indigent.³⁰⁷

However, the classification imperative of need is not limited to the broad area of economic need. Such systems make a further distinction as between paupers who are equally in need (in an objective sense) of material things. Need empowers us to segregate the nonproductive from the rest of us, it also permits segregation within the ranks of the nonproductive. Just as American society distinguishes between the productive and the non-productive by basing status and wealth rewards on the perceived utility of productivity and the effort expended, American general assistance systems make distinctions between garden-variety paupers and those worthy of special consideration. The distinctions are considered necessary as a matter of resource allocation. Thus, some state general assistance programs speak in terms of limited aid to the handicapped and unfortunate,³⁰⁸ the aged, infirm, lame, or sick,³⁰⁹ the person unable to maintain himself by his own labor,³¹⁰ people unable to provide for themselves,³¹¹ or unable to work because of illness or injury.³¹²

2. Relationship of Categorization to Aid

Who, then, is covered by state systems of general assistance? Assuming that state general assistance programs are creatures of the static paradigm, I have suggested that such programs should not only respect the distinctions between paupers and everyone else, but also the distinctions among paupers themselves. It should also follow that since productivity is prized, such systems should

306. *E.g.*, IOWA CODE ANN. § 252.25 (West 1994) (phrasing eligibility requirements in terms of poor people); N.H. REV. STAT. ANN. § 165.1 (1994) (same).

307. *E.g.*, CAL. WELF. & INST. CODE § 17000 (West 1991) (phrasing eligibility in terms of indigency); S.D. CODIFIED LAWS ANN. § 28-13-1.1 (1992) (same); W. VA. CODE § 9-1-2 (1990) (same).

308. *E.g.*, S.C. CODE ANN. § 43-5-310 (Law. Co-op. 1985).

309. *E.g.*, KY. REV. STAT. ANN. § 205.200 (Baldwin 1991); MO. ANN. STAT. § 205.590 (Vernon 1983).

310. *E.g.*, GA. CODE ANN. § 36-12-2 (1993).

311. *E.g.*, N.Y. SOC. SERV. LAW § 62 (McKinney 1992).

312. *E.g.*, S.D. CODIFIED LAWS ANN. § 28-13-1.1 (1992).

tend to favor those incapable of productivity, and disfavor the non-productive. And, indeed, the tendency of general assistance programs is to weigh heavily in favor of the incapacitated. For them, the government offers long-term relief with no obligation to work. For the others, the government may offer no material relief at all. To the extent that material relief is offered, it may be temporary or reserved for immediate or emergency need. For the able-bodied, aid more likely consists of programs designed to induce them to work (and thereby comply with the principle assumption of stasis).

a. Aid to the Incapacitated

For a large number of states and localities, general assistance is limited to disabled or incapacitated paupers; those unable to work or otherwise supply their needs. Thus, these states do not provide significant aid of any kind to people who do not otherwise qualify for federal categorical assistance.³¹³ Ohio has a separate program

313. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-233 (1988 & Supp. 1994). The statute does not specifically state that eligibility for federal categorical assistance is a factor in determining eligibility for general assistance. However, it is evident from the statute that an individual who would be eligible for a federal categorical aid program would also be eligible for Arizona's General Assistance Program because only unemployable persons can qualify for general assistance. *Cf.* DEL. CODE ANN. tit. 31, § 505 (1985 & Supp. 1994) (categorizing the types of assistance provided by the state: old age assistance, aid to families with dependent children, aid to the disabled, medical assistance for the aged, medical care and drug system assistance, and general assistance).

General assistance, however, is only available to unemployable persons. Most people who qualify under these programs would qualify for a federal categorical aid program. HAW. REV. STAT. § 346-52 (1985) (stating that an aged, blind, and permanently and totally disabled "person shall be eligible for public assistance who meets the requirements established by the Federal Supplemental Security Income Program or its successor agency, provided the person is also determined needy in accordance with state standards."); LA. REV. STAT. ANN. § 46:464 (West Supp. 1995) ("No parish or parish official shall, at the public expense, support or aid any persons as paupers, except such as are infirm, sick or disabled.").

Massachusetts only provides aid for those it determines are "needy." *See* MASS. GEN. LAWS ANN. ch. 18, § 2(A) (West 1994). Other states employ a similar scheme. *See* N.M. STAT. ANN. § 27-2-7 (Michie 1992) ("[P]ublic assistance shall be provided under a general assistance program to or on behalf of eligible persons who: (1) are under eighteen and meet all eligibility conditions for [AFDC] except for the relationship to the person with whom they are living; or (2) are [temporarily disabled and are not receiving AFDC]."); S.C. CODE ANN. §§ 43-5-65,-310 (Law. Co-op. 1985) (making general relief programs available only to needy families or handicapped and unfortunate persons who are not eligible for any other type of assistance and who are unable to support themselves due to a physical or mental infirmity.); WASH. REV. CODE ANN. § 74.04.005(6) (1982 & Supp. 1995) (making general assistance available only to people who are ineligible for federal aid assistance and who are either pregnant or incapacitated due to a physical or mental

called "Disability Assistance" for individuals who are under the age of eighteen, over the age of sixty, pregnant, or disabled. These incapacitated individuals are not otherwise covered under the Ohio general assistance program.³¹⁴ For such states, general assistance programs serve the limited purpose of providing temporary assistance between the time of application for relief under a federal categorical program and the commencement of federal categorical relief.³¹⁵

General assistance might also cover those able-bodied persons who are eligible for federal categorical aid—primarily people eligible for AFDC. Why? It reflects the view of an earlier age, that women alone with small children were considered "disabled," that is, unable to obtain work outside the home because their primary responsibility was raising their children.³¹⁶ This conception of the incapacity of women raising small children survives in several state statutes.³¹⁷ The notion is made easier, of course, since the federal government provides a significant portion of the funds to pay these women through the AFDC program. However, this approach has come under substantial attack over the last thirty years.³¹⁸

infirmary). The states of Tennessee, West Virginia, and Wyoming do not have any laws that provide for public or general assistance to indigent persons. Cf. D.C. CODE ANN. §§ 3-202.1, 3-205.42(a) (1981 & Supp. 1995) (providing for AFDC, General Assistance for Children, The Emergency Shelter Family Services Program, and General Public Assistance, but, limiting General Public Assistance to disabled persons).

314. OHIO. REV. CODE ANN. § 5115-01 (Baldwin 1995).

315. Under some state schemes, this temporary aid element is only a part of the general obligation to give alms to all who are in need. For example, in Iowa the law provides that:

The board of supervisors of each county shall provide for the relief of poor persons in its county who are ineligible for, or are in immediate need and are awaiting approval and receipt of, assistance under programs provided by state or federal law, or whose actual needs cannot be fully met by the assistance furnished under such programs.

IOWA CODE ANN. § 252.25 (West 1994).

316. See BUTLER & KONDRATAS, *supra* note 41, at 139 ("One of the assumptions underlying AFDC was the idea that a mother has an important role to play in the upbringing and socialization of her children."); Lurie, *supra* note 4, at 826-27 (discussing the genesis of AFDC in the mother's pension movement of the Roosevelt era).

317. See, e.g., ARK. CODE ANN. § 20-76-402(c) (Michie 1991) (excluding single mothers from the statutory definition of "able-bodied individual").

318. The current proposals to revise federal relief programs WARA and PRA (see *supra* note 74) are based in large part on the assumption that single women with children suffer no incapacity to work outside the home. For a discussion of the targeting of "welfare mothers" under the new federal initiatives, see Backer, *supra* note 42. Modern discourse has treated the single mother, especially the mother who is single by choice, as the source of poverty. See Fineman, *supra* note 17, at 279-89 (discussing how "welfare moth-

But even in these restrictive states, a small amount of aid is available to the potentially productive. This aid usually comes in the form of short-term temporary emergency assistance.³¹⁹ Massachusetts has two programs that provide emergency assistance, one for families with children³²⁰ and one for the elderly and disabled.³²¹ Other states particularly target special groups of the able-bodied for relief.³²²

b. Aid to Those Who Can (Ought to) Fend for Themselves

A large number of states provide some form of formalized general assistance to the able-bodied unemployed who do not qualify for categorical federal assistance. Twenty-one states impose on local units of government some form of general obligation to aid resident paupers.³²³ Six states provide broad general assistance

ers" are particularly singled out by government leaders and social commentators as being responsible for their position); White, *supra* note 17, at 1965-67 (arguing that racism plays a large part in perpetuating the "welfare-causes-poverty" myth).

319. See DEL. CODE ANN. tit. 31, § 503(h) (1985) ("Emergency monetary assistance, as shall be granted under this chapter to any needy person who has insufficient income or other resources to provide a reasonable subsistence compatible with decency and health, shall be paid to such needy person only in the form of a check drawn upon the State."); HAW. REV. STAT. § 346-53(e) (1985 & Supp. 1992) ("Any recipient may petition the department for additional assistance when the recipient's need is due to emergencies"); VT. STAT. ANN. tit. 33, § 2107(b) (1992) ("[A]n applicant in immediate need of general assistance for himself or a person dependent upon him shall be granted general assistance on an emergency basis"); VA. CODE ANN. § 63.1-58.1 (Michie 1995) ("In emergency situations or in the event of delay or error in a state issuance of checks for payments for assistance . . . , to eligible recipients, cost of foster care, or expenditures for administration and services, emergency payments shall be issued by local boards").

320. See MASS. GEN. LAWS ANN. ch. 18, § 2(D) (West 1994) ("The department shall administer a program of emergency assistance to needy families with children and pregnant women with no other children . . . to provide benefits to avoid destitution or to provide living arrangements in a home").

321. See *id.* at ch. 117A, § 1 ("There is hereby established within the department of public welfare a program of emergency aid for elderly and disabled residents of the commonwealth found by the department to be eligible for such aid.").

322. See, e.g., CONN. GEN. STAT. ANN. § 17-281a(c) (West 1992) (determining that a person "who is needed to care for a child under two years of age," for example, is considered unemployable).

323. See ALA. CODE § 38 (1992 & Supp. 1994); CAL. WELF. & INST. CODE § 17000 (West 1991); CONN. GEN. STAT. ANN. § 17-273 (West 1992 & Supp. 1995); GA. CODE ANN. § 36-12-1 (1993); IDAHO CODE § 31-3401 (1983 & Supp. 1995); ILL. ANN. STAT. ch. 23, paras. 6-1, 12-3 (Smith-Hurd 1993); IND. CODE ANN. § 12-20-1-1 (West 1994); IOWA CODE ANN. § 331.381 (West 1994); ME. REV. STAT. ANN. tit. 22, § 4307 (West 1992); MINN. STAT. § 256D.01 (West 1994); MISS. CODE ANN. § 43-31-1 (1993); NEB. REV. STAT. § 68-132 (1990); NEV. REV. STAT. § 428.010 (1989); N.H. REV. STAT. ANN.

coverage through state programs.³²⁴ One state appears to have both state and local poor relief programs available to the able-bodied.³²⁵

Elsewhere, however, supporting the able-bodied is not obligatory. Thus, seven states rely on local units of government (primarily counties) which are permitted, but not required, to create and fund programs of general assistance for all of the poor, including the able-bodied.³²⁶ Of these, it can be argued that only Arizona,³²⁷ Colorado,³²⁸ and Utah,³²⁹ provide any assistance to the able-bodied.

§ 165:1-a (1994); N.J. STAT. ANN. § 44:8-109 (West 1993); N.Y. SOC. SERV. LAW § 62 (McKinney 1992); N.D. CENT. CODE § 50-01-01 (1989 & Supp. 1995); OKLA. STAT. ANN. tit. 56, §§ 31, 32 (West 1991); R.I. GEN. LAWS. § 40-5-1 (1990); S.D. CODIFIED LAWS ANN. § 28-13-1.1 (1992); WIS. STAT. ANN. § 49.02(1M) (West 1987 & Supp. 1994).

324. ALASKA STAT. § 47.25 (1990); ARK. CODE ANN. § 20-76-401 (Michie 1991); KAN. STAT. ANN. §§ 39-7,-103 (Kanwork Program), -709(d)(A) (1993); KY. REV. STAT. ANN. § 205.200 (Baldwin 1991); MD. ANN. CODE art. 88A, §§ 65A(a), 65B (1991) (directing the social services administration to create assistance programs); PA. STAT. ANN. tit. 62, §§ 401-1148 (1968 & Supp. 1995).

325. OKLA. STAT. ANN. tit. 56, §§ 26.10, 31-32 (West 1991) (noting that the County commissioner, as overseer of the poor, has a duty to insure that all poor persons in the county are cared for so long as they remain a county charge).

326. See ARIZ. REV. STAT. ANN. § 46-136 (1988 & Supp. 1994) (empowering the State Department of Public Welfare to create work projects for the needy, able-bodied, and unemployed); COLO. REV. STAT. § 30-17-102 (1989) ("Each county *may* provide temporary general assistance to the poor who reside in the county or to transients.") (emphasis added); FLA. STAT. ANN. § 125.01(e) (West 1993) ("The legislative and governing body of a county *shall have the power* to . . . [p]rovide . . . health and welfare programs.") (emphasis added); MO. ANN. STAT. §§ 205.580-850 (Vernon 1983 & Supp. 1995) (placing responsibility on the counties for the poor who are not able-bodied, then allowing different classes of counties to help the able-bodied at their discretion through establishment of welfare boards); UTAH CODE ANN. § 17-5-62 (1991 & Supp. 1995) ("The county legislative body *may, if they deem it necessary and expedient to do so, . . .* assess and levy a tax for . . . [t]he care, maintenance and relief of the indigent sick or dependant poor persons [and] [t]he temporary relief of indigent persons not having a lawful settlement in the county") (emphasis added); VT. STAT. ANN. tit. 24, § 2691 (1992) (stating that towns *may* appropriate money to social service programs which provide assistance to people requiring employment to eliminate their need for public assistance); VA. CODE ANN. § 63.1-106 (Michie 1995) ("If a local board has exercised its option to establish a program of general relief, a person shall be eligible for such components of the general relief program as the locality chooses to provide if he is in need of general relief.")

327. See ARIZ. REV. STAT. ANN. § 46-136 (1988) (empowering the state Department of Public Welfare to create work projects for the needy, able-bodied unemployed).

328. Each county can provide financial assistance to single employable persons on a case-by-case basis. However, these county programs serve a small number of people because of the limited availability of funds. The 10 largest counties in Colorado do provide some kind of temporary assistance to single employable persons. Telephone Interview with Joan Baldwin, AFDC Specialist, Colorado State Board of Social Services (Aug. 12, 1992).

329. In Utah, the Office of Family Support offers a state-administered "Emergency Work

ied.

The fact that the programs exist does not mean that they are generous. Indeed, the general theory would suggest the opposite. Some programs are breathtakingly miserly in the aid offered, providing little more than temporary or emergency assistance to the able-bodied. Some states offer temporary assistance to the able-bodied,³³⁰ with payments capped at a stated amount,³³¹ or limited to a single payment during any twelve-month period.³³² Some states limit assistance to the alleviation of life-threatening circumstances,³³³ or to relieve immediate suffering,³³⁴ or for emergency situations.³³⁵ True to the static vision of productivity, this tempo-

Program" for single employable persons. In return for a biweekly payment, an applicant is required to search for employment or perform public service work for 40 hours per week. Telephone Interview with Kristi Carlson, Program Specialist for the Office of Family Support (Aug. 11, 1992).

330. See, e.g., S.D. CODIFIED LAWS ANN. § 28-13-38 (1992):

Whenever any person entitled to temporary relief as a poor person shall be in any county in which he has not established residency, the commissioners thereof may, if the same is deemed advisable, grant such relief by providing the same relief as is customary in cases where persons have established residency in the state and county.

331. See, e.g., ALASKA STAT. § 47.25.250 (1990) ("[T]he needy person may receive temporary assistance in the form and amount which the department considers necessary. Temporary assistance for needs other than transportation and medical care may not exceed \$120 per person per month.").

332. See, e.g., ILL. ANN. STAT. ch. 305, para. 5 (Smith-Hurd 1993):

[W]hen an applicant resides in the local governmental unit in which he makes application, emergency financial assistance to alleviate life-threatening circumstances or to assist the individual in attaining self-sufficiency may be given to or in behalf of the applicant. . . . Emergency assistance shall not be granted under this Section more than once to any applicant during any 12 consecutive month period.

333. See, e.g., *id.*

334. See, e.g., IND. CODE ANN. § 12-14-23-4 (West 1994) ("[T]he components of a community-action program shall be designed to assist participants, including the poor and near poor, persons with disabilities, farmworkers, the elderly, and youth . . . to . . . [o]btain emergency assistance through loans or grants to meet immediate and urgent individual and family needs.").

335. See, e.g., KY. REV. STAT. ANN. § 205.810(1) (Baldwin 1991) ("There is created within the cabinet a crisis oriented program for emergencies which shall provide money payments to individuals who meet standards promulgated by the secretary."); TEX. HUM. RES. CODE ANN. § 34.003(a) (West 1990) (establishing a "temporary emergency relief fund with state and local funds, and in cooperation with other public entities and nonprofit organizations," in meeting the needs of individuals and families for temporary emergency relief); VT. STAT. ANN. tit. 33, § 2107(b) (1992) ("[A]n applicant in immediate need of general assistance for himself or a person dependent upon him shall be granted general

rary relief is sometimes made available in the form of employment.³³⁶ For long-term aid, presumably, the comfort of a paycheck is suggested.

Where do the people for whom state aid is unavailable turn when they need aid? The general theory suggests that static systems should tend to favor at least passive reliance on non-governmental aid, primarily in the form of charity, to supplement governmental programs of poor relief, the idea being that if the state is unable to meet the need, the populace will rise up of its own volition and fill the void.³³⁷ Some states, such as California,³³⁸

assistance on an emergency basis.”); VA. CODE ANN. § 63.1-58.1 (Michie 1995) (“In emergency situations or in the event of delay or error in a state issuance of checks for payments for assistance . . . to eligible recipients, cost of foster care or expenditures for administration and services, emergency payments shall be issued.”).

336. See, e.g., OKLA. STAT. ANN. tit. 56, § 26.7 (West 1991) (“The Oklahoma Emergency Relief Board may provide temporary relief employment to destitute but able-bodied persons not otherwise cared for by the federal government, state or county agencies, public or private charity organizations or institutions.”).

337. And states are quite right to see private charitable endeavors as a viable substitute for formal governmental programs. For instance, the Gallup Organization reported to Independent Sector (a private group that promotes charity and volunteer work) that while charitable donations had decreased from prior years’ levels, in one study both volunteerism and donations remained at high levels. Thus, a “national Gallup poll of 2,671 people shows 72% of U.S. households made donations last year [1991], compared to 75% in 1989. Average annual contributions dropped from \$978 in 1989 to \$899 last year.” Anita Manning, *Charitable Spirit Survives Hard Times*, USA TODAY, Oct. 16, 1992, at D1; W. Dole Nelson, *Charitable Donations Down*, TULSA WORLD, Oct. 16, 1992, at C10. Giving isn’t limited, of course, to donations. The survey also reported that 51% of those surveyed also did some volunteer work, down from 54% in 1989. *Id.* However, the average numbers of hours worked by volunteers also increased slightly, averaging 4.2 hours per week. *Id.* Whatever the weakness of the numbers presented by the Independent Sector Gallup survey, what is apparent is that, to a substantial extent, private charitable giving is a significant part of the manner in which our society maintains the poor.

Whether private charitable giving is efficient or whether it best accomplishes its purposes is, however, problematic. See, e.g., Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393 (1988) (surveying the prevalent “subsidy” and “equity” theories for such a deduction); A. Kay B. Roska, Comment, *Nonprofit Hospitals: The Relationship Between Charitable Tax Exemptions and Medical Care For Indigents*, 43 SW. L.J. 759 (1990) (considering whether private nonprofit hospitals which no longer serve the sick poor should receive tax breaks); Christopher Edley, Jr., *Season’s Seethings: I Am Not a Point of Light*, LEGAL TIMES, Dec. 18, 1989, at 26 (arguing that government aid is more efficient than individualized charity).

338. CAL. WELF. & INST. CODE § 17000 (West 1991) (“Every county and every city and county shall relieve and support all incompetent, poor, indigent persons . . . when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions”) (emphasis added). County general assistance “is a program of last resort for indigent and disabled persons unable to qualify for other kinds of public benefits.” *Boehm v. Superior Court*, 223 Cal.

formally proclaim this aim in their statutes, providing aid for those indigent not relieved by other means, including, but not limited to private institutions. Other states, such as Texas, formally proclaim that the reason for the provision of state aid is to supplement private charitable efforts and local government programs in times of special economic dislocation.³³⁹ Several states have implemented formal or informal procedures for referring ineligible applicants to local charitable organizations.³⁴⁰ Other jurisdictions, embodying an extreme form of the passivity characteristic of the paradigm, merely provide for the maintenance of "safe" zones for the homeless population.³⁴¹

In addition, almost every state has enacted programs of temporary or emergency relief. Many states currently have a variety of emergency and temporary assistance programs.³⁴² Most of these kinds of programs have now been targeted to the homeless, and consist primarily of providing a little cash, overnight shelter, some food, and perhaps some clothing. The District of Columbia has an "Emergency Shelter Family Services Program."³⁴³ The program provides for emergency shelter family housing units for homeless families with minor children.³⁴⁴ Indiana permits a township trustee to provide shelter for families needing temporary housing assistance as part of a temporary emergency assistance program.³⁴⁵ The New

Rptr. 716, 719 (Ct. App. 1986).

339. In Texas, the legislature specifically found that "local governments and non-profit service organizations are unable to meet the increased financial burden caused by [economic and demographic changes creating rapid increases in the number of needy and homeless persons] in various areas of the state." TEX. REV. CIV. STAT. ANN. art. 34.001(a)(2) (West 1971 & Supp. 1993). This in turn required the state to provide some money in addition to that already available through local and private charitable organizations.

340. Thus, for instance, the Tulsa, Oklahoma office of the Department of Human Services routinely refers the ineligible to local charities for assistance. Interview with Toni Wilson, Tulsa Department of Human Services, in Tulsa, Oklahoma (Oct. 12, 1992).

341. Thus, Florida, which provides no aid for the able-bodied indigent population (other than mothers with small children through the AFDC program), may not evict the homeless from sheltered areas, public parks or streets, because doing so deprives them of minimal safety and cover from the elements. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992) (declaring unconstitutional Miami's practice of arresting homeless individuals and seizing their property).

342. See *infra* text accompanying notes 460-67.

343. D.C. CODE ANN. § 3-206.3 (1981). For an analysis of the District of Columbia's efforts, see Frank R. Trinity, *Shutting the Shelter Doors: Homeless Families in the Nation's Capital*, 23 STETSON L. REV. 401 (1994).

344. D.C. CODE ANN. § 3-206.3 (1981).

345. See IND. CODE ANN. §§ 12-1-21-1 to 12-1-21-9 (West 1994).

York legislature created a special fund to help provide housing to the state's large homeless population.³⁴⁶ The state funds programs sponsored by non-profit corporations, charitable organizations, public corporations, and municipalities that "will expand and improve the supply of shelter and other housing arrangements for homeless persons."³⁴⁷ The state finances the programs by grants, loans, or loan guarantees.³⁴⁸ Connecticut provides a maximum of one hundred days of emergency housing assistance for homeless families.³⁴⁹ Some municipalities have also implemented either formal or informal programs of temporary emergency aid to the destitute, providing enough cash or in-kind help to tide people over until relief applications are processed or private charitable aid is procured.³⁵⁰

For most of the able-bodied unemployed who are qualified for neither general assistance nor federal categorical aid programs, such temporary or emergency assistance provides an insignificant amount of aid. Some programs of temporary or emergency assistance provide a small amount of cash or vouchers to individuals in need.³⁵¹ Some programs provide housing and food for a short period of time.³⁵² Perhaps more honestly reflecting a jurisdiction's sense of the worthiness of the able-bodied who do not work, some

346. N.Y. SOC. SERV. LAW § 41 (McKinney 1992).

347. *Id.*

348. *Id.* § 43(3).

349. The Connecticut Department of Income Maintenance regulations which establish temporary housing assistance rules were unsuccessfully challenged when the period during which aid was provided was reduced to 100 days. *Savage v. Aronson*, 571 A.2d 696 (Conn. 1990). In *Savage*, the Connecticut Supreme Court reversed a lower court determination that the state AFDC rules required the state to support dependent children and their caregivers in a home, and that the emergency shelters were "home." *Id.* at 698-99. For a brief discussion of the necessity of meeting the immediate needs of the homeless in the context of *Savage*, see Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387 (1991).

350. In New York City, emergency cash aid is available to applicants who say they have no money to buy food. See *Welfare Applicants Who Claim Dire Need Get Emergency Grants*, N.Y. TIMES, Aug. 17, 1986, at 50. In Tulsa, Oklahoma, caseworkers have set up a food larder for what they consider extreme emergency conditions. In addition, that office will give food stamps to applicants who qualify for funds. Interview with Toni Wilson, Tulsa Department of Human Services, in Tulsa, Oklahoma (Oct. 12, 1992).

