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JOBLESSNESS AND THE LAW BEFORE THE NEW DEAL

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I. INTRODUCTION

The question of how society should view and respond to the problem of joblessness is a contentious issue in American social welfare policy debates. Liberals generally take the position that society bears substantial responsibility for causing joblessness--either because the economy has failed to provide enough jobs for everyone who needs work, or because factors such as racial discrimination, unequal educational opportunity, or the economic marginalization of poor communities prevent certain groups from enjoying adequate employment opportunities. Consistent with this view, liberals tend to support programs that offer substantial, non-stigmatizing income assistance to jobless individuals, while simultaneously advocating policies designed to close the economy's perceived job

gap and/or equalize existing employment opportunities among groups.

In contrast, the touchstone of conservative positions on this issue is the view that jobless individuals are substantially responsible for their economic condition. Conservatives suggest that those without jobs either do not seek work with adequate determination, or refuse to accept available jobs because of unrealistic expectations concerning wages and working conditions. Consistent with this view, conservatives tend to favor social welfare policies that place pressure on jobless individuals to seek and accept available jobs. Providing jobless individuals with income assistance is counterproductive, according to this view, because it encourages dependency rather than self-reliance. Humanitarian considerations may dictate that some assistance be provided, but the aid offered should be both minimal and temporary so as not to discourage job seeking.

In recent years the conservative view on this issue has attracted increasing support while liberals have struggled with public perceptions that their policies have failed. Since liberal initiatives have tended to dominate reform movements in this area of law since the 1930s, this conservative resurgence feels like an innovation in public policy. In fact, the views and policy preferences reflected in recent conservative responses to joblessness are anything but new. Similar views shaped the development of English social welfare law in its formative period spanning the fourteenth through the sixteenth centuries, and this tradition, in turn, dominated American social welfare law until the 1930s. Rather than an innovation in social welfare policy, the conservative strategy represents a return to policies from an earlier era, and this prior experience with conservative policies may tell us something about what to expect from conservative reforms today.

This article examines the public policy responses to joblessness in England during the fourteenth through sixteenth centuries and in America during the ***3** pre-New Deal era. Part II traces the history of English statutes that responded to the problem of joblessness from the mid-14th century through the end of the 16th century. This story has been told before, and told well, [FN1] but typically without focusing on the role played by competing views of the causes of joblessness. During that period, English social welfare law reflected a strong presumption that joblessness was voluntary--a product of laziness and antisocial propensities on the part of jobless individuals themselves. The economic environment in which these laws were implemented, however, cast doubt on the universal validity of that presumption. In tacit acknowledgement of this doubt, a degree of ambivalence emerged in the law's generally harsh treatment of the able-bodied poor. Punitive laws were mitigated by ambiguously worded provisions that allowed poor law administrators to provide paid work to at least some jobless individuals, not as punishment, but as a substitute for unavailable jobs.

Part III of this article describes the development of American social welfare law in the nineteenth and early twentieth centuries. Strongly influenced by the Elizabethan poor laws described in Part II, American social welfare law during the nineteenth and early twentieth centuries tended to treat jobless individuals with a singular lack of sympathy, a tendency that was reinforced by the teachings of classical and neo-classical economic theorists. The assumption that joblessness was a voluntary condition was now supported not only by moral judgments concerning the perceived character faults of jobless individuals, but also by the seemingly scientific reasoning of abstract economic theory. At the same time, however, the emergence of the modern business cycle in the second half of the nineteenth century posed a growing challenge to the assumption that joblessness was a voluntary condition. Sudden contractions in economic activity began to cause mass un-

employment on a recurring basis. During these periods of economic crisis, more sympathetic responses to joblessness emerged, based upon perceptions that there simply were not enough jobs to go around. The policy innovations manifesting this changed view were short-lived, but they foreshadowed the public's more decisive and lasting rejection of the poor law regime during the Great Depression of the 1930s.

The broadest conclusion to be drawn from a review of this history is that proponents of conservative reform initiatives in this area should adopt modest expectations of success. For almost six hundred years, jobless individuals were denied income assistance, punished, and admonished to change their behavior-- without any apparent success in eliminating joblessness. This history also suggests that public support for conservative responses to joblessness is likely to remain strong only so long as the public believes that jobs are plentiful relative to the number of persons seeking work. When jobs are perceived to be scarce, punitive policy regimes lose public support not only because they are ***4** viewed as unduly harsh, but because that harshness is viewed as ineffective in combating joblessness.

II. EARLY ENGLISH STATUTES

A. The Statute of Laborers of 1349

The plague epidemic known as the Black Death struck England in 1348. Within a year it had killed more than a third of the Kingdom's population. [FN2] One consequence of the epidemic was the promulgation, in 1349, of England's first Statute of Labourers. [FN3] The statute's opening paragraph stated that its purpose was to address labor shortages, especially shortages of agricultural laborers. This perceived problem was attributed to two causes. First, the statute asserted that "[b]ecause a great part of the people, and especially of Workmen and Servants, late died of the Pestilence, many seeing the Necessity of Masters, and Great Scarcity of Servants, will not serve unless they may receive excessive Wages." [FN4] Second, the statute claimed that some people were "rather willing to beg in Idleness, than by Labour to get their Living." [FN5]

As a remedy for these problems the statute required all able-bodied men and women under the age of sixty who lacked employment (or sufficient means to live without working) to accept employment with any person who required their services (with preference given to lords) at wages no greater than those prevailing before the Black Death. [FN6] Those who refused work on these terms were subject to imprisonment until they "find surety to serve in the form aforesaid." [FN7] The statute also prohibited the giving of alms to able-bodied beggars "so that thereby they may be compelled to labour for their necessary Living." [FN8] Violators of this latter prohibition were subject to imprisonment. [FN9]

In other words, the law's response to an increase in vagabondage and begging by able-bodied persons following the Black Death was to blame the problem, unequivocally, on the individuals who engaged in such behavior. They were presumed lazy and/or greedy. Given that assumption, the strategy adopted for remedying the Kingdom's perceived labor shortages was straightforward--deny charity to able-bodied laborers of working age so they would be forced to seek work, and require any such person who was unemployed to accept work on pre-plague terms when it was offered.

***5** We should be cautious, however, in accepting the statute's factual presuppositions concerning labor market conditions at the time. The fact that wages rose sharply following the Black Death does not necessarily mean that "jobs" were available for everyone who wanted work [FN10] Prior to the Black Death, the laboring population of England was chronically underemployed. [FN11] The plague most likely caused the population of common laborers to decline more than the number of available jobs. [FN12] This would have caused the bargaining power of laborers to increase and wages to rise, whether or not the number of available jobs actually exceeded the number of willing workers. We therefore cannot say to what extent England's population of able-bodied beggars and other jobless persons consisted of individuals who chose, for whatever reason, not to seek or accept available jobs, and to what extent it consisted of persons cast adrift by the plague (or other events) and unable to find work. The punitive policies adopted in the Statute of Laborers towards this population were based on the assumption that they were jobless by choice, but that assumption may have been false.

The importance of this assumption in shaping the statute's response to jobless individuals can be seen in the far more sympathetic treatment accorded to persons who were presumed unable to work. Men and women past the age of sixty and persons not "able in body" were excused from the duty to work, [FN13] and the public was permitted to give them alms. [FN14] Despite the fact that destitute persons who were elderly or disabled tended to engage in the same kind of behavior--especially begging--that the statute sought to stamp out among the able-bodied and that such persons may also have been prone to the same vices ***6** attributed to able-bodied beggars, this population was treated more leniently. Presumably, it would have seemed unconscionable to deny charity to such persons since they were considered incapable of supporting themselves. The same was not true of able-bodied but jobless workers, because it was assumed that their joblessness was voluntary.

This statutory design inaugurated two closely linked tendencies in Anglo-American law. The first was a tendency to view joblessness among able-bodied persons, at least when it was persistent enough to cause destitution, as a voluntary condition evidencing character defects on the part of the jobless individuals. The second was a tendency to distinguish between those destitute persons who were considered deserving of the public's support, and those who were not, based on whether they were deemed able to work.

B. The Early English Poor Law System

The law's tendency to treat able-bodied, jobless individuals harshly, combined with a more sympathetic response to destitute persons who were deemed unable to work, was institutionalized with greater formality during the 16th century. Three categories of statutory enactments provide insights into the law's development during that period. The first category consisted of statutes that either prohibited the conversion of tilled land into pasturage or mandated the reconversion of pasture lands back to tillage. These statutes call attention to trends that caused an increase in joblessness during the 16th century. The second category of statutes consisted of enactments mandating the punishment of able-bodied vagabonds and beggars. These statutes were the engine of change that led to the third category of enactments. This third category consisted of measures--usually contained in and always linked to the anti-vagrancy statutes--that gradually imposed a duty on local governments to aid destitute persons properly settled within their jurisdiction.

1. Protecting Tillage

In the latter part of the 15th century, the problem of vagabondage grew noticeably worse throughout Western Europe. [FN15] Policymakers were well aware ***7** that forces beyond the control of the laboring classes were at least partially responsible for this trend. In England, for example, the substitution of sheep herding for tillage was widely recognized as causing significant numbers of laborers to lose both their employment and their homes. A particularly clear statement of this view was included in Thomas More's *Utopia,* published in 1516:

> Some of [the tenant farmers], either circumvented by fraud or overwhelmed by violence, are stripped even of their own property, or else, wearied by unjust acts, are driven to sell. By hook or by crook the poor wretches are compelled to leave their homes--men and women, husbands and wives, orphans and widows, parents with little children….
>
> []After they have soon spent that trifle in wandering from place to place, what remains for them but to steal and be hanged--justly, you may say!--or to wander and beg. And yet even in the latter case they are cast into prison as vagrants for going about idle when, though they most eagerly offer their labor, there is no one to hire them. For there is no farm work, to which they have been trained, to be had, when there is no land for plowing left. [FN16]

A series of statutes prohibiting the conversion of cultivated land to pasturage and requiring the reconversion of pasturage back to its original use suggests that lawmakers accepted More's analysis. The first of these statutes was promulgated in 1488 by King Henry VII. It prohibited the conversion of tilled land to pasturage on the grounds that:

> great inconveniences daily do increase by desolation and pulling down and willful waste of houses and towns within this realm, and laying to pasture lands which customarily have been used in tilth, whereby idleness, ground and beginning of all mischiefs, daily do increase; for where in some towns two hundred persons were occupied and lived by their lawful labors, now be there occupied two or three herdsmen, and the residue fall in idleness. [FN17]

A statute promulgated by Henry VIII the same year More's *Utopia* was published, mandated that "[i]f any person shall decay a town, a hamlet or house of husbandry, or convert tillage into pasture," the lord of the place should take half of the offender's land "until the offence be reformed." [FN18] A 1533 statute of Henry VIII also limited the number of sheep any person could possess to 2,000. [FN19] The limitation was justified, in part, on the grounds that because of the ***8** conversion of land from tillage to pasturage,

> a marvelous multitude and number of the people of this realm be not able to provide meat, drink and clothes necessary for themselves, their wives and children, but be so discouraged with misery and poverty, that they fall daily to theft, robbery and other inconveniences, or pitifully die for hunger and cold. [FN20]

Two years later, a statute was promulgated confiscating half the profits of any lands converted from tillage to pasturage within the preceding fifty years "until the owner hath

builded up a convenient house to inhabit, and converted the same pasture to tillage again." [FN21]

Similar statutes were enacted periodically in England throughout the sixteenth century, [FN22] suggesting that the displacement of agricultural laborers was perceived as an endemic problem in England at the time and that lawmakers were well aware that forces beyond the control of the laboring classes were responsible for the trend. These statutes do not prove that a surplus of labor necessarily existed in England at the time, any more than the Statute of Laborers proved that a labor shortage existed following the Black Death. Rather, the promulgation of these laws shows that 16th century English lawmakers were well aware that economic trends rooted in the self-interested behavior of landowners were causing increased vagabondage and begging in England. Parliament's contiguous enactment in 1597-98 of statutes "against the decaying of towns and houses of husbandry," [FN23] "for the maintenance of husbandry and tillage," [FN24] "for the relief of the poor," [FN25] and "for punishment of rogues, vagabonds and sturdy beggars" [FN26] provides further evidence that policymakers understood the linkage between these trends.

