

OF HANDOUTS AND WORTHLESS PROMISES: UNDERSTANDING THE CONCEPTUAL LIMITATIONS OF AMERICAN SYSTEMS OF POOR RELIEF†

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The evolution of public welfare has been from public 'charity' towards social justice.¹

Not.

I. INTRODUCTION

This article examines the limitations, conscious and unconscious, on the reform of contemporary modes of assistance to the poor in the United States. My primary purpose is to delineate this nation's underlying paradigm of poor relief. I argue that the functional parameters of poor relief in the United States form a coherent world view which I describe as the static paradigm.² The basic assumption of this para-

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¹ *Robbins v. Superior Court*, 211 Cal. Rptr. 398, 404 (1985) (quoting *County of Los Angeles v. Worker's Comp. Appeals Bd.*, 179 Cal. Rptr. 215, 220 (1981)).

² I use "paradigm" to refer to a system of interrelated fundamental and critical assumptions, which are then used to derive certain theories and models of behavior. The word refers to critical assumptions which have been articulated and to others which may be critical but unrecognized. As John Steinbruner notes, the word retains a residual vagueness because it is frequently infeasible to list exhaustively all the assumptions of a paradigm. This article argues that the static paradigm gives rise to a number of possible models, some significantly different from others, but all of which share the limitations and orientation of the fundamental working assumption of the nature of things from which they derive. See JOHN D. STEINBRUNER, *THE CYBERNETIC THEORY OF DECISION: NEW DIMENSIONS OF POLITICAL ANALYSIS* 11 n.7 (1974). Steinbruner drew his definitions from the antifundamentalist theoretical discourse of Thomas S. Kuhn relating to the derivation and ultimate rejection of major theories in modern science. See THOMAS S. KUHN, *THE COPERNICAN REVOLUTION* (1959) (esp. at 74); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1963).

digm is that neither the mores and attitudes of the recipients of aid, nor the social and economic systems which produced indigents are subject to fundamental or permanent change.³ From this paradigm I derive theories to explain and describe the limitations of acceptable reformulation of institutional systems of poor relief. These theories are intended to be descriptive as well as prescriptive. They facilitate an understanding of the assumptions underlying this country's approach to public aid, as well as the practical limitations to the reformulation of our country's current approach to the servicing of its poor. It also serves to point the way to possible reforms of that system.

I use Part I of this essay to place the nature of my inquiry in context. The bulk of Part II discusses the social context in which the problems of the poor exist. Part III sets out the parameters of the static paradigm. The paradigm provides the (mostly unconscious) postulates and critical assumptions which govern the fundamental ordering of systems of institutional poor relief in the United States. Underlying our conceptions of poor relief are the notions (in the nature of cultural mores) that current social and economic systems are substantially immutable and unchallengeable, that income inequality must be preserved and that the basic conditions giving rise to the need to aid some members of society are not subject to successful manipulation. To give the paradigm some historical context, I briefly examine two archetypal static systems—Canon Law poor relief and the Elizabethan Poor Law. From the paradigm and archetypes, I briefly describe a general theory of poor relief in the United States.⁴ This theory provides the basis for the derivation, in Part IV, of the system of specific rules limiting the range of conceivable models for reforming institutional poor relief within the conceptual universe of the static paradigm.

In Part V, I test the explanatory potential of the theory by examining two contemporary "issues." First, I examine the basis of the "common wisdom" that welfare, both general assistance and public assistance, doesn't work.⁵ Poor relief systems don't work because of the

³ See *infra* Part III.A, *Critical Assumptions: The Static Paradigm*.

⁴ Explaining the principal regularities in current institutional approaches to the relief and maintenance of the poor is outside the scope of this article. I undertake that analysis in Larry Catá Backer, *Medieval Poor Law in Twentieth Century America: Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. (forthcoming, Spring 1

⁵ 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 which has been used by the U.S. Department of Human Services, and consists primarily 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. OFFICE OF FAMILY ASSISTANCE,

existence of a fundamental disjunction between the stated goals of poor relief systems and the capabilities of any such system implemented in the United States. In simple terms, this is saying nothing more than that program goals and program functions conflict. This conflict implicates a core disjunction—program goals are derived from a way of conceptualizing the role of the poor and of poor relief which is alien to the conceptualizations that produce the programs currently in place; the recently restated purposes of poor relief derive from the stirrings of a dynamic paradigm fundamentally incompatible with the static orientation of modern poor relief systems.⁶ Second, I offer a preliminary analysis of the recently proposed (but not enacted) “overhaul” of the California federal/state poor law system in light of the paradigm.⁷ The California proposals repeat in large measure recently enacted or proposed “reforms” in New Jersey, Wisconsin and other states.⁸ These reforms demonstrate the power of the theory to predict

U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, CHARACTERISTICS OF GENERAL ASSISTANCE IN THE UNITED STATES 3 (1978).

⁶ Although a detailed study of the static orientation of federal public assistance programs is beyond the scope of this article, I note that this fundamental disjunction affects federal categorical relief systems such as Aid to Families with Dependent Children (“AFDC”), Social Security Act, ch. 531, §§ 401–406, 49 Stat. 620, 627–29 (1935) (current version at 42 U.S.C. §§ 601–662 (1988 & Supp. II 1990)). AFDC provides cash assistance to usually female headed households, and is the program usually perceived by the public as “welfare.” AFDC, originally styled Aid to Dependent Children (“ADC”), began as a limited federal response to the inability of state and local welfare systems to cope with the economic problems of the Great Depression. The program consisted of grants-in-aid to state and locally run welfare programs. While participating states were permitted to set eligibility and benefit levels, the grants in aid were conditioned on compliance with a number of conditions, the more important of them being that (i) aid be limited to the categories of people to whom the grants were intended to be directed, (ii) the programs be available in all political subdivisions, (iii) a uniform hearing process be established, (iv) benefits be paid in cash, and (v) eligibility be uniform. For a discussion of AFDC in historical context, see, e.g., 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, 479–83 (1987–88); Robert Burns, *Rawls and the Principles of Welfare Law*, 83 NW. U. L. REV. 184, 219–27 (1989). For an overview of the United States’ welfare system, see SAR A. LEVITAN, PROGRAMS IN AID OF THE POOR FOR THE 1980’S (4th ed. 1980).

⁷ See Proposed Law: The Government Accountability and Taxpayer Protection Act of 1992, California state initiative measure submitted for voter approval on November 3, 1992 as Proposition 165. Proposition 165 was disapproved by California voters and has not become law. See Virginia Ellis & Paul Jacobs, *Tax-the-Rich’ Plan Put Hex on Welfare Cutbacks*, L.A. TIMES, Nov. 5, 1992, at A3; *infra* Part V, *Applying the Model to Determine the Limits of Change*.

⁸ For the New Jersey legislation, see N.J. STAT. ANN. §§ 44:10-19 to -33 (West Supp. 1993); see also Louis D. Greenwald, *Legislative Surveys: New Jersey Assembly Bill No. 4700-4705—The Family Development Initiative, a Package of Bills That Seek to Make Families Self-Sufficient; to Provide for Educational Training; to Create Individual Responsibility; and to Encourage Empowerment and Self-Commitment*, 16 SETON HALL LEGIS. J. 833 (1992); Les Payne, *At \$64 That Baby’s a Steal*, NEWSDAY (Nassau & Suffolk Ed.), Jan. 26, 1992, at 30; *infra* Part V.B, *Examining the Limits of Static Systems; the Example of California Proposition 165*.

the form which the political debate about "bettering" the poor relief system will take in the United States. Part VI presents a summary in the form of a commentary, exploring the "value" of static poor relief systems and the extent to which the static paradigm giving rise to such systems is embedded in the social, economic and cultural mores of this nation.

I would also call attention to an additional theme running through this essay—that the hortatory provisions of many modern versions of poor relief amount to little more than sophisticated means by which legislators comply with the wishes of an electorate desperate to be told what it wants to hear. The result: modern legislation speaks the language of self-sufficiency; but modern approaches to poor relief, as well as our fundamental conceptions of poverty and poor law, continue to speak the ancient language of maintenance, of alleviating short term poverty by feeding the hungry and clothing the naked. Our poor relief systems thus appear to strive for a dynamism that belies

For a discussion of the Wisconsin efforts, see The Parental and Family Responsibility Initiative, WIS. STAT. ANN. § 49.19 (West Supp. 1992), an experimental program that has been implemented in several Wisconsin counties. The major provisions of that effort include a requirement that teenage parents live with their parents or guardians and that the benefit levels of new residents will not be greater than the benefits paid in the state of prior residence. A popular press account of the Wisconsin proposal is contained in *Juneau, Oneida and Rock Counties Added to Bridefare Program*, UPI, Sept. 11, 1992 (BC Cycle, Regional News), available in LEXIS, Nexis Library, UPI file, and discussed *infra* in Part V.B, *Examining the Limits of Static Systems; the Example of California Proposition 165*.

For a discussion of the Maryland efforts, see Carolyn Colvin, Secretary of the Maryland Department of Human Resources, *Letter to the Editor, Maryland's Responsible Welfare Plan*, WASH. POST, Aug. 9, 1992, at C8. The "Primary Prevention Initiative" imposes a series of behavior modification requirements on welfare recipients. Under that proposal, AFDC benefits would be reduced by 30%, most of which could be "earned back" by performing certain tasks in the manner specified by the state: paying the rent on time, taking one's children for prescribed medical examinations and forcing one's children to attend school. See Richard Whitmire, *Can You Cut Family Aid and Not Hurt Children?*, GANNETT NEWS SERV., Jan. 16, 1992, available in, LEXIS, Nexis Library, Gannett News Service File. This program has been criticized by Maryland legislators. See Retha Hill, Md. *Legislators Question Welfare Overhaul Plan: Committees Raise Doubts About Whether Goal is Changing Behavior or Saving Money*, WASH. POST, Jan. 26, 1992, at B8; see also Part V.B, *Examining the Limits of Static Systems; the Example of California Proposition 165*. The federal government granted Maryland a waiver from federal requirements for the implementation of the program on July 1, 1992. See Fern Shen, Md. *Welfare Checks Tied to Behavior: Punitive Program is Approved by U.S.*, WASH. POST, July 2, 1992, at D1.

The Florida legislature also is considering the Human Support System Act of 1993 (clearly statutory name inflation continues unabated!). It purports to transform the state's social services delivery system. The plan institutes two pilot programs in rural and urban areas. These consist primarily of reducing AFDC benefits across the board, limiting AFDC benefits to 24 months, requiring participation in community work programs, imposing school attendance requirements on children of AFDC recipients and limiting AFDC benefit increases for children born to AFDC recipients. See FL. H.B. 1023, Reg. Sess. (1993).

their origins and purposes. Advertising systems of poor relief as "new" and "improved," especially to the poor, does a disservice to the recipients of aid, whose expectations are raised and then dashed,⁹ and to taxpayers whose assessment of the efficacy of the systems becomes quite negative, and who wind up blaming the poor for the failure of such systems to live up to their billing.¹⁰

While my larger ambition is to present a theory that both explains the principal conventions which inform current approaches to the relief and maintenance of the poor, including legal and positive responses, and to identify possible means of changing these norms, I do not champion any specific program of "reform." The implications of my exploration of this country's notions about poverty, the poor and the construction of programs in relief thereof, explored in Part V of this essay, are both clear and capable of cutting in opposite directions—it is as easy to conclude that there is no welfare problem as it is to determine that the entire socio-economic system of the United States needs drastic overhaul in order to preserve the dignity of, and opportunities for, the poor. The implications of Part V suggest options and characterizations of the problem in need of solution which can be given content only by the values of the decision makers. As such, the problem and the "solution" remain substantially political and beyond the scope of this essay. Understanding welfare today is much like walking into a dark room filled with furniture of various description, a room which we have used for years. We argue about the purpose of the room; the room, itself, however, remains unseen.¹¹ My primary

⁹ See, e.g., Stephen Buckley, *D.C. Merchants Losing Patience With Panhandlers*, WASH. POST, Mar. 10, 1990, at B1 (quoting a homeless man as expressing anger "when people say, 'you're big, you're healthy, go get a job.' Why don't they say, 'Son, you want to work? I know where you can get a job,' even if it's mowing lawns or digging ditches or fixing cars."). But see Dwight Hobbes, *Down, Out and Overindulged: The Case Against Helping Guys Like Me*, WASH. POST, Feb. 14, 1993, at C1 (former homeless person arguing there exist enough social services so someone truly wanting job could obtain one).

¹⁰ See THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* 1-2, 228-37 (1990) ("Even former supporters of activist government efforts to combat social ills publicly announced their dismay at 'the failure of so many of the government programs they once cherished,' and their frustration that 'the social problems that [liberal programs of the 1960s] were supposed to solve remain.'" *Id.* at 1, quoting, in part, Robert Walters, *Liberals Disillusioned With Government*, 7 NAT'L J. 815 (1975)).

¹¹ Thus, over the course of the last thirty or so years, academic and political debate again has centered on the traditional questions regarding implementation problems with respect to the relief of the poor, but have largely avoided looking closely at the underlying motivations or imperatives of the systems of relief whose provisions are defended or sought to be modified. There are, however, significant exceptions to this last statement. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 167-74, 265-68 (1974) (discussing proper distribution of wealth and income; arguing economic assets should be left in whatever hands they reach through free and fair

purpose is to illuminate the room. Perhaps, thus illuminated, we can more intelligently continue our arguments.

II. THE PROBLEM IN CONTEXT

During periods of economic instability, when people belonging to the better-off classes begin to notice the increasing number of beggars on the street, or hear reports of swelling "welfare" rolls, or the intractability of the "poor," it becomes fashionable to discover, once again, the existence of a "welfare" crisis, and demand that somebody, anybody, do something about the "problem."¹² Prior attempts to "solve" the problem are dutifully analyzed and found to be wholly or partially inadequate to the task. On this basis, generation after generation of

individual transactions and, on this basis, rejecting distributive basis of welfare on grounds that such requires (bad) coercive transfer); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 436-38 (3rd ed. 1986) (discussing approach of John Rawls from economic perspective); CHARLES FRIED, *RIGHT AND WRONG* 120-24 (1978) (rejecting notion of distributive basis for welfare on basis of his conclusion need cannot be adequately compartmentalized and contained); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (attempting exposition of unified theory of justice; arguing distribution of income and wealth is just if there is no alternative distribution that would make worst off people in society better off); Burns, *supra* note 6, at 187-88, 265-71 (discussing application of social philosophy of John Rawls' *A THEORY OF JUSTICE* to American social welfare policy and arguing "the kind of Kantian liberal constructive theory Rawls proposes fails to express our considered judgments in social welfare policy and law, or to extend our considered judgments in a meaningful way, or to provide a normatively superior determinate alternative."); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One's View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1015-19 (1973) (exploring relationship between constitutional adjudication of welfare rights and Rawls' *A THEORY OF JUSTICE*, and arguing Rawls' theory provides judges engaged in constitutional adjudication with exhaustive and coherent set of principles of justice in harmony with popular will and understanding); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 897-901 (1976) (arguing for middle ground, which permits redistribution of sufficient resources to guarantee basic material needs, in debate between egalitarians and libertarians on issue of coerced income redistribution); Martha Minow, *"Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819 (1985) (discussing manner in which rules about roles and duties between men, women and children conceptually underlie rules about welfare and governance of state by examining experience of women and social experience as means of understanding family law). For a discussion of traditional analysis in the context of the static paradigm, see Backer, *supra* note 4, at nn. 21-28.

¹²Newspapers, magazines and other popular journals have been full of seemingly endless barrages of articles describing the problem and, sometimes, even discussing proposed "solutions." See, e.g., George Skelton, *Wilson Says Welfare System is Chasing Jobs Out of State; Governor Sees the Issue as a Choice Between a Healthy Business Climate and an Overly Generous Relief Program that Keeps Forcing Higher Taxes*, in L.A. TIMES, Jan. 14, 1992, at A3; 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; James W. Michaels, *Oh, Our Aching Angst*, FORBES, Sept. 14, 1992, at 47; Hobbes, *supra* note 9; Gertrude Himmelfarb, *A De-Moralized Society?*, FORBES, Sept. 14, 1992, at 120.

creative elected or appointed public official,¹³ legal academic and social scientist,¹⁴ ideologue or demagogue bravely put forward yet another series of "innovative" solutions to the "problem."¹⁵ This process, similar in many ways to the type of progress made by those who ride stationary bicycles, has dogged Western society since at least the Late Antique period.¹⁶

Who are "they," or these "people" or the "poor" who so vex generations of social tinkers? Simply stated, they are those whom people who write about them label as "poor;" they can be whomever one wishes them to be. Not surprisingly, then, definitions tend to vary with the society¹⁷ and the times.¹⁸ The starting reference point in the

¹³ See, e.g., TASK FORCE ON POVERTY AND WELFARE, STATE OF N.Y. EXEC. CHAMBER, A NEW SOCIAL CONTRACT: RETHINKING THE NATURE AND PURPOSE OF PUBLIC ASSISTANCE 8-14 (1986); LOW INCOME OPPORTUNITY WORKING GROUP, DOMESTIC POL'Y COUNCIL, UP FROM DEPENDENCY: A NEW NATIONAL PUBLIC ASSISTANCE STRATEGY 51-58 (1986) (Report to President). Much of the musings of officials charged with the discovery of new and improved methods of dealing with the poor limit themselves to a description of the personal failings of the poor. See Taylor, *supra* note 12 (quoting New Jersey Governor Florio stating goal of efforts is to "wean people off welfare, and the way to do that is to force them to be responsible for their actions.").

¹⁴ The list of articles and books on the subject of the poverty problem and schemes to effect its solution approaches infinity. Some of the more influential include GEORGE GILDER, MEN AND MARRIAGE (1992) (expanded and updated version of SEXUAL SUICIDE (1973)); LAWRENCE M. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1986); WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984); FRANCES F. PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971); Michelman, *supra* note 11; Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964); see also the numerous articles and books elsewhere cited in this article. Of course, not all important works in this field accept the thesis that the current systems of maintenance are in need of fundamental repair or modification. See, e.g., MARMOR ET AL, *supra* note 10, at 19-21; TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 28-31.

¹⁵ For descriptions of the crooked path the United States has followed in the area of poor relief, see, e.g., R. LUBOVE, THE STRUGGLE FOR SOCIAL SECURITY 1900-1935 (1968); PIVEN & CLOWARD, *supra* note 14, at 180-98, 248-82; SAMUEL MENCHER, POOR LAW TO POVERTY PROGRAM: ECONOMIC SECURITY POLICY IN BRITAIN AND THE UNITED STATES 279-309 (1967); JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY 1900-1985 (2d ed. 1986).

¹⁶ This is reflected in the development of Catholic poor relief under the Canon Law, discussed *infra* in Part III.B, *Paradigm Archetypes*. The modern history of western poor relief likely begins in the Fourth Century, with the system of poor relief implemented by Ambrose, then Bishop of Milan, and memorialized in Ambrose's *De Officiis*, reprinted in 16 PATROLOGIAE CURSUS COMPLETUS; AMBROSE OPERA (Series Latina, J.P. Migne ed.) (Paris 1844-1855). See BRIAN TIERNEY, MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND 56-67 (1959).

¹⁷ Thus, to take an extreme example, the notion of poverty in Haiti is probably substantially different from the general sense of what constitutes poverty in the United States. "[P]overty—grim, degrading and ineluctable—is not remarkable in India. For few, the fate is otherwise. But in the United States, the survival of poverty is remarkable." JOHN K. GALBRAITH, THE AFFLUENT SOCIETY 254 (3d ed. 1976).

¹⁸ Thus, the people who Americans today tend to label as poor may live in ways even beyond

United States has tended to be income qualifications, the so-called "poverty-line."¹⁹ Of course, even in the United States, the definition of poverty might well vary depending on the political agenda of the definer.²⁰

the reach of the working classes of a century ago. See, e.g., MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 1-2 (2nd ed. 1969); Michaels, *supra* note 12 (describing difference in relative nature of affluence over last 60 years, "Unless they blow their money and energy on booze or drugs, the American poor have more physical comforts today than the average American did when *Forbes* first appeared 75 years ago."); see *infra* note 24.

¹⁹ See, e.g., U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, *THE MEASURE OF POVERTY* (1976) (detailed history of genesis of poverty line as measure of poverty). Poverty is measured in the United States in relation to the income necessary to provide an adequate diet. Poor people are defined as people with cash income less than three times the cost of an adequate diet, adjusted for inflation and for a number of family characteristics such as family size, urban or rural residence, etc. The cost of an adequate diet was based on an economy food plan developed by the United States Department of Agriculture in 1961. See Mollie Orshansky, *How Poverty is Measured*, 92 MONTHLY LAB. REV. 37-41 (Feb. 1969); Mollie Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, 28 SOC. SEC. BUL. 3 (1965); cf. MENGHER, *supra* note 15, at 365-66; MURRAY, *supra* note 14, at 57 n.2. The assumptions on which this measure of poverty is based—that families spending the amount necessary to maintain the economy food plan can provide nutritionally adequate diets, and that poor people spend about one third of their income on food—have been questioned. See, e.g., DAVID R. RIEMER, *THE PRISONERS OF WELFARE: LIBERATING AMERICA'S POOR FROM UNEMPLOYMENT AND LOW WAGES* 17-18 (1988); TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 16-17 (arguing poverty line measure understates cost of poverty); LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 13, at 8-9 (arguing poverty line overstates number of poor).

²⁰ Conservative critics believe that the "poverty line" approach to measuring poverty presents a false picture of poverty in America by overestimating people in need. See LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 13, at 8-9. This overestimation of the extent of poverty occurs because the measure of poverty, as adjusted, includes cash income but not in-kind transfers such as food stamps or medical care. See Aletha C. Huston, *Children in Poverty: Developmental and Policy Issues*, in *CHILDREN IN POVERTY: CHILD DEVELOPMENT AND PUBLIC POLICY* 1, 7-8 (Aletha C. Huston, ed., 1991). The poverty line approach fails to pick up what conservatives consider to be the income generated by the huge underground economy. See STANLEY L. FRIEDLANDER, *UNEMPLOYMENT IN THE URBAN CORE: AN ANALYSIS OF THIRTY CITIES WITH POLICY RECOMMENDATIONS* 186-89 (1972). The poverty line approach also fails to pick up differences in cost of living and quality of life between regions. See MURRAY, *supra* note 14, at 57 n.2.

Liberal critics argue that the poverty line, even as adjusted, underestimates the severity of poverty because it does not indicate the variations in family income below the poverty line. Instead, the better measure of poverty and its extent would focus on the *poverty gap*, the dollar amount by which the incomes of the poor fall below the poverty level. See Huston, *supra* at 1, 7; generally Sheldon H. Danziger et al., *Antipoverty Policy: Effects on the Poor and the Nonpoor*, in *FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T* 50-77 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986).

Other critics reject the poverty line concept because it attempts (albeit crudely) only a measurement of absolute poverty. However, because of the general wealth of America, *relative poverty* and not *absolute poverty* ought to be the yardstick against which programs in alleviation of the plight of the poor ought to be measured. For these critics, the touchstone is decency, not absolute deprivation. Those whose income falls far behind that of the community "cannot have what the larger community regards as the minimum necessary for decency; they cannot wholly

What is the "problem" that so captivates the imagination of people in the United States? The description of the problem is simple enough to state—in its broadest conception it is that certain people live under conditions that are deemed unacceptable²¹ because they are unable or unwilling to provide for their own material needs or those of their families.²² In other words, certain people in our society live in ways, and do without things, that others with more resources and influence in society believe they should not. Of course, there has been little agreement among scholars or those who determine policy respecting exactly what bundle of things the "poor" need and in what combination.²³

escape, therefore, the judgment of the larger community that they are indecent." See GALBRAITH, *supra* note 17, at 245-49.

²¹ This determination is at least made by those who *believe* they have the authority or moral backing to make such judgements for society. In a pluralistic society like ours, the question of who has the right to determine what is unacceptable, itself, is subject to lively debate. Contrast CHARLOTTE TOWLE, HELPING: CHARLOTTE TOWLE ON SOCIAL WORK AND SOCIAL CASEWORK (Helen H. Perlman ed., 1969) (social workers ought to have discretion to make determinations of need and best strategies for aiding the poor); HERBERT BISNO, THE PHILOSOPHY OF SOCIAL WORK (1952) with KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (arguing for legally based, detailed routinized system of aid to the poor, with ultimate discretion left to legislature or regulatory arm of government). How groups obtain the power to determine worthiness for poor relief is beyond the scope of this article. Contrast William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) with Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270 (1983) and Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialectic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88).

²² Why these people live in this unacceptable state is another story. Compare TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 17-28 (poverty and dependence explained as function of overall economic conditions, and deficiencies in education and skills of the poor) and Kathryn M. Neckerman et al., *Family Structure, Black Unemployment, and American Social Policy*, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 397, 416-19 (Margaret Weir, et al. eds., 1988) (labor policy must be substantially reoriented to solve poverty problems of poor (and especially African-American poor) households) with MURRAY, *supra* note 14, at 147-91 (poverty and dependence of able-bodied is largely function of maintenance programs constituting welfare in United States). Additionally, there is some evidence that some people accept the "lifestyle" of poverty deliberately—by refusing to acquire or retain employment. See, e.g., *In re Billie Boggs*, 522 N.Y.S.2d 407, 412 (N.Y. Sup. Ct.), *rev'd sub nom.*, *Boggs v. New York City Health & Hosp. Corp.*, 523 N.Y.S.2d 71 (N.Y. Sup. Ct. 1987), *appeal dismissed as moot*, 525 N.Y.S.2d 796 (1988) (releasing homeless person from involuntary confinement as mentally ill under New York program on basis of determination that fact she chose to live as panhandler did not make her necessarily mentally ill).

²³ Among the problems is the need to determine whether society ought to concern itself with the alleviation of dire poverty, that is, the prevention of starvation, or, instead, with the alleviation of less extreme need as determined from time to time, or yet again with the extremes of income inequality giving rise to these problems. See MENCHER, *supra* note 15, at 364-67. In any case, we find it difficult to allow the poor to make these choices for themselves. Thus, paternalistic programs are created to help make decisions for the poor. See, e.g., Food Stamp Act, Agriculture and Food Act of 1935, ch. 641, Pub. L. No. 74-320, 49 Stat. 774 (current version at 7 U.S.C.

The notion of needs, however, can be broken down into two major components. The first is that the poor need "things" in order to sustain themselves in a dignified and socially acceptable manner.²⁴ Food, shelter, clothing and at least some form of medical care comprise the bulk of the physical "things" the poor are generally thought to need.²⁵ These needs must be met by some person or entity—the state, the charitable person or institution, family or friends—when the needy have no place else to turn. Satisfaction of these needs provides immediate and direct benefits to the recipients (they do not go hungry or homeless) and indirect and secondary benefits to the providers (they do not have to witness death by starvation or deal with the lack of personal hygiene, violations of conventional morality, or criminal activities of the desperately poor).²⁶

Obviously enough, satisfaction of the perceived "needs" of the poor in this first sense constitutes the fundamental goal of any system of poor relief. Thus, the most straightforward goal of any kind of aid to people is to provide them with the necessities of life, such as may be defined from time to time. In its simplest manifestation, this provision requires only that the recipients actually need what is given. Satisfaction of this need, at its most generous, can be unquestioning and open-ended.²⁷ Naturally enough, most societies tend not to be at their most generous for long periods, if at all.

§§ 2011–2030 (1988 & Supp. II 1990); *900 Stores Cut From Food Stamp Program*, *TULSA WORLD*, Dec. 10, 1992, at A18.

²⁴ It should be understood, of course, that this socially acceptable level is a constantly moving target. As society as a whole becomes more affluent, the minimum decent level rises as well. See Michaels, *supra* note 12 (comparison between expectations of people in years past and today); EDWIN C. BANFIELD, *THE UNHEAVENLY CITY REVISITED* 127–47 (1974) (noting how, on comparative basis, things are better now than in past even for poorest segment of society).

²⁵ This type of aid constitutes the bulk of traditional poor relief, and certainly that given from the medieval period through the nineteenth century. See *infra* notes 148–79 and accompanying text. States and even the federal government continue to provide direct aid of this sort today. For instance, the federal government continues to provide food assistance by distributing surplus food to the needy. See Agriculture and Food Act of 1935, *supra* note 23; Agriculture Act of 1949, ch. 792, 63 Stat. 1051 (codified as amended at 7 U.S.C. §§ 1421 et seq. (1988 & Supp. II 1990)); Older Americans Act of 1965, Pub. L. No. 89–73, 79 Stat. 219 (codified as amended at 42 U.S.C. §§ 3001–3057 (1988 & Supp. II 1990)).

²⁶ The attitudes of donors were quite bluntly stated in a recent article describing a relatively short encounter by a commuter in New York with the indigent:

Penn Station is a mecca of apparently homeless, drug-dealing, alcoholic, pickpocketing, begging, stinking vagabonds. I spent much of the evening negotiating my way through rivers of urine, broken glass and human feces. All this in a place where commuters are not permitted to smoke cigarettes. . . . These people must be encouraged to seek refuge in public shelters.

Joseph T. Poggi, *Clean Up Penn Station*, *NEWSDAY*, Apr. 10, 1990 (Nassau & Suffolk Ed.), at 53.

