

## Behind the contract for welfare reform: antecedent themes in welfare to work programs

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# Behind the Contract for Welfare Reform:

## Antecedent Themes in Welfare to Work Programs

Amir Paz-Fuchs<sup>†</sup>

*“What’s past is prologue.”*  
—The Tempest

*Welfare-to-work programs throughout history and across jurisdictions exhibit similar traits, in form as well as in substance. After several decades that are now termed “the classical age of the welfare state,” numerous Western countries have made significant changes to their welfare and employment policy. In many ways, these changes constitute a reversion to the latter days of the poor laws, based on nineteenth century economic theory that viewed the market as central in determining wages and employment. This shift may be perceived as changing the nature of the welfare state or as completely abandoning the concept of the welfare state, in favor of a different model: a contractual relationship between the state and its members, manifested in conditioning access to welfare entitlements on fulfillment of obligations. Though antecedent elements of this format have been exhibited throughout history, the dominance of this perspective, especially in a period that follows the establishment of the welfare state, is a remarkable phenomenon.*

*The purpose of this article is to attempt to deconstruct the reigning umbrella ideology of contemporary welfare reform. Welfare reform is often framed in reference to the concept of the (social) contract, which includes the conditioning rights on the fulfillment of obligations. I argue that the importation of contractual discourse to the welfare debate conceals certain economic and ideological agenda that should be brought to light. Even*

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*though the notion of welfare reform is now common currency in most of the industrial world, they tend to differ in their ideological emphasis, enforced through law. The relevant ideological emphasis, explored here, reveals the true character of a given program, and thus should provide the true basis for its normative analysis. Strikingly, the poor laws, which were in force throughout the English-speaking world for three and a half centuries, were justified by very similar motivations as the contemporary welfare programs in the United States. The advantage of placing the past and the present side by side arises from the fact that poor laws advanced policies that were unencumbered by legal and moral reservations that putatively restrict contemporary welfare reform. Because of the similarities between the poor laws and modern programs, the juxtaposition of past and present, therefore, grants us a unique opportunity to detach ourselves from the reigning ideologies of the twenty-first century, and to view current policies with the wisdom accrued over several centuries.*

*In retrospect, the poor laws are now perceived as cruel and inhumane, and their implementation tainted by arbitrariness and lack of respect for the situation of the impoverished individual. It is expected, therefore, that modern society would distance itself not only from the poor law institutions, such as the notorious workhouse, but also from the ideology and rationales by which these laws were governed. This article questions whether the stated objective of breaking clear from poor law ideology was fulfilled.*

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## I. INTRODUCTION

From the poor law era to present day, welfare-to-work<sup>†</sup> programs have three features in common: first, they view work as a mechanism to deal with economic problems, such as poverty, and social problems, such as exclusion; second, they focus on the most impoverished members of society; and third, they offer benefits as a conditional entitlement, mainly for various work related obligations. Despite significant variations, then, it is important to keep in mind the main thrust of all the programs: the aim to move individuals from the welfare rolls into the labor market. Thus, on an appropriate level of abstraction, some of the ideas informing current programs are detectable in programs implemented centuries ago. In their excellent study of the development of legal regulation of the labor market, Simon Deakin and Frank Wilkinson have recently noted that, although the “context of those statutory provisions had completely changed . . . there were many continuities in the transition from the poor law to social security.”<sup>1</sup> Instead of attempting to detail the wide range of texts and analysis found in poor law material, this article is limited to addressing those ideas that carry into or have analogies to contemporary welfare programs.

Despite the continuity of many elements of welfare law, important transformations have also occurred. One of the greatest changes took place at the beginning of the twentieth century. It was then that the emphasis on the duty to work at market wages, which was central to welfare to work policies for over 300 years under the Anglo-American poor laws, shifted to a guarantee of social insurance, full employment and access to, at least, wages that support subsistence. This trend escalated following the Second World War, with an implementation of a model that “was the inversion of the set of beliefs which sustained the new poor law.”<sup>2</sup> The British National Insurance Act of 1946<sup>3</sup> offered a modern, comprehensive form of social insurance that extended to the employed, the self-employed, and the unemployed, thus coming “close to realizing a model of employment-based social citizenship.”<sup>4</sup> This model challenged the poor law notion that the poor were responsible for their own plight, and brought structural

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<sup>†</sup> I prefer the somewhat cumbersome concept of welfare-to-work to refer to programs currently addressed in European discourse under the heading of “activation” and in American discourse under the heading of “workfare.”

1. SIMON DEAKIN & FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET* 110 (2005).

2. DEAKIN & WILKINSON, *supra* note 1, at 197.

3. 9 & 10 George VI c 67.

4. DEAKIN & WILKINSON, *supra* note 1, at 164; *see also* FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* 410-412 (2d ed., Vintage Books 1993) (1971); WILLIAM P. QUIGLEY, *Backwards into the Future: How Welfare Changes in the Millenium Resemble English Poor Law of the Middle Ages*, 9 *STAN. L. & POL'Y REV.* 101 (1998).

explanations of poverty and unemployment to the fore. Thus began the period referred to as the “Age of the Welfare State,”<sup>5</sup> characterized by expansive legislation in the social and economic realms—here referred to generally as “welfare”—and in the field of social security and unemployment in particular.

More recently, the 1990s brought about a second wave of reform to welfare-to-work policies as numerous Western countries made significant changes to their programs.<sup>6</sup> In many respects, these changes have much in common with central poor law elements and with nineteenth century economic theory that viewed the market as central in determining wages and employment.<sup>7</sup> Unemployment benefits were increasingly targeted for cutbacks and the move away from universal benefits reinstated the practice of making distinctions between deserving and undeserving poor.<sup>8</sup> Instead of a demand-side emphasis on full employment at decent wages, policies were directed towards supply-side measures that would contribute both to labor flexibility and to the integration of excluded groups into the labor market.<sup>9</sup>

Notwithstanding the importance of the change in the mindset with respect to welfare-to-work programs, this change does not explain the attention that has been given to the analysis of welfare reform over the past decade. As I explain below, the issues addressed are not new, and the measures applied are not ground-breaking. Instead, I argue that the change in the structure and character of welfare-to-work programs indicate a more general shift in the relationship between the state and the impoverished members of its society. The shift may be perceived as a change within the nature of the welfare state or as the complete abandonment of the concept, in favor of a different model: a contractual relationship between the state and its members that is manifested in conditioning access to welfare entitlements on fulfillment of obligations. Though antecedent themes of this format have been exhibited throughout history, the dominance of this perspective, especially in the period that followed the establishment of the welfare state, is indeed a remarkable phenomenon.

The purpose of this article is to attempt to deconstruct the reigning umbrella ideology of contemporary welfare reform, often referred to via

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5. DEREK FRASER, *THE EVOLUTION OF THE BRITISH WELFARE STATE* 253 (2d ed. 2003).

6. These include Australia, Belgium, Britain, Canada, France, Germany, Holland, Ireland, Israel and the United States. See BARBARA SWIRSKI, *FROM WELFARE TO WORK: GOVERNMENT PLANS TO REDUCE INCOME SUPPORT BENEFITS* (2000).

7. DEAKIN & WILKINSON, *supra* note 1, at 176.

8. DESMOND KING, *ACTIVELY SEEKING WORK?* 23 (1995) [hereinafter KING, *ACTIVELY SEEKING WORK?*] 23; GUY STANDING, *GLOBAL LABOUR FLEXIBILITY* 227 (1999).

9. *Id.* at 185–92; LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* 217–18 (Gregory Elliott trans., Verso 2005).

reference to the concept of the (social) contract,<sup>10</sup> and the conditioning of rights upon the fulfillment of obligations. I shall argue that the contractual rhetoric serves as a veil for distinct ideologies that should be brought to light. Since welfare reform is now common currency in most of the industrial world, the emphasis placed on one ideology or another reveals the true character of the program. Strikingly, the poor laws, which were in force throughout the English speaking world for three and a half centuries, exhibited very similar motivations to contemporary welfare programs in the United States. The advantage of placing the past and the present side by side arises from the fact that poor law practices advanced policies that were unencumbered by legal and moral reservations that restrict contemporary welfare reform, at least to some extent.

There is another important reason to show the connection between the poor laws and contemporary American welfare regime. Gertrude Himmelfarb states that “England served as a social laboratory for other countries . . . Just as America was the exemplar of democracy, so England was the exemplar of social welfare—and in both cases, for both good and ill.”<sup>11</sup> Himmelfarb explains that while “the old kind of charity left it to the individual to alleviate, according to his means, the suffering he saw about him,” the poor law transformed relief of material want into “a matter for social action rather than public virtue.”<sup>12</sup> And yet, notwithstanding their historical standing, the poor laws are now perceived as cruel, inhumane and their implementation tainted with arbitrariness and lack of respect to the situation of the poor individual.<sup>13</sup> It is expected, therefore, that modern society would attempt to distance itself not only from the poor law institutions, such as the notorious workhouse, but also from the ideology and rationales that governed it. This article examines if the objective of breaking clear from poor law ideology, assuming it indeed exists, is fulfilled.

It is fitting to set the beginning of this exploration in England at the start of the seventeenth century. Before this period “it cannot be said that Poor Laws, in our sense of the word [i.e. measures for the relief of destitution] . . . existed at all; they might more fittingly be called laws against the poor and the rights of labour.”<sup>14</sup> Indeed, though the British Poor

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10. Stuart White, *Social Rights and the Social Contract—Political Theory and the New Welfare Politics*, 30 BRIT. J. POL. SCI. 507 (2000); Peter Vincent-Jones, *Contractual Governance: Institutional and Organizational Analysis*, 20 O.J.L.S. 317, 344 (2000); cf. Mark Freedland & Desmond King, *Contractual Governance and Illiberal Contracts: Some Problems of Contractualism as an Instrument of Behaviour Management by Agencies of Government*, 27 CAMBRIDGE J. ECON. 465 (2003) (criticizing the use of contractual arrangements, especially in the realm of welfare-to-work, as a mechanism to implement illiberal policy).

11. GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY* 5 (1984).

12. *Id.*, at 148–49.

13. ROSS CRANSTON, *LEGAL FOUNDATIONS OF THE WELFARE STATE* 30 (1985).

14. T.W. FOWLE, *THE POOR LAW* 55 (1881). Thus, according to the British Statute of Labourers,

Law Act of 1601<sup>15</sup> was, in effect, a consolidating measure, it has grown to be viewed as “the history of the country’s social conscience.”<sup>16</sup> American programs, for their part, followed British ideology in both spirit and form well into the twentieth century. Desmond King, in his studies of programs targeting impoverished people in Britain and the United States, concludes that “the principal characteristics of the Elizabethan Poor Law of 1601 . . . were adopted by the American states both during and after the colonial period.”<sup>17</sup>

There seems to be a consensus among students of social policy, including those who agree on very little else, that the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act 1996 (PRWORA)<sup>18</sup> and the program it put into practice—Temporary Assistance for Needy Families (TANF), represented the most important moment for the American welfare system since 1935.<sup>19</sup> PRWORA introduced TANF, replacing Aid to Families with Dependent Children (AFDC), the American welfare policy in place since 1935. PRWORA also amended one of the most important social assistance programs in America—the Food Stamps Program (FSP).<sup>20</sup> The purpose of the FSP is to provide low-income households with a more nutritious diet by giving families the ability to purchase food supplies at retail stores, as an alternative to receiving meals at soup kitchens or religious institutions.<sup>21</sup> Food stamps are a critical source of financial assistance to those in need, increasing household income by over forty percent.<sup>22</sup> Even prior to the 1996 reform, food stamps were inextricably linked to income support, with eighty-seven percent of AFDC recipients receiving food stamps.<sup>23</sup> PRWORA made this link formal by

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1351, 25 Edward III c. 3:

And because many sound beggars do refuse to labour so long as they can live from begging alms, giving themselves up to idleness and sins, and, at times, to robbery and other crimes - let no one, under the aforesaid pain of imprisonment presume, under colour of piety or alms to give anything to such as can very well labour, or to cherish them in their sloth, so that thus they may be compelled to labour for the necessaries of life.

15. Poor Law Act of 1601, 43 Eliz. I c. 4 (Eng.).

16. H.L. BEALES, *The New Poor Law*, 15 HISTORY 308, 309 (1931).

17. KING, *Actively Seeking Work?*, *supra* note 8, 224 n.2; *see also* DESMOND KING, IN THE NAME OF LIBERALISM: ILLIBERAL SOCIAL POLICY IN THE USA AND BRITAIN 258–65 (1999) [hereinafter KING, IN THE NAME OF LIBERALISM].

18. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S.C.).

19. *See, e.g.*, KING, IN THE NAME OF LIBERALISM, *supra* note 17, at 277; *see also* RONALD DWORIN, SOVEREIGN VIRTUE 320 (2000) (stating that “[t]he 1996 Welfare Reform Act was a plain defeat for social justice.”).

20. Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 974, as amended (1977).

21. *See* Preamble to the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703-709.

22. ED BOLEN, *A Poor Measure of the Wrong Thing: The Food Stamp Program’s Quality Control System Discourages Participation by Working Families*, 53 HASTINGS L.J. 213, 216 (2001).

23. STEPHEN B. PAGE & MARY B. LARNER, *Introduction to the AFDC Program*, 7 THE FUTURE OF CHILDREN 20, 22 (1997), [http://www.futureofchildren.org/usr\\_doc/vol1no1ART2.pdf](http://www.futureofchildren.org/usr_doc/vol1no1ART2.pdf) (last visited Nov. 16, 2008).

stating that participation in TANF serves as “passport eligibility”: a precondition for entitlement to food stamps.<sup>24</sup> Because of this the majority of single-parent households receiving food stamps also participate in TANF.<sup>25</sup> The legal links between the two programs, which were strengthened following PRWORA, along with the fact that both serve very similar purposes, suggest that an analysis of TANF is incomplete without addressing the reform of the FSP.

Before embarking on analysis of these programs, an introductory note is warranted. America’s 1996 PRWORA reform defederalized welfare programs, thereby complicating research and analysis of these programs. Though the federal PRWORA is lengthy and elaborate legislation, states are charged with designing and implementing important features of the programs, which are detailed in state, and not in federal, statutes. Indeed, one may argue that no “American” welfare program, per se, actually exists and that research must focus on the individual programs of fifty states, or even 3,000 counties, since each exhibit local variations.<sup>26</sup> Moreover, especially in the American case, the issue of local control over relief giving is not incidental, but rather a central policy decision. It should be clarified that local control was prevalent decades before TANF came into force. In her classic critique, Winifred Bell criticized AFDC for the weight given to “subjective standards by the community, the agency and the individual worker”.<sup>27</sup> Moreover, beginning in 1981, the Reagan administration granted states waivers from certain federal regulations. The waiver requests were examined with leniency, usually approved with impressive expeditiousness and soon expanded to cover the field of welfare.<sup>28</sup> PRWORA further expanded the devolution of control over welfare programs, leaving to the states “to adopt any level of benefits they wished, to set any waiting periods, and to fix the maximum period of benefit.”<sup>29</sup>

And yet, significant elements of TANF and FSP are mandated by federal legislation. It has been noted that PRWORA “did not simply devolve functions to states; rather, it established specific funding and policy rules, requirements, and signals both to encourage and to discourage

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24. Pub. L. 88-525, 78 Stat. 703 (codified as amended at 7 USCA § 2014).

25. LAURA A. CASTNER & RANDY ROSSO, CHARACTERISTICS OF FOOD STAMP HOUSEHOLDS-FISCAL YEAR 1998, xv-xvi (2000), <http://www.fns.usda.gov/oane/MENU/Published/snap/FILES/Participation/char98.pdf> (last visited Nov. 16, 2008).

26. JOEL F. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE 81 (2004).

27. WINIFRED BELL, AID TO DEPENDENT CHILDREN 41 (1965).

28. SUSAN BENNETT & KATHLEEN A. SULLIVAN, *Disentitling the Poor: Waivers and Welfare Reform*, 26 U. OF MICHIGAN J. OF L. REFORM 741 (1993); LUCY WILLIAMS, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard*, 12 YALE L. AND POL’Y REV. 8, 24-27 (1994).