2. Punishing Able-Bodied Vagabonds and Beggars

Despite widespread recognition of the fact that forces beyond the control of ***9** the laboring classes were causing the problem, the law continued to treat vagabondage and begging as evidence of individual moral failings rather than of impersonal economic forces. A 1531 statute of King Henry VIII complained that vagabondage and begging were steadily increasing in England, that the problem was caused by "idleness, mother and [teacher] of all vices," and that the result was "continual thefts, murders and other heinous offences and great enormities." [FN27] The statute directed that any able-bodied man or woman caught begging or without lawful employment should be "tied to the end of a cart naked and beaten with whips throughout [the town] till his body be bloody by reason of such whipping." [FN28] After the whipping, the idler was required to return to the place where he (or she) was born or last lived for three years "and there put his body to labor for his living or otherwise truly get his living without begging as long as he is able so to do." [FN29] The statute also reaffirmed the policy begun under the Statute of Laborers of prohibiting the giving of "harbor, money or lodging to any beggars being strong and able in their bodies to work." [FN30]

A 1536 statute, also promulgated by Henry VIII, provided that anyone continuing a life of vagabondage or begging after receiving the penalty prescribed in the 1531 statute would be "not only whipped again … but also shall have the upper part of the gristle of his right ear clean cut off." [FN31] Third time offenders were "to suffer pain and execution of death as a felon and an enemy of the commonwealth." [FN32]

A 1547 statute of Edward VI complained that these earlier enactments had proved ineffective "partly by foolish pity and mercy of them which should have seen the said godly laws executed, partly by the perverse nature and long accustomed idleness of the persons given to loitering." [FN33] The statute directed that:

> who so ever … man or woman being not lame, impotent or so aged or diseased with sickness that he or she can not work … shall … be lurking in any house … or loitering or idly wander … not applying them self to some honest and allowed art, science, service or labor, and so do continue by the

> space of three days or more together and not offer themself to labor with any that will take them according to their faculty … shall be taken for a vagabond. [FN34]

***10** Vagabonds who refused employment were to be "marked with an hot iron in the breast" with the letter "V" (for vagabond) and enslaved for two years by anyone who brought them before two justices of the peace. The person's master was directed to "cause the said slave to work by beating, chaining, or otherwise in such work and labor how vile so ever it be as he shall put him unto" while "only giving the said slave bread and water or small drink and such refuse of meat as he shall think mete." [FN35] The first time a slave ran away he was to be branded on the forehead or cheek with the letter "S" and enslaved for life. If he ran away a second time, he was to be executed. [FN36]

Vagabonds who were not claimed as slaves by private parties were to be conveyed to their home parish and there enslaved by the parish for the same period of time "in chains or otherwise either at the common works in amending highways or other common work." [FN37] Both local authorities and private masters of vagabond slaves were authorized to "sell or give away the right title and interest of the said slave to any other person." [FN38]

The children of beggars could be claimed as apprentices by anyone who wanted them, without the consent of the child or his or her parents, and kept until age 23 (for boys) or 20 (for girls). If a child ran away, the child's master was allowed to "take the said child again and to keep and punish the said child in chains or otherwise, and use him or her as his slave" until the age of 20 or 23. [FN39]

This statute marked the most extreme point in England's campaign against vagabondage and begging. Two years later the statute was repealed and the earlier statutes of Henry VIII reinstated, [FN40] with the additional provision that a common laborer who refused to work for such reasonable wages as normally were paid would be punished as a "strong and mighty vagabond." [FN41]

In 1572, during Queen Elizabeth's reign, all earlier enactments relating to the punishment of vagabonds or relief of the poor were repealed. [FN42] In their place, a new set of sanctions were imposed for the punishment of "rogues, vagabonds and sturdy beggars." The new act defined this population more carefully than in the past. It included, among others,

> all and every person and persons being whole and mighty in body and able to labor, having not land or master, nor using any lawful merchandize, craft or mystery whereby he or she might get his or her living, and can give no ***11** reckoning how he or she doth lawfully get his or her living … and all common laborers being persons able in body using loitering, and refusing to work for such reasonable wages as is taxed and commonly given in such parts where such persons do or shall happen to dwell. [FN43]

If over the age of thirteen, such persons were "to be grievously whipped, and burnt through the gristle of the right ear with a hot iron of the compass of an inch about" unless a person of honesty and substance agreed to take the offender "into his service for one whole year." [FN44] Since there was no requirement that the offender be paid during the year, this amounted to a term of involuntary servitude reminiscent of the sanctions under

the short-lived statute of Edward VI a quarter century earlier. "Rogues or vagabonds" who failed to complete their year of service were to suffer their foregone whipping and disfigurement. [FN45] If convicted a second time, the person would be adjudged a felon unless taken into service by someone for two full years. [FN46] For a third offense, the punishment was death. [FN47] Persons under the age of fourteen whose conduct otherwise subjected them to the statute's sanctions were to be "punished with whipping or stocking." [FN48]

A 1597-98 statute of Elizabeth repealed this statute and reauthorized a slightly modified version of the sanction mandated by Henry VIII in 1531.

> [E]very person which is by this present act declared to be a rogue, vagabond or sturdy beggar … [shall] be stripped naked from the middle upward and shall be openly whipped until his or her body be bloody, and shall be forthwith sent … to the parish where he was born, if the same be known, … and if the same be not known, then to the parish where he or she last dwelt … by the space of one whole year, there to put him or her self to labor as a true subject ought to do. [FN49]

3. Poor Relief

Ironically, it was measures adopted to punish able-bodied vagabonds and beggars that led to the development of organized public relief in England. The pattern was similar to one that can be seen in the Statute of Laborers of 1349. The purpose of that earlier enactment was to force able-bodied persons to seek and accept employment, not to encourage almsgiving to the poor; but in ***12** prohibiting the giving of alms to able-bodied persons, the statute indirectly authorized and encouraged continued almsgiving to persons not expected to work. During the 16th century, a similar pattern developed. Laws designed to prohibit begging were accompanied by mandates to offer publicly administered charity as a substitute means of support for the "deserving poor."

a. Early Developments

The 1531 statute of Henry VIII that called for able-bodied vagabonds to be whipped and sworn to return to their home parish also required local authorities, for the first time, to license begging. [FN50] Justices of the Peace in each county were directed to divide the county among themselves for the purpose of granting written begging licenses, valid only in the "precinct" of each justice's jurisdiction, to "such poor, aged, and impotent persons" as the justice considered "to have most need." [FN51] The statute directed that "if any do beg without such licence [sic] or without his precinct, he shall be whipped, or else be set in the stocks three days and three nights, with bread and water only." [FN52]

This statute was intended to restrict begging rather than to encourage almsgiving. It took away rights that non-able-bodied beggars had exercised previously rather than offering them additional assistance. Nevertheless, because the statute mandated the involvement of public authorities in examining the needs of the poor and in deciding whether they were deserving of charity, it has been characterized as "the beginning of definite assumption by government of responsibility for the care of persons in economic distress." [FN53]

Another step towards the establishment of a public relief system was taken in a 1535 statute that directed local authorities to "find and keep every aged, poor and impotent person" who had lived within their jurisdiction for three years or who had been born there, using voluntary alms collected for that purpose, "so as none of them shall be compelled to go openly in begging." [FN54] That the purpose of this provision was to reduce begging rather than to increase assistance to the poor is suggested by the fact that it also prohibited giving alms except through the "common boxes, and common gatherings in every parish." Violators of this latter prohibition were to be fined ten times the amount of their unauthorized almsgiving. [FN55]

***13** The 1535 statute also noted a gap in the policy adopted towards able-bodied vagabonds and beggars who returned to the communities of their birth or prior residence. Both the 1531 and 1535 statutes contemplated that able-bodied vagabonds and beggars would either return to their home communities voluntarily or be driven back to work "as a true man oweth to do." [FN56] If they refused work or persisted in begging they were subject to further corporal punishment, up to and including execution; [FN57] however, the 1531 statute failed to explain how these returning vagabonds and beggars were to be treated if there was no work for them in their home community. The 1531 statute provided for the licensing of begging by "aged poor and impotent persons," but was silent as to the treatment of able-bodied persons for whom there was no work.

The 1535 statute authorized local authorities not only to distribute alms to support the "impotent" poor (who now were prohibited from begging), but also "to cause and compel all and every the said sturdy vagabond and valiant beggars to be set and kept to continual labor, in such wise as by their said labors they and every of them may get their own living with the continual labor of their own hands." [FN58] In other words, local authorities were authorized to provide relief to able-bodied vagabonds and beggars who returned to their home communities, but only in conjunction with their being "set and kept to continual labor." Whether this work was intended to serve a charitable or disciplinary purpose is unclear. The fact that local authorities were directed to "cause and compel" able-bodied vagabond and beggars to engage in such labor, suggests that the work was seen as a disciplinary measure. On the other hand, the statute directed local authorities to "charitably receive" not only "poor creature[s]" but also "sturdy vagabond[s]" who returned to their home communities in accord with the dictates of the 1531 statute.

The 1535 statute did not provide for able-bodied persons who had no work but had not resorted to begging or vagabondage. They were neither subject to the punitive sanctions authorized for able-bodied beggars and vagabonds, nor included in the groups that local authorities were directed to relieve. Such persons could not be offered relief as "impotent" persons, but the mandate that able-bodied vagabonds and beggars be set to labor appears not to have applied to them either. No guidance was offered as to how such persons were expected to support themselves.

Regardless of the treatment they received, the law's failure to acknowledge the existence of able-bodied persons who were jobless through no fault of their own seems significant. Joblessness stemming from the unavailability of work ***14** was not acknowledged to exist, despite the express recognition in other statutes that the conversion of pasturage to tillage was destroying livelihoods, and despite the fact that reformers with a more "liberal" bent, such as Thomas More, were quick to make the connection. [FN59] The law consistently treated vagabondage and begging as evidence of flawed character rather than as the necessary consequence of the curtailment of agricultural employment. According-

ly, the provision of relief to able-bodied persons was closely identified with corporal punishment and the use of forced labor as a disciplinary device.

The punitive intent of the work requirements imposed on able-bodied vagabonds during this period was most clearly articulated in the short-lived statute promulgated by Edward VI in 1547. As noted above, this statute called for the branding and enslavement of vagabonds. Those who returned to their home communities were to be enslaved by local authorities for the term of their punishment "in chains or otherwise" to labor on roads or other public works. [FN60]

To the extent work requirements were viewed as a disciplinary or cost-cutting measure, of course, there was no reason to limit their use to able-bodied persons. Consistent with this view, the 1549 statute that reinstated the earlier statutes of Henry VIII mandates the imposition of work requirements on the "impotent" poor for the first time:

> [I]f any of the said aged, maimed, or impotent persons … be not so lame or impotent but that they may work in some manner of work, that then such city, town, parish or village do either in common provide some such work of them as they may be occupied in, or appoint them to such as will find them work for meat and drink; and if they refuse of willfulness and stubbornness to work, or do run away and beg in other places, then to punish the same according to their discretion with stocking, beating or otherwise as shall seem convenient. [FN61]

This statute shows a convergence in the treatment of able-bodied and "impotent" poor persons in another respect as well. For the first time, the duty of local communities to provide relief for the "impotent" poor was limited to those who either had been born in the community or who had lived there for the preceding three years. [FN62] Poor persons who failed to satisfy this condition were subject to compulsory removal to the communities of their legal settlement, a sanction that previously had been applied only to able-bodied beggars and vagabonds. [FN63]

***15** b. Refining the System

The next significant step in the development of the English poor law system occurred in 1572, when a comprehensive statute was enacted regulating both the punishment of able-bodied vagabonds and the provision of relief for the "impotent" poor. [FN64] The provisions of this statute relating to the punishment of able-bodied vagabonds and beggars have already been described [FN65] and generally resembled statutes already in place. With regard to the provision of relief, the statute was more innovative. First, voluntary almsgiving was abandoned as the primary source of funding for local poor relief, in favor of a straightforward system of local taxation. [FN66] Second, the statute mandated the establishment of "abiding places" where the "impotent" poor would be required to live and work, if able to do so. [FN67] Overseers of these "abiding places" were authorized to require work of "any of the said aged and impotent persons not being so diseased, lame or impotent but that they may work in some manner." [FN68] Those ***16** who refused to work were "whipped and stocked for their first refusal" and "punished as in the case of vagabonds" for a second refusal. [FN69]

Interestingly, the 1572 statute also authorized a less punitive form of work relief for able-bodied "rogues and vagabonds," possibly reflecting increased public sympathy for

the poor. [FN70] The statute directed local justices of the peace, acting in concert, to use any "surplusage" in local poor relief funds, after "poor and impotent people [had been] satisfied and provided for," to "settle to work the rogues and vagabonds that shall be disposed to work … to get their livings and to live and to be sustained only upon their labor and travail." [FN71] Local communities were no longer required to set able-bodied vagabonds and beggars to labor as a disciplinary measure. Instead, if surplus relief funds were available, they were permitted to offer work relief to returned vagabonds and beggars who wanted to work.