²⁷ Indiscriminate charity has been advocated since the time of the Early Church. See TIERNEY,

The second "need" is more abstract—the need for the poor to be economically self-reliant. Unlike the more concrete need for "things," satisfaction of the need for self-reliance may provide greater benefit to the donor (the state) than to the recipient. Thus, the satisfaction of this need provides the recipients with a variety of benefits, direct (the ability to provide for their own needs) and indirect (independence), but these are not quantitatively different from the benefits derived from the receipt of life's necessities from the state or some other person or institution, without indulging in the drudgery of work.²⁸ On the other hand, the giver receives significant direct benefits (reduction of the future burden and expense of providing for the pauper), as well as the indirect benefits associated with the provision of "things" to the poor. As such, the giver, usually the state, has perhaps a greater interest in meeting this second need than does the recipient.²⁹

The need to foster self-reliant indigents has found expression in the societal goal of eradicating poverty, or, stated more cynically, making the poor disappear. Historically, this need has been viewed in different ways.³⁰ In the United States, this need is said to be satisfied by securing and maintaining a job paying a sufficient amount to meet the worker's minimum physical needs.³¹ Once a job is acquired, so the

supra note 16, at 55–60 (discussing openhanded views of John Chrysostom). *But see infra* notes 159–66. The closest modern counterpart of these ancient views is the Swedish system of relief described in NORMAN FURNISS & TIMOTHY TILTON, *THE CASE FOR THE WELFARE STATE: FROM SOCIAL SECURITY TO SOCIAL EQUALITY* 122–52 (1977).

²⁸ This might be especially true where the level of giving approaches what would be available if the recipients held a job for which the recipient was qualified. Note that the incentive to prefer one to the other shifts as the level of relative benefits shifts and as the intangible costs of benefit acquisition change. Thus, for example, as the humiliation level increases in connection with the provision of aid from the state, the cost of receiving aid versus getting a job increases, and the recipient is more likely to prefer one (the job) to the other (the humiliation). This, apparently, is the theory employed by some county agencies charged with dispensing general assistance. *See, e.g.,* 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, 524–33 (1987–88) (describing practices in Los Angeles County, California). Unfortunately, analyses like this may not matter where there are no jobs available, whatever the cost of alternative forms of benefit provision. *See, e.g.,* REIMER, *supra* note 19, at 43–56.

²⁹ The state will always be better off if it can substitute wages from the private sector for relief. Indeed, the wealth available to the state (for other purposes) increases as the amount of (taxable) income earned by citizens increases. As such, the state's interest in eliminating the need to support the poor through creation of employment might well be greater than the need of the poor to support themselves, at least as long as the institutional benefits available to the poor are comparable to those obtainable from private sector wages. *See, e.g.,* MURRAY, *supra* note 14, at 154–77. For a contrary view, *see, e.g.,* MARMOR ET AL., *supra* note 10, at 104–24.

³⁰ *See infra* Part III.B, *Paradigm Archetypes*.

³¹ This abstract need, however, might not be attainable by all. Certainly, the able-bodied might find a job and disappear into the ranks of the working and self-sufficient population. On the

theory goes, the recipient becomes self-reliant (she receives the things she needs from someone other than the state), happy, and is no longer dependent on special aid from either government or her better-off neighbors in order to survive. In effect, the indigent is converted into a productive and tax-paying member of society, welcomed into the ranks of (at least) the working class. Unfortunately, there may not be a positive correlation between employment and indigent self-reliance.³²

Similarly, there does not exist universal consensus supporting the notion that there is a strong positive correlation between physical maintenance of the poor by the state and economic independence.³³ This lack of a perceived correlation has given birth to an extensive literature on the problems of state charity and dependence.³⁴

The notion of self-sufficiency gives rise to categorical distinctions between otherwise equally destitute people—one which is based primarily on the employability of the recipient.³⁵ Those who are perceived

other hand, the old, the sick, the incapacitated, might have a harder time of it. As a consequence, these people might be deemed not to have this need. Further, the satisfaction of this need becomes more complex when people cannot attain self-sufficiency, that is, provide for their needs at a level deemed minimally satisfactory by society, even after the provision of full-time employment.

³² For instance, job income may be insufficient to provide for family needs. See, e.g., ROBERT HAVEMAN, *STARTING EVEN: AN EQUAL OPPORTUNITY PROGRAM TO COMBAT THE NATION'S NEW POVERTY* 165-68 (1988); CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 233-35 (1992); Irwin Garfinkel, *Toward an Effective Income Support System*, in MICHAEL C. BARTH ET AL., *TOWARD AN EFFECTIVE INCOME SUPPORT SYSTEM: PROBLEMS, PROSPECTS, AND CHOICES* 151, 153-56 (1974); BARRY BLUESTONE & BENNETT HARRISON, *THE GREAT AMERICAN JOB MACHINE: THE PROLIFERATION OF LOW WAGE EMPLOYMENT IN THE U.S. ECONOMY* (1986) (study prepared for Joint Economic Committee, on file with author); TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 64-65.

³³ See, e.g., MEAD, *supra* note 14, at 69-90; CHARLES MURRAY, *IN PURSUIT OF HAPPINESS AND GOOD GOVERNMENT* 267-73 (1988). But see MARMOR ET AL., *supra* note 10, at 104-24.

³⁴ See, e.g., LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 13, at 7-37; TASK FORCE ON POVERTY AND WELFARE, *supra* note 13; GEORGE GILDER, *WEALTH AND POVERTY* 114-27 (1981); NATHAN GLAZER, *THE LIMITS OF SOCIAL POLICY* 1-17, 140-55 (1988); MURRAY, *LOSING GROUND*, *supra* note 14, at 145-91; GILBERT Y. STEINER, *SOCIAL INSECURITY: THE POLITICS OF WELFARE* 112-31 (1966); 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); and the studies in Christopher Jencks, *Is the American Underclass Growing?*, THE URBAN UNDERCLASS 28, 36-39 (Christopher Jencks & Paul E. Peterson eds., 1991).

³⁵ As a result, the state and society has, for millennia, divided those in need into categories, and aid is given on the basis of such category classification. The broadest traditional categories of poor were the deserving and undeserving poor. The modern equivalent of these categories are the unemployable and the employable poor. See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1502-08 (1991); WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 8-10 (3d ed., 1984); 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, 502-03 (1988). Of course, those incapable of providing for their own needs are the exception to the broad scope of this world view. Employable poor

to be unable to work are favored.³⁶ Those who are able-bodied but do not work are generally disfavored.³⁷ The strongly held belief underlying this categorization is that, once the target population³⁸ is convinced that the acquisition and retention of a full-time job is in their best interests, poverty and, therefore, the problem of the poor (that is, that the poor exist at all), will disappear and society will "improve" all of its citizens.³⁹

Beside providing for the needs of the poor, a government must also satisfy its need to control its population.⁴⁰ Although this goal has been most congenially discussed in purely historical terms, the perceived need to link poor law and social order is not dead. In order to preserve a social order based on inequality of income, wealth and opportunity, a government must provide the masses who populate the marginal classes with something to keep them in their place. Keeping the indigent in their place is important because the poor are useful to have when extra workers are needed; they are humanity's way of stocking up for events like warfare and economic booms, an infinitely exploitable group of people for all kinds of societal needs. They are

ought to work, and this category is divided into those who are willing but unable for some reason (lack of education, job training, job information, etc.) for which the state is eager to provide help, and those perceived to be unwilling to work (satisfied with the level of benefits given by the state) for whom the state has reserved work "incentives." Unemployable poor, in contrast, are expected to do nothing. This category is the one for which the least conditional societal giving is reserved.

³⁶ Thus, for instance, AFDC was first made available to mothers with dependent children on the theory that they should not be working. The same applied to federal categorical relief for the aged and the blind. See generally, William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 7-9 (1985).

³⁷ For these people, there is little to eat at either the local or the federal trough. See generally, Edward Mattison, *Stop Making Sense: Charles Murray and the Reagan Perspective on Social Welfare Policy and the Poor*, 4 YALE L. POL'Y REV. 90, 93 (1985). However, some distinction is made between those who have worked and those who may be seeking work, and those who are perceived to be loafing. Thus, the recently unemployed are eligible under some circumstances for unemployment compensation. See generally, MEAD, *supra* note 14, at 128-32.

³⁸ The targeted population must necessarily comprise only a subset of the entire population requiring assistance for the simple reason that not everyone requiring assistance is capable of working.

³⁹ This notion was perhaps best summarized in the early 1960's notion of "a hand up, not a handout." See generally, PATTERSON, *supra* note 15, at 142-54. While originally an argument of liberal thinkers, this notion was appropriated by self-professed conservative thinkers in the 1980s. The twist to the original notion is that, rather than treating the self-sufficiency need/obligation as one of the two principal needs of recipients, it treats this need/obligation as the sole focus of provision for the aid of the poor. See e.g., STEINER, *supra* note 34, at 18-47; MURRAY, *LOSING GROUND*, *supra* note 14, at 22-23.

⁴⁰ See, e.g., PIVEN & CLOWARD, *supra* note 14. The views of Piven and Cloward underwent some modification in their later work. See FRANCES F. PIVEN & RICHARD A. CLOWARD, *THE NEW CLASS WAR* (1982).

like the jackals of the African savannas, that group in society who can take whatever is discarded by the rest—and be grateful about it to boot.⁴¹ The gratitude and mindfulness of the poor is a learned response—the self-conscious goal of free education in the United States.⁴² However, while those in control of society must ensure that sufficient provisions are made to keep these exploitable people satisfied, they need not be so generous as to either increase the expectations of the recipients or make them less receptive to whatever task might be required of them.⁴³

The mixing of these needs with changing social, demographic and economic realities has foisted on society periodic waves of agitation for “reforms” to “solve” the recurrent “welfare” crises and to eradicate poverty, resulting in the creation of a variety of programs to provide aid of one kind or another to the poor. Some of these programs are the creatures of private efforts;⁴⁴ the most significant sources of poor relief, however, are governmental programs on the local, state and (principally) federal levels.⁴⁵ These programs can be formal, designed to provide relief indefinitely,⁴⁶ or *ad hoc*, as simple as giving money to a beggar on the street, or funding a pilot project of some kind. Some are available to all who apply, but most are available only to those who meet whatever threshold criteria are established as a prerequisite for the receipt of aid.⁴⁷ Income is the most common but not the sole

⁴¹ A delightfully perverse and cynical rendition of the thirteen most important functions of poverty can be found in HERBERT J. GANS, *PEOPLE, PLANS, AND POLICIES: ESSAYS ON POVERTY, RACISM, AND OTHER NATIONAL URBAN PROBLEMS* 264–68 (1991).

⁴² See Mencher, *supra* note 15, at 151–52.

⁴³ Thus, Richard Cloward and Frances Piven have argued that the function of welfare within the capitalist system was to ensure an abundant supply of cheap labor, the so-called reserve army of the unemployed. As such, except in times of social unrest, welfare and aid to the poor are kept as low as possible—high enough to prevent unrest, but no more. See PIVEN & CLOWARD, *supra* note 14, at 341–48; PAUL FREIRE, *PEDAGOGY OF THE OPPRESSED* 40 (1968) (arguing that only through empowerment of the poor and subversion of this system can the poor be liberated); Alfieri, *supra* note 21, at 678–90; cf. PATTERSON, *supra* note 15, at 163–64.

⁴⁴ This is accomplished primarily through voluntary private charity. See generally, GLAZER, *supra* note 34, at 128–39; Robert H. Bremner, *Private Philanthropy and Public Needs: Historical Perspective*, 1 RES. PAPERS (HISTORY, TRENDS AND CURRENT MAGNITUDES) 89–114 (Sponsored by Commission on Private Philanthropy and Public Needs, U.S. Treasury Dept., 1977).

⁴⁵ For a discussion of these programs see *supra* note 6; TRATTNER, *supra* note 35, at 284–339.

⁴⁶ For instance, AFDC, *supra* note 6, makes certain monetary benefits available to qualified recipients throughout the period during which they maintain their eligible status.

⁴⁷ It can be argued that even an act as simple as giving to a beggar on the street can involve eligibility prerequisites. One might, perhaps, be more willing to give money to a street beggar dressed in rags than one in an expensive dress. The clothing and hygiene, in this example, would serve the same purpose (informally) as the multi-page forms the destitute are required to complete in order to obtain aid from the state. The formal criteria employed for sorting the poor in this manner vary considerably. These criteria can be as simple as proving a certain income

qualification for aid eligibility. Even with the intrusion of the federal government in the poor relief business, the provision of aid remains dependent in some respects on other criteria, including marital and family status,⁴⁸ physical or mental condition,⁴⁹ age,⁵⁰ and perhaps even race and ethnicity.⁵¹ For all practical purposes, an indigent person who fails to meet these criteria is effectively barred from participation in virtually any federal program.⁵² For such ineligible—able-bodied un-

level for eligibility under the Food Stamp Program (*see supra* note 23), or a certain physical or mental condition for eligibility under the Supplemental Security Income Program (*see infra* note 49). The criteria, or at least proof of eligibility, can be quite complex. Thus, the 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, and included an initial oral screening, the completion of a twelve page application, interviews, and fraud investigations. First Amended Complaint For Declaratory Relief, ¶¶ 6–41, *City of Los Angeles v. County of Los Angeles*, No. C-655-274 Superior Court, L.A. County, Cal. (Oct. 19, 1987) (unpublished, on file with author).

⁴⁸ Thus, for instance, AFDC, the largest cash assistance program in the United States and considered to be 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. *See* Simon, *Legality, Bureaucracy*, *supra* note 21, at 1200–01.

⁴⁹ The Supplemental Security Income Program Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1465 (codified as amended at 42 U.S.C. §§ 1381–1383 (1988 & Supp. II 1990)), provides monthly payments to people who meet the income (based in part on state criteria) and assets (no more than \$2,000 for one person or \$3,000 for a couple) 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 to .924 (1992).

⁵⁰ The Social Security Act, 42 U.S.C. §§ 301–306 (1988 & Supp. II 1990), provides benefits to aged persons who meet certain criteria.

⁵¹ Writers stressing the racial considerations of poor relief systems and the delivery of aid include CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 127–28 (1974); DOROTHY K. NEWMAN ET AL., *PROTEST, POLITICS, AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS 1940–75*, at 262–64 (1978); Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 8–24, 31–49 (1988); *cf.* STEINER, *supra* note 34, at 3, 246–48 (federal programs set up in manner to minimize federal intrusion in state handling of racial issues); DANIEL P. MOYNIHAN, *DEPARTMENT OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965); Lynn R. Osborn, *Language, Poverty, and the North American Indian*, in *LANGUAGE AND POVERTY: PERSPECTIVES ON A THEME* 229–42 (Frederick Williams ed., 1970) (overview of effect of lack of language skills as contributor to poverty of Native Americans).

Writers stressing the ethnic bias of current public assistance include Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319 (1992); Vera P. John & Vivian M. Horner, *Bilingualism and the Spanish-Speaking Child*, in *LANGUAGE AND POVERTY: PERSPECTIVES ON A THEME* 140–52 (Frederick Williams ed., 1970) (arguing lack of bilingual education prevents poor children from achieving their potential). On the patriarchal underpinnings of current poor relief systems and the power of such systems to maintain the subordination of women, see, e.g., Sylvia A. Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983); Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Laws to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713 (1987–88); Mary Jo Bane, *Politics and Policies of the Feminization of Poverty*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 381 (M. Weir et al. eds., 1988).

⁵² Note, however, that even eligibility does not guarantee participation. As William Simon

employed men, women without children, two-parent families—the only sources of help, besides private charity, are state or local programs of general assistance.⁵³ Whatever the program—federal public assistance, state or local general assistance, private charitable efforts—the basis upon which all of these programs are conceived is the same. It is to the examination of this “basis,” the creative force underlying modern American poor relief programs, that this article turns to next.

III. THEORETICAL UNDERPINNINGS OF CHANGE AND AMERICAN POOR RELIEF

The fundamental working assumptions underlying all discussion of poor relief in the United States, assumptions which provide the intellectual framework for conceptualizing the “problems” of poor relief, is most usefully described as “static.” The term static, of course, is one that, while capable of precise definition, is also capable of great ambiguity. I use it in this article in two significant respects. I first use it to describe the underlying parameters or ground rules we apply in the construction of systems of poor relief. These include those parameters within which poor relief system builders conceive of the economic order and the functioning of society. These overarching conceptions serve to limit the universe of options available to system builders; “[t]hese assumptions serve to define problems which receive intellectual attention; they identify what data are pertinent enough to justify the efforts required to collect them; they provide coherent explanations for the central phenomena with which a . . . field concerns itself.”⁵⁴ I also use the term to encompass the structural characteristics by which any individual static system of poor relief can be identified. These characteristics are the nuts and bolts common to all static systems of poor relief—the actual means employed to maintain the poor. I will discuss the static paradigm in its wider and more fundamental

effectively argues, the formalization of entitlement, bureaucratization of administration, and the proletarianization of the workforce have virtually made a game out of the attainment of benefits, even by those qualified. See Simon, *Legality, Bureaucracy*, *supra* note 21, at 1198–99, 1200–22. Simon’s point is demonstrated in the recent 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 Equitable Relief, ¶¶ 6–41, *City of Los Angeles*.

⁵³ Cf. STEINER, *supra* note 34, at 8–17.

⁵⁴ STEINBRUNER, *supra* note 2, at 10. In this sense, the parameters on which a poor law system builder relies help shape and limit the choices available. Once a generalized conception of societal ground rules for system building is accepted, certain ideas become out of limits, or outside the consciousness of the builders.

sense. I first examine the critical assumptions which, together, form the static paradigm. I then examine the paradigm in the context of its historical referents. From these assumptions and referents, I derive a preliminary theory of poor relief which incorporates the limited and limiting conceptual framework of stasis. This provides the basis for the exploration of those limits in Part IV.

A. *Critical Assumptions: The Static Paradigm*

The static paradigm, at the broadest level, connotes the unchanging, the passive, the inactive. It implies a fundamental acceptance of stasis, hence my choice of name. Notions of stasis and passivity infuse the choices available in the structuring of relief, and act to 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 view, at least in the sense that there is little faith in progress or potential positive change for humankind.⁵⁵ It is a view rooted, ultimately, in the changelessness of things, in the notion that conditions can get no better for some without making others worse off,⁵⁶ and in the "End of History."⁵⁷ It implies a contentment with the amelioration of that which, at some fundamental level, cannot be changed. It accepts as given the social and economic order.

Why the concern over the underlying spirit animating the notion of relief? There are several reasons. First, this spirit affects the manner in which the mutability of the conditions giving rise to the problem of poverty and its alleviation are perceived, and the way in which the clients of this service—the poor—are characterized. In an important sense, this notion of stasis also affects the acceptable boundaries of conceptualizations of the system: what the system is and is not capable of; what it can accomplish; what the clients of the system are capable

⁵⁵ Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, in *THE URBAN UNDERCLASS* 3, 10 (Christopher Jencks & Paul E. Peterson eds., 1991); Ross, *supra* note 35, at 1509–10 (and articles cited therein); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPABILITIES, 1877–1920* (1982).

⁵⁶ This is reflected in the acceptance of the notion that labor market outcomes in the United States produce a just distribution for a substantial number of labor market participants. Consequently, adjustments to this just system are not only unnecessary, but amount to an unacceptable admission that the system is unjust. See Burns, *supra* note 6, at 229. This notion approaches, at least on a philosophical level, that of Pareto optimality or superiority. On Pareto optimality as an economic concept, see Posner, *supra* note 11, at 12–13.

⁵⁷ Referring to FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992), in which the author argued that the failures of every other conceivable form of human social and economic organization have left humanity with only the option of a free market economy within a liberal democratic order.

of doing or not doing; what can be attempted and what is unthinkable. Paradigmatic assumptions, thus, produce and police the cognizable range of goals, strategies and approaches to poverty and the poor recognized by society. Such a system tends to dismiss as unrealistic those approaches and possibilities that might be favorably considered by societies which adhere to different world views.⁵⁸

A number of postulates flow from this core assumption of the static paradigm, that the social and economic order is taken as a given. First, changing the fundamental makeup of society or the economic order is viewed as futile. Stasis dictates that the basic conditions giving rise to the need to aid some members of society are not subject to successful manipulation. Indeed, any attempt at manipulation will leave society worse.⁵⁹

Second, stasis limits poor relief to systems which do not challenge the status quo. Though this notion is ancient,⁶⁰ it has not lost its vitality.⁶¹ Systems created out of a static view tend to define their goals

⁵⁸ For instance, systems derived from a world view that accepts the idea of the mutability of conditions and of people might be more willing to implement programs designed to actually bring about change, than those whose views are grounded in the underlying stasis of the human condition and social order. A concrete example is where the poverty of the able-bodied is caused by their lack of desire to work. The program rooted in the static vision of things would tend to assume that human nature is immutable, and would ignore the problem of disinclination to work. Consequently, such a program concentrates on providing subsistence and compelling the poor to work irrespective of their inclination. On the other hand, the program rooted in the non-static, or dynamic vision of things might tend to concentrate on changing conditions giving rise to this lack of desire—wages that are too low, for instance, the underlying assumption being that the poverty of the able-bodied is a condition caused by wrong-thinking which, once corrected, will eliminate the poverty of those affected.

⁵⁹ Thus, scholars, in the early part of this century could, with confidence, express the view that:

[T]he preservation of some of the medieval feeling in favour of a due subordination of class to class, and of a separation between different classes which had different duties to perform, has had happy results upon English society and the English state. A strict caste system is favourable to corruption and fatal to progress; but a system which persists in ignoring all differences between classes, and in attempting to realize the fantastic doctrine of the equality of all individuals of the state, is favorable to social discontent and consequent unrest, and fatal to individual effort.

WILLIAM S. HOLDSWORTH, 4 A HISTORY OF ENGLISH LAW 406 (1924). This view finds its modern echo in the somewhat wry observations of Herbert Gans in outlining the status affirming functions of a permanent class of poor people. GANS, *supra* note 41, at 264-68; and the writings of people such as MURRAY, IN PURSUIT *supra* note 14, at 234.

⁶⁰ See Part III.B, *Paradigm Archetypes*.

⁶¹ Thus, 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 have made us what we are, and

in a symptomatic way, making the obese heart attack patient comfortable but dismissing the possibility that the patient's heart condition can improve, or that the patient can be induced to change his eating habits.⁶²

Third, acceptance of the status quo in the United States requires the acceptance of the existence, value and immutability of income inequality, and of the notion that a person has the right to the substantially undisturbed enjoyment of the fruits of his or her labor.⁶³ These are also ancient concepts.⁶⁴ As a consequence, some people will always have less than others—perhaps substantially less. And, among those with substantially less, there likely always will be people whose income will be insufficient to purchase life's necessities. We style these people "poor," whether we measure the insufficiency of their income by reference to some absolute determinant (for instance, a "poverty line") or as a percentage of some calculable median or medium standard of living below which the quality of life is deemed inadequate.⁶⁵ The poor,

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

quoted in William Chenery, *Unemployment at Washington*, 37 SURVEY 42 (1921).

⁶² This is reflected in the enormous amount of literature devoted to the so-called "culture of poverty" meant to explain the medical or psychological or social basis for the inability of the poor to overcome their condition. See DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969); BANFIELD, *supra* note 24; JAMES Q. WILSON, THINKING ABOUT CRIME (1975); Oscar Lewis, *The Culture of Poverty*, in ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES 187, 191-92 (Daniel P. Moynihan ed., 1968).

⁶³ "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." GALBRAITH, *supra* note 17, at 68. 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.

MURRAY, LOSING GROUND, *supra* note 14, at 234. But see ROBERT J. LAMPMAN, ENDS AND MEANS OF REDUCING INCOME POVERTY 33-42 (1971).

⁶⁴ See *infra* Part III.B, *Paradigm Archetypes*.

⁶⁵ Thus, it has been an easy step from the conclusion that someone with less resources than another is poorer than that other, to the conclusion that the person with lesser resources is poor. HARRINGTON, *supra* note 18, at 1-2; GALBRAITH, *supra* note 17, at 254. Moreover, in a society where every person is said to own his or her own labor, the result might still be the same. The inability or unwillingness of any portion of the population to realize the value of their human capital could, in the absence of other resources, reduce these people to absolute poverty. See, e.g., Robert C. Ellickson, *The Untenable Case For an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 30-31 (1992); see MURRAY, LOSING GROUND *supra* note 14, at 150-52; Kim Hopper et al., *Economies of Makeshift: Deindustrialization and Homelessness in New York City*, 14 URB. ANTHROPOLOGY 183, 211-18 (1985).

therefore, make up a necessary element of a stable social and economic order.⁶⁶

Who are those at the bottom of the scale of income inequality? For those who accept the static vision, the people at the bottom of the economic and social ladder are life's losers, social and economic deviants who could not or would not conform their behavior to our generally prescribed socio-economic norms. They are those who found it unnecessary to seek, obtain and hold a job or to properly arrange their personal affairs to avoid the burdens of pregnancy, drug addiction and the like. It follows inevitably under such a view, that the poor are deemed primarily responsible for their own miserable condition; indigence is produced not by the social or economic system, but by the deviance of the poor.⁶⁷ The necessary punishment for deviance is poverty. This is another sense in which the static vision accepts as fundamental the notion that poverty is substantially ineradicable. Stasis assumes that every generation will have its share of losers. Extreme income inequality is the most visible evidence of this difference between winners and losers. As such, poverty is necessarily status based.

The incentive, then, is to favor passivity. A passive orientation permits alleviation of the conditions deemed offensive, without a care for the reform of society or its economic basis, as the practical expression of the acceptance of stasis. Alleviation of deprivation 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, entity, or the state. In this guise, the notion of the need for aid as a relational concept is ancient in Western culture.⁶⁸ But even this status-based notion, in a

⁶⁶ See *supra* note 56; see also Ross, *supra* note 35, at 1510 (commenting on poverty literature and recurrence therein of theme of permanence of poverty).

⁶⁷ See, e.g., DAVID WARD, *POVERTY, ETHNICITY, AND THE AMERICAN CITY, 1840-1925: CHANGING CONCEPTIONS OF THE SLUM AND THE GHETTO* xi-xii (1970); Hobbes, *supra* note 9; see also *infra* notes 98-107.

⁶⁸ In the 4th Century, Ambrose, Bishop of Milan, devised an elaborate system of categorization of the poor for determining eligibility for aid. In determining whether aid was appropriate, Ambrose explained that it was important to determine the social position of the recipient. Thus, people of good birth or high station were worthy of aid to the extent 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 from that, inherited by the colonies. TIERNEY, *supra* note 16, at 56-57. This view finds modern expression in the writings of those who argue that the key to eradicating poverty lies in reducing relative poverty. See HARRINGTON, *supra* note 18, at 158-59. It also finds expression in the status limitations of federal categorical aid programs which determine need on the status of the recipient.

world of substantial resources, is meant to be open-handed.⁶⁹ It requires nothing of the recipient other than that the person be in need.

Well, almost nothing, for another characteristic of stasis is queuing.⁷⁰ Queuing is best understood as a product of, and the solution to, the problem of the limited resources available for the relief of the poor. Queuing takes two forms: eligibility discrimination and need hierarchies.⁷¹ The imperatives of prioritization and need hierarchies work in tandem to identify the poor and to provide each with a proper ration book. Eligibility discrimination is based on the notion of self-sufficiency; eligibility for relief will tend to be a function of the ability of the potential recipient to fend for himself or herself.⁷² Need hierarchies are a measure of relative deprivation—the greater and more immediate the need, the higher one's place on the hierarchy of need and the more likely that the identified need will be met.⁷³

Eligibility discrimination and need hierarchies exist as an inherent part of poor relief under the static paradigm, whether or not there are sufficient resources to aid all of the needy, and whether or not need is determined using absolute or relational criteria. Let's look at the necessity of discrimination and the creation of need hierarchies in situations involving sufficient and insufficient resources to aid all of

⁶⁹ "In hospitality there is to be no regard for persons, but we ought to welcome indifferently all for whom our resources suffice." John Chrysostom, translated and quoted in TIERNEY, *supra* note 16, at 55.

⁷⁰ Queuing, of course, is not unique to stasis. Queuing is a natural concomitant of limited resources and high demand. For elementary queuing theory and its application to the social sciences and economics, see, e.g., HARVEY M. WAGNER, *PRINCIPLES OF OPERATIONS RESEARCH* 851–902 (2nd printing 1975); LAJOS TAKACS, *INTRODUCTION TO THE THEORY OF QUEUES* (1962); DONALD GROSS & CARL M. HARRIS, *FUNDAMENTALS OF QUEUING THEORY* (1974).

⁷¹ Eligibility discrimination serves a gatekeeper function—determining who may line up for aid, and in what order. It serves to mark a social and economic boundary between social normality and deviance. Need hierarchies are the means used to catalogue the poor. It is the means used to determine how much aid every eligible person ought to receive, and the order in which it ought to be received. Eligibility discrimination separates the destitute from the rest of the population. Need hierarchies sort out who as among the eligible ought to receive aid first and how much aid is to be given. Seen in this way, need is intimately related to, but not identical to, eligibility discrimination as a prioritizing tool.

⁷² Income criteria provide the modern counterpart under most governmental programs. See *supra* notes 47–51; *infra* text accompanying notes 191–206.

⁷³ After a person has qualified as needing aid, the hierarchy of needs answers the questions: (1) when may I receive my aid and (2) to how much aid am I entitled? The second question, more than the first, separates the concepts of discrimination (am I needy?) from need hierarchy (am I to get what I believe I am owed today?). Note also that while the discrimination of the two is similar, it is not always the same. Thus, while discrimination principles may exclude the able-bodied from assistance, or at least place them well back in the line, the ordering of the hierarchy of need may catapult an able-bodied indigent to near the front of the line if, for example, such an able-bodied person is in danger of starvation.

the needy. Assume that there are enough resources available to maintain all of the needy in a satisfactory manner (according to then current social norms). In such a case, eligibility discrimination reinforces social and economic definitions of need. To that end, even a society with an abundance of resources retains for itself the power to identify the poor. Its tool is eligibility discrimination. Indeed, eligibility discrimination is a function of the necessity of income inequality.⁷⁴ Thus, as the goal of poor relief approaches income equality,⁷⁴ the necessity of eligibility discrimination diminishes, approaching zero at the state of total income equality, inconceivable in a static regime. Eligibility discrimination, thus, remains fundamental to the determination of assistance in a resource rich society; aid is unlimited,⁷⁵ but only for those whom society, through the state, identifies as qualifying for the status of "needy."