29. PIVEN & CLOWARD, *supra* note 4, at 114; *see also id.* at 94; MINOR MYERS, *A Redistributive Role for Local Government*, 36 URBAN LAWYER 753 (2004).

particular state action.”<sup>30</sup> The most significant and fundamental policy decisions are dictated at the federal level, while state discretion is largely limited to implementation.<sup>31</sup> This result has been intensified by the reauthorization of TANF as part of the Deficit Reduction Act (DRA) of 2005, which extends funding and authority for the program through 2010.<sup>32</sup> For example, federal rules have substantially increased the proportion of assistance recipients who are required to participate in work activities for a specified number of hours a week. The twelve categories of work that may count towards work participation are now clearly and narrowly defined in the Code of Federal Regulations.<sup>33</sup> States are now subject to a five percent reduction in their block grant if they fail to implement procedures and controls consistent with the Department of Health and Human Service (HHS) Secretary’s regulations.<sup>34</sup> In addition, states are forbidden from counting basic education or education towards a Bachelor’s Degree as vocational skill training.<sup>35</sup> Moreover, the substantive provisions of local programs show a striking degree of similarity to each other (e.g. residence laws that deny payments to recipients who have not lived in a certain locality over a certain period) even when the particulars (e.g. the extent of the period; different payment levels) may differ substantially.<sup>36</sup> Finally, since state practices are subject to judicial scrutiny by the Supreme Court, the Court’s affirmation of certain state practices, discussed below, reveals some of the relevant norms governing the TANF and Food Stamps programs as a whole. In sum, while the analysis and comparison of particular state programs is undoubtedly relevant and important, the merit of the broad, federal overview is not undermined by their unique dissimilarities.

It is also important to remember that local discretion is not a neutral factor. Indeed, insofar as poor relief is concerned, this feature has clear historical antecedents.<sup>37</sup> One may ask whether the issue of local control is at all relevant to the normative assessment of a given system. Under certain circumstances, it may indeed be irrelevant. Take for example, a school board’s control over the number of days per year that its teachers are deemed “employed.” In and of itself, this discretion would not, barring extraordinary circumstances, affect our conclusion that children in different school districts have, or do not have, a right to be educated. But if the

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30. MARK GREENBERG, *Welfare Reform and Devolution: Looking Back and Forward*, 19 BROOKINGS REVIEW 20, 21 (2001).

31. CANDICE HOKE, *State Discretion Under New Federal Welfare Legislation*, 9 STANFORD L. AND POL’Y REV. 115 (1998).

32. Pub. L. No. 109-171, 120 Stat. 4 (codified in scattered sections of 42 U.S.C. and 20 U.S.C.).

33. 45 C.F.R. § 261.2 (2006).

34. DRA Sec. 7102(c).

35. 45 C.F.R. § 261.31 (2006).

36. HOKE, *supra* note 31.

37. DEAKIN & WILKINSON, *supra* note 1, at 128–29.

school board exerts control that denies acceptance of children with disabilities, for example, this local decision would threaten the vitality of a child's equal right to education in the particular jurisdiction. A federal standard limiting local control and forbidding the local school board from discriminating against children with disabilities would promote children's right to education and to equal treatment. We find, therefore, that the administrative issue of local control should be assessed through the lens of another factor—that of discretion.

The relationship between discretion, welfare policy and individual rights is an interesting one that has been addressed by legal scholars.<sup>38</sup> The conventional position argues for an inverse relationship between individual rights and administrative discretion—the weaker the protection of the right, the more the individual is at the mercy of the administrator.<sup>39</sup> As Robert Goodin notes, “[t]he distinctive feature of rights is that they constitute control from below. . . . Rights thus constitute one clear way of diminishing the discretionary power of state officials, by giving those subject to their authority a certain measure of legal control over them.”<sup>40</sup>

This erosion of rights through the strengthening of local control was already apparent, in the context of welfare policy, in poor law legislation and practice. Himmelfarb notes that the use of open-ended legislation, that was to be filled by local implementation, was rampant in the administration of poor laws. She demonstrates that the concepts of discretion and rights are closely related:

▲ The frustration was all the worse because the ‘right’ was couched in language that was so vague, all those denominated ‘poor’ being told that they had a ‘right to a “reasonable subsistence,” or “a fair subsistence” or “an adequate subsistence.” . . . The alternative to this *vacuous notion of right* was the idea of ‘contract.’<sup>41</sup>

While Himmelfarb concludes that this vagueness offered claimants an

38. JOEL F. HANDLER, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270 (1983); WILLIAM H. SIMON, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

39. MICHAEL ADLER & STEWART ASQUITH, *Discretion and Power*, in DISCRETION AND WELFARE 9, 12 (Michael Adler & Stewart Asquith eds., 1981). However, some have observed that welfare interests require a certain degree of administrative discretion (see, e.g., Neville S. Harris, *The Welfare State, Social Security, and Social Citizenship Rights*, in SOCIAL SECURITY LAW IN CONTEXT 3, 36 (Neville S. Harris ed., 2000)); CHARLES A. REICH, *The New Property*, 73 YALE L.J. 733 (1963); WILLIAM H. SIMON, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1489 (1986) (evaluating the substantive rights theme dominant in liberal welfare discourse); ROBERT E. GOODIN, REASONS FOR WELFARE: THE POLITICAL THEORY OF THE WELFARE STATE 190 (1988).

40. GOODIN, *supra* note 39, at 211.

41. HIMMELFARB, *supra* note 11, at 161–62 [final emphasis added] (quoting *Report from his Majesty's Commissioners for Inquiring into the Administration and Practical Operation of the Poor Laws* (London, 1834)); see also SIMON DEAKIN, *The Capability Concept and the Evolution of European Social Policy*, in SOCIAL WELFARE AND E.U. LAW 3 (Michael Dougan and Eleanor Spaventa eds., 2005) (discussing the “fatal ambiguity” of poor law principles, such as “less eligibility”, *id.*, at 13).

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opportunity to fill the open-ended terms with their own “desires and imaginations,” Ross Cranston argues that this framework made possible the implementation of the poor law in a manner that was arbitrary, discriminatory, arrogant, “and in some cases downright cruel.”<sup>42</sup> Indeed, when the power to distinguish between deserving and undeserving poor was transferred to private and charity organizations in 1870s, such as the Christian Organization Society (COS), the bureaucracy of relief became entangled with social control and families were seen as undeserving “by reference to the qualities of temperance, cleanliness and thrift.”<sup>43</sup>

The analogy to twenty-first century faith-based initiatives is relevant. And, indeed, contemporary critics of welfare-to-work programs similarly suggest that in order “for there to be rights *in fact* . . . eligibility has to be fairly clear-cut, with a minimum of field-level discretion.”<sup>44</sup>

Complementing the discretion granted to officials, the issue of local control or, in poor law jargon, the concept of “settlement,” is central to the understanding of the system. Under the British Act of Settlement, local justices had the power to remove “any Person or Persons that are likely to be chargeable to the parish [that they] shall come to inhabit.”<sup>45</sup> It has been argued that “poor law was largely settlement law, and settlement law provided the rights and obligations which underpinned both the right to poor relief and the duty to provide it.”<sup>46</sup> Though the opening statement of the passage quoted may claim too much, it nonetheless indicates the centrality of the organizational feature of distributing relief solely through the mechanism of the local parish. The “whole business of settlements” was perceived, even by those who were unsympathetic to any form of relief, as “contradictory to all ideas of freedom” and “as a most disgraceful and disgusting tyranny.”<sup>47</sup> The situation of paupers was made all the more difficult by the fact that the local administration of the laws accentuated the harsh provisions of the Act of Settlement with even harsher practices, ignoring even the few safeguards that the law supplied.<sup>48</sup> This was partially because each parish operated separately with considerable legal discretion, exercising a degree of freedom that “led to increasingly idiosyncratic methods of distributing poor relief.”<sup>49</sup>

In addition to the evident effect on the situation of claimants, such an extreme degree of local control and discretion has also been considered to

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42. CRANSTON, *supra* note 13, at 30.

43. DEAKIN & WILKINSON, *supra* note 1 at 148.

44. HANDLER, *supra* note 26, at 248.

45. Poor Relief Act of 1662 (known as the “Settlement Act”) §1.

46. LORIE R. CHARLESWORTH, *The Poor Law*, 6 J. OF SOC. SEC. L. 79, 80 (1999).

47. THOMAS R. MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 344 (1798).

48. CRANSTON, *supra* note 13, at 24 (discussing safeguards such as the requirement to obtain judicial order before removal).

49. CHARLESWORTH, *supra* note 46, at 85.

be an ill-founded mechanism in dealing with the causes and symptoms of unemployment:

It can only be concluded that 'the elementary lesson that effective treatment of the Unemployment problem is utterly beyond the power of Local Government has not been learned.' Even with regard to the provision of maintenance, the government refused to realise 'the difficulties inherent in the use of a local system of relief to cure a depression national in its scope, and due to causes that are national and even international rather than local in their character.'<sup>50</sup>

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Nonetheless, we find contemporary programs, especially in the United States, following similar paths. Though some aspects of welfare programs are directed by the central (in some cases—federal) government, the emphasis on local control continually resurfaces in present-day programs.<sup>51</sup> Indeed, it has been argued that, like settlement policy, contemporary residency state laws "cement[] the relationship between a regional welfare system and a regional economy" and thus contribute to maintaining a low wage labor pool in the locality.<sup>52</sup> Moreover, states and municipalities have a strong fiscal incentive to reduce welfare expenses (and taxes) so as not to deter business and wealthy individuals from residing there. Alongside the noticeable hesitation of local public officials to assist disenfranchised, unpopular constituencies, granting state and local governments more authority to implement welfare programs will and already has led to harsh conditions and lower rates of benefit.<sup>53</sup> Indeed, this rationale was an important part of the reason for the initial nationalization of the American benefit program in 1935.<sup>54</sup>

## II.

### CONDITIONING BENEFITS: PAST AND PRESENT

We can now begin to investigate the nature of conditions placed on receipt of welfare benefits. Conditioning benefits upon the beneficiary's behavior and inclinations is a central feature in the typology of welfare-to-work programs in the U.S. and elsewhere.<sup>55</sup> It can even be argued that the precise nature of the condition gives each welfare relief program its specific

50. SIDNEY WEBB & BEATRICE WEBB, *ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY—PART II: THE LAST HUNDRED YEARS 708* (1963) [hereinafter WEBB & WEBB II], quoting FELIX MORLEY, *UNEMPLOYMENT RELIEF IN GREAT BRITAIN 3* (1924), and W.T. LAYTON ET AL., *THE THIRD WINTER OF UNEMPLOYMENT 48* (1923); see also DEAKIN & WILKINSON, *supra* note 1 at 193–99.

51. Dan Finn, *Welfare to Work 13 Benefits* 93, 95 (2004); Quigley, *supra* note 4, at 106–7.

52. PIVEN & CLOWARD, *supra* note 4, at 144; see generally *id.* at 123–46.

53. HOKE, *supra* note 31.

54. WILLIAMS, *supra* note 28, at 32–36.

55. CHRIS GROVER & JOHN STEWART, *THE WORK CONNECTION 23* (2002); DAVID MACAROV, *WORK AND WELFARE—THE UNHOLY ALLIANCE 11* (1980).

character. Thus, for each program, the following questions should be addressed: *Whose* benefits are conditioned? *What* is demanded? And *Why* are these conditions put forth (that is—what is the rationale underlying the conditioning of welfare relief)?

Only the first question may be answered simply insofar as this article is concerned: among those subject to various kinds of conditioning, the poor, able-bodied unemployed stand out mainly because they are perceived as able to change their predicament and to cease living on state aid. The subsequent questions posed above broaden the horizon of issues that may be dealt with because the conditions placed on the unemployed occupy a considerable range, they may be as amorphous as “being responsible for their family’s well being” or as concrete as “accepting any job offered to them.” The rationales and motivations underlying these requirements are similarly spread across a broad continuum that will be explored below.

The conditioning of relief upon various work requirements is hardly surprising to a twenty-first century student of social welfare policy and legislation. Indeed, it is actually the prospect of unconditional benefits that seems a peculiar suggestion.<sup>56</sup> Since the poor laws of the seventeenth century, welfare and work have not been viewed as separate.

Prominent amongst the conditions of the poor law programs was the idea that able-bodied poor persons would receive only “Indoor Relief” within the confines of the workhouse. One justification for such measures is the assertion that “if individuals or their dependants are to be selected for maintenance . . . they should in their maintenance be duly controlled by the Authority which supports them”.<sup>57</sup> Subsequent political and institutional contingencies required a revision of this condition, resulting in the introduction of alternative measures. One such alternative was the Labor Yard where the poor were required to perform outdoor tasks. “Relief Work” projects that benefited society were orchestrated in several regions often motivated by the desire to keep the claimants occupied.<sup>58</sup> Occasionally, programs sought to place claimants in jobs in the community, by requiring claimants either to accept any offer of employment or to “actively” or “genuinely” seek work on their own.<sup>59</sup>

It is possible to suggest several, different rationales as dominant in the analysis of welfare-to-work conditions. Moreover, more than one agenda motivates or advances certain programs and certain provisions within programs. The text of the legal provisions does not offer a straightforward position on the matter, leaving room for support of different approaches. Thus, Piven and Cloward go to great lengths to show that even when certain

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56. MACAROV, *supra* note 55, at 11.

57. JC M’Vail *Report on the Methods and Results of the Present System of Administering Indoor and Outdoor Medical Relief* (1907) 148 in WEBB & WEBB II, *supra* note 50, at 513.

58. WEBB & WEBB II, *supra* note 50, at 642–43.

59. For a detailed description of this policy see KING, *Actively Seeking Work?*, *supra* note 8.

policies “may be justified in the language of moral virtue . . . their economic effect is to ensure a pool of marginal workers.”<sup>60</sup> And, when Louisiana stopped providing benefits to thirty percent of welfare cases (ninety-five percent of which were African Americans) because the children were born out of wedlock, state officials “agreed that their law was as frankly directed towards saving public funds as it was toward improving family morals.”<sup>61</sup> This conflation of motivations is quite natural, of course, as “not every social practice can be interpreted in the sense of discovering its underlying social vision.”<sup>62</sup> Finding an unequivocal interpretation of the social vision of the programs is not the task at hand. Instead, it is important to map out the rationales motivating welfare-to-work programs in general. Such a platform will also assist in comparing, contrasting and evaluating different programs and their different emphases. This article highlights four rationales that are especially relevant in the workings of poor law and contemporary welfare-to-work programs: first, the “Deterrence Rationale” under which applicants are discouraged from claiming relief because relief payments are conditioned on harsh requirements; second, the “Fiscal Rationale” which stipulates that resources should be used efficiently and public costs should be kept to a minimum; third, the “Moral Argument” which views work as having an inherent moral value and utilizes various mechanisms of social control; fourth, the “Contractual Argument” which manifests a quid-pro-quo approach to welfare relief, and requires clients to give up “something” in return for the benefits received.

It may be necessary to provide a brief defense of this list. As noted below, many authors describing poor law programs focus on their deterrent nature, while appraisers of contemporary programs tend to identify a shift to a contractual discourse. The two perspectives, however, are not as far apart as implied by this positioning. If contractual discourse is understood to encompass all forms of conditioning, then it indeed contains all the ideologies and rationales listed above, including the deterrent aspect. If, on the other hand, the contractual rationale is an independent ideology that focuses on the reciprocal, quid-pro-quo attribute of human relations, then it stands distinct not only from a deterrent approach, but also from those approaches that highlight, *inter alia*, fiscal or moralistic explanations.

It is hardly contested that the rationales listed above are not independent of each other. Different ideologies may be invoked to bring about similar consequences while certain programs may reflect more than one rationale. And yet, there are significant differences between the motivations, as each reflects a different perspective on human interaction, free will, the image of beneficiaries, and various social and legal

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60. PIVEN & CLOWARD, *supra* note 4, at 127.

61. JOEL F. HANDLER & YEHESEKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 165 (2007).

62. HUGH COLLINS, JUSTICE IN DISMISSAL 74 (1992).

institutions. Therefore, though the categorizing of a specific feature of the programs under one rationale and not another is not incontestable, this thematic portrayal helpfully maps the dominant rationales and the provisions that they inspire.

