HOMELESSNESS: A POST-INDUSTRIAL SOCIETY FACES A LEGISLATIVE DILEMMA

by

ROBERT W. COLLIN* AND DANIEL J. BARRY**

INTRODUCTION

In American social welfare history, the intent with which one became poor has determined their eligibility for aid from the state. This intent has never been clearly labeled as such. Rather, it has taken the form of equating intentional poverty with those "voluntarily in need," not truly needy or "willful-

*Associate Director, Center for Legal Studies on Intergovernmental Relations; LLM-Urban Studies, University of Missouri; Masters of Urban Planning, Columbia; Masters of Social Work (Administration), Columbia; J.D., Albany Law School.

**Masters of Urban Planning and Masters of Public Policy, candidate — 1986, Princeton University; J.D. University of Virginia.

1WALTER I. TRATTNER. FROM POOR LAW TO WELFARE STATE (2nd ed. 1974). People were expected to look out for themselves and their families. If financial difficulties arose, they would turn first to their relatives and families, just as they do today. If these resources were inadequate, the community was morally obliged to share with them through the poor law. Town officials were justified in seeing that people did not evade their responsibilities. The basic mode of service delivery was for each family to care for a poor person for part of the year. People who were only temporarily in need received outdoor relief, which meant only in their own homes. Sometimes they were auctioned off after the town meeting.

Early American society was strongly influenced by Calvinism. The Calvinistic interpretation was hierarchial. Destiny determined one's rank, and it was through one's work that destiny prevailed. If one had no work, then they were instruments of the devil. Intent was deduced from the employment status of the individual. As the population increased, and the social life of the colonies grew more varied, the problem of dependency became more complex. The need for a permanent, carefully regulated social welfare policy became obvious.

2In New York provision for assistance to the needy is not a matter of legislative grace; it is specifically mandated by their Constitution. N.Y. Const. art. XVII, § 1 provides that:

[the aid, care, and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such a manner and by such means, as the legislature may from time to time determine.

As noted in Tucker v. Toia, 43 N.Y.2d 1, 7-8, 405 N.Y.S. 2d 728, 720-31 (1977), comments by Edward F. Corsi, chairman of the Committee on Social Welfare, in the adoption of the provision by the Constitution Convention were persuasive. Mr. Corsi states:

Here are the words which set forth a definite policy of government, a concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First: to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and, secondly, to set down explicitly in our basic law a much needed definition of relationship of the people to their government . . .

The Legislature may continue the system of relief now in operation. It may preserve the present plan of reimbursement to the localities. It may devise new ways of dealing with the problem. Its hands are untied. What it may not do is to shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government.

Revised Record of the Constitutional Convention of the State of New York, Vol. III, 2126 (1938). Judicial interpretations of Article XVII, § 1 have distilled and clarified the meaning of this Constitutional directive. Aid is to be provided to all those individuals who are "involuntarily needy"; but it is properly within the realm of legislative discretion to deny aid to employable persons who are deemed not "needy" because they have wrongfully refused to avail themselves of an opportunity for employment. Such individuals are deemed to be "voluntarily in need." Barie v. Lavine, 40 N.Y. 2d 565, 388 N.Y.S. 2d 878, (1976). Furthermore, the denial of aid to admittedly "needy" individuals on the basis of criteria having nothing to do with need is also forbidden as a violation of Article XVII, § 1. Tucker v. Toia, 43 N.Y. 2d 1, 400 N.Y.S. 2d 728 (1977).

The legal distinction between the "voluntarily" and "involuntarily" needy was first recognized and de-
ly unemployed." There has not been a distinction between the intention with which one seeks aid, and the intention with which one becomes poor. Recently, such a distinction is emerging in new homelessness legislation. However, the new poverty legislation which grapples with intent will be doing so in a post-industrial society. Intent minimally denotes some type of control over one's life, but the ability to control one's life decreases in a post-industrial society. As will be discussed, this dynamic has many implications for poverty legislation.

The main problem caused by the blurring of states of intent for public assistance is the failure to aid the needy. It also exacerbates economic class differences. In addition, income-maintenance programs effect the bargaining

fined by the New York Supreme Court, Appellate Division, in its consideration of the Barie case, where Justice Herlihy stated:

While the objective facts of hunger and a lack of sufficient assets to provide for one's own food, shelter and clothing establish prima facie a "needy" person, nevertheless, the word "needy" does not in its ordinary meaning encompass a person who is creating the need by consistently avoiding or refusing to provide for his needs.


1 N.Y. Soc. Serv. Law § 131(5) (McKinney 1986), provides that no assistance or care shall be given to an employable person who has not registered with the local employment agency or has willfully refused to accept employment in which he is able to engage. Regulations promulgated pursuant to this statute provide, in relevant part, that one who, without good cause, fails or refuses to accept manpower services and certification shall be disqualified from receiving assistance for 30 days [N.Y. Admin. Code tit. 18, §§ 385.7(a)(2), 385.8(b)(1)] (1979). Under the foregoing provisions it is clear that a "refusal to accept manpower services and certification" must be willful or without good cause.

However, judicial definitions of "willfullness" have stretched beyond its common meaning. One of the authors of this Article discussed this issue in a previous article.


In New York State certain categories of state Home Relief recipients are required to "work off" or "earn" their Home Relief grant through Work Relief in public works projects. The amount of time the recipient must work is determined by dividing the Home Relief grant by the minimum hourly wage. In Woods, the plaintiff was a single, elderly women who had documented illnesses of diabetes, hypertension, and arthritis. In this particular instance she had missed nineteen of the seventy-six work hours requirement. On other occasions she had worked overtime to make up the few hours she had missed. Though bedridden and without a telephone, she gave dimes to her friends to call and notify her supervisor at the public works project of her illnesses. Citing a case in which the recipient had missed a job referral where it was determined at a fair hearing that she did so without good cause. The Appellate Division held, "We also reject petitioner's constitutional challenge to the sanction of 30 days . . . and conclude that it is neither arbitrary and capricious nor an abuse of discretion." Attributing willfull poverty in this instance does not consider circumstances beyond the control of the individual. Attributing willful refusal to work to an individual who had worked overtime in the past smacks off judicial arbitrariness.

Collin, Homelessness: The Policy and the Law, 16 Urb. Law. 317, 326-27 (1984). It is decisions such as these that move poverty issues from the courts to the legislatures.

4 Poverty rose steadily over a five year period, from 1979 to 1983. In 1976 and 1977, before the rise in poverty began and at a time when the unemployment rate was at comparable levels to 1984, the poverty rate was 11.6% to 11.8%. Although unemployment is now down to 1976 and 1977 levels, the poverty rate is nearly three percentage points higher. Slices of the Pie, Center on Budget and Policy Priorities, 10-12 (1986).