A 1576 statute carried this more sympathetic response to jobless individuals still farther. The purposes of work relief were described in the following terms:

> [T]o the intent youth may be accustomed and brought up in labor and work, and then not like to grow to be idle rogues, and to the intent also that such as be already grown up in idleness and so rogues at this present, may not have any just excuse in saying that they cannot get any service or work, and then without any favor or toleration worthy to be executed, and that other poor and needy persons being willing to work may be set on work. [FN72]

Local authorities were directed to maintain "a competent store and stock of wool, hemp, flax, iron or other stuff" for delivery to able-bodied poor persons "within such time and in such sort as in their discretion shall be from time to time limited and fixed." [FN73] The poor persons were to work up the materials into finished goods for which they would be paid by the local authorities "according to the desert of the work." [FN74]

The use of forced labor as a disciplinary measure was still authorized, but only if "hereafter any such person able to do any such work shall refuse to work or shall go abroad begging or live idly, or taking such work, shall spoil … the same." [FN75] Punishment for such idleness was to be administered in "houses of correction" established in every county not only for this purpose, but also to ***17** serve as a place of confinement for "rogues" who violated the law's strictures against vagabondage and begging. [FN76] Inmates of these houses of correction were to be "straightly kept, as well in diet as in work, and also punished from time to time." [FN77]

The contrast between the relatively sympathetic response to jobless individuals mandated under the 1576 statute and the uniformly harsh response mandated under earlier statutes is striking. Harsh punishment was still mandated for jobless individuals who were considered blameworthy, but it was implicitly acknowledged that there were other "poor and needy persons" who were "willing to work" but who lacked employment. [FN78] The fact that work was to be offered to able-bodied persons who were idle, in order that they "may not have any just excuse in saying that they cannot get any service or work" suggests that such claims were being made by or on behalf of jobless individuals subject to punishment for their idleness. [FN79] Finally, the mandate that work be provided to needy youths in order that they "may be accustomed and brought up in labor and work" [FN80] implies that paid employment might not otherwise be available to them.

The fact that work relief was to be administered separately from the system of forced labor imposed as punishment on the work shy also seems significant. Spinning and iron work were recommended as work relief, with the labor to be performed in the worker's home and compensated "according to the desert of the work." [FN81] This description of

the work could have applied as easily to typical private sector employment at the time. In contrast, disciplinary labor was to be administered in "houses of correction," where inmates were incarcerated involuntarily.

The statute's description of the purposes of work relief suggests a diversity of views on the possible causes of joblessness--a diversity reminiscent of contemporary debates regarding welfare policy. First, work relief was described as having a training function. Youth were to be given work so that they wouldn't grow into rogues. This suggests that joblessness was viewed by some as the consequence of socially inculcated bad habits and possibly a lack of training in marketable skills. Second, work relief was described as a test of good faith for persons who claimed their unemployment was involuntary, so that those who failed the test could be executed without compunction. This suggests skepticism toward the view that all joblessness was voluntary, combined with a sensitivity to criticism that involuntarily unemployed workers were being punished unfairly. Third, work relief was described as a means of providing employment to ***18** people who were willing to work but lacked jobs. This suggests that joblessness was viewed as an involuntary condition, at least for some persons. Although the drafters of the statute did not state that some joblessness was caused by a lack of jobs, this seems to be the implication.

c. The Link Between Policy and Perception

The Elizabethan statutes of 1571 and 1576 demonstrate that a more sympathetic view of the plight of jobless individuals had some support in the period, and that occasionally this support was strong enough to influence legislation. [FN82] While support for this more sympathetic view of jobless individuals appears to have waned fairly quickly, its continuing influence was reflected in the maintenance of a certain ambiguity in subsequent poor law directives for setting able-bodied persons to work.

Between 1597 and 1601, in the wake of a severe economic contraction, Parliament undertook a restatement and refinement of the country's poor law and other related legislation. [FN83] Little of substance was added to the law, but this final recapitulation of seven decades of reform proved remarkably stable and influential. English law relating to poor relief remained essentially unchanged for almost the next two hundred and fifty years, [FN84] and the so-called "great poor law" enacted in 1601 served as the model for the administration of poor relief in the United States until the 1930s. [FN85]

The first statute enacted by Parliament in 1597 reaffirmed the kingdom's policy of restricting the conversion of tilled land to pasturage. As with similar statutes enacted previously, the linkage between the targeted practice and the growth of idleness in the kingdom is expressly noted. The maintenance of tillage is described as "a principal means that people are set on work, and thereby withdrawn from idleness, drunkenness, unlawful games, and all other lewd practices and conditions of life." [FN86]

The next statute enacted by the Parliament of 1597-98 was "An Act for the Relief of the Poor," [FN87] followed by "An Act for Punishment of Rogues, Vagabonds, and Sturdy Beggars" [FN88] and an act to encourage private contributions ***19** endowing "abiding and working houses for the poor." [FN89] In 1601, the first and last of these latter three enactments received further refinement. [FN90]

Under these statutes, the status of jobless individuals did not change significantly, but mandates for their treatment became somewhat more ambiguous. For example, local au-

thorities were authorized to establish "Houses of Correction" for the punishment of able-bodied poor persons who refused to work or whose community of legal settlement was unknown, [FN91] but they were not required to do so--as they had been under the 1576 statute. [FN92] Instead, local authorities could confine such persons in the "common jail" of the county,

> there to remain and be employed in work until he or she shall be placed in some service, and so to continue by the space of one whole year, or not being able of body until he or she shall be placed, to remain in some almshouse in the same county or place. [FN93]

The punitive character of this treatment is much less clear than that mandated for recalcitrant vagabonds under the 1576 statute. It also is less distinguishable from the treatment mandated for both the able-bodied and disabled poor deemed deserving of poor relief. Under the 1597-98 acts, assistance for the deserving poor was administered by "overseers of the poor" appointed:

> for setting to work … all such persons married or unmarried as having no means to maintain them, use no ordinary and daily trade of life to get their living by; and also to raise weekly or otherwise … a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff to set the poor on work, and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work. [FN94]

***20** The question of who among the able-bodied poor was to be relieved under this formulation had no clear answer. The statute left uncertain what was meant by "us[ing] no ordinary and daily trade of life to get [one's] living by." This language could simply mean that the person is unemployed, but it also could mean that the person has followed a life of idleness rather than pursued a trade. The statute also leaves unclear what the purpose of "set[ting] the poor on work" was conceived to be. The work could be intended to discipline the poor, to test their willingness to work, to train them in a "daily trade of life," or to furnish them with employment when jobs were scarce.

This ambiguity in defining those worthy of aid may be one of the secrets of the statute's durability. The statute was susceptible to varied interpretations and could support quite different relief efforts. It could be read as authorizing a relatively sympathetic response to jobless individuals, such as that mandated by the 1576 statute, or a relatively harsh response, such as that mandated by earlier sixteenth century statutes. Local authorities were authorized to fashion a relief effort after their own liking. In this manner, statutes whose original intent was to suppress vagabondage and begging by forcing able-bodied persons to seek and accept presumptively available employment spawned a system of public relief in England.

By the 1570s the English system of poor relief for both the "impotent" and the able-bodied poor was essentially complete. The distinguishing features of the system were local responsibility and local control. Local authorities were responsible for the care of their own poor, and only their own poor; financing for the system was furnished entirely from local sources; and all decisions about who was deserving of aid, how much should be provided and how it should be provided were made locally.

There were five principle features of the system's treatment of able-bodied but jobless individuals. They were: (1) its assumption that able-bodied vagabonds and beggars were work shy and deserving of harsh corporal punishment to force them to go to work and/or return to their home parish; (2) its mandating of compulsory labor for able-bodied persons settled in their home parish who were considered work shy; (3) its acknowledgment that there might be able-bodied individuals among the settled poor who were deserving of relief, (4) its assumption that the appropriate way to provide relief to deserving persons who were able-bodied but lacked work was to offer them work paid out of relief funds (i.e., work relief), and (5) its failure to distinguish clearly between work relief provided such persons and the forced labor imposed as a punishment and deterrent on the work shy. These features were reproduced in the American poor law system.

***21** III. THE AMERICAN POOR LAW SYSTEM

A. The Colonial Period

Each of the British colonies that later formed the United States enacted poor laws based on the Elizabethan statutes of 1597-98 and 1601. [FN95] Able-bodied vagrants were subject to punitive sanctions, including corporal punishment and imprisonment; [FN96] residency requirements for the receipt of assistance were strictly enforced; [FN97] and newcomers whose resources were thought insufficient were often excluded from communities. [FN98] At the same time, as in England, local authorities could provide relief to able-bodied individuals if they found them deserving. [FN99]

Aid for the poor was provided in various forms. Colonial legislation emphasized the desirability of providing relief in residential institutions ("indoor relief"), [FN100] but only the largest communities built such institutions. Where they existed, these institutions generally combined the functions of poor houses (for those incapable of working), work houses (for poor persons capable of working), and houses of correction (to discipline the "work shy"). [FN101] A more common form of relief was the "farming out" of both able-bodied and non-able-bodied paupers. Private parties would bid to house and feed non-able-bodied paupers for a fee, supplemented by the right to extract whatever labor they ***22** could from them. [FN102] The labor of able-bodied paupers would be auctioned to the highest bidder. [FN103] During periods of severe economic distress, when the ranks of jobless persons swelled with persons who ordinarily were employed, local officials occasionally responded with efforts to provide work relief, as allowed under the English model. [FN104] The most common type of relief provided in Colonial North America, however, consisted of in-kind and money payments to persons living in their own homes ("outdoor relief"). [FN105]

B. The Nineteenth and Early Twentieth Centuries

1. The Emergence of Cyclical Unemployment

Prior to the Industrial Revolution, [FN106] widespread joblessness was associated with natural or social disasters, such as war, [FN107] or the decline of particular industries, as with the conversion of tilled land to pasturage in 16th century England. The periodic declines in business activity that are a part of the modern business cycle were unknown. [FN108]

In the nineteenth century, the United States economy became more industrialized and larger numbers of laborers became dependent upon wage employment in urban areas for their livelihood. [FN109] In this context, joblessness increasingly came to be associated with cyclical fluctuations in business activity. In the early ***23** part of the century, these changes were still relatively subdued, but by the 1850s, business contractions and the joblessness that attended them were widely recognized as social crises. [FN110]

The last quarter of the nineteenth century was a period of especially severe economic distress and high unemployment. In 1873 a financial panic triggered a six-year economic contraction that was the longest in United States history and the second deepest after the Great Depression of the 1930s. [FN111] The business failure rate during the depression of the 1870s was greater than during the depression of the 1930s, and it remained elevated for a longer period. [FN112] John D. Rockefeller wrote of those years:

> [I wondered] how we came through them. You know how often I had not an unbroken night's sleep, worrying about how it was all coming out. All the fortune I have made has not served to compensate for the anxiety of the period. Work by day and worry by night, week in and week out, month after month. [FN113]

No reliable estimates of unemployment exist for the 1870s, [FN114] and the level of output appears to have declined less than in subsequent cyclical downturns. [FN115] Still, available data suggest that the unemployment rate probably exceeded 15 percent in the middle of the depression, and the downturn was exceptionally long. [FN116]

The U.S. economy suffered a shorter, less severe downswing from 1882 through 1885; but it was bad enough to qualify as a major depression. [FN117] Although reliable estimates of unemployment do not exist for this decade either, a Massachusetts state census conducted in 1885 recorded an average unemployment rate during the year of 10.4% for men and 9.6% for women, with almost ***24** 30% of both male and female workers having been unemployed for some part of the year. [FN118]

In the 1890s the economy suffered two recessions in quick succession, from 1893-94 and again from 1895-97. Unemployment rates were extremely high during this period, averaging 14.2 from 1893 to 1898, with a peak rate of 18.4 percent in 1894. [FN119] To place these figures in context, average unemployment rates were higher in the 1890s than during any 10 year period in the twentieth century except for the 1930s.

Viewed as a whole, the quarter century from 1873 to 1898 almost certainly was characterized by higher average unemployment rates than any other twenty-five year period in the nation's history, including periods encompassing the “Great Depression” of the 1930s. The policy responses to these bouts of mass unemployment were heavily influenced by two factors. The first was a strong bias against government regulation of the economy. The second was the ambiguity embedded in the poor law system concerning the proper response to jobless individuals.