351. *E.g.*, ALASKA STAT. § 47.25.250 (1990); DEL. CODE ANN. tit. 31, § 503(h) (1985); HAW. REV. STAT. § 346-53(e) (1985 & Supp. 1992); ILL. ANN. STAT. ch. 23, para. 6-10 (Smith-Hurd 1993); KY. REV. STAT. ANN. § 205.810(1) (Baldwin 1991); VA. CODE ANN. § 63.1-58.1 (Michie 1995).

352. MASS. GEN. LAWS ANN. ch. 18, § 2(d) (West 1994); TEX. HUM. RES. CODE ANN. § 34.003(b) (West 1990).

state programs assist in paying part of the transportation to the state's border.³⁵³ Recently, the courts have also begun to get more actively involved, requiring the state or locality to provide certain services to the homeless or other qualifying poor.³⁵⁴

The structure of state and local general assistance programs evidence a strong allegiance to the notion that relief must foster societal work norms. In the case of state and local general assistance programs, these incentives to conform to work expectations come in the form of work requirements and the punishment of "anti-social" behavior. "The philosophy here is unromantic: get a job, any job, even a low-paying, unpleasant job."³⁵⁵ Thus, states may require, as a condition to the granting of relief, that the able-bodied pauper register for and participate in state work or work search programs, or register with the state or local employment office,³⁵⁶ or accept work offered by the state,³⁵⁷ or actively seek

353. MONT. CODE ANN. § 53-3-201(4) (1994); VT. STAT. ANN. tit. 33, § 2107(b) (1992).

354. See *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992) (declaring as unconstitutional the city's practice of arresting homeless persons and seizing their property based upon the Fourth and Fourteenth Amendments). *Trinity*, *supra* note 343, at 412-26 (describing litigation under the District of Columbia's Emergency Shelter for Families Program).

355. de Parle, *supra* note 57, at 14; see Eva Donovan, *Reform of Welfare System is in the Best Interests of All*, BUFF. NEWS, May 2, 1993, at 8 (editorial) (equating positive welfare reform with increases in recipient productivity).

356. ALA. CODE § 38-11A-4 (1992 & Supp. 1994) ("Every applicant for and recipient of public assistance, except those exempted by federal law or regulation, shall be required to register and participate in programs and activities of the Alabama welfare employment program."); IDAHO CODE § 31-3404 (1983 & Supp. 1995) ("Applicants and all household members who are not fully employed and are capable of employment, shall be required to file an application with the department of employment."); IND. CODE ANN. § 12-20-13-1(1) (West 1994) ("A township trustee may, with the approval of the township board . . . conduct for poor relief recipients in the township rehabilitation, training, retraining, and work programs."); KY. REV. STAT. ANN. § 205-200(7)(a) (Baldwin 1991) ("No person shall be eligible for public assistance payments if . . . he refuses without good cause to register for employment with the state employment service."); ME. REV. STAT. ANN. tit. 22, § 4316-A(1)(B) (West 1992) ("An applicant is ineligible for assistance . . . if any municipality establishes that the applicant, without just cause refuses to register for work."); MD. CODE ANN., SOC. SERV. § 88A-17A-1(a) (1992) ("General public assistance benefits shall not be given to an employable person who has not registered with the local office of employment security."); MICH. COMP. LAWS ANN. § 400.55a(1)(d) (West 1988 & Supp. 1995) ("In determining the eligibility of an applicant for general assistance, and before granting the assistance . . . the county and district departments of social services shall . . . require an employable person to work on a work relief or work training project, or other departmental-approved activity, if available, in return for assistance given."); MINN. STAT. ANN. § 256D.051(3) (West 1994) ("In order to receive work readiness assistance, a registrant shall cooperate with the county agency in all aspects of the work readi-

work.³⁵⁸ States are not loathe to actually make use of the work

ness program, accept any suitable employment, including employment offered through the job training partnership act, an other employment and training options, and participate in work readiness activities”; MONT. CODE ANN. § 53-3-303(a) (1994) (“As a condition of eligibility for general relief assistance, an employable recipient must register for employment with the department of labor and industry.”); PA. STAT. ANN. tit. 62, § 405.1 (1968 & Supp. 1995) (“Prior to the authorization of assistance, every individual shall register in accordance with regulations of the department for employment, training and manpower services.”).

357. CAL. WELF. & INST. CODE § 17200 (West 1991) (“Work may be required of an indigent, who is eligible to receive benefits . . . and who is not incapacitated by reason of age, disease, or accident, as a condition of relief.”); CONN. GEN. STAT. ANN. § 17-281a (West 1992) (“[E]mployable persons otherwise eligible for support . . . from any town shall be required to perform such work or participate in such program as may be assigned to them by the public welfare official of the town granting such support”); KAN. STAT. ANN. § 39-709(d)(B)(3) (1993) (“[T]he secretary shall adopt rules and regulations which establish community work experience program requirements for eligibility for the receipt of general assistance in any form and which establish penalties to be imposed when a work assignment under a community work experience program requirement is not completed without good cause.”); KY. REV. STAT. ANN. § 205.200(7) (Baldwin 1991) (“No person shall be eligible for public assistance payments if, . . . he refuses without good cause . . . to accept suitable employment.”); ME. REV. STAT. ANN. tit. 22, § 4316-A (West 1992 & Supp. 1994) (“An applicant is ineligible for assistance for 120 days . . . when any municipality establishes that the applicant, without just cause . . . refuses to accept a suitable job offer under this section; refuses to perform or; willfully fails to perform a job assigned”). MD. ANN. CODE art. 88A, §§ 17A1-2 (1991) (“Local social services offices shall give an assignment to unemployed employable persons receiving general public assistance to employables. General public assistance benefits shall not be given to an employable person who has . . . refused after job counseling to accept a suitable placement.”); N.H. REV. STAT. ANN. § 165.31 (1994) (“If a person who is receiving support . . . is physically able to work, the overseer of public welfare . . . may require the person receiving aid to work for the town or city at any job which it has available that is within the capacity of the person receiving support.”); OKLA. STAT. ANN. tit. 56, § 27.3 (West 1991):

[A] government agency may enter into an agreement with the Department of Public Welfare wherein and whereby the Department of Public Welfare may assign unemployed employable persons who have attained the age of sixteen (16) and who are eligible for assistance to do and perform work and labor on behalf of said [government agency] and such person shall perform, if available, work and labor for such [government agency] for the length of time necessary to earn at the legal minimum wage or the going hourly rate prevailing in the area for labor of like kind, whichever is higher, an amount of money equal to the amount of assistance granted to such person and the assistance unit of which he or his dependents is a part.

PA. STAT. ANN. tit. 62, § 405.1(c) (1968 & Supp. 1995) (“No person registered . . . shall refuse to accept a bona fide offer of employment or training.”).

358. COLO. REV. STAT. § 30-17-103(3) (1989) (“The board of county commissioners . . . may require that any applicant for temporary general assistance shall search for employment and accept employment that is offered and shall also enroll with the division of employment and training in order to be eligible to receive temporary general assistance.”); N.D. CENT. CODE § 50-01-17 (1989):

requirement provisions of general assistance. For instance, towns in New Hampshire have adopted a program called the "Welfare Work Program." The program requires recipients of aid to work for four hours per day, five days per week. Recipients are assigned to various jobs around town, such as washing police cars or helping the county clerk's office with voter registration.³⁵⁹ Alameda County, California, was considering requiring general assistance recipients to work cleaning parks, painting, or doing other public works jobs.³⁶⁰ Poor relief programs are structured so that the failure of the able-bodied to comply with requirements to work, apply for work, or enroll in certain job training or other educational or vocational training, can lead to the diminution or termination of benefits.³⁶¹ Federal programs have been subject to the same incentive, to tie work-attaining performance to benefits.³⁶² And the recent

[T]he county social service board of the county in which such poor person is a resident shall insist that those able to labor shall seek employment and such board shall refuse to furnish any aid until it is satisfied that the person claiming help is endeavoring to find work for himself. The board shall make all possible effort to secure, for an able-bodied person claiming poor relief, employment in the county where he resides and may call upon residents of the county to aid it in finding work for such person.

359. Telephone Interview with Joan Callahan, Welfare Administrator for the Concord Welfare Administration, Concord, New Hampshire (Aug. 31, 1992).

360. Judy Ronnigen, *Part-Time Jobs Proposed For Welfare Recipients: Alameda County Supervisors Must OK It*, SAN FRAN. CHRON., Dec. 8, 1992, at A20.

361. See IDAHO CODE § 31-3404(4) (1983 & Supp. 1995) ("Individuals voluntarily removing themselves from the work force may be denied assistance."); KAN. STAT. ANN. § 39-709(d)(B)(3) (1993) ("[T]he secretary shall . . . establish penalties to be imposed when a work assignment under a community work experience program requirement is not completed without good cause."); KY. REV. STAT. ANN. § 205.200(7) (Baldwin 1991) ("No person shall be eligible for public assistance payments if . . . he refuses without good cause to register for employment with the state employment service, to accept suitable training, or to accept suitable employment."); MD. CODE ANN., SOC. SERV. § 88A-17A1,2 (1992) ("General public assistance benefits shall not be given to an employable person who has not" complied with the applicable work or work registration requirements); MINN. STAT. ANN. § 256D.051(3) (West 1994) ("The county agency may terminate assistance to a registrant who fails to cooperate in the work readiness program."); N.D. CENT. CODE § 50-01-17 (1989) ("[S]uch board shall refuse to furnish any aid until it is satisfied that the person claiming help is endeavoring to find work for himself."); PA. STAT. ANN. tit. 62, § 405.1(d) (1968 & Supp. 1995) ("Any person required to register . . . who willfully fails to register or refuses a bona fide offer of employment or training . . . shall be ineligible for . . . assistance.").

362. Thus, in Michigan, a welfare proposal called the Social Contract and Michigan Opportunity and Skills Training Act is pending in the legislature and is to provide for employment, job training, and education for welfare recipients. See MI S.B. 142, 87th Leg., Reg. Sess. (1993). In return for public assistance, a recipient of assistance must

change in administrations from a self-declared conservative to a self-declared "liberal" one appears to have made no difference in this respect.³⁶³

The type of conduct required of recipients in return for aid is not always limited to work. Many states increasingly require their indigent population to act "responsibly," that is, to act in a manner prescribed by statute or face reduced benefits. Thus, states now require indigents to force their children to attend school,³⁶⁴ to get married and stay married,³⁶⁵ and to prevent additional pregnancies while "on the dole."³⁶⁶

3. The Drive to Quarantine the Destitute: Separation, Isolation, Self-Containment, Local Administration

Since any challenge to the social or economic status quo is inconceivable, a politically successful system of state general assistance will direct itself inward. The same notion will drive a successful poor relief system to focus on directly manipulating the target population rather than attempting the manipulation of the

participate for a minimum of 20 hours in employment, educational, and job training programs. *Id.* Failure to participate would result in a 20% reduction of benefits or, in the case of a parent receiving AFDC, payments on behalf of any dependant child would be made to another person. *Id.*

363. In 1994, President Clinton proclaimed his intention to end welfare as presently constituted. To that end he introduced his version of poor relief reform, WARA, which was substantially ignored by Congress. Freed of its hyperbole, the Clinton Administration proposed little more than greater incentives to find any job on pain of a reduction or elimination of benefits. The new plan would have limited AFDC benefits for the able-bodied to two years, create a national community service program for aid recipients unable to get a job after the expiration of their AFDC eligibility, and expand certain benefits to the working poor. See Backer, *supra* note 42; PROGRESSIVE POLICY INSTITUTE, MANDATE FOR CHANGE 217-36 (Will Marshall & Martin Schram eds., 1993). The Republican proposal, PRA, introduced in early 1995, adopted the same general approach. See Backer, *supra* note 42.

364. See *supra* text accompanying notes 105-06.

365. See, e.g., Isabel Wilkerson, *Wisconsin Welfare Plan: To Reward the Married*, N.Y. TIMES, Feb. 12, 1991, at A1 (discussing Wisconsin Governor Tommy Thompson's proposal to increase welfare payments to those who are married).

366. At the end of 1993, New Jersey was the only state which eliminated the increment in benefits under AFDC for which a family would otherwise be eligible as a result of the birth of a child during the time the recipient is on welfare. N.J. STAT. ANN. § 44:10:3.5 (West 1993). However, there were similar proposals awaiting approval in the legislatures of Connecticut, Missouri, Oklahoma, Pennsylvania, and South Carolina. See Conn. S.B. 143, Reg. Sess., (1993); Mo. H.B. 27, 87th Leg., 1st. Sess., (1993); Okla. H.B. 1492, 44th Leg., 1st Sess. (1993); Pa. H.B. 2580, 175th Legis., 1991-1992 Reg. Sess. (1991); S.C. S.B. 308, Statewide Sess. (1993).

system. It would be inconceivable for state general assistance programs to be constructed on the basis of any assumption acknowledging that any aspect of the American socio-economic system might well have given rise to the destitution causing the need for state support in the first place. Consonant with this notion, there is very little formal or informal connection between the state's poor relief program and any other program, including, but not limited to, its labor, commerce, health, or education programs. The link between general assistance is limited, where it exists at all, between able-bodied paupers receiving aid and state employment offices, but even this link is passive, requiring little more than registration and some kind of minimal effort.³⁶⁷ Some states have begun to recognize the lack of connectedness between programs, but take the position that they are unable to effectively make any such connection.³⁶⁸ The administrative unit, acting in virtual isolation, is thus required to provide care and assistance for the indigent,³⁶⁹ and, much as in the days of late Tudor England, to supervise the poor.³⁷⁰

The state, then, is both purse-mistress and nanny to its incompetents and deviants. As nanny the state devotes a substantial amount of resources to the segregation of these socio-economic deviants. This isolation and separation is attested to by the separation between income transfers to those thought part of the produc-

367. See, e.g., IDAHO CODE § 31-3404(4) (1983 & Supp. 1995) ("Applicants and all household members who are not fully employed and are capable of employment, shall be required to file an application with the department of employment."); ILL. ANN. STAT. ch. 305, para. 5/6-1.4 (Smith-Hurd 1993) (requiring applicants to "register for and accept bona fide offers of employment"); KY. REV. STAT. ANN. § 205.200(7)(a) (Baldwin 1991) (stating that applicants must "register for employment with the state employment service"); ME. REV. STAT. ANN. tit. 22, § 4316-A(1)(B) (West 1992 & Supp. 1994) (stating that applicants must "register for work"); MD. CODE ANN., SOC. SERV. § 88A-17A1(a) (1992) (requiring applicants to be "registered with the local office of employment security"); PA. STAT. ANN. tit. 62, § 405.1(a) (1968 & Supp. 1995) ("[E]very individual shall register . . . for employment, training, and manpower services.").

368. NEW YORK TASK FORCE, *supra* note 23.

369. N.Y. SOC. SERV. LAW § 62(1) (McKinney 1992) ("[E]ach public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care"); OKLA. STAT. ANN. tit. 56, § 32 (West 1991) ("The overseers of the poor in each county shall have the oversight and care of all the poor persons in their county so long as they remain a county charge, and shall see that they are properly relieved and taken care of.").

370. See, e.g., GA. CODE ANN. § 36-12-1 (1993) ("The general supervision of all paupers is vested in the county governing authority."); NEB. REV. STAT. § 68-132 (1990) ("The county board of each county shall be the overseer of the poor and shall be vested with the superintendence of the poor in such county.").

tive mainstream and treated as an integrated part thereof, and the "others." Members of the productive mainstream receive unemployment compensation, which is treated as an "earned" transfer. Deviants are gifted poor relief. Productive people are thought only to have temporarily lost a job. The productive will always be able to obtain another one (even if it is not as good as the previous job) because such people understand and conform to the static imperative to work. They are treated as part of the labor force, temporarily between jobs. Their status merits a special form of relief—short-term unemployment "insurance."³⁷¹ This is a stigma-free form of relief, earned and merited by those who work and intend to continue to do so.³⁷² In contrast, the able-bodied unemployed have earned nothing. They are not the same kind of people. We do not even count them, acknowledge that they exist, when we calculate our rates of unemployment.³⁷³ These able-bodied do not merit unemployment compensation; they are isolated, saved from utter destitution and reconditioned to accept the consequences of the prime static directive: GET A JOB.³⁷⁴

Self-containment can be increased by physical isolation. State general assistance programs continue the millennia-old tradition of administering and funding poor relief at the local level. Of the states with general assistance provisions, twenty impose the administrative burden of general assistance on localities.³⁷⁵ Of these,

371. See LEVITAN, *supra* note 3, at 43-46 (discussing unemployment insurance (UI)).

372. "The objective of UI is to provide essential aid to workers during periods of forced idleness. It is not viewed as an anti-poverty program, but as a protection earned by the worker against joblessness." *Id.* at 43.

373. The unemployment rate is estimated monthly through the Current Population Survey of the Bureau of the Census. An "unemployed person" is defined as one who did not work during the survey week, who made specific efforts to find a job within the past four weeks, and who was available for work during the survey week; alternatively, one could be considered "unemployed" if he were waiting to be called back to an old job or report to a new one within 30 days. MURRAY, *supra* note 3, at 68 n.4.

374. Indeed, society tends to measure the success of even the most progressive state experimentation with the poor relief apparatus in terms of the ability of the experiments to induce the recipients of aid to get and maintain a job. See GUERON & PAULY, *supra* note 6, at 79-120 (discussing a number of current state experimental programs and demonstration projects).

375. ALA. CONST. art IV, § 88; CAL. WELF. & INST. CODE § 17000 (West 1991); CONN. GEN. STAT. ANN. § 17-273 (West 1992); GA. CODE ANN. § 36-12-1 (1993); IDAHO CODE § 31-3401 (1983 & Supp. 1995); IND. CODE ANN. § 12-20-5-1 (West Supp. 1993); IOWA CODE ANN. § 331.381 (West 1994); MINN. STAT. ANN. § 256D.03(1) (West 1994); MISS. CODE ANN. § 43-31-1 (1993); MONT. CODE ANN. § 53-2-306 (1993); NEB. REV. STAT. § 68-132 (1994); NEV. REV. STAT. § 428.010 (1989); N.H. REV. STAT. ANN. § 165.2 (1994); N.J. STAT. ANN. § 44:8-109 (West 1993); N.Y. SOC. SERV. LAW § 62(1)

fourteen impose the primary administrative responsibility for the maintenance of the poor on county governments.³⁷⁶

Five of the other seven jurisdictions impose the obligation on towns in the Elizabethan manner.³⁷⁷ New York imposes the obli-

(McKinney 1992); N.D. CENT. CODE § 50-01-02 (1989); OKLA. STAT. ANN. tit. 56, § 32 (West 1991); R.I. GEN. LAWS § 40-5-1 (1990); S.D. CODIFIED LAWS ANN. § 28-13-1 (1992); WIS. STAT. ANN. § 49.02(1)(m) (West 1987 & Supp. 1994).

376. ALA. CONST. art IV, § 88 ("It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."); CAL. WELF. & INST. CODE § 17000 (West 1991) ("Every county and every city and county shall relieve and support all incompetent, poor, indigent persons and those incapacitated by age, disease, or accident . . ."); GA. CODE ANN. § 36-12-1 (1993) ("The general supervision of all paupers is vested in the county governing authority."); IDAHO CODE § 31-3401 (1983 & Supp. 1995) ("The boards of county commissioners in their respective counties shall . . . evaluate the need and provide to indigent person(s) nonmedical assistance . . ."); IOWA CODE ANN. § 331.381 (West 1994) ("The county board shall administer general relief for the poor . . ."); MINN. STAT. ANN. § 256D.03(1) (West 1994) ("General assistance shall be administered by the county agencies."); MISS. CODE ANN. § 43-31-1 (1993) ("The board of supervisors of each county shall have the jurisdiction and power necessary and proper for the relief and support of the poor of its county."); MONT. CODE ANN. § 53-2-306 (1994) ("Except in a county that has transferred its public assistance and protective services responsibilities to the state under part 8 of this chapter, the county department of welfare shall be charged with the local administration of all forms of public assistance operations in the county."); NEB. REV. STAT. § 68-132 (1990) ("The county board of each county shall be the overseer of the poor and shall be vested with the superintendence of the poor in such county."); NEV. REV. STAT. § 428.010 (1989):

The boards of county commissioners of the several counties shall establish and approve policies and standards, prescribe a uniform standard of eligibility, appropriate money for this purpose and appoint agents who will develop regulations and administer these programs to provide care, support and relief to the poor, indigent, incompetent, and those incapacitated by age, disease or accident.

N.D. CENT. CODE § 50-01-02 (1989) ("The county social service board of each county shall have exclusive jurisdiction and control of the administration of poor relief within the county."); OKLA. STAT. ANN. tit. 56, § 32 (West 1991) ("The overseers of the poor in each county shall have the oversight and care of all the poor persons in their county so long as they remain a county charge, and shall see that they are properly relieved and taken care of."); S.D. CODIFIED LAWS ANN. § 28-13-1 (1992) ("Every county shall relieve and support all poor and indigent persons . . ."); WIS. STAT. ANN. § 49.02(1)(m) (West 1987 & Supp. 1994) ("Every county shall furnish general relief to all eligible dependant persons within the county and shall establish or designate a general relief agency to administer general relief.").

377. CONN. GEN. STAT. ANN. § 17-273 (West 1992) ("Each person who has not estate sufficient for his support, and has no relatives of sufficient ability who are obliged to support him, shall be provided for and supported at the expense of the town in which he resides."); IND. CODE ANN. § 12-20-5-1 (West 1994) ("The township trustee of each township is the ex officio administrator of poor relief within the township."); N.H. REV. STAT. ANN. § 165.2 (1994) ("The administrator of town or city welfare in each town or city shall administer general assistance to all persons who are eligible for such assistance."); N.J. STAT. ANN. § 44:8-109 (West 1993) ("[T]he administration [of public assis-

gations on special units of local government—public welfare districts.³⁷⁸ Only seven states have transferred all,³⁷⁹ or a portion,³⁸⁰ of the burden of administration to the state.

State general assistance systems also tend to favor a system of local *funding*, that is funding at the county, city, or village level. In the United States, funding obligations usually follow the assignment of administrative responsibility.³⁸¹ Eighteen state general assistance programs which impose administrative responsibilities at the local level, also impose funding responsibility at the same level,³⁸² although several states reimburse the locality for its expens-

tance] is primarily the duty of the municipalities"); R.I. GEN. LAWS § 40-5-1 (1990) ("Every town shall be required to relieve and support all poor and indigent persons.").

378. N.Y. SOC. SERV. LAW § 62(1) (McKinney 1992) ("[E]ach public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care.").

379. ALASKA STAT. § 47.25.170 (1990) ("The department [of Health and Social Services] shall decide whether the applicant is eligible for and should receive assistance, the amount of assistance, the manner of paying or providing it, and the date on which assistance shall begin."); ARK. CODE ANN. § 20-76-201 (Michie 1991) ("The department [of Human Services] shall administer or supervise all forms of public assistance including general relief."); KAN. STAT. ANN. § 39-708(c), (d) (1993) ("The secretary [of social and rehabilitation services] shall supervise all social welfare activities of the intake offices and area offices."); KY. REV. STAT. ANN. § 205.200(2) (Baldwin 1991) ("The secretary [for Human Services] shall, by administrative regulations, prescribe conditions of eligibility for public assistance."); MD. CODE ANN., SOC. SERV. § 88A-3(a) (1992) ("The State administration shall be the central coordinating and directing agency of all social service and public assistance activities in this State."); MICH. COMP. LAWS ANN. § 400.14(2) (West 1988 & Supp. 1995) ("[A]ll powers and duties of the county social services boards to develop, implement, and administer a program of general public relief are transferred to the state department."); PA. STAT. ANN. tit. 62, § 403 (1968 & Supp. 1995) ("The department [of Public Welfare] is responsible for maintaining uniformity in the administration of public welfare, including general assistance, throughout the commonwealth.").

380. See OHIO REV. CODE ANN. § 5113.05 (Baldwin 1995) ("The department of human services shall supervise and administer the general assistance program except that the department may require county departments to perform any administrative function specified in the rules adopted by the department.").

381. The relationship between funding and administrative obligations holds even with respect to federal categorical aid programs. Under such programs, the state and federal governments share both funding and administrative (or control) obligations. For a discussion of federal categorical aid programs, see, e.g., Lurie, *supra* note 4; JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY 1900-1985, at 126-84 (2d ed. 1986).