5 The new census data show that the gap between upper income and lower income American families was wider in 1984 than at any time since the Census Bureau began collecting this data in 1947. The poorest 40% of United States families received just 15.7% of the national income in 1984, the lowest percentage the Census Bureau has recorded since 1947. The top 40% received 67.3% of the national income, the highest percentage ever recorded. Slices of the Pie, at 5.
power of workers in the labor market.\textsuperscript{6}

The main result of the failure to aid the needy is the rise in the number of homeless individuals in American society.\textsuperscript{7} The problem of homelessness has reached such national proportions that state legislatures have begun to react.\textsuperscript{8} It is in this context that the blurred states of intent clash with the emerging homelessness legislation.

**BACKGROUND OF HOMELESSNESS**

One of the early causes of homelessness in the United States were state policies regarding the treatment of mentally ill individuals. This policy was called "deinstitutionalization." Estimates of the number of homeless persons who are mentally ill are inconclusive.\textsuperscript{9} Deinstitutionalization meant that psychiatric hospitals released inpatients who did not require supervision, and restricted admissions of mentally ill persons who may not have required such supervision.\textsuperscript{10} This policy evolved on a state by state basis, with New York and Massachusetts taking the lead.

The major forces behind deinstitutionalization were, discontent in the psychiatric profession with institutional modalities of treatment,\textsuperscript{11} the introduction of anti-psychotic drugs,\textsuperscript{12} cost-saving concerns of conservative policy-makers,\textsuperscript{13} and liberty concerns of liberal policy-makers.\textsuperscript{14}

Many psychiatrists felt that the mental health institution helped to perpetuate the very pathology it was designed to cure. That is, the institution failed to prepare the mentally ill person for re-entry into the mainstream of society.

\textsuperscript{6}"...It [is suggested] that income-maintenance benefits support wage levels despite high unemployment. The reason is simple. If the desperation of the unemployed is moderated by the availability of various benefits, they will be less eager to take any job on any terms. In other words, an industrial reserve army of labor with unemployment benefits and food stamps is a less effective instrument with which to deflate wage and workplace demands." F. PIVEN & R. CLOWARD, THE NEW CLASS WAR, (1982).

\textsuperscript{7}See NEVER AGAIN: A REPORT TO THE NATIONAL GOVERNOR'S ASSOCIATION TASK ON THE HOMELESS 15-18. See generally Collin, supra note 3.

\textsuperscript{8}See, e.g., MASS. GEN. LAWS ANN., ch. 450 (West 1976).

\textsuperscript{9}The Federal InterAgency Task Force on the Homeless has estimated that there are 30,000 homeless nationwide. The Community for Creative Non-Violence has estimated that there are 2.5 million homeless nationwide. Most other estimates fall between 1 and 2 million.

\textsuperscript{10}Basuk & Gerson, Deinstitutionalization and Mental Health Care Services, 238 SCl. AM. 46, 53 (1978).


\textsuperscript{12}In 1954 chlorpromazine was marketed in the United States under the name thorazine. In 1955, for the first time in 100 years, the number of patients in state mental hospitals declined. See Brill & Patton, Analysis of the 1953-56 Population Fall in New York State Mental Hospitals During the First Year of Large Scale Tranquilizing Drugs, 114 AM. J. PSYCHIATRY 509, 511 (1957); Brill & Patton, Analysis of Population Reduction in New York State Mental Hospitals During the First Four Years of Large-Scale Therapy with Psychotropic Drugs, 116 AM. J. PSYCHIATRY 495 (1959).

\textsuperscript{13}Rubin, An Economic Analysis of Litigation and Legislation for the Handicapped. BUREAU OF ECONOMIC RESEARCH, DISABILITY AND HEALTH ECONOMICS RESEARCH 102 (1976).

\textsuperscript{14}Proponents of the liberty interests of mentally ill people propelled the implementation of deinstitutionalization. Due process of law is violated if one is deprived of liberty for the purpose of treatment, but does not actually receive such treatment. See generally Birnbaum, The Right to Treatment, 46 A.B.A.J. 499 (1960).
Instead, the mental institution created its own society with norms and values dependent on the personalities of the participants. Many of the participants exhibited pathological behavior, therefore the institutional society developed in ways that were much different than mainstream society. Because the mentally ill person adapted to the institutional society, and felt secure there, re-entry into mainstream society was difficult. This was, and is, especially true given the stigma mainstream society places on mental illness. Many professionals in this area considered deinstitutionalization an appropriate alternative.

A concern of mainstream society is that mentally ill persons not harm either themselves or others. Traditionally, this required constant supervision which was generally translated into institutionalization. When behavior-modifying drugs were introduced in the United States in the middle of 1950's the threat of harm by the mentally ill to themselves or society was lessened. Since the threat of harm was lessened so to was the need for constant supervision, or institutionalization.

Public policy makers were very concerned about the issue of mental illness. It was considered costly and an infringement upon individual liberty. Proponents of community-based facilities successfully argued that the care given in their facilities was less expensive than that in large institutions. Proponents of the liberty interests of mentally ill individuals were able to persuade judges and legislators that the mentally ill had a right to treatment in the least restrictive environment. Liberal and conservative concerns merged to effectuate deinstitutionalization as state policy.

Most communities have strongly resisted the placement of homes and half-way houses in their community. They do so for a variety of reasons, the two foremost being fears of lowered property values and increased crime. They do so in a variety of ways. One of the most common ways is through the use of restrictive ordinances. These ordinances limit and otherwise prevent the placement of community-based facilities in most communities, especially areas zoned for single-family residences. Often these ordinances are illegal, but need to be litigated before their illegality can be determined. This is very dependent upon the ability of proponents of community-based facilities to garner the time, expertise, and money necessary for litigation. More often than not, the costs of litigation prevent a determination of invalidity of the ordinance in question.

The lack of low cost housing is another causal factor of homelessness. The National Housing Law Project has stated that two and one half million persons a year are involuntarily displaced from homes. Also, 500,000 units of

---

17C. HARTMAN, D. KEATING, & R. LEGATES, DISPLACEMENT: HOW TO FIGHT IT, 3 (1982).
low-income housing are lost each year due to the collective forces of abandonment, arson, conversion, demolition, and inflation. The Census Bureau's Annual Survey of Housing placed the number of households with two or more related families sharing space at 1.9 million in 1982, up from 1.2 million previously. This represents a 58 percent increase, the largest since 1950. Clearly these trends, combined with increases in mortgage foreclosure rates and increases in the proportion of personal income paid for housing, indicate a growing national need for basic shelter. Furthermore, the dynamics of urban economics wreaks special havoc upon low income populations, leading to homelessness.

Recent trends in employment are associated with homelessness. As unemployment benefits run out individuals may travel to seek employment and, when they find none, become homeless. Structural, and long-term unemployment statistics indicate a declining demand for low-skilled labor. Homelessness may be the first sign of the declining labor market demand that characterizes post-industrial, technological societies.