2. Nineteenth Century Economic Thought

The vast majority of both classical and neo-classical economists were strong advocates of laissez-faire. [FN120] Their opposition to government interference with the market's regulation of economic outcomes was virtually unqualified, including efforts to reg-

ulate labor market outcomes. [FN121] Since they assumed that labor ***25** markets exhibit the same tendency to clear as other markets, they took for granted that remunerative employment was available for everyone who wanted it, provided wages remained flexible. [FN122]

Not surprisingly, the problem of unemployment tended to receive very little attention in their writings. [FN123] When mentioned at all, [FN124] unemployment typically was treated as a temporary disequilibrium condition, easily rectified by price and wage flexibility. [FN125] Similarly, depressions were treated as irrational aberrations in the life of an economy. [FN126]

The key labor market problem requiring investigation, from this perspective, was low wages rather than joblessness. [FN127] The question asked was whether and how the laboring classes could escape low-wage poverty (rather than how to reduce unemployment).

Classical and neo-classical economists differed in their analysis of the low wage problem. Classical economists assumed that rising wages caused population growth. Population growth caused the supply of labor to increase, which in turn exerted downward pressure on wages. They reasoned that unless a way ***26** could be found to avoid this cycle, wages were destined to remain at a subsistence level. [FN128]

The neo-classical school did not disagree with the classical theory as a long-term proposition; [FN129] but the body of theory that they developed in the late eighteenth century had a short-term focus. Within their theoretical framework, population was treated as an exogenously determined independent variable whose value was fixed in the short run. [FN130] The key determinant of wage levels, in their view, was labor productivity, since that was what determined the real value of labor's marginal contribution to total output (assuming labor supply remained constant) and thus, the real value of the wages labor could command. [FN131]

Despite their contrasting approaches to the analysis of wage determination, the policy implications of both classical and neo-classical economic thought concerning remedies for poverty were consistent. Economists from both schools were highly critical of efforts to raise wages above market levels, either by statute or by trade union activity. Such measures were viewed as either futile or counterproductive because of their interference with the equilibrating functions of market forces. [FN132] Both schools believed that rapid economic growth would tend to raise wages and that the principles of laissez-faire provided the best policy for achieving that goal. Both schools thought that educational measures directed at the laboring class were crucial to raising wages, either because a higher “cultural level” would lead to “moral restraint” (i.e., decisions to defer marriage and have smaller families) or because it would increase the productivity of labor. Finally, both schools thought that the provision of public relief to able-bodied persons had a strongly negative effect on wages and therefore increased poverty.

This latter point deserves special emphasis. Since poor relief benefits constituted the only institutionalized form of public assistance available to jobless individuals in the United States, its elimination would have meant the end of all ***27** public aid for such persons. The most influential advocate of this abolitionist policy was the classical English economist Thomas Malthus, who placed the blame for poverty squarely at the feet of the poor themselves. According to Malthus:

> When the wages of labor are hardly sufficient to maintain two children, a man marries and has five or six; he of course finds himself miserably distressed. He accuses the insufficiency of the price of labor to maintain a family. He accuses his parish for their tardy and sparing fulfillment of their obligation to assist him. He accuses the avarice of the rich, who suffer him to want what they can so well spare. He accuses the partial and unjust institutions of society, which have awarded him an inadequate share of the produce of the earth. He accuses perhaps the dispensations of Providence, which have assigned to him a place in society so beset with unavoidable distress and dependence. In searching for objects of accusation, he never adverts to the quarter from which his misfortunes originate. The last person that he would think of accusing is himself, on whom in fact the principle blame lies, except so far as he has been deceived by the higher classes of society. [FN133]

Rather than calling for collective action, Malthus argued that the poor held the keys to their own deliverance from poverty:

> No co-operation is required. Every step tells. He who performs his duty faithfully will reap the full fruits of it, whatever may be the number of others who fail. The duty is intelligible to the humblest capacity. It is merely that he is not to bring beings into the world for whom he cannot find the means of support. [FN134]

Poor relief was singled out for criticism because it removed the negative reinforcement necessary to induce the poor to refrain from having children. [FN135] Instead of providing aid, the proper role of government in relieving poverty should be to educate the lower classes concerning the true source of their suffering--their own behavior. [FN136]

Neo-classical economists adopted essentially the same position with respect to the harmful effects of poor relief, but their opposition was no longer based on Malthus's reasoning. They argued that the receipt of relief tended to undermine habits of industry and thrift among the poor, thereby reducing their productivity and consequently the wages they could command. The result was an account of poverty among able-bodied persons that supported essentially the same policy conclusion as Malthus, but with a focus on productivity rather than fertility.

The writings of Alfred Marshall, the best known and most influential neoclassical economist of the late nineteenth and early twentieth century, illustrate ***28** this perspective. Writing in the early twentieth century, he criticized the English poor law in the following terms:

> [W]e are still suffering in England from the effects of the Poor-law which ruled at the beginning of last century, and which introduced a new form of insecurity for the working classes. For it arranged that part of their wages should, in effect, be given in the form of poor relief; and that this should be distributed among them in inverse proportion to their industry and thrift and forethought, so that many thought it foolish to make provision for the future. The traditions and instincts which were fostered by that evil experience are even now a great hindrance to the progress of the working class; and the

> principle which nominally at least underlies the present Poor-law, that the State should take account of destitution and not at all of merit, acts in the same direction, though with less force. [FN137]

The reason this policy caused poverty, according to Marshall, was not because it encouraged workers to marry too young, but because it rendered them less productive, thereby depressing their wages. Marshall argued that competitive labor markets tend to compensate individual workers in proportion to their relative productivity, [FN138] the implication being that individual poverty was caused by a lack of individual productivity. Accordingly, the only effective remedy for poverty was to increase the productivity of labor. [FN139] As we have noted, he considered public assistance for able-bodied persons to be counterproductive, but he was a strong advocate of measures designed to improve the health and skills of the laboring classes, including public health measures, [FN140] vocational training, [FN141] and even a shortening of the work day if people could be taught to use leisure better, i.e., in ways that would tend to enhance their productivity and that of their children. [FN142]

By the early twentieth century, the laissez-faire thinking of the classical and neo-classical schools had come to dominate U.S. jurisprudence, providing a "conservative" bulwark against "liberal" efforts to protect workers from the negative effects of market forces. [FN143] Laissez-faire attitudes ran deeply enough that the Supreme Court read the United States Constitution as barring most government efforts to regulate labor market activities at either the state or ***29** federal level. State statutes regulating working hours [FN144] and minimum wages [FN145] were invalidated on this basis along with attempts by both states and the federal government to bar employment contracts that prohibited employees from joining trade unions. [FN146] Federal attempts to regulate child labor also were declared unconstitutional. [FN147]

The same hands-off attitude was evident in the scope given the employment-at-will doctrine by common law judges. As yet untempered by judicially recognized exceptions [FN148] or legislated limitations, [FN149] the at-will doctrine permitted employers to establish whatever conditions of employment market conditions would permit [FN150] and to discharge their employees for any reason, at any time, and in any manner they chose. [FN151]

The influence of laissez-faire thinking was also apparent in the administration of the American poor law system. No dramatic shift in the law occurred in the United States during this period, as it did in England in 1834, but the administration of the law did reflect the influence of classical and neo-classical economic thought in the way it responded both to endemic joblessness and to the new problem of mass unemployment caused by the business cycle.

***30** 3. Poor Relief

a. Early Poor Laws

Colonial statutes modeled on the Elizabethan poor laws of 1597-98 and 1601 provided the model for state poor laws enacted following independence. [FN152] The basic system of public assistance established under these laws remained essentially intact until the 1930s. [FN153] The key features of this system are familiar. Local governments were required to support and care for destitute persons residing within their jurisdiction and

unable to support themselves. [FN154] This duty was limited, however, by two conditions. First, the community's duty extended only to persons who were legally settled in the community. [FN155] Second, the community's duty was made secondary to that of close relatives with sufficient means to support their needy kin. [FN156]

As mentioned above, support was owed under these statutes only to persons who lacked the capacity to be self-supporting. The Illinois Pauper Law was typical. [FN157] It defined the eligible population to consist of poor persons who were "unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause." [FN158] A more modern statute, enacted just prior to the Great Depression, still defined a person entitled to care as one "in need of relief and care which he is unable to provide for himself." [FN159]

Local officials determined the practical applications of these laws. The duty imposed on local governments to relieve the poor was mandatory in principle, but enforcement of this obligation was limited. Since all funding for the poor law system was raised locally, state governments had no compelling reason to ***31** regulate or even monitor local officials in the performance of their duties. Accordingly, local poor relief administrators were subject to little or no state supervision. [FN160] Some states established state-run institutions for the care of certain categories of needy persons during the nineteenth century, [FN161] and some began to regulate local almshouses in the post Civil War period. [FN162] Nevertheless, except for the indirect effects of almshouse regulations, these efforts did not encroach upon the discretion of local authorities to decide who was deserving of aid and how much aid to provide.

Court enforcement of local obligations was also very limited. Poor persons themselves generally were not recognized as having an enforceable right to assistance. [FN163] In contrast, suits by third parties seeking reimbursement for care provided to destitute individuals were fairly common, [FN164] as was litigation by local officials seeking to shift responsibility for the care of certain individuals to other jurisdictions. [FN165] Litigation of this sort may have forced local governments to provide relief for particular individuals, but it did not create any incentives for local officials to be more even-handed in deciding other cases.

The result was a system in which eligibility standards and benefit levels could vary widely among communities based on differences in local perceptions of ***32** who was deserving of aid and how much assistance was warranted. In this sense, there were thousands of public assistance systems operating in the United States in the nineteenth and early twentieth centuries. As a study of the poor law in Ohio noted, "[u]nder the present plan, instead of one standard for the care of the destitute, there are as many standards as there are townships in the state." [FN166]

Despite variations in local practice, a common feature of public relief under the American poor law system was its stigmatizing and punitive character.

> It was conceded that unavoidable misfortune sometimes results in the fact that "worthy" persons are forced to ask for public aid, but a stigma was attached to the receipt of all relief, whether by "worthy" or "unworthy" persons. It was therefore deemed conducive to economy and public morality to make relief so disagreeable to the recipient that he would be persuaded or forced to devise some means of self-support in order to remove himself

> from relief lists as soon as possible. This deterrent policy was conceived also as a stern warning to those on the borderline of dependency to practice thrift and keep out of the pauper class. [FN167]

A 1915 decision by a New York court construing the meaning of the term "poor person" under the state's poor law illustrates this view:

> It is common knowledge who the ordinary "poor persons" are. They are those without property, without habits of industry or thrift, improvident, usually physically or mentally deficient, who are unable through efforts of their own to gain a livelihood. They are constantly seeking, and generally receive at somewhat regular intervals, public charity or assistance. [FN168]

Both in the poor laws and ordinary usage, recipients of relief were commonly termed "paupers," a term which had such strongly stigmatizing connotations that social welfare reformers in the New Deal era sought to eliminate its usage. [FN169]

In some jurisdictions applicants for relief were required to execute a formal declaration of destitution and incapacity, commonly referred to as a "pauper's oath." [FN170] Poor law administrators were commonly called "poor masters" or ***33** "overseers of the poor," [FN171] a designation with a history dating back to the Elizabethan period but also redolent of associations with slavery. A number of states deprived poor law recipients of the right to vote or hold public office. [FN172] Settlement requirements and the power conferred on local authorities to "remove" paupers to jurisdictions where they were legally settled subjected the poor to involuntary or coerced resettlement. [FN173] Frequently, aid was offered only in institutions notorious for their wretched and abusive conditions, [FN174] and families were not uncommonly subjected to involuntary or coerced separation. [FN175]

Consistent with the stigmatizing purposes of the American poor law system, the amount of aid provided to recipients was kept very low to deter people from seeking public assistance.