A resource rich society also requires the creation of a hierarchy of need. Creation of such a hierarchy is necessary because need contains its own chronological imperatives based on the relative effect of deprivation—the hungriest ought to go first. This hierarchy is imposed whether poverty is defined in relative or absolute terms. In either case, the ordering will reflect the subjective valuations of the hierarchy.⁷⁶ Queuing of some sort is both necessary and inevitable to satisfy the needs of the hungriest first, progressing last to the least needy.

The need for queuing in both forms increases when we change our previous assumption and postulate a situation where there do not exist enough resources to satisfy all of the needs of the poor. Resource poverty provides an incentive to use both means for identifying and sorting the pool of eligible indigents, where identification and sorting

⁷⁴ In a system based on the goal of creating perfect income equality, the trigger for the provision of aid would have to be any difference in income. Such a system has not been seriously advocated in the United States, though the idea of such a program has been lampooned. See KURT VONNEGUT, JR., *Harrison Bergeron*, in *WELCOME TO THE MONKEY HOUSE* 7-13 (1968). But see Richard Delgado, *Rodrego's Fourth Chronicle: Neutrality and Stasis in Anti-Discrimination Law*, 44 STAN. L. REV. 1133 (1993).

⁷⁵ Limitlessness, in this sense, is strictly temporal. There remain strict limits on the quantum of aid to be made available even to those who qualify. See *infra* notes in Part V.B, *Examining the Limits of Static Systems; The Example of California Proposition 13*.

⁷⁶ In a system based on determinations of absolute need, discrimination, naturally enough, would be based on the relation of the needy to whatever current standard of need is set by the state. To the extent that need is relational, discrimination is possible based on a manipulation of the notion of need, and the eligibility for that need. Those unable to care for themselves might be most in need, and, therefore, put at the head of the line. The able-bodied, on the other hand, might be deemed to be marginally poor, and put in the back of the line. Likewise, a political determination that younger people have greater value than older people will result in the creation of need hierarchies reflecting this essentially political choice. See *infra* note 77.

serve a limiting function. Moreover, in such a case, both discrimination (which indigents may stand in line) and need hierarchies (what resources are allocable to a particular indigent) become highly politicized. This is particularly acute in societies which are resource poor, in whole or in part, from an unwillingness to divert resources to the maintenance of the poor. In such cases, the driving force of aid distribution and the underlying political imperative molding discrimination and hierarchy is scarcity of resources and not the needs of the indigents.⁷⁷

Indeed, I hypothesize that both eligibility discrimination principles and need hierarchies are, to some extent, political concepts.⁷⁸ Each is given definition by the value context of the people who craft them; each is, therefore, manipulable to suit the needs of providers and recipients⁷⁹ in a manner that is dependent on the characterization of poverty as either an absolute or relational concept.⁸⁰ Manipulation is a simple concept in this context. It involves the drawing of boundaries to determine an indigent's place in line. It is as simple as defining eligibility to exclude from aid all persons who are potentially employable,⁸¹ or to exclude certain child care support from aid given to families with children.⁸²

⁷⁷ This is most clearly illustrated by states' recent attempts to ration the availability of health care as among the pool of the eligible poor, all of whom are considered deserving. 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 instituted a similar plan. See *id.*

Understand, of course, that the lack of resources, though quite real, is perhaps more a function of the political limitations society has placed on public expenditure than on the inability of the government to raise taxes sufficiently to provide the services. Thus, there may be no resources because to increase tax burdens would result in unacceptable distributive effects. This type of change is precisely what the static system is devoted to avoid. "This 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.* (quoting Dr. Leslie Beitsch, Florida Director of Division of Health Services).

⁷⁸ See *infra* notes 213–17; cf. MENCHER, *supra* note 15, at 364–71.

⁷⁹ The latter at least to the extent that they have power to influence the process of need determination. See, e.g., PIVEN & CLOWARD, *supra* note 14, at 177 (arguing "structure of American public welfare system meshes with and enforces the work system, not least by excluding potential workers from aid."); STEINER, *supra* note 34, at 148 (noting each group with stake in 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.").

⁸⁰ See *supra* notes 18–24.

⁸¹ See *infra* notes 192–206.

⁸² See, e.g., Proposed Law: The Governmental Accountability and Taxpayer Protection Act of 1992, *supra* note 7, §§ 6, 7 (prohibiting grant increases to grant recipients who bear children

Context is supplied by the status quo. The poor relief system will tend to mimic the social and economic system which creates the poor in the first instance. Just as the social and economic order punishes social and economic deviants, static poor relief systems punish deviance by conditioning aid on the magnitude of the deviation. Static systems of poor relief thus punish deviance as well.

To punish deviance and reward conduct affirming the prevailing social and economic norms, static system builders employ eligibility discrimination and need hierarchies to create well-known categories of aid-worthiness.⁸³ Near the top rung are the disabled, 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.⁸⁴ At the bottom rung are the able-bodied poor. These people are clearly capable of taking care of themselves. They deviate from accepted conduct norms by refusing or failing to do so. Theirs, therefore, is a poverty born of deviance. Necessity is borne with the least adverse effect by them, unless they are in clear and immediate danger of physical harm (starvation, catastrophic illness). Stated another way, necessity is most easily borne by the able-bodied because they, as a group, can most easily ameliorate their own economic predicament, and social and economic rules compel the able-bodied to do this. As such, there is no reason to treat them like those with more limited options.

while receiving aid). See also *infra* Part V.B, *Examining the Limits of Static Systems; The Example of California Proposition 165*.

⁸³ Theda Skocpol & John Ikenberry, *The Political Formation of the American Welfare State In Historical and Comparative Perspective*, 6 COM. SOC. RES. 87, 120-39 (1983). Skocpol and Ikenberry quite correctly demonstrate that the "New Deal's original refusal to institutionalize public assistance for the able-bodied—as opposed to the 'dependent'—has ever since remained characteristic of American 'welfare' at the federal level and in most of the states." *Id.* at 138; TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 85 ("The Task Force believes, as do most Americans, that people who are unable to work because of age or disability should be supported without harassment at a decent level of income, even if long term support is required.").

⁸⁴ These categories form the bulk of the federally favored categories, the members of which traditionally included most welfare recipients under federal welfare programs. See, e.g., Asa Briggs, *The Welfare State in Historical Perspective*, 2 ARCHIVES EUR. SOC. 221 (1961); Handler, *supra* note 6, at 470-83, 487-88. 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 (i.e., blindness) might restrict, but not eliminate, the person's ability (and therefore obligation) to work. See, e.g., MEAD, *supra* note 14, at 132-35; James R. Sheldon, Jr., *PASS: SSI's Plan For Achieving Self Support*, 25 CLEARINGHOUSE REV. 962 (1991).

I have talked about the necessity for eligibility discrimination and need hierarchies under a static approach to poor relief, and the predilection of stasis to punish the violation of social and economic taboos by discriminating against the able-bodied. Let us explore this predilection further. Why do static systems base discrimination on a determination of fitness for work, rather than on some other characteristic, such as strength, education, astrological sign or good looks? For one, stasis accepts the idea that the immutable economic and social system has provided, and will continue to provide, sufficient occupations to employ all able-bodied people who actively seek employment.⁸⁵ Fitness for work as a distinguishing characteristic makes sense the more a society believes (however irrationally) that a job awaits every seeker. 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.⁸⁶ For some reason, the fact that the only work available is exploitative, or perpetuates racial, gender or ethnic subordination is also irrelevant.⁸⁷ It is enough that there exists enough honest work to employ all who need work; that is, to ensure that every able-bodied person's needs can be met by the sweat of her brow, without the intervention of the state.⁸⁸

⁸⁵ This is an old notion with roots back to the labor policies of the Ordinance and Statute of Labourers of 1349–1351, which had been 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 SCHWEINITZ, *ENGLAND'S ROAD TO SOCIAL SECURITY* 6 (1943); See E. Merrick Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643 (1943); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 270–71 (1963–1964). Of course, in times of labor surplus, the jobs available might well have to be provided by the state. See *id.*

⁸⁶ The problem, then, is not the lack of work, but the attitude of those able-bodied who have not sought work out. It has been noted that, "if you want to work, the program is there for you. But you've got to want to do it for yourself." KEN AULETTA, *THE UNDERCLASS* 226 (1982) (quoting Eric Lax, interviewer for Manhattan MDRC program, subject of Auletta's study). See also *id.* at 210–19 (discussing case histories of participants and noting degree to which several participants dropped out of program because they were bored, or thought the work dumb); MEAD, *supra* note 14, 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. But at present, for most jobseekers in most areas, jobs of at least a rudimentary kind are generally available.").

⁸⁷ The most celebrated exponent of the view that only work matters is Murray, *supra* note 14. Indeed, much of the work available may perpetuate the current discriminatory tendencies of society. See Law, *supra* note 51; DOROTHY L. NEWMAN, *PROTEST, POLITICS AND PROSPERITY* 262–64 (1978).

⁸⁸ *Gen.* 3:17–19 (setting forth Divine work commandment). Thus, Robert Burns notes that

The social and economic order thus imposes the obligation on all able-bodied individuals to work. If, in fact, society provides enough employment to occupy all of the able-bodied—for that is what the static system builder believes—then unemployed able-bodied people are shirkers, people who seek to satisfy their needs without using their own resources (that is, their labor).⁸⁹ Such people fail to conform their behavior to strongly held societal norms and expectations. As such, the able-bodied unemployed are considered less deserving (or undeserving), not because they are healthy, but because of the belief that there does, in fact, exist sufficient work for them.

There is more than a whiff of status in this view: the function of the laboring class is to labor, and the laboring classes include all those without wealth sufficient to provide for their needs. The laboring poor and the poor who will not labor violate the core tenet of the rules governing their status.⁹⁰ If this category of poor would only seek work, they would not be needy. In this sense, the need of the able-bodied is evidence of a character flaw.⁹¹

Since deliberate unemployment is considered fundamentally unfair from the perspective of stasis, the people who indulge in that

federal categorical relief is based on the notion that special consideration ought to be made for family units that do not contain potential participants in the labor market and do not derive income from the labor market. Burns, *supra* note 6, at 227–29. Indeed, the modern critics of forms of poor relief in the United States concentrate on illustrating the work disincentives of modern forms of poor relief. See MURRAY, *LOSING GROUND* *supra* note 14, at 145–66.

⁸⁹This view often is expressed in popular press opinion accounts of the welfare problem. As one example illustrates:

Welfare was created during the New Deal to help Americans bridge the chasm between jobs and to help those who could not work at all. . . .

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 A15 (opinion of chairman of Committee for Republican Leadership writing for Scripps Howard News Service).

An exception to this view would include the able-bodied unemployed who are actively seeking work and find themselves temporarily unemployed. This exception is certainly recognized in the United States and provision is made therefore in the form of unemployment *insurance*, not poor relief. This category is part of the favored categories qualifying for governmental aid. See LEVITAN, *supra* note 6, at 43–46. But the work incentives imposed by society are strong even among this group. See, e.g., Sheldon, *supra* note 84.

⁹⁰tenBroek, *supra* note 85, at 276 & n.88.

⁹¹This is the "stubborn reality of the underclass" for Ken Auletta, which complicates the problem of making the desitute disappear. AULETTA, *supra* note 86, at 275; JAMES Q. WILSON, *The Rediscovery of Character: Private Virtue and Public Policy*, in ON CHARACTER 11, 16–17 (James Q. Wilson ed., 1991). This is also the almost archetypal vision of the welfare queen—a mother of 29 who gets used to welfare. AULETTA, *supra* note 86 at 225–26.

(in)activity can be characterized as neither honest nor, perhaps, truly needy—more thieves than victims of misfortune.⁹² Such people are thieves because they effectively steal resources otherwise available to aid those with no alternative other than institutional poor relief. Further, because no person could truly be idle, the unemployed poor are not merely stealing from the mouths of the deserving, they are doing far worse; they are employing themselves in dishonest occupations—primarily robbery and theft.⁹³ In a society which accepts the notion that people are entitled to the fruits of their own productivity, the state could hardly permit people to earn their keep by stealing the wealth (or the fruits of the productivity) of others. Labor, in this sense, has the salutary effect of reducing the institutional cost of maintenance by limiting the right to be maintained to those who “truly” need it, those who could not potentially secure life’s necessities by any other means. It also makes social control easier and cheaper. The lower the institutional cost of maintenance, the fewer the riches which must be diverted from those who have acquired them.

As such, eligibility discrimination and need hierarchies serve another important purpose: to punish the least deserving, who have no business pretending to need or deserve the aid of society in the first place. A static system’s most severe punishments are reserved for those who are viewed as subversive, those potentially able or willing to disrupt the established social or economic order.⁹⁴ The stronger the belief that idleness is a personal choice and that every person has a moral, religious and legal duty to work, the more likely that those who do not will

⁹² In discussing the economic efficiency of income inequality, Richard Posner argues that “[i]nvoluntary redistribution is a coerced transfer not justified by high market-transaction costs; it is, in efficiency terms, a form of theft.” POSNER, *supra* note 11, at 436. Poverty, in this sense, is the natural reward of the lazy and incompetent; it is also a fate such people deserve. See GALBRAITH, *supra* note 17, at 67 (describing view of popularized Western classical economics: “The competent entrepreneur and worker were automatically rewarded. The rest, as automatically, were punished for their incompetence and sloth.”).

⁹³ Indeed, this explanation was commonly offered as a reason for the criminalization of the state of idleness. Idleness was described as:

the mother & rote of all vyces, whereby hath insurged & spronge & dayly insurgeth & spryngeth contynual theftes muders and other haynous offenses & great enormytes. . . in all places throughe out this Realme . . . Vacabundes & Beggars . . . dayly do increase in greate & excessyve nombres into great routs and companies . . . to the high displeasure of God the inquietacon & damage of the Kyng's People & to the marvaylous disturbance of the Comon Weale of this Realme.

22 Hen. 8, c.12 (1530).

⁹⁴ For a similar conclusion from a different perspective, see GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE 381–400* (1984) (describing development of notion of poor as dangerous and potentially revolutionary, and on that basis, in need of strict social control).

tend to be seen as a threat to the community and will be dealt with accordingly.⁹⁵ This is all the more so when this type of deviance can lead to anti-social behavior—mostly run-of-the-mill criminal activity—which must be suppressed if for no other reason than that it amounts to an illegitimate and arbitrary means of redistributing wealth.⁹⁶

I have said that one of the beneficial effects of laboring (to society at least) is the perception that fewer resources are misallocated (by diversion to the able-bodied). I explore this further here. Stasis, when applied to the problem of poverty, has implications for the approach taken with respect to the allocation of society's resources. The static paradigm assumes that the expenditure of public funds has a necessarily redistributive effect which runs counter to the notion of income equality as a reward of individual productivity. Stasis, therefore, will resist the allocation of any resources to the relief of the poor. The result is that under a static view institutional programs of poor relief will tend to be crafted in a manner that will minimize the cost of providing poor relief.⁹⁷ This is consonant with the quintessentially static assumptions that the poor are the authors of their own poverty and that large scale transfers of wealth to the able-bodied are counterproductive. The so-called traditionalist popular press has been particularly effective in articulating these notions, especially in arguing that undocumented immigration provides evidence of the falsity of the notion of job scarcity as an explanation of poverty. Thus, Georgie Ann Geyer writes:

'Why AREN'T poor Americans—black, white, any shade of the Clinton rainbow—taking the jobs that illegals are taking?'

⁹⁵ An example of this notion was recently expressed by New Jersey Assemblyman Wayne R. Bryant, the author of New Jersey's revisions to its Aid to Families With Dependant Children program, when he stated that, "the most useful thing welfare can do for the poor is to press middle-class values upon them. A middle-class wage earner does not go to his boss and say, 'I'm having another child, so I'm entitled to a raise.'" See Taylor, *supra* note 12.

⁹⁶ The link between poverty and lawlessness is routinely assumed by commentators. See, e.g., Jencks, *supra* note 34, at 74–83. Its modern rhetorical form was developed in the 19th century. HIMMELFARB, *supra* note 94, at 381–87, finds modern expression in the notion of an underclass riddled with vice and criminal tendencies. AULETTA, *supra* note 86, at 275.

⁹⁷ See tenBroek, *supra* note 85; Skocpol & Ikenberry, *supra* note 83, at 124 (arguing that one of the principal reasons that universal welfare state programs were never institutionalized in the United States 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 Greene, *Board Kicks Off New Philosophy of Welfare*, TULSA WORLD, Sept. 1, 1992, at A1 ("The state Commission for Human Services on Monday started a new era of lean budgets, program reviews and new thinking about welfare that puts taxpayer concerns at the forefront."). The notion of cost containment 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).

... The first and ideologically fashionable answer to the question is that lower income black or white Americans simply will not take these jobs [as farm workers or domestics]. But any way you think about that statement, it indicates that something is terribly wrong in our society.

If they won't take those jobs because the jobs are too de-meaning, then we need to do some basic re-educating. If they won't take them because they can get more money and benefits on welfare, then we need to do some basic re-working of our welfare system.⁹⁸

Redistribution of income in the context of poor relief, then, amounts to little more than a subversive act. As a consequence, stasis places a premium on alternative approaches to the maintenance of the destitute. Noninstitutional charity provides one such attractive alternative. To the extent that those with substantial resources are able to derive pleasure from relieving the misery of the destitute with their own funds, such tendencies are to be encouraged. Even where donations are coercively derived, through social pressure, for example, the objective is still the same. Private charity thus becomes an integral part of any static program of poor relief.⁹⁹ Private giving has none of the coercive redistributive effects of governmental programs and complements the notion that the social and economic system is unchange-

⁹⁸ Georgie Anne Geyer, *Why Won't U.S. Poor Take Jobs Illegals Take?*, *TULSA WORLD*, Jan. 31, 1993, at D1.

⁹⁹ For example, former President Bush, in accepting the Republican Party nomination for President in 1988, stated that:

For we are a nation of communities, of thousands and tens of thousands of ethnic, religious, social, business, labor union, neighborhood, regional and other organizations, all of them varied, voluntary and unique. . . a brilliant diversity spread like stars, like a thousand points of lights in the broad and peaceful sky.

Does government have a place? Yes. Government is part of the nation of communities—not the whole, just a part.

George H. W. Bush, *Address at the Republican Party Convention accepting the Republican Party Nomination for President of the United States*, Aug. 18, 1988 in *FACTS ON FILE WORLD NEWS DIGEST*, Aug. 19, 1988, at 605. The Reagan Administration also worked hard to popularize private charitable giving as a significant means of fighting poverty. See, e.g., *LOW INCOME OPPORTUNITY WORKING GROUP*, *supra* note 13, at 43-47.

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 important of them include favorable tax policy—primarily, the charitable deduction, I.R.C. § 170 (1988 & Supp. II 1990), and the exclusion from income of much of the income received by charitable organizations, I.R.C. § 501 (1988 & Supp. II 1990). Other methods are also available, and include Good Samaritan provisions. See, e.g., N.J. STAT. ANN. § 2A:53A-7 (West 1987); TEX. CIV. PRAC. & REM. CODE ANN. §§ 84.001 to .008 (West Supp. 1993).

able.¹⁰⁰ Moreover, private charity is driven by a relentless social pressure that rewards charitable giving with social and economic advancement.¹⁰¹ The well-off appear to profit from charity as it is least likely to threaten the social order, or empower the poor.¹⁰² As such, some have argued, private charity is, in a democratic society, profoundly anti-democratic.¹⁰³

In addition, cost reduction incentives 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 resources poorly spent; they will not increase the productivity of the people being maintained, while those who are productive are forced to share their resources with those who are not as productive. In the jargon of our times, we provide opportunity (to work) not results (income). Finely crafted definitions of income units charged with the obligation of mutual maintenance, usually family units however broadly defined, and the attempt to link the indigent and those taxed to support them (i.e. local administration) provide some of the com-

¹⁰⁰ 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 that the combination of private and public transfers in the aggregate optimally meet the aggregate social need for poor relief, increases in 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(1) PUB. CHOICE 29, 30-31 (1978).

¹⁰¹ See Long, *Social Pressure and Contributions to Health Charities*, 28 PUB. CHOICE 55, 66 (1976); Berry Keating et al., *United Way Contributions: Coercion, Charity or Economic Self-Interest?*, 47 S. ECON. J. 816, 817 (1981).

¹⁰² See, e.g., Alfieri, *supra* note 21. But see Sarah C. Carey, *Philanthropy and the Powerless* (1975), II RESEARCH PAPERS (PHILANTHROPIC FIELDS OF INTEREST) 1109-64 (Sponsored by Commission on Private Philanthropy and Public Needs, U.S. Treasury Dept., 1977).

¹⁰³ 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. This notion was put nicely by Fernand Braudel, "[h]e who gives, dominates. The theory of the donor works not only at the level of individuals and societies but also for civilizations." FERNAND BRAUDEL, II THE MEDITERRANEAN AND THE WORLD IN THE AGE OF PHILLIP II, 826 (2d revised ed. 1966, trans. 1973 by Sian Reynolds). Thus, voluntary charity substitutes decision making and the preferences of the donor class for the collective preferences of the nation, at least as represented in the nation's legislative bodies. GANS, *supra* note 41, at 264-68. Christopher Edley, Jr., *Season's Seethings: I am Not a Point of Light*, LEGAL TIMES, Dec. 18-25, 1989, at 26.

mon bases for effecting the cost reductive imperatives of the static view.¹⁰⁴

Lastly, the fundamental passivity of stasis implies a reactive, rather than an active, approach to the aid of the poor. It describes an outlook that regards the problem of poverty as substantially constant in the aggregate, though cyclical as to particular people or groups. This outlook accepts as an unchangeable fact the existence of a group of people with less than others, who are in a constant potential state of need; the potential is realized when, for an endless number of causes,¹⁰⁵ some, but not necessarily all, of this group of poor become destitute for periods of time. There is no relief from this cycle because, as already noted, there will always be people with substantially more than others in a society that accepts substantial income inequality. Programs of relief are geared primarily to respond to need which is both unending in the aggregate, and temporary for a great number of individuals. In this sense, our permanent poor relief programs are meant to be temporary and to relieve only the most extreme want.¹⁰⁶

Reactive sensibilities reinforce the tendencies to treat poverty as a separable problem, to elevate the goal of amelioration, and to minimize the perceived utility of eradication programs. The guiding notion is that the poor are a separate, and inferior, component of the general population.¹⁰⁷ The compartmentalization of poverty is deeply embedded in the American psyche. It is evidenced by the way in which poverty is defined, by reference to a poverty line, for instance—a boundary which identifies and subordinates one kind of person (a person in need) from the rest of us. It is evidenced by the language of separation used to describe the poor. The desperately poor are not like the rest of the laboring population; they are a different subspecies of humanity. They are the “lower classes,” the “underclass,” the “dangerous [classes],

¹⁰⁴ See *infra* Part III.C, *Out of Paradigms and Archetypes: A General Theory of American Poor Relief*; *infra* text notes 335–41 and accompanying text.

¹⁰⁵ This is the old “causes of poverty” problem, over which scholars and others have destroyed thousands of acres of woodland. A listing of articles covering this subject would likely exceed the length of this article. For a brief list, see the articles cited *supra* in note 51.

¹⁰⁶ JOEL F. HANDLER & ELLEN J. HOLLINGSWORTH, *THE “DESERVING POOR:” A STUDY OF WELFARE ADMINISTRATION 203* (1971) (“AFDC is basically a low-level income maintenance program, and very little else; much more routine than flexible.”).

¹⁰⁷ See HIMMELFARB, *supra* note 94, at 288–304, 371–400 (discussing development of notion of separateness and inferiority in 19th Century Britain); PIVEN & CLOWARD, *supra* note 14, at 165–75 (degrading non-productive able-bodied serves as effective means of reinforcing work ethic); Alfieri, *supra* note 21, at 682–90 (examining tendency of even advocates of the poor to treat them as sub-status individuals and give short shrift to their concerns); Karst, *supra* note 51, at 3–7 (describing manner in which modern welfare system separates the poor from rest of society and treats them, through such programs, as inferior).

discontented and potentially revolutionary."¹⁰⁸ The very labels society uses to "describe" the poor brands them and makes self-evident the need to make them act differently (for their own good). It reinforces the conclusion that they are 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.¹⁰⁹ Indeed, separation itself serves as a means of characterizing the very nature of the poverty which gave rise to the indulgence in creating distinctiveness. It is, thus, commonplace to hear that poverty is caused either by an inability to provide for oneself because of childrearing, physical or mental disabilities,¹¹⁰ or by the refusal to do so. Both are deviations from the norm, either to be pitied (incapacity) or otherwise despised as such. In a large sense, then, the problem of poverty is a dilemma caused by the poor,¹¹¹ not a deficiency of society in general.¹¹²

The static view in this manner also reinforces the belief that efforts to eradicate poverty by modifying the social or economic basis of society are beside the point. Neither the social nor the economic system is defective in any fundamental sense. Rather, stasis imbues us with the reality of a perception that the aid-eligible poor are inferior, defective or otherwise not like the "normal" person in the United States. They are the type of people who worry us because they do not feel stigma. "They seem to be passive, accepting, satisfied, and unable to take advantage of the few things that the AFDC program has to offer."¹¹³ And in this manner, a validating basis is provided for the tendency of stasis to embrace a reactive methodology. The manifesta-

¹⁰⁸ HIMMELFARB, *supra* note 94, at 371-400; AULETTA, *supra* note 86, at 272; Jencks, *supra* note 34, at 143-203; Peterson, *supra* note 55, at 3; Ross, *supra* note 35, at 1517-39 (analyzing marginalizing rhetoric in judicial decision making which treats the poor as class apart).

¹⁰⁹ Labelling theory has taught us that we tend to become what we are called. David P. Farrington, *The Effects of Public Labelling*, 17 BRIT. J. CRIMINOLOGY 112 (1977); see also Ross, *supra* note 35, at 1509-10 (arguing such notions make it easy to conclude poverty is irremediable).

¹¹⁰ In effect such people are different from the societal standard because, not only do they lack the money or resources to provide for themselves, but also because they cannot function in accordance with the societal norm. See Ross, *supra* note 35, at 1502-08.

¹¹¹ See, e.g., Ross, *supra* note 36, at 1502-08; Briggs, *supra* note 84. Contrast this view to the universalist notion of certain modern scholars who take the position that poverty is merely part of an overall problem (correctable), a kind of societal disfunction or inefficiency. See, e.g., Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in THE URBAN UNDERCLASS 411-43 (Christopher Jencks & Paul E. Peterson eds., 1991).

¹¹² But see GILDER, *supra* note 14, at 79-98, in which the author argues that poverty, and 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. *Id.*, at 97-98.

¹¹³ HANDLER & HOLLINGSWORTH, *supra* note 106, at 177.

tion of this tendency is reflected by an implementation philosophy which limits provision of the most basic material needs to those otherwise eligible people who are desperate enough and persistent enough to seek aid from the state; it is not guided by any desire to seek out those whose economic condition could be improved.¹¹⁴

The deviance of the poor extends beyond the physical; the poor in the static world view do not act or necessarily share the same culture as middle and upper class America.¹¹⁵ Indeed, there might well be a closer link between the poor and the criminal class, than between the poor and the people who bear the financial burden of maintaining them.¹¹⁶ This view has been amplified in non-homogeneous societies

¹¹⁴Piven and Cloward describe the passivity of a federal/state welfare system in which the applicant quite literally had to undertake something akin to a quest out of Arthurian legend in order to obtain the "prize"—some form of relief to which the applicant was likely entitled to in the first place. See PIVEN & CLOWARD, *supra* note 14, at 149–61. Those who need the system most, and who could best benefit from whatever programs are in place are the least likely to know about the programs, or its potential benefits, and therefore are also the least likely to seek these programs out. See HANDLER & HOLLINGSWORTH, *supra* note 106, at 177; Simon, *Invention*, *supra* note 36, at 17–23 (describing increasing passivity of system separating its income maintenance from its social services functions).

¹¹⁵This raises the familiar canard, the "culture of poverty." See *supra*, note 89. This concept has ancient roots. In the medieval period it was assumed that the poor were different; the poor were supposed to be different in a strict hierarchical society. See TIERNEY, *supra* note 16, at 58–61. 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. *Id.* at 58. The only ground for refusal to aid the poor was the presumption that almsgiving would encourage vagrancy and idleness—in effect encourage the violation of status norms. *Id.* at 61. This was the conceptualization of the problem that came to dominate a substantial part of the Elizabethan Poor Law and American conceptions of poor relief. JOHN POUND, *POVERTY AND VAGRANCE IN TUDOR ENGLAND* 39–76 (1971); MENCHER, *supra* note 15, at 39–53.

The modern version of this notion is tinged with racial and ethnic overtones. 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. See, e.g., GALBRAITH, *supra* note 17, at 254; WILSON, *supra* note 91, at 11.