Another factor contributing to the growth of the homeless populations is the reduction of federal disability benefits. Intensified review procedures of

18 Id. at 3.
20 Id.
21 Basuk & Gerson, supra note 10.
22 In urban areas where the housing market sports low vacancy rates the problem is even more severe. Obviously homeless individuals are very, very poor and cannot afford anything more than the lowest cost housing. When the overall vacancy rate in urban rental units is low the availability of low cost housing tends to decrease. When urban areas offer tax incentives to convert low income housing to luxury housing, the vacancy rate may remain stable, or even increase, but the accessibility of housing stock for potentially homeless individuals decreases. Single room occupancy hotels seeking to convert to condominiums raise rent levels above the public assistance allotment, which forces low-income tenants into the streets or, if there is room, into the shelters. With no mailing address they no longer receive public assistance checks or other mail. It is in this manner that the detachment from society characteristic of homelessness begins.

Collin, supra note 3, at 323.
23 There are striking differences in employment rates in American cities. Raleigh, Phoenix, Dallas — Fort Worth, Austin, Manchester and Portland have employment rates of approximately 96 percent. Cleveland, Detroit, Buffalo, Newark, Birmingham and Gary have employment rates of approximately 79 percent. It should be noted that black, teen-age males bear the brunt of unemployment trends. It should be emphasized that the employment rate does not consider those who are no longer actively seeking employment. Both long-term and structural unemployment are not measured with common indices of employment comparability.

Anthony Downs (Brookings Institute) points out that cities with high unemployment have populations who are not mobile. These include young people attached to their families, homeowners who can not sell their homes, and those tied to a welfare system. Many laid-off workers can not transfer their skills to new systems of production. Cities with high employment tend to have low vacancy rates, high property values and little public transit. These characteristics from both types of cities act to prevent transfer of labor market demand, although there has been some migration from the ranks of the unemployed. These people tend to become part of the homeless population. See Kurtz, Land of Full Employment, Wash. Post Nat'l Weekly Ed., January 21, 1985. See also Collin, Homelessness, 8 Urb. St. & Local Law Newsletter 2 (Scholar's Column) (1985).

welfare recipients, combined with stricter eligibility requirements, has resulted in many qualified claimants losing their benefits. Any evaluation of the loss of benefits does not include denied new applications.\textsuperscript{25} Often the loss of benefits is due to the limited ability on the part of the recipient to challenge the ruling. It is readily apparent that large holes in the safety net exist, and that our nation's scant domestic programs are in part responsible for a hungry, homeless population roving from city to city in search of sustenance.

\textbf{Constitutional Protection of Subsistence Rights}

There is no federally guaranteed right to subsistence in the United States Constitution.\textsuperscript{26} Equal protection\textsuperscript{27} limitations are placed on a government which does pass a law creating subsistence benefits,\textsuperscript{28} but there is no constitutional requirement that the government create such a benefits program. Traditionally, the Supreme Court has employed two separate tests, rational relationship and strict scrutiny, to review legislation challenged under the equal protection clause. Strict scrutiny is applied when legislative classifications discriminate on the basis of suspect classes—race, nationality, or alienage—or infringe upon certain fundamental rights, rights which have a basis in the Constitution.\textsuperscript{29} Application of this standard has traditionally been fatal to the legislation under examination.\textsuperscript{30} The rational relationship test is considerably

\textsuperscript{25}See \textit{Cong. Q.} at 2242 (September 11, 1982).


The Supreme Court here held that the Maryland regulation imposing a $250 per month ceiling on an AFDC grant regardless of the actual need and size of the family is not prohibited by the Social Security Act, nor is the regulation violative of the Equal Protection Clause. A state has much latitude in dispensing available funds. The Social Security Amendments of 1967 show that Congress fully recognized that maximum grant regulations are permissible. The equal protection concept of overbreadth is not relevant to state regulation in the socio-economic field. Additionally, the regulation rationally furthers the state's legitimate interest in encouraging employment and in maintaining a fair balance between welfare families and the families of the working poor.

\textsuperscript{27}\textit{U.S. CONST. amend. XIV, § 1.}


Traditionally, equal protection challenges to social welfare legislation have been subject to a minimal scrutiny, rational basis test. However, there has been a trend among the judiciary to employ a higher level of scrutiny to social welfare legislation. In cases where there has been a denial of subsistence benefits or a reduction in these benefits equivalent to a denial, the Supreme Court has applied intermediate scrutiny and in some rare cases strict scrutiny. Application of the former is used when relative deprivation occurs because of a reduction in benefits paid to recipient. Use of intermediate scrutiny enables flexibility in agency distribution of scarce economic resources while providing greater protection of individual rights to governmental services. \textit{Id.}

\textsuperscript{29}Id. at 589.


The comment recognizes that one of the dangers of applying strict or intermediate scrutiny, as opposed to the traditional rational basis test, is that social welfare legislation could easily be invalidated. Therefore, the judiciary must exercise control in the application of heightened scrutiny. Furthermore, intermediate scrutiny ought to be applied in those instances where subsistence benefits are denied discriminatorily because individuals are a member of what is termed a "sensitive class." The Comment defines the characteristics and traits of a "sensitive class" signaling application of intermediate scrutiny.
more lenient, requiring the judiciary to uphold a classification if it bears a rational relationship to a legitimate government interest.\textsuperscript{31}

Until recently, courts, in deciding cases involving subsistence rights, employed the rational relationship test to determine whether the laws or regulations at issue afforded equal protection to the parties involved. Most recently in \textit{Dandridge v. Williams},\textsuperscript{32} the Supreme Court, in a case involving a law imposing maximum levels regardless of family size in a state income maintenance program, applied the rational relationship test because they could find no invidious discrimination which could justify a heightened level of review.

In \textit{United States Department of Agriculture v. Moreno},\textsuperscript{33} a case involving a statute denying food stamps to households containing one or more unrelated individuals, the Supreme Court held that the state's interest in minimizing fraud in the food stamp program did not justify the denial of food stamp assistance to all otherwise eligible households. In the companion case to \textit{Moreno}, \textit{United States Department of Agriculture v. Murry},\textsuperscript{34} the Court invalidated a statute which denied food stamp eligibility to households of individuals who had been claimed as tax deductions during the previous year. The statute was intended to prevent children, generally college students, of wealthy families from abusing the system, but the court found the statute unconstitutional because of this irrebuttable nature.\textsuperscript{35} In both of these cases, the Court employed a heightened form of review to invalidate statutes which, while rationally related to a legitimate state interest, had the effect of completely denying subsistence benefits to a group of persons.

In \textit{Price v. Cohn},\textsuperscript{36} the Third Circuit decided a case where a state statute denied for nine months of the year general assistance benefits to all persons between the ages of 18 and 45. An earlier Third Circuit case, \textit{Medora v. Colautti},\textsuperscript{37} had indicated that a heightened form of scrutiny would be ap-

\textsuperscript{31}City of New Orleans v. Dukes, 427 U.S. 297 (1976)

This case concerned a constitutional challenge to a municipal ordinance prohibiting food vending in the streets of the French Quarter except for those vendors who had continually been operating the same business within the Quarter for eight years. The Supreme Court found it had jurisdiction to review the decision of the Court of Appeals which struck the ordinance invalid, and reversed it, holding that the ordinance rationally furthered the legitimate purpose of preserving the appearance and customs of the French Quarter.