> To give more than the barest minimum of public assistance to employables, it was argued, would be to encourage idleness and make inroads upon the needed labor supply of the growing nation. To grant more than the barest minimum to unemployables, it was believed, would remove the inducement for relatives to take up their rightful burden. [FN176]

Moreover, as in England, the trend in the nineteenth century was toward greater stringency in the administration of the poor law system. [FN177] Even the ***34** reforms sought by humanitarians were affected by the Malthusian view of the origins of poverty. The humanitarian program did not challenge the assumption that poverty among the able-bodied was caused by deficiencies in the poor themselves rather than by a lack of available jobs. They merely argued that the existence of such deficiencies could be attributed to an unhealthy environment rather than character defects. They pressed for the elimination of "outdoor relief," [FN178] arguing that it left the poor in a debilitating environment. Instead, they proposed that they poor be housed in "asylums," where they could be taught the virtues of clean living and inculcated with the work ethic. [FN179]

This trend toward the institutionalization of the poor was also supported by those with less humane motives. Although the theory was rarely proven to be true, [FN180] supporters of institutionalization argued that such care would be cheaper to provide, and it was known from long experience that it could be made punitive. Actual conditions in asylums for the poor suggested that the latter considerations tended to prevail in practice. As one historian has noted:

> Every almshouse became a workhouse, and the work test applied indiscriminately to all paupers--children, aged, blind, and disabled as well as able-bodied …. In every city plagued by pauperism in the first half of the nineteenth century, outdoor relief was cut back, and work became the indispensable condition for institutional aid. [FN181]

As a general rule, unemployed workers were not viewed as qualifying for poor relief because they were presumed capable of finding work if they wanted to. [FN182] A detailed legislative history of the development of Connecticut's poor law from 1634 through 1903 describes a vast array of laws responding to various perceived causes of destitution. [FN183] At different times, slave owners were required to reimburse towns for the support of former slaves emancipated when they were no longer able to work; [FN184] employers were required to reimburse towns for the cost of medical care provided to former employees who contracted smallpox while employed; [FN185] and the sale of alcoholic beverages to ***35** persons considered likely to become public charges was prohibited. [FN186] However, in almost three hundred years of Connecticut legislation addressing the subject of poor relief, the Connecticut legislature never acknowledged that able-bodied individuals might become public charges due to the unavailability of work. Historical accounts of the administration of other state poor laws are similarly devoid of references to individuals being relieved because they were unemployed, [FN187] and some state laws expressly, or impliedly, prohibited the granting of relief to employable persons. [FN188] In surveying state court cases involving the administration of state poor laws prior to 1930, I found many references to individuals granted relief because of age, disability or sickness, but no references to able-bodied persons granted relief because they had lost a job or were unable to find work.

Nevertheless, local authorities had discretion in deciding who was entitled to public assistance, and at least some unemployed workers received temporary accommodations in poorhouses during the winter or periods of economic crisis. However, in the last quarter of the nineteenth century reformers pursued a concerted and largely successful campaign to bar able-bodied individuals from poorhouses on the grounds that receiving public aid would encourage their idleness. [FN189]

Homeless persons among the unemployed also received ad hoc public assistance in the form of overnight accommodations in police stations where they were permitted to sleep on the floor or in empty cells. This practice was widespread during the last two decades of the nineteenth century until reformers sought to eliminate it for the same reasons they campaigned against admitting able-bodied individuals to poorhouses. [FN190]

To end police station accommodation of homeless men, many municipalities constructed “municipal lodging houses” at the turn of the century where homeless men could obtain a bed and a meal in exchange for chopping wood or breaking stone in public for several hours--a requirement commonly referred to as a “work test.” [FN191] The purpose of the work test was neither to provide the unemployed with jobs nor to provide the

public with a return for the relief it provided. The principal function of the work test was to deter individuals who were work shy or had access to other resources from applying for relief. [FN192] As a ***36** late nineteenth century commentator expressed it, "A labor test is not intended as relief; it is a test precedent to relief; … a condition on which relief depends; a test of the genuineness and desert of the applicant." [FN193] This was why the work required typically consisted of hard physical labor, was required in amounts that bore little market relationship to the amount of assistance provided and was required to be performed in public--thereby forcing recipients of aid to endure the humiliation of publicly displaying their destitution.

b. Changing Perspectives

The general practice of not providing outdoor relief to the unemployed was seriously strained during the second half of the nineteenth century by the emergence of the modern business cycle and the exceptional severity of the cyclical downturns that occurred in the last quarter of the century. [FN194] Widespread job loss among normally employed people during these downturns challenged the presumption that joblessness among able-bodied persons was a voluntary phenomenon. [FN195] The realities of cyclical unemployment led some authorities to begin making distinctions between those who were "impoverished by their indolence and vices, for which they are responsible," and those who "have been reduced to distress by unavoidable or Providential causes." [FN196] Administrators of relief efforts began to concede that during recessions or depressions the relief problem "was of a different sort from that which was normally dealt with by the charitable agencies … for the existing distress was supposed to be due chiefly to non-employment, and not to the ordinary causes of poverty." [FN197] Accordingly, as the phenomenon of cyclical unemployment became firmly established in the economic life of the nation, the practice grew of extending outdoor relief to unemployed workers during recessions or depressions. [FN198]

The "panic" of 1857-58 appears to have been the first business slump to inspire a noticeable relief effort on behalf of unemployed workers. [FN199] Between 1857 and 1929, there were five other recessions or depressions during which significant efforts were made to provide relief to unemployed workers. [FN200] The unemployed received outdoor relief through the regular channels of poor law administration and by means of various ad hoc public measures. [FN201] However, ***37** the amount of aid provided was never substantial. [FN202] For instance, an emergency work relief program that operated in Boston during the winter of 1893-94 provided an average of approximately one week's normal wage per recipient for the entire winter. Similar programs in Cambridge and Holyoke provided an average of merely three week's normal wage. [FN203] Furthermore, the initiatives were generally short-lived. Except during the depressions of the 1870s and 1890s, special efforts on behalf of unemployed workers generally were limited to a single winter. [FN204] The limited nature of these efforts was dictated not only by budgetary constraints, but also by Malthusian concerns that the good character of even the deserving poor was placed at risk by the receipt of public assistance.

> The apprehension lest "temporary aid might end in permanent support and that the habit of receiving without rendering an equivalent might sap the foundation of that independence of character, and that reliance on one's own resources" so highly valued, lurked always just behind plans for relief in the emergency. While the rich were commended for their generosity, they were reminded in the depression that often their charity might weaken habits of

> independence and lead people to grow accustomed to supporting themselves from the bounty of others. [FN205]

Limited as they were, the existence of these initiatives in an era that strongly disfavored the provision of relief to able-bodied persons was significant. These initiatives demonstrate once again an important tendency we first noted in the sixteenth century: when conditions demonstrate beyond reasonable doubt that a group of workers has been left jobless through no fault of their own, either the law or its administration becomes decidedly more sympathetic to jobless individuals. In such situations, unremitting harshness is replaced by ambivalence and occasionally even generosity.

The late nineteenth and early twentieth centuries reflected this change in attitude both in the greater willingness of public authorities to grant relief to jobless individuals during recessions and depressions, and in the nature of the work requirements imposed on unemployed workers during the limited periods they were granted aid. Disciplinary work requirements adopted to correct the presumed moral failings of jobless individuals (or simply to discourage them from applying for assistance) were supplemented by or combined with efforts to provide jobless workers with paid employment.

As always under the American poor law system, local practices varied dramatically. In understanding this varied record, however, four types of work requirements can be distinguished. The first type were work tests such as those ***38** imposed on homeless men seeking overnight accommodation in municipal lodges. Requiring substantial amounts of work as a condition for receiving only meager amounts of relief also functioned as a work test during the recessions and depressions of the late nineteenth and early twentieth centuries. [FN206]

A second type of work requirement imposed as a condition for receiving relief was what we now call "workfare." [FN207] Workfare requires public assistance recipients to earn their benefits by performing an amount of labor deemed equivalent in value to the relief provided. Typically the benefits are not provided in the form of a wage; the work requirement instead functions as a condition that must be satisfied for benefits to be granted. Workfare differs from a work test in that the amount of work required is intended to provide a labor equivalent for the benefits provided, and a greater effort is made to find something useful for the recipient to do. Workfare may be intended to deter individuals from applying for relief, but it also may serve other purposes--compensating the public for relief expenditures, providing public assistance recipients with work experience and training, or enhancing the dignity of welfare receipt by permitting recipients to earn their benefits. In the New Deal era, workfare sometimes was referred to as "work for relief" to distinguish it from what shall be defined below as "work relief." [FN208] No such distinction was recognized in the nineteenth and early twentieth centuries, but work tests sometimes assumed a form more properly described as workfare. [FN209]

A third way in which the provision of relief was conditioned on work involved the operation of "work relief" programs. The term "work relief" has long been used to describe initiatives in which wage-paying jobs are offered to needy workers as a means of relieving their poverty until regular employment becomes available. [FN210] Hours of work and/or rates of pay typically are restricted to limit earnings, but these limitations are imposed more or less uniformly on all participants. [FN211] Work relief initiatives were a recurring component of temporary relief initiatives undertaken on behalf of the unem-

ployed in economic crises during the late nineteenth and early twentieth centuries, but they never constituted the primary focus of those relief efforts. [FN212]

A fourth form of work-based public assistance was the expansion of public works spending to reduce unemployment. Public works (or public service) ***39** employment refers to the hiring of workers, based on their qualifications and at market wages, to produce needed public goods or services. Employment of this type may be funded to expand job opportunities in periods or areas of high unemployment, but the projects generally are considered worth undertaking whether or not joblessness is perceived to be a problem. [FN213] During periods of significant job loss, unemployed workers often put pressure on governments to increase the number of available jobs by this means. This was true during the nineteenth and early twentieth century economic crises, [FN214] and occasionally projects responsive to such demands were undertaken or planned. [FN215]

The fact that work-based public assistance consistent with all four of these models was provided during economic crises in the late nineteenth and early twentieth centuries illustrates that sympathetic responses to jobless individuals could occur under the poor law system, but these various models of public aid also illustrate that even when sympathy for jobless workers was at its height, the American poor law's tradition of hostility towards jobless individuals, reinforced by the writings of classical and neo-classical economists on the functioning of labor markets, fought against these generous impulses. This same conflict was reflected in the exceptional character of unemployment relief during this period, confined as it was to brief moments at the bottom of the business cycle.

These contradictory tendencies resulted in the development of two fault lines in the nation's response to jobless individuals. The first fault line was a tendency to distinguish between joblessness in economic downturns and joblessness during periods of economic growth. During economic downturns it was acknowledged that there was a shortage of jobs and that jobless individuals might not be at fault for their condition. When the crisis passed, it was assumed that anyone who really wanted to work could find employment. Social policy responses to joblessness accordingly developed a cyclical pattern, tending to become more sympathetic to jobless individuals in economic downturns and less sympathetic the rest of the time.

The second fault line distinguished between the treatment owed to different categories of jobless individuals regardless of the current state of the economy. Needy individuals who were unemployed because their job had been eliminated were presumed to be involuntarily unemployed. Needy individuals who were unemployed because they had not found work were presumed to be work shy. The distinction between these two groups was not a precise one. A laid-off worker who remained unemployed too long gradually would come to be viewed as work shy.

These two fault lines interacted with one another. Jobless individuals laid off in an economic crisis were likely to receive the most sympathetic response; jobless individual who failed to find work in a period of relative economic ***40** prosperity were likely to receive the least sympathetic response. Laid-off workers generally inspired less sympathy in periods of relative prosperity, but more sympathy than jobless individuals who were perceived as failing to find work. The latter group inspired more sympathy in economic downturns, but not as much as the laid-off workers.

The constraining influence of the poor law tradition on efforts to provide public assistance to jobless individuals was also reflected in important changes legislated in the poor law system in the early twentieth century. A key feature of the system had been the undifferentiated character of poor relief. Different categories of destitute persons may have been treated differently by local officials, but, in principal, one eligibility standard applied to all. This feature of the system began to collapse in the decades preceding the 1930s with the establishment of certain "categorical" entitlements to relief.

Needy veterans were the first group to be offered categorical relief beginning shortly after the Civil War, [FN216] but the growth of categorical assistance programs for other groups of needy individuals was largely the product of reform efforts during the two decades immediately preceding the 1930s. [FN217] Three categories of needy persons benefited from these programs--the blind, mothers with dependent children, and the aged poor. Ohio established the first categorical relief program for the blind in 1898, Missouri the first program for mothers with dependent children in 1911, and Montana the first program for the aged poor in 1923. [FN218] By 1929, 43 states had enacted categorical relief programs for mothers with dependent children; 22 had such programs for the blind; and 10 had them for the aged. [FN219]

The goal of these reform efforts was to create a less stigmatized form of public assistance, [FN220] an understandable goal for advocates of the poor, given the stigma of moral condemnation associated with the receipt of aid under the poor law system. Nevertheless, despite the increased sympathy shown to unemployed workers during economic crises in the late nineteenth and early twentieth centuries, and the widespread acknowledgment that ordinary poor relief was both inadequate and unsuitable to meet the needs of involuntarily unemployed workers, no categorical assistance programs were established for the unemployed until the 1930s. [FN221]

***41** IV. CONCLUSION

The law's response to jobless individuals in fourteenth to sixteenth century England and in the late nineteenth and early twentieth centuries in the United States were remarkably consistent. Despite vast differences in the details of social welfare policy between the two periods, a common view of the causes of joblessness provided a unifying framework. Joblessness was viewed as a voluntary phenomenon except in relatively rare circumstances. Jobless individuals were viewed as persons of suspect moral character who chose to live lives of idleness rather than accept presumptively available employment. Consistent with this view, public policy responses to joblessness emphasized the denial of assistance to able-bodied persons except in conjunction with disciplinary work requirements designed to weed out the work-shy, punish the lazy, and mold character.