382. See ALA. CODE § 38-8-1 (1992) ("The county commission of each county shall have jurisdiction, power and authority necessary and proper for the relief and support of the poor of its county . . . and payment therefore shall be made out of county funds."); CONN. GEN. STAT. ANN. § 17-273 (West 1992 & Supp. 1995) ("Each person who has not estate sufficient for his support, and has no relatives of sufficient ability who are obliged to support him, shall be provided for and supported at the expense of the town

es in whole or in part.³⁸³ Likewise, states that permit, but do not

in which he resides."); IND. CODE ANN. § 12-20-22-1 (West 1994) ("When preparing the annual budget for a township, the township trustee and the township board shall set out in the budget the amount of expenditures estimated to be reasonably required for current poor relief in the following calendar year."); ME. REV. STAT. ANN. tit. 22, § 4307 (West 1992) ("Municipalities shall provide general assistance to all eligible persons at the expense of that municipality."); MISS. CODE ANN. § 43-31-15 (1993) ("The board of supervisors shall annually assess and cause to be collected by the tax collector, and paid into the general fund of the county treasury, such tax as may be necessary for the support of the poor of the county."); MONT. CODE ANN. § 53-2-321 (1994) ("The board of county commissioners has jurisdiction and power . . . to provide for the care and maintenance of the indigent sick or the otherwise dependent poor of the county; and for said purposes to levy and collect annually a tax."); NEB. REV. STAT. § 68-131 (1990) ("[T]hen the poor person shall receive such relief . . . out of the treasury of the county in which he or she has legal settlement at the time of applying for assistance"); NEV. REV. STAT. § 428.010 (1989) ("To the extent that money may be lawfully appropriated by the board of county commissioners for this purpose . . . every county shall provide care, support and relief to the poor, indigent, incompetent and those incapacitated by age, disease or accident."); N.H. REV. STAT. ANN. § 165.2a (1994) ("The financial responsibility for general assistance for assisted persons shall be the responsibility of the town or city in which the person making the application resides."); N.Y. SOC. SERV. LAW § 69 (McKinney 1992) ("The responsibility for the administration of public assistance and care in a county public welfare district and the expense thereof may either be borne by the county public welfare district or be divided between such district and the towns and cities therein.");

In the manner of the Elizabethan Poor Law from which these statutes were directly derived, a number of jurisdictions continue to indirectly impose on localities the obligation to pay for the maintenance of the poor. See CAL. WELF. & INST. CODE § 17000 (West 1991) ("Every county and every city shall relieve and support all incompetent, poor, indigent persons, and those incapacitate by age, disease or accident . . ."); GA. CODE ANN. § 36-12-1 (1993) ("The general supervision of all paupers is vested in the county governing authority."); IDAHO CODE § 31-3401 (1983 & Supp. 1995) ("[T]he boards of county commissioners in their respective counties shall . . . evaluate the need and provide to indigent person(s) nonmedical assistance. For the purposes of funding nonmedical services for indigent persons, boards of county commissioners are authorized to levy an ad valorem tax."); IOWA CODE ANN. § 331.381 (West 1994) ("The board of supervisors of each county shall provide relief of poor persons in its county . . ."); OKLA. STAT. ANN. tit. 56, § 33 (West 1991) ("Every county shall relieve and support all poor and indigent persons lawfully settled therein . . ."); R.I. GEN. LAWS § 40-5-1 (1990) ("Every town shall be required to relieve and support all poor and indigent persons lawfully settled therein, whenever they shall stand in need of relief and support . . .") (Rhode Island has a state-funded and administered public assistance program in addition to the support provided by towns.); S.D. CODIFIED LAWS ANN. § 28-13-1 (1992) ("Each board of county commissioners may raise money by taxation for the support and employment of the poor."); TEX. REV. CIV. STAT. ANN. art. 2351(6) (West 1971 & Supp. 1993) ("Each commissioners court shall provide for the support of paupers, residents of their county, who are unable to support themselves.");

383. Although the duty of administration and funding general relief programs is usually upon counties, there are a few states where the programs are administered by the counties, but the state partially or fully funds them. See ILL. ANN. STAT. ch. 305, para. 5/12-4.8 (Smith-Hurd 1993) ("[T]he Illinois Department of Public Aid shall] supervise the administration of General Assistance under Article VI by local governmental units receiving State funds."); MINN. STAT. ANN. § 256.051(6) (West 1994) ("The commissioner [of

compel a local unit of government (usually a county) to create a general assistance system, also require that county to fund whatever system is created.³⁸⁴

Other states have set up alternative funding arrangements. Among the most popular of these alternatives is full or partial state funding of the poor law obligation. Arkansas, Kansas, Kentucky, Maryland, Michigan, and Ohio are states in which the state administers and funds general relief programs.³⁸⁵ Alaska and Pennsylva-

Human Services] shall reimburse 92% of county agency expenditures for providing work readiness services including direct participation expenses and administrative costs.”); N.J. STAT. ANN. § 44:8-109 (West 1993) (“[F]unding of such public assistance is the responsibility of the State and the administration is primarily the duty of the municipalities.”); N.D. CENT. CODE § 50-01-09.2 (1989) (“Within limits of legislative appropriations, the department of human services shall allocate and distribute to each county social service board a proportionate share of funds appropriated for the purpose of assisting county social service boards in the furnishing of poor relief.”); WIS. STAT. ANN. § 49.035(1)(d) (West 1987 & Supp. 1994) (“The department [of social services] shall reimburse . . . a county for up to 37.5% of the eligible costs paid by the general relief agency for general relief . . .”).

384. See COLO. REV. STAT. § 30-17-105 (1989) (“Each board of county commissioners, upon its determination to undertake a temporary general assistance program, shall establish a temporary general assistance account for the purpose of providing money . . . for the temporary general assistance program in the county; and each board shall appropriate money for such account for such purpose.”); MO. ANN. STAT. § 205.610 (Vernon 1983) (“The county court of each county . . . shall from time to time, and as often and for as long a time as may be necessary, provide, at the expenses of the county, for the relief, maintenance and support of such persons.”); UTAH CODE ANN. § 17-5-62 (1991) (“The board of county commissioners may, if they deem it necessary and expedient so to do, . . . assess and levy a tax for . . . the care, maintenance and relief of the indigent sick or dependent poor persons.”); VT. STAT. ANN. tit. 24, § 2691 (1992) (“At a meeting duly warned for that purpose, a town or incorporated village may appropriate such sums of money as it deems necessary for the support of social service programs and facilities within that town for its residence.”); VA. CODE ANN. § 63.1-120 (Michie 1995) (“Assistance shall be paid to or on behalf of the applicant monthly, . . . by the treasurer [of] the district fiscal officer, . . . from funds appropriated or made available for such purpose by the board of supervisors, council or other governing body of such county or city.”). Florida imposes the county funding obligation indirectly. See FLA. STAT. ANN. § 125.01 (West 1993) (“The legislative and governing body of a county shall have the power to . . . provide . . . welfare programs.”).

385. ARK. CODE ANN. § 20-76-406 (Michie 1991) (“In the event any applicant is found eligible for benefits under the present law, the applicant’s case shall be certified immediately to the deputy director . . . who in turn must cause a voucher to be issued without delay for the amount allowed the applicant.”); KAN. STAT. ANN. § 39-708c(1) (1993) (“All moneys and property of any kind whatsoever received from the Kansas emergency relief committee or from any other state department or political subdivision of the state shall be used by the secretary in the administration and promotion of social welfare in the state of Kansas.”); KY. REV. STAT. ANN. § 205.240 (Baldwin 1991) (“All money appropriated by this state . . . are hereby appropriated and shall be available to the secretary for expenditure consistent with the provisions of this chapter . . .”); MD. CODE ANN., SOC. SERV. § 88-65A(a) (1992) (“The Social Services Administration shall promptly establish, imple-

nia impose the funding obligation for state-administered general assistance upon the state indirectly.³⁸⁶ Another alternative to county funding of general assistance programs is complete or partial state funding or reimbursement of county administered general relief programs. For example, New Jersey's state government is responsible for the funding of general public assistance programs even though counties are responsible for its administration.³⁸⁷ In Illinois, some local units of government fully fund the general assistance program. However, there are local units of government that receive state funding for the general assistance program and are subject to the supervision of the Illinois Department of Aid.³⁸⁸ Minnesota and North Dakota partially reimburse the counties for the costs of their general assistance programs.³⁸⁹

The isolation and separation of this group shows up in other ways as well. Some states have preserved the old Tudor-Stuart laws of settlement in addition to criminal proscriptions against

ment and modify as necessary a program of State funded assistance payments"); MICH. COMP. LAWS ANN. § 400.18(1) (West 1988 & Supp. 1995) ("[A]ll expenditures for a program of general public relief shall be appropriated from the general revenues of the state."); OHIO REV. CODE ANN. § 5113.03(B) (Baldwin 1995) ("The department of human services shall establish mandatory financial assistance payment amounts based upon state appropriations.").

386. See ALASKA STAT. § 47.25.170 (1990) ("Upon the completion of its investigation, the department shall decide whether the applicant is eligible for and should receive assistance . . . , the amount of assistance, the manner of payment or providing it and the date on which assistance shall begin."); PA. STAT. ANN. tit. 62, § 205 (1968 & Supp. 1995) ("On the basis of formulae which include public or voluntary support, the department [of public welfare] shall have the power to disburse Federal and State funds, appropriate for the purpose, as grants and subsidies to programs in fields in which the department has the responsibility if they meet the department's standards.").

387. See N.J. STAT. ANN. § 44-8-109 (West 1993) ("[T]he funding of such public assistance is the responsibility of the state and the administration is primarily the duty of the municipalities.").

388. See ILL. ANN. STAT. ch. 305, para. 5/12-3 (Smith-Hurd 1993) ("As provided in Article VI [general assistance], local governmental units shall provide the funds for and administer the programs provided in that Article subject, where so provided, to the supervision of the Illinois Department."); *Id.* para. 5/12-4.8 ("[The Illinois Department of Aid shall] supervise the administration of General Assistance under Article VI [general assistance] by local governmental units receiving State funds for the purposes of such Article.").

389. See MINN. STAT. ANN. § 265D.051(6) (West 1994) ("The commissioner [of human services] shall reimburse 92% of county agency expenditures for providing work readiness services including direct participation expenses and administrative costs."); N.D. CENT. CODE § 50-01-09.2 (1989) ("Within the limits of legislative appropriations, the department of human services shall allocate and distribute to each county social service board a proportionate share of funds appropriated for the purpose of assisting county social services boards in the furnishing of poor relief.").

vagrancy.³⁹⁰ More particularly, localities have begun to cope with migrations of the destitute by imposing residency limitations. These migrations are most acute between suburbs and adjoining urban areas and where large urban areas are located next to state borders, for example places like Chicago (Indiana and Wisconsin), St. Louis (Illinois), Philadelphia (New Jersey and Delaware), and New Orleans (Mississippi).³⁹¹ Related to the concept of vagrancy, state systems of poor relief are increasingly resurrecting a modified notion of the principal of settlement, primarily by limiting the amount a state must pay indigents who move from other states to no more than the amount received in the state of prior residence, if that amount is smaller than that offered by the state of new residence.³⁹²

390. See, e.g., MISS. CODE ANN. § 43-31-27 (1993) (empowering county Boards of Supervisors, by action of a constable, to prevent "the poor from strolling from one district to another" and to "remove the pauper back to the county from which he came."); N.D. CENT. CODE § 50-01-14 (1989) (stating that counties may not give aid to any person who is not a resident of the county except for attempts to provide some sort of labor); WIS. STAT. ANN. § 49.015(1)(b) (West 1987 & Supp. 1994) (legislating that if a dependent person is to be eligible for general relief, the person must have resided in the state for 60 consecutive days before applying for aid, be born in the state, or have resided in the state for 365 days in the past, or come to the state to join a close relative who has resided in the state for 180 days upon the applicant's arrival or have come into the state to accept an offer of employment).

In some jurisdictions, however, settlement laws are now being used not to deny benefits, but to allocate inter-county fiscal responsibility for the maintenance of the poor. See, e.g., *Dery v. County of Rockingham*, 14 A. 866 (N.H. 1888) (holding that a county must support a poor person who cannot provide for his own support even if the person does not have settlement in the county).

391. See MICHAEL LANG, *HOMELESSNESS AMID AFFLUENCE: STRUCTURE AND PARADOX IN THE AMERICAN POLITICAL ECONOMY* 145 (1989) (describing the practice of suburbs to ship their vagrant populations to municipalities which provide services for the destitute). For a description of the patterns of migration between Philadelphia, Pennsylvania and Camden, New Jersey, see Fullen, *supra* note 25, at 122-24 (describing also the practice by Atlantic City, New Jersey police of purchasing one-way bus tickets to Philadelphia for losing gamblers and unemployed casino workers picked up for hitchhiking).

392. Prior to 1969, states freely imposed direct residency requirements as a condition of eligibility. Thus, typically, proven residence of anywhere from six months to more than a year was necessary in order to become eligible for assistance of any type. The Supreme Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969), ruled this practice was unconstitutional as an impermissible interference with the federal constitutional right to travel. Over the last several years, several states have proposed or imposed a rule permitting state assistance administrators to pay new resident recipients no more than the amount that they had received in the state of prior residence. To the extent that this rule applies to federally assisted aid programs, states have been able to secure waivers from federal rules in order to implement the plan. See *Wisconsin Welfare: Second Federal Waiver Approved*, AMERICAN POLITICAL NETWORK, INC. (the "Hotline"), July 28, 1992, available in LEXIS, Nexis Library, Current file. See also *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994),

4. The Right to Relief, the Right to a Specific Form of Relief

Many state poor relief statutes provide explicitly that the eradication of poverty is, indeed, the primary goal of such systems.³⁹³ These "feel-good" sentiments bear little relationship to the actual purposes of the poor relief system—minimal provision for those who cannot fend for themselves, and grudging provision for those who ought to fend for themselves.³⁹⁴ Whether we call this minimal provision (coupled with a "boot" in the pants for the able-bodied) a right, or a privilege, whether we enshrine the obligation in our constitutions or relegate it to municipal codes, the system implemented will be substantially unaffected.

Indeed, there exists some variation among the states as to the source of the obligation to maintain the poor. Three states have held that the right to maintenance is guaranteed by their respective state constitutions.³⁹⁵ Of the remaining states, all provide that, to

judgment vacated 115 S. Ct. 1059 (1995) (no justifiable controversy because case not ripe) (California unsuccessfully sought to impose a provision which permitted state AFDC payments for new residents to equal but not exceed that of the state of prior residence on right to travel grounds).

393. See CAL. WELF. & INST. CODE § 10000 (West 1991):

The purpose of this division is to provide for protection, care and assistance to the people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to all of its needy and distressed. . . . Such aid shall be [provided] as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society.

COLO. REV. STAT. § 26-2-102 (1989) ("It is the purpose of this article . . . to assist [needy] individuals and families to attain or retain their capabilities for independence, self-care, and self-support . . ."); DEL. CODE ANN. tit. 31, § 501 (1985) (declaring purpose is to: "promote the welfare and happiness of all of the people of this State by providing public assistance to all of its needy, unemployable and distressed . . . in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society"); MINN. STAT. ANN. § 256D.01(1) (West 1994) ("The objectives of [general assistance] are to provide work readiness services to help employable and potentially employable persons prepare for and attain self-sufficiency and obtain permanent work."); PA. STAT. ANN. tit. 62, § 401 (1968 & Supp. 1995) ("[A]ssistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society."); UTAH CODE ANN. § 62A-9-101 (1991) ("Applicants and recipients . . . shall be encouraged and assisted to achieve economic independence and self-sufficiency."). Although the issue is beyond the scope of this Article, state general assistance systems seem less than effective in meeting such lofty goals. This issue is explored in more detail in Backer, *supra* note 20.

394. For a discussion of the nature and effect of this heightened rhetoric in the context of federal categorical aid programs, see MARMOR ET AL., *supra* note 6, at 50-52.

395. Three states guarantee a right to maintenance in their constitutions. See ALA.

the extent it is offered at all, the right to general assistance is strictly a matter of statute and completely within the discretion of the legislature.³⁹⁶ In the context of static systems, the question of whether relief to be afforded the poor is a right or a privilege, and the limitations of the right of the state to determine benefit levels, has been a subject of concern in only a handful of states, primarily California.³⁹⁷ And even in California, the object of the battles has been little more than one over control of the machinery for setting minimum benefits for the poor. Why the indifference? Because the nature and force of any compulsion to relieve the poor does not inhibit the state from its principal task—inducing the able-bodied poor to fend for themselves.

Since the implementation of a static system is not dependant on the manner in which benefits are dispensed, we find that state general assistance is dispensed in a variety of forms: cash,³⁹⁸ in-kind benefits,³⁹⁹ or both.⁴⁰⁰ States can even prohibit the giving

CONST. art. IV, § 88 ("It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."); N.Y. CONST. art. XVII, § 1 (providing in relevant part that: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such subdivisions, and in such manner and by such means, as the legislature may from time to time determine."); MONT. CONST. art. XII, § 3(3) ("The Legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune, have need for the aid of society.").

396. See *supra* part V.A.1.

397. See, e.g., the discussion of the California general assistance litigation in Bensingler, *supra* note 9. There has been an effort in recent years to attempt to find constitutional rights to poor relief in one form or another in state constitutions. See also articles cited *supra* note 21.

398. See HAW. REV. STAT. § 346-1 (1985) ("Public assistance means financial assistance to or for the benefit of persons . . . , payments to or on behalf of such persons for medical care, and social service payments as described under the Social Security Act."); N.Y. SOC. SERV. LAW § 131a(1) (McKinney 1992) ("Such provision shall be made in monthly or semi-monthly allowances and grants within the limits of the schedules"); OHIO REV. CODE ANN. § 5113.03 (Baldwin 1995) ("General assistance shall be given by warrant or by direct deposit").

399. See ARK. CODE ANN. § 20-76-409 (Michie 1991) ("General relief shall be material aid or service given to any person or family not in the form of an assistance grant."); FLA. STAT. ANN. § 409.029(f) (West 1993) ("'Public assistance' means . . . the receipt of food stamps."); IDAHO CODE § 31-3403 (1983 & Supp. 1995) ("Nonmedical assistance means reasonable costs for assistance which includes, but is not limited to food and shelter and other such necessary services."); IND. CODE ANN. § 12-20-16-1 (West 1994) (dealing with various forms of poor relief including payment by the township trustee of water, gas, and electric services and purchase orders for food).

400. See KAN. STAT. ANN. § 39-702(d) (1993) ("'Assistance' includes such items or functions as the giving or providing of money, food stamps or coupons, food, clothing, shelter, medicine, or other materials"); MD. CODE ANN., SOC. SERV. § 64 (1992)

of aid of a particular kind.⁴⁰¹ Aid can be dispensed on an institutional (indoor)⁴⁰² or non-institutional (outdoor)⁴⁰³ basis. Indeed, the hallmark of aid for the homeless has been the revival in certain urban centers, primarily New York and California, of wholly institutional aid consisting of in-kind benefits.⁴⁰⁴ In some cases, these

(providing assistance "including payments toward funeral expenses of [needy] individuals, and in the case of a recipient without a legal guardian or person legally responsible for his support means the placement of such recipient in a suitable home or institution with the recipient's consent"); MONT. CODE ANN. § 53-3-309 (1994) ("The form of relief may include but is not limited to cash, checks, vouchers, lines of credit, in-kind goods and services, and food commodities."); N.Y. SOC. SERV. LAW § 158 (McKinney 1992) ("Home relief means allowances . . . for all support, maintenance and need, and costs of suitable training in a trade to enable a person to become self-supporting."); W. VA. CODE § 9-1-2 (1990) ("The term 'general assistance' shall mean cash or its equivalent in services or commodities expended for care and assistance to an indigent person.").

401. One state, New Hampshire, specifically prohibits assistance to be provided in the form of cash payments. N.H. REV. STAT. ANN. § 165:1(III) (1994).

402. Most institutional or indoor aid dispense methods have been poorhouses. See CAL. WELF. & INST. CODE § 17002 (West 1991) ("The boards of supervisors may establish almshouses and county farms . . ."); COLO. REV. STAT. § 30-17-106 (1989) ("The board of county commissioners in each county in this state . . . may establish a poorhouse . . ."); IND. CODE ANN. § 12-20-16-15 (West 1994) ("The township trustee may place indigent individuals in the county home . . ."); KAN. STAT. ANN. § 39-714 (1993) ("It shall be lawful for the board of county commissioners, whenever they deem it advisable, to purchase a tract of land in the name of the county, and thereupon to build, erect, establish, organize, and maintain a home for persons eligible to public assistance."); MISS. CODE ANN. § 43-43-1 (1993) ("The board of supervisors may purchase . . . land for a county home and farm . . ."); MO. ANN. STAT. § 205.650 (Vernon 1983) ("Such county court may cause to be erected on the land so purchased or leased a convenient poorhouse or houses . . ."); NEV. REV. STAT. § 428.100 (1989) ("If the board of county commissioners of any county thinks it proper, the board may cause to be built in the county workhouses for the accommodation or employment of such indigents as may, from time to time, become a county charge.").

403. Cash or in-kind benefits can be dispensed on a non-institutional basis. See *supra* notes 369-71. But Lucie White has correctly noted that recent criticism of current forms of poor relief reflects substantial anxiety about the negative effects of providing non-institutional relief to the able-bodied poor. See White, *supra* note 17, at 1963. This anxiety has also been broadened to include able-bodied mothers with minor children within the group thought to be corruptible by outdoor relief. See Fineman, *supra* note 17, at 280-85.

404. N.Y. SOC. SERV. LAW § 41 (McKinney 1992) ("The legislature finds that a special fund should be established to fund capital programs sponsored by not-for-profit corporations, charitable organizations, wholly owned subsidiaries of not-for-profit corporations or charitable organizations, public corporations and municipalities that will expand and improve the supply of shelter and other housing arrangements for homeless persons.") Homeless housing arrangements are specific facilities, including lands, buildings, and improvements acquired, constructed, renovated, or rehabilitated and operated by not-for-profit corporations or charitable organizations to increase the availability of housing for homeless persons, which may include other non-housing services such as but not limited to dining, recreational, sanitary, social, medical, and mental health services as may be deemed by the commissioner to be essential to such a project. *Id.* § 42. See also MD. CODE ANN.,

programs serve as a means of controlling vagrants found loitering in the streets.⁴⁰⁵ This type of aid has brought with it the concerns and criticisms reserved for the poor houses of the nineteenth century.⁴⁰⁶

Although from the theory we understand that static systems should be indifferent with respect to the discretion placed in the hands of the administrators of the system, most state general assistance is dispensed by a proletarianized workforce shorn of any discretionary authority, the actions of whom are sharply limited by statute and regulation.⁴⁰⁷ In this, the procedures of general assistance merely mirror those mandated under the significantly larger federal categorical aid programs.⁴⁰⁸

SOC. SERV. § 126 (1992) ("The Secretary of Human Resources shall establish a program of crisis shelter homes for homeless women. The purpose of the crisis shelter homes shall be to provide shelter, meals, and counseling to clients."); *Id.* § 133 ("The Governor is authorized to establish a shelter, nutrition, and service program for homeless individuals. The purpose of the program is to provide crisis and transition shelter, proper nutrition, and adequate services to homeless individuals."). See *Bell v. Board of Supervisors of Alameda County*, 28 Cal. Rptr. 2d 919 (Ct. App. 1994) (calculation of value of in-kind relief).

405. See Robert E. Gould & Robert Levy, *Psychiatrists as Puppets of Koch's Roundup Policy*, N.Y. TIMES, Nov. 27, 1987, at A35 (discussing New York City's policy of using roving teams of psychiatrists and social workers to round up homeless people deemed dangerous to themselves or others and placing them in the city psychiatric hospital); David Margolick, *Weighing the Risks and Rights of the Homeless*, N.Y. TIMES, Dec. 8, 1985, at D6 (discussing critically the New York City policy of rounding up the homeless for delivery to shelters on extremely cold nights).

406. This concern includes, among other things, fear for the personal safety of the recipients. See Herr, *supra* note 137, at 377 (quoting a 12 yr. old resident of a New York City welfare hotel: "My mother is afraid to let me go downstairs. Only this Saturday, my friend, the security guard at the hotel, Mr. Santiago, was killed on my floor"). Cf. Berger, *supra* note 9; Chackes, *supra* note 9. Anecdotal and press accounts routinely describe homeless shelters as dangerous places. See, e.g., Suzanne Daley, *Robert Hayes: Anatomy of a Crusader*, N.Y. TIMES, Oct. 2, 1987, at B1 (describing view of homeless that shelters were dangerous places); Charles J. Gans, *Immigration Aggravates Homelessness*, NEWSDAY, Aug. 5, 1993, at 56 (discussing order by a New York State court to move homeless men from what were described as two dangerous shelters in Brooklyn and the Bronx); Sandra Mathers, *Homeless Center Also Takes in Crime: The President of the Orlando Coalition Said Most Incidents That Occur Are not Serious*, ORLANDO SENTINEL, July 8, 1993, at B1 (describing criminal activity at an Orlando, Florida homeless shelter).

407. The primary force determining the manner of service delivery appears to be the requirements of the federal categorical relief programs administered by the same state agencies. On the nature of the incentives to reduce discretion of caseworkers administering federal categorical relief, see Simon, *supra* note 13, at 1201-22.