\textsuperscript{32}97 U.S. 471 (1970).

\textsuperscript{33}13 U.S. 528 (1973).

\textsuperscript{34}13 U.S. 508 (1973).

\textsuperscript{35}Id. at 513.

\textsuperscript{36}715 F. 2d 87 (3d Cir. 1983).

The Third Circuit upheld a provision of the Pennsylvania Welfare Code denying benefits for nine months of the year to those who would otherwise be entitled to the benefit for the entire year, but for that they were 18 to 45 years old and did not meet specific categories established by legislation. This distinction in age and between the chronically and temporarily needy was held to be a reasonable means for furthering the legitimate state interests of reallocating scarce welfare sources to those most in need and encouraging those best able to become self-supporting. As such, the provision did not violate equal protection.

\textsuperscript{37}602 F. 2d 1149 (3d Cir. 1979).

Pennsylvania Department of Public Welfare (DPW) regulation requiring the blind, aged or disabled to apply for federal Supplemental Security Income (SSI) benefits prior to applying for state general assistance and
Applicable where a classification denied, as opposed to reduced, benefits to a class of persons. However, the Price court found the Dandridge case to be controlling and distinguished Medora, holding that the rational relation test was appropriate in Price.

Commentators have theorized that the Price decision can be squared with Dandridge and distinguished from Murry and Moreno in that the latter cases involved an absolute ban on eligibility on certain classes of persons while the former case involved a reduction of benefits for certain groups. Leaving aside the Dandridge case, the facts of Price are such as to question the appropriateness of this distinction while accepting it as legally correct.

In Price the denial of benefits was for nine months of the year to that class of persons deemed by the legislature to be employable, namely all of those able bodied between the ages of 18 and 45. Evidence was adduced at trial to show that persons in this age group were, on average, more likely than persons in the remaining age groups to be able to find a job once unemployed. But further evidence was presented by those attacking the statute that while this was true for the population as a whole, it was not true for those persons who were receiving welfare benefits. This difference was attributed to the fact that this class of persons generally had few, if any, marketable job skills and had poor work histories. In addition, in low skill jobs employers have little incentive to discriminate against older job applicants with fewer working years ahead of them, as little training is necessary and therefore little investment is made in each worker.

Further evidence showed that many persons denied general assistance under the challenged statute were likely to end up without a source of support and, for some, homeless. It was argued that this circle feeds on itself, as a deprived or homeless is unable to find a job, thereby creating long term poverty out of what was previously transitional need.

What is clear from the foregoing is that:

1. Federal courts have, to some extent, begun to recognize the fundamental need which subsistence benefits satisfy by applying a somewhat heightened form of scrutiny to laws which terminate eligibility for benefits for any group of needy persons; and

2. Attempting to draw a distinction between a termination and reduction in benefits may be disingenuous to the point of being farcical.

Barred such a person from applying for the more liberal general assistance benefits if found ineligible for SSI held to violate the equal protection clause. The regulation discriminated among similarly situated persons and did not rationally further any legitimate governmental interest.


Id. at 1571.

Id. at 1572.
In order to equally protect all groups, it is necessary to draw rational lines which properly delineate between the deserving and the undeserving poor. This is not a constitutional mandate which can be enforced by courts, at least according to present interpretations of the equal protection clause. However, it is important that courts have begun to recognize that subsistence rights, so intimately intertwined with the exercise of rights that are explicitly protected in the Constitution, are worthy of some protection against arbitrary delineations of deserving and undeserving by lawmakers.

The range and severity of the problems of the homeless alerted public interest attorneys to the duties of state and local government for the needy. The first, groundbreaking case was *Callaghan v. Carey*.41

**JUDICIAL FORAYS INTO HOMELESSNESS**

On October 2 and 18, 1979, attorneys moved for a preliminary injunction seeking an order that defendants provide adequate shelter to those homeless men who apply for it.

During the next year-and-a-half plaintiffs were in court three times seeking enforcement of the injunction while the case was in litigation. The chosen observers maintained that there were still not enough beds for the homeless men and that the shelters were still not up to the standards set by law. Finally, without final adjudication of any issue of fact or law, an agreement between city and state officials and the plaintiffs was reached. The agreement provided that sanitary and safe shelter and board be supplied to each homeless man who applies for it as long as the man meets the need standard to qualify for the home relief established in New York State, or the man, by reason of physical, mental, or social dysfunction, is in need of temporary shelter. Enforcement of the agreement, called "the Callahan Decree," has presented problems. The City has frequently delayed implementation of the decree. In October of 1981, as temperatures in New York City began to drop, plaintiffs obtained a court order mandating action by the City to enforce the decree. Despite initial arguments by the City that no acceptable shelter could be found on such short notice, City officials managed to locate a vacant school building in Brooklyn the next day. That night approximately 200 men were sheltered in that building.

Homeless individuals have also been involved in first amendment issues. In *Clark v. Community for Creative Non-Violence*, plaintiffs camped in a park in Washington, D.C. to re-enact the central reality of homelessness, in a highly visible public place in the dead of winter, in order to express the message that the plight of homeless people is serious and too often ignored.42

---

The questions presented were whether the respondent’s act of sleeping outdoors in a public place in the dead of winter to convey the plight of homeless people is sufficiently expressive to warrant first amendment protection; and if so, whether petitioners have failed to demonstrate a sufficiently substantial interest to justify suppressing it. The Supreme Court held:

Aside from its impact on speech, a rule against camping or overnight sleeping in public parks is not beyond the constitutional power of the Government to enforce. And as noted above, there is a substantial Government interest, unrelated to suppression of expression, in conserving park property that is served by the proscription of sleeping.43

This case represents not only one of the parameters of homeless litigation, but also an avenue of political expression denied to homeless persons.44 The homeless are now pursuing relief from their destitution through federal and state legislation.

AID FOR FAMILIES WITH DEPENDENT CHILDREN BENEFITS: A CASE STUDY OF STANDARDS APPLIED TO DETERMINE ELIGIBILITY

In order to determine the proper basis for delineating between the deserving and the undeserving poor, there is the need to find the philosophical basis for public welfare programs. In the United States, there is no federal constitutional right to subsistence.45 Any right to welfare benefits is the result of statutory enactments and the legal and constitutional requirements which attach to them. There are a number of areas in which the various levels of government have created these statutory rights: Aid to Families with Dependent Children (AFDC), Old Age Survivors Disability Insurance (OASDI),


The Supreme Court held that Texas’ school-financing system, based on state funding supplemented by an ad valorem tax on property within each local district, did not violate the Equal Protection Clause of the fourteenth amendment, even though the system disadvantaged those living in comparatively poor school districts. Strict scrutiny was inappropriate because the class created by the financing system was not found to be suspect, nor is education a fundamental right with which the Texas system impermissibly interfered. The system bore a rational relationship to a legitimate state purpose, basic education for every child, and local participation and control of the schools within each district.
Social Security Income (SSI), food stamps, unemployment insurance, and Medicaid are just a few examples. Each of these programs includes a set of rules and regulations which includes some and excludes others. Besides the substantive laws in question, there are the procedural rules which also act as filtering agents between the applicant and the recipient. In order to ascertain the standards of fault which are used to determine whether a recipient is eligible for aid, one must start with the rules and their applications which determine how allocational decisions are made.