When, in rare circumstances, it became obvious that significant numbers of individuals were jobless not by choice but due to the unavailability of work, the foundations of this policy were challenged. Occasionally, this led to the temporary emergence of more sympathetic responses to the jobless. In those relatively brief periods, jobless individuals were considered worthy of public assistance, and efforts were made to provide them with less punitive forms of work relief.

With the emergence of the business cycle as a major economic force in the late nineteenth century, the tension between the law's generally harsh response to jobless individuals and these more sympathetic impulses became more marked. Social welfare measures

foreshadowing New Deal initiatives appeared during economic downturns, but "conservative" policies remained essentially intact until the 1930s. Then the foundational assumption of this approach--that jobless individuals were responsible for their own condition--received a crippling blow, and public policy changed dramatically.

The pattern is consistent. The character of public policy responses to the problem of joblessness has depended on prevailing assumptions concerning the causes of joblessness. When joblessness has been viewed as voluntary, jobless individuals have received little sympathy. When it has been viewed as involuntary, much greater sympathy has been shown. Contemporary social welfare policy debates may be better understood if this relationship is appreciated.

The pre-New Deal history of public policy responses to joblessness also suggests that current hopes that conservative policies will solve the problem are unreasonable. For almost six hundred years prior to the 1930s, jobless individuals were denied assistance, punished, and admonished to "put [[[[themselves] to labor, like as true [men] oweth to do" [FN222]--yet the problem of joblessness persisted. Based on that historical record, proponents of conservative reform initiatives today would be wise to remain modest in their expectations.

[FN1]. *See, e.g.*, SIDNEY WEBB & BEATRICE WEBB, ENGLISH POOR LAW HISTORY, PART I: THE OLD POOR LAW 1-95 (Frank Cass and Co. 1963) (1927); KARL DE SCHWEINITZ, ENGLAND'S ROAD TO SOCIAL SECURITY 1-29 (1943); FRANCES FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 12-24 (Vintage Books 2d ed. 1993) (1971).

[FN2]. *See* DE SCHWEINITZ, *supra* note 1, at 5.

[FN3]. The Statute of Labourers, 1349, 23 Edw. 3 (Eng.).

[FN4]. *Id.* at preamble.

[FN5]. *Id.*

[FN6]. *Id.* at ch. 1.

[FN7]. *Id.*

[FN8]. *Id.* at ch. 7.

[FN9]. *Id.*

[FN10]. Although I shall refer to positions of employment as "jobs" throughout this article, these positions may not have been "jobs" in the modern sense of the term. Instead, they may have been various forms of voluntarily entered servitudes. *See* ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 16 (1991) (indicating that the historical English view of the employment relationship was one master "superiority and power," and servant subjection and allegiance).

[FN11]. PHILIP ZIEGLER, THE BLACK DEATH 235 (1969).

[FN12]. For a succinct statement of the reasons that the supply of labor probably fell more than the demand following the Black Death, see RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 48 (Addison-Wesley 6th ed. 1997). It should be noted, however, that the Black Death could have caused upward pressure on average wage levels even if the aggregate supply of and demand for labor were equally affected by the plague so long as local variations in the two effects existed. Because both the monetary and psychic costs of changing one's residence are high for laborers, employers in areas where death rates among the laboring classes were exceptionally high might have been forced to offer substantial wage premiums or other inducements to attract needed labor from areas where death rates were lower than average. In contrast, regions that emerged from the plague with a relative surplus of labor might not have experienced a fall in wages, either because of worker resistance to downward adjustments in money wages, or because wage rates were already at the subsistence level and could not be lowered farther without substantially undermining productivity. *Cf.* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 9 (1st Harbinger ed., Harcourt, Brace & World 1964) (1936); RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 256-57 (4th ed. 1992).

[FN13]. The Statute of Labourers, 1349, 23 Edw. 3, ch. 1 (Eng.).

[FN14]. *Id.* at ch. 7.

[FN15]. A variety of factors contributed to this trend: the decline of feudal economic relations (which had secured individuals from unemployment by binding them to the land while guaranteeing them a share of its produce); the "rationalization" of agricultural production through enclosures (which resulted in a decline in demand for agricultural labor); the growth of manufacturing and commerce in the towns (which attracted migrants from the countryside without guaranteeing that they would find work or keep it when they did); the disbanding of large coteries of feudal retainers (as intra-national feudal warfare diminished); a decline in religiously motivated charity (associated with the declining influence and power of the church); and accelerating population growth. *See* WEBB & WEBB, *supra* note 1, at 42-44; DE SCHWEINITZ, *supra* note 1, at 9-13; PIVEN & CLOWARD, *supra* note 1, at 8-14; *see generally* 1 KARL MARX, CAPITAL 694-713 (Progress Publishers 1954) (1887)

[FN16]. ST. THOMAS MORE, UTOPIA 24-25 (Edward Surtz ed., Yale Univ. Press 1965) (1516).

[FN17]. For Keeping Up Houses of Husbandry, 1487, 4 Hen. 7, ch. 19 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN18]. An Act to Prevent the Decay of Towns, 1515, 7 Hen. 8, ch. 1 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN19]. An Act Limiting What Number of Sheep Men Shall Keep, Occupy and Have in Their Possession at One Time, 1533, 25 Hen. 8, ch. 13 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN20]. *Id.*

[FN21]. An Act Concerning Decay of Houses and Inclosures, 1535, 27 Hen. 8, ch. 22 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN22]. *See* An Act for Re-Edifying of Towns, 1540, 32 Hen. 8, ch. 18 (Eng.); An Act Touching the Repairing and Amending of Certain Decayed Houses and Tenements, as Well in England as in Wales, 1543, 35 Hen. 8, ch. 4 (Eng.); An Act for the Maintenance and Increase of Tillage and Corn, 1551, 5 & 6 Edw. 6, ch. 5 (Eng.); An Act for the Re-Edifying of Decayed Houses of Husbandry, and for the Increase of Tillage, 1555, 2 & 3 Phil. & M., ch. 2 (Eng.); An Act for the Maintenance and Increase of Tillage, 1562, 5 Eliz., ch. 2 (Eng.); An Act Against the Decaying of Towns and Houses of Husbandry, 1597, 39 Eliz., ch. 1 (Eng.); An Act for Maintenance of Husbandry and Tillage, 1597, 39 Eliz., ch. 2 (Eng.).

[FN23]. An Act Against the Decaying of Towns and Houses of Husbandry, 1597, 39 Eliz., ch. 1, § 1 (Eng.).

[FN24]. An Act for Maintenance of Husbandry and Tillage, 1597, 39 Eliz., ch. 2 (Eng.).

[FN25]. An Act for the Relief of the Poor, 1597, 39 Eliz., ch. 3 (Eng.).

[FN26]. An Act for Punishment of Rogues, Vagabonds and Sturdy Beggars, 1597, 39 Eliz., ch. 4 (Eng.).

[FN27]. An Act Concerning Punishment of Beggars and Vagabonds, 1531, 22 Hen. 8, ch. 12, § 1 (Eng.).

[FN28]. *Id.* § 3.

[FN29]. *Id.*

[FN30]. *Id.* § 6.

[FN31]. An Act for Punishment of Sturdy Vagabonds and Beggars, 1536, 27 Hen. 8, ch. 25, § 10 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN32]. *Id.* § 11.

[FN33]. An Act for the Punishing of Vagabonds, and for the Relief of the Poor and Impotent Persons, 1547, 1 Edw. 6, ch. 1, § 1 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN34]. *Id.*

[FN35]. *Id.*

[FN36]. *Id.*

[FN37]. *Id.* § 6.

[FN38]. *Id.* § 7.

[FN39]. *Id.* § 3.

[FN40]. An Act Touching the Punishment of Vagabonds and Other Idle Persons, 1549, 3 & 4 Edw. 6, ch. 16, § 1 (Eng.).

[FN41]. *Id.* § 3.

[FN42]. An Act for the Punishment of Vagabonds, and for Relief of the Poor and Impotent, 1572, 14 Eliz., ch. 5, § 1 (Eng.).

[FN43]. *Id.* § 5 (quotations from this old English statute are presented with modified spelling for clarity).

[FN44]. *Id.* § 2.

[FN45]. *Id.*

[FN46]. *Id.* § 4.

[FN47]. *Id.*

[FN48]. *Id.* § 14.

[FN49]. An Act for Punishment of Rogues, Vagabonds and Sturdy Beggars, 1597, 39 Eliz., ch. 4, § 3 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN50]. An Act Concerning Punishment of Beggars and Vagabonds, 1531, 22 Hen. 8, ch. 12, § 1 (Eng.).

[FN51]. *Id.*

[FN52]. *Id.*

[FN53]. DE SCHWEINITZ, *supra* note 1, at 21. The Webbs describe the same statute as "the earliest English law that we can recognize as one for the relief of the poor." WEBB & WEBB, *supra* note 1, at 44-45.

[FN54]. An Act for Punishment of Sturdy Vagabonds and Beggars, 1535, 27 Hen. 8, ch. 25 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN55]. Similar statutes promulgated during this period on the continent frequently included explicit prohibitions against all begging. When one such plan was attacked by several Catholic mendicant orders for its alleged harshness on the poor, a ruling from higher church authority was obtained that such a prohibition was permissible, but only if

the needs of all the poor were adequately met by the public authorities. *See* WEBB & WEBB, *supra* note 1, at 39-40. *Cf.* DE SCHWEINITZ, *supra* note 1, at 33-36.

[FN56]. An Act Concerning Punishment of Beggars and Vagabonds, 1530-1531, 22 Hen. 8, ch. 12, § 3 (Eng.).

[FN57]. *Id.*

[FN58]. An Act for Punishment of Sturdy Vagabonds and Beggars, 1535-1536, 27 Hen. 8, ch. 25, § 1 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN59]. *See* W.K. JORDAN, PHILANTHROPY IN ENGLAND 1480-1660, at 63-66, 84-85 (1959).

[FN60]. An Act for the Punishment of Vagabonds and for the Relief of the Poor and Impotent Persons, 1547, 1 Edw. 6, ch. 3, § 6 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN61]. An Act for the Punishment of Vagabonds and Other Idle Persons, 3 & 4 Edw. 6, ch. 16, § 6 (quotations from this old English statute are presented with modified spelling for clarity).

[FN62]. *Id.* § 4.

[FN63]. *Id.* § 5.

[FN64]. An Act for the Punishment of Vagabonds, and for Relief of the Poor and Impotent, 1572, 14 Eliz., ch. 5 (Eng.).

[FN65]. *See supra* Part II.B.2.

[FN66]. An Act for the Punishment of Vagabonds, and for Relief of the Poor and Impotent, 1572, 14 Eliz., ch. 5, § 16 (Eng.). Efforts to extract "voluntary" alms from the local population to support poor relief had become increasingly cumbersome in the period leading up to the enactment of this statute. A 1555 statute provided that:

> [I]f any person or persons being able to further this charitable work do obstinately and forwardly refuse to give towards the help of the poor, … the parson, vicar, or curate and churchwardens of the parish wherein he dwelleth shall then gently exhort him or them towards the relief of the poor, and if he or they will not so be persuaded, then upon the certificate of the person's vicar or curate of the parish to the Bishop of the diocese or Ordinary of the place, the same Bishop or Ordinary shall send for him or them, to induce or persuade him or them by charitable means and ways to extend their charity as in this act is well meant and intended.