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 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. See, e.g., MURRAY, *LOSING GROUND* *supra* note 14 (Murray's point is that everyone is lazy at heart, but the poor have been given a means, through modern systems of institutional relief, to capitalize on their laziness at the expense of those who work, with what Murray considers awful consequences for recipients of this largesse); GILDER, *supra* note 34, at 64–74 (arguing poverty can be explained as result of abandonment by the poor (as result of pernicious effects of modern welfare programs) of central tenets of success—work, monogamous heterosexual family structure with traditional gender roles, and faith represented by traditional Western moral codes).

¹¹⁶See *supra*, notes 92–93.

like that of the United States in the late 20th Century, where the poor may be disproportionately members of non-majority racial and ethnic groups.¹¹⁷ In this way, the static assumption that the poor are responsible for their own condition¹¹⁸ merges imperceptibly with the American Protestant vision of poverty.

Protestant theologians, commencing during the formative period of the break with Roman Catholicism in the 16th Century, have asserted that hard work and frugality are close to divine commandments. Influential early Protestant thinkers constructed their welfare systems on this basis. Thus, for instance, Martin Luther's *Ordinance for a Common Chest* for the Saxon town of Leisig in 1523 provided for the abolition of begging by the able-bodied. No aid was to be given to those who could work for their keep, with the exception of the worthy poor. They, along with the sick, the aged and orphaned, poor children were the only classes of persons meriting maintenance by the community.¹¹⁹ Ulrich Zwingli's *Ordinance and Articles Touching Almsgiving*, created for the City of Zurich in 1525, is even more blunt in its assumption that the able-bodied poor must suffer the (physical) consequences of their lack of desire to work. The right to aid was based on the moral character of the eligible and the election to refuse to work for one's keep was a great immorality. Thus, minimal relief was to be accorded "any persons, whether men or women, on whom it is known that they spent and wasted their days in luxury and idleness, and will not work, but frequent public houses, drinking-places and haunts of ill-repute."¹²⁰ Indeed, 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."¹²¹ These notions found expression in New England where the Puritan thinker Cotton Mather explained that only the disabled were worthy of charity. For

¹¹⁷ See MOYNIHAN, *supra* note 61; Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1, 74-96 (1969); John & Horner, *supra* note 51, at 140-52.

¹¹⁸ See *supra*, text accompanying notes 85-93.

¹¹⁹ Martin Luther, *Ordinance for a Common Chest*, in SOME EARLY TRACTS ON POOR RELIEF 84, 92-93 (F.R. Salter ed., 1926) (First published in 1523).

¹²⁰ Ulrich Zwingli, *Ordinance and Articles Touching Almsgiving*, in SOME EARLY TRACTS ON POOR RELIEF 99, 100-01 (F.R. Salter ed., 1926) (First published in 1525). Such unworthy people 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 with them." *Id.* at 101. On the other hand, the pious, "who have worked all their days and taken trouble to maintain themselves honourably, who have not consumed their substance with riotous living but happen to be, through God's providence, unable to work any more to maintain themselves by reason of war, fire, famine, accident, excess of children, old age or other infirmity" were to be maintained at the expense of the state. *Id.*

¹²¹ *Id.* at 99, 101.

the rest, the best charity was work.¹²² There was, thus, a clear tie between compliance with the religious commandment to work and the right to be maintained by the state in times of need. In a world in which religion was not far removed from the everyday things of statecraft, Protestant thinkers encouraged the state to help God reward in this life those whose lives were guided by Divine rules, and to punish, both in this life and the next, those who chose to ignore the Word of God.¹²³ Moral blameworthiness, thus, was part and parcel of the requirements of relief. The unemployed, able-bodied person was morally suspect and unworthy of relief. They were suspect because they likely became poor through their own fault—by gambling, drinking or lack of desire to work. Relief was, at bottom, a fault-based system.¹²⁴ Thus, religious theory serves to confirm the view of stasis respecting the nature of society, the economic order and the poor. Poverty remains the outward mark of inward sin. The poor deserve their fate.

B. *Paradigm Archetypes*

Every paradigm of the type I describe contains within it an archetypal form—a concrete manifestation of paradigmatic rules and constraints in purest form. It is this concrete archetypal manifestation which gives the paradigm form and meaning.¹²⁵ The archetypal crea-

¹²² Quoted in MENCHER, *supra* note 15, at 43–44 (Cotton Mather maintained, “for those who Indulge themselves in Idleness, the Express command of God unto us, is, That we should let them Starve.”).

¹²³ Thus, John Galbraith quotes the Calvinist precept—“The only sound way to solve the problem of poverty is to help people help themselves.” GALBRAITH, *supra* note 17, at 251. 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.” MENCHER, *supra* note 15, at 43. For a discussion of the blending of early Protestant theology and the poor law of the American colonial period, see Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 201–14 (1955); Julius Goebel, Jr., *King’s Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 427 n.19 (1931).

¹²⁴ Compare the notions of Luther and Zwingli, *supra* notes 119–21 with those of modern day commentators:

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.

Himmelfarb, *supra* note 12 (footnote omitted).

¹²⁵ Cf. Briggs, *supra* note 84, at 229–30 (noting importance of underlying philosophy of welfare for determining parameters of systems created).

tion of the static conception of the relationship of a society to its poor in Anglo-European society is the system of poor relief created by Canon Law,¹²⁶ which, prior to the Protestant Reformation, was administered by the Roman Catholic Church and enforced in ecclesiastical courts. Modern poor relief in the United States derives in large part from the ecclesiastical system in place prior to the Protestant Reformation, and which was thereafter codified as the Elizabethan Poor Law.¹²⁷ As such, much of the way that the passivity and immutability of the static vision has manifested itself in the motivations, structures and limitations of current systems is rooted in the ancient ecclesiastical system long thought discarded.¹²⁸ Its tensions, goals, strategies, approaches and arguments over reasonableness and justice are our own.¹²⁹

The theoretical structure of medieval poor relief under Canon Law can be succinctly summarized.¹³⁰ While the structure of poor relief during the medieval period is relatively unsophisticated by contemporary standards, it does encompass a complete system not dissimilar to our own. Canon Law accepted, as a fundamental part of its 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

¹²⁶ 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 protection 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 16, at 6-9.

¹²⁷ The history of the evolution of medieval Canon Law into modern state general assistance, has been extensively described. See TIERNEY, *supra* note 16, at 128-33; E.M. LEONARD, EARLY HISTORY OF ENGLISH POOR RELIEF 210-59 (1900). For a fuller treatment of the static characteristics of medieval and Elizabethan poor relief systems, see Backer, *supra* note 4.

¹²⁸ Indeed, especially among Anglo-American writers, there is a long tradition of assuming that modern notions of poor relief are based on the Elizabethan Poor Laws, codified in 1601, and that, prior to their codification, no significant thought was given to the relief of the poor. See, e.g., SIDNEY & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY: PART I, THE OLD POOR LAW 3-5 (1927); TRATTNER, *supra* note 35, at 1-13 (ecclesiastical relief transitory product of its time); LEONARD, *supra* note 127, at 1-2, 17-20, 294 (characterizing ecclesiastical poor relief as non-system of haphazard indiscriminate aid). But see *id.* at 58 n.3 (noting link between Elizabethan poor law and old methods of relief).

¹²⁹ See *infra* Part V.A, *Explaining the Disjunctions Between Goals and Implementation; Why Don't Current Systems of Poor Relief Seem to Accomplish Their Purposes.*

¹³⁰ See *supra*, note 126, for my working definition of Canon Law.

place in society, from which followed expectations of income, social position and obligation. Different styles of living were appropriate for people holding different ranks within society and people occupying different rungs of the hierarchy were expected to make do with different amounts.¹³¹ The notion of poverty, therefore, was not restricted to a concern with absolute need. It also encompassed notions of unacceptable and acceptable relative deprivation.¹³² Poor relief, in this sense, was a positive tool to maintain the social order.

The poor relief system reinforced the social and economic order in other ways. Reinforcement of the obligations of class hierarchy, and primarily that laborers labor, found expression in the tendency of medieval poor law systems to criminalize vagrancy as a violation of compulsory work laws. Thus, the ecclesiastical poor law system tended to rely on secular criminal law to penalize the able-bodied who ought to be working for their bread instead of begging for it.¹³³

The benefits of status and property, however, carried with them a spiritual and quasi-legal duty of charity.¹³⁴ In time of necessity all people were expected to share their superfluous wealth with those in need;¹³⁵ otherwise the wealthy were under no *obligation* to donate their wealth for charitable purposes (in addition to any required tithings). Those

¹³¹ As such, poverty was a relative concept. Thus, if a noble family was reduced to the financial status of a rich peasant, the noble family would be considered impoverished, and qualify for relief. Why? Because they would be unable to live as required by their social station without aid. See THOMAS AQUINAS, SUMMA THEOLOGIAE, II-II, Q. 32, art. 6, *Treatise on Faith Hope and Charity*, (translated as III THE SUMMA THEOLOGICA OF SAINT THOMAS AQUINAS at 1322-23 (Fathers of the English Dominican Province 1981) ("... for no man ought to live unbecomingly.").

¹³² Thomas Aquinas defined need in a manner anticipating modern notions of relative deprivation. He stated that, "a thing is said to be necessary, if a man cannot without it live in keeping with his social station, as regards either himself or those 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 131 (translated at 1323).

¹³³ See tenBroek, *supra* note 85, at 270-79 (discussing rise of civil penal approaches to control of vagabonds); Margaret K. Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 CAL. L. REV. 511, 512-13 (1966); 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, 635-38 (1992).

¹³⁴ See AQUINAS, *supra* note 131 (translated at 1321-22) (Giving alms from out of surplus is precept. A failure to give alms, however, is mortal sin (i) when recipient is in evident need and is unlikely to be relieved otherwise and (ii) when giver knowingly refuses to give of his superfluities.).

¹³⁵ See *id.*; TIERNEY, *supra* note 16, at 34-35. 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. See *id.* at 37; AQUINAS, *supra* note 131 (translated at 1321) ("On the part of the giver, it must be noted that he should give of his surplus. . . .").

who refused to give an appropriate amount of charity could be compelled to do so through the Canon Law procedure of *denunciatio evangelica*.¹³⁶ In England, after 1552, the secular government began to supplement the Bishop's power under the *denunciatio evangelica* procedure by legislation which provided the Church with the power to collect a required contribution.¹³⁷ However, the charitable person was permitted a strictly passive role—while required to meet the needs of those who sought aid, she was not compelled to seek them out.

In addition to the timing and extent of the duty of charity, Canon Law created a crude system of eligibility discrimination: "to feed the hungry, to give drink to the thirsty, to clothe the naked, to harbor the harborless, to visit the sick, to ransom the captive, to bury the dead."¹³⁸ Determination of eligibility under these criteria was to be left to the parish priest and to the donor, who both exercised the kind of discretionary, informed decision-making which several hundred years later was thought more appropriate for a professionalized cadre of social workers.¹³⁹ Canon Law limited discretion only to the extent of requiring that the distribution of aid be in amounts "due and customary,"¹⁴⁰ with local churches to provide more detail to meet local needs.¹⁴¹ The Canon Law also provided that if there was enough for all, all who sought aid would be given to the extent of their need. Otherwise, a system of preferences devised by Ambrose in 5th century Milan was to be applied, the preference system based on the physical condition of

¹³⁶ See TIERNEY, *supra* note 16, at 38–39. Under the process of *denunciatio evangelica*, any person could renounce a recalcitrant parishioner to the Bishop. A recalcitrant parishioner was one who refused to contribute his superfluous wealth to the relief of the poor. See *infra*, note 150, for an explanation of the notion of superfluous wealth. Originally, the *denunciatio* process gave the Bishop only the power to exhort contribution from the recalcitrant donor; his only power was to threaten 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* note 16.

¹³⁷ See TIERNEY, *supra* note 16, at 127. The statute provided 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 call the recalcitrant parishioner to induce and persuade him to make the proper contribution. See LEONARD, *supra* note 127, at 57–59. After 1563, the 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. 5 Eliz. I, c.3; see TIERNEY, *supra* note 16, at 131; LEONARD, *supra* note 127, at 58 & n.3.

¹³⁸ AQUINAS, *supra* note 131 (translated at 1318–20).

¹³⁹ See BISNO, *supra* note 21; TOWLE, *supra* note 21; Simon, *Legality, Bureaucracy*, *supra* note 21; William M. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1437 (1986).

¹⁴⁰ See TIERNEY, *supra* note 16, at 78.

¹⁴¹ Tierney, for instance, describes the efforts to regulate the details of poor relief in England in the 13th and 14th Centuries. TIERNEY, *supra* note 16, at 89–109.

the recipient, his utility to the community and his connection to the donor.¹⁴² The amount of aid required was that sufficient to prevent death or utter destitution.¹⁴³

The institutional delivery of aid to the poor was the responsibility of the Church. Under Canon Law, each bishop was responsible, in the first instance, for the supervision of the care of the poor of the diocese.¹⁴⁴ Relatively early in Church history, each diocese was divided into several parishes, local units of administration presided over by a priest, who was responsible for the administration of the revenue derived from Church assets in the parish (church lands and the like) and the tithings of parishioners, and its use, in part, for the maintenance of the parish poor.¹⁴⁵

Even this most cursory description of the system of Canon Law poor relief evidences the quintessentially static nature of that system. The distinguishing feature of the medieval system of poor relief was its acceptance of the notion that the social and political order was immutable as the fundamental core of its system-building philosophy. This order was based on hierarchy and status of a kind that assumed significant socio-economic inequality.¹⁴⁶ True to its static nature, the Ca-

¹⁴²Thomas Aquinas cites to both Ambrose and Augustine in relating the principle of charity that favors those most closely united to the giver over strangers, with exceptions that approach a fairly comprehensive hierarchy of need based on the weighing of a variety of factors including the strength of the family connection, the extent of the need and the worthiness of the stranger. He also describes the exceptions of that rule. See AQUINAS, *supra* note 131 (translated at 1325–26).

¹⁴³Thus, 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.'" *Id.* (translated at 1326) (quoting GLOSSA LOMBARDI reprinted in 191 PATROLOGIAE CURSUS COMPLETUS at 1660 (Series Latina, J.P. Migne ed.) (Paris 1844–55)).

¹⁴⁴See TIERNEY, *supra* note 16, at 69–70.

¹⁴⁵It was well accepted under Canon Law that the obligation of the parish to support its poor was legally enforceable in the church courts. See *id.* at 127. Such obligations became enforceable before the English royal courts after 1563. See LEONARD, *supra* note 127, at 58–59 (describing administrative process for enforcing charitable contributions).

Both monasteries and charitable hospitals were significant sources of charity in the medieval period. See TIERNEY, *supra* note 16 at 83–85; LEONARD, *supra* note 127, at 18 (arguing that though great, monastic charity was uncoordinated and indiscriminate). Charitable hospitals were the equivalent of hospitals for the sick, and almshouses for the destitute. The charitable hospitals were the forerunners of the almshouses and workhouses that emerged after the Reformation and persist into the present. See generally, TIERNEY, *supra* note 16, at 85–87.

¹⁴⁶Quoting Ambrose, Aquinas suggests that, "When you give 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 indulgence through no fault of his own." AQUINAS, *supra* note 131 (translated at 1326) (quoting AMBROSE, *DE OFFICIIS*, reprinted in 16 PATROLOGIAE CURSUS COMPLETUS; AMBROSE OPERA at 74 (Series Latina, J.P. Migne ed.) (Paris 1844–55)).

nonical system of poor relief tended to isolate and regulate identifiable economic and social classes—in its positive role as provider of alms to young orphans, the old, the sick and the handicapped, and in its negative role as enforcer of work obligations on the able-bodied unemployed.¹⁴⁷

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, however defined from time to time, was neither part of the consciousness nor even of the vocabulary of the creators of that system. Rehabilitation was, thus, alien to the conceptual universe of Canon lawyers. The creators of ecclesiastical poor relief assumed a general population of industrious, poor laborers who, from time to time in periods of adversity, might require the aid of those in the locality with more resources. After all, it was not by the commandment of mere humankind that people were required to labor for their sustenance; such had been a divine commandment in effect from the very beginning of the species.¹⁴⁸ The obligation to aid the poor thus extended to all of the needy no matter how the need arose.¹⁴⁹ To the extent that the able-bodied members of the laboring class required a reminder of their obligation to fulfill the Biblical work imperative, the limited aid available to the able-bodied ensured that resources were spent on needier folk.¹⁵⁰

And what of the villain who scoffed at the Word of God and at humankind and refused to eat by the sweat of his brow? Canon Law minimized the obligation owed such a person: no obligation to aid except to the extent necessary to prevent actual starvation. But the Canon Law could rely on more incentive than a meager amount of charitable aid. The shiftless poor mocked the law of humankind as well as that of God, and, at least in England, the state supplemented the

¹⁴⁷ Handicapped at least severely enough to render the person incapable of work. Understand that one epoch's disability is another epoch's ordinary (although challenged) person. Good examples of the transition in perception of the disutility of handicap include the blind, once treated as substantially totally disabled, and the hearing impaired, whose rehabilitation has proceeded substantially in this century. See MEAD, *supra* note 14, at 132-35 (describing work requirements creeping into aid for disabled traditionally thought incapable of work).

¹⁴⁸ Gen. 3:17-19 (setting forth God's commandment that Adam work for his keep).

¹⁴⁹ See, e.g., AQUINAS, *supra* note 131 (translated at 1236).

¹⁵⁰ 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 such aid a death could be prevented. See, e.g., *id.* (translated at 1326) ("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.").

relief efforts of the Church by imposing a secular obligation to work, on pain of imprisonment.¹⁵¹ As such, the quintessentially secular static notion that the voluntarily unemployed, able-bodied person was a social deviant reinforced a theology which taught that the voluntarily unemployed were religious deviants.

In this context, institutional charity 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. As such, any system of maintenance would have to be implemented in a manner that minimized the amounts taken from others, and did not reward those who, though capable of labor, did not labor for whatever cause. In the language of the static paradigm, such a system was fundamentally geared to provide poor relief based on the maximization of cost savings, and the reinforcement of the social order.

It is in the context of this fully developed static 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 fundamental static orientation.¹⁵² The Elizabethan Poor Law represented, in effect, the culmination of the longstanding effort of the English Crown to absorb the entire system of ecclesiastical poor relief. This effort had begun in earnest during the reign of Henry VIII, when the functions of the Roman Catholic Church were absorbed by the state.¹⁵³ The Elizabethan Poor Law has been rightly characterized as the attempt to fuse the ecclesiastical system of poor relief with the civil statutes which the English monarchy had over the prior several centuries enacted to supplement that system.¹⁵⁴ Thus, while the major characteristics of the system of poor relief did not change much, the administrative mechanism for the implementation of the programs of relief did change substantially.¹⁵⁵

¹⁵¹ See *supra* note 150. In England, statutes required the able-bodied to work for anyone who wanted them, at wages determined by the Crown, and criminalized begging. 25 Edw. 3, st. II (1350-51) (Statute of Labourers, which had been preceded by Ordinance of Labourers, 23 Edw. 3, c. I-VIII (1349)). In other emerging Protestant jurisdictions, work might not be required, but failure to work might entitle the pauper to the barest aid essential to physical survival. See *supra*, notes 119-23.

¹⁵² 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, *supra*, at notes 119-21, and reproduced in *SOME EARLY TRACTS ON POOR RELIEF* 92-93 (F.R. Salter ed., 1926).

¹⁵³ See, e.g., TIERNEY, *supra* note 16, at 131; tenBroek, *supra* note 85, at 258.

¹⁵⁴ See LEONARD, *supra* note 127; MENCHER, *supra* note 15.

¹⁵⁵ See TIERNEY, *supra* note 16, at 109-31. Tierney argues, however, that a substantial distinc-

The administrators of this system of poor relief were to be the "churchwardens of everie Parish, and fower . . . substanciall Householders there . . . [who] shalbe called Overseers of the Poore of the same Parishe."¹⁵⁶ They, with the consent of the Justices of the Peace,¹⁵⁷ were to determine the amounts necessary to maintain the poor, and the manner of relief to be afforded on a case-by-case basis.¹⁵⁸ While legislation creating a non-ecclesiastical system of poor relief was national in scope, the administration of the system as well as the obligation to raise the revenues sufficient for the purpose were left strictly in local hands.¹⁵⁹

In general, the new, secularized English poor law forbade begging.¹⁶⁰ It required all the able-bodied males and unmarried females to labor for at least twelve hours per day to provide for their needs.¹⁶¹ Furthermore, the overseers of the poor were to organize manufacturing projects on which to put to work all of the employable poor.¹⁶² The able-bodied refusing to work were to be sent to houses of correction.¹⁶³ The Tudor monarchs, and the Stuarts, thereafter imposed severe punishments on people classified as rogues, vagabonds and vagrants.¹⁶⁴ The overseers were required to put poor children to work or to apprentice

tion between ecclesiastical poor relief and secular (Elizabethan) poor relief, was the latter's concern with the suppression of vagrancy and begging. *See id.* That, I think, is too narrow a reading of Medieval relief which relied in some measure on compulsory work statutes to suppress any desire to abandon productivity. *See supra* note 150.

¹⁵⁶ *See* 43 Eliz. 1, c.2 (1601).

¹⁵⁷ "[T]he Maiors, Bailifs, or other Head Officers of everie Towne and Place Corporate and Citie within this Realme" [43 Eliz. 1, c.2, § VII (1601)] were normally appointed justices of the peace by royal commission. *See* tenBroek, *supra* note 85, at 262 & n.27.

¹⁵⁸ The administrators were responsible for "settinge to worke all such [poor] psons married or unmarried havinge no meanes to maintaine them," as well as for providing "the necessarie Reliefe of the lame impotent olde blinde and such other amonge them beinge poore and not able to work." 43 Eliz. 1, c.2 (1601).

¹⁵⁹ *See* Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 178-81 (1955) (for American version of Elizabethan Poor Law); LEONARD, *supra* note 127, at 133.

¹⁶⁰ 7 Jac. 1, c.4 (1609); 39 Eliz. 1, c.4, §§ II, III (1597); 39 Eliz. 1, c.3, § X (1597); 14 Eliz. 1, c.5 (1572); 27 Hen. 8, c.25 (1535); 22 Hen. 8, c.12 (1530); 11 Hen. 7, c.2 (1495).

¹⁶¹ 5 Eliz. 1, c.4, § XV (1562). This recodified at least the spirit of the old compulsory labor statutes of Edward III. *See supra* note 151.

¹⁶² 43 Eliz. 1, c.2 § I (1601); 39 Eliz. 1, c.3 § I (1597); *see* 18 Eliz. 1, c.3, § IV (1575-76).

¹⁶³ *See* 43 Eliz. 1, c.2, § II (1601); 39 Eliz. 1, c.3, § III (1597); 18 Eliz. 1, c.3, § IV (1575-76); *see also* 14 Eliz. 1, c.5, § XXII (1572); 3 & 4 Edw. 6, c.16, § VI (1549-50); 1 Edw. 6, c.3, § XI (1547); 27 Hen. 8, c.25, §§ VI, X (1535-36).

¹⁶⁴ 7 Jac. 1, c.4 (1609); 39 Eliz. 1, c.4, §§ II, III (1597); 39 Eliz. 1, c.3, § X (1597); 14 Eliz. 1, c.5 (1572); 27 Hen. 8, c.25 (1535-36); 22 Hen. 8, c.12 (1530); 11 Hen. 7, c.2 (1495).

them.¹⁶⁵ The law imposed financial responsibility on relatives for the maintenance of their destitute kinsmen.¹⁶⁶

The statutes sought to supplement such institutional relief as the locality was willing to provide by private charitable efforts.¹⁶⁷ To facilitate charitable giving, or at least its effectiveness, the statutes refined and expanded the law on charitable uses, principally to provide a mechanism to better ensure that charitable foundations devoted their resources in accordance with the wishes of the founder.¹⁶⁸ The purposes to which private charitable giving was devoted tended to mirror those of institutional relief.¹⁶⁹

The manner in which the system was implemented is significant evidence of its adherence to notions of poor relief "right" and "wrong" which flow from the static paradigm. Essentially, the Elizabethan system devised during the period preceding the English Civil War bears a striking resemblance to the medieval ecclesiastical system of relief it supplanted. Little more was really required where, as in Sixteenth Century England, the state could easily fill the vacuum left by the forced elimination of Church government and administration. The differences between the two systems amounted to little more than substitutions of procedures which made the secular system substantially more efficient and sophisticated. Institutional relief was still delivered locally; the locality with the relief obligation was still to provide and distribute the funds for local relief. Local taxation and the charitable

¹⁶⁵ 43 Eliz. 1, c.2, §§ I, III (1601); 18 Eliz. 1, c.3, § IV (1575-76); 27 Hen. 8, c.25, § VI (1535-36).

¹⁶⁶ 43 Eliz. 1, c.2, § VI (1601); 39 Eliz. 1, c.3, § VII (1597); 18 Eliz. 1, c.3, § I (1575-76). In late Tudor England and during the colonial period in this country, the primary duty to support extended to spouses, parents, grandparents and children, each with a duty to support all of the others. See Riesenfeld, *supra* note 159, at 199. Some states, such as New York, also extended the familial obligation of support to grandchildren. tenBroek, *supra* note 85, at 294. The obligation to support extended to illegitimate children and to spouses and children abandoned by the other parent. *Id.* at 284-86.

¹⁶⁷ See POUND, *supra* note 115, at 69-76 (private charity might even, in aggregate, exceed total state expenditures on relief); LEONARD, *supra* note 127, at 210-15; MENCHER, *supra* note 15, at 37; tenBroek, *supra* note 85, at 259-60.

¹⁶⁸ Thus, charitable corporations could be created and endowed in perpetuity, and 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 done, the Chancellor was empowered to appoint commissions "to enquire . . . of all . . . such Guift . . . and of the Abuses and . . . Falsities defrauding of the Truste Intente." 43 Eliz. 1, c.4 (1601); 39 Eliz. 1, c.5-6 (1597). See also 14 Eliz. 1, c.14 (1572). The ability of the state to regulate private charities was more important because during the 16th Century a significant amount of money was placed in private charitable institutions as a result of the abolition of the monasteries. See tenBroek, *supra* note 85, at 266-67.

¹⁶⁹ See POUND, *supra* note 115, at 70-74.

endeavors of the local citizenry remained the principal sources of funding for relief, the latter also backed by the power and support of the state.¹⁷⁰ None of this was new. These practices and the concepts of local charity and local institutional obligations to fund relief efforts had been deeply embedded in English custom and practice through the mechanism of the tithe and the procedure for *denunciatio evangelica* under Canon Law.

The Elizabethan Poor Law system and English local practice in the seventeenth and eighteenth centuries¹⁷¹ provided the foundation for the construction of poor relief systems in the United States.¹⁷² All of the original colonies, whether or not originally settled by the British, ultimately embraced substantially all of the notions inherent in the Elizabethan Poor Law.¹⁷³ Transmitted through the law of the original colonies, the Elizabethan system was adopted by virtually every other state in the United States.¹⁷⁴ Oddly, perhaps, this system, as adopted, appeared untouched either by the Industrial Revolution or the vaunted progress of Anglo-European society from one of status to one of contract.¹⁷⁵ Poverty remains a condition of status, a caste apart from the rest of society which no amount of Enlightenment rhetoric al-

¹⁷⁰ In this manner, the state appropriated one of the two significant parts of the canonic system, the institutional system of parish poor relief providing the rest of the formal apparatus of aid. A sizeable portion of the other part of ecclesiastical poor relief—private charitable efforts—was left to the continued ministrations of religious organizations. See LEONARD, *supra* note 127, at 210–20; MENCHER, *supra* note 15, at 25–26, 95–96.

¹⁷¹ See Riesenfeld, *supra* note 159, at 176–77; Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931) for descriptions of English legal and local practices during the American colonial period.

¹⁷² For a description of a fairly standard system of poor relief in America during the 1930s, that of Alabama, and the striking parallels of that system to that of 17th century England, see WAYNE FLYNT, *POOR BUT PROUD: ALABAMA'S POOR WHITES* 281–320 (1989).

¹⁷³ See Riesenfeld, *supra* note 159, at 201–33; MENCHER, *supra* note 15, at 44–48.

¹⁷⁴ In this respect, the adoption of the Elizabethan Poor Law followed the pattern of the adoption of the English common law in the United States. See Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAN. L. REV. 791 (1951).

¹⁷⁵ See Mencher, *supra* note 15, at 21–53. In this respect, the United States is heir to a long tradition of social and political discourse of this nature. See generally, OLWEN H. HUFTON, *THE POOR OF EIGHTEENTH CENTURY FRANCE: 1750–1789*, at 131–19 (1974) (discussing formal and informal means for relieving poverty in 18th Century France); JEAN SARRAILH, *LA ESPANIA ILUSTRADA DE LA SEGUNDA MITAD DEL SIGLO XVIII* 528–43 (1954) (trans. from French by Antonio Alatorre) (discussing proposals current during Spanish Enlightenment respecting solutions to problem of poverty). Gertrude Himmelfarb has ably described the rhetorical effect of post-Enlightenment thinking on the discourse of the means of making the poor productive, none of which affected the fundamental views of society toward poverty or its poor. HIMMELFARB, *supra* note 94, at 42–304.

tered.¹⁷⁶ Indeed, this status even has a name—the “underclass.”¹⁷⁷ Unlike Britain, which abandoned the forms and underlying assumptions of stasis memorialized in the Elizabethan Poor Law upon the adoption of the National Assistance Act,¹⁷⁸ systems of poor relief in the United States, at both the state and federal levels, continue to build on the notions, and to be subject to the constraints inherent in the underlying stasis, of the Elizabethan system.¹⁷⁹

C. *Out of Paradigms and Archetypes: A General Theory of American Poor Relief*

Let us assume for a moment that state and local governmental systems of poor relief are essentially static (an assumption we will examine below in connection with the nature of change inherent in such systems). The model tells us a number of things about the characteristics of such systems. First, the system accepts as given the fundamentals of the current social and economic order, including income and social inequality. We would expect, 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.¹⁸⁰

¹⁷⁶ See *supra* text accompanying notes 107–12; HIMMELFARB, *supra* note 94, at 393. It is hard to remember our lessons about the demise of law based on status when society continues to employ the social sciences to prove that the poor continue to constitute a caste apart. Oscar Lewis confidently described what makes the poor different:

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 deter gratification and to plan for the future; widespread belief in male superiority; and high tolerance for psychological pathology of all sorts.