408. See *id.* at 1201-19 (discussing instances of formalization, bureaucratization, and proletarianism in AFDC).

5. The Obsession With Cost

The general theory suggests that cost will drive the design of American poor relief systems. Cost minimization reduces the redistributive effects (bad) of any system of poor relief and, by providing for minimum support under relatively unpleasant conditions, increases the "rehabilitative" focus of such systems on the poor themselves (good) who could eradicate poverty merely by becoming more productive. Cost minimization appears in several guises: cost shifting, aid level determination, need hierarchies and aid (what amount of destitution is sufficient destitution to merit aid), definitions of aid-worthiness, work requirements for the able-bodied, restitution (repayment by recipient), group (usually family) support obligations, and stigma, humiliation, and complexity (to drive home the point that almost any kind of work is better than poor relief). The object of all of this? The provision of the least amount of aid to the smallest number of people.⁴⁰⁹

a. Cost Shifting

Cost minimization by cost shifting is fairly effective and universal in the world of American general assistance. These systems generally attempt to shift whatever costs they can to other sources of funding. In practical terms, this results in a substantial reliance on private charity and on other governmental units, principally the federal government. Recall that the costs shifted are merely those which the state or locality imposed on itself in creating basic categories of eligibility.

Shifting of the poor relief burden to private charity is accomplished in a variety of ways. For example, costs are shifted by requiring, through statute or regulation, the referral of ineligible poor to local non-governmental charitable institutions,⁴¹⁰ or the

409. For a discussion of a plan to eliminate the entire federal welfare and income support structure for working aged persons, see MURRAY, *supra* note 3, at 227-33. The purpose of Murray's plan is to "leave the working aged person with no recourse whatsoever except the job market, family members, friends, and public or private locally funded services." *Id.* at 228.

410. For example, Michael Espy, a Clinton Administration Secretary of Agriculture, discovered when he sought to apply for Food Stamps in West Virginia on June 14, 1993, that, because he was employed, it would take one month to "process" his Food Stamp application. In the meantime, the local poor relief office was authorized to provide him with a "food voucher at a local charity to help tide him over." *Food Stamp Applications*

reference in statutes, such as that of Texas, to the role of state government as the backup to private and local governmental efforts, to be relied on only in extreme conditions.⁴¹¹ Other states require, as part of the eligibility determination, a finding that the need giving rise to the application for aid could not be met by any other means.⁴¹² Some states have created formal and informal relationships with local charitable organizations to which applicants are referred on a temporary or permanent basis.⁴¹³ For instance, St. Louis, Missouri, created a system of services for the city's homeless population by coordinating a variety of private charitable organizations that fed, clothed, transported and provided medical aid. In the process, the city bore only about one-third of the total costs incurred for the services provided.⁴¹⁴

Both the state and federal governments use private charity in a variety of other ways designed to relieve governmental institutions of the burden of providing relief to the destitute.⁴¹⁵ We spend significant resources justifying this type of cost shifting. Private

Confusing, Official Says, TULSA WORLD, June 15, 1993, at A20.

411. See TEX. HUM. RES. CODE ANN. § 34.001(b) (West 1990 & Supp. 1995) (providing that the state will contribute "money to match local and any federal money available to provide emergency relief").

412. See, e.g., IDAHO CODE § 31-3401 (1983 & Supp. 1995) ("The boards of county commissioners in their respective counties shall . . . evaluate the need and provide to the indigent person(s) nonmedical assistance in a temporary situation only when no alternatives exist."); OKLA. STAT. ANN. tit. 56, § 26.7 (West 1991) ("The Oklahoma Emergency Relief Board may provide temporary relief employment to destitute but able-bodied persons not otherwise cared for by the federal government, state or county agencies, public or private charity organizations or institutions.").

413. See, e.g., TEX. HUM. RES. CODE ANN. § 34.003(a) (West 1990):

The department [of health and human services] shall establish a temporary emergency relief fund from funds appropriated for that purpose. The funds may be used to match funds from local communities on a 50% state and 50% local ratio basis in order to assist counties, in cooperation with other public entities and nonprofit organizations, in meeting the needs of individuals and families for temporary emergency relief.

414. *Homelessness in St. Louis: Beyond the Crisis*, FIN. WORLD, March 2, 1993, at 38.

415. Wilbur Cohen, Secretary of Health, Education & Welfare under President Lyndon Johnson and involved in the creation of the modern American welfare state at the federal level in the 1930s, described classical views of the uses of private charity in an article written in the 1970s. These included: serving as a source of innovation, providing recipients with a choice (and thereby limiting government complacency), providing for emergency needs, and generally increasing responsiveness to the individual problems of the poor. Cohen, *supra* note 4, at 660. Mr. Cohen, then Dean of the School of Education at the University of Michigan, anticipated that private charity could usefully serve as a substitute for government in the provision of early childhood education, community education programs, emergency social services, and services for the aging. *Id.* at 662-67.

charitable efforts are said to provide a means of experimenting with new methods of delivering aid to the poor. To that end, the federal and state governments subsidize the experiments of such organizations.⁴¹⁶ But for all of the delightful and inspirational language enveloping these private experiments, none seems to have sparked change at the governmental level. Indeed, most of these experiments appear to be little more than variations on the basic premise of institutional static poor relief: convincing people that they are better off working, or finding a husband, or not having more children, or preparing themselves better for work.⁴¹⁷ The other classical formulations of the usefulness of private charity—forcing efficiency, helping people who fall through the cracks, and giving people a choice of the type of charity they accept—adhere closely to the traditional roles of private charity from at least the Elizabethan period. The primary effect of a flourishing trade in private charity, whatever other rationale is given, is the reduction of the burden of the state to take care of its poor.

More direct approaches to shifting the burden have been tried. It is common for those whom the state cannot afford to support. Having segregated and categorized the poor, elimination by category is easy and morally justifiable. Thus, for example, Arizona,⁴¹⁸ Delaware,⁴¹⁹ Hawaii,⁴²⁰ Louisiana,⁴²¹ Massachusetts,⁴²² New Mexico,⁴²³ North Carolina,⁴²⁴ Ohio,⁴²⁵ Oregon,⁴²⁶ South

416. A number of such experimental programs have been studied. See generally GUERON & PAULY, *supra* note 6. Additionally, the Republican Administrations of 1981-1991 were fond of lauding the experimental approaches of these private groups. See, e.g., LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3 (describing a number of experimental programs judged successful).

417. See GUERON & PAULY, *supra* note 6, at 107-20 (describing a number of such programs and their effect).

418. ARIZ. REV. STAT. ANN. § 46-233(A)(3) (1988) (providing assistance only to persons who are unemployable).

419. DEL. CODE ANN. tit. 31, § 505 (1985) (limiting aid benefits to the elderly, families with dependent children, the disabled, and the unemployables).

420. HAW. REV. STAT. § 346-52 (1985 & Supp. 1992) ("A[n] [aged, blind, and permanently and totally disabled] person shall be eligible for public assistance who meets the requirements established by the Federal Supplemental Security Income Program or its successor agency, provided the person is also determined needy in accordance with state standards.").

421. LA. REV. STAT. ANN. § 46:464 (West 1982) ("No parish or parish official shall, at the public expense, support or aid any persons as paupers, except such as are infirm, sick or disabled.").

422. MASS. GEN. LAWS ANN. ch. 18, § 2(A) (West 1994) (limiting aid programs to families, children, unmarried parents, the elderly, and individuals as needed).

423. N.M. STAT. ANN. § 27-2-7 (Michie 1992) (offering aid to the temporarily dis-

Carolina,⁴²⁷ Tennessee,⁴²⁸ Washington,⁴²⁹ West Virginia,⁴³⁰ Wyoming,⁴³¹ and the District of Columbia⁴³² do not provide significant aid of any kind to people who do not otherwise qualify for federal categorical assistance. The notion is that these people, ineligible for federal or state aid, will either have to turn to private charitable organizations or learn to fend for themselves. Privatization is also attempted, for example, by shifting the responsibility for job training and creation to the private sector.⁴³³ More financially strapped jurisdictions might well privatize the entire burden of the relief of certain portions of the population in the belief that the decrease in governmental expenditures will be made up by

abled).

424. N.C. GEN. STAT. §§ 108(A)28, .41 (1994) (limiting aid to persons at least 65 years old or between 18 and 65 who are permanently disabled).

425. OHIO REV. CODE ANN. § 5113.02-.032 (Baldwin 1995) (limiting the program to persons between 18 and 60 years old).

426. OR. REV. STAT. § 411.740 (1993) (allowing the Family Service program to prescribe eligibility requirements).

427. S.C. CODE ANN. §§ 43-5-65, -310 (Law. Co-op. 1985) (permitting assistance only to needy families or handicapped and unfortunate persons not eligible for any other type of assistance and unable to support themselves due to a physical or mental infirmity).

428. TENN. CODE ANN. §§ 71-5-102, -201, -302, -401, -1101 (1987) (allowing only medical assistance, community clinics, food stamps, energy assistance, and job opportunity programs).

429. WASH. REV. CODE ANN. § 74.04.005 (West 1982 & Supp. 1995) (permitting general assistance only to people ineligible for federal aid assistance, and who are either pregnant or incapacitated due to a physical or mental infirmity).

430. W. VA. CODE §§ 9-6-1, 9-6-8 (1990) (providing no public or general assistance to indigent persons). *But see* Hodge v. Giusberg, 303 S.E.2d 245 (W. Va. 1983) (interpreting §§ 9-6-1 and 9-6-8 as providing for emergency housing, food, and medical care for homeless state residents).

431. WYO. STAT. § 42-2-103 (1994) (providing no public assistance program except for AFDC, but stating that programs are to be provided to individuals who lack sufficient income or resources to provide for themselves).

432. D.C. CODE ANN. §§ 3-202.1 to -205.42a (1981) (providing AFDC, General Assistance for Children, Emergency Shelter Family Services, and General Public Assistance).

433. Nathan Glazer has suggested that the best means to deal with social problems, such as poverty, is to "think of ways to meet needs with a lesser degree of dependence on public action." GLAZER, *supra* note 67, at 139. This need is driven in large part by the perceived necessity of cost containment and has given rise to the interest in the privatization of social services, and reliance on private philanthropic efforts. *Id.* at 125-26, 139. Alan Houseman argued that a significant trend that developed during the 1980s was the increased role of the private sector through privatization of governmental services and through the creation of a number of public-private joint ventures. *See* Houseman, *supra* note 172, at 839. *See also* Bovbjerg & Kopit, *supra* note 147, at 892-93 (discussing with respect to medical indigence, the limitations of efforts to privatize health care coverage); Weinberg, *supra* note 27, at 419, 431-32 (arguing that the workfare requirements imposed under the Family Support Act of 1988 effectively privatizes the responsibility to assist the indigent).

private voluntary contributions.⁴³⁴

General assistance programs also shift a substantial part of whatever relief obligation they have placed upon themselves by structuring their programs to take maximum advantage of available federal funds. Because federal aid is available only for certain categories of the needy, the general theory suggests that states will tend to craft their poor relief programs in a manner that takes the greatest possible advantage of available federal funds. The easiest way to do this is to directly limit the availability of poor relief to persons qualified to receive federal categorical relief.⁴³⁵ The result has been that most state general relief resources are devoted to supplementing federal payments. The state programs, in effect, become nothing more than conduits for federal programs.

The result: Federal categorical aid programs, such as AFDC, which originated as a federal supplement to state general assistance programs, have become the primary focus of state relief efforts, and state general assistance programs have withered.⁴³⁶ Since federal categorical aid programs, at least as originally envisioned, were geared to aid those whom society deemed incapable of working,⁴³⁷ the effect has been to reinforce the static tendency to discriminate against those whom ought to be fending for themselves and in favor of the incapacitated; the disabled. The paradigm thus provides a useful framework for understanding the cost minimizing basis of this approach. Since the federal government partially funds programs of public assistance to all but the able-bodied poor, and since, for static system builders, poor relief to the able-bodied is troubling, some states or localities restrict their own aid programs

434. This is essentially what cities like St. Louis, Missouri do when they farm out their relief efforts. See *Homelessness in St. Louis: Beyond the Crisis*, FIN. WORLD, Mar. 2, 1993, at 38; see also Abrams & Schitz, *supra* note 167, at 36 (arguing that increased governmental expenditures crowd out, at least to some extent, private charitable giving).

435. See discussion *supra*, part V.A.2.a.

436. Indeed, because of the size of the federal categorical relief burden in most states, and the limited availability of state aid to people not eligible for federal categorical relief, most states devote much of their resources to the administration and funding of their part of federal categorical aid programs. See LEVITAN, *supra* note 3, at 28-30 (discussing aggregate cost and cost sharing between the federal and state governments); MARMOR ET AL., *supra* note 6, at 84-96 (discussing the nature of expenditures on federal programs).

437. See MARMOR ET AL., *supra* note 6, at 99 (arguing that federal aid programs target the aged, blind, children, and disabled poor); Liebman, *supra* note 119, at 833 (arguing that ad hoc societal welfare legislation has produced inequitable determinations of disability); Lurie, *supra* note 4, at 828-29 (noting that the original objective of AFDC was to provide aid to families "incapable of supporting themselves").

to those funded, in whole or in part by the federal government. The resulting incentive to states is then, in effect, to deny all aid to those determined to be at least theoretically capable of fending for themselves.⁴³⁸ The pernicious effect is apparent—the states bask in the glory of a “generous” poor relief program for which they must pay only a fraction of the cost.

b. Aid Level Determination

The aim of poor relief is not to eradicate poverty, in the sense that it will act as a means of eradicating a substantial amount of income inequality. It is geared only to ameliorate some, but not all, of the conditions of the destitute (lest they starve). Correspondingly, the statutory mandates for the construction of systems of general assistance do not speak in terms of eradication or rehabilitation.⁴³⁹ Rather, these statutes describe the obligation of government to the destitute as one of “relie[f] and support” when support by any other means is unavailable,⁴⁴⁰ or as an obligation to re-

438. Arizona’s approach is perhaps typical of this method of static system building limiting assistance to, among others, people who are not employable, as such term is defined by the state. ARIZ. REV. STAT. ANN. § 46-233(a)(3) (1988 & Supp. 1994). DES regulation R6-3-701 defined eligibility for assistance to include all people “physically or mentally incapacitated to the degree he is unemployable.” Any person, therefore, who is not incapacitated to the degree he or she is unemployable is not eligible for aid. See *Herrera v. Jamieson*, 602 P.2d 514 (Ariz. 1979) (concluding in part on the basis of that regulation, that the statute was not vague.).

The approach of Illinois, Oregon, and Utah are very similar to Arizona’s. In Illinois, to be eligible for assistance, an individual must be chronically needy. Chronically needy persons are persons who are “too impaired to work but are not disabled enough to qualify for Supplemental Security Income or have substantial barriers to being employable” ILL. ANN. STAT. ch. 305, para. 5/6-11(c)(2) (Smith-Hurd 1993). The Illinois Department of Public Aid proscribes rules for determining whether a person is chronically needy. *Id.* In Oregon, although the statute providing for general assistance does not specifically state employable persons are not eligible, the Court of Appeals of Oregon in *Smith v. Peet*, 564 P.2d 1083, 1085 (Or. Ct. App. 1977), stated that by departmental rule, the Public Welfare Division granted public assistance to unemployable persons only with a few exceptions. Utah also limits general assistance to unemployable persons. UTAH CODE ANN. § 62A-9-114(2)(a) (1991).

Some states have limited this approach a bit. See NEV. REV. STAT. § 428.015 (1989). In Nevada, the board of county commissioners must set eligibility standards. *Id.* However, the Supreme Court of Nevada held, in *Clark County Soc. Serv. Dep’t v. Newkirk*, 789 P.2d 227, 228 (Nev. 1990), that counties, in establishing eligibility criteria, cannot automatically exclude employable persons from eligibility.

439. Many statutory provisions do express certain lofty hortatory goals for the poor relief system in place. These feel-good pronouncements are generally observed, if at all, only in the breach. For a discussion of the differences between the vision and reality of poor relief goals, see Backer, *supra* note 20, at 1050-70.

440. See, e.g., CAL. WELF. & INST. CODE § 17000 (West 1991) (“Every county and

lieve and maintain the poor,⁴⁴¹ or to support the poor.⁴⁴² These statutory mandates reflect the fundamental understanding that poverty is a mark of individual deficiency or incapacity caused by forces beyond the power of the individual affected,⁴⁴³ or the result of a deliberate repudiation of societal work requirements.⁴⁴⁴

Cost minimization results in systems of minimums. The minimum which is extremely consonant with static notions of rewarding productivity involves the setting of benefit levels. State systems, by statute or regulation, or case law, do not require jurisdictions to provide more than the minimum required to sustain the poor, as this minimum is calculated by the jurisdiction. Thus, state statutes

every city shall relieve and support all incompetent, poor, [and] indigent persons . . . when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.”); CONN. GEN. STAT. ANN. § 17-273 (West 1992 & Supp. 1995) (“Each person who has not estate sufficient for his support, and has no relatives of sufficient ability who are obliged by law to support him, shall be provided for and supported . . . at the expense of the town in which he resides.”); NEV. REV. STAT. § 428.010 (1989) (“[E]very county shall provide care, support and relief to the poor . . . lawfully resident therein, when those persons are not supported or relieved by their relatives or guardians, by their own means, or by state hospitals, or other state, federal or private institutions or agencies.”); TEX. LOCAL GOV'T CODE ANN. § 81.028(6) (West 1990 & Supp. 1995) (“Each commissioners court may . . . provide for the support of paupers . . . who are unable to support themselves.”).

441. *See, e.g.*, ALA. CONST. art. IV, § 88 (“It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor.”); N.H. REV. STAT. ANN. § 165:1 (1994) (“Whenever a person in any town is poor and unable to support himself, he shall be relieved and maintained”); OKLA. STAT. ANN. tit. 56, § 32 (West 1991) (“The overseers of the poor in each county shall have the oversight and care of all the poor persons in their county so long as they remain a county charge, and shall see that they are properly relieved and taken care of”); R.I. GEN. LAWS § 40-5-1 (1990) (“Every town shall be required to relieve and support all poor and indigent persons”); S.D. CODIFIED LAWS ANN. § 28-13-1 (1992) (“Every county shall relieve and support all poor and indigent persons”).

442. *See, e.g.*, MISS. CODE ANN. § 43-31-15 (1993) (“The board of supervisors shall annually assess and cause to be collected by the tax collector, and paid into the general fund of the county treasury, such tax as may be necessary for the support of the poor of the county.”).

443. *See* MONT. CONST. art. XII, § 3(3) (“The legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune, have the need for the aid of society.”).

444. Thus, a New Jersey legislator could, in support of modifications to the state's AFDC requirements, claim without much opposition that “the most useful thing welfare can do for the poor is to press middle class values upon them.” Paul Taylor, *Carrots and Sticks of Welfare Reform: Author of Landmark Federal Bill Hears Why States are Going Their Own Way*, WASH. POST, Feb. 4, 1992, at A13. Likewise, a popular conservative representative of the popular press notes that any indigent person who refuses to take any available job because it might be demeaning is in need of substantial “re-education.” Geyer, *supra* note 132, at D1.

mandate in terms such as "adequate provision,"⁴⁴⁵ "reasonable subsistence,"⁴⁴⁶ "support,"⁴⁴⁷ "properly relieved and taken care of,"⁴⁴⁸ a minimum benefit equal to some amount at or below the federally established poverty level,⁴⁴⁹ the "needs and resources" of the applicant,⁴⁵⁰ a "reasonable and decent low-income standard of

445. The Alabama Constitution requires that the legislature impose the duty upon the counties to give "adequate provision for the maintenance of the poor." ALA. CONST. art. IV, § 88. In New York, the duty of the social service officials is to "provide adequately for those unable to maintain themselves" by administering "such care, treatment and service as may restore such persons to a condition of self-support or self-care." N.Y. SOC. SERV. LAW § 131 (McKinney 1992). The state department of Social Services determines an applicant's eligibility according to a standard of need set at \$112.00 for one person. *Id.* §§ 131-a(1), -a(2)(a). The maximum amount of aid granted to one person is also \$112.00. *Id.* § 131-a(3)(a).

446. The aim of Alaska's general relief statute is to provide needy persons with funds for reasonable subsistence. ALASKA STAT. § 47.25.130(a) (1990). The amount of aid given to a recipient may not exceed \$120.00. *Id.* Other statutes have similar provisions. *See, e.g.* ARK. CODE ANN. § 20-76-407 (Michie 1991) (providing that the amount of assistance is determined by the amount needed to provide a "reasonable subsistence" compatible with decency and health); DEL. CODE ANN. tit. 31, § 512(3) (1985) (stating that the Department of Social Services makes periodic surveys of the cost-of-living factors in relation to the needs of recipients of assistance and welfare services so that they "may be reasonably sufficient to provide recipients with a subsistence compatible with recognized scientific standards"); KAN. STAT. ANN. § 39-709(d)(A) (1993) (making general assistance available to persons who have insufficient income or resources to provide a "reasonable subsistence compatible with decency and health"); MD. CODE ANN., SOC. SERV. § 88A-66 (1992) (stating that the amount of assistance shall be sufficient to provide an applicant with a "reasonable subsistence compatible with decency and health"); VA. CODE ANN. § 63.1-110 (Michie 1995) (providing that the amount of aid is sufficient if it provides a person with a reasonable subsistence).

447. *See, e.g.,* CAL. WELF. & INST. CODE § 17000 (West 1991) (requiring each county to support its poor); GA. CODE ANN. §§ 36-12-1, -2 (1993) (making counties responsible for the supervision of paupers and providing aid to those unable to financially support themselves); LA. REV. STAT. ANN. § 46:464 (West 1982 & Supp. 1995) (providing state-imposed mandatory duty on parishes to "support or aid" infirm, sick, or disabled paupers); MISS. CODE ANN. § 43-31-1 (1993) (stating that supervisors of each county must support the poor); R.I. GEN. LAWS § 40-5-1 (1990) (obligating towns to relieve and support the poor).

448. *See* OKLA. STAT. ANN. tit. 56, §§ 31, 32 (West 1991) (stating that county commissioners have the duty to oversee and care for all poor persons in their county so long as they remain a county charge, and to see that they are "properly relieved and taken care of").

449. *See* HAW. REV. STAT. § 346-53 (1985 & Supp. 1992) (stating that the amount of assistance should be based on 62.5% of the federally established poverty level). The maximum amount of assistance disbursed to one recipient is limited to \$100.00 per week. OKLA. STAT. ANN. tit. 56, § 26.16 (West 1991) (stating that the amount of assistance must not be less than \$10.00 and may not be more than the maximum amount standard for AFDC); UTAH CODE ANN. § 62A-9-120 (1991 & Supp. 1995) (providing that the amount of the general assistance grant be calculated the same as AFDC).

450. KY. REV. STAT. ANN. § 205.210(1) (Baldwin 1991) (stating that assistance should

living,"⁴⁵¹ "minimum decency and health,"⁴⁵² or meeting "the costs of necessary maintenance and services."⁴⁵³ Payments are calculated and made on the basis of poverty lines and related minimums. The thrust of the public policy underlying these statutory mandates is clear. Irrespective of the level at which benefits are set (and adjusted) the redistributive potential of this transfer is thus substantially muted.

Cost minimization can also manifest itself by permitting the relief entity to base the aggregate amount of relief on a variety of factors other than the anticipated need of the entire potential pool of eligible applicants. The more discretion a poor relief system is given to set benefit levels, the more likely costs (including the cost of taxation on the taxing groups) will dominate considerations of aid levels. Some courts, principally in California, have recently limited a locality's discretion in this regard.⁴⁵⁴ One can, in fact, see the direct connection between the Canon Law notion that the donor is solely responsible for setting the amount of aid he is to give,⁴⁵⁵ and the (unsuccessful) arguments of the California counties that they ought to be free to determine the amount of aid

be determined according to the "needs and resources of the applicant" as prescribed by regulation provided that there are available funds during the budgetary period).

451. See MO. ANN. STAT. § 208.150(1)(a) (Vernon 1983 & Supp. 1995) (stating that the amount of assistance for AFDC recipients be determined by the average need for each eligible person which includes "the cost of basic needs required to maintain a child or children in the home at a reasonable and decent low-income standard of living.").

452. See KAN. STAT. ANN. § 39-709(d)(A) (1993) (making general assistance available to persons who have insufficient income or resources to provide a reasonable subsistence compatible with decency and health); NEB. REV. STAT. § 68-133(2) (1990) (stating that counties must adopt written standards of assistance to poor persons which "[p]rovide a schedule of goods and services necessary for the maintenance of minimum decency and health"); OHIO REV. CODE ANN. § 5113.031(A)(3) (Baldwin 1995) (making the monthly standard of need the minimum monthly income required for the assistance group to maintain health and decency as determined by the department).