AFDC is a federally financed state aid plan for providing aid to families of needy, dependent children. A state choosing to participate in this program is required to formulate a program consistent with federal statutes and regulations, and any state mandated requirement inconsistent with federal law and regulations is invalid. However, states are allowed, within the federal guidelines, to design the administrative mechanism for implementing the federal program. The federal control of the program is powerful, creating a method of administration which is rule oriented, centralized, and bureaucratic as opposed to earlier programs and many current state run general assistance programs, which are discretionary and decentralized.

While the replacement of discretion by rules has been a giant step toward eliminating arbitrary determinations of fault from the administration of welfare benefits, such determinations are still present in the rules which define administration of the AFDC program, and to a far greater degree, in the state and locally controlled general assistance programs.

As a starting point, it is necessary to outline the overall structure of income assistance programs. AFDC is just one of a number of federal and state income maintenance programs. The federal programs operate by designating groups, or categories, of individuals eligible to participate in them. While eligibility for participation in a program may require a demonstration of need, all programs require an applicant to meet other criteria as well, and some programs require no showing of need. Two widely utilized programs of the latter type are Old Age, Survivors, and Disability Insurance, (OASDI or Social Security) and Unemployment Insurance. Supplemental Security Income (SSI) requires a showing of need, combined with a requirement that the applicant be either aged, blind or disabled. Other programs, such as public housing, Food


This decision affirmed the Secretary of Health, Education and Welfare's final decision finding that certain public assistance plans in Arizona failed to conform to federal law and regulations. Arizona's automatic termination of welfare eligibility after 90-day absence, its disregard of earned income for the Aid to Families with Dependent Children (AFDC) program, and its failure to create an advisory committee AFDC-Child Welfare Services (CWS) were in conflict with valid federal requirements. In addition, Arizona's custody requirement for AFDC did not satisfy the mandatory condition that aid to families with dependent children be furnished with reasonable promptness.

Stamps, Medicare and Medicaid, provide in kind benefits to the needy. Each of the programs identifies a group of persons in the country in need of assistance, and then designs a program to provide the assistance which is deemed appropriate.

There is no federal program to assist the poor generally, only those groups, including some subgroups of the poor, which fall into neatly defined categories. In most states, there are state, county or local programs which provide general assistance to poor persons, but even these programs are often limited to those considered unemployable. Consequently, there is in this country no general program to assist the poor, and the benefits provided by all the programs falls far short of providing a subsistence income to recipients.

AFDC constitutes the income maintenance program which is most accessible to the poor. The category of eligible individuals singled out for aid by this program is the dependent child. For a child to be eligible, he must be both needy and dependent. The term needy has been interpreted by courts to not require destitution, and a family may be able to provide some support and still remain eligible for assistance. A child is dependent if he "has been deprived of parental support or care by reason of death continued absence from the home . . . , or physical or mental incapacity of a parent" or, in some states, "by reason of the unemployment . . . of the parent who is the principal earner." Recipients of AFDC are required to register for "manpower services, training, employment, and other employment-related activities" in order to receive aid. Exceptions to this requirement are allowed for recipients sixteen years of age or under who are attending secondary school, or those who are incapacitated, elderly, obligated to care for an incapacitated person or child under the age of six, already working, or if the other parent is obligated to register for the program. Those refusing employment or participation in the Work Incentive Program may have their benefits terminated.

Given these rules concerning eligibility for the AFDC program, what delineation of deserving and undeserving poor is attempted by the program?

Quite understandably, the program attempts to delineate between the

---


Under the California Department of Benefits Payments regulation, eligibility for AFDC benefits was conditioned on the following: "A child is eligible on the basis of age until his 18th birthday only if he is unmarried." The Department construed the term "unmarried" to mean never married. Such a reading of the regulation excludes from the AFDC program children who are married and divorced but still have a right to parental support and who were otherwise eligible. In construing the eligibility requirement, the court held the term "unmarried" to mean "not presently married," so as not to exclude the class of children described above.


needy and the not needy. Some of the income maintenance programs include vast numbers of persons who are not poor, but these programs perform functions other than relieving poverty. The goal of this program is to relieve poverty; consequently, exclusion of those not considered needy is not inconsistent with the goals of the program.

How is need to be measured? It is not necessary that the family be destitute, but must generally be without funds or assets necessary to meet the expenses of life as determined by the local social services agency. The AFDC award is generally much less than the recognized poverty level.

The issue of availability of assets can, in some cases, present particularly difficult problems. Most AFDC applicants do not possess any consequential assets, but some applicants are fortunate enough to own or have substantial equity in their homes. It is customary to refuse aid to families who own their own home, and where aid is provided it is legal to condition the aid on a promise to reimburse the government, and to require the applicant to give the government a lien on the home as security for the agreement to reimburse. Persons in this situation are faced with a difficult choice, perhaps a choice the government should not force them to make. While it is entirely reasonable to require that a family sell assets not intimately associated with subsistence, it is hardly conducive to long term economic well being of the poor and near poor to force them to sell their homes as a condition to receiving aid. One who owns a house is likely to be in need of aid for only a short period of time, and allowing them to retain ownership of the house is probably likely to decrease future needs to revert to public aid. Strictly on efficiency grounds, this rule may constitute bad policy.

It also seems unfair to force a family to rid itself of all assets before applying for temporary aid when the bankruptcy code allows those who are unable to meet their debts to retain some assets, with many states allowing the debtor family to retain a house, two automobiles and various other assets. It would seem wiser to allow the applicant to retain those assets necessary to pursue a search for employment.

---


In affirming the State board of Welfare's decision to deny appellants surplus commodity assistance, the Arizona Court of Appeals held that the term "fair market value" as used in the statute, providing for eligibility for surplus commodity assistance and assistance to dependent children to be based on the amount of property or assets the child's parents possess, means the fair market value of the owners' interest in the property after the deduction of the amount of any outstanding and unpaid mortgage lien, encumbrance or security interest. This interpretation of the statute would be prospective only.


Pennsylvania welfare regulations required AFDC applicants owning certain types of property to agree to reimburse the state for assistance received, and to give the state a lien on the property as security. These regulations, the District court held, were not in conflict with the Social Security Act by imposing a condition of eligibility beyond need and dependency. Further, the regulations did not violate equal protection or due process.
A dependent child is one who lacks parental support, either through death, disability, continued absence, or unemployment of a parent. By requiring that parental support be sent before aid be granted, the statute draws a line between the deserving and the undeserving poor which encourages activities not healthy to the social and economic fabric of the country. The prevalence of female headed households is probably the most widely cited result of this policy, but there are other, less visible results as well.

First, if the object is to provide aid only to the deserving, the line between present and absent parents is irrational. True, the statute does provide for aid in the event of unemployment, but only about half of the states participate in this program. In those states which do not participate, the absence or inability of a parent is required in order to qualify for AFDC.