Oscar Lewis, *The Culture of Poverty*, in *ON UNDERSTANDING POVERTY* 187, 191–92 (Daniel P. Moynihan ed., 1968).

¹⁷⁷ AULETTA, *supra* note 86; Jencks, *supra* note 34.

¹⁷⁸ 11 & 12 Geo. 6, c.29 (1948); see FURNISS & TILTON, *supra* note 27, at 104–21.

¹⁷⁹ Riesenfeld, *supra* note 159, at 178. Cf. Bensinger, *supra* note 35 (examining California general assistance provisions); Nancy S. Blanton, *General Assistance in California*, 12 SAN FERN. V. L. REV. 31 (1984) (same); Stephen E. Kravit, *Standards for General Assistance in New Hampshire: An Analysis and Proposal*, 16 N.H. BAR ASS'N J. 135 (1974) (examining New Hampshire's general assistance provisions and derivations from Elizabethan Poor Law).

¹⁸⁰ For instance, even the programs of the 1960's Great Society have been described as attempting to give the eligible poor the tools to function within the economic system, and not to change the system itself. See MEAD, *supra* note 14, 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., TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, 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

Since income inequality rewards productivity and industry, all systems of poor relief should focus on income or in-kind maintenance. While each generation produces its losers, no loser should be required to live below a certain level of dignity. Systems of poor relief are meant to ensure that those that have less do not have so little that they are unable to live in a minimally acceptable manner. 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 (who are perceived to be economic criminals). For them, support is more likely to compel self-help (employment). In any case, we should expect our system of poor relief to be crafted as a minimalist system, in the sense of providing minimal assistance.¹⁸¹ It is not fashioned to eradicate, or even ameliorate, income inequality. It merely sustains, to varying degrees, those without resources sufficient for the purpose.

With this in mind, the theory would further suggest that these systems exhibit a certain tension between the desire to provide for those at the bottom end of the scale of social and income inequality and the notion that people ought to keep what they earn (and therefore should not be forced to part with it to enrich the deliberately unproductive). This tension should be most clearly evidenced by the

the previous chapter, but also on policies concerning the working poor.") This, of course, is not to suggest that this notion has never been challenged. For instance, so-called universalists and economic libertarians continue to argue that the whole basis on which relief is accorded must be changed. See *infra* Part VI, *Summary in the Form of a Commentary: Are Static Systems Good or Bad*. Significant voices in academia have, for years, argued that a national guaranteed income program would eliminate the need both to maintain the poor and to continue to employ a large bureaucracy of alms givers. See, e.g., David A. Larson, *Long Overdue: The Single Guaranteed Minimum Income Program*, 69 U. DET. MERCY L. REV. 353, 355 (1992). 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., Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981). But see Ellickson, *supra* note 65. Academic scholars have also begun to explore the utility of a universalist approach to poor relief, either as a means of fulfilling the potential of the current economic and social system, Skocpol, *supra* note 111, or as a means of overturning it, PIVEN & CLOWARD, *supra* note 14.

¹⁸¹ This might be especially true where the level of giving approaches what would be available if the recipient held a job for which the recipient were qualified. Note that the incentive to prefer one to the other shifts as the level of relative benefits shifts and as the intangible costs of benefit acquisition changes. Thus, for example, as the humiliation level increases in connection with the provision of aid from the state, the cost of receiving aid versus getting a job increases, and the recipient is more likely to prefer one (the job) to the other (the humiliation). This, apparently, is the theory employed by some county agencies charged with the dispensing of general assistance. See, e.g., Handler, *supra* note 6, at 524-33 (describing practices in Los Angeles County, California). Unfortunately, analyses like this may not matter where there are no jobs available, whatever the cost of alternative forms of benefit provision. See, e.g., RIEMER, *supra* note 19, at 43-56.

tendency of static systems to eschew an absolutist definition of poverty in favor of a political definition.¹⁸² And, as should be expected, political definitions might break down along economic, race, gender, and ethnic lines.¹⁸³ While these lines can get crossed, they should reinforce the underlying assumption that interference with the private ordering of economic or social relationships is forbidden.¹⁸⁴ Aid is always "too generous," and contributes to the breakdown of the work ethic,¹⁸⁵ or family or traditional values,¹⁸⁶ or to the decay of large cities.¹⁸⁷

Another characteristic we should observe with uniformity is that the system should be separable from other programs and concerns of government. This follows from an acceptance of the notion that the needy are the cause of their own need. The problems of the poor are either a result of unfortunate circumstances which render people unable to support themselves, or the consequence of an intentionally made vicious or deviant lifestyle choice. Poor relief systems are, therefore, structured to ameliorate the results of need; amelioration of the

¹⁸² See STEINER, *supra* note 34, at 108-75; 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, 855-67 (1976); see also *supra* notes 88-92.

¹⁸³ The political debate mirrors the general debate in the United States concerning the changing role of people in society and the redistribution of power generally in this society during the latter part of the 20th Century. While the debate is important to the nature of particular effects of such changes on non-majority peoples, and the powerless, it lies beyond the scope of this article. See, e.g., articles cited *supra* note 51.

¹⁸⁴ A current example: should the amount of welfare payments made to single parents be dependent on the number of children in the household? This question could encompass questions of race, Morley D. Glick, *Transgenerational Welfare Dependency*, 4 J. CONTEMP. STUD. 31 (1981), gender, Law, *supra* note 51, sexual orientation, *Aids and Homelessness: Personal Accounts*, LAW & LIBERATION; 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 (1990-91), handicap, 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) and ethnicity, Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319 (1992).

¹⁸⁵ LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 13, at 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.").

¹⁸⁶ GILDER, WEALTH AND POVERTY, *supra* note 34, at 64-74, 259-69 (loss of faith and traditional values are at core of poverty problem); GILDER, MEN AND MARRIAGE, *supra* note 14, at 79-98 (family values and traditional gender roles are bedrock of stable and independent working class); GLAZER, *supra* note 34, at 140-46 (strength of traditional structures—family, church, ethnic group, neighborhood and voluntary organizations—are essential and have been replaced ineffectively by institutionalized forms of relief); Bush, *supra*, note 99 (seeking replacement of governmental charity by traditional forms of voluntary efforts).

¹⁸⁷ Skelton, *supra* note 12 (Address by Governor of California arguing state will continue to lose jobs as long as welfare spending remains out of control); WILSON, *supra* note 14, at 46-62.

causes of need focuses on programs which can "fix" the poor. The problem of alleviating the condition of the poor is, in this manner, treated as quite distinct from labor policy, discrimination policy, monetary policy, military procurement or any other problem or policy area. Static poor law systems tend to respect these boundaries.¹⁸⁸ It would follow that since poor relief does not touch on complex matters of policy, but does concern itself with cost minimization, much of the administrative machinery of poor relief should be found at the local level. Local administration, it is believed, reduces aggregate costs and simplifies the process of discriminating between classes of the needy, effectively eliminating all who do not qualify for aid.¹⁸⁹ The "relief of the poor is a matter which can only be efficiently administered by men who have a great knowledge of detail."¹⁹⁰

As a minimalist and discriminatory system, the static model would dictate different treatment of the various categories of potential recipients of aid.¹⁹¹ Since stasis assumes that the poverty of the able-bodied reflects voluntary lifestyle choice, it follows that poor relief to the able-bodied should be extremely troublesome, at least to the extent that such aid is perceived as a reward for the decision not to work. As a consequence, aid to the able-bodied will be kept to a minimum, and likely will be limited to the provision of minimally necessary food and shelter. In many jurisdictions, governmental aid to the able-bodied without minor children may approach nothing. For example, Ari-

¹⁸⁸ See, e.g., FURNISS & TILTON, *supra* note 27, at 164-66 (noting while notion of full employment has been embraced as ideal, government has taken minimalist attitude to its achievement, relying on private sector to achieve 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 TASK FORCE ON POVERTY, *supra* note 13, at 43. But the separation of poor relief policy (as an ameliorative device) from other social policy areas has come under increasing criticism. See, e.g., FOLKE DOVRING, *INEQUALITY: THE POLITICAL ECONOMY OF INCOME DISTRIBUTION* 146-48 (1991) (arguing United States should take more active role in achieving full employment); BLUESTONE & HARRISON, *supra* note 32; Reimer, *supra* note 19.

¹⁸⁹ See LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 13, at 51; TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 93. Local administration makes it easier for the providers of relief (taxpayers) to politicize the granting of aid. See Bensinger, *supra* note 35, at 506.

¹⁹⁰ LEONARD, *supra* note 127, at 133.

¹⁹¹ The term "discriminatory" is used here both in the sense of treating different classes of people differently in accordance with economic criteria, and also in the commonly understood sense of different treatment on the basis of such categories as race, gender, sexual orientation, ethnicity, and religion.

zona,¹⁹² Delaware,¹⁹³ Hawaii,¹⁹⁴ Louisiana,¹⁹⁵ Massachusetts,¹⁹⁶ New Mexico,¹⁹⁷ North Carolina,¹⁹⁸ Ohio,¹⁹⁹ Oregon,²⁰⁰ South Carolina,²⁰¹ Tennessee,²⁰² Washington,²⁰³ West Virginia,²⁰⁴ Wyoming²⁰⁵ and the District of Columbia²⁰⁶ do not provide significant aid of any kind to people who are not otherwise worthy. Worthiness is likely measured as a function of ability to qualify for any one of the federal categories entitling a person to federal assistance. The recent concern about the homeless

¹⁹² Arizona provides assistance only to persons who are unemployable. *See* ARIZ. REV. STAT. ANN. § 46-233 (1988).

¹⁹³ Delaware limits aid benefits to the elderly, families with dependent children, the disabled and to unemployables. *See* DEL. CODE ANN. tit. 31, § 505 (1985).

¹⁹⁴ Hawaii provides aid only to the aged, blind and the disabled in accordance with the eligibility requirements of the Supplemental Security Income Program. HAW. REV. STAT. § 346-52 (1991).

¹⁹⁵ Louisiana provides aid only to needy, infirm, sick or disabled persons. LA. REV. STAT. ANN. § 46:464 (West 1982).

¹⁹⁶ Massachusetts limits aid programs to families, children, unmarried parents and the elderly. MASS. GEN. LAWS ANN. ch. 18, § 2(A) (West Supp. 1992).

¹⁹⁷ "[P]ublic assistance shall be provided under a general assistance program to or on behalf of eligible persons who are under eighteen years of age and meet all eligibility conditions for aid to families with dependent children except the relationship to the person with whom they are living" or are temporarily disabled and are not receiving AFDC. N.M. STAT. ANN. § 27-2-7 (Michie 1978).

¹⁹⁸ In North Carolina, persons who may be eligible for public assistance are limited to families, persons at least 65 years old, or persons between the ages of 18 and 65 who are permanently and totally disabled. *See* N.C. GEN. STAT. §§ 108A-28, -41 (1988).

¹⁹⁹ Ohio has a general assistance program that is available to persons over the age of 18 and under the age of 60. *See* OHIO REV. CODE ANN. § 5113.03 (Baldwin Supp. 1992).

²⁰⁰ The Oregon Adult and Family Service Division proscribes the eligibility requirements for general assistance, but Oregon law does not list any specific requirements except for state residence. *See* OR. REV. STAT. §§ 411.710, .740 (Supp. 1989).

²⁰¹ South Carolina's general relief program is available only to needy families or handicapped and unfortunate persons who are not eligible for any other type of assistance and unable to support themselves due to a physical or mental infirmity. *See* S.C. CODE ANN. §43-5-65 (Law. Co-Op. Supp. 1992) & § 43-5-310 (Law. Co-Op. 1985).

²⁰² The only programs available to the poor are medical assistance, community clinics, food stamps, energy assistance, and job opportunity programs. *See* TENN. CODE ANN. §§ 71-5-101 to -1310 (Supp. 1992).

²⁰³ In Washington, general assistance is available only to people who are ineligible for federal aid assistance and who are either pregnant or incapacitated due to a physical or mental infirmity. *See* 1992 Wash. Legis. Serv. ch. 165 (West).

²⁰⁴ West Virginia does not provide public or general assistance to indigent persons.

²⁰⁵ Wyoming law does not provide public assistance except for AFDC, although it states that programs are to be provided to individuals who lack sufficient income or resources to provide for themselves. *See* WYO. STAT. § 42-2-103 (Supp. 1992).

²⁰⁶ The District of Columbia provides for AFDC, General Assistance for Children, Emergency Shelter Family Services, and General Public Assistance. D.C. CODE ANN. § 3-202.1 (Supp. 1992). However, General Public Assistance is available only to disabled persons. D.C. CODE ANN. § 3-205.42a (Supp. 1992).

will not change the nature of the response of state and federal governments, even with respect to the destitute able-bodied who lack minor children to support.²⁰⁷

Since work is "good" and unemployment is "bad," static systems tend to implement programs that make the provision of aid for unemployed able-bodied recipients as unpleasant as possible.²⁰⁸ Since the core societal imperative under a static regime is to work, we should also expect static poor relief systems to require the able-bodied poor to labor for whatever aid is provided.²⁰⁹ Those able-bodied poor who refuse to work for their keep, whether it be provided by the state or otherwise, will be punished. This punishment would consist of criminalizing acts of vagrancy or otherwise assessing penalties on those who earn their living without the benefit of gainful, honest employment.²¹⁰

²⁰⁷ See, e.g., Norman Siegel, *Homelessness: Its Origins, Civil Liberties Problems and Possible Solutions*, 36 VILL. L. REV. 1063 (1991) (arguing homelessness in places like New York City is function of displacement of racial minorities caused by urban development); Donald E. Baker, Comment, "Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. MIAMI L. REV. 417, 424-25 (1990-91) (describing response of cities to homeless problem).

²⁰⁸ In contemporary terms, the procedures devised for the determination of eligibility can be complex and drawn out. See, e.g., First Amended Complaint For Equitable Relief, ¶¶ 6-41, *City of Los Angeles*, *supra* note 47 (discussing intake procedures for general assistance in Los Angeles, California). The receipt of aid is deliberately meant to be a humiliating experience, where, in return for aid, a substantial amount of privacy is surrendered. See PIVEN & CLOWARD, *supra* note 14, at 149-61 (describing burdensome and humiliating procedures used in "intake" process through 1960s); SUSAN SHEEHAN, A WELFARE MOTHER 19-24, 60-66 (1976). But see Simon, *Legality, Bureaucracy*, *supra* note 21, at 1200-22 (stultifying effects of seeking aid is by-product of routinization and bureaucratization of welfare delivery). The very basis of the proposals of commentators such as 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. See MURRAY, *LOSING GROUND*, *supra* note 14. 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 will needs decline in multitude. It is a secret known to all rat-catchers; stop up the granary-crevices, afflict with continual mew-ing, 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* 175 (Everyman ed., 1915).

²⁰⁹ And, as such, 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, JUDITH M. GUERON & EDWARD PAULY, *FROM WELFARE TO WORK* 79-125 (1991) (analysis based on studies of several work inducing or enhancing programs).

²¹⁰ See PIVEN & CLOWARD, *supra* note 14, at 147-77 (describing means by which welfare rolls are shrunk); Simon, *supra* note 133, at 632-33, 645-47 (discussing punishments for vagrancy); Jodie Levin-Epstein, *Changes that Won't Serve the Public Welfare*, WASH. POST, July 12, 1992, at C8 (describing amendments to Maryland's welfare rules, noting "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, available in LEXIS, Nexis Library, NPR File (Mississippi legislature considering requiring

Another form of punishment might involve conditioning the amount of benefits received on the conduct of the recipients.

In contrast, relief to the incapacitated should be more openhanded. The incapacitated did not make a deliberate choice to become unproductive, and are therefore more deserving of aid. Moreover, redistributing income in the form of aid to the incapacitated does not significantly threaten the social and economic system. The recipients of this aid are not economic outlaws. But even this aid, though graciously provided, will be limited by the cost minimization emphasis of the system and the tendency of static systems to mimic the underlying social and economic norms of productive society. Since society universally imposes an obligation on certain family members to support each other,²¹¹ that obligation will be mirrored in the obligations of any system of poor relief. Indeed, the obligations of certain family members to support each other has been legally recognized in the poor law of twenty-two states.²¹² The obligations extend not only to positive support, but also encompasses reimbursement to the state for prior support.

Because the maintenance of the incapacitated is significantly more costly to society than maintenance of the able-bodied (because the state will compel the latter to work), the determination of incapacity becomes a political question.²¹³ Stasis favors policy determinations

women on welfare with more than four children to use birth control and conditioning benefits on school grades of children of welfare beneficiaries).

²¹¹ Currently, state law almost uniformly imposes a duty on parents to support their minor children. See, e.g., OKLA. STATS. ANN. tit. 10, § 4 (West 1987); FLA. STAT. ANN. § 856.04 (West 1941); N.J. STAT. ANN. § 2C:24-5 (West 1937); TEX. FAM. CODE ANN. § 4.02 (West 1975). For a general discussion of the history of the legal obligations between family members, see Minow, *supra* note 11; tenBroek, *supra* note 85, at 287-91, 298-317.

²¹² See ALASKA STAT. § 47.25.230 (1990); CAL. WELF. & INST. CODE § 17300 (West 1991); CONN. GEN. STAT. ANN. § 46b-215 (West 1958); DEL. CODE ANN. tit. 31, § 511 (1953); GA. CODE ANN. § 36-12-3 (Michie 1981); ILL. ANN. STAT. ch. 23, para 10-2 (Smith-Hurd Supp. 1992); IOWA CODE ANN. § 252.2 (West 1946); ME. REV. STAT. ANN. tit. 22, § 4319 (West 1992); MASS. GEN. LAWS ANN. ch. 117A, § 7 (West 1981); MICH. COMP. LAWS ANN. § 401.3 (West 1991); MINN. STAT. ANN. § 256D.15 (West Supp. 1992); MISS. CODE ANN. § 43-31-25 (Supp. 1990); N.H. REV. STAT. ANN. § 165:19 (1955); N.Y. SOC. SERV. CODE § 101 (McKinney Supp. 1992); N.D. CENT. CODE § 14-09-10 (1943); OR. REV. STAT. § 416.010 (1991); PA. STAT. ANN. tit. 62, § 1973 (1930); R.I. GEN. LAWS § 40-5-13 (1956); UTAH CODE ANN. § 17-14-2 (1953); VA. CODE ANN. § 63.1-127 (Michie 1950); W. VA. CODE § 9-5-9 (1939); WIS. STAT. ANN. § 49.90(1)(a) (West Supp. 1991).

²¹³ See, e.g., MEAD, *supra* note 14, at 132-35; Grace M. Marcus, *Reappraising Aid to Dependent Children as a Category*, 8 SOC. SECURITY BULL. 3 (Feb. 1945); Richard P. Weishaupt & Robert E. Rains, *Sullivan v. Zebley: New Disability Standards for Indigent Children to Obtain Government Benefits*, 35 ST. LOUIS U. L.J. 539 (1991); 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); Michael Diehl, *Comment, Screening Out Worthy Social Security Disability Claimants and Its Effects on Homelessness*, 45 U. MIAMI L. REV. 617 (1990-91).

based in part on a notion that society is better off erring on the side of ability to work, than in favor of incapacity. Thus, a person unable to walk might still be fit for work as a typist.²¹⁴ We should expect, then, that static poor relief systems will create a broader rather than a narrower definition of capacity for work.²¹⁵ Static society fosters this notion in indirect as well as direct ways. Indeed, even the most well-intentioned efforts to protect the work rights of people traditionally considered disabled can have the effect of eliminating whole groups of such people from eligibility for poor relief assistance.²¹⁶

Furthermore, the narrower the definition of incapacity, the smaller the aggregate obligation of the state to its recipients.²¹⁷ Since the federal categorical aid programs cover certain narrowly defined classes of the incapacitated, we might expect states seeking to minimize expenditures to conform their definitions of incapacity to the federal definition. In that way, states can pass along a substantial cost of poor relief programs to the federal government. These practices evidence the manner in which the notions of worthiness and cost minimization are conflated in the highly manipulable concept of "disability."

²¹⁴ "Persons with physical disabilities hold down jobs of almost every description, and many more could if more were done to remove barriers to participation." TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, 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, § 301, 86 Stat. 1468 (1972); *codified at* 42 U.S.C. §§ 1382a(b)(4)(A)(iii), 1382a(b)(4)(B)(iv), 1382b(a)(4) (1988 & Supp. II 1990); 20 C.F.R. §§ 416.1180 et seq. and 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 84.

²¹⁵ "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." TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 86.

²¹⁶ See, e.g., Rehabilitation Act of 1973, 29 U.S.C. § 794 (1992) (as amended); Americans with Disabilities Act of 1990, P.L. 101-336, 104 Stat. 327 (1990) (*codified at* 42 U.S.C. §§ 12101 et seq.).

²¹⁷ Certainly the Reagan Administration understood this concept quite well. As a result, the Reagan Administration fought a very 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 ("SSI"). 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. 42 U.S.C. §§ 1381-1383 (1988 & Supp. II 1990). See TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 85-86. In addition, the Reagan Administration attempted to shrink the size of the eligible population by interpreting narrowly 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 brought by claimants for wrongful denial of benefits. In the ensuing political storm which followed, the Reagan Administration abandoned this approach. MEAD, *supra* note 14, at 134.

Substantial reliance on private charity, our model tells us, should also follow from a static society's reluctance to redistribute income.²¹⁸ In this, of course, Western society 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 the relief of those who do not have enough even to meet their basic needs.²¹⁹ And yet, it need not. There exist practical and theoretical alternatives. It continues to do so only by reason of adherence to the "rules" and assumptions of the static paradigm.²²⁰

The paradigm would predict system indifference with respect to the manner in which the institutional relief is dispensed—that is, either by a class of professional case workers or by a proletarianized work force shorn of any discretionary authority. In either case, the goal of the system is the transfer of the minimum amount necessary. For purposes of crafting a static system, the only difference between them is whether a caseworker will make the determination on the basis of individualized perceptions of minimal needs, or whether such determinations will be made in gross form by resort to rules and regulations prescribing such minima.²²¹ Currently, federal aid is dispensed by a proletarianized work force whose discretion is sharply limited by statute and regulation; state systems will tend to follow suit, as the least expensive alternative for the distribution of relief.²²²

²¹⁸ Gilbert Steiner describes the complexity of this reliance on charity—both positive and negative charity—in relating the results of the elimination of all forms of general assistance in Clermont County, Ohio in 1961. The result, according to Steiner was not only an increase in the demands on local charitable organizations, but increases in negative charity as well (late rent, food on credit and the like). See STEINER, *supra* note 34, at 9. Even in periods of economic stress, private charitable efforts do not diminish. See Anita Manning, *Charitable Spirit Survives Hard Times*, USA TODAY, Oct. 16, 1992, at D1. Indeed, the nation's political leaders have been in the forefront of arguing for the expansion of charitable efforts over the last decade or so. See, e.g., Bush, *supra* note 99.

²¹⁹ See *infra* Part III.B, *Paradigm Archetypes*.

²²⁰ Indeed, where one hypothesizes a non-static system, one might well argue that private charity becomes inefficient, and, ultimately superfluous. See, e.g., Abrams & Schütz, *supra* note 100; Edley, *supra* note 103. But see Ellen Winston, *Some Aspects of Private Philanthropy in Relation to Social Welfare*, II RESEARCH PAPERS (PHILANTHROPIC FIELDS OF INTEREST) 677–97 (1975) (Sponsored by Commission on Private Philanthropy and Public Needs, U.S. Treasury Dept., 1977).

²²¹ Of course, as William Simon has amply demonstrated, even this difference in approach can substantially affect the benefits available in individual cases. See Simon, *Invention*, *supra* note 36, at 34–37; Simon, *Towns Without Pity*, *supra* note 133, at 1489–92; Simon, *Legality, Bureaucracy*, *supra* note 21, at 1201–22.

²²² For a critical description of the means by which federal categorical aid is dispensed, primarily AFDC, see Simon, *Legality, Bureaucracy*, *supra* note 21, at 1201–22.

IV. LIMITS ON THE POSSIBILITIES OF REFORMATION OF AMERICAN SYSTEMS OF STATIC POOR RELIEF

I have discussed what a static system is and its likely primary characteristics when implemented. The model provides a guide for understanding the nature of the universe in which the static system builder operates and a description of the parameters of ideal poor relief systems. The static system builder will tend to tinker with systems to minimize the difference between actuality and the ideal. However, as a limited, and perhaps limiting view, the static paradigm requires the treatment of any significant deviation from the ideal with suspicion.²²³ As such, the static system builder will tend to restructure programs which deviate (whether in form or effect) from the static mold into programs more acceptable from that perspective. In this section, I will define the characteristics of two principal types of limitations to the reformation of static systems of poor relief. The first deals with characteristics which undermine the very foundations on which the static world-view is based; this I describe as "dynamic" reformation. These forms of change are taboo under a static regime. The second deals with that fairly limited universe of approaches to the "problem" of poor relief that constitutes the sole means of approaching the reform of static systems.

A. Defining What a Static System is Incapable of Being: A Prolegomenon to a Dynamic View

At the core of what a static system is not, predictably enough, is the notion of change. The distinguishing feature of a dynamic approach is its acceptance of the notion that as a result of intervention, the problems of poverty, destitution and the like can be eradicated.²²⁴ Intervention can take many forms. For some, it may involve as little as the application of certain rehabilitative or therapeutic policies;²²⁵ for

²²³ Among the more spectacular examples of this suspicion of the new is perhaps the reaction to and ultimate defeat of President Nixon's Family Assistance Plan in the early 1970s, a substantially watered down and perhaps problematic, negative income tax proposal. For a discussion of the Family Assistance Plan and its ultimate defeat, see DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN* (1973).

²²⁴ Commentators have, over the years, urged or argued for the adoption of this type of approach to solve the problem of poverty in the United States. See, e.g., HAVEMAN, *supra* note 32, at 29-50; LAMPMAN, *supra* note 63, at 135-45.

²²⁵ See Skocpol, *supra* note 111, at 411-34.

others, intervention requires coordinated manipulation of labor markets and general assistance,²²⁶ or the reduction of the extremes in our system of income inequality by redistributing wealth.²²⁷ It may even imply the need to overhaul the social and economic basis of society in the United States.²²⁸ In all of these notions, the goal is similar—to end dependency and exploitative economic relationships between groups, not merely to prevent destitution.

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 the more traditional static system, or not thought of much at all.²²⁹ There are several elements commonly shared by the various proponents of the modern dynamic approach: (i) the desire to change the mores and attitudes of the targeted group, (ii) the perceived necessity of providing economic incentives to prod the people whose mores and attitudes have been changed to take specific concrete actions (ordinarily, to get and keep a job); (iii) the necessity of reducing income inequality (equality of result), or the need to reduce inequality of opportunity, or some form of labor or job creation policy, or a combination of these three.

The first element encompasses the imposition on the targeted poor of certain rehabilitative, therapeutic or educational services. Such imposition rests on the theory that the problems of this group are much more than economic and that the giving of money without

²²⁶ See, e.g., WILSON, *supra* note 14; William J. Wilson, *Public Policy Research and "The Truly Disadvantaged"* 460–81, in *THE URBAN UNDERCLASS* (Christopher Jencks & Paul E. Peterson eds., 1992); RIEMER, *supra* note 19.

²²⁷ See, e.g., SHELDON DANZIGER & DANIEL FEASTER, *INCOME TRANSFERS AND POVERTY IN THE 1980s* (1984) (advocating creation of form of guaranteed minimum income program to eradicate poverty); HAVEMAN, *supra* note 32.

²²⁸ See, e.g., PIVEN & CLOWARD, *REGULATING*, *supra* note 14, at 345 (advocating reforms in economic policy "that would lead to full employment at decent wages."). But see PIVEN & CLOWARD, *NEW CLASS WAR*, *supra* note 40 (where authors take position welfare state is here to stay, and with it, transformation of American political economy; this is in effect the less desirable alternative they recognized in *REGULATING*, *supra* note 14, at 345–48).

²²⁹ 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. For instance, rather than provide maintenance for the respectable poor, 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 111, at 411, 429.

providing social services increases dependency.²³⁰ The premises underlying the creation of dynamic goals are that most of the recipients of relief who are potentially employable would work if given the opportunity, that the only thing standing between these recipients and a job is proper training and referral to existing jobs, and that, once so trained and referred, these recipients would become self-sufficient.²³¹ There is a fundamental distinction between these notions and those of the static system. Some of those favoring the dynamic approach believe that the poor are desperate to find work, if only there was work to be had²³² or sufficient information about available work or training to make one better prepared for available jobs.²³³ Contrast the basic dynamic presumptions with that of those accepting the static notion of things, the latter of whom tend to believe that unemployment is a lifestyle choice, not dependent on any extraneous disjunctions between the potentially employable and the job market.²³⁴

The second element encompasses the structuring of programs of poor relief to provide targeted populations with incentives to seek jobs, training and placement services. Incentives can be positive (provide more money if the recipient cooperates) or negative (reduce the level of benefits if the recipient does not cooperate).²³⁵ Dynamic systems, though, need not be limited to actions directly affecting the poor. The so-called universalists, for instance, have argued that the dynamic goal of eradication cannot be achieved without regard to general labor policy,²³⁶ a domain traditionally separated from "poverty" policy. When related to labor policy, dynamic approaches have also been charac-

²³⁰ See HANDLER & HOLLINGSWORTH, *supra* note 106, at 104-05 (roughly speaking, equality of opportunity view).