453. See COLO. REV. STAT. § 26-2-102 (1989).

454. See *Poverty Resistance Ctr. v. Hart*, 271 Cal. Rptr. 214 (Ct. App. 1989) (stating that county boards must consider actual subsistence costs in making a determination of minimum levels of assistance); *Boehm v. Superior Court*, 223 Cal. Rptr. 716, 720-21 (Ct. App. 1986) (setting for determining this minimum standard). See also *Bensinger*, *supra* note 9, at 533 (arguing that the courts' interpretations compel counties to survey cost of living before setting guidelines minimum subsistence needs); *Blanton*, *supra* note 9, at 46 (observing that several California courts used evidence obtained through studies to determine subsistence levels).

455. See *AQUINAS*, *supra* note 196, at 546 ("Yet it would be inordinate to deprive oneself of one's own in order to give to others to such an extent that the remainder would be insufficient for one to live in keeping with one's station and the ordinary occurrences of life . . .").

available based on their budgetary constraints.⁴⁵⁶ Not surprisingly, there was a strong effort to eliminate judicial restrictions on a county's benefit determination, led by the Governor of the state which led to the passage of legislation nullifying such judicial restrictions.⁴⁵⁷

Despite the opinions of the California courts, many other state general assistance systems are permitted a substantial amount of discretion in determining benefit levels for the eligible poor. Illinois provides an example of the manner in which the system accommodates this need.⁴⁵⁸ Kentucky provides another example; the poor there must make due with a pro rata portion of the benefit otherwise payable if there are insufficient funds allocated in the budget to cover aggregate need.⁴⁵⁹ We feel badly for the poor, however, as the general theory suggests, while their need may serve as the motivation for poor relief, it can not serve as the actual basis on which relief is allocated.

c. Need Hierarchies and Aid (What Amount of Destitution is Sufficient Destitution to Merit Aid?)

As the general theory suggests, states tend to devise programs that discriminate against the able-bodied, in a number of significant respects. The drive to minimize costs increases the incentives to minimize aid to the able-bodied. Since the able-bodied are the most likely to be able to fend for themselves, over-aiding them inappro-

456. See *Boehm*, 223 Cal. Rptr. at 722 (stating that "budgetary constraints cannot justify excluding from minimum subsistence grants to the indigent allowance for each of the basic necessities of life"); *Mooney v. Pickett*, 483 P.2d 1231, 1238 (Cal. 1971) (rejecting the county's argument that narrowing the definition of eligibility to exclude employable single males was justified by reason of budgetary constraints).

457. For a discussion of the California proposal, Proposition 165, its relationship to static notions of system reform, and the reasons for its defeat, see Backer, *supra* note 20, at 1070-82. Despite the defeat of Proposition 165, the California legislature enacted WELF. & INST. CODE § 17000.5, which "overrules previous judicial authority which required the standard of aid to be based upon a specific factual study of actual subsistence costs of living in each county . . . and authorizes counties to adopt a 'general assistance standard of aid' equal to 62% of the 1991 federal official poverty line." *Gardner v. County of Los Angeles*, 40 Cal. Rptr. 2d 271, 273 (Ct. App. 1995) (citing *Oberlander v. County of Contra Costa*, 15 Cal. Rptr. 2d 182 (Ct. App. 1992)).

458. In Illinois the amount of aid given to a recipient may be determined by local budget standards in localities which do not receive state funds. Local government units receiving state funds must set aid levels in accordance with state standards. ILL. ANN. STAT. ch. 305, para. 5/6-2 (Smith-Hurd 1993).

459. KY. REV. STAT. ANN. § 205.210(1) (Baldwin 1991).

propriately increases the costs of the poor relief effort in a way that magnifies its income redistributive effects to a portion of the population to which such distribution is at best problematical.⁴⁶⁰

Thus, cost minimization adds another layer of incentive in Western society to restrict aid to the able-bodied, tends to those whose need places them near the top of the need hierarchy (in terms of the immediacy of the need), and limits the type of aid available which will effectively move the able-bodied down the need hierarchy. Thus, aid to the able-bodied tends to be temporary, and for the relief of life-threatening or other extreme emergency situations.⁴⁶¹ Such assistance is usually provided in the form of food or vouchers for private charitable relief or small amounts of cash⁴⁶² in a quantity sufficient to ensure that the recipients can be temporarily fed and housed. It tends to be limited to those to whom failure to provide it could result in injury to the applicant.⁴⁶³ It is not meant to be permanent, the way that aid to the incapacitated is likely permanent.⁴⁶⁴ And in the jurisdictions where a general obligation to provide for the able-bodied poor exists, it is also coupled with work requirements.⁴⁶⁵

Also, more common now, as state budgets become squeezed, is the establishment of explicit queuing, and need hierarchies, even within the categories of poor universally considered deserving of aid. The example of Florida's recent attempt to ration health care for the poor on the basis of status is telling.⁴⁶⁶ However, the abil-

460. See, e.g., MONT. CODE ANN. § 53-3-121(5) (1994) (differentiating between benefits to the employable and the unemployable for the purpose of allocating scarce welfare resources to the most needy).

461. See, e.g., ILL. ANN. STAT. ch. 305, para. 5/6-10 (Smith-Hurd 1993) ("[T]o alleviate life-threatening circumstances or to assist the individual in attaining self-sufficiency . . . [e]mergency assistance shall not be granted under this Section more than once to any applicant during any 12 consecutive month period."); MONT. CODE ANN. § 53-3-201(4) (1994) (providing assistance "in cases of extreme necessity and destitution"). See *supra* text accompanying notes 330-36, 342-50.

462. Alaska, for instance, limits all assistance of this type to \$120.00. ALASKA STAT. § 47.25.250 (1990).

463. See *supra* part V.A.2.b.

464. See, e.g., MD. CODE ANN., SOC. SERV. § 88A-65(a) (1992) ("The Social Services Administration shall promptly establish, implement and modify as necessary a program of State funded assistance payments to residents of the State of Maryland who are temporarily in need but are not eligible for any other State or federal category of assistance.").

465. See *infra* part V.A.5.e.

466. Florida, in an effort to reduce the cost of running state-maintained public health clinics, has proposed implementing a system whereby all clients would be placed in one of seven ranked categories. Categories would be divided by status, such as age, sex, and pregnancy. The category consisting of pregnant women and infants would have top rank-

ity to manipulate in this manner is not limitless and the state courts have, on occasion, imposed broader interpretations on the concept of incapacity.⁴⁶⁷

d. Definitions of Aid-worthy Categories

I have spoken about the way in which the cost minimization imperative of poor relief systems results in cost shifting to the federal government, and how that provides a basis for limiting the scope of some state poor relief systems. But cost shifting is not the only way to minimize costs. In jurisdictions where the obligation to aid paupers does not extend to the able-bodied, costs also can be reduced. The extent of the obligation to relieve the poor can be limited by narrowing the definition of incapacity. This is an easy way of limiting the size of the eligible population. This technique also is effective in jurisdictions in which the obligation to relieve and maintain the poor extends to the able-bodied. There is incentive to narrow the definition of incapacity since the able-bodied recipient can be made to work for his aid (reducing the cost thereof, theoretically, of course) where the disabled recipient cannot.

The manipulation of the definition of incapacity and its antonym takes several forms. Since the fundamental critical assumption of stasis is the work imperative, the general theory suggests that definitions of incapacity might directly turn on an ability to

ing, and the bottom ranking would consist of people 65 years of age or older. Those in the higher-ranked categories would have preference for limited state health dollars over those in the bottom categories. *Florida Plan Would Ration Health Care*, TULSA WORLD, Oct. 17, 1992, at A8. The rationale for ranking the elderly at the bottom is also quintessentially static; since the elderly usually qualify for Medicare, it makes sense, from the state's perspective, to force the federal government, through the Medicare program, to shoulder a greater proportion of the health care costs of the elderly. Thus, Florida's plan forces "those eligible for Medicare, such as the elderly, to deal directly with federal Medicare providers rather than state-funded clinics." *Id.* Florida is not alone in the attempt to create need hierarchies. Oregon recently attempted, unsuccessfully, to ration health care by rating medical procedures in importance and funding them on that basis. The highest-ranked procedures were eligible for the most funding; the lowest-ranked got no funding at all. This plan was halted by the Federal government on the basis of a suggested violation of Federal Health Care Guidelines. *Id.*

467. In Missouri, although only aged, infirm, lame, blind, or sick persons can be eligible for assistance, the court in *Jennings v. City of St. Louis*, 58 S.W.2d 979 (Mo. 1933) held that an able-bodied man who is unable to obtain employment due to severe economic conditions was entitled to relief. Note, however, that the case was decided in the midst of the Great Depression when it was commonly assumed that even the willing able-bodied could not find work, and starvation was a real possibility.

work. A number of states classify incapacitated individuals as those who are not employable: Arizona, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas, Montana, New Jersey, Oklahoma, Rhode Island, South Dakota, and Utah.⁴⁶⁸ So defined, the term is flexible enough to permit the state broad latitude in determining the size of the eligible population by "refining" the meaning of the term "employable." The key concept is one of total disability, that is, the total inability to perform any kind of work. The fact that the disability makes it impossible to perform work for which the claimant had been trained is irrelevant. Thus, the skilled lifeguard is not unemployable because of the loss of a limb; he might still find employment as a file clerk or on a sales staff. This can be quite useful when budgetary constraints are tight, and accords with feder-

468. ARIZ. REV. STAT. ANN. § 46-233 (1988 & Supp. 1994) ("No person shall be entitled to general assistance who does not meet and maintain the following requirements: Is not employable according to the findings of the state department."); CONN. GEN. STAT. ANN. § 17-281a(b) (West 1992 & Supp. 1995) ("Each town shall separate the persons it is liable to support . . . into either the category of employable recipient of general assistance or the category of unemployable recipient of general assistance."); DEL. CODE ANN. tit. 31, § 505(4) (1985) (General assistance is "granted to all other needy persons . . . who are not employable."); GA. CODE ANN. § 36-12-2 (1993) ("No person who is able to maintain himself by labor . . . shall be entitled to the benefits of the provisions for the poor."); IDAHO CODE § 31-3405 (1983 & Supp. 1995) ("A recipient of nonmedical assistance shall be classified as either employable or medically unemployable."); ILL. ANN. STAT. ch. 305, para. 5/6-11(c)(2) (Smith-Hurd 1993) ("The Illinois Department or local government unit shall determine whether individuals under State Transitional Assistance are chronically needy. Individuals shall be considered chronically needy if they are too impaired to work, but are not disabled enough to qualify for Supplemental Security Income or have substantial barriers to being employable."); KAN. STAT. ANN. § 39-709(d)(A) (1993) ("To qualify for general assistance in any form a needy person must . . . be a member of a family in which a minor child or a pregnant woman resides or be unable to engage in employment."); MONT. CODE ANN. § 53-3-215 (1994) ("For purposes of eligibility, a recipient of general relief must be classified as either employable or unemployable. Unemployable persons may receive general assistance for as long as they remain eligible."); N.J. STAT. ANN. § 44-8-109 (West 1993) ("It is hereby declared to be the public policy of this State that every needy person shall, while in this State, be entitled to receive such public assistance as may be appropriate . . . to the need of a category of persons and whether or not such persons are employable."); OKLA. STAT. ANN. tit. 56, § 32 (West 1991) ("It shall be the purpose of this act [state-funded general assistance] to provide aid and assistance for destitute and/or unemployable citizens of the state . . ."); R.I. GEN. LAWS § 40-6-3.1(a) (1990 & Supp. 1994) ("General public assistance shall be provided to . . . individuals age eighteen (18) or older, provided that . . . they are determined by the department in accordance with this chapter and departmental regulations to be unemployable."); S.D. CODIFIED LAWS ANN. §§ 28-13-1, -1.1 (1992) ("Every county shall relieve and support all poor and indigent persons. An indigent or poor person is any person who . . . is unable to work because of illness or injury."); UTAH CODE ANN. § 62A-9-114(2)(a) (1991) ("General assistance may be provided to individuals who are . . . unemployable according to the standards of the department.").

al disability requirements as well.⁴⁶⁹

Several states classify the incapacitated as disabled individuals: Arkansas, District of Columbia, Iowa, Louisiana, Minnesota, New Mexico, North Carolina, South Carolina, and Washington classify the incapacitated as disabled individuals.⁴⁷⁰ This medical (physical) incapacity definition is refined by Alabama, Colorado, Hawaii, Kentucky, Maryland, and Missouri, which define incapacity as a person over age sixty-five, blind, or permanently and totally disabled person, or a needy dependent child.⁴⁷¹ The California and

469. See 42 U.S.C. § 423(d)(2)(A) (1991) (requiring that a social security disability claimant demonstrate an inability to perform any substantial gainful activity); 42 U.S.C. § 1382(c)(3) (1992 & Supp. 1993) (stating similar requirements for proof of disability for receipt of S.S.I. benefits).

470. ARK. CODE ANN. § 20-76-404 (Michie 1991) ("Whenever any person makes application for an assistance grant or for general relief and states . . . that he is physically disabled and unable to support his family or himself, then the claim must be proved to the satisfaction of the appropriate division of the Department of Human Services."); D.C. CODE ANN. § 3-205.42a (1981 & Supp. 1995) ("[A]n individual shall be eligible for GPA benefits only if the individual has a disability."); IOWA CODE ANN. § 252.1 (West 1946) (granting county general relief to "poor persons" who are persons that "are unable, because of physical or mental disabilities, to earn a living by labor"); LA. REV. STAT. ANN. § 46:461 (West 1982 & Supp. 1995) ("Parish governing authorities shall provide for the support of all infirm, sick and disabled paupers residing within the limits of their respective parishes . . ."); MINN. STAT. ANN. § 256D.05(1) (West 1994) ("Each person or family whose income and resources are less than the standard of assistance . . . shall be eligible for and entitled to general assistance if the person is a person suffering from a professionally certified permanent or temporary illness, injury, or incapacity . . ."); N.M. STAT. ANN. § 27-2-7 (Michie 1992) ("[P]ublic assistance shall be provided under a general assistance program to or on behalf of eligible persons who are over the age of eighteen and are temporarily disabled . . ."); N.C. GEN. STAT. § 108A.41 (1994) ("Assistance shall be granted to any person who is 65 years and older, or is between the ages of 18 and 65 and is permanently and totally disabled."); S.C. CODE ANN. § 43-5-310 (Law. Co-op. 1985) ("General assistance in the form of money payments shall be granted . . . to handicapped and unfortunate persons in need who are not eligible for other forms of assistance . . . and who are unable to support themselves because of physical or mental infirmity and would suffer unless so provided for."); WASH. REV. CODE ANN. § 74.04.005 (1982 & Supp. 1995) ("General assistance is aid to persons in need who are either pregnant or . . . incapacitated.").

471. ALA. CODE § 38-4-1 (1992) ("Public assistance shall be payable . . . to or on behalf of any person who is a needy blind person . . . , or is a needy person over the age of 65 . . . , or is a dependent child . . . , or who is permanently and totally disabled . . ."); COLO. REV. STAT. § 26-2-104 (1989) ("The state department shall establish public assistance programs consisting of assistance to eligible individuals, including but not limited to old age pensions, aid to families with dependant children, aid to the needy disabled, and aid to the blind."); HAW. REV. STAT. § 346-71 (1985 & Supp. 1992) ("The department of human services shall administer and provide public assistance to eligible persons who are disabled, or are at least fifty-five years of age, or have dependent children in the home not otherwise provided for . . ."); KY. REV. STAT. ANN. § 205-200(1) (Baldwin 1991) ("A needy aged person, a needy blind person, a needy child, a needy

Nevada statutes include people who are incapacitated by age, disease, or accident while Pennsylvania covers people who are unable to work due to medical, social, or related circumstances.⁴⁷² In Idaho, Montana, and Nebraska, incapacity is limited to certified medical incapacity to perform any kind of work.⁴⁷³ In addition, it can also include people who are taking care of the medically incapacitated at home, and in Arkansas, includes mothers potentially eligible for AFDC.⁴⁷⁴ Note the similarities between the definitions

permanently and totally disabled person, or a person with whom a needy child lives shall be eligible to receive a public assistance grant"); MD. CODE ANN., SOC. SERV. § 88A-65(a) (1992) ("The Social Services Administration shall establish, implement and modify as necessary a program of State funded assistance payments to residents . . . who . . . are aged, blind, or disabled as required under Title XVI of the Social Security Act and, but for income, would receive cash benefits under that title."); MO. ANN. STAT. §§ 205.580, .590 (Vernon 1983) ("Aged, infirm, lame, blind or sick persons, who are unable to support themselves . . . shall be deemed poor" and are supported by the county.).

472. CAL. WELF. & INST. CODE § 17000 (West 1991) ("Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident."); NEV. REV. STAT. § 428.010 (1989) ("[E]very county shall provide care, support and relief to the poor, indigent, incompetent and those incapacitated by age, disease or accident."); PA. STAT. ANN. tit. 62, § 432(3) (1968 & Supp. 1995) (Needy persons who are chronically needy shall be eligible for assistance. "Chronically needy persons are those persons chronically in need who may be eligible for an indeterminate period as a result of medical, social or related circumstance.").

473. IDAHO CODE § 31-3403(13) (1983 & Supp. 1995) ("'Medically unemployable' means a physical or mental disability to the extent it prevents an individual from participation in employment and such disability is certified by one or more licensed physicians and/or psychiatrist or psychologist."); MONT. CODE ANN. §§ 53-3-109(6), (16) (1994):

'Employable' means the condition of a person who is not unemployable.
'Unemployable' means the condition of a person who is at least 55 years of age and has a limited ability to obtain or retain suitable employment because of advanced age, has a serious physical, emotional, or mental handicap that is medically certified and that prevents him from being employed in any substantial gainful employment, or suffers from a permanent or temporary illness, injury, or incapacity that is medically certified and that prevents the person from working in any substantial, gainful employment.

NEB. REV. STAT. § 68-153 (1990):

Employable recipient shall mean any individual who is eighteen years of age or older, who is not engaged in full-time employment or satisfactorily participating in an approved program of vocational, rehabilitation, or job training, and who is not rendered unable to work by illness or significant or substantial mental or physical incapacitation to the degree and of the duration that the illness or incapacitation prevents the person from performing designated vocational, rehabilitation, or job training activities.

474. ARK. CODE ANN. § 20-76-402(c) (Michie 1991):

'Able-bodied individual' shall be defined as all individuals between eighteen

of medical incapacity sufficient to qualify for aid in the state statutes, and that of disability under federal law.⁴⁷⁵ The potential for institutions to use the indeterminacy of these definitions to enforce shifting public policy has been explored in the federal context.⁴⁷⁶

e. Work Requirements for the Able-bodied

States and localities that actually make provision for the able-bodied destitute impose work requirements on the recipients. Since all systems of general assistance accept the underlying notion that those capable of it must work, most state systems of general assistance require the able-bodied poor to labor for their maintenance. Fifteen states officially require such labor as a condition of the receipt of relief.⁴⁷⁷ Another nine permit the governmental institu-

years of age and sixty years of age, except for those individuals who are medically certified by a licensed physician as incapacitated; or whose presence in the home is required because of the medically certified illness or incapacity of another member of the household; or who are mothers or other relatives of a minor under twelve years of age who are caring for the child.

OKLA. STAT. ANN. tit. 56, § 26.5 (West 1991):

The word 'unemployable,' is hereby defined as meaning those persons who are unable to secure employment by reason of physical or mental disability, infirmity or temporary illness, or other disability which prevents such person from securing ordinary employment, or who are unable to secure employment by reason of Federal Relief Administration rules as to age requirements or work relief programs; or due to being ineligible for worker's compensation insurance; and persons who are unable to leave their homes to procure employment because of illness of a person in their care requiring constant supervision and attention.

475. See 42 U.S.C. § 423(d)(1)(A) (1991) (requiring a claimant for social security disability to prove that his inability to obtain work is a result of a medically determinable illness or injury); *id.* § 423(d)(2)(A) (1992 & Supp. 1993) (holding that a social security disability claimant must demonstrate an inability to perform any substantial gainful activity); *id.* § 1382(c)(3) (1992 & Supp. 1993) (making similar requirements for proof of disability for receipt of S.S.I. benefits).

476. See Liebman, *supra* note 119, at 844-47. "The variety of individual reactions to illness and injury presents the Social Security Administration with a large number of difficult qualification questions. The SSA often concludes that an individual is not medically disabled because for many other persons a similar injury or illness is compatible with work." *Id.* at 844.

477. ALA. CODE § 38-11A-4 (1992 & Supp. 1994); CONN. GEN. STAT. ANN. § 17-281a (West 1992 & Supp. 1995); IDAHO CODE § 31-3404 (1983 & Supp. 1995); ILL. ANN. STAT. ANN. ch. 305, paras. 5/6-1.4, 6-1.6 (Smith-Hurd 1993); IND. CODE ANN. § 12-20-13-1(I) (West 1994); KAN. STAT. ANN. § 39-709(d)(D)(3) (1993); KY. REV. STAT. ANN. § 205.200(7) (Baldwin 1991); ME. REV. STAT. ANN. tit. 22, § 4316A (West 1992); MD. CODE ANN., SOC. SERV. §§ 88A-17A-1, -17A-2 (1992); MICH. COMP. LAWS ANN.

tion dispensing aid to require work from those recipients who are capable.⁴⁷⁸ Kansas, in addition to community work experience programs, enacted the "Kanwork Act" which provides for a work experience and training program for public assistance recipients.⁴⁷⁹ However, some states requiring labor do not enforce the provisions because there are insufficient funds.⁴⁸⁰ Other states have abandoned their work programs because they have been unwilling to bear the financial risks and expenses of employing recipients risks which, somewhat ironically, the same states blithely mandate private employers to bear (along with the moral obligation to hire the unemployed).⁴⁸¹

The labor required of those capable is not meant to provide a permanent occupation for the recipients of aid.⁴⁸² Rather, it is primarily meant to serve the purpose of repayment to the state of the

§ 91(1)(d) (West 1988 & Supp. 1995); MINN. STAT. ANN. § 256D.051(3) (1992); MONT. CODE ANN. § 53-3-303,-304(3), -304(4) (1994); N.D. CENT. CODE § 50-01-17 (1989); OKLA. STAT. ANN. tit. 56, § 27.3 (West 1991); PA. STAT. ANN. tit. 62, § 405.1 (1968 & Supp. 1995).

478. CAL. WELF. AND INST. CODE § 17200 (West 1991); COLO. REV. STAT. § 30-17-103(3) (1989); IOWA CODE ANN. § 252.27 (West 1994); MISS. CODE ANN. § 43-31-9 (1993); MO. ANN. STAT. § 205.700 (Vernon 1983); NEB. REV. STAT. § 68-154.01 (1990 & Supp. 1994); N.H. REV. STAT. ANN. § 165.31 (1994); S.D. CODIFIED LAWS ANN. § 28-13-20 (1992); WIS. STAT. ANN. § 49.05(1)(g) (West 1987 & Supp. 1994).

479. KAN. STAT. ANN. §§ 39-7,-101 (1993).

480. Although counties in Connecticut must require general assistance recipients to work in return for aid, only two-thirds are actually required to work. The counties would like to provide training that would help recipients obtain meaningful employment, but the programs are too expensive to fund. Telephone Interview with David Frascarelli, General Administrative Analyst, Connecticut Department of Social Services (Feb. 11, 1994). General assistance recipients in Maine are also required to work in return for aid, however, there are no specific work or training programs available. Telephone Interview with Gary Veilleux, General Assistance Supervisor, Augusta Department of Human Services (Aug. 31, 1992). Work relief programs are, of course, always dependent on the availability of state funds. *See, e.g.*, ALA. CODE § 38-11A-3 (1992 & Supp. 1994) ("Program size, requirement, benefits and services shall be contingent upon the availability of funds.").

481. Iowa provides an interesting example. The workfare program for general assistance recipients was abandoned in that state in the 1980s as a result of a workers compensation lawsuit. The risk of additional liability from similar future lawsuits created the perception that such programs were too risky and not cost-effective. Telephone Interview with Mike Freilinger, Department of Social Services, Polk County, Iowa (Aug. 13, 1992).

482. State administrators are well aware of the limitations of the work programs they are required to administer. Thus, administrative officials in one state concede that, although all labor required of aid recipients is temporary in nature, attempts have been made to provide training to recipients that would help them obtain meaningful employment. However, such programs are rarely successful because of inadequate funding. Telephone Interview with David Frascarelli, General Administrative Analyst, Connecticut Department of Social Services (Aug. 13, 1992).

aid given, to curtail crime by keeping the otherwise idle busy, and also to impress on the able-bodied that his or her maintenance is dependent on his or her own efforts. When work is available for aid recipients, it is usually in the form of menial labor, such as janitorial services.⁴⁸³ In several states the labor provisions are limited by provisions designed to protect the jobs of permanent state employees.⁴⁸⁴ Indeed, states sometimes make no effort to consider even the physical ability of recipients in assigning work.⁴⁸⁵ This conscious use of employment as a cost saving device survives undiluted from the Elizabethan Poor Law.⁴⁸⁶

In addition to reducing the cost of aid by working for it, the able-bodied are also required to obtain permanent non-institutional employment. Thus, fifteen states require those capable of it to work for their maintenance.⁴⁸⁷ A number of states require, in lieu of or in addition to the work requirement, that the employable poor

483. Telephone Interview with Gary Veilleux, General Assistance Supervisor, Augusta Department of Human Services (Aug. 31, 1992). Cf. Ronnigen, *supra* note 360, at A20 (describing proposal to give single welfare recipients part-time jobs doing park maintenance, painting, or child care to help establish job histories).