An Act for the Re-Edifying of Decayed Houses of Husbandry, and for the Increase of Tillage, 1555, 2 & 3 Phil. & M., ch. 5, § 5 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity). A more decisive step towards compulsion was taken in a 1562 statute that added additional steps to the above procedure. The

latter statute provided that persons who "obstinately refuse to give weekly to the relief of the poor" would be required to appear before a justice of the peace. The justice of the peace was required to try one more time to "charitably and gently persuade and move the said obstinate persons to extend his or their charity towards the relief of the poor." But if this final effort failed, the justice was directed to "assess, tax and limit upon every such obstinate person so refusing according to their good discretion, what sum the said obstinate person shall pay weekly towards the relief of the poor." Persons who refused to pay these assessments were to be jailed until they "have paid the said sum so appointed, taxed and limited, together with the arrearages thereof." An Act for the Maintenance and Increase of Tillage, 1562, 5 Eliz., ch. 3, §§ 7-8 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity). The 1572 statute replaced this cumbersome process with a simple grant of authority to local authorities to "tax and assess all and every the inhabitants … to such weekly charge as they and every one of them shall weekly contribute towards the relief of the said poor people." An Act for the Punishment of Vagabonds, and for Relief of the Poor and Impotent, 1572, 14 Eliz., ch. 5, § 16 (Eng.). Individuals who believed their assessments were excessive could appeal them to "the next General Sessions" of local justices of the peace. *Id.* § 25.

[FN67]. An Act for the Punishment of Vagabonds, and for Relief of the Poor and Impotent, 1572, 14 Eliz., ch. 5, § 25 (Eng.).

[FN68]. *Id.* § 22.

[FN69]. *Id.*

[FN70]. *See* JORDAN, *supra* note 59, at 86-89.

[FN71]. An Act for the Punishment of Vagabonds, and for Relief of the Poor and Impotent, 1572, 14 Eliz., ch. 5, § 23 (Eng.).

[FN72]. An Act for the Setting of the Poor on Work, and for the Avoiding of Idleness, 1575-1576, 18 Eliz., ch. 3, § 4 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity).

[FN73]. *Id.*

[FN74]. *Id.*

[FN75]. *Id.*

[FN76]. *Id.* §§ 4-5.

[FN77]. *Id.* § 4.

[FN78]. *Id.*

[FN79]. *Id.*

[FN80]. *Id.*

[FN81]. *Id.*

[FN82]. A similar softening of sentiment towards jobless individuals, accompanied by increased support for non-punitive forms of work relief occurred in England in the late seventeenth and early eighteenth centuries. *See* DE SCHWEINITZ, *supra* note 1, at 48-57.

[FN83]. On the relationship between current economic conditions and the enactment of the poor laws of 1597-98 and 1601, see JORDAN, *supra* note 59, at 91-101. Jordan notes that conditions were bad enough to cause bread riots in London. *See id.* at 93.

[FN84]. *Id.* at 97.

[FN85]. *See infra* Part III.B.3.

[FN86]. An Act for the Maintenance of Husbandry and Tillage, 1597, 39 Eliz., ch. 2, § 1 (Eng.) (quotations from this old English statute are presented with modified spelling for clarity). *See also* An Act Against the Decaying of Townes and Houses of Husbandry, 1597, 39 Eliz., ch. 1, § 1 (Eng.).

[FN87]. An Act for the Relief of the Poor, 1597, 39 Eliz., ch. 3 (Eng.).

[FN88]. An Act for Punishment of Rogues, Vagabonds, and Sturdy Beggars, 1597, 39 Eliz., ch. 4 (Eng.).

[FN89]. An Act for Erecting of Hospitals or Abiding and Working Houses for the Poor, 1597, 39 Eliz., ch. 5 (Eng.). For a discussion of the importance of charitable trusts in the development of England's system of poor relief in the sixteenth century, see JORDAN, *supra* note 59, at 109-25.

[FN90]. *See* An Act for the Relief of the Poor, 1601, 43 Eliz., ch. 2 (Eng.); *see also* An Act to Redress the Misemployment of Lands, Goods and Stocks of Money Heretofore Given to Certain Charitable Uses, 1601, 43 Eliz., ch. 4 (Eng.).

[FN91]. An Act for the Relief of the Poor, 1597, 39 Eliz., ch. 3, § 3 (Eng.) (explaining that it may be lawful for "the said Justices of the Peace or any one of them to send to the House of Correction such as shall not employ themselves to work being appointed thereunto as aforesaid"). (Quotations from this old English statute are presented with modified spelling for clarity.)

[FN92]. *Compare* An Act for the Setting of the Poor on Work, and for the Avoiding of Idleness, 1576, 18 Eliz., ch. 3, § 5 (Eng.) ("within every county … one, two or more abiding houses … shall be provided, and called the House or Houses of Correction"), *with* An Act for Punishment of Rogues, Vagabonds, and Sturdy Beggars, 1597, 39 Eliz., ch. 4, § 1 (Eng.) ("it shall and may be lawful for the Justice of Peace of any County or City … to erect … one or more Houses of Correction"). (Quotations from these old English statutes are presented with modified spelling for clarity.)

[FN93]. An Act for Punishment of Rogues, Vagabonds, and Sturdy Beggars, 1597, 39 Eliz., ch. 4, § 3 (Eng.).

[FN94]. An Act for the Relief of the Poor, 1597, 39 Eliz., ch. 3, § 1 (Eng.). This language is repeated almost verbatim in the 1601 refinement of the poor law. *See* An Act for the Relief of the Poor, 1601, 43 Eliz., ch. 2, § 1 (Eng.).

[FN95]. *See* Raymond Mohl, *Three Centuries of American Public Welfare: 1600-1932*, CURRENT HIST., July 1973, at 6-7 (discussing poor laws in the colonies and their derivation from British law).

[FN96]. *See* MARCUS JERNEGAN, LABORING AND DEPENDANT CLASSES IN COLONIAL AMERICA, 1607-1783, at 200 (Frederick Ungar Publishing 1960) (1931) (describing late 17th century and early 18th century colonial punishments for encouraging employment).

[FN97]. *See* JUNE AXINN & HERMAN LEVIN, SOCIAL WELFARE: A HISTORY OF THE AMERICAN RESPONSE TO NEED 14 (4th ed. 1997) (describing the residency or "legal settlement" requirement for public assistance, and how this provision also reflected the interests of large employers and towns).

[FN98]. *See, e.g.*, JERNEGAN, *supra* note 96, at 192-93 ("The problem of 'entertaining' persons, even for a short visit, led to the enacting of stringent laws designed to compel the entertainer to bear the burden of support if the visitor became chargeable."); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 46 (1971) ("The enforcement of settlement laws, which stood midway between poor relief and crime prevention measures, was one basic technique by which colonial communities guarded their good order and tax money.").

[FN99]. *See, e.g.*, MARGARET CREECH, THREE CENTURIES OF POOR LAW ADMINISTRATION: A STUDY OF LEGISLATION IN RHODE ISLAND 8-9 (1936).

[FN100]. *See* AXINN & LEVIN, *supra* note 97, at 15 (explaining that "[r]elief for people in home--that is, family--settings was well regarded because of the order and stability such settings promised for the community as a whole").

[FN101]. *See* Mohl, *supra* note 95, at 7 (explaining that while non-institutional assistance was common, large colonial cities established poor houses; the article describes the New York City poor house system); *see also* ROTHMAN, *supra* note 98, at 25-28 (discussing in detail the development of the poor house, work house, and alms house in the colonies); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 14-15 (10th ed. 1996) (listing the large colonial cities which built poorhouses, and indicating that smaller towns did not construct poorhouses).

[FN102]. *See* AXINN & LEVIN, *supra* note 97, at 17-18 (explaining that poor families were considered morally and economically dangerous, and that able-bodied family members, particularly young children who could potentially be corrupted with "sloath and idleness," would be farmed out to apprenticeship programs to seek economic and religious salvation); *see also* ROBERT W. KELSO THE HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS 1620-1920, at 107-11 (Patterson Smith Reprint Series in Criminology, Law Enforcement, and Social Problems Pub. No. 31, 1969) (1922) (explaining that colonial towns sought to "dispose of the poor as cheaply as possible" and lacked the elaborate social-worker placement programs of today, and as such, that "[i]t

became the custom … to bid off the support of the town's poor at public auction"); KATZ, *supra* note 101, at 15 (indicating that auctioning of the poor was most common in small towns, where construction of an almshouse was not practicable).

[FN103]. *See, e.g.*, Mohl, *supra* note 95, at 7.

[FN104]. *See, e.g.*, 1 DAVID M. SCHNEIDER, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE [1609-1866], at 22-23, 166, 167-72 (1938).

[FN105]. *Id.*

[FN106]. The Industrial Revolution began in England in the late 18th century and spread to other countries, including the United States, in the 19th century. For accounts of the Industrial Revolution, see ERIC HOBSBAWM, INDUSTRY AND EMPIRE (Penguin Publishing, Pelican Economic History of Britain vol. 3, 1980) (1969); PAUL MANTOUX, THE INDUSTRIAL REVOLUTION IN THE EIGHTEENTH CENTURY (Harper & Row rev. ed. 1962) (1928); PHYLLIS DEANE, THE FIRST INDUSTRIAL REVOLUTION (2d ed. 1979).

[FN107]. *See, e.g.*, SCHNEIDER, *supra* note 104, at 167-69, (describing the effect of French and British embargoes in 1807-1809 on employment in New York City).

[FN108]. *See, e.g.*, ALEXANDER KEYSSAR, OUT OF WORK: THE FIRST CENTURY OF UNEMPLOYMENT IN MASSACHUSETTS 9-38 (1986); JOHN A. GARRATY, UNEMPLOYMENT IN HISTORY: ECONOMIC THOUGHT AND PUBLIC POLICY 57-84 (1978); MARC BLAUG, ECONOMIC THEORY IN RETROSPECT 15 (5th ed. 1996).

[FN109]. For a description of this transformation in Massachusetts, see KEYSSAR, *supra* note 108, at 31-36.

[FN110]. *See id* at 31 (explaining that as the economy developed and became less agrarian, "the proportion of the population vulnerable to unemployment increased, and periodically that vulnerability was exposed and activated by downturns in the business cycle").

[FN111]. For a description of the depression and a discussion of its causes, see RENDIGS FELS, AMERICAN BUSINESS CYCLES 1865-1897, at 98-112 (1959).

[FN112]. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 912-13 series V-23 (1975) [[[[hereinafter HISTORICAL STATISTICS OF THE UNITED STATES].

[FN113]. ROBERT L. HEILBRONER, THE ECONOMIC TRANSFORMATION OF AMERICA 106 (1977) (quoting Rockefeller from EDWARD C. KIRKLAND, DREAM AND THOUGHT IN THE BUSINESS COMMUNITY 9 (1956)).

[FN114]. *See* KEYSSAR, *supra* note 108, at 50 (explaining that there are no reliable unemployment statistics from the 1870s); LEAH HANNAH FEDER, UNEMPLOY-

MENT RELIEF IN PERIODS OF DEPRESSION 38-40 (Arno Press 1971) (1936) (discussing the "extreme unreliability of estimates of unemployment").

[FN115]. *See* FELS, *supra* note 111, at 107-08 (explaining that "in terms of output the contraction of the seventies was singularly mild").

[FN116]. *See* KEYSSAR, *supra* note 108, at 50-52 (citing various statistical estimates of unemployment during the late 19th and early 20th centuries).

[FN117]. *See* FELS, *supra* note 111, at 128-34 (describing in detail the economic downswing of the early 1880s, and characterizing it as a "major depression").

[FN118]. *See* KEYSSAR, *supra* note 108, at 51 tbl. 3.2.

[FN119]. HISTORICAL STATISTICS OF THE UNITED STATES, *supra* note 112, at 135 series D-86.

[FN120]. The ascendancy of the classical school dates from the publication of Adam Smith's *Wealth of Nations* in 1776, while the rise of the neo-classical school is associated with the work of William Stanley Jevons, Carl Menger and Leon Walras in the 1870's. With few exceptions, economists working in this theoretical tradition before the 1930's believed that market forces provided a quick and efficient means of correcting whatever disequilibria arose in the functioning of the economy, including the general and massive upheavals we characterize as depressions or recessions. It was to undermine the theoretical foundations of this view that John Maynard Keynes published his *General Theory* in 1936. For a non-esoteric survey of the history of economic thought, see ROBERT L. HEILBRONER, THE WORLDLY PHILOSOPHERS (6th ed. 1986). For more scholarly treatments of the subject, see BLAUG, *supra* note 108, INGRID HAHNE RIMA, THE DEVELOPMENT OF ECONOMIC ANALYSIS (3rd ed. 1978), and ERIC ROLL, A HISTORY OF ECONOMIC THOUGHT (Richard D. Irwin, 4th ed. 1974) (1938).