²³¹ See MURRAY, *supra* note 14, at 23.

²³² See Marta Tienda & Haya Stier, *Joblessness and Shiftlessness: Labor Force Activity in Chicago's Inner City*, in THE URBAN UNDERCLASS 135 (Christopher Jencks & Paul E. Peterson eds., 1991) (study based on Chicago neighborhood; authors conclude number of people who did not want to work for socially intolerable reasons comprised small subset of unemployed able-bodied studied); REIMER, *supra* note 19, at 64-89; Robert J. Lampman, *What Does it Do For the Poor?—A New Test for National Policy*, 34 PUB. INTEREST 66 (1974).

²³³ This is perhaps best exemplified by the thinking that resulted in the creation of the Manpower Demonstration and Training Act (MDTA, 1962-1973) 42 U.S.C. § 2517 et seq. (1988) (repealed by Pub. L. 93-203, Title VII, § 714, 87 Stat. 883, Dec. 28, 1973), The Comprehensive Employment and Training Act (CETA, 1973-1982), 29 U.S.C. § 801 et seq. (1988) (repealed by Pub. L. 97-300, Title I, § 184(a)(1), 96 Stat. 1357, Oct. 13, 1982) and the Job Training Partnership Act (JTPA, since 1982), 29 U.S.C. § 1501 et seq. (1988 & Supp. II 1990). See MEAD, *supra* note 14, at 27.

²³⁴ See Taylor, *supra* note 12; *supra* Part III.A, *Critical Assumptions: The Static Paradigm*.

²³⁵ See, e.g., MURRAY, *supra* note 14, at 154-56.

²³⁶ See, e.g., TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 16, 42-45; HAVEMAN, *supra* note 32; WILSON, *supra* note 14, at 149-59; Neckerman, et al., *supra* note 22, at 416-19.

terized by an insistence on the interplay between wage policy and poverty—a fusion which requires, at a minimum, substantial changes in the minimum wage structure.²³⁷ Proponents of dynamic, eradivative approaches to poor relief believe, in Cass Sunstein's words, that "[i]t is a gross misstatement, even if a fashionable one, to suggest that social and economic regulation has generally proved unsuccessful."²³⁸

The third element introduces social change into the equation. It is perhaps in this area, more than in any other, that the dynamic approach clearly begins to distinguish itself from traditional approaches. A fundamental goal of this dynamic approach is to make the poor disappear; that requires the poor not to be poor. The easiest way to achieve this is to require the better-off to support the less well-off through taxes or other forms of income redistribution. This can be accomplished in a variety of ways, all of which are fundamentally dynamic. These approaches range from the relatively conservative to the radically transformative, and include negative income tax proposals,²³⁹ the increase of income transfers or entitlements based on income levels and related proposals,²⁴⁰ and the notions generally of equality of results for traditionally marginalized groups.²⁴¹ Dynamic proposals are not necessarily limited to the problems of relative poverty, which can be corrected by income redistribution. Such programs, as proposed, also tend to be somewhat universalist—tied to various programs calling for the restructuring of society, including the redistribution of political

²³⁷ See Paula Roberts, *Why Don't We Do It Right This Time? Redefining the Welfare Reform Debate*, 21 CLEARINGHOUSE REV. 1305 (1988). But see CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 100-101 (1990).

²³⁸ SUNSTEIN, *supra* note 237, at 2; see also TASK FORCE ON POVERTY AND WELFARE, *supra* note 13, at 28-30 ("The Task Force disagrees with the argument that the growth of social welfare programs during the 1970s is the major reason poverty rates are so high today." *Id.* at 28. However, "[w]e conclude that reforms of the welfare system are an important part of an anti-poverty strategy. At the same time, however, making work more attractive than welfare will require attention to the situation of the working poor." *Id.* at 30.).

²³⁹ 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. 678-98 (1969); William A. Klein, *Some Basic Problems of Negative Income Taxation*, 1966 WIS. L. REV. 776 (1966); Larson, *supra* note 180, at 355.

²⁴⁰ See, e.g., WILSON, *supra* note 14 (advocating integration of comprehensive labor policy for all classes and melding of social and economic classes); DAVID T. ELLWOOD, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* (1988); Francis F. Piven & Richard A. Cloward, *The Contemporary Relief Debate*, in *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* 45, 99 (Fred Block, et al. eds., 1987) (advocating creation of comprehensive national system of social provision for the poor).

²⁴¹ See, e.g., Richard Delsado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Anti-Discrimination Law*, 44 STAN. L. REV. 1133 (1933).

and economic power through programs affecting substantial portions of the society.²⁴² Such a restructuring is needed, proponents argue, because poverty is a structural component of our form of social organization—the inevitable and ineradicable by-product of our society as currently organized.²⁴³

There is yet no dynamic paradigm. There exists no fully developed conceptual world view to challenge the reigning static view of reality. Current dynamic approaches point the way to fundamental change. As such, they pose a clear threat to the established conceptual order. Indeed, as I discuss below, these dynamic approaches do not even exist within any acceptable conceptual framework of the static paradigm. As a result, they tend to be trivialized, marginalized and rejected as lying outside the mainstream by paradigmatic thinking seeking to preserve its intellectual hegemony.

B. *Static Systems and Limitations on the Possibilities of Change*

The underlying notions of the static view largely define the universe of possibilities available to the static system builder. In this section, I develop a model of the "typical" response of static system builders to a perceived need for the reform or modification of the system. This general theory of poor relief reformation is derived from the basic working assumptions which constitute the generally accepted intellectual framework for dealing with the poor—the governing paradigm. This general theory of the limitation of poor relief reform reflects both the strength of the static paradigm and the manner in which it imposes its views on social and political reality rather than receiving instruction from it.²⁴⁴

Programs which specifically disrupt the social or economic order are beyond the bounds of the conceptual framework of such builders.

²⁴² See, e.g., Alfieri, *supra* note 21, at 695-711; FRANCES F. PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 264-359 (1977).

²⁴³ See, e.g., PIVEN & CLOWARD, *supra* note 14.

²⁴⁴ Thus, paradigms are not powerful in an objective sense. Rather, paradigms, such as the static paradigm, derive their power from their ability to distort, or at least bend, the shape and limitations of perceived reality is derived from the works of Thomas Kuhn. See KUHN, *COPERNICAN REVOLUTION* *supra* note 2. As John 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 2, at 10 n.5.

Paradigmatic thinking builds substantial obstacles to such disruptions. Thus, consider the conceptual filter through which static system builders resist programs that reject the underlying static world view.²⁴⁵ It is not the social, economic or political system that is at fault, it is the recipients. Since jobs are available for all who seek them, there is no reason to integrate labor policy and policies seeking the eradication of unemployment among the able-bodied poor.²⁴⁶ Proposals which seek to transform the social, political or economic order rarely enter into the political debate; they remain confined to the rarified (and powerless) halls of academia. At those rare times that such transformative proposals rise to political consciousness, they are quickly shorn of their non-static characteristics and then rejected as dangerous, inadequate or unworkable. That, certainly, was the fate of President Nixon's negative income tax Family Assistance Plan in the 1970s.²⁴⁷ Thus neutralized, radicalism is confined within static notions of the acceptable. As I explore more closely in Part V, what passes for acceptable radicalism in the static view are efforts to make the poor more "responsible."

Poor relief, therefore, remains focused on the poor themselves. Since the able-bodied have made a vicious, or at least unenlightened, lifestyle choice, the correction lies not with the system, but with the recipient.²⁴⁸ Reforms will then likely take the form of punishment and compulsion, although these may often be couched in therapeutic language. Static programs will be modified to compel desired behavior more efficiently, that is, to substitute employment, any employment,

²⁴⁵ See Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993).

²⁴⁶ See MURRAY, *supra* note 14. (In proposing that welfare be eliminated, Murray argues that because benefit payments exceed what recipients could receive in real wages in labor market, the only way to induce able-bodied to work, and control their tendency to breed, is to eliminate most of these benefits. *Id.* All former recipients will then have incentive, previously lacking, to take jobs available, and jobs available would employ all who needed work in world where alternative to work is starvation. *Id.*). MEAD, *supra* note 14, at 4, 61 (since even most rudimentary types of jobs are available for substantially all who seek them, unemployment is far more a function of pickiness than of an inability to find work.). See *id.*, at 73, 76-82.

²⁴⁷ For a discussion of the rise, transformation, evisceration and defeat of the Family Assistance Plan, see DANIEL P. MOYNIHAN, *THE POLITICS OF GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN* (1973).

²⁴⁸ See Edward Weisband, *Introduction*, in *POVERTY AMIDST PLENTY: WORLD POLITICAL ECONOMIC AND DISTRIBUTIVE JUSTICE* 7, 8-9 (Edward Weisband ed., 1989). Thus, the poor are incapable of bettering themselves because they are unable to speak standard English. See Frederick Williams, *Some Preliminaries and Prospects*, in *LANGUAGE AND POVERTY: PERSPECTIVES ON A THEME* 1, 8-9 (Frederick Williams ed., 1970). The poor remain on welfare because they refuse to take available jobs. See MEAD, *supra* note 14, at 76-82. The poor do not accept or model their behavior in accordance with the norms of the middle-classes in American society. See GILDER, *supra* note 14, at 79-98; AULETTA, *supra* note 86, at 120-179.

for institutional maintenance. Adjustment of the benefit levels available to the poor and required attendance at what are thought to be job prospect enhancing programs are the forms which compulsion will most likely take.²⁴⁹

Compulsion of the type of which I speak is substantially punitive. That is clear enough from the use of benefit level adjustments as a stick to compel behavior. Punishment also takes more direct routes. Static reform efforts tend to permit criminal proscription of disapproved conduct, such as sleeping in the streets, urinating or washing in public, public intoxication,²⁵⁰ prostitution and, in some jurisdictions, fornication, adultery and other forms of deviant conduct as well.²⁵¹

As components of an essentially residualist and minimalist system, "reforms" will also tend to revolve around the need to save money. The more money is spent, the more taxes must be raised, and the larger the redistributive effect of the program. Consequently, reforms will tend to focus on cost-savings features. These would likely include narrowing the definitions of the eligible population,²⁵² or the modification or elimination of minimum maintenance levels for the poor,²⁵³ or the imposition of work or conduct requirements as a prerequisite for aid.²⁵⁴ These reductions can take various forms: for instance, the elimi-

²⁴⁹ GUERON & PAULY, *supra* note 209, review a number of such programs.

²⁵⁰ See, e.g., Baker, *supra* note 207, at 417-25, 429-31, 456; Simon, *supra* note 133, at 632-33, 645-47.

²⁵¹ Mississippi appears to lead the nation in direct reforms in this regard. Its legislature is considering a proposal to require welfare mothers with more than four children to submit to mandatory birth control. See *Mississippi Proposes*, *supra* note 210. It is argued that the tearing down of traditional gender roles and sexual conduct proscriptions, especially where such result in fornication and illegitimate births, are part and parcel of the reasons there exists so much poverty: a man without a wife and child to support has little reason to get and keep a job, or even to marry the woman with whom he breeds. See GILDER, *supra* note 14.

²⁵² PIVEN & CLOWARD, *supra* note 14, at 161 ("Keeping people off the [welfare] roles is the main method by which relief administrations keep costs down and ward off public attack."). One method of controlling the size of the eligible population is to require that the recipients have an address. This requirement, however, has been successfully challenged in California. See *Nelson v. San Diego County Bd. of Sup'rs.*, 235 Cal. Rptr. 305 (Cal. App. 1987). States have attempted to reduce the size of the eligible population in others ways: for instance, by income deeming—treating the income of relatives as available to the recipient for purposes of determining income eligibility. This also has been successfully challenged on occasion. See, e.g., *Bernhardt v. Alameda County Bd. of Sup'rs.*, 130 Cal. Rptr. 189 (Cal. App. 1976).

²⁵³ This is precisely the goal of the California welfare restructuring proposal I examine in some detail in Part V, *Government Accountability and Taxpayer Protection Act of 1992, California Proposition 165*.

²⁵⁴ See, e.g., MEAD, *supra* note 14, at 144-47; Elizabeth Neuffer, *Cash-Hungry States Revamp Welfare*, BOSTON GLOBE, July 22, 1992, at 1 (describing various behavior and work habit modification goals of several state reform proposals being considered in summer of 1992); *infra* note 257.

nation of cost of living increases,²⁵⁵ or of benefits tied to the number of children in the household, or capping the number of months a person may be eligible to receive aid.²⁵⁶ All such reductions, or efforts in that direction, will also be tied to efforts to vest local officials with greater discretion with respect to determining eligibility and setting benefit levels.²⁵⁷ These types of reforms form a central part of President Clinton's efforts to teach the idle poor some "responsibility."²⁵⁸ Additionally, states and localities will tend to tie benefits to federal programs, primarily because more of the financial burden would then be borne by someone else, in this case the federal government.

Lastly, static notions of poor relief encourage the belief that monetary savings can be achieved by increasing the participation of private charitable groups. These types of reform were made the central tenet of former President Bush's program for the revitalization of the federal welfare programs—the so-called "thousand points of light" campaign.²⁵⁹ Reliance on the belief that private charity is available to "fill the void" makes it easier to reform by a process of selective elimination. Thus, institutional reform can be characterized by the tendency to eliminate eligibility for selected categories of people, to reduce benefit

²⁵⁵ Reductions of cost of living increases can take at least two forms. In one guise, the state will pay newly arrived residents no more than the benefits to which they were entitled in the state in which they previously resided. See, e.g., WIS. STAT. ANN. § 49.19 (11m)(a) (West Supp. 1992); Proposed Law: The Government Accountability and Taxpayer Protection Act of 1992, California state initiative measure submitted for voter approval in accordance with CAL. CONST. art. II, § 8 on November 3, 1992 as Proposition 165, § 7. In another guise, the state directly reduces or eliminates any automatic adjustments in benefit levels based on any cost of living indicator. See *infra* Part V.B, *Examining the Limits of Static Systems: The Example of California Proposition 165*. Wisconsin's enactments in this regard have been self-consciously aimed not at rehabilitation but at cost reduction. Thus, its statute provides for the evaluation of some of its programs to determine whether they deter "persons from moving to this state. . . ." WIS. STAT. ANN. § 49.19 (am)(2)(e) (Supp. 1992).

²⁵⁶ For instance, in 1992, the Oklahoma Department of Human Services proposed that aid levels be reduced for all recipients, with greater reductions for able-bodied recipients, and that assistance be limited to two years. Wayne Greene, *Board Kicks off New Philosophy of Welfare*, TULSA WORLD, Sept. 1, 1992, at A1. One year later, the Department continued to push its program. See Wayne Greene, *Reform Plan Sets Curbs on Welfare*, TULSA WORLD, Oct. 27, 1993, at A1 (three year limit on welfare benefits). New Jersey has actually enacted such benefit limitations as part of its public assistance programs. See N.J. STAT. ANN. §§ 44:10-19 to -33 (West 1993).

²⁵⁷ This, of course, is precisely what the courts in jurisdictions like California have attempted to eradicate. See generally, Bensinger, *supra* note 35.

²⁵⁸ President Clinton has proposed a two-year maximum for welfare benefits. Such benefits would be terminated after two years if the recipient has failed to secure a job, and a government job would be substituted for the benefits. For a description of the plan, see PROGRESSIVE POLICY INSTITUTE, MANDATE FOR CHANGE 217-36 (W. Marshall & M. Schraw eds. 1993).

²⁵⁹ Bush, *supra* note 99; see also *supra* note 111.

levels below that determined to be minimally required by the very institution that implements the reduction or to reject calls for increasing benefits even to levels below the poverty line. Static systems will also seek reforms that make more efficient the manner in which private charitable contributions are actually received by the poor. This course of reform has been prominent on the agenda of static reformers since the Tudor period in England.²⁶⁰ In our own time, the problems of fraudulent solicitation, to take one example, generate much legislative concern.²⁶¹

Irrespective of the details, the conceptual framework of reform will be limited to refinements to the basic elementary model of relief—the provision of things for the physical maintenance of the poor. It rejects any attempt to proceed on the basis of a program that abandons the basic notion that people get what they deserve, and that the deserving will take care of themselves, absent physical or mental incapacity. Static reform will not take the form of any significant restructuring of the basic delivery mode for relief. Such attempts might require, if only to a small degree, the restructuring of the social and economic order, and that is beyond the consciousness of static system builders. Radical reform of static systems will tend to resemble that of California, New Jersey, Wisconsin or Michigan.²⁶² A static orientation, which attempts so little, cannot be expected to measure its reforms or changes by a larger scale.

V. APPLYING THE MODEL TO DETERMINE THE LIMITS OF CHANGE

The models derived from the static paradigm help explain why recent attempts to “reform” existing systems are futile, and why efforts by states to eliminate “poverty” make little real difference. I explore the nature of this futility first by considering the reasons why current systems of poor relief do not seem to accomplish their purpose. Then, by way of example, I will use the model to examine a “reform” proposal in pure form—the poor relief rules recently proposed and rejected in California.

²⁶⁰ See, e.g., LEONARD, *supra* note 127, at 77–78, 206–220; Glazer, *supra* note 34, at 1–17, 133–39, 168–92; tenBroek, *supra* note 85, at 265–70.

²⁶¹ See, e.g., Richard Steinberg, *Economic Perspectives on Regulation of Charitable Solicitation*, 39 CASE W. RES. L. REV. 775 (1988–89).

²⁶² See *infra* Part V.B, *Examining the Limits of Static Systems: The Example of California Proposition 165*.

A. *Explaining the Disjunctions Between Goals and Implementation; why don't current systems of poor relief seem to accomplish their purposes?*

At least since the end of the Second World War, and especially since the declaration of the first "War on Poverty" in 1964,²⁶³ governments at all levels have trumpeted an attempt to abandon the static paradigm underlying the existing systems of poor relief in favor of more dynamic, universalist approaches to the problem of poverty and inequality. This was accomplished by embracing the goal of eradicating poverty, and abandoning the goal of mere maintenance of the poor during the period of their poverty. These efforts have centered on the numerous federal categorical aid programs,²⁶⁴ which have served as the testing ground for this new approach. In recent years, mostly in response to growing concern about the cost of poor relief, states have mimicked federal efforts by lacing statements of the primary goals of their poor relief programs with eradivative notions. These state attempts have been similar to their federal counterparts. For the sake of simplicity I concentrate on the response of the states through their respective general assistance programs.²⁶⁵ State poor law changes ap-

²⁶³ President Johnson announced the "War on Poverty" in January, 1964, in connection with the passage of the Economic Opportunity Act of 1964, Pub. L. No. 88-452 (codified as amended at 42 U.S.C. §§ 2701 et seq. and repealed in 1981). See PIVEN & CLOWARD, *supra* note 14, at 256-59, 258 n.7.

²⁶⁴ For a description of federal categorical relief programs, through the early 1980s, see, SAR A. LEVITAN & CLIFFORD M. JOHNSON, *BEYOND THE SAFETY NET: REVIVING THE PROMISE OF OPPORTUNITY IN AMERICA* (1984). For a discussion of changes since the early 1980s, see Handler, *supra* note 6, at 501-23.

²⁶⁵ Recall that federal categorical grant programs are administered by state welfare departments along with state general assistance programs. As William Simon has noted, the developments affecting each of these programs correspond to analogous developments in the others. See Simon, *supra* note 21, at 1201. But, Theodore Marmor and others have argued that the federal programs of categorical assistance are often the contradictory product of evolving compromises among four different views of the purposes of poor relief: behaviorist (poor law must induce the poor to behave in a more socially acceptable manner), residualist (poor law must provide subsistence for those who are unable to provide for themselves at that level), social insurance (poor law must provide economic security, prevent destitution rather than rescuing the fallen), and egalitarian/populist (poor law is a means to redistribute income and overcome the evils of modern capitalism). MARMOR ET AL., *supra* note 10, at 23-31. From the perspective of the theory I have developed, the static orientation and American systems of poor relief certainly encompass Marmor's behaviorist and residualist tendencies. I believe, however, that American systems of poor relief to the able-bodied, primarily state general assistance and public assistance programs, *say or speak* the language of social insurance, especially when enunciating the purpose of poor law programs. Such programs, however, incorporate neither the social insurance nor the egalitarian/populist basis of program structuring—both principally dynamic approaches. That is not to say that social insurance programs do not exist. Certainly the social security and unemployment insurance programs are conceived as social insurance programs—eligibility is based on contribu-

pear to have been implemented in a variety of forms, essentially by legislative fiat, overlaying the goals and programs of the more dynamic orientation to poor relief upon the existing static poor relief systems.²⁶⁶

Despite this flurry of legislation, the general sense among both academics and the "common folk" is that these new goals have not been achieved;²⁶⁷ poor relief programs, as reconstituted, have not decreased the number of "dependent" poor either in absolute or relative terms.²⁶⁸ This is particularly the case with recently enacted workfare programs.²⁶⁹ Why do these refocused systems seem to have failed?²⁷⁰

tion. Contributions under either program, however, are not necessarily sufficient to meet outlay requirements.

²⁶⁶ At the state level the overlay of dynamic considerations has been crude. California provides a good example. See *infra* note 283.

²⁶⁷ Peterson, *supra* note 55, at 3, 6; Payne, *supra* note 8 (quoting Wayne R. Bryant, author of New Jersey legislation eliminating increases in AFDC benefits to women who have additional children while receiving benefits as describing AFDC as "cradle-to-grave protection from responsibility. . . . You can't provide guidance and responsibility when you just hand people a check at the beginning of the month. Its nothing more than a modern form of slavery.").

The notion of the moral, social or economic bankruptcy of the "welfare" system also has been the subject of attack from non-traditional ideologues. See JAMES O'CONNER, *THE FISCAL CRISIS OF THE STATE* (1974) (especially Chapter 6); PIVEN & CLOWARD, *supra* note 14; Alfieri, *supra* note 21, at 669.

Traditionalist ideologues argue that the Great Society programs had themselves caused the exacerbation in the poverty problem, and that the only way to solve the problem is to dismantle the system, in whole or in part, and restore traditional ways of dealing with the able-bodied poor. See MEAD, *supra* note 14; GLAZER, *supra* note 34.

Even among those who believe that the present system is not a failure, there is a sense that poverty and the poor are not disappearing. Rather than blame the programs themselves, they blame conditions over which the programs have no control, for instance: (i) rising average unemployment rates, (ii) an increase in the percentage of the population in high risk groups and (iii) a long term trend toward inequality in the distribution of market income. See MARMOR ET AL., *supra* note 10, at 114.

²⁶⁸ Thus, reports respecting the failure of the new programs are fairly commonplace. See, e.g., Cindy Simmons, *Capitol Comments*, UPI, Sept. 25, 1992 (BC Cycle), available in LEXIS, Nexis Library, UPI file (describing early cancellation of four year study of an innovative welfare program stressing job training because, some believed, the program proved more costly than traditional welfare program and people who participated in innovative program tended to stay on welfare slightly longer than those in traditional program). Moreover, these programs have failed to reduce poverty at a time when some research indicates that the economic restructuring of the 1980s has created a proliferation of low wage jobs, reducing the general standard of living of American workers. See BLUESTONE & HARRISON, *supra* note 32, at 7. But see MEAD, *supra* note 14, at 73 (even low wage jobs provide basis for eradication of poverty, or at least joblessness). MARMOR ET AL., *supra* note 10, at 112-14 (Great Society programs did not affect behavior).

²⁶⁹ See, e.g., Joanna K. Weinberg, *The Dilemma of Welfare Reform: "Workfare" Programs and Poor Women*, 26 NEW ENG. L. REV. 415, 442-45 (1991) (arguing California's workfare program GAIN has done little to relieve poverty or recycle unemployed back into work force, in part due to lack of training and other support); HANDLER & HOLLINGSWORTH, *supra* note 106 (studying effects and administration of AFDC in a number of Wisconsin counties).

²⁷⁰ Whether they have failed *in fact* is another question with respect to which there exists

While easy answers provide little of value in approaching questions of this scope,²⁷¹ the theory I develop might provide at least some insight into possible explanations. I first examine the nature of the shift in the focus of poor relief, and then examine the means chosen by government to implement this goal in light of the model I have created.

1. Documenting the shift of focus

The extent to which states have modified their goals cannot be assessed without at least a glimpse at where they started. Understand, of course, that, at least to the extent that state general assistance programs remain independent of increasingly imperialistic federal categorical relief programs,²⁷² states have not moved in lock step in refocusing their general assistance programs. Indeed, many states have made no attempt to change even the official focus of the aid programs.

The traditional goals of state general assistance are quite modest. State general assistance is meant to relieve and maintain the poor who are unable to support themselves. It is intended to do no more than provide that those "who are subject to the recurring misfortunes of life [will] continue to have such aid and encouragement as the county alone, the State alone, or the State in cooperation with the federal government may provide."²⁷³ These traditional statutes describe the obligation of government to the destitute as one of "relief and support" when support by any other means is unavailable,²⁷⁴ or as an obligation to relieve and maintain the poor,²⁷⁵ or to "support the poor."²⁷⁶ The administrative unit is required to provide care and assistance for the

substantial debate. Compare MURRAY, *supra* note 14 (arguing systems have failed in fact), with MARMOR ET AL., *supra* note 10 (welfare systems in the U.S. have not, in fact, failed, if only because Americans have gotten what they wanted).

²⁷¹ See, e.g., Peterson, *supra* note 55, at 3, 24.

²⁷² Recall that state public assistance programs, by accepting funds from the federal government, bind themselves to comply with whatever terms the federal administrators of such programs require. As such, state public assistance programs reflect more federal desire with respect to the primary focus of such programs than any independent state desire in this respect. See Simon, *supra* note 21, at 1201. The general assistance statutes themselves bear some evidence of the overtaking of state programs by federal dollars. See, e.g., COLO. REV. STAT. CODE § 26-2-102 (1989), which explicitly acknowledges the dependence of the Colorado program for the assistance of the poor on federal programs.

²⁷³ W. VA. CODE § 9-1-1 (1990).

²⁷⁴ See, e.g., CAL. WELF. & INST. CODE § 17000 (West 1991); CONN. GEN. STAT. ANN. § 17-273 (West Supp. 1993); OKLA. STAT. ANN. tit. 56 § 32 (West 1991); R.I. GEN. LAWS § 40-5-1 (1990); S.D. CODIFIED LAWS ANN. § 28-13-1 (1967); TEX. REV. CIV. STAT. ANN. art. 2351(6) (West Supp. 1993); WIS. STAT. ANN. § 49.02(1)m (West Supp. 1992).

²⁷⁵ N.H. REV. STAT. ANN. § 165:1 (1990); ALA. CONST. art. IV, § 88 (1977).

²⁷⁶ MISS. CODE ANN. § 43-31-15 (Supp. 1992).

indigent,²⁷⁷ and, much as in the days of late Tudor England, to supervise the poor.²⁷⁸ Such traditional goals, however, can be ambitious as well, obliging a state to maintain its poor at a higher level relative to the non-desstitute population.²⁷⁹

The notion underlying these formulations of the purposes of state poor relief derives from quintessentially static notions. Poverty is a mark of individual deficiency or incapacity caused by forces beyond the power of the individual affected,²⁸⁰ or the result of a deliberate repudiation of societal work requirements.²⁸¹ What the eligible poor are entitled to are "things"—maintenance, support and supervision. The poor are not entitled to a reformulation of societal or economic norms for their benefit. The poor are, however, entitled to supervision; this is society's way of expressing to the poor their responsibility for conforming their social and economic behavior to the norms. There are no surprises here. The poor understand that they will not starve, although they will not live well (compared to other (productive) members of society). The working population will understand that they will not cause the unemployed to die through neglect, that the poor will leave them alone to continue to reap the rewards of their productivity, and that the manner in which aid is given will not induce anyone to abandon work for maintenance.

Modern goals, like a leaky balloon filled with hydrogen, are simultaneously lofty and likely to quickly fall to Earth. The language is lovely, with a power approaching that of Biblical passages. Restated for modern sensibilities, the modern goals of general assistance include the promotion of the welfare and happiness of the people, to "encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society."²⁸² Other statutes declare, in a related vein, the goal of assisting

²⁷⁷ N.Y. SOC. SERV. LAW § 62(1) (McKinney 1992); OKLA. STAT. ANN. tit. 56 § 32 (West 1991).

²⁷⁸ GA. CODE ANN. § 36-12-1 (Michie 1987); NEB. REV. STAT. § 68-132 (1990).

²⁷⁹ See, e.g., MINN. STAT. ANN. § 256D.01 (West 1992), which obligates the state, among other things, "to provide an integrated public assistance program for all persons in the state without adequate income or resources to maintain a subsistence reasonably compatible with decency and health; and to provide work readiness services to help employable and potentially employable persons prepare for and attain self-sufficiency and obtain permanent work."

²⁸⁰ MONT. CONST. art. XII, § 3(3) (1991), provides that, "The Legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need."

²⁸¹ Thus, a New Jersey Legislator, who is in support of modifications to the state's AFDC requirements, could state without much opposition that "the most useful thing welfare can do for the poor is to press middle class values upon them." See Taylor, *supra* note 12.