484. Several states which require aid recipients to work specifically prohibit the employment of an aid recipient to replace a regular employee. See ILL. ANN. STAT. ch. 305, para. 5/6-1.7 (Smith-Hurd 1993) ("Each such local governmental unit shall assure that . . . [t]he taxing district or private not-for-profit organization does not use a person selected to work . . . to replace a regular employee."); IND. CODE ANN. § 12-20-11-1(g) (West 1994) ("A poor relief recipient may not be assigned to work that would result in the displacement of governmental employees or in the reduction of hours worked by governmental employees."); MD. ANN. CODE art. 88A, § 17(b) (1991) ("[E]mployable persons shall be assigned for work in full-time jobs . . . , but no person shall be assigned to a job in which he would replace regular workers or duplicate or replace an existing service."); N.D. CENT. CODE § 50-01-17.3(2) (1989) ("Any community work experience program . . . must provide . . . [t]hat the program does not result in displacement of persons currently employed."); OKLA. STAT. ANN. tit. 56, § 27.7 (West 1991) ("The work performed on a community work and training program by a recipient of public assistance . . . , must not displace regular workers or result in the performance by such persons of work that would otherwise be performed by employees of public or private agencies, institutions or organizations"); PA. STAT. ANN. tit. 62, § 405.1(c)(2) (1968 & Supp. 1995) ("In order to be a bona fide offer of employment, there must be reasonable assurances that . . . [t]he offer of employment will not result in any displacement of employed workers.").

485. Thus, a 102 lbs., 59-year-old recipient was assigned to move refrigerators in Washtenaw County, Michigan. When the recipient refused, AFDC benefits were terminated and not reinstated until after a hearing. VESELY ET AL., *supra* note 96, at 44.

486. With respect to the Elizabethan Poor Law, tenBroek, notes that "the state, which was then assuming a public obligation for the support of the able-bodied unemployed as well as of the impotent, might by this method minimize its expenditures while at the same time accomplishing its objective." tenBroek, *supra* note 9, at 276.

487. See *supra* note 477.

register for work with state or private employment referral agencies,⁴⁸⁸ vocational or training programs,⁴⁸⁹ or other employment-related programs.⁴⁹⁰

f. Restitution

Cost savings are also effected by requiring the poor who receive general assistance to repay the state for any aid received if they later come into any money or property. Eleven states, by statute, permit the administering body to recover its expenses from the recipient or his estate, at least up to the amount of the aid actually dispensed.⁴⁹¹ Three states allow those administering the

488. See, e.g., IDAHO CODE § 31-3404(4) (1983 & Supp. 1995) (requiring application with the department of employment); ILL. ANN. STAT. ch. 305, para. 5/6-1.4 (Smith-Hurd 1993) (stating regulations pertaining to the registration for and acceptance of bona fide work offers); KY. REV. STAT. ANN. § 205-200(7)(a) (Baldwin 1991) (discussing registration with the state employment office); ME. REV. STAT. ANN. tit. 22, § 4316-A(1)(B) (West 1992 & Supp. 1994) (discussing registration for work); MD. CODE ANN., SOC. SERV. § 88A-17A-1(a) (1992) (discussing registration with local employment security office); PA. STAT. ANN. tit. 62, § 405.1(a) (1968 & Supp. 1995) (requiring registration for employment, manpower, and training services).

489. See CONN. GEN. STAT. ANN. § 17-281a (West 1992 & Supp. 1995) (defining employable persons for purposes of "work readiness programs"); ME. REV. STAT. ANN. tit. 22, § 4316-A(1)(0) (West 1992) (defining training, educational, or rehabilitation programs).

490. See, e.g., ALA. CODE § 38-11A-4 (1992) (stating that every non-exempt applicant or recipient of public assistance must register and participate in the employment program); KAN. STAT. ANN. § 39-709(d)(B)(3) (1993) (requiring a community work experience program); MINN. STAT. ANN. § 256D.051(3a) (West 1994) (requiring a work readiness program).

491. See ALASKA STAT. § 47.25.220 (1990) ("The total amount paid in assistance to a recipient constitutes a claim against the recipient and the recipient's estate."); CONN. GEN. STAT. ANN. § 17-283(a) (West 1992) ("Any person who receives relief from any town or municipality of this state shall be liable to reimburse such town or municipality for any moneys or relief received."); IND. CODE ANN. § 12-20-27-1 (West 1994) (stating that a claim may be filed "against the estate of a poor relief recipient who: (1) dies leaving an estate; and (2) is not survived by a spouse or a dependent child less than eighteen years of age; for the value of aid or assistance given the recipient"); KAN. STAT. ANN. § 39-719a (1993) ("Any assistance paid shall be recoverable by the secretary as a debt due to the state."); ME. REV. STAT. ANN. tit. 22, § 4318 (West 1992) (allowing recovery of "the full amount expended for that support either from the person relieved, or for any person liable for the recipient's support, their executors or administrators, in a civil action"); MD. ANN. CODE art. 88A, § 77 (1991) ("On the death of any recipient, the total amount of assistance paid under this subtitle shall be allowed as a claim against the estate."); MICH. COMP. LAWS ANN. § 400.77 (West 1988) (empowering the government "to collect and receive funds to reimburse the county for expenditures made on behalf of recipients of any form of aid or relief . . . from such recipients . . . or from the estates of recipients"); N.H. REV. STAT. ANN. § 165:20-b (1994) (stating that a locality may recover amounts paid in relief from any person "who is returned to an income status after receiving the assistance" which allows the recipient to reimburse the locality); N.D. CENT.

relief to contract with the recipient to repay the relief granted.⁴⁹² Eight states are given the authority to seek reimbursement from those relatives of a recipient who are statutorily liable for support.⁴⁹³ Several states also require the prospective recipient to repay from future earnings or out of any property the recipient might have gained while receiving general assistance.⁴⁹⁴ Several states

CODE § 50-01-21 (1989) ("County funds used for subsistence, medical, hospital, or burial expenses of county indigents may not be considered as gifts, and the county shall have a preferred claim against the estate of any person for funds expended for such person . . ."); OR. REV. STAT. § 411.795(1) (1993) ("The amount of any general assistance paid under this chapter is a claim against the property or any interest therein belonging to and a part of the estate of any deceased recipient . . ."); S.D. CODIFIED LAWS ANN. § 28-14-1 (1992) ("When any county shall furnish relief to any person . . . , such county shall have a claim against the person so relieved for the value of such relief . . .").

492. S.D. CODIFIED LAWS ANN. § 28-13-20 (1992) ("[T]he board may require the recipient of assistance to enter into a contract for the repayment of all or part of the assistance he receives."); WASH. REV. CODE ANN. § 74.04.005(10)(f)(ii)(A) (West 1982 & Supp. 1995) ("[T]he department may provide grant assistance . . . from the date the agreement is signed . . . [p]rovided, [t]hat . . . [t]he applicant or recipient signs an agreement to repay the lesser of the amount of aid received . . .") (emphasis added). In Maine, the court in *Oliver v. Petit*, 432 A.2d 428, 431 (Me. 1981) upheld a contractual promise by a recipient to reimburse a municipality for general assistance which was duplicated by later benefits.

493. ALASKA STAT. § 47.25.230 (1990) ("Every designated person who fails to support the needy person when directed by the department to do so, . . . shall reimburse the state or a municipality for the funds expended . . . for the relief . . . of the needy person, and these sums with interest and costs may be recovered . . ."); CAL. WELF. AND INST. CODE § 17300 (West 1991) ("All aid rendered by the county under this part shall be a charge against the responsible relative or relatives of the recipient thereof, and the county rendering aid shall be entitled to reimbursement therefore."); GA. CODE ANN. § 36-12-3 (1993) ("Any county having provided for such pauper upon the failure of such relatives to [support the pauper] may bring an action against such relatives of full age and recover for the provisions so furnished."); IOWA CODE ANN. § 252.13 (West 1994) ("Any county having expended money for the assistance or support of a poor person . . . may recover the money from [the person, the person's estate or relatives]."); ME. REV. STAT. ANN. tit. 22, § 4318 (West 1992) ("A municipality or the State, which has incurred general assistance program costs for the support of any eligible person, may recover the full amount expended for that support from . . . any person liable for the recipient's support, . . . , in a civil action."); MICH. COMP. LAWS ANN. § 400.77 (West 1988) ("The county department of social welfare is hereby authorized and empowered to collect and receive funds to reimburse the county for expenditures made on behalf of recipients of any form of aid or relief . . . from . . . their relatives legally responsible . . ."); N.D. CENT. CODE § 50-01-19 (1989) ("The county may recover for necessities furnished to an indigent person from his father, mother, or adult children."); OR. REV. STAT. § 416.170(1) (1993) ("If the relative fails to [support or contribute to the support of an indigent], the division may cause to have issued . . . a warrant directed to the sheriff . . . commanding the sheriff to levy upon and sell the real and personal property of the relative found within that county, for the payment of the amount of the contribution . . .").

494. CAL. WELF. & INST. CODE § 17403 (West 1991) ("If a person for the support of whom public moneys have been expended acquires property, the county shall have a

have given themselves the right to place a lien on property acquired by an aid recipient.⁴⁹⁵

Despite the broad power to seek reimbursement, a number of states with the power to seek reimbursement rarely pursue the matter. The states' reluctance to pursue reimbursement from former clients can be explained by a variety of factors. Foremost among them is the notion that the cost to the state of obtaining reimbursement may exceed the amount sought to be reimbursed. This is particularly true when the amount to be reimbursed is small and the former client refuses the reimbursement request, requiring the governmental entity to seek recoupment through legal action. Thus, reimbursement provisions can serve more as *in terrorem* measures, indirectly reducing costs by discouraging applications for relief, than as a direct means of recovering costs. Additionally, since stasis rewards productivity and abhors redistribution, static systems tend to avoid situations where recoupment results in

claim against him to the amount of a reasonable charge for moneys so expended"); MD. ANN. CODE art. 88A, § 76 (1991) ("Any assistance paid before the recipient has come into possession of such property or income and in excess of his need shall be recoverable by the county department as a debt due."); N.Y. SOC. SERV. LAW § 104 (McKinney 1992):

A public welfare official may bring an action or proceeding against a person discovered to have real or personal property, or against the estate or the executors, administrators and successors in interest of a person who dies leaving real or personal property, if such person, . . . , received assistance and care during the preceding ten years, and shall be entitled to recover up to the value of such property the cost of such assistance or care.

Wis. STAT. ANN. § 49.08 (West 1987 & Supp. 1994) ("If any person is the owner of property at the time of receiving general relief . . . , or if such person becomes self-supporting, the authorities charged with the care of the dependent, . . . may sue for the value of the general relief from such person or the person's estate"). Wages are included in the definition of property for repayment purposes. *City of Madison v. Lange*, 408 N.W.2d 763, 764 (Wis. Ct. App. 1987).

495. ME. REV. STAT. ANN. tit. 22, § 4320 (West 1992) ("A municipality or the State may claim a lien against the owner of real estate for the amount of money spent by it to provide mortgage payments on behalf of an eligible person under this chapter [general assistance]"); N.H. REV. STAT. ANN. § 165:28 (1994) ("The amount of money spent by a town or city to support an assisted person under this chapter shall, except for just cause, be made a lien on any real estate owned by the assisted person."); S.D. CODIFIED LAWS ANN. § 28-14-1 (1992) ("When any county shall furnish relief to any person . . . , such county shall have a claim against the person so relieved for the value of such relief, which may be enforced against any property, not exempt from execution, which such person may have or later acquire."). In Illinois, a township may require a property owning aid recipient to agree to a lien or a charge upon his property as a means to recover non-medical general assistance benefits. *Libertyville Township v. Woodbury*, 460 N.E.2d 66 (Ill. App. Ct. 1984).

reimpoverishment. This is recognized by statute in some states.⁴⁹⁶ The courts of other states, such as California, Colorado, and Maryland, have also modified the government's power to recoup from after-acquired income or property.⁴⁹⁷ The effect of these determinations do not affect the primary cost minimizing effect of the principle of restitution—to the extent that recipients acquire wealth or income, amounts received as poor relief ought to be treated as a loan (the funds returned thereafter useable to provide for the needs of other paupers), collectable to the extent that collection will not result in a renewed need for relief.

But even states that do not, as a routine matter, seek reimbursement, do so on occasion when the prospects of recovery are good. For instance, some states seek reimbursement only after the recipient or former recipient becomes a judgment creditor, or receives money in settlement of a dispute.⁴⁹⁸ Some states also recover upon the occurrence of more extraordinary financial events. California and Connecticut, for instance, seek reimbursement from, or terminate aid to, recipients who come into windfalls, such as a lottery winning.⁴⁹⁹

496. See, e.g., N.H. REV. STAT. ANN. § 165:20-b (1994) ("Any town or city furnishing assistance to any person who is returned to an income status after receiving the assistance which enables him to reimburse the town or city *without financial hardship* may recover from such persons the amount of assistance provided.") (emphasis added).

497. The California Supreme Court held in *County of San Diego v. Muniz*, 583 P.2d 109 (Cal. 1978), that the county could not recoup prior assistance payments from the wages of a former recipient necessary for the support of such person. The Colorado Supreme Court in *Denver Dep't of Welfare v. Gomer*, 346 P.2d 1016 (Colo. 1959), held that the provision which requires reimbursement of aid from after-acquired property does not apply when a deed is released and authorities had full knowledge of such property. Further, in Maryland, the court in *Worcester Ct. Welfare Bd. v. Wyatt*, 150 A.2d 435 (Md. 1959) held that for the county to have a claim for recovery of assistance from a recipient's estate, the recipient must have been receiving assistance at the time of his death. The court also stated recovery would not be allowed against a husband's estate for assistance given to his wife. See generally Blanton, *supra* note 9, at 43-44.

498. Connecticut and California, for example, will generally attempt to recover prior assistance payments from recipients recovering sums in litigation. Telephone Interview with Alan Kaplan, Connecticut Department of Social Services, Hartford, Connecticut (Aug. 13, 1992); Telephone Interview with Ms. Rifkin, Department of Social Services, San Francisco County, California (Aug. 24, 1992) (discussing assistance recovery only if the county should learn of the litigation recovery); see also Lynne Tuohy, *Lawyers To Supply Records*, HARTFORD COURANT, July 2, 1991, at C3 (stating that lawyers in a personal injury firm were required to turn over to the state information on 52 cases involving welfare recipients obligated to reimburse the state from their legal "windfalls").

499. See Tuohy, *supra* note 498 (discussing that recipients are obligated to reimburse the state for welfare payments from lottery winnings); Nancy Skelton & Jerry Gillam, *Lottery Winners May Be Bumped Off Welfare Rolls*, L.A. TIMES, Oct. 10, 1985, at A3 (not-

g. Group (Usually Family) Support Obligations

As a system of minimums, a system of last resort, the general theory suggests that poor relief systems will tend to impose the relief obligation on others. I have discussed how this manifests itself in cost shifting to private charities and the federal government. But cost shifting of this kind also manifests itself in the tendency to assign fiscal responsibility for adult paupers to a large range of individuals—primarily relatives.⁵⁰⁰ Why relatives? Because they are the individuals on whom it is easiest to impose the obligation, if for no other reason than the long tradition in Western religion and culture for imposing mutual obligations for support on a unit composed of relatives by blood or marriage, at the head of which was the father.⁵⁰¹ This obligation is in addition to the general family law style obligation requiring a parent to support his or her minor children.⁵⁰²

State general assistance systems, then, tend to place generous

ing that anyone owing the state money will have debts deducted from winnings and winners will have their state or county benefits reduced or terminated upon winning the lottery).

500. This cost shifting is not an unconscious act by government. *See, e.g.*, Pyke v. Dep't of Social Servs., 453 N.W.2d 274 (Mich. Ct. App. 1990), where the court stated that the policy of considering a spouse's income in determining eligibility for general assistance for the other spouse was rationally related to the state's interest of allocating funds among welfare recipients. *Cf.* Dempsey v. Pennsylvania Dep't of Pub. Welfare, 404 A.2d 1373 (Pa. Commw. Ct. 1979) (noting that an inquiry into the potential resources of a legally responsible relative is proper in determining an applicant's eligibility for public assistance).

501. On the origins of modern Western family structure, see generally JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987); SUZANNE DIXON, THE ROMAN FAMILY (1992); FRANCES & JOSEPH GIES, MARRIAGE AND THE FAMILY IN THE MIDDLE AGES (1987). Medieval Christian notions of charity turned in large measure on the imperative of intra-family unit responsibility. *See supra* part IV.A.

502. *See, e.g.*, FLA. STAT. ANN. § 856.04 (West 1993); N.J. STAT. ANN. § 2C:24-5 (West 1993); OKLA. STAT. ANN. tit. 10, § 4 (West 1991) ("The parent entitled to the custody of a child must give him support and education suitable to his circumstances."). Some jurisdictions also require some form of parental support of adult children. *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 12 (West 1991 & Supp. 1995) ("It is the duty of the father and the mother of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability."). *But see* Sharum v. Sharum, 225 P. 628 (Okla. 1924) (holding that a grandfather need not support a minor dependent of his indigent son). For a discussion of the general obligation to support minors, see Minow, *supra* note 17, at 827-34. On the implicit notions of patriarchy, and control of women inherent in systems which assume that a male is required for the support of children, and which underlies much family law and welfare discourse, see Fineman, *supra* note 17, at 277-89; White, *supra* note 17, at 1986-90, 1999-2000 (describing control through domestic violence).

financial obligations on relatives to support their family members. Indeed, the questions of identifying the poor and determining the extent of the imposition of familial support obligations are sometimes fused by the courts in interpreting the scope of state general assistance provisions.⁵⁰³ These support obligations are enforceable by the state. Generally, the agency which was required to make poor relief payments to an indigent is allowed to recover the amounts paid from these responsible relatives.⁵⁰⁴ Some statutes give the poor relief agency the power to seek to compel a responsible relative to make future support payments to the pauper.⁵⁰⁵

503. *See, e.g.*, *Atkins v. Curtis*, 66 So. 2d 455 (Ala. 1954) (determining that a person is not "poor" and therefore eligible for relief if there exists a legally liable relative who possesses sufficient income and resources to maintain the applicant).

504. *See, e.g.*, CAL. WELF. AND INST. CODE § 17300 (West 1991) ("All aid rendered by the county . . . shall be a charge against the responsible relative or relatives of the recipient thereof . . ."); CONN. GEN. STAT. ANN. § 46b-215 (West 1992 & Supp. 1995) (stating that the court can "enforce orders for payment of support against any person who neglects or refuses to furnish necessary support to [a relative], according to his or her ability to furnish such support"); DEL. CODE ANN. tit. 31, § 511 (1985) (imposing support obligation on parents, children, and spouses); ILL. ANN. STAT. ch. 305, para. 5/10-2 (Smith-Hurd 1993) (noting that responsible relatives "shall be liable for any financial aid extended under this Code to a person for whose support they are responsible"); ME. REV. STAT. ANN. tit. 22, § 4319 (West 1992 & Supp. 1994) (stating that a state can recoup general assistance costs from legally responsible spouses or parents); MASS. GEN. LAWS ANN. ch. 117A, § 7 (West 1994) (holding that parents are bound to support children in proportion to ability); MICH. COMP. LAWS ANN. § 401.3 (West 1988 & Supp. 1995) ("Upon the failure of any relative of a poor person to relieve and maintain the poor person, the county department of social services . . . shall apply . . . for an order to compel the relief."); MINN. STAT. ANN. § 256D.15 (West 1994) (imposing financial responsibility on certain relatives of recipient); MISS. CODE ANN. § 43-31-25 (1993) (noting that relatives of a pauper are liable to any governmental entity which supports that person); N.H. REV. STAT. ANN. § 165:19 (1994) (requiring certain relatives to "assist or maintain such person when in need of relief"); N.Y. SOC. SERV. LAW § 101 (McKinney 1992) (stating that relatives are liable to public welfare district or non-profit institution for care of medically indigent person); OR. REV. STAT. § 416.110 (1993) (noting that the state subrogated to the right of indigent to prosecute a relative for support); R.I. GEN. LAWS § 40-5-13 (1990) ("The kindred of any poor person . . . shall be holden to support the pauper in proportion to their ability."); VA. CODE ANN. § 63.1-127 (Michie 1995) ("The local board may proceed in the manner provided by law against any person who is legally liable for the support of an applicant or recipient of assistance to require such person, if of sufficient financial ability, to support the applicant or recipient."); W. VA. CODE § 9-5-9 (1990) ("The relatives of an indigent person, who are of sufficient ability, shall be liable to support such person in the manner required by the department of welfare . . ."); WIS. STAT. ANN. § 49.90(1)(a)1 (West 1987 & Supp. 1994) ("The parent and spouse of any dependant person who is unable to maintain himself or herself shall maintain such dependant person . . .").

505. *See Freitas v. County of Contra Costa*, 33 Cal. Rptr. 2d 406 (Ct. App. 1994) (stating that when a responsible adult is defined by the state statute, the county may not impose financial responsibility on family members not covered by the statute). *See also*

However, given the redistributive potential of family support, courts have tended not to broaden the reach of these statutory obligations.⁵⁰⁶

Of course, the more inclusive the definition of family group, the more likely the state will be able to find an individual who will be well-off enough to assume the financial burden of maintaining the pauper. Generally, since the institution of Elizabethan Poor Law, legally responsible relatives have included the parents, grandparents, and children of the potential aid recipient.⁵⁰⁷ Contemporary general assistance provisions show surprising little variation from the Elizabethan ideal. Thus, several states continue to impose financial liability for paupers on parents, children, grandchildren, grandparents, siblings, and spouses.⁵⁰⁸ Maine imposes the obligation only on parents and spouses, but not on siblings.⁵⁰⁹ In contrast, West Virginia imposes the burden on children, parents, and siblings, but not grandparents or grandchildren.⁵¹⁰ Other states limit the obligation to members of the immediate family.⁵¹¹ The

infra text accompanying notes 569-71.

506. *See, e.g.*, *Anchor v. State Soc. Sec. Comm'n*, 191 S.W.2d 259 (Mo. Ct. App. 1945) (holding that a granddaughter or an adult child is under no obligation to support a grandparent or parent); *Missouri-Kan.-Tex. R.R. v. Pierce*, 519 S.W.2d (Tex. Civ. App. 1975) (stating that adults have no legal obligation to support their parents).

507. *See* discussion *supra* part IV.B. On the origins of the parental obligation to support minor children, particularly the support of bastards, see tenBroek, *supra* note 9, at 284-86. For modern commentary on the necessity for such obligation and the efficacy of its enforcement, see generally Payne, *supra* note 178; Creech, *supra* note 178.

508. ALASKA STAT. § 47.25.230 (1990) (holding spouse, children, parents, grandparents, grandchildren, or siblings of the needy person responsible for support); IOWA CODE ANN. § 252.2 (West 1994) (holding father, mother, children responsible for support of the needy person), *id.* § 252.5 (presenting an alternative to section 252.2, grandparents and grandchildren are also responsible for support); MISS. CODE ANN. § 43-31-25 (1993) (holding responsible "[t]he father and grandfather, the mother and grandmother, and brothers and sisters, and the descendants of any pauper not able to work"); R.I. GEN. LAWS § 40-5-13 (1990) (holding the father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, or children by adoption responsible for support); UTAH CODE ANN. § 17-14-2 (1991) (holding children, parents, siblings, grandchildren, grandparents responsible for support).

509. ME. REV. STAT. ANN. tit. 22, § 4319 (West 1992) (stating that parental liability for support of a child ends when the child reaches 25 years of age; grandparents and siblings may be liable for rental payments).

510. W. VA. CODE § 9-5-9 (1990) (holding that a mother's obligation follows a sibling's, while a father's precedes a sibling's).