### III. CONDITIONING FOR DETERRENCE

For many commentators, conditions for relief under the poor laws, and especially those applied under the New Poor Law of 1834,<sup>63</sup> were driven by the desire to deter claimants from applying for benefits.<sup>64</sup> If, indeed, that is the case, why not indeed accept Charles Murray's suggestion to opt for the "Alexandrian solution" and "cut the knot, for there is no way to untie it"?<sup>65</sup> Indeed, for some "abolitionists" during the poor law era, reducing the number of applicants was deemed an end in itself, and the existence of a system of relief was viewed as a concession.<sup>66</sup> Furthermore, these views clearly crossed the Atlantic as well as the threshold of the twentieth century. Josephine Brown writes about welfare provision in the United States during the Great Depression:

The conviction still prevailed generally that relief should be made so disagreeable to the recipient that he would be persuaded or forced to devise some means of self support in order to get off the list as swiftly as possible.<sup>67</sup>

But for the majority, deterrence was seen as the negative corollary of the provision of relief: relief should be given only to those who are in material dire straits and those individuals who have other options, whatever they may be, should prefer those options. Indeed, charity was to be provided under conditions so detestable that "persons not in danger of starvation will not consent to receive it."<sup>68</sup> This notion finds a modern analog in the persistent concern about fraud in modern welfare programs; those who *do* have other feasible options but choose to receive benefits are viewed as fraudulent claimants.<sup>69</sup> Thus, to deter these claimants, harsh

63. 4 & 5 George IV c 76.

64. See, e.g., KING, IN THE NAME OF LIBERALISM, *supra* note 8, at 240; SIDNEY WEBB & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY—PART I: THE OLD POOR LAW 243 (1963) [hereinafter WEBB & WEBB I]; WEBB & WEBB II, *supra* note 50, at 132–33; PIVEN & CLOWARD, *supra* note 4, at 33–36.

65. CHARLES MURRAY, LOSING GROUND 228 (1986).

66. Most prominently DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION Ch. 5 (1817, reprint 1996); See BRIAN INGLIS, POVERTY AND THE INDUSTRIAL REVOLUTION 185 (1972).

67. JOSEPHINE BROWN, PUBLIC RELIEF 1929–1939 17 (1940).

68. Cited in AMY D. STANLEY, *Beggars Can't Be Choosers*, in LABOR LAW IN AMERICA 128, 137 (Christopher L. Tomlins & Andrew J. King eds., 1992).

69. I.T. SMITH, INDUSTRIAL LAW 543 (7<sup>th</sup> ed, 2000); DEAKIN & WILKINSON, *supra* note 1, at 178–79.

conditions are attached to benefits.

We find, then, that historically deterrence is connected to conditional benefits via the mechanism of needs-testing. Thus, one of the recurring themes in texts of the poor law era is the view that relief of the destitute serves, and should serve, as a test for destitution: under the more moderate approach to deterrence, (i.e. distinct from the position that wishes to empty the welfare roles entirely), only the seriously destitute would accept the terms of the “deal,” thus creating a mechanism that would separate the deserving (the “truly destitute”) from the undeserving (the fraudulent claimants). This understanding of the deterrence mechanism may help to explain the seemingly incoherent combination of a contractual or conditional method with the emphasis on deterrence. A short explanation of this argument may be warranted.

In terms of public perception, it was routinely argued that the existence of the working poor undermined the justification for granting aid that could place the non-working, able-bodied pauper in an overly advantageous material position.<sup>70</sup> In terms of the structure and rationale behind welfare-to-work programs, however, this distinction between the laboring poor and able-bodied paupers is of negligible importance, especially when contrasted with the distinction between the able-bodied unemployed and the “impotent” (aged and infirm) unemployed.<sup>71</sup> The reason for this seems plain, for it is this latter distinction that discriminates clearly (at least theoretically)<sup>72</sup> between those who cannot gain subsistence due to their own fault or choice, and those who had fallen victim to ill fate. Incentives and disincentives could (again, in theory) target those whose personal capacities enabled them to work, thus eliminating the category of “undeserving poor” who are able to work but “refuse” to do so. It should come as no surprise, therefore, that this distinction was a central tenet in the American Quincy Report of 1821:

[T]he poor are of two classes: first, the impotent poor, in which denomination are included all who are wholly incapable of work, through old age, infancy, sickness or corporeal debility; second, the able poor, in which denomination are included all who are capable of work of some nature or other . . . .<sup>73</sup>

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70. HIMMELFARB, *supra* note 11, at 163-64.

71. MACAROV, *supra* note 55, at 35-37.

72. Liverpool philanthropist William Rathbone saw this effort as futile and its consequences as potentially disastrous:

It is beyond the omnipotence of Parliament to meet the conflicting claims of justice to the community; severity to the idle and vicious and mercy to those stricken down into penury by the visitation of God . . . .

Quoted in DEREK FRASER, *Introduction, in THE NEW POOR LAW IN THE NINETEENTH CENTURY* 1, 13 (Derek Fraser ed., 1976).

73. *Massachusetts, General Court, Committee on Pauper Laws, Chaired by Josiah Quincy, Report of Committee to Whom Was Referred the Consideration of the Pauper Laws of the*

According to the report, assisting the poor would diminish their work ethic by “destroying the economical habits and eradicating the providence of the laboring class of society . . . .”<sup>74</sup> Indeed, we find that the necessity to distinguish between the deserving and undeserving poor motivates a practical element of poor law schemes, that of “less eligibility,” referred to below. This idea has influenced contemporary perceptions of the welfare-to-work mechanism. Indeed, it has influenced Supreme Court jurisprudence: in rejecting a challenge to the work requirement, Justice Powell stated, in a manner that corresponds with distinctions between deserving and undeserving poor, that welfare is intended for those who are “genuinely incapacitated and most in need,”<sup>75</sup> thus reaffirming the rationale behind the work requirement, not far removed from the workhouse test—the offer of work is to serve as the test for relief.

The linking of deterrence to the distinction between deserving and undeserving poor results in the irony that the more successful deterrent measures are, the fewer “undeserving” claimants remain on the welfare roles. Sidney and Beatrice Webb, looking backwards towards the poor law, and Robert Goodin, predicting the effects of contemporary welfare programs, reached the same conclusion: a successful mechanism would thus lead to a situation where those truly deserving of unconditional relief would be subject to the harshest measures.<sup>76</sup>

The rationale of deterrence is most directly exhibited in the English institution of the workhouse, as unequivocally expressed in the 1834 Poor Law Report:

Into such a house none will enter voluntarily; work, confinement and discipline will deter the indolent and vicious; and nothing but extreme necessity will induce any to accept the comfort which must be obtained by the surrender of their free agency and the sacrifice of their accustomed habits and gratifications.<sup>77</sup>

The workhouse was intended to eradicate all forms of outdoor relief, that is relief granted to the poor while they could reside at home.<sup>78</sup> Permission to erect the first workhouses was granted in the early eighteenth century, but workhouses became a ubiquitous phenomenon after becoming

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*Commonwealth*, 1821, in PUBLIC WELFARE ADMINISTRATION IN THE UNITED STATES: SELECTED DOCUMENTS 32 (Sophonisba P. Breckinridge, ed. 1927).

74. *Id.* at 33.

75. *New York State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973).

76. WEBB & WEBB II, *supra* note 50, 157; ROBERT GOODIN, *Social Welfare as a Collective Social Responsibility*, in David Schmitz & Robert Goodin (eds.) *Social Welfare and Individual Responsibility—For and Against*, 97, 173–74 (CUP 1998).

77. *Report from his Majesty’s Commissioners for Inquiring into the Administration and Practical Operation of the Poor Laws*, at 271 (London, 1834) [hereinafter *Poor Law Report*].

78. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *The Relief of Welfare in HOW WE LOST THE WAR ON POVERTY* (Marc Pilisuk & Phyllis Pilisuk eds.) 269, 287 (2002)

a compulsory mechanism under the New Poor Law.<sup>79</sup> Under the New Poor Law, poor families were forced to enter the workhouse, sometimes as a whole unit, but on occasion men, women, and children were put in separate institutions.<sup>80</sup> Cranston contends that even the name “workhouse” is misleading, since the workhouse served not as a source of employment but as a test of destitution itself, a medium for relief and a form of social control.<sup>81</sup> Derek Fraser views the workhouse as the mechanism that set the principle of less eligibility into practice.<sup>82</sup> This principle is succinctly explained by the Royal Commission:

The first and most essential of all conditions . . . is, that [the able bodied person’s] situation on the whole shall not be made really or apparently so eligible as the *situation of the independent labourer of the lowest class* . . . Every penny bestowed, that tends to render the condition of the pauper more eligible than that of the independent labourer, is a bounty on indolence and vice.<sup>83</sup>

It should be noted that the concept of less eligibility applied not only to decisions regarding rates of relief, but was also used to justify deplorable conditions in the workhouse. For example, a prominent economist at the time, J.R. McCulloch, argued that “The able-bodied tenant of a workhouse should be made to feel that his situation is decidedly less comfortable than that of the industrious labourer who supports himself.”<sup>84</sup>

And so, Fraser concludes, the workhouse “was not intended to reduce poverty but to deter pauperism.”<sup>85</sup> Or, as described by one official of the period: “The advantage of the workhouse to the parish does not arise from what the poor people can do towards their own subsistence, but from the apprehensions the poor have of it.”<sup>86</sup>

In a similar vein, Sidney and Beatrice Webb argue that the utility of the workhouse test lay in the fact that “except in the very direst necessity” a person would prefer not to willingly admit himself.<sup>87</sup> Indeed, the deterrent nature of poor law programs is central to the Webbs’ analysis. So much so, in fact, that they find that just as the prospect of successful deterrence was the driving force behind institutions such as the workhouse, the main reason for the demise of such institutions lies in their *inability* to furnish sufficient deterrence.<sup>88</sup> As political and institutional developments forced changes on

79. HIMMELFARB, *supra* note 11, at 26.

80. The variations depended on time and place, as various workhouses had different policies at different times (see WEBB & WEBB II, *supra* note 50, at 132–33).

81. CRANSTON, *supra* note 13, at 42.

82. FRASER, *supra* note 5, at 45.

83. *Poor Law Report*, *supra* note 77, at 228 (emphasis added).

84. Cited in FRASER, *supra* note 5, at 46.

85. *Id.* at 50.

86. WEBB & WEBB I, *supra* note 50, at 244.

87. *Id.* at 243.

88. For a similar analysis with respect to the labor yards see RUTH HUTCHINSON CROKER, *The*

the intolerable nature of the workhouse, the workhouse no longer deterred a significant portion of the populous from entering. A London Inspector in the early nineteenth century observed that “the Workhouse is attractive to paupers . . . there are many persons to whom the Workhouse furnishes no test of destitution.”<sup>89</sup> Indeed, it became clear that a complete ban on outdoor relief was impractical to implement, and so in some cases outdoor relief was permitted subject to a strict work test—the requirement to be available for work, accept work offered and actively seek work.<sup>90</sup> Over the years the work test was implemented in an increasing number of regions and by the early twentieth century regions representing three quarters of the English population had some form of labor test in place.<sup>91</sup>

It may be suggested that the British institution that was established to supplement the workhouse suffered a similar fate for similar reasons—lack of deterrence. The Labor Yards were intended to fill in the gap left by the slow decline of the Workhouses and to reduce the costs of full-time maintenance of the poor.<sup>92</sup> This work, assigned “purely for “[deterrence],”<sup>93</sup> was limited to such tasks as stone breaking, wood cutting, or oakum picking. And, once again, the Royal Commission of 1905–1909 saw no reason to maintain the system that had obviously failed its purpose, since “there grows up a nucleus of loafers, who have found the stoneyard under lax supervision an easy way of earning a scanty living . . . .”<sup>94</sup> Then, as now, a perspective that idealized the value of work for work’s sake was prevalent. It is illuminating to note that those who participated in physical tasks for even the most negligible compensation were admonished for “earning a scanty living.” If this criticism was leveled at welfare recipients because they were willing to accept the conditions that were intended to deter them, then the more cynical goal of contractual deterrence, lowering the number of applicants, appears to have been at work.

To combat fraud in early welfare-to-work programs, England introduced harsh conditions for benefits. The classification of all paupers as fraudsters was instrumental to this process. The low rates of relief at the time of the poor law ironically served as a basis for such a broad generalization since, as the Local Government Board of 1881 deduced, the rates of benefits were so minimal that the poor must be working while receiving relief: “the old abuse of relief in aid of wages must largely prevail

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*Victorian Poor Law in Crisis and Change* 19 ALBION 19, 36 (1987).

89. *Id.* at 376–77.

90. DEAKIN & WILKINSON, *supra* note 1 at 137–38.

91. *Id.*

92. CROKER, *supra* note 88 at 36.

93. M.A. CROWTHER, *THE WORKHOUSE SYSTEM 1834-1929: THE HISTORY OF AN ENGLISH SOCIAL INSTITUTION* 198 (1981).

94. WEBB & WEBB II, *supra* note 50, at 203–4; *Report of the Royal Commission on the Poor Laws and Relief of Distress*, Poor Law Commissioners, at 204 (London: HMSO, 1909).

in some form or other.”<sup>95</sup> The leading economist at the time of the enactment of the New Poor Law justified the severity of the proposals of the Royal Commission as necessary due to the failure of the Old Poor Law to eradicate cases of abuse and fraud. In his conclusion, he suggests that deterrent measures are a compromise between those who support the need for such a system and those who would like to see it abolished:

The Commissioners, with very few exceptions, appear to have set out with a determination to find nothing but abuses in the Old Poor Law, and to make the most of them; and this was no more than might have been expected, seeing that this was the most likely way to effect its abolition.<sup>96</sup>

We find, then, that the workhouse and the labor yards, the separation of families, and dire conditions for relief all had, to a certain extent, one common objective—to make the provision of benefits as repellent as possible in order to deter applicants from applying. In this manner, the poor law motto—“work for those that will [l]abour; [p]unishment for those who will not; and [b]read for those who cannot”<sup>97</sup>—was put into practice. The goals of those who argued for deterring individuals from applying for assistance were not monolithic: some viewed the dire conditions as a self-maintaining test of desert—only “deserving” individuals and “those who cannot” work would accept the conditions. Others saw it as a mechanism for detecting fraud, as noted above. In sum, however, deterrent provisions may all be identified by their motivation to alter the potential claimant’s sense of priorities and to influence her to choose other means of maintenance.

Notwithstanding the fact that the manifestation of the deterrent rationale in many contemporary programs has departed in great measure from the treatment that the poor were subjected to in the workhouses and labor yards, poor law programs and contemporary programs have much in common. But centuries of social policy research make the modern deterrent rationale more problematic than it may initially seem. A quick digression is necessary to explain why this is the case.

When programs drift from a universal to a selective criterion for entitlement, policymakers should address at least two measures of efficiency.<sup>98</sup> First, a policy should be vertically efficient: the benefits should reach those in the target group. This objective is advanced by procedures to eliminate fraud. Secondly, a policy should also be horizontally efficient: a policy should try to reach a high percentage of the

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95. ANNE DIGBY, *The Rural Poor Law* in *THE NEW POOR LAW IN THE NINETEENTH CENTURY* 158 (Derek Fraser ed., 1976).

96. Cited in WEBB & WEBB II, *supra* note 50, at n.84.

97. JOYCE APPLEBY, *ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND* 131 (1978) (quoting Richard Dunning, *Preface, in A plain and easie method shewing how the office of overseer of the poor may be managed* (1686)).

98. STANDING, *supra* note 8, at 259.

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target group. The decision to put a program into practice is a statement that the administration prefers eligible candidates to, in the now-popular vernacular, accept the “terms of the contract.” The program is put in place, presumably because government either views entitlement to the program under the prescribed conditions as just and fair or because it fears that if claimants do not take part in the program, they will resort to other measures that will leave society (and perhaps, but not necessarily, claimants themselves) worse off.