Even in those states which do participate, a parent's participation in the labor force is required in order for the remainder of the family to receive aid. This seems particularly harsh. If the object of the program is to provide support to children who need it, the fact that a parent fails to live up to his or her responsibility does not make the child any less deserving of aid. The analytically correct approach would be to provide aid to the child while pursuing remedies against the irresponsible parent. In this way, the child (and often the mother as well) are not deprived as a result of actions not for which he is responsible.

The current rules under which AFDC operates have resulted in other deserving families being denied assistance. One particularly egregious example of this involves a newly married California couple, the husband a 17 year old full time high school student with a pregnant wife. According to the court, the family was not eligible for AFDC benefits because the husband, who expected to graduate from high school, was not an unemployed parent due to the fact that his work experience established that he was capable of engaging in a gainful occupation so that his attendance at school was not essential to his self support. Aside from being totally counterproductive, this decision is wholly unjust


The District of Columbia Director of Public Welfare terminated Mrs. Trull's assistance payments for six of her nine children. The Court of Appeals held that although the father refused to work and support the family the children were not qualified to receive AFDC assistance payments, because the father was living at home and was able-bodied and employable. The D.C. AFDC program regulations required that the child must be deprived of the care and support of at least one parent by reason of death, incapacity or continued absence from the home. Such was not the case here.


The Court of Appeals affirmed the denial of a 17-year old married with a pregnant wife high school student's application for benefits under the Aid to Families with Dependent Children Program (AFDC). The applicant did not qualify for the program because he was not an "unemployed parent" for AFDC purposes, as defined by statute. For the applicant who was attending high school full-time voluntarily, rather than as a result of unemployment.

Carleson has been overruled by Frink v. Prod, 181 Cal. Rptr. 893, 31 Cal. 3d 172 (1982) which held that the independent judgment standard shall be applied to decisions denying applications for welfare benefits, rather than the substantial evidence rule used in Carleson.
in its determination that one who is completing high school is disqualified from public aid because he is doing so. The possession of a high school diploma in our time is the *sine qua non* of minimal marketable job skills, and to deny aid to an applicant because he is pursuing his diploma is inexcusable.

Perhaps the worst injustice is visited on those who, although fully employed, are in need of public aid. With a minimum wage rate in covered industries of $3.35 per hour, a family of four with one full time wage earner falls approximately $3,500 short of the poverty line, before taxes. Those in poverty are likely to work less than a full year, or in industries not covered by the minimum wage law. Consequently, they are quite unlikely, if fully employed, even if fully employed for the entire year, to reach the poverty line. Even in those states which provide AFDC benefits to be paid to families with unemployed parents, full employment is an absolute bar to the family’s receipt of aid, regardless of the amount of income which is realized from this employment.59

Clearly, this provision punishes behavior which should be encouraged. But in addition, it places the employed in the category of undeserving poor, even though by working they are pursuing a course which lessens their responsibility for their poverty. By punishing them for their industriousness (or their luck), the AFDC rule has created a poor delineation between the deserving and the undeserving poor in this case.

**LEGAL AND WELFARE ADVOCACY**

Local coalitions and church organizations have developed important advocacy functions as the problem of poverty has increased in severity. This has developed through the services these groups provide for indigent populations. Although their efforts meet only a small portion of the need, they tend to be the only provider of essential services. Therefore, their advocacy has been developing in the manner of traditional welfare advocacy.60

However, so overwhelming have been both the needs and growth of the homeless population that legal advocacy groups have formed. The dimensions of the homeless problem, and concomitant urgency have created new demands on the public sector. The public sector has the resources, in terms of shelter options and planning expertise, to ameliorate many of the basic needs of the

---


60Traditional welfare advocacy involved increasing the accessibility of welfare entitlements to poverty populations. It was implemented by informing citizens eligible for welfare, helping them apply, and advocating on their behalf through the entire process. Its overall goal was to mobilize the poorest people into a political force by expanding welfare rolls and pressuring the state to increase the level of entitlement. See POOR PEOPLE'S MOVEMENTS (1979).
homeless. However, the tremendous cost and complexity of the needs of the homeless have created much resistance on the part of the public sector. This, combined with the aforementioned federal cutbacks, has created obstacles so insurmountable that most advocacy efforts were forced into adversarial positions.

There are inherent limits upon legal advocacy. States which do not have a constitutional or statutory basis create an inhospitable environment for advocacy of shelter needs. Another limitation of legal advocacy is that it is time consuming. This increases the cost to a population with very little resources.

Another limitation is that implementation of judicial decisions is often muted by the reluctance of urban governments to implement costly decisions. Narrow interpretations of the law by these governments, whether it be constitutional, statutory, or caselaw, drain time and money from the limited resources of advocacy groups. The most severe limitation of legal advocacy is that only the most needy symptoms of a desperate case are litigated. The underlying causes and other important problematic facets of homelessness are not addressed. This is why legislative initiatives are needed to move public resources to provide for the basic needs of the poorest poor. Ecologically, it is more efficient to move resources toward prevention than late partial remedies surrounded by litigation.

THE NEW HOMELESSNESS LEGISLATION

United States

The distinguishing feature of all the federal approaches is that there is little recognition of a right to shelter and, concomitantly, no establishment of appropriate federal funding mechanisms for the homeless. Indeed, in a congressional hearing of the House Subcommittee on Intergovernmental Relations and Human Resources, Paul Wright of the General Accounting Office reported that only $200,000 had been spent of the $8 million that the Department of Defense had received for sites for use as emergency shelters. Representative William Boner (D-Tenn.) chaired a hearing of the U.S. House of Representatives’ Subcommittee on Housing and Consumer Interests on the homeless. The hearing resulted in a bill that would have provided for a study of health care services for the homeless. The provision was contained in an amendment to the Health Professions and Services Act of 1984 (S-2574). The amendment would have required the Secretary of the Department of Health and Human


63See generally Id.
Services to conduct a study of health care needs of the homeless, and to report the findings within a year. It also would have required an evaluation of current eligibility requirements that prevent the homeless from receiving health care services. This bill was vetoed by President Reagan in October 1985. President Reagan's 1985 budget provisions for the Department of Housing and Urban Development (HUD) are $3.2 billion less than the previous year.

Homelessness issues will continue to fall into the laps of local planners as a politicized hot potato. However, there is a glimmer of hope on the federal horizon. The Housing Act of 1985 (H.R. 1) has been passed by the House. It was designed to address the issues of long and short term housing for poor people by providing funds for subsidized housing and other programs that would make resources available for poor and homeless people. Part of the Omnibus Budget Reconciliation Act of 1985 (H.R. 3500), the bill would authorize $20.5 billion for housing programs, including $14.3 billion in new funds for fiscal 1986 housing and community development programs operated by the Departments of Housing and Urban Development (HUD) and Agriculture.