511. CAL. WELF. & INST. CODE § 17300 (West 1991) (holding spouse and parent of a minor child responsible for support); CONN. GEN. STAT. ANN. § 46b-215 (West 1992 & Supp. 1995) (holding that support should be provided for the pauper spouse and children under 18); DEL. CODE ANN. tit. 31, § 511 (1985) (holding the parent, child, or spouse responsible for support); GA. CODE ANN. § 36-12-3 (1993) (requiring support by father,

financial responsibility is sometimes prioritized in accordance with the degree of relation between the pauper and the financially responsible relative.⁵¹² In Iowa, the prioritization creates a right of contribution in favor of those—grandparents and grandchildren—farther down the line of financial responsibility.⁵¹³ Several states, by statute, also limit relative responsibility by the obvious condition that those responsible have the financial means to comply with the support obligation.⁵¹⁴ And some states limit the obligation of parents to support adult children.⁵¹⁵

mother, and child of any pauper); ILL. ANN. STAT. ch. 305, para. 5/10-2 (Smith-Hurd 1993) (holding the spouse and parents of recipient responsible); MASS. GEN. LAWS ANN. ch. 117A, § 7 (West 1994) (holding parents responsible); MICH. COMP. LAWS ANN. § 401.3 (West 1988 & Supp. 1995) (holding husband, wife, father, or mother responsible); MINN. STAT. ANN. § 256D.15 (1994) (holding for support for the pauper spouse, parent of adult child residing with parent); N.Y. SOC. SERV. LAW § 101 (McKinney 1992) (holding the spouse parent of a child under 21 years of age responsible); N.H. REV. STAT. ANN. § 165:19 (1994) (holding the father, mother, stepfather, stepmother, son, daughter, husband, or wife responsible); N.D. CENT. CODE § 14-09-10 (1989) (“holding the father, the mother, and the children of any poor person” responsible); OR. REV. STAT. § 416.010 (1993) (holding responsible the husband, wife, father, mother, son, or daughter 21 years of age or over); PA. STAT. ANN. tit. 62, § 1973 (1968) (“The husband, wife, child, father and mother of every indigent person . . .”); VA. CODE ANN. § 63.1-90.1 (Michie 1995) (holding the person who lives in the same home of a child and co-habits as husband or wife with the parent of the child responsible); WIS. STAT. ANN. § 49.90(1)(a) (West 1987 & Supp. 1994) (holding responsible the parent and spouse of dependant).

512. *See, e.g.*, IOWA CODE ANN. § 252.5 (West 1994) (holding grandparents and grandchildren responsible only if no nearer relative is able to support the pauper); UTAH CODE ANN. § 17-14-2 (1991) (holding children, parents, siblings, grandchildren, and grandparents responsible—in that order); W. VA. CODE § 9-5-9 (1990) (holding children, father, siblings, and mother responsible—in that order).

513. This, of course, increases the expenses of the relatives while decreasing the expenses of the state. Thus, the unfortunate grandparent or grandchild is given the opportunity (by lawsuit, if all else fails) to require nearer relatives to (in turn) reimburse them for moneys paid to the state. IOWA CODE ANN. §§ 252.5, 252.15 (West 1994). *See also* ALASKA STAT. § 47.25.230 (1990) (imposing support obligations on grandparents and grandchildren).

514. *See, e.g.*, GA. CODE ANN. § 36-12-3 (1993) (holding relatives responsible only if “sufficiently able”); MASS. GEN. LAWS ANN. ch. 117A, § 7 (West 1994) (holding relatives responsible “in proportion to their ability”); N.D. CENT. CODE § 14-09-10 (1989 & Supp. 1995) (holding relatives responsible “to the extent of [their] ability”); PA. STAT. ANN. tit. 62, § 1973 (1968) (holding relatives responsible “if of sufficient financial ability”); W. VA. CODE § 9-5-9 (1990) (“The relatives of an indigent person, who are of sufficient ability, shall be liable to support such person in the manner required by the department of welfare . . .”).

515. *See, e.g.*, CAL. WELF. & INST. CODE § 17300 (West 1991) (holding parents of minor children responsible for support); CONN. GEN. STAT. ANN. § 46b-215 (West 1992 & Supp. 1995) (holding parents responsible for children under 18); MINN. STAT. § 256D.15 (West 1994) (stating that support is limited to minor children and adult chil-

The theoretical obligation of relatives is sometimes enforced only in the breach—it, again, may cost more to enforce than the value of the recovery. For instance, although Iowa interprets the relative financial liability provision very liberally, it makes little effort to actively seek repayment from the recipient or from relatives liable for the support of the indigent relative. Counties enforce the provision by requiring a parent to house the poor person if possible. The county will deny general assistance to an applicant if he or she can stay with a parent.⁵¹⁶ Alaska considers the income of spouses, children, parents, grandparents, grandchildren, or siblings as an available resource to an aid recipient if he or she is living with them and they will be subject to a civil action for reimbursement if they fail to support the poor person. However, if a responsible relative is not living with the indigent, the provision is not enforced.⁵¹⁷ Other states have similar approaches to the relative liability provisions.⁵¹⁸ Additionally, some states have explicitly limited the force of these provisions by judicial interpretation of the statutory obligation.⁵¹⁹

dren living with parent); N.Y. SOC. SERV. LAW § 101 (McKinney 1992) (holding support is limited to children under 21); VA. CODE ANN. § 63.1-90.1 (Michie 1995) (holding support is limited to children living at home).

516. Telephone Interview with Mike Freilinger, Iowa Department of Social Services, Polk County, Iowa (Aug. 13, 1992).

517. Telephone Interview with Rick Hanby, Eligibility Technician, Alaska Department of Health and Social Services (Feb. 25, 1994). *See also* ALASKA STAT. § 47.25.230 (1990):

Every needy person shall be supported while living and upon dying, shall be given a decent burial by the spouse, children, parents, grandparents, grandchildren, or siblings of the needy person when directed by the department to do so, in the order named. Every designated person who fails to do so, or fails to give the needy person a decent burial shall reimburse the state or a municipality for the funds expended by either the state or the municipality for the relief or burial of the needy person, and these sums with interest and costs may be recovered by the state or a municipality of the state in a civil action.

518. In California, counties expect spouses and parents to take financial responsibility depending on their ability to do so, but do not enforce the law requiring relatives to support poor persons. Telephone Interview with Ms. Rifkin, Department of Social Services, San Francisco County, California (Aug. 24, 1992). In Connecticut, towns usually do not force relatives to financially support their poor relatives despite the relatives' legal obligation to do so. Telephone Interview with David Frascarelli, General Administrative Analyst, Connecticut Department of Social Services (Feb. 11, 1994). In West Virginia, the relative liability provisions were enforced at one time, but are currently enforced only to the extent that a parent is compelled to support minor children. Telephone Interview with Rondel Spruce, Economic Assistance Supervisor, West Virginia Department of Human Services (Aug. 12, 1992).

519. California provides a good example of a state with a traditional form of general assistance statute, CAL. WELF. & INST. CODE § 17000 (West 1991), which has been inter-

h. Enveloping Aid in Stigma, Humiliation, and Complexity

To the extent that the poor relief system is able to inculcate the "work ethic" among its potentially eligible destitute population, the system will reduce the cost to maintain that group (the group is now smaller). One way to inculcate this ethic, while affirming the notion that poor relief is "bad" (drive home the point that almost anything, i.e. any kind of work, is better than poor relief), is to surround the process of obtaining aid with sufficient stigma, humiliation, and complexity that some of the otherwise eligible poor will be discouraged from taking advantage of the aid (at least theoretically) offered.

Stigma, humiliation, and complexity are achieved in a variety of ways. First, the instructions and procedures for obtaining relief can be made quite complex. Thus, plaintiffs in *City of Los Angeles v. County of Los Angeles* alleged that the application procedures for general assistance in Los Angeles County were unreasonably onerous, including an initial oral screening, the completion of a twelve-page application, interviews, and fraud investigations.⁵²⁰ Even the most trivial failure to comply can result in loss of eligibility or denial of benefits, and the obligation to start the process

preted by the state's courts to limit the ability of the county to force parental support. *Mooney v. Pickett*, 483 P.2d 1231 (Cal. 1971); *Bernhardt v. Alameda County Bd. of Supervisors*, 130 Cal. Rptr. 189 (Ct. App. 1976). The courts proceeded from the proposition, expressed in *Mooney*, 483 P.2d at 1237-39, that an entire class of persons could not be excluded if some of the class members might be eligible for aid, to the determination of the court in *Bernhardt*, 130 Cal. Rptr. at 193, that regulations which deemed that parental resources must be counted in determining the eligibility of teenage applicants for general assistance were invalid. As a result of the holding in *Bernhardt*, the county would be required to make individual determinations of *actual* support before the county would be empowered to deny relief. In effect, the family obligation provisions of CAL. WELF. & INST. CODE § 17300 (West 1991) have been made more difficult to enforce. The effect of these rulings is to weaken the ability of the state to aggressively enforce the parental support obligations provided in the general assistance provisions, increasing both the cost of administration of the general assistance system and the aggregate amount of aid given. In this sense at least, the decisions seem to go against the static paradigm. Importantly, however, the courts did not determine that the county was prohibited from requiring relatives from supporting their indigent family members; rather, the county was prohibited from *presuming* the existence of this obligation in cases where the child might be an adult. Note, however, that there may be little support for this view in the statute itself, CAL. WELF. & INST. CODE § 10000 notwithstanding. See *Bensinger*, *supra* note 9, at 522 & n.201 (outlining county's arguments rejected by courts); *Blanton*, *supra* note 9, at 38-39 (listing roles of statutory regulations used by California courts to interpret the general assistance laws).

520. First Amended Complaint, *supra* note 13, ¶¶ 6-41.

over again.⁵²¹ Second, the institutions designated for the processing of requests for state charity retain the hierarchic characteristics, the rigid status boundary between donor and recipient, master and servant, which traditionally formed part of charitable giving. As a consequence, the recipient is expected to be humble, patient, and grateful; the donor can be excused its rudeness, insensitivity, and arbitrariness.⁵²² The donor's conduct constitutes yet another form of the message society sends to the recipient—"Is the paycheck worth the humiliation? Wouldn't you rather be working for minimum wage than receiving this treatment?"⁵²³ But, as Professor White has discussed, it is easier to talk about getting a job, than it is actually getting a job that does not, in turn, carry humiliations, discriminations, and the potential for violence any less severe than that suffered at the hands of the archetypically mean, slothful, petty bureaucrats which seem to inhabit a number of general assistance offices nationwide.

521. See THE MOUNT PLEASANT REPORT, *supra* note 17, at 91-101; VESELY ET AL., *supra* note 96, at 41-44. Anecdotal accounts also abound in the popular press. See, e.g., Melinda Henneberger, *Kingston Journal: Real Faces of Welfare at Meeting*, N.Y. TIMES, Apr. 29, 1993, at B6. For a description of the daunting complexity of federal categorical programs, see Simon, *supra* note 13, at 1200-01.

522. There are a number of studies and reports which document the negative relationship between recipients and the staffs of state social services agencies. See, e.g., THE MOUNT PLEASANT REPORT, *supra* note 17; VESELY ET AL., *supra* note 96, at 41-44 (Report of Project Fair Play, a project conducted by the Human Services Design Laboratory of the School of Applied Sciences at Case Western Reserve University between Nov. 1980 and Sept. 1981, the purpose of which was to study the administration of AFDC in selected welfare departments in the Midwest, train advocates for AFDC recipients, and bring problems to the attention of the appropriate officials.).

The Project Fair Play Report grouped the offensive conduct into four categories, giving examples of instances of each at the sites studied. The categories included rudeness, insensitivity, arbitrariness, and inflexibility. Rudeness included bouts of shouting and abrupt conduct (so abrupt that the social worker accompanying the recipient feared asking questions of the staff person for fear of jeopardizing the benefits of the recipient). VESELY ET AL., *supra* note 96, at 42. Worker insensitivity was marked by lack of concern for the individual needs of recipients (for example, children in the hospital), and lack of timely action upon a change of circumstances, (the example given was of a recipient who was entitled to increased benefits, whose increase was delayed several months because the state employee had not had the time to "get around to it.") *Id.* at 43. Arbitrariness was evidenced by petty power acts by state employees—the denial of benefits because the worker believed the recipient was not watching her child, or because the case-worker thought the recipient's boyfriend ought to support her. *Id.* at 43-44. Inflexibility was marked by a mindless adherence to the letter rather than the spirit of the rules—the denial of benefits to a 59 year-old, 102 lbs. recipient who refused a work assignment moving refrigerators. *Id.* at 44.

523. See White, *supra* note 17, at 1979-85 (discussing the bleak job prospects of a middle-aged African American woman on welfare).

Another effective means of stigmatizing the poor is through education. Education is meant to teach us to recognize the norm, and to pattern our lives on that basis. Western education teaches us status—it helps all of us internalize the basic assumptions of our culture. Our norms require that we all provide for our own maintenance. Our norms also require that all non-majority racial, ethnic, and religious groups adhere at least to the major tenets of dominant group cultural patterns. Education is meant to teach us all to adhere to these norms without question.⁵²⁴ Society ensures adherence to its norms through tremendous social pressure. It trains people to believe that they are useless, lazy, and unproductive when they seek welfare benefits.⁵²⁵ And then it seeks to prove the point by resort to all manner of scientific, sociological, and religious studies.⁵²⁶ Indeed, much like cultural anthropologists venturing into the forests of New Guinea before the Second World War, late twentieth century social scientists have ventured into the worlds of American cities to “describe” the sex codes of the poor “inner-city” (that is, African-American) youths and how it contrib-

524. In this sense, at least, Karl Marx may have been right in discussing the British attitude towards the education of the lower classes in the 19th century, and in the 20th century as well.

The actual meaning of education in the minds of the philanthropic economists is this: Every worker should learn as many branches of labor as possible, so that if, either through the application of new machinery or through a changed division of labor, he is thrown out of one branch, he can easily be accommodated in another.

Karl Marx, *Wages*, lecture delivered before the German Working Men’s Association in Brussels, Belgium (Dec. 1847) in *NEUE RHEINISCHE ZEITUNG*, Apr. 5-7, and 11, 1849, and reprinted in *VI THE KARL MARX LIBRARY (ON EDUCATION, WOMEN, AND CHILDREN)* 25 (Saul K. Padover ed. & trans., 1975). Today, we speak of vocational education and coping skills training for our young people. Of course, the Western non-Marxist world does not have a monopoly on this conception of the role of education. See *STALIN*, *supra* note 136 (Soviet Union); Read, *supra* note 136 (Cuba).

525. For example, one woman trapped in welfare for lack of better alternatives described herself as lazy, though it is difficult to understand how she might better her circumstances. White, *supra* note 17, at 1971-97 (approaching the problem through the words of Elaine Preston about her life trapped on welfare).

526. Rosemary L. Bray, a former editor of the *New York Times Book Review*, and the product of growing up on AFDC, perhaps recently said it best:

But all manner of sociologists and policy gurus continue to equate issues that simply aren’t equivalent—welfare, race, rates of poverty, crime, marriage and childbirth—and to reach conclusions that serve to demonize the poor.

Rosemary L. Bray, *So How Did I Get Here: In Recounting Her Hard Fought Passage from Welfare to Writing, the Author Tells How She and Her Family Beat A System Designed to Mire Them In Failure*, *N.Y. TIMES MAG.*, Nov. 8, 1992, at 35, 39.

utes to their inability to fend for themselves as the rest of society might expect.⁵²⁷ Education, thus, reinforces the notion that racial groups, and women, both overrepresented among the poor, are inferior,⁵²⁸ or adhere to inferior modes of family organization,⁵²⁹ or fail to properly train their children in the need to adhere to fundamental social rules (particularly the rule that everyone must labor for their maintenance).⁵³⁰ It is a view that holds to the notion that:

One does not require a deep sociological imagination to sense the attitudinal and behavioral consequences of growing up in an impoverished household where there is no activity associated with the world and a household that, in turn, is spatially embedded in a commercially abandoned locality where pimps, drug pushers, and unemployed street

527. An example: Professor Anderson recently described the manner in which inner-city youth express themselves, and the causes of this behavior due to the inability of inner-city adolescents to attain the traditional mark of American "manhood," that is, the power to form economically self-reliant families.

Partially in response, the young man's peer group emphasizes sexual prowess as a mark of manhood, at times including babies as its evidence. A sexual game emerges and becomes elaborated, with girls becoming lured by the boys' often vague but convincing promises of love and marriage. As the girls submit, they often end up pregnant and abandoned, but eligible for a limited but sometimes steady income in the form of welfare, which may allow them to establish their own households and, at times, attract other men in need of money.

Elijah Anderson, *Sex Codes and Family Life Among Poor Inner-City Youths*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 59 (1989) (quoted from the abstract). For a discussion which reverses the order, see RICHARD POSNER, *SEX AND REASON* 167-68, 264 (1992) (discussing the relationship between welfare and single parenthood; welfare induces women to carry their pregnancies to term).

528. Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1 (1969).

529. MOYNIHAN, *supra* note 17; WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 104-05 (1987) (considering marital status an appropriate objective to be fostered by public policy).

530. *See, e.g.*, Kasarda, *supra* note 42, at 44-45 (noting that at the root of the concern is the link between female headship and welfare dependency). Richard J. Murnane, *Education and the Well-Being of the Next Generation*, in *CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE* 289, 296-97 (Sheldon H. Danziger et al. eds., 1994):

But it is important to keep in mind that the roots of the low achievement of many American children lie in the circumstances of poverty in which they live. Consequently, educational policy changes not accompanied by policies that significantly reduce the poverty that dominates many children's lives will have only a modest influence on their academic achievement.

people have replaced working fathers as predominant socializing agents.⁵³¹

Complexity, stigma, and humiliation are augmented by punishment. As in the time of the Tudor monarchy, those able-bodied poor who refused to work for their keep, whether the work is provided by the state or otherwise, will be punished. Punishment is generally meted out in one of two ways. As an initial matter, most states retain laws criminalizing conduct which in an earlier age would have been subsumed under the vagrancy statutes.⁵³² This type of conduct is usually characterized as disorderly conduct, and includes sleeping in the streets or parks, or on public or private property without permission, and public urination or intoxication, public bathing, eating, or congregating, or blocking the free movement of persons in a public place.⁵³³ Significantly, a number of states have proscribed the act of begging to a greater or lesser extent, with uneven success.⁵³⁴ The other favored means of punishing the non-compliant is by reducing benefits. A good example of the use of rules to force "self-sufficiency": the federal government's search for the means to transform welfare by limiting

531. Kasarda, *supra* note 42, at 44.

532. See POUND, *supra* note 90, at 53-57; Rosenheim, *supra* note 108, at 512-18.

533. Many of the ordinances under which this type of control is effected are local. All are on the books of many localities. For a description of the use of the ordinances to control the activities of the unemployed able-bodied poor, see Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992); Norman Siegel, *Homelessness: Its Origins, Civil Liberties Problems and Possible Solutions*, 36 VILL. L. REV. 1063, 1067-81 (1991); Simon, *supra* note 9, at 631-33, 645-47; Baker, *supra* note 9, at 425 n.43.

534. New York City has banned begging in the subway system. 21 N.Y. COMP. R. & REGS. tit. 21, § 1050.6 (1989) (upholding constitutional attack in *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990); see Zur, *supra* note 110, at 383-93. However, the federal courts have declared a New York City law generally proscribing panhandling to violate the Federal Constitution. *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993). California has proscribed the accosting of others to solicit alms. CAL. PENAL CODE § 647(c) (West 1991) (codifying as a misdemeanor accosting a person in a public place "for the purpose of begging or soliciting alms"). This statute was declared unconstitutional by a federal court, *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991) (holding that the statute was unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution), but was enforced as constitutionally sound by the California state courts, *Ulmer v. Municipal Court*, 127 Cal. Rptr. 445 (Ct. App. 1976); *People v. Zimmerman*, 19 Cal. Rptr. 2d 486 (App. Dep't Super. Ct. 1993). See also *Panhandlers Hope Supreme Court Will Be Generous*, L.A. TIMES, May 12, 1990, at A18. The District of Columbia proscribes begging on the Capital grounds, D.C. CODE ANN. § 9-110 (1981 & Supp. 1995), and has attempted to prevent begging in affluent neighborhoods. *Upset by Beggars, Washington Arresting Them*, N.Y. TIMES, Nov. 7, 1990, at A20.

the time a recipient can remain on welfare and creating incentives to marry and bear children within the marriage relationship after the completion (at least) of high school.⁵³⁵

But punishment can also come in a variety of other, more subtle ways. Subsidizing the cost of the food to be purchased by the poor and then limiting the choice of food is one way. The poor are told, in effect, that they are too incompetent to decide for themselves matters as simple as what to eat and where to buy it.⁵³⁶ The poor are also punished by being forced to live in places which are generally held up to contempt and derision. Living in welfare hotels, low-income housing, and in housing in the poorer parts of the city may constitute a significant humiliation for those who have to disclose the location of their residence to others. And federal, state, and local laws may effectively prevent the dispersal of the poor.⁵³⁷

B. American General Assistance, Elizabethan Law, Ecclesiastical Poor Law: Aren't We Talking About the Same System?

Current systems of general assistance in the United States are demonstrably static. They are also strikingly similar to each other in basic conception and implementation, as well as to those dusty and irrelevant old systems each claimed to displace. While the Elizabethan Poor Law and contemporary American general assistance programs have each, in turn, added layers of sophistication and complexity to the programs as implemented, the basic core and the spirit animating such systems remains substantially the same. Its sources are our birthright, our reality. An understanding of the static paradigm and the general theory of poor relief brings these similarities into stark focus. Let me highlight these similarities.

The three systems seem to share a fondness for an understanding of poverty in cultural terms. This makes judgments of deviance and relative worth easy to make and easier to defend at the level of the *unconscious*. This is no surprise; we have no reason to really question the underlying assumption that people have an

535. See discussion of these proposals in Backer, *supra* note 42.

536. See, e.g., *900 Stores Cut From Food Stamp Program*, TULSA WORLD, Dec. 10, 1992, at A18 (describing the actions of the Department of Agriculture which determined that the poor ought not to use food stamps at convenience stores "because they sell too many sodas and snacks and not enough milk and bread").

537. See, e.g., Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI-KENT L. REV. 795, 831-47 (1991).

obligation to fend for themselves, those who fail to do so are different; deviants in the fully critical and unpleasant sense of the terms. This concept has ancient roots. In the medieval period it was assumed that the habitually needy poor were different; the poor were supposed to be different in a strict hierarchical society.⁵³⁸ While the poor were thought inferior, only the able-bodied who refused to work, and thereby violated the class and status norms of medieval society, were despised as deviants and punished as beggars, thieves, and vagabonds.⁵³⁹ The only ground for refusal to aid the poor was the presumption that almsgiving would encourage vagrancy and idleness and in effect encourage the violation of status norms; the habitually idle were to be kept from starvation; no more.⁵⁴⁰

This was the conceptualization of the problem that came to dominate a substantial part of the Elizabethan Poor Law and the American conceptions of poor relief.⁵⁴¹ Indeed poverty as a cultural crime can tend to dominate public policy for extended periods. By the time of the New Poor Law (the Poor Law Act of 1834) in Britain, the notion that not all the poor were bad, just vagrants and mendicants (status outlaws in the old hierarchical society), was extended to include all of the poor, even the working poor. The commonly held notion was that if a person was destitute, he was probably idle and he deserved his fate. These policy notions have carried over to our own day, when homeless males are usually instructed to simply shape up and get a job,⁵⁴² even by those who were once homeless themselves (perhaps this is not surprising since the zeal of the converted usually exceeds that of old believers). Society widely believes that all of the poor are basically idle, and that the only way the poor can be induced to work is to make the process of aid to the needy as humiliating and difficult as possible.⁵⁴³

While the intensity of the policy implications of poverty as a culture crime modulates over time, the underlying notion that poverty is in the hands of the poor does not. Thus, consider the Brit-

538. See TIERNEY, *supra* note 36, at 58.

539. *Id.*

540. Roch, *supra* note 202, at 510; see AQUINAS, *supra* note 196, at 544; TIERNEY, *supra* note 36, at 61.

541. MENCHER, *supra* note 14, at 39-53; POUND, *supra* note 90, at 39-76.

542. See, e.g., Hobbes, *supra* note 43.

543. See HIMMELFARB, *supra* note 52, at 147-76. See also Briggs, *supra* note 65, 232-46.

ish reforms of the early twentieth century, when the view emerged linking poverty not merely to individual irresponsibility, but also to social maladjustment. While this maladjustment might be the result of societal incentives, and therefore, not the "fault" of the maladjusted—it was still clear that the poor would have to find some way to relieve themselves of this condition. In a sense then, social maladjustment was defined as normal—the system (regrettably to be sure) was supposed to work this way. Thus, even if not their fault, it was the poor and not society which was maladjusted, and it would have to be the poor, and not society which would have to change. The only change required of society would be to prevent the existence of incentives to maladjustment.⁵⁴⁴

Religious teaching mirrors the civil notion of the social maladjustment of the destitute. Through the end of the twentieth century, God has not yet been heard to lift the command to be self-sufficient, delivered at the time of the expulsion from the Garden of Eden. Sloth is sin; the taking of alms when one could work is theft (from the giver as well as from the deserving who would now have to make do without), and is therefore, a double sin. Poverty is still a sign of sin, to be remedied by greater devotion to religious teachings and greater application to work. Destitution of the able-bodied was the mark of the hellfire to come. Though perhaps less luridly expressed today (in some religious circles, at least) than a century ago, or even a millennium ago, the underlying belief has not changed. "A couple of millennia after the Apostle Paul announced his welfare policy—'If anyone will not work, let him not eat'—it has become the most popular idea of the 1992 Presidential campaign."⁵⁴⁵ Indeed, government still occasionally calls on general religious (moral) principles to justify the core value of the static paradigm.⁵⁴⁶ Thus, the 1990s have witnessed a return to religiously or morally based arguments respecting the poor and societal obligations to and from them.⁵⁴⁷

544. See Briggs, *supra* note 65, at 251-55 (discussing the changing focus on the nature of the problems of the poor in early 20th century Britain).