An analysis of participation in the FSP reveals that between 1994 and 2000 the percentage of *eligible* participants for food stamps who participated in the program dropped from seventy-one percent to fifty-nine percent despite the fact that a fairly consistent number of people remained eligible throughout the 1990s.<sup>99</sup> Recent figures show that only forty percent of families eligible for food stamps receive them.<sup>100</sup> The declining levels of participation by eligible households may help explain the puzzling trend that, despite the booming economy at the time, the income of the poorest families actually declined between 1995 and 1999.<sup>101</sup> A low rate of participation in the program creates a moral hazard and consequently a problem that governments should address. Indeed, it has been noted that the purported educative and integrative objectives of the programs—to inculcate work skills and proper work attitude—are incompatible with their deterrent and punitive measures.<sup>102</sup> It is important, therefore, to inquire into the extent to which contemporary programs implement measures that deter eligible claimants from applying for benefits.

Recent research of social assistance programs has identified several features as deterring eligible recipients from claiming benefits to which they are entitled. These include means testing,<sup>103</sup> the requirement of periodic renewal of applications for eligibility,<sup>104</sup> the vagueness and complexity of

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99. ALLEN L. SCHIRM & LAURA A. CASTNER, U.S. DEPARTMENT OF AGRICULTURE FOOD AND NUTRITION SERVICE, REACHING THOSE IN NEED: STATE FOOD STAMP PARTICIPATION RATES IN 2000 (2002), <http://www.mathematica-mpr.com/publications/PDFs/fns00rates.pdf> (last visited November 16, 2008) (for statistics dating back to approximately 1998); ALLEN L. SCHIRM & LAURA A. CASTNER, U.S. DEPARTMENT OF AGRICULTURE FOOD AND NUTRITION SERVICE, REACHING THOSE IN NEED: STATE FOOD STAMP PARTICIPATION RATES IN 1999 (2002), <http://www.fns.usda.gov/oane/MENU/Published/SNAP/FILES/Participation/1999rates.pdf> (last visited November 16, 2008) (for statistics dating back to approximately 1994).

100. HANDLER, *supra* note 26, at 38.

101. BOLEN, *supra* note 22, at 217.

102. ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 129 (1996); *see also* Dan Finn, *The Role of Contracts and the Private Sector in Delivering Britain's "Employment First" Welfare State*, in *CONTRACTUALISM IN EMPLOYMENT SERVICES* 101, 106 (Els Sol & Mies Westerveld eds., 2005); WIM VAN OORSCHOT & JOHN SCHELL, *Means-testing in Europe: A Growing Concern*, in *THE SOCIOLOGY OF SOCIAL SECURITY* 187, 192 (Michael Adler et al eds., 1991).

103. WIM VAN OORSCHOT, *REALIZING RIGHTS* 17–18, 25, 271 (1995).

104. ANNE CORDEN, *CHANGING PERSPECTIVES ON BENEFIT TAKE UP* 22 (1995); VAN OORSCHOT, *supra* note 103, at 88–94.

eligibility rules,<sup>105</sup> a low benefit rate,<sup>106</sup> a structure that binds together service and fraud surveillance, and a stereotypical and derogatory perception of the clients. These traits, along with remarkably high rates of eligible individuals who are not aware of their rights, and are not informed by the administrative agency, have been characterized as “a bureaucratic design in deterrence.”<sup>107</sup> The conclusion that these elements have a deterrent effect has been corroborated by subsequent research in other countries, including Britain.<sup>108</sup> Critics have asserted that policymakers use such methods as a deterrent so as to reduce the costs of the programs.<sup>109</sup> The low take-up rate, however, has been seen to run contrary to the “integrative aim of social policy”<sup>110</sup> and to lead to social exclusion. It is important, therefore, to explain in more detail how contemporary programs implement measures to deter eligible claimants from applying for benefits.

#### A. Means Tests

Far from William Beveridge’s vision for the welfare state, according to which “no means test of any kind can be applied to the benefits of the Scheme”<sup>111</sup>—welfare-to-work programs in every industrial country require household income tests as a condition for benefits. The PRWORA enlarged the previous scope of the definition of the household for the purpose of obtaining FSP, to include including children under twenty-one who are married or have children.<sup>112</sup> The Congressional Budget Office estimated that this change would affect 150,000 food stamp households.<sup>113</sup> The eligibility standards for food stamps are incredibly complicated and extensive.<sup>114</sup> Application forms to claimants have to mirror, at least in some respect, these provisions. Bolen notes that:

The average length of an application is 12 pages, though it runs over twenty pages in ten states, and reaches thirty-six pages in Minnesota. In fact, the average food stamp application is six times longer than the federal application for a firearms permit and three times as long as the federal home mortgage loan application.<sup>115</sup>

105. VAN OORSCHOT, *supra* note 103, at 32; CORDEN, *supra* note 104, at 14.

106. VAN OORSCHOT, *supra* note 103, at 52; *see also* ALEX BRYSON, *The Jobseekers’ Allowance: Help or Hindrance to the Unemployed?*, 24 *INDUS. L.J.* 204, 208 (1995).

107. PIVEN & CLOWARD, *supra* note 4, at 152.

108. CORDEN, *supra* note 104, at 7; STANDING, *supra* note 8, at 266.

109. CHRISTOPHER S. JENCKS, *RETHINKING SOCIAL POLICY* 89, 226-228 (1992).

110. VAN OORSCHOT & SCHELL, *supra* note 102, at 192.

111. NICHOLAS TIMMINS, *FIVE GIANTS—A BIOGRAPHY OF THE WELFARE STATE* 21 (1995).

112. PRWORA § 803.

113. H. COMMITTEE ON WAYS AND MEANS, 104<sup>TH</sup> CONG., *SUMMARY OF WELFARE REFORMS MADE BY PUBLIC LAW 104-93 THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION* 130 (1996).

114. *See* 7 U.S.C. § 2014 and § 2015 (eligible households and eligibility disqualification) (2006).

115. BOLEN, *supra* note 22, at 218.

The demand for documentation to verify the details in these forms is similarly daunting. Thus, the complexity of the application process itself has a deterrent effect on potential claimants. In addition, the household must essentially reapply at least once every six months, and if the state agency demands—every month.<sup>116</sup>

### B. Low Rates of Benefits

By way of background to the TANF reform, it is noted that AFDC benefits lost half of their purchasing power between 1970 and 1992.<sup>117</sup> This was somewhat offset by the fact that food stamps maintained their purchasing power, leaving the rate of the combined reduction in purchasing power at twenty-seven percent.<sup>118</sup> This changed following the 1996 welfare reform.

Though there is room for alternative explanations, it is a suggestive fact that while Food Stamps benefit costs decreased between 1997 and 1998 by fourteen percent in the United States, participation in the Food Stamps program decreased by thirteen percent.<sup>119</sup> While families in dire poverty (below fifty percent of the poverty line) received almost sixty-six percent of their income from means-tested programs in 1995, this percentage plummeted to fifty-three percent in 2001.<sup>120</sup> During that period, TANF benefits in most American states fell below the corresponding 1994 AFDC level.<sup>121</sup>

After adjusting for purchasing power, TANF and FSP offer single individuals benefits at a rate that, at \$130 per month, is higher only than the Slovak Republic and Hungary amongst all OECD nations.<sup>122</sup> For the sake of comparison, Denmark grants \$1426, the Netherlands offers \$1002, and Luxembourg grants \$1053.<sup>123</sup> Provisions for couples and lone parents are only marginally more generous. The United States ranking with respect to benefits for families (couples or lone parents) with two children is identical. Granting \$466 for couples with two children and \$337 for lone parents, the United States is, again, more generous only when compared to the Slovak Republic and to Hungary. Acting mainly as a replacement for income, benefits may alternatively be compared through the use of the Net Replacement Rate (NRR) as a percentage of the wages of the average

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116. 7 U.S.C. § 2015(c)(1)(D) (2006).

117. PAGE & LARNER, *supra* note 23, at 24.

118. PIVEN & CLOWARD, *supra* note 4, at 372.

119. CASTNER & ROSSO, *supra* note 25, at xv.

120. HANDLER & HASENFELD, *supra* note 61, at 55.

121. *Id.* at 62.

122. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), BENEFITS AND WAGES OECD INDICATORS (2007). All benefit rates in this section signify the national rates. It is noted that in the U.S., benefit rates vary substantially between states.

123. *Id.*

production worker. In these terms, the United States rates second lowest for NRR for single persons (seven percent) and among the five lowest rates for benefits granted to couples with no children (twelve percent), couples with two children (forty-six percent) and lone parents with two children (thirty-eight percent).<sup>124</sup> Among countries that grant young people long term social assistance,<sup>125</sup> the United States' NRR rate for young people (seven percent) is the lowest among OECD nations.<sup>126</sup>

### C. Stigmatizing Attitude Towards Recipients

Stigma and attitude towards beneficiaries are difficult traits to quantify. And yet, stigma has been recognized as an effective deterrence from applying for social assistance.<sup>127</sup> Moreover, stigma may and has been empirically attached to material factors. Thus, Wim van Ooschot shows how Dutch housing benefits were not associated with negative stigma partly because one could earn 150 percent above the minimum eligibility and still be entitled to the benefit, thus leading to a substantially higher level of take-up.<sup>128</sup> Similarly, it has been established that American localities that have higher support rates also show a lower degree of personal stigma among recipients.<sup>129</sup> This dynamic creates a vicious circle, as governments are far more inclined to cut benefit rates for unpopular programs whose recipients are stigmatized.<sup>130</sup>

### D. Abolition of Fraud

In order to receive grants under TANF, the state must establish and enforce standards and procedures to combat fraud and abuse.<sup>131</sup> If the state does not participate in the Income and Eligibility Verification Scheme, designed to reduce fraud, the federal Family Assistance grant to the state will be reduced by up to two percent.<sup>132</sup> The legislation provides that a person found to have fraudulently misrepresented residence in order to

124. *Id.*

125. France, Greece, Italy, Luxembourg and Portugal have age limit of twenty-five and above. Australia and New Zealand grant young people only short term assistance.

126. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), BENEFITS AND WAGES OECD INDICATORS 39 (2002).

127. JOEL HANDLER & ELLEN HOLLINGSWORTH, *Stigma, Privacy and Other Attitudes of Welfare Recipients* 22 STAN. L. REV. 1.

128. WIM VAN OOSCHOT, *Troublesome Targeting: On the Multi-Level Causes of Non-Take-Up*, 56 SOCIAL SECURITY 193, 201–2 (1999) [Hebrew]. Some French benefits are also characterized by high ceilings of means testing (see PIERRE ROSANVALLON, *THE NEW SOCIAL QUESTION* 49 (2000)).

129. PIVEN & CLOWARD, *supra* note 4, at 289 (citing U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *THE ADMINISTRATION OF AID TO FAMILIES WITH DEPENDENT CHILDREN IN NEW YORK CITY*, NOVEMBER 1968-FEBRUARY 1969 36 (1969)).

130. *Jefferson v. Hackney*, 406 U.S. 535, 575 (1972) (Marshall, J., dissenting).

131. PRWORA § 402(a)(6).

132. PRWORA § 409(a)(4).

obtain assistance in two or more states will be denied assistance under TANF, Medicaid, Food Stamps, or SSI programs, for a period of ten years.<sup>133</sup>

In Britain, as well, an increasing level of public anxiety over the issue of benefit abuse and fraud since the 1970s has culminated in the 1997 Green Paper dedicated to the matter<sup>134</sup> and in the Social Security Administration (Fraud) Act 1997 that immediately followed. The SSA(F)A marked the opening of a new era in government determination to eradicate fraud and abuse. The Act empowered officials with greater authority and changed the balance between the public interest in detecting fraud and abuse, on the one hand, and claimants' rights to privacy, on the other hand, in a manner that has been criticized as inappropriate.<sup>135</sup> Both the American and the British governments' increased vigilance and reduced tolerance towards fraud, along with the potential violation of the beneficiaries' right to privacy, have served as efficient mechanisms of deterrence.<sup>136</sup>

#### IV.

#### CONDITIONING FOR SOCIAL CONTROL

The Poor Law concept of "residuum," like that of the present day "underclass," views causes of unemployment and poverty as related to behavior and morality.<sup>137</sup> A contractual model is beneficial to organs that have in mind behavior modification as it converts "diffuse, non-specific expectations into more specific and concrete obligations".<sup>138</sup> Following the logic that the contract is the foundation of the rules, and that rules dictate behavior,<sup>139</sup> governments turned to inspect what rules are needed so as to change behavior of asocial welfare claimants. Thus, social conservatives in the United States argued that since AFDC caused women to have children out of wedlock and families to break-up, the "Contract with America" needs to fuse a work oriented agenda with a behavior-modification agenda.<sup>140</sup> Social welfare can, under this paradigm, demand claimants to change their values, attitudes and behavior *in return* for assistance.<sup>141</sup> There is a danger here, however. Esping-Anderson notes that a characteristic trait of Fascist

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133. PRWORA § 408(a)(8).

134. DEPARTMENT OF SOCIAL SECURITY, BEATING FRAUD IS EVERYONE'S BUSINESS (1997).

135. GRAINNE MCKEEVER *Detecting, Prosecuting and Punishing Benefit Fraud* 62 MODERN L. REV. 261 (1999).

136. DEPARTMENT OF SOCIAL SECURITY *A New Contract for Welfare: Safeguarding Social Security* (1999); GRAINNE MCKEEVER, *Fighting Fraud: An Evaluation of the Government's Social Security Fraud Strategy* 21 J. OF SOCIAL WELFARE AND FAMILY LAW 357 (1999).

137. CHRIS JONES & TONY NOVAK, POVERTY, WELFARE AND THE DISCIPLINARY STATE 73 (1999).

138. FREEDLAND & KING, *supra* note 10, at 468.

139. CHARLES MURRAY, THE EMERGING BRITISH UNDERCLASS 25 (1990).

140. C NOBLE, WELFARE AS WE KNOW IT 127 (1997).

141. JONES & NOVAK, *supra* note 137, at 80.

regimes was the conditionality of social rights conditional on loyalty and morality, seeking to invigorate the workforce while reinstalling the principle of moral desert.<sup>142</sup>

But there are other approaches which, at least facially, seek to connect moral and cultural norms to the task at hand, namely, moving the able bodied unemployed into the labor force. The importance of these approaches lies in the way they connect popular perceptions on poverty and the reasons for unemployment to the collective response in the form of institutionalized welfare systems.

The first approach focuses on the importance of work as a moral endeavor,<sup>143</sup> sometimes even endowing it with reverent religious attributes, “the power to save the soul.”<sup>144</sup> A second approach perceives the culture of unemployment as the cause for unemployment, and therefore justifies the conditioning of welfare benefits on moral behavior.<sup>145</sup> The third approach views the culture of unemployment as the *result* of unemployment, and addresses asocial behavior through conditioning relief.

Though quite clear in theory, the distinction between the first and second approach does not manifest itself neatly when analyzing the legislation and policy. Both approaches concentrate on the moral attributes of the unemployed and view a productive life as morally superior to a life of “indolence, improvidence or vice.”<sup>146</sup> It is difficult to determine whether the perceived moral authority of a life of gainful employment is derived from the paramount value of work as an end in itself, or as the natural consequence of living a decent, and thus productive, life.<sup>147</sup> The two approaches will therefore be addressed together. This subsection concludes with an analysis of a significant and distinguishable moral agenda—the paternalistic attitude towards welfare recipients. Though it may have much in common with some of the other approaches, such as the clear concept of the good life that one should strive towards, its peculiarities merit separate exploration. I shall therefore deal with the moral rationale under three headings: moral correction as the avenue to work, welfare provision as a means of addressing moral concerns, and paternalism.

#### A. *Moral Correction as the Avenue to Work*

This perception views a productive life as one of the important

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142. GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 40 (1990).

143. HANDLER, *supra* note 26, at 21-22.

144. JASON DEPARLE, *AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION'S DRIVE TO END WELFARE* 162 (2004); MACAROV, *supra* note 55.

145. MURRAY, *supra* note 139.

146. *Poor Law Report*, *supra* note 77, at 264 (emphasis added).