This $14.3 billion includes $9.2 billion for assisted housing, and would support an additional 91,509 dwellings, including 66,209 existing Section 8 housing units, 6,200 units of Section 8 moderately rehabilitated housing, 12,100 units of housing for the elderly and handicapped, 5,000 units of public housing, and 2,000 units of Indian housing. $2.3 billion was authorized for loans for rural housing, including $1.3 billion for home ownership and $900 million for rental housing, to support a total of 63,000 units.

In addition, a total of $216 million would be authorized to aid the nation's homeless. $66 million of that amount would go to the emergency food and shelter assistance program administered by the Federal Emergency Management Agency (FEMA); $50 million would go to a new program of grants to nonprofit groups to acquire and rehabilitate structures for the homeless, and for technical assistance in providing housing and support services as an alternative to institutionalization; and $100 million would fund grants, to be matched by state and local governments, to renovate buildings for use as shelters for the homeless and for basic services.

*The British Housing (Homeless Persons) Act of 1977*

Britain enacted the Housing (Homeless Persons) Act in 1977. The main

---

44See CONF. REP., 98th Cong. 2d Sess. 1143, 1147, 1169.
45FY 1987 Budget proposals contain large reductions. Rural Housing would suffer a 75% rescission of $1.525 billion. Housing Development Action Grants are to be cut by $99.5 million. Moderate rehabilitation is cut by $239 million and low income programs are to be cut by $91 million. These cuts are expected to reduce the number of additional low income households provided with housing assistance by about a third, from 150,000 housing units in 1987 to about 100,000 units in 1988. CENTER ON BUDGET AND POLICY PRIORITIES, 4 (January 1987).
purpose of the act is to prevent and ameliorate the effects of homelessness. It placed a series of statutory duties upon housing authorities to provide accommodation, advice, and assistance to the homeless. It transferred responsibility for homelessness from social service departments to housing departments.

Under the Act a person is homeless if he has no accommodation. A person is homeless even with accommodation if he can not secure entry to it, or it is probable that occupation of it will lead to violence from some other person residing in it, or it consists of a movable structure and there is no place he is permitted to place it. Under the Act, a person is threatened with homelessness if it is likely that he will become homeless within 28 days. Those claiming homelessness are placed in a preferred position if they can establish that they are in “priority need.” There are three categories of priority need. They are individuals with dependent children, individuals who are homeless as a result of a disaster, individuals who are physically or mentally disabled or who might be expected to reside with such an individual, and pregnant women and those who might be reasonably expected to reside with a pregnant woman.

The Act defines “intentional homelessness” with great particularity. Under the Act, a person becomes homeless intentionally if he deliberately does or fails to do something which causes him to cease to occupy accommodations which are available for his occupation and which would have been reasonable for him to continue to occupy. The Act further states that one is homeless intentionally if he deliberately does or fails to do something the likely result of which is that he will be forced to leave the accommodation which is available. “Intentionality” is determined from an objective viewpoint, not from the subjective intention of the applicant.

The Act has run into several obstacles in its implementation. The chart below came from application statistics for accommodation in England in 1979:

<table>
<thead>
<tr>
<th>Reason</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relatives/friends no longer able/willing to accommodate</td>
<td>46%</td>
</tr>
<tr>
<td>Marital dispute</td>
<td>9%</td>
</tr>
<tr>
<td>Illegal letting/eviction</td>
<td>7%</td>
</tr>
<tr>
<td>Court order/unable to pay</td>
<td>18%</td>
</tr>
<tr>
<td>Loss of service tenancy</td>
<td>5%</td>
</tr>
<tr>
<td>Had to leave unprotected accommodation</td>
<td>8%</td>
</tr>
<tr>
<td>Other reasons (includes fire, flood and sleeping rough)</td>
<td>8%</td>
</tr>
</tbody>
</table>

The chart indicates that the main reason for homelessness of persons in Britain is that relatives or friends are no longer willing or able to accommodate them. It does not indicate whether the friends or relatives are residing in England. A major concern of many British local authorities is that the Act has made them

---

"the housing authority of the world" because they had ports or international airports in their jurisdiction. The fear and actuality that public resources will be distributed to non-residents positively atrophies human service planners and politicians. To redress the problem, those responsible for the program revised the texts of leaflets issued by British embassies to include reminders to prospective immigrants to make proper accommodation before they arrive. The immigration rules have been changed to the effect of making it necessary for those who wish to obtain admission of their dependents to the United Kingdom for settlement be able to demonstrate that they can accommodate them without recourse to public funds in accommodations that they themselves own or occupy.

Some judicial gloss has been added to this policy line. It was held in *Eastleigh Borough Council v. Betts* that a local council could validly establish a guideline that an individual who had lived in the area for less than six months had no local connection with the area. It was also held that the local council must consider the facts of any particular case, including the intention to stay in the area.

A still more pervasive and complex problem is the issue of "intentional homelessness." If a person is intentionally homeless then they are not within the ambit of the Act. Again, this distinction permeates all poverty law; intentional versus unintentional homelessness, involuntarily in need versus unintentional homelessness, involuntarily in need versus voluntarily needy, and the truly needy versus those not truly needy. It is a policy objective not to allocate public welfare resources to anyone but those who actually need them. While a laudable and pragmatic policy, it is very fine line to discern for those who administer the programs.

Despite a major code revision, people are considered intentionally homeless for a variety of reasons. For example, a person who chooses to sell his home, or who lost it because of willful and persistent refusal to pay rent is considered intentionally homeless. Also, when a person has voluntarily resigned from a job, he or she will be treated as intentionally homeless if it is deemed reasonable to continue in the employment. The British legislation is directed not at those who are *in fact* homeless, but to those who are homeless through no fault of their own. In a rapidly changing post-industrial society it is increasingly difficult to assign "fault" for the lack of a basic need. Inherent in the need for housing is the ability to pay for it. The ability to pay for it is dependent upon the cost (supply and demand) and the income of the individual. The income of the individual is dependent upon society’s demand for his or her labor. A trait of post-industrial societies is rapidly shifting demands from the labor force as well as an overall decline in demand. This is in part due to the development of production technologies that require fewer man-hours. Thus, "inten-
tionality” of homelessness loses its relevance in light of the inability of the individual to control his or her marketability in the labor force.

**New Developments in the States**

The State of Massachusetts is at the cutting edge of legislative and administrative attempts to meet the problem of homelessness, in both an immediate and preventive manner. One of the main ways Massachusetts has immediately dealt with homeless needs is to come to terms with the definition of “resident.” The reason that this has been a problem is that many human services, especially public ones, distribute resources on the basis of the residency of the recipient. While this may extend coverage it will not meet the need if residency is necessary for eligibility requirements. Problems of transiency and verification requirements present insurmountable obstacles for homeless populations. Indeed, these two problems are the reasons for the inefficiency with which many fragmented human services are delivered. Massachusetts has uniquely defined “resident” as one “with no present intention of definite and early removal” and “not necessarily with the intention of remaining permanently,” thus overcoming stultifying questions about public jurisdiction and responsibility.