545. Stephen Chapman, *Clinton, Bush and Welfare: Beyond the Promises*, CHIC. TRIB., Sept. 6, 1992, at C3. *But see* NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *supra* note 224, at 83-105 (addressing the need to "require fundamental changes in social and economic structures that perpetuate glaring inequalities and cut off millions of citizens from full participation in the economic and social life of the nation") *Id.* at 93.

546. "Thus, providing the means and opportunity to enter the economic mainstream is both morally right and economically sound." NEW YORK TASK FORCE, *supra* note 23, at 2.

547. A typical expression of this modern form of belief is represented by Gertrude

But modern folk do not rely on religion alone. While in ancient times the culture of poverty might have referred to the taste of some people for sloth and the life of a thief or rogue, in modern times people have tended to find medical and scientific basis for the existence of a culture of poverty.⁵⁴⁸ Thus, Oscar Lewis described the traits commonly thought to be shared by the poor which might be responsible for their own inability to overcome their miserable economic conditions:

Other traits include high incidence of maternal deprivation, of orality, and of weak ego structure; confusion of sexual identification; lack of impulse control; strong present time orientation, with little ability to defer gratification and to plan for the future; sense of resignation and fatalism; widespread belief in male superiority; and high tolerance for psychological pathology of all sorts.⁵⁴⁹

The modern version of this notion, that the poor are somehow different and inferior from the rest of us is also tinged with racial and ethnic overtones; and the inferiority highlighted is evidenced by the subjects' lack of economic success, because to be normal means to be successful, or at least stable and upwardly mobile.⁵⁵⁰

Himmelfarb, who writes:

We are now confronting the consequences of this policy of moral "neutrality." Having made the most valiant attempt to "objectify" the problems of poverty, criminality, illiteracy, illegitimacy and the like, we are discovering that the economic and social aspects of these problems are inseparable from the moral and psychological ones. And having made the most determined effort to devise remedies that are "value-free," we find that these policies imperil the material, as well as the moral, well-being of their intended beneficiaries—and not only of individuals but of society as a whole.

Gertrude Himmelfarb, *A De-Moralized Society*, FORBES, Sept. 14, 1992, at 120 (footnote omitted). See also GILDER, *supra* note 26, at 72-74 (reflecting on the importance of faith in the creation of a lower-class capable of ridding itself of the 'disease' of poverty).

548. In secularized form, this was certainly the view of the authors of the New Poor Law in 1834 Britain. The only difference is that the notion that poverty was an indication of the worthlessness of the poor individual (or at least a sign of his or her laziness and unfitness for civil society) was wrapped in scientific terminology, first the theorems of Malthus, and then the Social Darwinism of the late Victorian period. For a discussion of the development of these notions in the 19th century, see HIMMELFARB, *supra* note 52, at 100-44.

549. Lewis, *supra* note 27, at 191-92.

550. See generally, AULETTA, *supra* note 27; GALBRAITH, *supra* note 44; HARRINGTON, *supra* note 26; JENCKS, *supra* note 27; EDWARD M. KAITZ & HERBERT H. HYMAN, *URBAN PLANNING FOR SOCIAL WELFARE: A MODEL CITIES APPROACH* (1970); MOYNIHAN, *supra* note 17; PIVEN & CLOWARD, *supra* note 20; WILSON, *supra* note 529; WILSON,

For women, being normal also means being married, and submitting to the dictates of patriarchy implicit in the status quo that is fundamental to the static paradigm.⁵⁵¹ This is a touchy subject, especially when the suggestion is made that the means to success and upward mobility are denied on the basis of factors other than ability or willingness,⁵⁵² or that it ought to be because ability is tied to race or ethnicity,⁵⁵³ or gender.⁵⁵⁴

Indeed, modern conservatives share the vision of the poor as different (inferior), but they tend to take the characterization a bit further. For "conservative" commentators, the difference is not altogether benign or unconscious. They argue from the perspective of intentional conduct. The poor are basically lazy at heart (or at least would prefer to receive money from the government rather than work at a disagreeable job for the same amount of money) and require the rigor of little or no governmental aid in order to induce them to work for a living.⁵⁵⁵ But even people who are

supra note 42.

551. The consensus is that the behavior of women is responsible for their welfare dependency. What behavior? Raising children out-of-wedlock, and preferring the dole to a humiliating and wholly inadequate job? See Mimi Abramovitz, *Why Welfare Reform is a Sham*, THE NATION, Sept. 26, 1988, at 24 (stating that welfare officials in California conceded that working women required a wage of \$11.00 per hour to stay off the welfare rolls, but the average wage of graduates of the state workfare program was \$6.50 per hour). This notion of the deviance of poor women, and the impediments of patriarchy on their efforts to become self-sufficient on their own terms has been critically explored recently. See Fineman, *supra* note 17, at 289-93; Law, *supra* note 17.

552. Contrast BELL, *supra* note 79; Karst, *supra* note 17 with MURRAY, *supra* note 3. See NEW YORK TASK FORCE, *supra* note 23, at 44 ("Government has a responsibility to use its position as regulator, employer, and purchaser to influence the labor market conditions confronting disadvantaged groups.").

553. See, e.g., Jensen, *supra* note 528 (suggesting that African-Americans are incapable of the type of achievement that Caucasian-Americans enjoy because the basis of their intelligence lies elsewhere). Cf. RICHARD J. HERNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 317-40 (1994) ("The persisting gap in family income between blacks and whites is reflected in the poverty data Controlling for IQ shrinks the difference between whites and other ethnic groups substantially but not completely.") *Id* at 326.

554. The double binds facing poor women, especially poor women of non-dominant ethnic and racial groups has been explored recently by Professor White. See White, *supra* note 17, at 1971-97 (approaching the problem through the words of Elaine Preston about her life trapped on welfare).

555. See, e.g., GILDER, *supra* note 26, at 64-74 (arguing that poverty can be explained as the result of the abandonment by the poor (as a result of the pernicious effects of modern welfare programs) of the central tenets of success—work, monogamous heterosexual family structure with traditional gender roles, and faith represented by traditional Western moral codes); MURRAY, *supra* note 3 (stating that everyone is lazy at heart, but the poor have been given a means, through modern systems of institutional relief, to

thought more "liberal" succumb, especially when dealing with the poverty of women who have the temerity to bear children without the benefit of a husband.⁵⁵⁶ The Reverend Martin Luther King, Jr. understood the historical and religious basis of society's categorization of the poor and stigmatization of large groups of them. Unfortunately, in advancing a proposal for a nationwide guaranteed annual income, he hoped in vain that such notions had disappeared when he said:

Now early in this century this proposal would have been greeted with ridicule and denunciation, as destructive of initiative and responsibility. At that time economic status was considered the measure of the individual's ability and talents. And, in the thinking of that day, the absence of worldly goods indicated a want of industrious habits and moral fiber. We've come a long way in our understanding of human motivation and of the blind operation of our economic system. Now we realize that dislocations in the market operations of our economy and the prevalence of discrimination thrust people into idleness and bind them in constant or frequent unemployment against their will. Today the poor are less often dismissed, I hope, from our consciences by being branded as inferior or incompetent.⁵⁵⁷

Indeed, twenty-five years after that speech, an American President could, in addressing Congress and the nation, invoke the imagery of welfare as "a narcotic and a subtle destroyer of the spirit . . . passed on from generation to generation like a legacy" to advance a poor relief program based on time-honored distinctions of productivity and moral worthiness for relief.⁵⁵⁸

The general theory suggests that all systems of poor relief categorize; that is their basic nature. I have demonstrated just how pervasive the imperative to categorize the poor has been since at

capitalize on their laziness at the expense of those who work, with what Murray considers awful consequences for the recipients of this largesse).

556. Professors Fineman and White have recently explored the manner in which commentators across the political spectrum have united to condemn the deviant woman on the dole—as lazy, without the sense to get and keep a man. Fineman, *supra* note 17, at 283-85.

557. King, *supra* note 28, at 247.

558. George H. Bush, State of the Union Address, Address before the Congress of the United States (Jan. 28, 1992), in *N.Y. TIMES*, Jan. 29, 1992, at A14.

least the fourth century. The categories of Ambrose of Milan might have been a crude basis on which to build a poor relief system, compared to modern categorization, but the fact of categorization as a foundation for the provision of relief has not changed. Indeed, the whole basis of federal relief in the United States starts from the notion of categorization.⁵⁵⁹ The federal government has always been quite picky about what types of destitute it is willing to aid. State programs traditionally have been less picky, but "monkey see, monkey do." Federal categorical aid has resulted in a narrowing of the categories of destitute thought to merit state and local aid.

Americans, like their Elizabethan and medieval counterparts, continue to despise their poor. We have discussed the religious and economic basis of this disgust; the needy have violated a core cultural taboo. Traditionally, they were permitted not to starve. In contemporary society, they are still thrown to private charity or made to work. The able-bodied are frequently denied general assistance on the basis that they are able to work. The able-bodied are ineligible for assistance in fourteen states.⁵⁶⁰ Of those states that do provide aid to the able-bodied, twenty-four states have provisions which require or may require able-bodied recipients to work in return for aid given.⁵⁶¹

But we also despise the worthy poor who actually aggressively pursue the aid made available to them. In the seventeenth century they were considered riff-raff, professional beggars, and worse.⁵⁶² In contemporary America, we reserve a substantial amount of revulsion for the "welfare-wise,"⁵⁶³ "welfare queens" are hounded into marriage.⁵⁶⁴ Men who father children without the benefit of

559. BARTH, ET AL., *supra* note 14, at 32-34; LEVITAN, *supra* note 3, at 22-56; MARMOR ET AL., *supra* note 6, at 166-72.

560. For a discussion of the Elizabethan approach, see *supra* part IV.B., for the current American approach, see *supra* part V.A.

561. See discussion *supra* text accompanying notes 477-90.

562. See POUND, *supra* note 90.

563. This is the welfare recipient, whose knowledge is limited to an ability to "milk" the system for all the benefits Congress or the state legislature has made available. See Ken Neal, *The Welfare Prison: Society Punishes Rather than Rewards Those Who Find Jobs*, TULSA WORLD, June 13, 1993, at D1 (describing the reaction of the President of the National Association of Housing and Redevelopment Officials, an administrator of public housing in Pueblo, Colorado).

564. See, e.g., Mimi Abramovitz & Martha Davis, *Welfare or Welfare? Proposals Seek to Control Behavior*, WASH. POST, Feb. 4, 1992, at A-15 ("A recent spate of legislative proposals in states across the country seeks to use welfare programs to control the be-

marriage and then permit their offspring to be supported by the state are condemned as the wellsprings of crime, drug abuse, and intergenerational poverty; such conduct is even offered up to "explain" (but certainly not "approve") the rationality of racism against certain groups of non-dominant peoples.⁵⁶⁵ The destitute can't win—society really doesn't even want them to take what is offered; it wants them to fend for themselves.

Our poor law system continues to rely on charity to provide aid to the indigent. The Canon Law system relied heavily on charitable contributions from those who had the benefits of status and property and the church.⁵⁶⁶ The Elizabethan Poor Law system was also characterized by heavy reliance on private charitable efforts.⁵⁶⁷ Private charity is still seen as the only truly general system of relief—the last resort for people who are found to be ineligible for state or federal aid.⁵⁶⁸

Before the age of the individual, there were groups. The medieval period thought in terms of family and local allegiances, and this extended to the obligation to provide material support. The Ambrosian system of preferences stressed the obligation of family to support indigent relatives.⁵⁶⁹ While the religious basis for this obligation has given way to more secular rationales, these obligations remain enforceable. Family support obligations became enforceable by the state under the Elizabethan system of poor relief.⁵⁷⁰ In contemporary America, twenty-two states impose a duty upon certain relatives to support their indigent relatives.⁵⁷¹

Because all systems of poor relief categorize, they all require a means of enforcing the categories created. The general theory hy-

havior and family structure of poor women."). The "marriage" bonus also suggests that poor women should accept a marriage regardless of its safety and security just to survive. *Id.* See also Fineman, *supra* note 17, at 279-89; White, *supra* note 17, at 1986-90 (describing the hazard of domestic violence).

565. See, e.g., GILDER, *supra* note 37, at 79-85 (analyzing the "tangle of pathology" in the inner city); MURRAY, *supra* note 3 at 56-142. Even liberal commentators speak in terms of the immorality of men who do not "stand by" or "provide" for "their" women, or the need to foster the patriarchal family group. See, e.g., HAVEMAN, *supra* note 26, at 69-70, 71-77 (discussing the problems of single-parent (female-headed) families and noting the absence of these problems in the traditional two parent family); WILSON, *supra* note 529, at 104-05.

566. See *supra* part IV.A.

567. See *supra* part IV.B.

568. See *supra* part V.A.5.a.

569. See *supra* part IV.A.

570. See *supra* part IV.B.

571. See *supra* part V.A.5.g.

pothesizes, and the structure of Anglo-American poor relief systems from the medieval period to our own day demonstrates, that enforcement of the drive to categorize is effected through a system of local administration of poor relief. We no longer permit parish priests to administer state relief programs. However, like the Elizabethans, we have cultivated a taste for town and county administration. Eighteen state general assistance programs impose administrative and funding responsibilities at the local level.⁵⁷² However, some states have either fully or partially taken the administrative or funding obligation away from the local units.⁵⁷³

Implementation of the goals of poor relief systems requires a central theme, and cost minimization would seem to have been the theme for a millennium. It underlies everything, from the determination of benefit levels,⁵⁷⁴ to the emphasis on enforcement of aid-worthiness categories, to the creation of aid-categories themselves. It reinforces the incentives for these poor relief systems to be passive, rather than active instruments of policy, to make the process of receiving aid as humiliating and difficult as possible.⁵⁷⁵ There is only a difference of degree between petitioning the local priest for a handout in 1393, requesting aid of the local administrators of relief in London or Hartford in 1693, and applying for general assistance in the United States in 1993.⁵⁷⁶

And underlying all of the complexity, and all of the sameness of poor relief systems is the bedrock assumption of the static para-

572. See *supra* part V.A.3.

573. *Id.*

574. There is little difference between the discussions of Aquinas respecting the nature of individual "superfluities," see *supra* note 203, and the arguments of California counties that they be allowed to set benefit levels based on the availability of funds. See *Boehm v. Superior Court*, 223 Cal. Rptr. 716, 722 (Ct. App. 1986) (holding that "budgetary constraints cannot justify excluding from minimum subsistence grants to the indigent allowance for each of the basic necessities of life").

575. President Reagan's Low Income Opportunity Working Group reported that while "[b]ureaucratic rules were created to ensure that welfare flows only to those society considers truly needy, [y]et an inspection of how the rules work in practice reveals a system that is so complicated it often undermines that goal." LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3. Indeed, that in part, is its purpose. See First Amended Complaint, *supra* note 13, ¶¶ 6-41 (detailing the complex procedure for obtaining general assistance in Los Angeles, California); Cf. Simon, *supra* note 13, at 1200-01.

576. The report prepared by President Reagan's Low Income Opportunity Working Group is replete with comments from humiliated users of the poor relief system. LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 3, at 19-20; VESELY ET AL., *supra* note 96, at 41-44 (describing the forms of humiliation suffered by recipients); Briar, *supra* note 96, at 374-77.

digm—the social and political order as immutable, and income or wealth inequality as necessary.⁵⁷⁷ We can take from the productive, but not too much; we can provide for the poor, but not in excess amount. The social order is good and radical change is bad, especially when it masquerades as something else. Of course, every society believes it is good—that belief gives cohesion to the social framework. The implication for poor relief systems, however, is that they do not change in any fundamental respect.

We have laid bare the essence of these systems—static, passive, reactive systems—and this despite loud statutory protestations to the contrary. These systems are not, in truth, particularly active in creating substantial means of integrating the poor into productive society. Nor should they be, on the basis of accepted notions about the people requiring assistance. As in Tudor England, the generally accepted parameters of relief remain to induce work from those who would labor, punish those who would labor not, and provide sustenance for those who cannot labor. Static system builders are comfortable with the parameters so stated. And why not? The able-bodied poor have made a lifestyle choice—they refuse to secure one of any number of jobs just waiting to be filled. That these jobs don't pay an amount the unemployed deem acceptable, or are boring or demeaning or dirty or dangerous is irrelevant. That these jobs are the only ones available because of your race, sex, or ethnicity is of little concern as well.⁵⁷⁸

Much like the thirteenth century parish priest, our state general assistance administrators are charged with making sure that the poor do not starve. With respect to the incapacitated, the state administrator can rely on the modern day equivalent of the King—the federal government provides some amount for the care of most of the incapacitated. The king and the priest might argue over definitions, but that is a technical matter. With respect to the able-bodied, the state administrator, like the parish priest, must rely on relatively insignificant local governmental revenues, and mostly on the kindness of the wealthy. The state administrator understands that vague promises to the wealthy about the need to force the poor to do their duty and work will increase the size of donations,

577. See *supra* part II.

578. But it can be of concern, if the state so desires. See NEW YORK TASK FORCE, *supra* note 23, at 44. Racism and sexism may affect the ability to maximize productivity, under the static conception, however, minimal production (bare self-sufficiency) is all that is required.

and he is willing to oblige, through hortatory legislation, if necessary. But, then again, the state need only keep the able-bodied unemployed from starving. That, in itself, is a large enough task.

VI. COMMENTARY IN THE FORM OF A CONCLUSION

American programs of general assistance present an interesting conundrum. These programs are said to be required to contribute significantly to the eradication of poverty in the United States; that is their primary purpose. However, these programs *do not* contribute in any material respect to the eradication of poverty. They are fundamentally incapable of making any such contribution. These programs merely contribute a minimum amount of alms to people deemed deserving of such assistance by the providers thereof, and nothing more.

So what is it, exactly, that we seem to have created? The general theory supplies a simple answer; not much and, also, a lot. We are proud of the products of the "New Deal," and of the social welfare system which our mythology teaches us emerged from the economic catastrophe of the Great Depression. We have been taught to believe that this period marked the beginning of a time in which society opened more opportunities to those who had previously been denied; it created the basis of our "kinder, gentler nation."⁵⁷⁹ It was also, however, the formative period for the emergence of political and economic systems, the fundamental goal of which was control of the populace. I suggest that the most significant transformation of poor relief in twentieth century America was not its goals, nor purpose, nor fundamental structure; in that respect the general theory confirms that we have not "progressed" or accomplished much or moved forward. Rather it has been in the creation of a huge, intrusive, efficient governmental machine for the accomplishment of traditional goals that modern poor relief systems have made significant strides. We don't approach poor relief differently than our medieval or Elizabethan ancestors, we merely approach the problem infinitely more efficiently and with an institutional provider (civil government) sub-

579. George H. Bush, Address at the Republican Party Convention Accepting the Republican Party Nomination for President of the United States, New Orleans, Louisiana (Aug. 19, 1988), in WASH. POST, Aug. 19, 1988, at A-28. Even as President Clinton delivered a welfare reform proposal which cut benefits to long-term beneficiaries he could argue that "I just don't want to punish poverty and past mistakes." Clinton, *supra* note 99.

stantially more powerful than anything conceivable five hundred or more years ago. For it is in the twentieth century that American society has managed to assert a degree of control over the mechanics of poor relief (and the dispensing thereof) unknown in earlier times. And it has done so without renouncing the traditional basis on which poor relief is conceived or dispensed. American society has managed to implement increasingly sophisticated mechanisms with respect to the relief of the poor; and it has done little else.

And so we argue about matters of efficiency and implementation and power. We seek to define the poor. We speculate about what it is we ought to or need to provide the poor. We ask ourselves what are we required by whim, expediency, natural law, ethical command, divine stricture, or any number of other related systems of ordering things to provide for the poor? We temper our generosity, such as it is, with control; control over all sorts of things—the manner of giving aid, the determination of qualification for relief, the conditions for relief (since we pay, they should dance to our tune), the things for which such aid ought to be used. We “empower” the poor; we give them some things of our own choosing and let them play with them until they demonstrate that they don’t know how to use them (that is, they don’t play the way we envisioned), and then we educate and train them (in the Maoist⁵⁸⁰ sense of these terms). None of this is bad or good, but the rules governing these arguments will have been set before the arguments have begun. They will have unconsciously limited the acceptable range of argumentation, and that is my point.

The stationary progression from ecclesiastical systems of poor relief to Elizabethan poor relief to contemporary American systems of general assistance demonstrates the strength of the static paradigm and the general theory. The differences between the systems are more illusory than real; the differences demonstrate the growing sophistication of the system of poor relief on which Anglo-American society has relied for almost a millennium. And yet the illusion is powerful. Society has for some time been content with the notion that its poor relief efforts are somehow painlessly transformative. Society has written laws telling itself so, even as such laws entrench themselves ever more strongly in traditional

580. See YEH CH'ING, *INSIDE MAO TSE-TUNG'S THOUGHT: AN ANALYTICAL BLUEPRINT OF HIS ACTIONS 247-83* (Stephen Pan et al. eds. & trans., 1975) (discussing the use of education as a tool of indoctrination to the social and political goals of the ruling ideology and the bending of technical education to the service of that vision).

visions.⁵⁸¹ And so, in the name of progress and compassion, and for the sake of the poor themselves, we have, as we end the twentieth century, managed to perpetuate our medieval poor relief, but with an increasingly cruel twist.

And yet, American society is weaned on the notion of progress, on the transformation of the manner in which society succors its destitute, on how the contemporary poor relief product (for all its faults) is a radically different and better product than those of the uncaring cultural barbarians in either, say, the thirteenth or seventeenth centuries.⁵⁸² This, perhaps, more than anything else, demonstrates the power of the paradigm and the manner in which it restricts its conception of reality, rather than receiving instruction from it.⁵⁸³ Critical thinking about the underlying imperatives of our conception of poor relief, therefore, provides the clarity of thought necessary to intelligently consider the issue of relieving the poor and the manner thought best to respond to the problem.⁵⁸⁴ For those who wish to continue the process of refining our essentially ecclesiastical system of poor relief, the field is rich. The system can always stand to be refined, adding elements of control, more sophisticated methods of determining eligibility, less expensive ways of delivering aid, better methods of policing compliance with the need requirements of eligibility, more intelligent means of tinkering with eligibility criteria. And depending on the proclivities,

581. For a discussion of the limiting manner in which poor relief reform is framed, see Backer, *supra* note 20.

582. "The evolution of public welfare has been from public "charity" towards social justice." *Robbins v. Superior Court*, 695 P.2d 695, 701 (Cal. 1985) (quoting *County of Los Angeles v. Workers Comp. Appeals Bd.*, 637 P.2d 681, 687 (Cal. 1981)).

583. This notion of the fundamental contradiction of paradigms, at once irrelevant in an objective sense, and yet, in a subjective sense, providing a powerful vehicle through which we distort, or at least bend, the shape and limitations of perceived reality, is derived from the works of Thomas S. Kuhn. KUHN, *supra* note 29. As Steinbruner has noted:

Ptolemaic astronomy formed a paradigm which governed science for many centuries, and men in those centuries held it to be just as compelling as we now hold the governing paradigms of modern science to be. The Ptolemaic paradigm, however, was ultimately discarded as other powerful ones have been, and that experience emphasizes the degree to which even hard science imposes its views on reality rather than receiving instructions from it.

STEINBRUNER, *supra* note 19, at 10 & n.5.

584. See UNGER, *supra* note 119, at 97-102 (discussing the idea that critical evaluation refutes "the tacit identification of abstract institutional endeavors, such as democracy or the market, with the concrete institutional forms that these endeavors happen to take in the contemporary world"). *Id.* at 98.

outlook, politics, world view, or agenda of those seeking refinement, this process, and the value of the underlying systems themselves, can be infused with notions of "goodness" and "evil"—such abstract concepts still "sell." But all of these issues beg the fundamental question—is there value to the concept that everyone is responsible for fending for oneself? Fundamental change, for good or ill,⁵⁸⁵ can come only when the paradigm itself is scrutinized, changed, or rejected in favor of another. Students of social and legal practices—including the practices of poor relief—can illuminate the real issues which the language of our arguments disguise.⁵⁸⁶ But scrutiny will lead to fundamental change, and it need not inevitably lead to such change, only if cultural and societal mores change, when the critical assumptions of a new paradigm emerges. And so it goes.

585. And perhaps fundamental change, when it comes, and it always comes in the long run, will always be "good" (at least that is what the new dominant teaching will inculcate in its citizens) in the beginning, and always "bad" (in need of change) in the end. For an interesting discussion on this point, see Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

586. See Martha Minow, *Law Turning Outward*, 73 TELOS 79, 83-85 (1986) (describing how scholarship ought to strive to explain the manner in which legal divisions evidence the internal dynamic of a legal culture contingent on historical preferences for a set of critical assumptions and values).