147. See similarly FRASER, *supra* note 5, at 134 (discussing whether “moral degradation of the poor was a *consequence* of their housing condition . . . [or] the other way round”).

common traits of a decent citizen in a decent society. If an offer of work is rejected, this view finds fault in the different set of moral and cultural values that the claimant possesses.<sup>148</sup> Thus, the New Poor Law sought to modify the behavior of the poor and unemployed by holding them to a strict disciplinary regime within the workhouse. This was justified on the basis that “it has been found that the pauperism of the greater number of [able-bodied individuals] *originated in* indolence, improvidence or vice, and might have been averted by ordinary care and industry.”<sup>149</sup> For those who were previously employed, it seemed even ~~more clear~~ clearer that “their way of life had been anchored in the discipline of work, and so that discipline had to be restored.”<sup>150</sup> The way to do so was to shift “from direct relief to work relief.”<sup>151</sup>

The moralistic practice during the workhouse era was quite crude: the pauper was to be removed from his corrupting “natural” environment and placed in an environment conducive to forming a character that would meet society’s expectations. He would be subject to a system of labor discipline and restraint that, even when not inhumane, required him to adhere to the principle of less eligibility and, thus, be less attractive than the life of the independent laborer.<sup>152</sup>

The moral agenda of the poor law included the idea of enhancing male responsibility and punishing “‘intemperate’ marriages and births outside wedlock” that were seen as “responsible for overpopulation and the pauperization of the labouring classes.”<sup>153</sup> But within this practice of removing paupers from their home, there is a clash amongst the rationales that supposedly underpin poor law policies. Some regions adopted policies such as sending men to one institution and women and children to another.<sup>154</sup> Children above the age of five were required to work so as “to prevent an idle, lazy kind of life, which if once they get the habit of, they will hardly leave.”<sup>155</sup> Youth were subject to a similar treatment so as to ensure that they “may[] be accustomed and brought up in [I]labour[] . . . and [w]ork[]”<sup>156</sup>

This scenario is troubling since, then as now, those who explain

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148. MACAROV, *supra* note 55, at 124; Quigley, *supra* note 4, at 105–6.

149. *Poor Law Report*, *supra* note 77, at 264 (emphasis added).

150. PIVEN & CLOWARD, *supra* note 4, at 80–81.

151. *Id.*

152. DEAKIN & WILKINSON, *supra* note 1, at 141.

153. DEAKIN & WILKINSON, *supra* note 1, at 145.

154. DIGBY, *supra* note 95, at 153–4. In fact, such a policy was actually prescribed by the Poor Law Commissioners of 1832–1834, and those regions that applied the ‘mixed workhouse’ scheme did so knowing that they were deviating from that standard. The Webbs view the prevalence of this deviation as one of the reasons the system as a whole was eventually abandoned (see WEBB & WEBB II, *supra* note 50, at 376–7).

155. APPLEBY, *supra* note 97, at 141.

156. Poor Law Act, 1576, 18 Eliz. 1, c. 3 (Eng.).

unemployment through reference to moral and cultural norms consider the break-up of family ties to be intimately linked to problems of poverty and unemployment.<sup>157</sup> Indeed, it has been observed that “life in the workhouse was the antithesis of the domestic ideal: families were fragmented, women worked, and men did not provide for their families.”<sup>158</sup> One may wonder if the modern “man in the house” rules, which deny aid to a mother who is associated with a man in any way, do not have a similar negative effect. Dealing with unemployment by forcibly breaking up families, it should be concluded, undermines the goals of the programs.<sup>159</sup>

The idea that destitution may be attributed to personal irresponsibility offered justification for poor law measures, including the workhouse.<sup>160</sup> Then as now, the beneficiary was understood to lack the aptitude that enabled his fellow man to assume responsibility for himself and his loved ones. Thus, “the offer of the [Work]House” compelled “the able[-]bodied [man] to assume responsibility for the able[-]bodied period in his life.”<sup>161</sup>

These themes have become a central to modern welfare reforms.<sup>162</sup> Examining provisions of contemporary programs, the *moral* desert of beneficiaries has become an increasingly important condition for entitlement. As Lucy Williams argues, “only those women and children who conform to majoritarian middle-class values deserve government subsistence”.<sup>163</sup>

Welfare-to-work schemes have been criticized for seeking to reinstate the traditional roles in the family and to re-establish the prominent, normative role that a family had in society.<sup>164</sup> It is possible to suggest two scenarios that the programs putatively address, both of which stem from the lone mother’s refusal to marry the father of her children. Her refusal is justified because the financial incentives to marry are missing, and because the male in question is not an attractive prospect. He is, according to conservative writings, a “barbarian,” pure and simple.<sup>165</sup> The first scenario, then, views the welfare system as instrumental in “taming barbarians”; transforming them into attractive and worthy partners. As Charles Murray

157. MURRAY, *supra* note 139.

158. MARJORIE LEVINE-CLARK, *Engendering Relief: Women, Ablebodiedness, and the New Poor Law in Early Victorian England*, 11.4 J. OF WOMEN’S HISTORY 107, 122 (2000).

159. A more sinister explanation is that poor men and women were segregated to prevent the “unfit” from having children. BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS 135 (2005).

160. See DEAKIN, *supra* note 41, at 12.

161. Cited in WEBB & WEBB II, *supra* note 50, at 441–2.

162. LAWRENCE MEAD, BEYOND ENTITLEMENT 82–88 (1986) (advocating “the need for authority” and compelling welfare beneficiaries to assume responsibility by entering the workforce for their own good).

163. WILLIAMS, *supra* note 28, at 720–21.

164. GROVER & STEWART, *supra* note 55, at 148–74.

165. Cited in KIRK MANN & SASHA ROSENEIL *Some Mothers Do ‘Ave ‘Em: Backlash and the Gender Politics of the Underclass Debate* 3 J. OF GENDER STUD. 317, 323 (1994).

intimates, “young males are essentially barbarians for whom marriage—meaning not just the wedding vows—is an indispensable civilizing force. Young men who don’t work don’t make good marriage material.”<sup>166</sup> Taming the barbarians and socializing young men into their pre-ordained roles in the workforce and in society is seen as the moral notion underlying the programs.<sup>167</sup>

The second scenario recognizes that such social engineering may not always succeed. The alternative is to assure that the lone mother will take up functions traditionally associated with the male role model. Sociologist AH Halsey explains that this is because:

[T]he very, very important ingredient of a role model of a working man, a person who goes to work and comes back and does all sorts of DIY and is a responsible adult person is missing. And that seems to be a way of making sure you don’t have barbarism.<sup>168</sup>

If rising rates of divorce and “illegitimate” births cannot be controlled, then pressure should be applied so that the child will see the mother leaving for work on a daily basis. It is suggested that this is the hidden agenda underlying schemes that focus on lone parents.<sup>169</sup>

### B. Addressing the Symptoms

It has been repeatedly noted, by scholars on both sides of the political spectrum, that long term dependency is associated with unfavorable symptoms such as social exclusion, lower levels of education, vagrancy, alcoholism and drug abuse.<sup>170</sup> Conditioning welfare, then, may advance society’s conception of the good life by modifying this destructive behavior. Charitably, this approach is paternalistic; society employs an existing mechanism to reach out to socially excluded groups and improve their condition. A more cynical perspective would view this approach as preoccupied with “social control and the moral improvement of the lower orders.”<sup>171</sup> This approach was arguably dominant in the mindset of poor law policy makers, who “thought instinctively in terms of controlling the lives of those beneath them.”<sup>172</sup> Indeed, Piven and Cloward advance an even more troubling thesis, that social control driven by fear of revolt is a foundational explanation for the institution and expansion of public relief. In this they cite the Hammonds:

If compassion was not a strong enough force to make the ruling classes

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166. CHARLES MURRAY, *THE EMERGING BRITISH UNDERCLASS* 23 (1990).

167. GROVER & STEWART, *supra* note 55, at 96–112.

168. MANN & ROSENEIL, *supra* note 165.

169. GROVER & STEWART, *supra* note 55, at 55–57, 76–86.

170. HANDLER, *supra* note 26, at 210; DOUGLAS BESHAROV, *The End of Welfare as We Know It?* 111 PUBLIC INTEREST 95 (1993).

171. KIM LAWES, *PATERNALISM AND POLITICS* 66 (2000).

172. DAVID ROBERTS, *PATERNALISM IN EARLY VICTORIAN ENGLAND* 61–62 (1979).

attend to the danger that the poor might starve, fear would certainly have made them think of the danger that the poor might rebel . . . . Thus fear and pity united to sharpen the wits of the rich, and to turn their minds to the distresses of the poor.<sup>173</sup>

The attempt to change the social attitude and behavior of beneficiaries, referred to as the “problematic marriage of social engineering with individual freedom,”<sup>174</sup> did not cease with the passing of the poor laws. While vagrancy was a central concern in the eighteenth and nineteenth centuries, modern social concerns center around loose sexual conduct and the break-up of families. Moreover, these are issues that can be dealt with through the vehicle of welfare provision. Thus, Frank Field, discussing Britain, suggests that as Christian morality becomes unsustainable, “[t]he distribution of welfare is one of the great teaching forces open to advanced societies.”<sup>175</sup> Charles Murray is a prime exponent of this agenda, arguing that “illegitimacy is the single most important social problem of our time . . . because it drives everything else.”<sup>176</sup>

It is not always easy to determine whether the process of moral correction is done with the purpose of social control in mind, or for the bettering of the lower orders themselves. Thus, the Medical Assistant Commissioner, after reporting the grave hygiene conditions that the poor experienced, opined that “beneficiaries must be compelled to obedience alike in their own and in the public interest.”<sup>177</sup> A similar ambivalence is found in President Roosevelt’s Congressional Address, in which he explained why direct relief should be abolished in favor of relief conditioned on work. Moving between the concern for the individual and the interest of the nation, he explained:

Continued dependence upon relief induces a spiritual and moral disintegration fundamentally destructive to the national fiber . . . . We must preserve not only the bodies of the unemployed from destitution but also their self-respect, their self reliance and courage and determination.<sup>178</sup>

Turning our attention now to the details of the moral agenda of the American welfare-to-work program now in force, we find that the same normative ideas are quite explicit. Indeed, the PRWORA *opens* with the following statement:<sup>179</sup>

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173. PIVEN & CLOWARD, *supra* note 4, at 20–21 (quoting J.L. HAMMOND AND BARBARA HAMMOND, *THE VILLAGE LABOURER* 118 (1948)).

174. PETER VINCENT-JONES, *THE NEW PUBLIC CONTRACTING* 265 (2006).

175. FRANK FIELD, *A Rejoinder*, in *STAKEHOLDER WELFARE* 107, 111 (Alan Deacon ed., 1996).

176. CHARLES MURRAY, *The Coming White Underclass*, *THE WALL STREET JOURNAL*, Oct. 29, 1993, at A14.

177. FIELD, *supra* note 175, at 111; *see also* ALAN DEACON, *The Case for Compulsion* 98 *Poverty* 8–10 (1997).

178. PIVEN & CLOWARD, *supra* note 4, at 94.

179. PRWORA § 101.

## Sec. 101 Findings

The Congress makes the following findings:

Marriage is the foundation of a successful society.

Marriage is an essential institution of a successful society which promotes the interests of children.

Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children. . .

. . .

The number of individuals receiving aid to families with dependent children (. . . AFDC) has more than tripled since 1965. . . . Eighty-nine percent of children receiving AFDC benefits now live in homes in which no father is present.

The increase of out-of-wedlock pregnancies is well documented . . .

. . . The increase of teenage pregnancies among the youngest girls is particularly severe and is linked to predatory sexual practices by men who are significantly older.

The negative consequences of an out-of-wedlock birth on the mother, the child, the family and society are well documented . . .

As for the amendment to the Social Security Act (SSA) itself, section 401(a) of the Act now reads as follows:

## Sec. 401 Purpose

(a) The purpose of this part is to increase the flexibility of States in operating a program to

Provide assistance to needy families . . .

End the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.

Prevent and reduce the incidence of out-of-wedlock pregnancies . . .

Encourage the formation and maintenance of two-parent families.<sup>180</sup>

Thus, it should not be surprising that some provisions of welfare-to-work programs, state and federal, do not address unemployment benefits or work requirements at all, but rather strictly moral matters. In some states, such as New Jersey and Wisconsin, “wedfare” programs encourage claimants to “feel responsible” for their children by offering supplementary allowances if parents get married.<sup>181</sup> Indeed, one proclaimed target of contemporary measures outlined below is the non-normative family, and especially the single parent family, and their objectives are mainly to re-establish a particular idea of the family as the preferred domestic structure. Work, then, would “transform family structure, community life and . . .

180. PRWORA § 401.

181. ROSANVALLON, *supra* note 128, at 102.

would restore the social fabric.”<sup>182</sup> In addition, other provisions refer to the non-normative and asocial behavior of recipients in general, behavior that is not directly (or at times not at all) related to employment. These are some central elements of current program that advance certain moral agenda:

- **Minor Parent not in School:** A certain variation of what was known as Learnfare programs is established under TANF. Under this provision, the state will not grant assistance to an individual who is under the age of eighteen, unmarried, has a minor child at least twelve weeks old and has not successfully completed high school or its equivalent, unless the individual participates in either educational activities directed towards attainment of a high school diploma or its equivalent, or in alternative education or training schemes approved by the state.<sup>183</sup> Evaluations of such programs suggest that their impact, if any, was limited. In Wisconsin, for example, where Learnfare was first initiated, the program had no effect on improving school attendance.<sup>184</sup>
- **Minor Parent in Adult-Supervising Setting:** The state may not grant TANF funds to provide assistance to an unmarried individual who is under the age of eighteen and is caring for a child if the minor parent and child are not residing with a parent, legal guardian, or other adult relative of the individual, subject to limited exceptions.<sup>185</sup> Research on the living arrangement provision is limited and conclusions are mixed.<sup>186</sup> Alongside evidence that teen mothers who lived with their parents obtained more schooling, other studies have shown a decrease in enrollment and graduation and an increase in depression among teens living in a three-generation household.<sup>187</sup>
- **Illegitimacy:** The federal government requires states to establish goals and take action to prevent and reduce the incidence of out-of-wedlock pregnancies, with special emphasis on teenage pregnancies, for the calendar years 1998 through to 2005.<sup>188</sup> In addition, bonuses are granted to states that demonstrate a net decrease in out-of-wedlock births.<sup>189</sup> The SSA provides that \$50 million per year will be allocated to the states for a period of five years for abstinence-only programs for teens and unmarried adults.<sup>190</sup> Moreover, the reauthorization of TANF, under the DRA of 2005,

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182. PIVEN & CLOWARD, *supra* note 4, at 392-93.

183. PRWORA § 408(a)(4).

184. JODIE LEVIN-EPSTEIN & JOHN HUTCHINS, CTR. FOR L. & SOC. POL’Y, TEENS AND TANF: HOW ADOLESCENTS FARE UNDER THE NATION’S WELFARE PROGRAM 4 (2003), [http://www.clasp.org/publications/Teens\\_TANF.pdf](http://www.clasp.org/publications/Teens_TANF.pdf) (last visited November 23, 2008).

185. PRWORA § 408(a)(5).

186. LEVIN-EPSTEIN & HUTCHINS, *supra* note 184, at 3.

187. LEVIN-EPSTEIN & HUTCHINS, *supra* note 184, at 3.

188. PRWORA § 402(a)(1)(A)(v).

189. PRWORA § 403(a)(1)(E)(2).

190. PRWORA § 912 (Abstinence Education, replacing Sec. 510 of the Social Security Act, 42 U.S.C. 701).

includes \$150 million per year (2006 to 2010) to promote responsible fatherhood.<sup>191</sup>

- **Family Cap:** One of the more popular, and more controversial, measures enacted by state legislatures under the previous waiver system was carried into the framework of the PRWORA. The family cap, sardonically referred to as “contraceptive welfare laws,”<sup>192</sup> denies lone mothers benefits they would have been entitled to due to the birth of a new child, if they gave birth to the child while on welfare.<sup>193</sup> This measure exhibits the most direct manifestation of the public perception of the lone mother on welfare who engages in illicit sexual relations and gets pregnant so as to receive benefits.<sup>194</sup> Though the federal law makes no mention of family cap schemes, it permits states to continue to implement the welfare programs that were in place under the waiver scheme.<sup>195</sup> Many legislatures saw this as a green light to carry on with such policies as the family cap.<sup>196</sup>

As with Learnfare, there is no data to show that states that have employed family cap schemes under the waiver system have seen a drop in the size of AFDC families.<sup>197</sup> Furthermore, such families have substantially decreased in size during the twenty years prior to the implementation of the schemes. In 1969, 32.5 percent of AFDC families had four or more children, while only 9.9 percent had four or more children in 1990.<sup>198</sup> The average AFDC family in 1990 had 2.9 members (including adults) and 72.5 percent of AFDC families had one or two children.<sup>199</sup> Moreover, studies show that the ability to receive benefits had no effect on an AFDC mother’s decision to have a child.<sup>200</sup> As such data have accumulated, a number of states have either eliminated the family cap or are beginning to phase it out.<sup>201</sup>

- **Penalty for Non-Cooperation in Obtaining Child Support:** If an

191. Deficit Reduction Act (DRA) § 7103, Pub. L. No. 109-171, 120 Stat. 4 (2006).

192. DOROTHY E. ROBERTS, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 932 (1995) (arguing welfare policies that interfere with poor women’s reproductive choices violate the unconstitutional conditions doctrine).