The state will match funds on a 3:1 ratio with all other “non-state” sources. Non-state sources specifically include city and county governments. Local planning processes regarding shelter for the homeless traditionally evolve around a policy of eliminating them from their residential and commercial areas. The broad scope of possible providers, given a nonstate nomenclature, may counteract exclusionary tendencies at the local level. The act is as preventive as the federal government will allow it. It mandates temporary shelter when the family has no feasible alternative housing available, up to the maximum period subject to federal reimbursement. Moving expenses, storage of furniture, advance rent payments, and a security deposit are provided to prevent distribution.

From the Massachusetts legislation we see evidence of a demographically sensitive human service planning process, albeit, not so right from the start, but nonetheless thoroughly incorporated in the present programs delivering services. However, their coverage of the population is very similar to Britain’s, that is, one that is limited to “families and pregnant women.” The inherent nature of detachment in many homeless prevent familial bonds. Many single and homeless individuals are excluded from the present provision of services, and therefore, are excluded from demographically sensitive planning mechanisms incorporated in the present service and delivery framework. Apparently, the Massachusetts statute will confront some of the same problems

---

as the British Act, that is, targeting services to those truly needy, but single. Intentionality of homelessness has not yet arisen as an issue in Massachusetts. A literal reading of the Massachusetts statute is that anyone "who enters the Commonwealth solely for the purposes of obtaining benefits under this chapter shall not be considered a resident." If there has been an assignment or transfer of real or personal property for the purposes of becoming eligible within one year immediately prior the filing for application for services, there is no emergency assistance granted. Although not specifically mentioned, these two aspects of the Massachusetts state touch on the intent with which one seeks aid. This is to be distinguished from the British approval which is premised on the intention with which one becomes homeless. Although the two are interrelated, the distinction is important in terms of recipient populations. Massachusetts may have avoided many problems of implementation by confining intent to seeking aid, and at the same time observe a policy goal of fiscal restraint. It recognizes that people may become intentionally homeless but are not motivated by lures of free public money, are nonetheless in need. This is much more in accord with the labor-market fluctuations and changes inherent in post-industrial societies.

**DELINEATION OF DESERVING AND UNDESERVING POOR BASED ON THE GOAL OF JUSTICE**

"Welfare policies, like any form of redistribution of wealth, are always introduced in the name of justice." Consequently, any program should be designed, to the maximum feasible extent, to treat all members of society justly. Formal justice requires equal treatment of all those who belong to the relevant category, but the decision concerning the choice of the relevant category is beyond the scope of the concept of justice. It appears reasonable, based on political consensus and history, that the relevant group in this case should be those unable to provide for themselves and all those so able who are willing to do so. Equal treatment would mean the right to a standard of living which is consistent with membership in the general society.

The above description attempts to come to grips with the conflict between formal justice and distributive justice where, according to the latter, unequal treatment may be justified as necessary to obtain equality in the satisfaction of needs. The egalitarian approach implied by any system of substantial (distributive) justice is laden with practical implications which render it not only impractical but highly undesirable. For example, any egalitarian system faces massive problems of efficiency, control, bureaucratization, and social uniformity. Any system of distributive justice involves an unacceptable level

---

71 Id.
72 Id. at 5.
of interference with personal lives. Even the most ardent redistributionists would recognize the propriety of abandoning an egalitarian policy if doing so would make everyone better off.\textsuperscript{73}

As a starting point, it is necessary to recognize that the economic/political/social system which allows for the accumulation of wealth by some and the extreme poverty of others is the product of a social pact — partly explicit, partly implicit — which now exists. Only with the tacit acceptance of all is the system able to operate so as to generate mammoth amounts of wealth. Conversely, the talents of some of generate disproportionate amounts of wealth. Given this arrangement whereby the cooperation of all is required, the means necessary for full participation in the society should be available to all. Thus, a system which creates unemployment for some in order that the whole shall be greater cannot justly deprive the forcibly unemployed of participation in the fundamental activities of society.

The standard proposed, then, is essentially a standard of fault which seeks to ascertain responsibility for individual noncontribution to the societal whole. Society currently recognizes numerous acceptable reasons for such noncontribution, including age, disability, family responsibility, and past work history. But there is no recognition of inferior jobs skills or lack of jobs as acceptable reasons for noncontribution. In short, there is no recognition of the distributive shortcomings of the present system. This needs to be remedied, to serve not only the interests of justice, but also to serve the interests of efficiency.

A system of subsistence benefits has been proposed, experimented with, and rejected on the bases of cost and diminution of work incentive. The cost issue is somewhat of a red herring, as it can be viewed as internalization of the negative externalities provided by the current system of distribution. In other works, if we can financially support a system of subsistence payments to the truly deserving poor without decreasing total output, then has the program actually cost anything? Thus, the cost of the program lies only in its effects on incentives to work.

The prime deterrent to work is not the existence of any public benefits, but the relative unattractiveness of low wages. To counteract the unattractiveness, well designed schedules are necessary which provide for income supplement with the minimum of disincentive. For a single person, a full time full year minimum wage job is almost enough to reach the poverty standard. For the sole breadwinner in a family of four, it is not.

The recognition of the social value of the individual is necessary as well. If the system is one in which society awards benefits to those who have fallen into poverty for reasons beyond their control, there is a need to approach the
problem in something other than the adversarial manner in which it is now approached. This is not unprecedented.

Not long ago, welfare was treated as a privilege bestowed on persons and revocable at the whim of the provider. Since that time, numerous administrative practices based on the supposed moral degeneracy of the poor have been eliminated. Social work professionals of the New Deal era championed the ideas that benefits be recognized as rights (to leave the beneficiary unshackled by feelings of personal obligation to the welfare agency), that poverty does not indicate moral failing, and that financial assistance be conditioned solely on need. For the social workers of this era, a right was not an absolute triumph which provided the individual with absolute insularity from the larger society; instead, it had to be seen in the context of the social good. The free market principles of effort and exchange were treated as just two of several legitimate principles of distribution, with need being considered a principle of at least equal dignity.

The fundamental concept in the framework of the New Deal social workers is that of interdependence. They rejected the notion of a rigid distinction between the individual and the collective, instead recognizing the cooperation inherent in any advanced society. In applying their principles to welfare policy, the social workers emphasized that recognition of need as a distributive principle was imperative for a person to function as a full member of society. Rather than a premise, autonomy was identified as a goal.

It is this sense of interdependence which is an essential element of any successful welfare policy. The first step in creating this sense of interdependence is to create a system of public welfare which explicitly seeks to reward virtuous behavior. Some people are not able to work at all; others are unable to find jobs for shorter periods of time. In order to treat equals equally, we need to devise a welfare system which identifies individual responsibility as the determinant of aid eligibility. The current system fails to do that, and only a system based on need can do it.

---


The focus of the article is to reconcile the purpose and objective of social work theory, formulated during the New Deal and those of the New Property right in both a legal and political context. The critical issue revolves around whether welfare rights should be determined by "need-based distribution, [or] is it concerned with the protection of interests in economic status generally."

7Id. at 6-7.

7Id. at 13.

7Id.

7Id. at 14.

7Id. at 16.

7Id.