²⁸² CAL. WELF. & INST. CODE § 10000 (West 1991). The statute reads, in pertinent part:

It is the legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life, and

those without the means to meet the costs of necessary maintenance "to attain or retain their capabilities for independence, self-care, and self-support"²⁸³ or that of encouraging and assisting the needy "to achieve economic independence and self-sufficiency."²⁸⁴ Federal political imperatives have not escaped the race toward lofty language. The rhetoric of federal welfare programs has been strongly laced with affirmations of "rehabilitation," or "independence and self-support," or "responsibility."²⁸⁵

What do all these inspirational statements mean? Logically enough, when stripped of their rhetoric, they seem to indicate a well-intentioned desire to eradicate poverty. They exhibit a desire that the poor act like the rest of the population; like good middle class working people, whether they want to or not.²⁸⁶ They express the hope that the able-bodied poor will grow up, leave home and stop mooching off the rest of the citizenry. The expression, at least, is dynamic. They imply

without discrimination on account of race, national origin or ancestry, religion, sex, marital status, or political affiliation; and that aid shall be so administered and services so provided, to the extent not in conflict with federal law, as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society."

Id. Other state codes have similar provisions. *See, e.g.,* PA. STAT. ANN. tit. 62, § 401 (1968); DEL. CODE ANN. tit. 31, § 501 (1985).

The purpose of this provision is to express the statutory purpose and legislative intent of the California Welfare and Institutions Code (§§ 10000-18971), has been employed by California courts to limit the discretion of counties in connection with the administration of their general assistance programs. *See infra* notes 291-92.

²⁸³ *See* COLO. REV. STAT. § 26-2-102 (1989).

²⁸⁴ *See* UTAH CODE ANN. § 62A-9-101 (1989).

²⁸⁵ This lofty language is meant to sugarcoat the work obligation at the core of all poor relief schemes. *See, e.g.,* WHITE HOUSE WORKING GROUP ON THE FAMILY, *THE FAMILY: PRESERVING AMERICA'S FUTURE* 51-58 (1987). For a short discussion of the rhetoric in connection with the imposition of federal work requirements, and the political nature of such rhetoric, *see* MEAD, *supra* note 14, at 219-33. These euphemisms can easily be used by those who wish to impose work tests as a condition for the receipt of benefits, as well as by those who wish to provide the poor with guaranteed incomes. *Compare* MICKEY KAUS, *THE END OF EQUALITY* 121-48 (1992) (end to poverty and stigma of relief can only be brought about by forcing poor to work for their keep) *with* LAMPMAN, *supra* note 63, at 135-68 (reducing income poverty through governmental transfers is worthy goal); and Alfieri, *supra* note 21, at 678-95 (poor must be entrusted with responsibility for their own transformation, and eradication of their poverty, through strategies of empowerment in which poverty has clearly defined but subordinate place).

²⁸⁶ *See supra*, note 95, quoting New Jersey Assemblyman Wayne R. Bryant in connection with the debate over New Jersey's revisions to its AFDC program. In arguing in favor of the necessity for rules eliminating benefit increases for women who breed while on welfare, the Assemblyman urged that the best thing that the modifications could do would be to press (superior) middle class values upon the recipients of aid. *See* Edward C. Banfield, *The Future of the Lower Class, THE VIEW FROM BELOW: URBAN POLITICS AND SOCIAL POLICY* 46, 59 (Susan S. Fainstein & Norman I. Fainstein eds. 1972) (identifying middle class culture as "normal" and those of lower classes as defective and poorly preparing its members to survival in American political culture).

wealth redistribution and entitlements,²⁸⁷ notions inimical to the static vision.

The notions embodied in the "new and improved" hortatory statements of intent suggest static vision overload. How is poverty to be eradicated under the terms of these statements of goals? Certainly not by providing the poor with the means of achieving political power, full employment and financial independence. Not surprisingly, legislatures have done little to implement these new goals.²⁸⁸ The most significant difference between the ancient systems of poor relief and those in place after the imposition of the new statutory purposes is that the official statutory compilations of the several states have more words in them. The result is frustration, consternation, and dissatisfaction. Poor relief systems are required to travel forward, but walk backwards; they are, in this sense, conceptually neither here nor there and always ripe for further reform. On the other hand, we have at least provided our elected officials with something to do over and over again. I turn next to a brief examination of the (non)means chosen by legislatures to effect their new goals.

2. Means Chosen to Implement the Restated Goals

One would suppose that with the changes in the stated purposes of general assistance would come substantial changes in the means used to deliver services to the poor. What we discover, instead, is that state general assistance statutes have not been modified to take into account their newly restated goals. The result, of course, is that fundamentally static systems of relief, designed primarily to maintain and relieve the poor, are now burdened with the task of eradicating poverty. The additional burden placed on state general assistance programs, however, has not been accompanied by any kind of substantial change in the manner in which the programs are structured or administered.²⁸⁹ Even in states which might be considered exceptions, such as

²⁸⁷ See, e.g., *Mooney v. Pickett*, 94 Cal. Rptr. 279 (1971); *Robbins v. Superior Ct.*, 211 Cal. Rptr. 398 (1985); *infra* Part V.B, *Examining the Limits of Static Systems: The Example of California Proposition 165*.

²⁸⁸ See MARMOR ET AL., *supra* note 10, at 228, 231 ("[M]ost programs that make up the American welfare state have been around for quite a while in one form or another. That form is constantly changing, but almost never radically, whatever ballyhoo attends this or that amendment.").

²⁸⁹ For instance, CAL. WELF. & INST. CODE § 10000 (West 1991) was first enacted in 1947 and made applicable to county general assistance obligations. Those obligations, set forth at CAL.

California, where the courts have attempted to give substantive content to the otherwise hortatory poverty eradication provisions,²⁹⁰ the result has been not so much a rejection of the static vision of reality as an attempt merely to expand the minimum levels of benefits and the size of the eligible population.²⁹¹ While such actions could be characterized

WELF. & INST. CODE § 17000 (West 1991), were first enacted in 1855 and remain substantially unchanged. See *Mooney*, 94 Cal. Rptr. at 284. Counties were expected to fulfill the new expectations using tools created in the nineteenth century and for a purpose fundamentally different from that newly imposed under the inspiring message set forth in CAL. WELF. & INST. CODE § 10000. California courts, however, have applied these hortatory provisions in construing the general assistance obligations of the counties. See, e.g., *Robbins*, 211 Cal. Rptr. at 403 n.13 ("The legislative history does not indicate why the Legislature decided that such a statement of statutory purpose was necessary at the time section 19 was enacted. Accordingly, this court must rely on the plain meaning of the terms of section 10000 in implementing the provisions of division 9.").

²⁹⁰ See *Mooney*, 94 Cal. Rptr. 279; *Boehm v. County of Merced*, 209 Cal. Rptr. 530, 532 (Cal. App. 1985). See generally, *Bensinger*, *supra* note 35, at 521-23, 528-35. Having taken this position, though, I note that as the static theory would predict, to the extent that decisions such as *Boehm* begin to have significant redistributive effect, static system builders will seek to overturn them. This, essentially, is what the Governor of California and his allies are attempting to do through Proposition 165, discussed *infra* in Part V.B, *Examining the Limits of Static Systems: The Example of California Proposition 165*.

²⁹¹ Courts in three states (Illinois, New York and Montana) have expanded the eligible population by holding that persons on strike do not refuse employment and therefore cannot be denied public assistance on that basis. See *Lascaris v. Wyman*, 292 N.E. 2d 667, 671 (N.Y. 1972); *Strato-o-Seal Mfg. Co. v. Scott*, 218 N.E. 2d 227, 230 (Ill. App. Ct. 1966); *State ex rel. International Union of Mine, Mill & Smelter Workers v. Montana State Dept. of Public Welfare*, 347 P.2d 727, 738 (Mont. 1959).

Several other court decisions in New York have expanded the minimum level of benefits and the eligible population. In *Thrower v. Perales*, the court compelled the Department of Human Services to grant home relief to homeless plaintiffs, and rejected the Commissioner's argument that homeless shelters are public institutions which rendered homeless persons ineligible for home relief. 523 N.Y.S.2d 933 (N.Y. Sup. Ct. 1987). Furthermore, the court in *Shaw v. Wyman* held that a recipient can become temporarily ineligible for aid if he willfully fails to report to a job interview. 337 N.Y.S.2d 98, 100 (App. Div. 1972). Failure to report, however, is not "willful" if there is no public or private means of transportation available to the recipient. *Id.*

The Court of Appeals of Indiana expanded the minimum level of benefits in *State ex rel. Van Buskirk v. Wayne Township, Marion County*, 418 N.E.2d 234 (Ind. Ct. App. 1981). The court held that a township trustee cannot deny shelter relief [element of general assistance] to homeowners because the trustee is obligated to provide any type of aid to provide shelter or to prevent loss of shelter. *Id.* at 243. The court also stated that the trustee must provide transportation to seek and accept employment and provide furniture and utensils, including heating and cooking stoves, and special medical diets, when eligible individuals are unable to provide such items for themselves. *Id.* at 246. In addition, the trustee must do whatever is necessary to restore terminated heating and utility service in cases of pressing hardship, including repayment of reconnect fees. *Id.* at 247.

In Maine, three court decisions have increased the size of the eligible population. See *Beaulieu v. City of Lewiston*, 440 A.2d 334, 341 (Me. 1982) (municipality cannot automatically disqualify applicant for assistance because he is purchaser of shelter); *Page v. City of Auburn*, 440 A.2d 363, 364 (Me. 1982) (municipalities cannot enact ordinances which automatically disqualify applicant for general assistance because he voluntarily quit job); *Gilman v. City of Lewiston*, 524

as "anti-static" in spirit, they do little to alter the basic purpose of the system—to sustain the poor, not to eradicate poverty.

Despite the hortatory language now gracing many state public assistance provisions, state systems of general assistance continue to deny any relief to employable persons otherwise ineligible for federal categorical aid programs. Essentially, able-bodied persons without young children are excluded from such programs.²⁹² Exclusion from relief does not appear to me to be a therapeutic or transformative means of ending the poverty of the excluded. Also, as the static model would predict, the eradication goals unveiled over the course of the last forty or so years, much like toys given a small child, to be played with as long as they are not used to destroy anything, have been neutralized by transforming them into tools of an essentially static vision. In the case of the eradication goals, this means that the attainment of such goals may not be achieved at the expense of the public fisc, or the social or economic order.²⁹³ Moreover, state general assistance programs continue to be based, as they have been for millennia, on the notion that aid to the poor must start with, and largely consist of, providing for the material needs of the poor, from time to time, and to the extent needed.

Further, insinuated into new eradication goals is the ancient static notion that since unemployment is a vicious lifestyle choice, the eradication of poverty, if it is to be achieved, must derive largely from efforts to change the habits of the poor. In effect, the new goals permit productive members of society to indulge the static fantasy that the poor are America's noble savages, frightening, burdensome, lazy and ignorant.²⁹⁴ If only they were more like the rest of the working population. Eradication efforts, then, are mostly characterized by static no-

A.2d 1205, 1207 (Me. 1987) (municipality cannot disqualify applicant for general assistance because he was discharged from employment for misconduct).

The Supreme Court of Nevada also expanded the number of people eligible for public assistance. *Clark County Social Serv. Dep't v. Newkirk*, 789 P.2d 227, 228 (Nev. 1990) (counties may not automatically exclude employable persons from eligibility).

Court decisions in Wisconsin have had a similar effect on welfare benefits. *See, e.g., State ex rel. Arteaga v. Silverman*, 201 N.W.2d 538, 541 (Wis. 1972) (county may not consider applicant's past single voluntary termination of employment in determining eligibility for general assistance); *State ex rel. Sell v. Milwaukee County*, 222 N.W.2d 592, 595 (Wis. 1974) (statute providing for general assistance does not prevent applicant with assets from being eligible for benefits).

²⁹² *See supra* notes 192-208.

²⁹³ Thus, eradication goals means teaching the poor to be responsible; that is, to get a job and get off the dole. *See Payne, supra* note 8.

²⁹⁴ JENCKS, *supra* note 32, at 201-03; *supra* notes 107-12.

tions of "obligation," that is, the "right" to work. These take the form of provisions for mandatory²⁹⁵ or optional²⁹⁶ job training programs, job referral programs²⁹⁷ and general education programs.²⁹⁸ At the federal level, a number of programs exist for the purpose of forcing those who take other people's money to begin to act more like the people from whom they take (notice here how static notions inhere in the way we characterize the "transaction!") by getting married, getting a job, and becoming "responsible" citizens.²⁹⁹ None of these programs, however, focus the efforts of eradication outside of the population to be "treated" for the disease of laziness, incompetence or ineptitude. Among the most publicized, and fairly typical of the lot, are proposed changes to the AFDC provisions of several states, under which benefits will be terminated after a number of years,³⁰⁰ or will be denied for children born to a recipient of aid,³⁰¹ or will be reduced if the recipient or his or her children fail to attend school,³⁰² or will be reduced to new residents.³⁰³ From the static perspective, these programs can be characterized as little more than more subtle and sophisticated versions of

²⁹⁵ See, e.g., ILL. ANN. STAT. ch. 305, para 5/6-1.4 (Smith-Hurd 1993); KAN. STAT. ANN. § 39-709(d)(B)(3) (Supp. 1992); ME. REV. STAT. ANN. tit. 22, § 4316-A (West Supp. 1992); MINN. STAT. ANN. § 256D.051 (3a) (West 1992); MONT. CODE ANN. § 53-3-304(3) (1991); PA. STAT. ANN. tit. 62, § 405.1(d) (Supp. 1993). For a review of a number of these programs, see GUERON & PAULY, *supra* note 209, at 79-191.

²⁹⁶ See, e.g., CONN. GEN. STAT. ANN. § 17-281a (West 1992); IND. CODE ANN. § 12-20-13-1 (Burns 1992); MICH. COMP. LAWS ANN. § 91(1)(d) (West 1991). For a review of studies of a number of these programs, see GUERON & PAULY, *supra* note 209, at 79-191.

²⁹⁷ See IDAHO CODE § 31-3404 (Supp. 1992); ILL. ANN. STAT. ch. 305, para 5/6-1.4 (Smith-Hurd 1993); KY. REV. STAT. § 205.200(7) (a) (Michie/Bobbs-Merrill 1991); ME. REV. STAT. ANN. tit. 22, § 4316-A(1)(B) (West Supp. 1992); MD. SOC. SERV. CODE ANN. § 88A-17A-1(a) (1991); MONT. CODE ANN. § 53-3-303(1)(a) (1991); PA. STAT. ANN. tit. 62, § 405.1(a) (Supp. 1992).

²⁹⁸ See *supra* note 291.

²⁹⁹ Federal job training and employment programs are described in LEVITAN, *supra* note 6, at 115-41; MEAD, *supra* note 14, at 121-35. The most recent attempt by the federal government to induce the poor who receive federal money to work is embedded in the Family Support Act of 1988, 42 U.S.C. §§ 651-669 (1988 & Supp. II 1990), which seeks to eradicate the poverty of single mothers through a combination of mandatory work and job training while providing limited child care.

³⁰⁰ The Oklahoma Department of Human Services has proposed cutting all welfare benefits after three years, substituting a job for benefits after the three year period. Wayne Greene, *Reform Plan Sets Curbs on Welfare*, TULSA WORLD, Oct. 27, 1993, at A1. Florida sought to limit aid to 24 months. H. 1023, Reg. Sess., 1993 Fla. Laws.

³⁰¹ See *supra* note 8 (New Jersey provisions).

³⁰² See S. 140, 87th Leg., Reg. Sess., 1993 Mich. Laws (AFDC benefits reduced \$25 per month for each Michigan child with more than two unexcused absences). N.J. STAT. ANN. § 44:10-23 (West 1992) (requiring participation in vocational and counselling programs); *supra* note 8 (Maryland provisions).

³⁰³ WIS. STAT. ANN. § 49.19 (West Supp. 1992); *supra* note 8.

the Statute of Laborers³⁰⁴ or other ordinances commanding the unemployed to work.³⁰⁵

Consequently, United States society has not rid itself of poverty nor of the poor. It has no intention of doing so. General assistance provisions are not administered to "encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society."³⁰⁶ Such programs do not assist those without the means to meet the costs of necessary maintenance "to attain or retain their capabilities for independence, self-care, and self-support,"³⁰⁷ nor do they encourage the needy "to achieve economic independence and self-sufficiency."³⁰⁸ These programs fail because "economic and demographic changes have created rapid increases in the number of needy persons who are homeless or without other necessities of basic existence."³⁰⁹ Perhaps they are meant to fail, at least in the sense of fulfilling the expectations they might raise among the poor. That, too, is quintessentially static: "the options being put before the nation are to continue present relief arrangements, perhaps modified by measures to shift the local fiscal burden to the federal government, or to adopt the age-old approach to relief explosions—namely, the introduction of work-enforcing measures. It is a poor choice to be sure, but it is the politically real choice nevertheless."³¹⁰

³⁰⁴ See *supra* note 151. For a discussion of the anti-vagrancy conceptions of modern welfare laws, and the preoccupation of such law with work requirements, see Margaret K. Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 CAL. L. REV. 511 (1966).

³⁰⁵ In this manner, society indulges itself much like King Canute commanding the sea to stay put. Obviously, I take the position to the limit. There no doubt are substantial numbers of people who are aided in significant respects by job training and placement programs. Judith Gueron and Edward Pauly review the data generated by a number of studies of work incentive programs, including several "innovative" demonstration projects. They conclude that the studies provide evidence that welfare to work programs as currently conceived are neither as successful nor as useless as either the advocates or opponents of such programs would have you believe. Most are expensive. For a discussion of their conclusions, see, GUERON & PAULY, *supra* note 208, at 24–39.

³⁰⁶ CAL. WELF. & INST. CODE § 10000 (West 1991).

³⁰⁷ See COLO. REV. STAT. § 26-2-102 (1989).

³⁰⁸ See UTAH CODE ANN. § 62A-9-101 (1989).

³⁰⁹ See TEX. HUM. RES. CODE ANN. § 34.001(a)(1) (West 1990). As some scholars have argued, these programs also fail because the states have failed to devote substantial resources to solving the problem. Thus, the argument goes, if the state would devote substantial enough resources to programs such as job training (or retraining) and placement, the state might well be able to meet its eradication goal. See FURNISS & TILTON, *supra* note 27, at 179–83; GANS, *supra* note 41, at 268–70. To the extent, however, that people continue to lose their jobs, or businesses fail, or people enter the labor market, the state would have to continue its role as a jobs "clearinghouse" indefinitely. Poverty, in the sense of people unable to provide for themselves, would perhaps be substantially reduced, but societal efforts to maintain this state of reduction would have to continue unabated if this "success" is to have any lasting effect.

³¹⁰ PIVEN & CLOWARD, *supra* note 14, at 346–47.

This result should come as no surprise. The static paradigm would indicate that such systems are capable of only limited function. Recall that, at most, these limited functions include the sustaining, feeding, clothing, and housing of the poor. Recall further that, in many static systems, the institutional aid provided to the able-bodied is substantially more limited than this.³¹¹ And yet, these new goals purport to set a new course for institutional relief, that of eradicating poverty. This new course is supposed to be navigated by a system which is only reasonably efficient at delivering material things to those in need. Charles Murray has described this legislative response to the problem of poverty "escapism," explaining that "those who legislate and administer and write about social policy can tolerate any increase in actual suffering as long as the system in place does not explicitly permit it."³¹² Perhaps legislators are best able to respond to perceived desires of the population by telling them what they want to hear, without the bother of actually having to do what they say they have done. In this sense, the new eradicated purposes of our poor relief statutes can be best understood as (an empty) political gesture. They are the words that hide the inattention to programs left substantially unaltered.³¹³

I have argued that this divergence between dynamic goals and static systems, the one rooted in change, and the other rooted in immutability, could help to explain why such reoriented systems did not seem to "work," that is, to eliminate poverty.³¹⁴ Contrary to the common view that these systems do not work well, the theory helps explain that they work quite well. What they work well at, however, is the provision of the bare necessities to the qualified poor, not the eradication of poverty nor the creation of a self-sustaining class of poor. As long as legislatures are content to change the purpose of ancient provisions, without adjusting the provisions themselves to meet the changes in purpose, such measures will continue to function as they

³¹¹ See *supra* notes 291–305 and accompanying text.

³¹² MURRAY, *supra* note 14, at 235. Of course, Murray's sweeping proposals to solve the problem, to dismantle substantially all of the programs in place for the maintenance of the poor, might be as problematic as the recent legislative proposals to solve the poverty problem by enacting legislation decreeing this worthy goal. See Mattison, *supra* note 37, at 93.

³¹³ On the politics of poverty reform rhetoric from a "liberal" perspective, see MARMOR ET AL., *supra* note 10, at 228–29.

³¹⁴ But see SUNSTEIN, *supra* note 237, at 101, 106–07, 230 (describing perverse results of regulatory failure in income redistributive welfare programs—they accomplish opposite of their intended purpose—and describing means of reforming nature of regulation so stated purpose might be effected).

always have, the newer purpose ignored, and the determination made, sooner or later, that the statute fails to meet its new goals.³¹⁵

B. *Examining the Limits of Static Systems: The Example of California Proposition 165*

The theory I have been developing can also help us to understand why poor law reforms seem to take a static turn, even when the stated purposes of the reforms are not static. The theory can tell us at least two things. First, it can help us to understand the limits of the vision of the static system builders and, in that manner, explain why "reforms" tend to take a particular path. Second, contextualizing any such "reforms" within a governing paradigm helps explain the divergence between stated purpose and actual goals of such "reforms."³¹⁶ Testing the utility of the theory merely by examining the rhetoric of welfare reform, which I did in Part A, has provided a glimpse of the manner in which stasis insinuates itself into reform. I believe it is also useful to examine the theory's potential as a basis for understanding the limits of political and legislative rhetoric and reforms by examining a concrete attempt at reform. Reform unadulterated by compromise and expediency can provide us with a clear view of the manner in which reform operates in a static poor relief context. For this purpose, I have chosen the representative set of provisions contained in a recent California voter initiative, Proposition 165,³¹⁷ the Government Accountability and Taxpayer Protection Act of 1992 ("GATPA").

³¹⁵ Of course, the legislature does more than create systems that are incapable of fulfilling their stated or popularly conceived purposes. More important, perhaps, is that they create a series of somewhat lofty expectations on the parts of both the recipients and those whose money is funding the system. The recipients tend to expect that, by submitting to the peculiar dictates of the local program, they will obtain work or otherwise achieve the advertised self-sufficiency. Instead, they find jobs, if they find them at all, which are not good. See the stories of participants in AULETTA, *supra* note 86, at 210-19; MEAD, *supra* note 14, at 149-50.

³¹⁶ This result has been seen in the divergence between the restated purposes of many systems of state general assistance, and the traditional methods of actually dispensing aid. See *supra* Part V.A, *Explaining the Disjunctions Between Goals and Implementation; Why Don't Current Systems of Poor Relief Seem to Accomplish Their Purposes*.

³¹⁷ Proposed Law: The Government Accountability and Taxpayer Protection Act of 1992, California state initiative measure submitted for voter approval in accordance with California Constitution Article II, § 8 on November 3, 1992 as Proposition 165. I note, but do not explore, the context in which Proposition 165 arose. In 1992, California was in the midst of a severe recession, state government was revenue-starved and the populace was looking for a scapegoat. While exploration of the details of this context adds flavor to the analysis, it does not affect the analysis, its utility or the result. For further discussion of Proposition 165 in context, see *infra*, notes 321-22, 363.

California Proposition 165 consisted of two major parts, which at first glance do not appear related. Proposition 165 was certified for voter approval in the November, 1992 general election,³¹⁸ but failed to win voter approval for a variety of reasons, many of which probably had little to do with the poor relief features of the proposition.³¹⁹ A significant portion of Proposition 165 concerned a redistribution of power between the governor and the legislature respecting the budget process and control over state fiscal matters. A significant effect of GATPA was to alter the manner in which the annual state budget was adopted and implemented, generally in favor of the governor and at the expense of the legislature. The governor was to be given until March 10 to submit a budget proposal to the legislature. Failure by the legislature to approve a budget by June 15 would result in the suspension of the salaries and certain privileges and perquisites of the governor and legislators. If no budget were to be passed by July 1, the governor would be empowered to declare a state of fiscal emergency and to impose a budget based on projected revenues, at least until the legislature passed, and the governor signed, a new budget.³²⁰

As an integral part of the process of controlling the state budget, Proposition 165 determined that "the California welfare system must be substantially restructured to put less emphasis on unconditional public aid and more emphasis on values fundamental to a free society: personal responsibility, self-sufficiency, employment and family."³²¹ This

³¹⁸ Pursuant to California Constitution Article IV, § 1, "the people reserve to themselves the powers of initiative and referendum." In all other respects, the legislative power is vested in the California Legislature. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 149 Cal. Rptr. 239 (1978). The California courts recently rejected a challenge to the right to place the initiative measure, Proposition 165, the "Government Accountability and Taxpayer Protection Act of 1992" on the ballot. *See League of Women Voters v. Eu*, 9 Cal. Rptr. 2d 416 (Cal. App. 1992).

³¹⁹ *See Ellis & Jacobs, supra* note 7. Proposition 165 failed to win voter approval along with Proposition 167, the later of which was placed on the ballot by political opponents of Proposition 165 and was aimed at solving the welfare and budgetary problems cited in Proposition 165 by cutting the state sales tax and significantly raising taxes on wealthier individuals and corporations. *See id.*; *see also* Paul Jacobs & Virginia Ellis, *Prop. 165 Lags; Right-to-Die Balloting Close*, L.A. TIMES, Nov. 4, 1992, at A1 (suggesting as reasons for failure to pass measure (i) opposition by California Democrats to provisions of Proposition 165 which would have given Republican Governor extensive control over budget process, and (ii) diversion of financial support for measure from corporate and wealthy individual supporters to effort to defeat of Proposition 167).

³²⁰ GATPA, §§ 4-5. It is easy to see why this portion of the measure might inspire a certain amount of suspicion and disapproval in a state where the governor and the legislative majority were members of different parties and with different political agendas. The provisions could easily be used to usurp the Legislature's budgeting role.

³²¹ GATPA, § 3. This characterization of the proposed reforms as a "substantial restructuring" would have become a permanent fixture of California law, since GATPA required that statement be written into the state constitution as new article I, § 31.

restructuring was to be accomplished by reducing governmental poor relief expenditures. The poor relief provisions of Proposition 165 deal primarily with the administration of federal programs, and most significantly with Aid to Families With Dependent Children ("AFDC").³²² Proposition 165 also would have effected significant reform of the California general assistance system. With respect to the reforms proposed affecting both general and public assistance, the proposals are profoundly static in orientation, aimed primarily at cutting costs, reducing benefit levels and tightening eligibility criteria to decrease the size of the eligible class. As such, and despite the lofty purposes set forth in Section 10000 of the California Welfare and Institutions Code,³²³ the modifications would have strengthened the general assistance program's primary goal of maintaining the poor as cheaply as possible, and do little, if anything, to "encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society." Indeed, the conceptualization of welfare reform as a subset of overall fiscal reform related to the state's budget process, which was confirmed by the California appellate courts in certifying Proposition 165 for voter approval, is strong evidence of the reformers' adherence to the limitations inherent in the static paradigm.³²⁴

1. Public Assistance Reforms

The public assistance provisions of Proposition 165 ostensibly concentrate on what is termed "flexibility."³²⁵ At least in California, flexibil-

³²² See GATPA §§ 6-9, and *infra* notes 343-54.

³²³ CAL. WELF. & INST. CODE § 10000 (West 1991).

³²⁴ GATPA § 2, explicitly merges the provision of aid to the poor and governmental fiscal policy. It declares that "California's fiscal imbalance is also reflected by a growing social imbalance. In the past few years, welfare caseloads have escalated at a growth rate four times faster than our general population. . . . This is why welfare reform and budget reform are one and the same." *Id.* See *infra* note 350 for the text of this provision. Indeed, the major hurdle for those who sought to prevent the proposition from appearing on the ballot was to show that the welfare provisions of the proposition were unrelated to the budgetary provisions. Under the "single subject rule," an initiative may not be brought for a vote unless its provisions cover only a single subject. This rule is satisfied if the initiative's "provisions are either functionally related to one another or are reasonably germane to one another or the objects of the enactment." *Harbor v. Deukmejian*, 240 Cal. Rptr. 569, 582 (1987). The court in *League of Women Voters* rejected this contention, finding that the welfare provisions are reasonably germane to the stated purpose of the initiative. 9 Cal. Rptr. 416, 423 (Cal. App. 1992). "The budget balancing objective of GATPA is also served by restoring to the government the power to make annual adjustments in expenditures under the state welfare system, which the initiative identifies as a primary engine of budgetary imbalance." *Id.*

³²⁵ According to its proponents, "GATPA seeks to introduce flexibility and reduce expenditures in the state welfare system, a program which constitutes a major force driving the budget

ity translates into *budgetary* flexibility requiring the elimination of statutorily mandated cost-of-living increases in grants for AFDC, Supplemental Security Income/Supplemental State Program (SSI/SSP) and In-Home Supportive Services (IHSS).³²⁶ Substituted for the cost-of-living increases would be a system based on annual redeterminations by the California Department of Social Services to be based on projected caseload and the amount appropriated in the annual budget.³²⁷ In effect, federal categorical poor relief would be based on the ability of the state to pay, rather than on the needs of all of the potentially eligible population.