193. *Id.*

194. VICKY LENS, *Welfare Reform and the Family Cap: Rhetoric versus Reality*, 4 J. OF CHILDREN AND POVERTY, 19 (1998)

195. PRWORA § 415.

196. *See N.B. v. Sybinski*, 724 N.E.2d.1103, 1106-07 (Ct. App. 2000) (Indiana’s family cap was intended to reduce fertility of welfare beneficiaries thereby lowering the number of children born into a dependent situation).

197. HANDLER & HASENFELD, *supra* note 61, at 302; WILLIAMS, *supra* note 28, at 737-40 (noting that empirical studies refute a correlation between women’s childbearing decisions and AFDC benefits).

198. WILLIAMS, *supra* note 28, at 738.

199. *Id.*, at 737

200. WILLIAMS, *supra* note 28, at 737-40 (noting that empirical studies refute a correlation between women’s childbearing decisions and AFDC benefits).

201. JODIE LEVIN-EPSTEIN, CTR. FOR L. & SOC. POL’Y, LIFTING THE LID OFF THE FAMILY CAP: STATES REVISIT PROBLEMATIC POLICY FOR WELFARE MOTHERS 4, (2003), [http://clasp.org/publications/family\\_cap\\_brf.pdf](http://clasp.org/publications/family_cap_brf.pdf) (last visited November 23, 2008).

individual fails to cooperate with the state in establishing paternity or in establishing or enforcing a child support order without showing good cause, the state will deduct no less than twenty-five percent and potentially deny assistance altogether.<sup>202</sup> This deduction or denial of service deprives the individual's family of funds that they would otherwise receive.

- **Drug Use:** The PRWORA contains a provision permanently denying cash assistance and food stamps to anyone convicted under state or federal law of a felony offense that "has as an element the possession, use, or distribution of a controlled substance."<sup>203</sup> If an individual is denied benefits under this provision and is part of a family that receives TANF assistance, the amount of assistance the family receives will be reduced by the amount that the offending individual would have received in assistance.<sup>204</sup> Food stamp benefits have a similar provision. The deterrent effects of these provisions seems questionable given the fact that in some states drug offenders already face the threat of life in prison without parole.<sup>205</sup> Instead, it seems that a moralistic approach guided the insert of the provision into PRWORA. As Senator Phil Gramm, who proposed this amendment to the PRWORA, explained: "I don't believe that people who are using drugs and who are selling drugs should be getting welfare . . . It's a tough provision but it's time to get tough".<sup>206</sup>

### C. *Paternalism*

Since the poor law era, paternalism has been perceived as "the most straightforward justification for conditionality."<sup>207</sup> The uniqueness of the paternalistic approach lies in its attitude to welfare claimants. In a sense, paternalism may be understood as a concrete policy that manifests "the value of reciprocal relations and mutual obligation translated into a holistic, great chain of being . . ." <sup>208</sup> Indeed, leading up the early twentieth century, poor law authorities habitually instructed claimants not only how to spend the money granted to them, but also how to conduct other aspects of their lives as well:

The 'principles of 1907' embody the doctrine of a mutual obligation between the individual and the community. The universal maintenance of a definite minimum of civilized life . . . becomes the joint responsibility of an

202. PRWORA § 408(a)(1)(B)(2).

203. PRWORA § 115(a).

204. PRWORA § 115(a)(1).

205. Note, *Recent Legislation*, 110 HARV. L. REV. 983, 988 (1997).

206. *Id.* at 986.

207. ALAN DEACON, *An Ethic of Mutual Responsibility? Towards a Fuller Justification for Conditionality, in Welfare in WELFARE REFORM AND POLITICAL THEORY* 127, 131 (Christopher Beem and Lawrence Mead eds., 2005).

208. LAWES, *supra* note 171, at 48 (quoting nineteenth century English paternal idealist Michael Thomas Sadler).

indissoluble partnership, such as the duty to treat the sick and educate the children. The inevitable complement of this corporate responsibility is placed on the individual to keep her children in health and send them to school.<sup>209</sup>

This attitude differs from the efficiency approach that immediately follows, and from the [other](#) moral perspectives identified in this section. First, while an efficiency approach ~~would~~ [assumes](#) the existence of, and [grants](#) credence to, an individual's ability to act rationally, i.e. in accordance with economic incentives, paternalism sees its justification *precisely* on the grounds that people will not act rationally. With respect to wage-work, the economic paradigm will stress the monetary incentives and disincentives to prefer work to benefits, while the paternalistic approach suggests that sometimes individuals need to be forced to maximize their own well-being. But paternalism is also unique as a moral approach. The policies discussed above suggest that the root cause for the poor's deprivation is their own moral character. Their different set of priorities leads them to prefer idleness and vice to productive wage-work. Re-educating them by addressing the moral flaws (or by simply cutting their entitlement) will result in beneficial material results, for them and for society.<sup>210</sup>

The paternalistic approach, on the other hand, assumes that the no such disparity in moral sensibilities exists. The poor and the welfare recipient simply lack the will power choose the better life. Therefore, they should be forced to be free.<sup>211</sup> Incidentally, ~~the latter~~[this perspective](#) is supported by studies that reveal that unemployed men and women exhibit attitudes favorable to wage labor at least to the same extent as working people, and often—to a greater extent.<sup>212</sup> And yet, the conclusion need not be that welfare beneficiaries should be forced to work. In fact, studies show that up to forty-six percent of welfare mothers do work, at least intermittently, even though they do not always report their income.<sup>213</sup> While this practice may not be laudable, it certainly shows that these women do not lack personal responsibility or will power. Moreover, the indignation directed towards this combination of work and benefits should be tempered by the fact that low wages and meager benefits force many beneficiaries to combine the two, to make ends meet.<sup>214</sup>

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209. SIDNEY WEBB & BEATRICE WEBB, ENGLISH POOR LAW POLICY 270 (1963); *see also* WEBB & WEBB II, *supra* note 50, at 613–4 (critiquing the parental responsibility policy that was in place at the beginning of the twentieth century).

210. MURRAY, *supra* note 65 (1984).

211. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT I.vii, II.iv (1998)

212. ELIZABETH ANDERSON, *Welfare, Work Requirements, and Dependent-Care*, 21 J. OF APPLIED PHILOSOPHY 243, 249–50 (2004); MEAD, *supra* note 162, at 79–80.

213. ANNE L. ALSTOTT, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 992–93 (1999).

214. MCKEEVER, *supra* note 136 at 366.

The paternalist attitude, then, was as prominent during the poor law era as it is today. The Poor Law Report of 1832–1834, which provided the basis for the New Poor Law, described the impact the workhouse has on the pauper. Through the workhouse,

new life, new energy is infused into the constitution of the pauper; *he is aroused like one from sleep*, his relation with all his neighbors, high and low, is changed; he surveys his former employers with new eyes. He begs a job—he will not take a denial. . .<sup>215</sup>

Desmond King overlooks the paternalistic undertone of the passage and characterizes it as deterrence.<sup>216</sup> But such is not the case. The view reflected in the 1834 report is on par with the view advocated by a contemporary proponent of a paternalistic approach to welfare, Lawrence Mead. Mead views the poor as “dutiful but defeated.” Though the poor are naturally inclined to work, they are exposed to a welfare system that leads to “the degradation of the character of the labouring class.”<sup>217</sup> Instead, the system should create incentives to work by conditioning benefits.<sup>218</sup> Both Mead and the Poor Law Commissioners view the poor as children, who should be shown the right path. Unable to assess their economic options rationally, the poor are dependent on the state to step in and impart their authority on them. Hegel endorsed this approach:

[S]ociety has the duty and right to act as guardian on behalf of those who destroy the security of their own and their family’s livelihood by extravagance, and to implement their end and that of society in their place.<sup>219</sup>

Ross Cranston identifies under the Old Poor Law “the idea of a paternal ruling class which regarded the maintenance of the poor as part of their duty.”<sup>220</sup> He describes the case of one William Amarys who, as he “hath behaved himself very rudely and irreligiously in the church,”<sup>221</sup> saw his weekly sums cut by half. The similarity to an adult granting a child allowance, and then refusing to pay because the child “behaved badly,” can hardly be more straightforward. Fraser explains this rationale explicitly, stating that “[s]ociety was acting like the loving parent inflicting sharp, painful punishment on the miscreant child—being cruel to be kind. The child, like the pauper, resented the short term discomfort, but benefited

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215. *Poor Law Report*, *supra* note 77, at 247–48 (emphasis added).

216. KING, IN THE NAME OF LIBERALISM, *supra* note 17, at 227.

217. DEAKIN & WILKINSON, *supra* note 1, at 133 (citing the 1824 Select Committee).

218. LAWRENCE MEAD, *Welfare Employment*, in THE NEW PATERNALISM 39 (Lawrence Mead ed., 1997); ALAN DEACON, PERSPECTIVES ON WELFARE 49–63 (2002).

219. GEORG WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 264, §240 (H.B. Nisbet trans., 1991); *see also* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY Bk.II, §12.11 (“Of Popular Remedies for Low Wages”) (1977) (arguing in favor of an attitude characterized by “enforced rigidity of discipline” towards the poor).

220. CRANSTON, *supra* note 13, at 35.

221. *Id.* at 36.

from the long-term improvement in character.”<sup>222</sup>

## V. CONDITIONING FOR EFFICIENCY

No account of historical or contemporary welfare-to-work programs would be complete without consideration of the fuel that drives the machine: money. But when costs are considered, two perspectives should be distinguished. The “macro” perspective analyzes costs and efficiency gains (potential and actual) from the state’s point of view. If benefit costs present an unbearable burden on the state budget, for example, some may argue that benefits need to be cut (at least temporarily), regardless of the consequences for beneficiaries.<sup>223</sup> From a “micro” perspective, the focus is on the individual’s decision making process. Beneficiaries are perceived as rational maximizers, who behave rationally when they maximize their own self-interest. If the state wishes to realize certain policy goals, it must arrange monetary incentives and disincentives accordingly. Arguments that are of interest in this subsection may be termed interchangeably as “efficiency,” “utilitarian,” “fiscal” and “economic” all denote an approach that focuses on the pragmatic, rational and efficient use of resources, monetary as well as human.

In fact, just as some poor law measures were not effectively executed because of excessive costs of implementation,<sup>224</sup> spiraling costs are cited as a major motivation for contemporary welfare reform. During the 1980s, a consensus seemed to develop in the U.S. and Britain around the notion that welfare payments had led to a fiscal crisis.<sup>225</sup> Thus, welfare needed to be reformed by reducing the level and duration of benefits, raising contributions rates and tightening conditions for entitlements. The fiscal rationale was integrated into the goals of the programs, which now include reducing the number of the unemployed claiming benefits, reducing the budget expenditures for welfare payments, increasing the flexibility of the local labor market and exploiting the available human resources.

To effectively convey the economic approach’s impact on welfare reform, it is useful to ~~return to employ~~ the ~~mentioned~~ distinction between the micro level and the macro level. As noted, on the micro level, beneficiaries are perceived to be motivated predominantly by pecuniary incentives and disincentives. This view had gained popularity over the decades, culminating in a contemporary discourse that warns policy makers

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222. FRASER, *supra* note 5, at 47.

223. This was precisely the argument that brought about significant benefit cuts in Israel in 2003.

224. DEAKIN & WILKINSON, *supra* note 1, at 113.

225. STANDING, *supra* note 8, at 228, 253.

against granting benefits that would lead to an “unemployment trap.”<sup>226</sup> The implication is that as long as benefits remain above a minimal market wages, the unemployed, behaving rationally, would continue receiving benefits and never enter the labor force.<sup>227</sup> As far as this discourse is concerned, values, stigma and social exclusion do not enter into the analysis. The idea that *social norms* “provide a cognitive frame of reference through which group members interpret and judge their environment . . . [and] a basis for distinguishing good from bad”<sup>228</sup> is dismissed as romantic naiveté. Thus, one seventeenth century writer protested that “the Poor, if Two Days work will maintain them, will not work three.”<sup>229</sup> The poor law principle of less eligibility, which requires one to compare the unemployed to the lowest of the laborer class, naturally emanates from such a paradigm.

The macro level of the economic rationale focuses on the goal of increasing society’s wealth and is concerned with ~~the wasting—waste of human~~ resources, *human and other*. Joyce Appleby finds that welfare reform policy in seventeenth century England was not focused on the loss to the national economy accrued due to the sums paid from the public purse, but rather on the fact that the able-bodied individuals were not included in the labor force. She states that viewing the poor as a source of labor “represents the infusion of the outlook of those who had embraced the productive ideal into public thinking on charity.”<sup>230</sup> Appleby finds compelling evidence that the government’s theory of economic growth and development took precedence over immediate concerns with the distress of the poor or the exactions of the poor rate.<sup>231</sup>

The most straightforward example of economic measures in poor law programs is the public works schemes, which were formed to enable the poor to be “encouraged, and mercifully dealt with, and kindly used.”<sup>232</sup> Appleby notes the wide range of projects embarked upon with poor relief money, including “a fishery, the draining of fens, clearing of wastelands, working up of flax or spinning the wheel by thousands of poor whose misery could be exchanged for a supportive competence.”<sup>233</sup> The

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226. GUY STANDING, *The Road to Workfare*, 129 INT’L LAB. REV. 677, 684 (1990)

227. HUGH COLLINS, KEITH D. EWING & AILEEN MCCOLGAN, *LABOUR LAW: TEXT AND MATERIALS* 466 (2001).

228. H. ANDREW MICHENER & JOHN D. DELAMATER, *SOCIAL PSYCHOLOGY* 352 (3 ed., 1994); for a more sophisticated approach to law and economics see CHRISTINE JOLLS, CASS SUNSTEIN & RICHARD THALER, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (advancing an approach that “reflects a better understanding of human behavior and its wellsprings” *Id.*, at 1473).

229. APPLEBY, *supra* note 97, at 145 (quoting GARDINER, *SOME REFLECTIONS ON A PAMPHLET*, 16-17 (1697)).

230. APPLEBY, *supra* note 97, at 151.

231. *Id.* at 140.

232. *Id.*

233. *Id.*

accomplishments of the Work Progress Administration (WPA) under President Franklin Roosevelt's New Deal were even more impressive. Within a five year span, the WPA completed "the construction or renovation of 110,000 public buildings, 600 airports, 600,000 miles of roads, and 116,000 bridges and viaducts."<sup>234</sup> At times, this logic was taken to its extreme, as when parish children were seen as "an ideal labor source for new manufacturers" thus creating a system of "'free' child labor."<sup>235</sup> Piven and Cloward reveal that factories began to relocate to towns where they could "employ" local children.<sup>236</sup> Moreover, young paupers were shipped to remote factories, to take advantage of the streams from which the power was drawn.<sup>237</sup>

Another form of work-benefits fusion was the famous Speenhamland system. Under this structure, parish funds complemented sub-minimum wages in the labor market. The parish would send the pauper to a farmer and pay the difference between the wages the pauper received and the allowance to which he was entitled.<sup>238</sup>

From a modern perspective, Speenhamland is generally viewed as a failed experiment. Some stress the fact that the program generally benefited employers and depressed wages, while "increas[ing] the attraction of pauperism precisely at the juncture when a man was straining to escape the fate of the destitute."<sup>239</sup> Others have judged the system as espousing "principles of pre-commidification since it . . . [was] designed to establish market hegemony in the distribution of welfare."<sup>240</sup> Using benefit beneficiaries as labor for public works schemes and to provide public services, also had ramifications on the level of wages in the labor market. Contemporary scholars note that the Speenhamland program not only negatively affected beneficiaries, but also increased the polarization of the labor market by "creating a cheap pool of forced labour", ~~by~~-harming the negotiating position of low-wage workers and depressing wages.<sup>241</sup>

The popularity of the Speenhamland programs stemmed from the fact that the government was able to exploit all the available resources. This opportunity ~~is-was~~ tempting not only because it allowed ~~eds~~ governments to save funds on domestic projects, but also to increase the ability to compete with foreign markets. Ross Cranston notes that this line of thought goes back to the erection of the poor houses in the seventeenth century,

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234. PIVEN & CLOWARD, *supra* note 4, at 97.

235. *Id.* at 28.

236. *Id.*

237. *Id.*

238. DEAKIN & WILKINSON, *supra* note 1, at 128-29.

239. KARL POLANYI, THE GREAT TRANSFORMATION 99 (1944).

240. ESPING-ANDERSEN, *supra* note 142, at 36.

241. KING, *Actively Seeking Work?*, *supra* note 8, at 159 (citing NATIONAL URBAN COALITION AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, FALLING DOWN ON THE JOB 59-60 (1971); PIVEN & CLOWARD, *supra* note 4, at chs. 4-5.

historically inspired by the need to compete with Dutch commerce through the use of low wages.<sup>242</sup> Despite disagreement over the program, the Speenhamland system stayed in place until the New Poor Law's Labour Test Order (1842) and Relief Regulation Order (1852) directed that no relief should be given to a person who is employed.<sup>243</sup>

Both sides of the political and economic sphere have lodged criticism against the synthesis of wage labor and relief. Those prone to *laissez faire* ideology had their own critique of the Public Work and Speenhamland schemes. Not only were these programs more costly than simply distributing benefits, but they also extended the range of government activity into areas traditionally preserved for private enterprise.<sup>244</sup> A different argument stressed the fact that wages and relief are governed by two different justifications. While the wage laborer was entitled to compensation for his daily toil, relief claimants should be offered assistance on the basis of their need, even if these beneficiaries were workhouse inhabitants who were assigned labor. This was noted by charity organizations such as the Charity Organisation Society:

Labour . . . is an excellent thing . . . . But . . . it must be labour subjected to the true conditions of labour . . . . Charity is also an excellent thing, but . . . when . . . labour and charity are mixed up together, great abuse and demoralisation are always engendered . . . .<sup>245</sup>

With such a rare historical consensus on the ineffectiveness of the Speenhamland program in mind, it is interesting to note that numerous Western countries are experimenting today with initiatives that combine work and benefits.

Relief itself, of course, has always been also subject to criticism. Indeed, contemporary American welfare legislation reveals with admirable candor that one of the main objectives of welfare reform is to lower costs, regardless of personal costs accrued by recipients. Under the previous welfare program, the federal government reimbursed the states for certain expenses undertaken by AFDC, AFDC Administration, JOBS and Emergency Assistance programs.<sup>246</sup> The structure of the new TANF program is substantially different. TANF consolidates and replaces these programs granting each state an annual block grant, calculated according to the state's total expenses under the four programs in previous years.<sup>247</sup> The

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242. CRANSTON, *supra* note 13, at 41.

243. DEAKIN & WILKINSON, *supra* note 1, at 138.

244. *Id.*, 82.

245. WEBB & WEBB II, *supra* note 50, at 643 (quoting Sir Charles Trevelyan, speaking on behalf of the Charity Organisation Society to the *Times*, December 24, 1878); DEAKIN & WILKINSON, *supra* note 1, at 130–31.

246. BENNETT & SULLIVAN, *supra* note 28, at 741.

247. PRWORA § 103, § 403 (Grants to States), § 416 (Administration). See also H. COMMITTEE ON WAYS AND MEANS, *supra* note 113, at 14.

result creates a simple economic incentive for the states: “states make money when clients are dropped from the rolls . . . .”<sup>248</sup> Moreover, even though inflation has been relatively low over the last decade, by 2007 the purchasing power of block grants had declined by twenty-three percent since 1997.<sup>249</sup> The ~~modern-economic~~ facets of welfare-to-work are neatly represented in TANF, as shown below.

i) Participation Rates: Under PRWORA, states must meet an escalating work participation rate for all families within the state receiving benefits. When the legislation was passed, the participation goal was set to fifty percent for all families and ninety percent for two-parent families by 2002.<sup>250</sup> Starting in 1995, states received a caseload reduction credit reducing their target by one percentage point for each percentage point reduction in the TANF caseload.<sup>251</sup> Following the reauthorization of TANF in the DRA of 2005, adjustments to participation rates are based on caseload reductions after 2005 (which saw an historic low level of caseloads) rather than 1995.<sup>252</sup> As a result of these new 2005 provisions, states have been forced to clear or, perhaps, “cream” the roles from those employable welfare recipients. This means, however, that those who have remained on TANF are individuals facing serious barriers to employment, including physical and mental health problems, substance abuse, learning disabilities, and low cognitive functioning.<sup>253</sup> This conclusion is reminiscent of one of Goodin’s insights,<sup>254</sup> discussed above, that the more successful programs are, the fewer “undeserving” recipients remain on the roles.

The federal rules governing the activities that count towards these work participation rates are detailed and complex, and include education, job search, and training programs.<sup>255</sup> For example, recipients in single-parent families with a child under six must participate for twenty hours per week; other single parent families must participate for thirty hours a week; a two parent family not receiving federally funded child care must participate for thirty-five hours a week, and if they do receive child care—for fifty-five

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248. HANDLER, *supra* note 26, at 58.

249. SHARON PARROTT, CTR. ON BUDGET AND POLICY PRIORITIES, and ALLEGRA BAIDER, CTR. FOR LAW AND SOCIAL POLICY, IMPLEMENTING THE TANF CHANGES AND THE DEFICIT REDUCTION ACT: “WIN-WIN” SOLUTIONS FOR FAMILIES AND STATES 110 (2<sup>nd</sup> ed., Washington, D.C. 2007), <http://www.cbpp.org/2-9-07tanf.pdf> (last visited November 23, 2008).

250. HANDLER, *supra* note 26, at 26.

251. MARK GREENBERG & SHARON PARROTT, CTR. ON BUDGET AND POLICY PRIORITIES, SUMMARY OF THE WORK PARTICIPATION PROVISIONS IN THE BUDGET RECONCILIATION BILL 2 (2006).

252. DRA § 7102(a), Pub. L. No. 109-171, 120 Stat. 4 (2006).

253. HANDLER, *supra* note 26, at 210; DEMETRA SMITH NIGHTINGALE, NANCY PINDUS & JOHN TRUKO, THE URBAN INSTITUTE, THE IMPLEMENTATION OF THE WELFARE TO WORK GRANTS PROGRAM 51 (2002)

254. GOODIN, *supra* note 76 and discussion there.

255. PRWORA § 407; CFR 45 § 261.30-36.

hours a week.<sup>256</sup> At least twenty hours per week under the all-families rate and thirty hours per week under the two-parent rate must be attributable to one of twelve enumerated occupations.<sup>257</sup> The DRA limits the range to nine core activities, and three non-core activities.<sup>258</sup> The latter may be assigned to participants only under certain conditions. The core occupations include: unsubsidized employment, subsidized private or public sector employment, on-the-job training, job search and job readiness assistance, community service programs, vocational educational training, child care services to individuals participating in a community service program.

ii) Time Limit on Eligibility: States may be penalized for failure to comply with a new sixty month limit on assistance.<sup>259</sup> According to the measure, a state may not use any part of the grant to provide assistance to a family that includes an adult who received assistance under any state program for sixty months (whether or not consecutive) after the date the TANF program commenced.<sup>260</sup> While states may exempt up to twenty percent of individuals ~~of~~ their caseload from this requirement, they may also choose to enforce even more stringent time limits. Indeed, six states impose lifetime limits of less than sixty months and eleven states impose a fixed-time limit of twenty-four consecutive months within the sixty month period.<sup>261</sup> Undoubtedly, TANF's most controversial measure was placing time limit on welfare benefits.<sup>262</sup>

Directly related to time limited benefits is the legislative proclamation that no individual or family is entitled to income assistance.<sup>263</sup> The proclamation has obvious rhetorical value, clarifying that abolishing federal entitlement implies "greater [government] discretion with regards to services and supports provided, expectations placed on clients and application of sanction policies".<sup>264</sup> But, in addition, the assertion that Americans no longer enjoy a *right* to welfare is also derived from the state-focused and consequentialist-oriented perspective. To reiterate: when benefit recipients reach their five-year limit, they lose their eligibility even if they exhibit the same criteria as they did when they first applied for

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256. PRWORA § 407(c)(1); 42 U.S.C § 607(c).

257. 45 CFR § 261.30

258. 42 USC § 607(c)(1) ; § 607(d) ; 45 CFR § 261.31 (narrowing the terms set in PRWORA § 407(d)).

259. PRWORA § 408(a)(7).

260. *Id.*

261. HANDLER, *supra* note 26, at 47.

262. The idea was originally proposed by David Ellwood, who later joined the Clinton administration to implement the concept. See DAVID T. ELLWOOD, POOR SUPPORT 124-127, 238 (1988) (proposing to replace the current welfare system with a "transitional support system").

263. PRWORA § 401(b).

264. ALAN WEIL, *Assessing Welfare Reform in the United States*, in WELFARE REFORM: A COMPARATIVE ASSESSMENT OF THE FRENCH AND U.S. EXPERIENCES 145, 159 (Neil Gilbert and Antoine Parent eds., 2004).

benefits. Although some welfare critics justify these restrictive measures as a deterrent,<sup>265</sup> it seems illogical that time restrictions would have an impact on the incentives or disincentives that individuals consider when applying for benefits. For if individuals lose the entitlement to welfare simply because their benefits expire, this completely evades the personal cost-benefit analysis. Structural conditions, such as the state of the economy or the local job market, may make labor market inclusion an unrealistic goal, at a given time, despite serious individual effort. Limited cognitive abilities, borderline mental health and substance abuse may also be significant barriers to attainment of employment.<sup>266</sup> Beneficiaries may require government assistance, on such occasions, as a remedy of last resort. Rather than a deterrent, a policy that allows welfare entitlement to expire is rooted in the desire to reduce government expenses.

Incidentally, it is noted that research of the effects of time limits is beginning to accumulate, as an increasing number of beneficiaries are exhausting their entitlement. Thus, a decade after adding time limits to welfare, research of Wisconsin's TANF program found that in the sixth year of leaving TANF, only 16 percent of families had earnings above the federal poverty line, while sixty percent were defined extremely poor (defined as families earning twenty-five percent less than the federal poverty line).<sup>267</sup> More generally, a recent government survey across ten states whose welfare cases were closed because of time limits found that time limit leavers were materially worse off than they were, with fifty-seven percent agreeing that they were "just barely making it from day to day", and many experiencing food insecurity and even hunger.<sup>268</sup>

## VI.

### THE STRICTLY CONTRACTUAL RATIONALE

We have now reached the most interesting rationale underlying historical and current welfare-to-work programs: conditioning for the sake of conditioning. The rationale governing the provisions discussed in this section is not neutral in any way.<sup>269</sup> Rather, the motivation for conditioning benefits is purely contractual. In other words, the mechanism of conditioning here is not used as a vehicle for the moral betterment of individuals, for efficiency, or for deterrence. Rather, the contractual

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265. See, e.g., King, *In the Name of Liberalism*, *supra* note 17, at 278.

266. PARROTT & BAIDER, *supra* note 249, at 27.

267. PARROTT & BAIDER, *supra* note 249, at 27.

268. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, WELFARE TIME LIMITS AN UPDATE ON STATE POLICIES, IMPLEMENTATION, AND EFFECTS ON FAMILIES Ch. 5 (April 2008), available at: [http://www.acf.hhs.gov/programs/opre/welfare\\_employ/sep\\_state/reports/time\\_limits/time\\_limits\\_ch5.html](http://www.acf.hhs.gov/programs/opre/welfare_employ/sep_state/reports/time_limits/time_limits_ch5.html).

269. MICHAEL FREEDEN, *The Ideology of New Labour*, *Political Quarterly* 42 (1999).

discourse embodies the ideology of reciprocity, offering the notion that a “something for nothing” attitude is immoral and unjust. Instead, the guiding principle for government benefits should be that “those who willingly share in the social product have a corresponding obligation to make a reasonable ([albeit] relatively proportional) productive contribution to the community in return.”<sup>270</sup>

This contractual rationale, it is suggested here, views human interaction through a quid-pro-quo lens. The use of the contractual terminology is not incidental. Interactions are equated with transaction, which elevate market intuitions to public policy principles and imply that imposing duties on right holders is feasible, efficient, and, most strikingly, morally just. Appealing to our market intuition, which suggests that we would not enter a contract that offers nothing for something, this paradigm suggests that the same is true for all human interaction and for the welfare sphere in particular.

Furthermore, the contractual approach neither accepts nor rejects the idea that unemployed men and women should receive assistance solely on account of their condition. Instead, the proponents of this approach acknowledge the fact that relief is granted, and focus on the question of what the beneficiaries of relief should be required to do in return. The most straightforward reply is that the claimant should take care of himself before he expects assistance. This might mean that the recipient must accept any offer of employment. In fact, the Vagrancy Act 1824<sup>271</sup> stated that willfully refusing employment, even when the wages offered were inadequate or below the accepted rate, is a criminal offence punishable by one month’s hard labor.<sup>272</sup> Only in the early twentieth century did the English courts begin to place constraints on the conditions of the work that must be accepted, if offered.<sup>273</sup>

The quid-pro-quo rationale has reached such prominence in contemporary policies that many writers propose the term “contractual welfare” as the governing approach for all welfare policies.<sup>274</sup> Proponents of this view sometimes exploit the concept of a “social contract,” which was employed historically to provide legitimation for state authority, and more recently as a mechanism to identify the reciprocal rights and duties of the citizen and her government.<sup>275</sup> Handler and Hasenfeld describe this approach:

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270. WHITE, *supra* note 10, at 513.

271. 5 George IV c. 34 §3.

272. DEAKIN & WILKINSON, *supra* note 1, at 139.

273. *Lewisham Union Guardians v. Nice*, [1924] 1 K.B. 618, 622-23 (holding that respondent was not bound to accept an offer of work based on wage).

274. See note 10 and accompanying text.

275. See e.g. ROUSSEAU, *supra* note 211; JOHN RAWLS, *A THEORY OF JUSTICE* (1971); for an excellent overview see JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986)

Citizens have *responsibilities*, not entitlements, some conservatives said. This is the social contract; it was a matter of fairness, of equity. The ‘truly needy’ deserved to be helped, but they must also contribute to society by supporting themselves and their families if they can.<sup>276</sup>

However, the contractual approach offers a much narrower view than that suggested by historical or contemporary social contract theories.<sup>277</sup> On one level, the quid-pro-quo ideology shares some similarities with the economic approach. Individuals are presumed to have the same bargaining power as the state, and thus able to accept or reject offers given to them. The problems of poverty and unemployment are individualized, so contracting with individuals is offered as a natural practice to deal with issues of public policy. Since the idea of unemployment as a structural phenomenon was introduced in Britain only in the 1880s, “signifying an abstract, impersonal, amoral condition, in contrast to the older word ‘unemployed,’”<sup>278</sup> it seems that the individualized approach has never been seriously contested. As King notes, policy in the United States operates under a similar paradigm:

With [brief exceptions in the 1930s and 1960s] . . . unemployment and welfare dependency [in the United States] have been viewed as problems of individual indolence rather than as structural manifestations of an industrial economy.<sup>279</sup>

But the quid-pro-quo rationale also adds a normative perspective. The argument suggests that it is intolerable for the poor to loaf about while receiving government money. This argument would therefore justify “occupying” the poor in any manner possible. Yet this attitude is distinguished from an approach that focuses on deterrence or on economic incentives. The work demanded is not meant to have a deterrent effect: the work is not intentionally meant to be repulsive enough to deter the poor from applying for relief. But the work also falls short of contributing to the economy and, at times, demands laid upon the poor are more costly than any profit gained. Under the English poor laws, initiatives such as Relief Work or Employment Relief sought to put able bodied men to work for local authorities or charitable institutions, for sums that were on par with the relief already granted to them, and well below the market rate.<sup>280</sup>

Notwithstanding some of noted accomplishments of the New Deal schemes or of “work relief” under the Public Works Administration,<sup>281</sup> it is

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276. JOEL F. HANDLER & YEHESKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY & WELFARE* 9 (1997) (emphasis in original); cf. MEAD, *supra* note 162, at 189 *ff* (addressing attitudes against forcing obligation in general, and in the welfare realm in particular).