Flexibility would also require an absolute reduction of welfare expenditures by reducing maximum AFDC grants by 10% during the first six months of eligibility and an additional 15% thereafter.³²⁸ Increases in AFDC grants would be prohibited with respect to children conceived while the mother was receiving benefits, certain benefits afforded pregnant women would be eliminated and teenage mothers' grants would be restricted.³²⁹ In addition, the initiative would require certain behavior from recipients. Parents under nineteen years of age would receive a \$50 per month increase in benefits if they attended school with fewer than two unexcused absences per month. Failure to meet this requirement would result in a \$50 per month reduction in benefits.³³⁰ Mothers under eighteen years of age would also be required to live with their parents or legal guardians.³³¹ New California residents

out of balance yet which is still susceptible to legislative control." *League of Women Voters*, 9 Cal. Rptr. 2d at 419.

³²⁶ GATPA, §§ 7, 8, 16-18.

³²⁷ *Id.* § 12.

³²⁸ *Id.* § 7. Other states are considering similar reforms of their categorical aid programs. See, e.g., H.B. 1023, Reg. Sess., 1993 Fla. Laws which would cut AFDC benefits for all recipients in an effort to foster self-sufficiency.

³²⁹ GATPA, §§ 6-7. This is similar to a proposal currently under consideration in Florida. See H.B. 1023, Reg. Sess., 1993 Fla. Laws, eliminating benefit increases for children born to an AFDC recipient. Currently New Jersey is the only jurisdiction that has successfully enacted a program restricting benefit increases for children born to AFDC recipients. A number of jurisdictions besides Florida are currently considering similar proposals. See *supra* note 8.

³³⁰ GATPA, § 9. Other states have enacted or considered similar programs. See, e.g., N.J. STAT. ANN. § 44:8-114 (West Supp. 1992), which requires recipients with children over two years of age to attend educational programs; see also *infra* note 365. A Michigan reform proposal, titled the "Higher Attendance in Michigan's Schools Act," is similar to GATPA § 9, except that it imposes a school attendance requirement on the children of AFDC recipients rather than on the recipients themselves. S.B. 140, 87th Leg., Reg. Sess., 1993 Mich. Laws. For a discussion of other programs, see *supra* note 8. A number of such programs are also examined in GUERON & PAULY, *supra* note 209, at 107-20.

³³¹ GATPA, § 6. This provision, of course, would indirectly, but effectively, overrule *Bernhardt v. Alameda County Board of Supervisors*, 130 Cal. Rptr. 189 (Cal. App. 1976), which prohibited

would be eligible for benefits in an amount no greater than the maximum to which they had been eligible in the state of prior residence for the first twelve months of residence in California.³³² Mothers would also be encouraged to identify the fathers of their children in order to qualify for AFDC, presumably so that the fathers would have to bear their fair share of the expense of raising their children.³³³

Clearly, the proposed changes to the administration and funding of the state's public assistance programs demonstrate its substantial static orientation. The primary purpose of the proposed modifications is cost savings.³³⁴ Note that the static bent of the "reforms" is not so much the attempt to reduce the costs of the administration of the system of relief *per se*, but the implementation of this cost-cutting ethos by *reducing the amount of funds the state would be willing to devote to the maintenance of the poor*. Thus, in California, cost savings are effected in a manner a static view based theory would predict: (i) a uniform reduction of benefits across the board, (ii) a reduction in the size of the class to be benefitted (recall the static system's tendency to politicize the definition of eligibility), and (iii) a limitation of benefit increases by tying such increases, not to need, but instead to whatever amount might be allocated for that purpose by the legislature. The parallels to the Elizabethan Poor Law are striking. Provisions for the identification of the fathers of bastards occupied a central place in the Elizabethan scheme, primarily as a means of decreasing the fiscal burden on the state with respect to the care and raising of these children.³³⁵ Similarly, a rudimentary settlement scheme is attempted as a means of controlling the migration of the destitute to California by limiting the grants of new residents. The purpose, to discourage welfare shopping and the influx of beggars and vagrants to the state, mirrors the purpose underlying the settlement provisions of Tudor law.

These changes fall most significantly on women with small children, a category of poor once thought deserving because they were

the enforcement of a regulation which effectively required young adults to live with their parents by limiting their eligibility for general assistance to all but exceptional cases. A similar provision has been adopted in Wisconsin. WIS. STAT. ANN. § 49.19(4e)(a) (West Supp. 1992). Texas is considering a similar proposal. See H.B. 54, 73rd Leg., Reg. Sess., 1993 Tex. Laws.

³³² GATPA, § 7. A similar provision has been enacted in Wisconsin. WIS. STAT. ANN. § 49.19(11m)(a) (West Supp. 1992). Texas is considering a similar proposal. See H.B. 54, 73rd Leg., Reg. Sess., 1993 Tex. Laws.

³³³ GATPA, § 15.

³³⁴ *Id.* § 2; see *League of Women Voters v. Eu*, 9 Cal. Rptr. 2d 416, 423 (Cal. App. 1992); *supra* Part III.A, *Critical Assumptions: The Static Paradigm*.

³³⁵ See *tenBroek*, *supra* note 85, at 284-86; *supra* Part III.B, *Paradigm Archetypes*.

deemed incapable of working (recall that women with young children were expected to devote their energies to nurturing their children), but now "reclassified" as able-bodied workers who have chosen not to work. Since they are now deemed capable of supporting themselves, they should do so with all available speed. Indeed, GATPA § 2 makes clear the reason for these provisions by declaring that "every citizen also has an obligation to do their best to contribute to the welfare of society." Clearly, the static social order has made a choice for the able-bodied, including women with young children: they can best contribute to society by fulfilling their Biblical obligation to work, and by ignoring the Biblical injunction to breed.

Thus, closely bound with the desire to reduce costs, is the quintessentially static notion that the able-bodied have a duty to work, that their failure to work is a deliberate life-style choice, and that, but for the exaggeratedly high level of benefits, the able-bodied would seek productive employment. People have the right to work; they have no right to relief. "Welfare must be returned to its proper role as a transition to gainful employment and self-determination and must include an element of mutual obligation between government and the recipient."³³⁶ GATPA § 2 further characterizes the nature of this relationship between the state and the pauper: "We believe that the State has a responsibility to look after the welfare of individuals in need. But we declare that every citizen also has an obligation to do their best to contribute to the welfare of society."

The behavior modification provisions of the act also demonstrate the static orientation of the authors of the GATPA. The purposes of those provisions are basically punitive. As with every static system, we expect that the poor's right to receive benefits is conditioned on "productive" activities. Breeding while on the dole, failure to attend or finish school, and refusal to arrange one's living arrangements to suit the state (i.e. refusal of teenage parents to live with *their* parents) are all punished, primarily by reducing benefits. Again, the problem is not conceived of as originating with defects in the social or economic system; the problem is that the state is put in the uncomfortable position of having to support society's "losers," and it will fulfill this obligation as cheaply as possible. Thus, in proposing GATPA, Governor Wilson acknowledged that he would be accused of being elitist, racist, callous and uncaring, but countered, "Do they (his critics) think it is

³³⁶ GATPA, § 3, *adding* CAL. CONST. art. I, § 31.

fair that working families pay for welfare benefits that have grown twice as fast as their family incomes?"³³⁷

GATPA was billed as a substantial restructuring of traditional welfare.³³⁸ As applied to federal relief programs, however, it is not. What any of the proposed changes have to do with anything but run-of-the-mill cost control in the face of an ever-increasing demand for services, is speculative at best. The modifications do not alter the essentially static orientation of the federal categorical grant system as administered in California: that the poor be given the minimum necessary in a manner that will not disturb the economic status quo. Indeed, the GATPA's principal proponent, Governor Wilson, quite self-consciously declared that its purpose is to ensure that the social and economic status quo must be protected against the destabilizing effect of spending for the maintenance of the poor. "California will lose more jobs unless we work to provide fundamental reform to the business climate. Part of that is fundamental budget reform and control of state spending. That reform is the California Taxpayers Protection Act."³³⁹ California provides, in this instance, an archetypal example of the use of the Biblical work imperative recast in modern socio-economic jargon, coupled with the notion that abandonment of this work imperative is socio-economic disaster.³⁴⁰

2. General Assistance Reforms

GATPA's flexibility also has a decidedly static feel with respect to the proposed general assistance reforms. Under GATPA, county boards of supervisors, currently charged with the administration and funding of general assistance, would be given sole discretion to set general assistance levels, taking into consideration the availability of funds and

³³⁷ Vlai Kershner, *Big Drive to Cut Welfare: Wilson Plans Initiative for 1992 Ballot*, SAN FRAN. CHRON., Dec. 10, 1991, at A1.

³³⁸ See *supra*, note 323.

³³⁹ Pete Wilson, Address to the Valley Industry and Commerce Association of Woodland Hills, California (n.d.), in Skelton, *supra* note 12.

³⁴⁰

No matter how tempting it may be to declare that everyone ought to have his "needs" fulfilled without regard to "effort, thrift or foresight," only a society bent on self-destruction or radical change of economic and political structure would create incentives for individuals or families deliberately to avoid private provision of those items which the society itself has officially declared to be minimum goods.

Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 72 (1972).

the projected caseload.³⁴¹ The county supervisors' discretion would be limited in at least one respect, however—general assistance levels could not be set at amounts greater than that available to the recipient (assuming that the recipient was eligible) under the AFDC program in California.³⁴² In effect, the state department of social services, by setting maximum levels of AFDC, would have the power, albeit indirectly, to set maximum general assistance levels as well. In addition, the general assistance provisions would be amended to make explicit that eligible persons could not double-dip, by making recipients of AFDC payments ineligible for general assistance.³⁴³

These provisions attempted to modify the way in which California provided general assistance in two significant respects. First, they restricted the ability of a county to seek reimbursement from the state for increases in the size of the general assistance population which might result from the diminution of the size of the population eligible for federal categorical relief.³⁴⁴ The restriction would have been effected by permitting counties not to increase their general assistance budgets, even if the size of the eligible pool increased dramatically.

³⁴¹GATPA, § 19. That section adds a new subsection (b) to CAL. WELF. & INST. CODE § 17000, which would provide, in relevant part, that:

Notwithstanding Section 10000 and subdivision (a), the level for general assistance grants or in kind aid, if any, provided by a county or city and county for the relief and support of incompetent, poor, indigent persons, and those incapacitated by age, disease or accident shall be set by the Board of Supervisors in its sole discretion, taking into consideration the availability of county or city and county funds for such aid and the projected caseload, and shall not exceed the grant available to the same size family unit receiving aid pursuant to [federal aid programs].

³⁴²*Id.* § 19.

³⁴³*Id.* § 19, which would have amended CAL. WELF. & INST. CODE § 17020 (West 1991), which currently provides that any person eligible for state administered federal aid programs "shall not be eligible for monthly payments provided pursuant to this part if the maximum payment standard established by county pursuant to Section 17001 exceeds the payment level established pursuant to [the state administered federal programs]."

³⁴⁴This arises from a peculiarity of California law which compels the state to reimburse counties for "costs mandated by the state." CAL. GOV'T CODE § 17561 (West Supp. 1993). "Costs mandated by the state" include "any increased costs which a [county] is required to incur . . . as a result of any [state] statute . . . which mandates a . . . higher level of service of an existing program. . . ." CAL. GOV'T CODE § 17514 (West Supp. 1993). There is a question regarding whether the state may be required to reimburse counties for increased general assistance payments resulting from changes to state eligibility requirements for non-county welfare programs, such as AFDC. *See* League of Women Voters v. Eu, 9 Cal. Rptr. 2d 416, 423-24 (Cal. App. 1992).

As a result of the changes to the general assistance provisions, county governments would not be required to increase spending on general assistance as a result of the state cutbacks proposed in GATPA. Consequently, as a legal matter, no obligation for state reimbursement would arise under CAL. GOV'T CODE § 17561 (West Supp. 1993).

Thus, the provisions permitting county supervisors to set general assistance levels, not with respect to the needs of the poor, but primarily with respect to the availability of funds, would have permitted the county to reduce the amount of aid it was required to give the poor. The obligation to supplement inadequate levels of county assistance would be foisted on someone else, most likely private charity. The ease of this conclusion betrays its static underpinnings.

Second, the manner in which this elimination of the reimbursement requirement was effected would have substantially overturned a number of recent California cases which had held to the contrary.³⁴⁵ In effect, the modification to the general assistance provisions would permit counties to revert to a system of determining aid levels previously held in violation of the general assistance provisions by California courts. In *City of San Francisco v. Superior Court*,³⁴⁶ the court held that the method by which San Francisco set general assistance levels—by dividing the amount the city administration allocated to general assistance by the estimated number of recipients³⁴⁷—failed to meet the county's obligations under the California general assistance statutes. According to the *San Francisco* court, counties were required to adopt standards upon which adequate assistance levels could be determined, and to set assistance at a level high enough to meet the minimum subsistence levels of the eligible population.³⁴⁸ Under Proposition 165, the focus would shift away from minimum subsistence levels to the relationship between the "availability of funds" and the pool of eligible recipients. Furthermore, the amount of funds available would be a direct function of the desire of the county to tax itself.³⁴⁹

The reforms described in Proposition 165 were primarily directed at cutting governmental expenses.³⁵⁰ This is a fundamentally static form

³⁴⁵ See *supra* notes 291-92.

³⁴⁶ 128 Cal. Rptr. 712 (Cal. App. 1976).

³⁴⁷ This, of course, yielded an amount significantly below estimates of the minimum required to exist at a subsistence level in San Francisco, and also below that accorded to general assistance recipients in neighboring counties. See *City of San Francisco*, 128 Cal. Rptr. 715. How was the difference supposed to be made up? Naturally enough, as in a good static system, by reliance on the large and active community of private charitable organizations.

³⁴⁸ See *City of San Francisco*, 128 Cal. Rptr. at 716-17.

³⁴⁹ Lower tax burdens related to welfare expenditures would, it was hoped, reverse the trend of the state's taxpayers to flee the state and its growing tax burdens. See GATPA, § 2.

³⁵⁰ The purposes of GATPA were set forth in § 2, which provided, in relevant part:

Despite repeated attempts by the people to limit the size of government programs, the public sector continues to grow faster than our ability to pay for it. California's taxpayers must now work well into the fifth month of the year to earn enough income to pay all our taxes.

of relief. GATPA focused on the needs of the poor, at least with respect to the legislative obligation of the general assistance and public assistance programs in California to be administered to "encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society,"³⁵¹ only to the extent that it declared that "every citizen also has an obligation to do their best to contribute to the welfare of society."³⁵² With respect to recipients who meet this obligation, the state would be willing "to look after the welfare of [those] individuals in need."³⁵³ California then, like other states facing the same "problems," would then encourage self-reliance and the desire to be a good citizen, useful to society, by enforcing the recipient's obligation to work.³⁵⁴

Proposition 165, then, shares the view of the static system builders that it is not the system that is at fault for creating or sustaining poverty; rather, able-bodied recipients have only themselves to blame for their condition. Since the able-bodied have made a vicious, or at least unenlightened, lifestyle choice, they, and not the system, require correction.³⁵⁵ GATPA, as expected, attempted to modify the system in place

This is a burden that can only become more and more onerous. The reasons why are autopilot spending programs, or entitlements—the prime engine driving California's perennial overspending.

California's fiscal imbalance is also reflected by a growing social imbalance. In the past few years, welfare caseloads have escalated at a growth rate four times faster than our general population.

While California's tax-receivers grow quickly in numbers, California taxpayers are starting to flee our State. This leaves California with proportionally fewer taxpayers, and State government in a perpetual budget crisis. No matter how robust our economy becomes, the State will not be able to finance existing programs at current levels with projected tax revenues.

This is why welfare reform and budget reform are one and the same. The State's fiscal future is in jeopardy and reforms of the budget process, including reform of significant programs of public expenditure which have heretofore mandated automatic increases without regard to the capacity of the State fisc, must be adopted immediately.

We are willing to finance essential services. We believe that the State has a responsibility to look after the welfare of individuals in need. But we declare that every citizen also has an obligation to do their best to contribute to the welfare of society.

Id.

³⁵¹ CAL. WELF. & INST. CODE § 10000 (West 1991) (*see supra* note 283 for text of provision). The purpose of this provision was described by the California courts as requiring a liberal interpretation of welfare laws, to facilitate the evolution of public welfare from public charity to social justice. *See County of Los Angeles v. Workers' Comp. Appeals Bd.*, 179 Cal. Rptr. 214 (1981); *Robbins v. Superior Ct.*, 211 Cal. Rptr. 398, 404 (1985).

³⁵² GATPA, § 2

³⁵³ *Id.*

³⁵⁴ Compare the proposed changes to AFDC rules discussed *supra* in notes 8 & 328.

³⁵⁵ California Governor Pete Wilson, a sponsor of GATPA, is thus quoted as stating with

for the purpose of providing greater incentives for the poor to help themselves, that is, to get off welfare. The incentives reflected the typical static limitations on acceptable alternatives to "solve" the problem—to make public assistance less attractive to the recipients, who feel freer than the rest of society to act irresponsibly (at least more irresponsibly than the sober working population) while on the dole.³⁵⁶ Thus, GATPA called for the downward adjustment of the benefit levels available to the poor, and reduced the benefits of recipients for other acts of wrong conduct, such as breeding, failing to attend school regularly or failing to live with parents. Since a job is available for all who wish to meet their "obligations to do their best to contribute to the welfare of society," job acceptance, not job creation, is necessary.³⁵⁷

As an essentially minimalist set of reforms, GATPA, as I have related, tended to revolve around the need to save money. The more money is spent, the more taxes must be raised, and the larger the redistributive effect of the program. The result was socio-economic disaster: "California taxpayers are starting to flee our State."³⁵⁸ Consequently, reforms emphasized cost savings features. I have discussed the most directed cost savings feature of GATPA, the ability to set general assistance levels taking into consideration the availability of funds and the projected caseload.³⁵⁹ Equally significant was the return of a substantial amount of discretion to the county supervisors with respect to the setting of such grant levels.³⁶⁰ With such discretion, county super-

respect to the recipients of welfare: "Let's choose to prevent injury and enrich human potential, rather than to continue warehousing human failure." *quoted in Kershner, supra* note 335.

³⁵⁶ Speaking in favor of his proposed reduction of the level of benefits offered to California recipients of federal categorical aid, California Governor Pete Wilson declared that "Welfare is meant to support families. Now it is weakening and even pulling families apart. The welfare system actually encourages teen pregnancies." Whitmire, *supra* note 8.

³⁵⁷ For instance, GATPA innovations, like those of New Jersey and several other states, would eliminate increases in AFDC benefits for increased family size where additional children are born to recipients while receiving public assistance. *See* GATPA, §§ 6, 7. The stated purpose of these innovations is to induce the recipients to act more "responsibly" and to help such people get off the dole more quickly. In reality, this "reform" flows naturally from the basic conception of poverty as caused primarily by the poor themselves. *See id.* Presently, New Jersey is the only state which has 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. *See* N.J. STAT. ANN. § 44:10-3.5 (West Supp. 1993). Similar proposals await approval, however, in the legislatures of Connecticut, Missouri, Oklahoma, Pennsylvania, and South Carolina. *See* S.B. 143, Reg. Sess., 1993 Conn. Laws; H.B. 27, 87th Leg., 1st Sess., 1993 Mo. Laws; H.B. 1492, 44th Leg., 1st Sess., 1993 Okla. Laws; H.B. 2580, 175th Legis., 1991-1992 Reg. Sess., 1991 Pa. Laws; S.B. 308, Statewide Sess., 1993 S.C. Laws.

³⁵⁸ GATPA, § 2; *see* Skelton, *supra* note 12.

³⁵⁹ GATPA, § 19.

³⁶⁰ This is precisely what the courts in California had substantially eradicated. *See, generally, Bensinger, supra* note 35.

visors could limit eligibility by tying eligibility criteria to those used for federal categorical grants. While the county would not be able to deny relief to those ineligible for federal assistance, they might limit benefits based on the number of children in the household, or the existence of close relatives whose incomes might be deemed available to the applicant.³⁶¹

The resulting practical effect of GATPA would have been to increase the participation of private charitable groups in programs to maintain the poor. While GATPA is silent with respect to the role of private charity in this regard, it seems clear that private charity is expected to fill the void left by the state. Those who can bear the costs will be expected to do so to minimize the redistributive effects of large state programs in relief of the poor; otherwise, the poor with no place to turn in California would have to leave, migrating to another jurisdiction where the benefits are better.³⁶² The latest AFDC "reforms," including those set forth in GATPA, appear to do the same thing, whether the proponents say so or not.³⁶³ Thus, as the static model would predict, elimination of minimum benefit levels is not necessarily a determination that such people do not need to be maintained. Rather, it reflects the determination that private institutions be forced to handle the problem and that whatever they did (or failed to do) would be adequate.

GATPA, then, in typical static fashion, concentrated on refinements to the basic implementary model of relief—the provision of things for the physical maintenance of the poor. GATPA does not represent any kind of significant or radical restructuring of the basic theory of poor relief or even of the delivery mode for such relief as may be accorded the poor. It is, rather, more in the nature of an attempt to return the general relief system to its antique origins, as a loose governmental system of preventing starvation, supplemented in large measure by private efforts, or the ingenuity of the poor themselves in their struggle to survive. California's radical reform, then, was

³⁶¹ These are things that county supervisors could not do under current California case law interpretation of the general assistance provisions. See, generally, *id.*; Blanton, *supra* note 179.

³⁶² I believe this is one of the clearest implications of the speeches Governor Wilson was making in support of Proposition 13. The sense was that the state was draining its resources and imposing increasingly larger tax burdens on the working population to support the idle, as a result of which the productive citizens were leaving the state. See Kershner, *supra* note 335 (quoting Gov. Wilson as saying, "Additional tax collections would be both unfair to the taxpayers and dangerous in the risk they pose of driving even more employers out of California."); Skelton, *supra* note 12 (quoting Gov. Wilson as saying, "The bottom line is, I'm trying to stop California from being a welfare magnet.").

³⁶³ With respect to GATPA, see *supra* notes 320–43.

as "radical," "different" or "new" as those, for instance, of Florida, Maryland, Michigan, New Jersey or Wisconsin.³⁶⁴ Indeed, it is less "radical" than the reforms suggested in other jurisdictions.³⁶⁵ It amounts to nothing more than an attempt to shift the mix of aid available, and the price the poor must pay for the receipt of such aid. It does not institutionalize a different philosophy of aid giving. As such, it will suffer the same triumphs and failures as the system it will "replace," and yet remain little more than what it began as—a low-level income maintenance program for certain pre-selected elements of the destitute.

VI. SUMMARY IN THE FORM OF A COMMENTARY: ARE STATIC SYSTEMS GOOD OR BAD?

I discussed static systems and the static paradigm that underlies them. I have described the underlying assumptions of which the inclination to static poor law system-building is perhaps merely symptomatic, argued that this orientation is unchanged by modifications to such statutes urging any of a number of different (and non-static) purposes, and that irrespective of the labels applied, any reform of our existing systems of poor relief will also tend to be limited and fundamentally static. Static systems, I have argued, are rooted in the acceptance of the status quo; such systems are also rooted in the unquestioned acceptance of the notion of the benefits of income inequality as the evidence of an economic system that rewards thrift and industry, and punishes sloth and economic irresponsibility. Jobs exist for all who seek them; the able-bodied who do not work, therefore, have made a lifestyle choice which should not be lauded. Those unable to work for their keep and who lack the wealth to support themselves through ill-fortune or irresponsible conduct need support, but not at the price of taking away the monetary rewards of the frugal and industrious. Thus, society's goal is not to reward those who by adversity, ill-luck or otherwise, do not have the means to support themselves. The object of poor relief is to maintain the poor, nothing more.

In contrast to the notions and values represented by static systems are those dynamic, eradivative notions which have found their way into the hortatory sections of many state statutes of general assistance.³⁶⁶

³⁶⁴ See *supra* note 8.

³⁶⁵ For example, California would not impose the requirement of birth control implants on indiscriminate breeders who are on the dole, whereas the state of Mississippi may impose such a requirement. See *Mississippi Proposes*, *supra* note 210.

³⁶⁶ See *supra* Part V.A, *Defining What a Static System is Incapable of Being*.

These conceptions of the poor and the nature and function of relief, while differing radically among themselves,³⁶⁷ have some similarities in approach. All seek the ultimate eradication of poverty. Many argue that eradication requires some level of significant income redistribution. Others argue that some type of universalist policy is necessary to achieve the end of poverty;³⁶⁸ poverty is a function of labor policy, or the lack of available jobs, and not of policy necessarily directed primarily to the habits or peculiar inclination of the poor.³⁶⁹

The static paradigm accepts the status quo and seeks merely to ameliorate existing conditions. The emerging dynamic outlook seeks to eliminate a disagreeable condition. Is one approach necessarily "good" and the other "bad?" It would be easy to say yes—"good" means eradicating poverty, or at least saying so, and "bad" means not caring enough about the poor to want to do everything possible to end their misery. Provocatively stated, the answer seems easy; but is it?

Whatever its deficiencies when compared to the lofty goals of more dynamic approaches, the static system does seem well-suited to its modest purpose—the prevention of acute destitution. While this may not be much, it is more than nothing. Giving little to those in need, it requires relatively little from those who must support the system. It neither disrupts social nor economic order; it is not income redistributive; it does little to reward idleness. Most importantly, it requires little political will to implement or maintain.³⁷⁰ When coupled with hortatory statements of more dynamic purpose, it might even, somewhat cruelly, serve the purpose of making taxpayers feel good about the use to which their tax dollars are being put.

In contrast, dynamic, eradivative programs require more investment of human and capital resources than do static systems. They tend to disrupt the social and the economic system, and are likely income redistributive.³⁷¹ They are indifferent to many of the personal peculiarities of behavior of the poor, usually assuming that these are func-

³⁶⁷ *Id.*

³⁶⁸ See *supra*, notes 237–39 and accompanying text.

³⁶⁹ See, e.g., RIEMER, *supra* note 19; *supra* Part IV.A, *Defining What a Static System is Incapable of Being*.

³⁷⁰ It should be noted that even this type of passive minimalist system might well be subject to popular pressure for reduction in times of acute economic stress, when it is most needed. The example of the California response to its current economic slowdown, Proposition 165, is substantial evidence of this. See PIVEN & CLOWARD, *supra* note 14, at 341–47; *supra* Part III.A, *Critical Assumptions: The Static Paradigm*.

³⁷¹ See *supra* Part V.A, *Explaining the Disjunctions Between Goals and Implementation: Why Don't Current Systems of Poor Relief Seem to Accomplish Their Purpose*.

tions of economic conditions.³⁷² No such program is simple, either in conception or implementation; consequently, even when implemented, there is no assurance that such systems will actually accomplish their purpose.³⁷³ Most importantly, perhaps, such systems may be enormously expensive to support over an unknown period of time.³⁷⁴ Consequently, a nation without the political will to undertake such endeavors will likely be reduced, ultimately, to perpetuating the meanness of parading their substantially static systems about, dressed in the purposes of a more dynamic orientation.

Neither approach is inherently good or bad. Both approaches rely for validation on the outlook and politics of the people advocating a particular approach. Either can be justified on the basis of the "proper" manipulation of political considerations, expediency, economics or any other principalled (or unprincipalled) means which elites in this nation employ to make choices among alternatives.³⁷⁵ This manipulation follows from the acceptance (or rejection) of the notions of the static paradigm, and not the other way around.

But, rather than choose either, we have contented ourselves by disguising one as the other. This is a painful national delusion. It may be that a nation or a state might lack either the political will, wealth or knowledge even to attempt the implementation of any kind of dynamic program. In this event, perhaps the population might have to content itself with a well-crafted static system until a more generous day arrives. On the other hand, a jurisdiction embarking on a more dynamic program might understand the costs and complexities of such an approach and be prepared for the social and economic modifications which might be at the heart of such programs. While that may

³⁷² See *id.*

³⁷³ See, e.g., JENCKS, *supra* note 32, at 228-33 (arguing universalist programs are based on faulty premises; but proposing type of universalist program aimed at aiding all single mothers with low wage jobs); Roger Wilkins, *The Black Poor Are Different*, N.Y. TIMES, Aug. 22, 1989, at A23 (arguing universalist, dynamic programs will not solve special problems of African-Americans).

³⁷⁴ See Robert Greenstein, *Universal and Targeted Approaches to Relieving Poverty: An Alternative View*, in THE URBAN UNDERCLASS 437, 452-56 (Christopher Jencks & Paul E. Peterson, eds. 1991); Louise B. Russell, *Proposed: A Comprehensive Health Care System For the Poor*, 7 BROOKINGS REV. 13, 17 (Summer, 1989). But see HAVEMAN, *supra* note 32, at 177 (asserting program he proposed would cost only 1.5% more than federal expenditures for comparable programs).

³⁷⁵ For a discussion of the manner in which political choices are made in the United States, see, e.g., JOHN D. STEINGRUMER, THE CYBERNETIC THEORY OF DECISIONMAKING: NEW DIMENSIONS IN POLITICAL ANALYSIS (1974); ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN THE AMERICAN CITY (1961); RICHARD NEUSTADT, PRESIDENTIAL POWER (rev. ed. 1990); Ralph K. Hutt, *The Congressional Committee: A Case Study*, 48 AM. POL. SCI. REV. 340-65 (1954).

not be a bad thing, and certainly many people so believe, the elimination of poverty will require more than a mere governmental pronouncement to that effect.

The static paradigm predicts many things about the manner in which the condition of the poor is alleviated; it does not predict or require honesty. What a generation of "reform" in the area of poverty law has demonstrated is that the United States is blessed with legislatures which have chosen (consciously or unconsciously) to embrace the traditional approach to poor relief and the implications of the static paradigm, all the while dishonestly peddling this choice as the implementation of a new and improved, dynamic transformative system for the permanent eradication of poverty.