277. AMIR PAZ-FUCHS, *Rights, Duties and Conditioning Welfare* 21 CANADIAN J. OF L. AND JURISPRUDENCE 175 (2008).

278. HIMMELFARB, *supra* note 11, at 13.

279. KING, *IN THE NAME OF LIBERALISM*, *supra* note 17, at 258.

280. WEBB & WEBB II, *supra* note 50, at 642–43.

281. DEBORAH MALAMUD, *Middle-Class Welfare in the Early New Deal*, 151 U. Pa. L. Rev. 2019,

clear that at times benefits were conditioned upon fulfillment of almost useless tasks. Josephine Brown describes work projects under the New Deal that were “invented as an excuse for work, obviously made for the purpose of creating means whereby recipients of relief could make some payment for what they received.”<sup>282</sup> But she collapses the distinction between an economic motivation and a quid-pro-quo rationale when she states that:

Many people who were not willing to give outright relief to the needy, believed in making them work for what they received, so that the community would have a return for the money expended. They even insisted that the needy should ‘work’, although this might mean no more than putting them through the motions, as was the case on many a ‘leaf-raking’ project.<sup>283</sup>

Though, as it was made clear above, there will always be borderline cases that are affected by more than one rationale, projects that put recipients “through the motions” seem to be paradigmatic examples of conditions for the sheer purpose of requiring individuals to “do something” rather than providing a “return for the money expended.”

The Labor Yards, discussed above, may also be seen as a manifestation of the quid-pro-quo perspective, especially when one considers the type of work demanded from the poor. Indeed, while the most repulsive and humiliating “occupations” had a distinct deterrent facet, and others, initiated after the publication of the Chamberlain circular, had some economic merit, the poor were also required to take on odd jobs such as cleaning, painting and decorating poor law institutions.<sup>284</sup> It is difficult, in these cases, to avoid the inference that the motivation behind employing the poor in this manner fits the quid-pro-quo analysis.

On a jurisprudential level, the strictly contractual rationale suggests that one cannot expect something for nothing and that rights have to be balanced with responsibilities. Workfare, one of the prominent features of modern welfare-to-work programs, has such a distinct quid-pro-quo nature. In essence, workfare schemes all have in common “the requirement that the poor work for their benefits.”<sup>285</sup> According to this approach, the opposing views as to the beneficial or deterrent consequences of workfare should be seen as a side-effect of the scheme’s main purpose: to provide “services of value to local communities in return for their expenditures on welfare.”<sup>286</sup> Moreover, the services are not given “in return” in the traditional sense.

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2033-2041.

282. BROWN, *supra* note 67, at 239.

283. *Id.*, at 240.

284. WEBB & WEBB II, *supra* note 50, at 367.

285. ALAN DEACON, *Welfare and Character*, in STAKEHOLDER WELFARE, *supra* note 175, at 60, 67.

286. NANCY E. ROSE, WORKFARE OR FAIR WORK 135 (1995).

Claimants are required to do *something*, even if it is unproductive and costly, in order to demonstrate that they have made an effort. Work-tests, unlike workfare, do not demand *actual* work contribution but rather test the claimant's *willingness* to work by demanding that she actively seek employment or that she participate in training schemes.<sup>287</sup> Work-tests also belong under the strictly contractual heading, because they are intended to separate the deserving from the undeserving, assuring that those receiving benefits have acted responsibly by pursuing all available alternative routes.

And, indeed, current programs proudly place high currency on workfare and on the "obligation to volunteer," as oxymoronic as that phrase may be. Like many other features, they are far from novel. The legal platform for these programs was established through the seemingly innocuous research provision contained in section 1115 of the Social Security Act, allowing states to replace existing federal programs with "experimental, pilot or demonstration" initiatives.<sup>288</sup> Waivers were granted with greater frequency during the Reagan administration as a result of welfare provisions included in the Omnibus Budget Reconciliation Act (OBRA) 1981.<sup>289</sup> By the time the 1988 Family Support Act (FSA)<sup>290</sup> was passed, thirty states responded favorably to this opportunity,<sup>291</sup> and by 1996, forty-three states had waiver-based programs.<sup>292</sup> Highly popular amongst the various state schemes was the Community Work Experience Program (CWEP). According to the House of Representatives' Committee of Ways and Means, these programs

required adult AFDC recipients to perform some sort of community work, such as park beautification or as a teacher aide, in exchange for the AFDC benefit. The individual does not become a paid employee but, instead, works off the AFDC benefit. The number of hours a person works may not exceed their AFDC grant divided by the applicable minimum wage.<sup>293</sup>

The rhetoric of the time reveals a budding discourse of strict contractualism, balancing rights and responsibilities. Thus, the National Governors Association wrote in support of the reforms:

The principal responsibility of government in the welfare contract is to

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287. PAUL BOU-HABIB & SERENA OLSARETTI, *Liberal Egalitarianism and Workfare*, 21 J. OF APPLIED PHILOSOPHY 257, 258 (2004).

288. 42 U.S.C. § 1315(a) (Supp. III 1991); see WILLIAMS, *supra* note 28, at 10-13.

289. Omnibus Reconciliation Act of 1981, 98 Pub. L. No. 97-35, 95 Stat. 357 (codified in scattered sections of 42 U.S.C.) (1981); see SHELLY ARSENAULT, *Welfare Policy Innovation and Diffusion* 32 STATE AND LOCAL GOVERNMENT REV. 49, 55 (2000).

290. Family Support Act, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.) (1988).

291. BENNETT & SULLIVAN, *supra* note 28, at 742.

292. HANDLER & HASENFELD, *supra* note 61, at 181.

293. STAFF OF H. COMM. ON WAYS AND MEANS, 101ST CONG., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 523 (Comm. Print 1989).

provide education, job training and/or job placement services to all employable recipients . . . The major obligation of the individual in the public assistance contracts we propose is to prepare for and seek, accept, and retain a job.<sup>294</sup>

With this background in mind, it would be useful to examine the details of the TANF program that exhibit a quid-pro-quo rationale:

i) Work-tests: Recipients must accept any offered work, without exceptions for prior work experience, prior earnings, education or training. Though the concept of “willingness to work” was always present in the background of Food Stamp Act amendments,<sup>295</sup> PRWORA broke with tradition by establishing formal work requirements for FSP participants.<sup>296</sup> The current law states that able-bodied adults without dependants are subjected to the new work requirements. In order to fulfill the work requirement, an individual must register for employment every twelve months. Additionally, an individual will lose entitlement in the following cases: for refusing to participate in an employment and training program without good cause; for refusing, without good cause, to accept an offer of employment at a wage not less than the applicable minimum wage; for refusing to provide information required to determine employment status or job availability; or for voluntarily and without good cause quitting a job or reducing work effort to less than thirty hours per week.<sup>297</sup> In addition, adults not engaged for at least twenty hours or more per week in work, training or workfare schemes will have their eligibility for benefits limited to a maximum of three months in any thirty-month period.<sup>298</sup>

Unlike Britain, the requirement to actively seek work has not become part of the legislative framework that governs the American programs. In practice, however, the situation is not much different. In fact, in many cases applicants are required to conduct independent job searches while the application for benefits is *pending*. This period can range from two to six weeks, and claimants are sometimes required to contact up to four employers per day.<sup>299</sup>

ii) Work-Related Activity: As part of the “work first” ideology, welfare

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294. KING, *Actively Seeking Work?*, *supra* note 8, at 175 (quoting NATIONAL GOVERNORS’ ASSOCIATION, *JOB-ORIENTED WELFARE REFORM 1-2* (1987); *see also* KING, *Actively Seeking Work*, *supra* note 8, at 276.

295. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986), *superseded by statute*, McKinney Homeless Assistance Act, 7 U.S.C. § 2012(i)(3) (redefining “household” to include children of parents who share a single household dwelling); *Lyng v. Int’l Union*, 485 U.S. 360, 371 (1988) (strikers disqualified from food stamp program); *cf* GERALD R. WEBER JR., *The Striker Amendment to the Food Stamp Act: Politics Chipping Away at the Union, Family, and Social Welfare*, 22 GA. L. REV. 741 (1988) (criticizing the striker amendment for running against “American perceptions of social welfare, labor unions, and family” – *Id.* at 770-771).

296. PRWORA § 815(d).

297. PRWORA § 815(a) replacing 7 USC § 2015(d)(1).

298. PRWORA § 824(a) amending 7 USC § 2015(o)(2).

299. HANDLER, *supra* note 26, at 49.

recipients must be engaged in some kind of work-related activity (as defined by the state) when they are ready for work or after twenty-four months of coming on assistance, whichever is earlier.<sup>300</sup> However, it is not clear how this requirement may be satisfied. For example, the federal mandate does not explain whether self-employment, volunteer work, or other form of non-gainful employment will satisfy the condition.<sup>301</sup> Moreover, ~~the~~ the assumption that participation in the workplace will nurture and expand aptitude to enter the paid labor market has not been born out.<sup>302</sup> In fact, there is growing evidence that forced inclusion into the labor market has proven to be an obstacle to mobility, as less and less workers are moving up the economic ladder.<sup>303</sup> Some of the jobs that recipients were sent to required no skills at all, and did nothing to develop hidden aptitudes. In one well known case, women were required to sort coin-sized toys into piles of different colors. When they finished, a supervisor reshuffled the pile and the next crew began anew.<sup>304</sup>

iii) Workfare: After two months of receiving assistance, a parent or caretaker receiving assistance must partake in community service employment, with minimum hours per week and tasks to be determined by the state. For the first time, PRWORA also introduced workfare requirements to participants in FSP. Subject to the exception detailed below, states must penalize individuals if they refuse to engage in the required work. The penalty may take the form of a pro rata reduction of assistance otherwise payable to the family with respect to any period in which the individual so refuses, or by completely terminating the assistance. In addition, a measure that did not exist under the AFDC was added; a state may terminate Medicaid (health insurance for poor individuals) for recipients, though not for their children, if their cash assistance has been terminated.<sup>305</sup> The state may exempt individuals if they show good cause or under other exceptions that the state establishes.<sup>306</sup> The state may not reduce or terminate assistance to a single custodial parent caring for a child who is under six years old if certain conditions apply.<sup>307</sup>

iv) Individual Responsibility Plan: States must devise an individual

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300. PRWORA § 103, replacing § 402(a)(1)(A)(ii) of the Social Security Act (42 U.S.C. 601 et seq.).

301. NEIL GILBERT, *Welfare Policy in the United States: The Road from Income Maintenance to Workfare*, in WELFARE REFORM, *supra* note 210, at 55, 61.

302. STANDING, *supra* note 8, at 237; JASON DEPARLE, *supra* note 144, at 330-332.

303. HANDLER, *supra* note 26, at 31, 56; AMIR PAZ-FUCHS, *Welfare to Work: Myth and Fact, Social Inclusion and Labour Exclusion* 28 OXFORD J. OF LEGAL STUD. 797, 811.

304. DEPARLE, *supra* note 144, at 168.

305. PRWORA § 114(b)(3).

306. PRWORA § 407(e)(1).

307. The conditions are: the individual can prove he or she was unable to obtain childcare due to the unavailability of childcare within reasonable distance; unavailability or unsuitability of informal childcare by a relative or under other arrangements; or the unavailability of appropriate and affordable formal child care arrangements.

responsibility plan for any individual who is over eighteen years old, has not completed high school, or has not obtained an equivalent certificate and is not attending secondary school. The plan will set an employment goal for the individual, a general scheme for moving the individual into private sector employment and the obligations of the individual during that time. Obligations may include attending school, maintaining grades, keeping school-age children in school, immunizing children and undergoing appropriate substance abuse treatment.<sup>308</sup> The plan is to be constructed within ninety days (and in certain cases within thirty days) of the receipt of assistance. The individual's failure to comply with the responsibility plan may, in addition to any other penalty, result in a reduction of benefits.<sup>309</sup> Problematically, however, recent studies show that the personal responsibility plan is a contract by name only. In fact, agency workers construct the terms of the welfare contract while excluding the client from the process and recipients have little recourse in getting the welfare department to meet its part of the contract.<sup>310</sup> Thus, one Member of the British Parliament characterized a similar Jobseeker's Agreement as "an abuse of language in an abuse of power."<sup>311</sup>

## VII. CONCLUSION

History does, indeed, repeat itself. Welfare-to-work programs are not an exception to this rule. In reviewing the publicly administered assistance programs of the poor law era, I highlighted several important themes that serve as the foundations of current welfare-to-work programs. At times, the article referred to legal provisions and policies that are centuries apart. This shows, of course, that this article is not meant to be an exhaustive historical tract. Rather, its purpose is to introduce several themes that played a role in the construction of historical and modern welfare-to-work programs.

More importantly, these themes are present, at times in different shape or form, in contemporary programs. The historical parallels were drawn out through reference to the four rationales that governed poor law programs—deterrence, morality, economics and quid-pro-quo. It was argued that these rationales inform, in varying degrees, programs that are in force today in different jurisdictions. Then as now, policy makers aim to deter eligible beneficiaries from seeking assistance; government wishes to reform the moral character of beneficiaries; the costs of social programs has always

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308. PRWORA § 103, replacing section 408(b)(2) of the Social Security Act (42 U.S.C. 601 et seq.).

309. PRWORA § 103, replacing section 408(b) of the Social Security Act (42 U.S.C. 601 et seq.).

310. HANDLER, *supra* note 26, at 85, and references there.

311. 262 PARL. DEB., H.C. (6th ser.) (1995) 300.

been a central consideration; and the idea of social assistance as conditional only upon proof that something is given in return is prevalent now as it was during the poor law era. These four rationales, as distinct as they may appear at first glance, actually stem from a coherent paradigm: the idea that relief is conditional. As Deakin and Wilkinson conclude, “it is in precisely those periods when a belief in the ‘natural’ properties of the market is at its strongest, that the administration of social welfare is at its most repressive.”<sup>312</sup>

Moreover, American programs revisit the poor law fundamentals not only in rationales, but also in concrete policy. Noteworthy amongst these are means testing, keeping benefit rates below labor market rates, emphasizing fraud detection, work testing, focusing on single parents and young adults, and even ceremoniously signing a contract between the agency and the claimant.

We find, then, that public opinion, policy, and legislation are drawn back to contractual discourse of the kind exhibited during the poor law era. This phenomenon may be attributed, in part, to welfare state fatigue and disillusionment. In addition, the accompanying themes of the poor law era have regained prominence. These include the elusive distinction between deserving and undeserving poor that resurfaces along with the principle of less eligibility. We also find that personal responsibility makes an appearance not only in poor law discourse, but also in contemporary approaches to welfare state programs. Moralistic agendas, which blame the poor for their lack of responsibility, were present ~~both~~ during the workhouse era with schemes designed to instill a sense of responsibility in the pauper. Nowadays, however, the concept of personal responsibility must be reconciled with basic human rights and fundamental welfare state intuitions. The constitutional and moral framework that governed the civil rights era and the establishment of the welfare state must remain intact, especially when and where unpopular social programs and beneficiaries are involved.

This convergence of past and present, and the abstract and concrete, indicates that current welfare-to-work programs have retreated from the egalitarian ideals exhibited in the early welfare state era, such as a strive to equal opportunity, social and economic protection in times of income loss, economic redistribution and a fair day’s pay for a fair day’s work. In other words, policy makers have shown a preference for poor law philosophy over continuing the welfare-state project. This moral and economic philosophy is clearly manifested in the renewed emphasis on the four rationales noted above.

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312. DEAKIN & WILKINSON, *supra* note 1, at 199.