[FN121]. In criticizing the efforts of urban craft guilds to restrict entry to their trade and raise the wages of their members, Adam Smith wrote as follows:

> The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 121-22 (Edwin Cannan ed., Random House 1937) (1776). Later economists writing in the classical and neo-classical tradition typically described efforts to regulate labor markets in the interest of workers as laudable in their goals but probably futile and possibly harmful in their unintended consequences. *See, e.g.,* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 355-59 (J.M. Robson ed.,

Univ. Of Toronto Press 1965) (1871); ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 714 (8th ed. 4th prtg. 1930).

[FN122]. *See* PAUL H. DOUGLAS, THE THEORY OF WAGES 70-71 (1934).

[FN123]. The same was not true of the economic writings of nineteenth century critics of capitalism or at least of the existing capitalist system. *See* GARRATY, *supra* note 108, at 103-28. By the early twentieth century, more moderate reformers were beginning to recognize unemployment as an endemic problem in market economies requiring corrective action. *See, e.g.*, W. H. BEVERIDGE, UNEMPLOYMENT: A PROBLEM OF INDUSTRY (Garland Publishing 1980) (1912).

[FN124]. The term "unemployment" did not come into usage until late in the nineteenth century. *See* GARRATY, *supra* note 108, at 109 n.12; KEYSSAR, *supra* note 108, at 3-4.

[FN125]. For a description of the Classical School's treatment of unemployment, see GARRATY, *supra* note 108, at 62-73, 92-94, 104. The neo-classical school hardly broached the subject. As Blaug notes, "almost no economist after 1870 considered the type of macroeconomic problems with which Keynes was concerned. The strength of neoclassical theory lay in microeconomic analysis, which was ill suited to the discussion of remedies for general unemployment." BLAUG, *supra* note 108, at 675.

[FN126]. Writing with some chagrin in the midst of the Great Depression, a prominent American economist described this tradition in the following terms:

> One of the most remarkable features about the theoretical work of both the classical and neo-classical schools has been their failure to recognize the possibility of unemployment. In their desire to disprove the "heresy" of overproduction, they have tended to ignore the fact which the advocates of overproduction have sought to explain, namely, that of unemployment. Intent upon demonstrating that the production of goods constitutes the demand for goods (which under a barter economy is the case) they have tended to satisfy themselves by showing that it is, therefore, impossible for widespread unemployment to exist. Until the last decade, the business cycle has been viewed by the "orthodox" economists as an excrescence upon business activity rather than as a tendency which is organically a part of it.

DOUGLAS, *supra* note 122, at 70.

[FN127]. In contrast to the lack of attention given to the problem of unemployment in the writings of classical and neo-classical economists in the nineteenth century, the determination of wage levels and their effect on the standard of living of the laboring classes received extended treatment. *See, e.g.*, SMITH, *supra* note 121, at 64-86; MILL, *supra* note 121, at 337-99; MARSHALL, *supra* note 121, at 546-79.

[FN128]. *See* SMITH, *supra* note 121, at 67-68; THOMAS ROBERT MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 9-10 (Augustus M. Kelley Publishers 7th ed. prtg. 1971) (1872); DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 116 (Penguin 1971) (1817); MILL, *supra* note 121, at 337-54. Several escape routes were proposed by the classical school. Adam Smith argued

that economic growth could keep the demand for labor ahead of a growing supply. *See* SMITH, *supra* note 121, at 68-70. Malthus, the economist whose name is associated most with the classical theory of population, argued that moral restraint--i.e., decisions by individual workers not to marry and have children--could permit wages to rise. MALTHUS, *supra* note 128, at 403-07. David Ricardo agreed with Smith's assessment of the positive effects of rapid economic growth but added that the "natural price of labor," to which demographic forces tend to drive wages, varies with the "habits and customs of the people," thus raising the possibility that the "natural price" might come to reflect a higher standard of living. RICARDO, *supra* note 128, at 118. John Stuart Mill developed this latter point at length, proposing education and colonization as the best means of encouraging such a trend among the laboring classes. MILL, *supra* note 121, at 370-79.

[FN129]. *See, e.g.*, MARSHALL, *supra* note 122, at 178-80.

[FN130]. *See* BLAUG, *supra* note 108, at 279.

[FN131]. *Id.* at 406-08.

[FN132]. *See, e.g.*, MARSHALL, *supra* note 121, at 710.

[FN133]. MALTHUS, *supra* note 128, at 404-05.

[FN134]. *Id.* at 404.

[FN135]. *See, e.g.*, *id.* at 428-29.

[FN136]. *Id.* at 437-41.

[FN137]. MARSHALL, *supra* note 121, at 226.

[FN138]. *Id.* at 547, 705-06.

[FN139]. *Id.* at 706-22.

[FN140]. *Id.* at 718.

[FN141]. *Id.* at 718-19.

[FN142]. *Id.* at 720-21.

[FN143]. For discussions of the rise of laissez faire thinking in the courts, see BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (Russell & Russell 2d prtg. 1962) (1942), and ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960).

[FN144]. *See* Lochner v. New York, 198 U.S. 45 (1905) (striking down state maximum hour legislation under due process clause).

[FN145]. *See* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (striking down minimum wage for women).

[FN146]. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915).

[FN147]. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down federal statute that prohibited interstate shipment of certain goods produced using child labor); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (holding that child labor tax is "regulatory," and an unconstitutional exercise of taxing power).

[FN148]. The first case recognizing a common law exception to the employment-at-will doctrine based on public policy considerations was *Petermann v. Local 396, International Brotherhood of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959). For an account of the timing and extent of state law modifications to the at-will doctrine, see David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L. J. 645 (1996).

[FN149]. The first statutes limiting the right of private sector employers to terminate otherwise at-will employees that survived Supreme Court review were the Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-163, 181-185, 187-188. (1994 & Supp. 1996)), and the National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1937) (codified as amended at 29 U.S.C. §§ 151-169 (1994)). The Supreme Court upheld the constitutionality of the Railway Labor Act in *Texas & N.O.R. Co. v. Brotherhood of Railway & S.S. Clerks*, 281 U.S. 548 (1930). The constitutionality of the National Labor Relations Act was upheld in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[FN150]. *See, e.g.*, Payne v. Western Atl. R.R. Co., 81 Tenn. 507 (1884).

[FN151]. *See, e.g.*, Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908); Henry v. Pittsburgh & L.E.R., 139 Pa. 289 (1891). The confidence in the results of individual bargaining displayed by turn-of-the-century courts, also found expression in the courts' readiness to enjoin trade union activity--including peaceful picketing--that imposed economic pressure on employers. Picketing to achieve collective bargaining rights was commonly viewed as a coercive, and therefore unlawful, form of interference with the individual rights of employers and employees to agree to whatever terms of employment the market dictated and they deemed mutually acceptable. *See, e.g.*, Vegelahn v. Guntner, 167 Mass. 92 (1896).

[FN152]. *See* EDITH ABBOTT, PUBLIC ASSISTANCE 125-26 (1940); KATZ, *supra* note 101, at 14.

[FN153]. *See* ARTHUR E. BURNS & EDWARD A. WILLIAMS, FEDERAL WORK, SECURITY, AND RELIEF PROGRAMS 11 (1941).

[FN154]. *See, e.g.*, ABBOTT, *supra* note 152, at 3-7 (explaining and discussing in detail the tenet that "taxpayers of the community must provide the necessaries of life for those unable to provide such necessities for themselves").

[FN155]. Most states established minimum residency requirements for achieving settlement by statute, with periods ranging from 6 months or less to 10 years as of 1930. *See* UNITED STATES NATIONAL RESOURCES PLANNING BOARD, SECURITY,

WORK AND RELIEF POLICIES, H.R. DOC. NO. 78-128, pt. 3, at 27 (1943) [[[[hereinafter NRPB]. In addition to establishing requirements for legal settlement, state poor laws typically provided for the removal of unsettled paupers to jurisdictions where they were settled. For a discussion of settlement and removal provisions in state poor laws, see ABBOTT, *supra* note 152, at 133-55. These provisions resulted in considerable litigation among communities over the proper assignment of responsibility for the care of particular individuals. *See id.* at 135-40, 180-257; *see also* WILLIAM R. BROCK, WELFARE, DEMOCRACY, AND THE NEW DEAL 74-76 (1988).

[FN156]. *See* NRPB, *supra* note 155, at 27. The responsibility of family members for the support of their destitute relatives was legally enforceable in most jurisdictions through proceedings brought by public authorities. *See* ABBOTT, *supra* note 152, at 155-76 (discussing both the history and application of this principle in the United States).

[FN157]. *See* ABBOTT, *supra* note 152, at 36.

[FN158]. *See* Town of Kankakee v. McGrew, 52 N.E. 893, 895 (Ill. 1899) (referring to 107 Ill. Rev. St. § 20 (West 1889)).

[FN159]. An Act in Relation to the Public Welfare, 1929 N.Y. Laws 565, § 18.

[FN160]. In 1880, a committee of the New York State Assembly commented that "[t]he laws of the government of poor-houses and for the relief of the poor in the several towns, counties, and cities of this State are administered according to no uniformity of interpretation, fixed by an appellate authority, having jurisdiction therein, but according to the caprice or interest of the various officers exercising authority therein." *Report of Committee on General Laws of 1879, in Relation to Poor Houses and Relief of the Poor,* New York Assembly Doc. No. 57 (1880) (*quoted in* KATZ, *supra* note 101, at 15 n.30). *See also* JAMES LEIBY, A HISTORY OF SOCIAL WELFARE AND SOCIAL WORK IN THE UNITED STATES 40 (1978) (noting that prior to 1863, no state agency existed to supervise localities, and that such state supervision remained sparse until the 1920s); ANN E. GEDDES, TRENDS IN RELIEF EXPENDITURES 1910-1935, at 2 (Da Capo Press 1971) (1937) (noting a traditional lack of state supervision or control over local overseers of the poor).

[FN161]. For accounts of the development of this institutional innovation in the nineteenth century, see ROTHMAN, *supra* note 98; and KATZ, *supra* note 101, at 3-113. "State institutions were first authorized or established exclusively for the insane in 1842 (New York); for the mentally deficient in 1848 (Massachusetts); for dependent children in 1866 (Massachusetts); and for epileptics in 1890 (Ohio)." ALEXANDER RADOMSKI, WORK RELIEF IN NEW YORK STATE, 1931-1935, at 9 (1947).

[FN162]. *Id.* at 8. Despite these regulatory efforts, "[t]he shocking conditions prevailing in almshouses in many States as late as 1929 were notorious." BURNS & WILLIAMS, *supra* note 153, at 13.

[FN163]. ABBOTT, *supra* note 152, at 19-22.

[FN164]. *See id.* at 23-35, 103-07. Most cases of this type involved doctors or hospitals seeking reimbursement for care provided to destitute persons in medical emergencies. *See id.* at 349-506.

[FN165]. *See id.* at 133-50. In one such case,

> [a] farmer who had never been on relief moved from Hettinger County to Stark County [North Dakota], but before he was able to make his new farm pay, he was forced to ask for assistance in caring for his crippled son. Stark County thereupon instituted proceedings to have him removed to Hettinger, but Hettinger then sent him back to his farm in Stark. The Stark County court then ordered the crippled child hospitalized at the expense of Hettinger and confirmed the removal order for the father, who ended up destitute and without a farm. This action was upheld by the state supreme court on the ground that care for crippled children was "in the nature of poor relief" and therefore came under the laws of settlement.

BROCK, *supra* note 155, at 75-76 (citing Hettinger County v. Stark County, 260 N.W. 698 (N.D. 1935)).

[FN166]. AILEEN E. KENNEDY, THE OHIO POOR LAW AND ITS ADMINISTRATION 109 (1934), *quoted in* BROCK, *supra* note 155, at 74. For a discussion of regional differences in local practices, see James W. Ely, *"There Are Few Subjects in Political Economy of Greater Difficulty": The Poor Laws of the Antebellum South*, 10 AM. B. FOUND. RES. J. 849 (1985).

[FN167]. NRPB, *supra* note 155, at 26.

[FN168]. Tompkins County v. Ontario County, 156 N.Y.S. 335, 338 (N.Y. Sup. Ct. 1915).

[FN169]. ABBOTT, *supra* note 152, at 126-31. The favored substitute for the pauper designation consisted of terms using the modifier "welfare." *Id.* at 127 (referring to the New York poor law enacted in 1929 as having "the modern title" of "Public Welfare Law"). Since the 1930s, this latter term has developed strongly stigmatizing connotations of its own.

[FN170]. NRPB, *supra* note 155, at 26.

[FN171]. BURNS & WILLIAMS, *supra* note 153, at 12.

[FN172]. NRPB, *supra* note 155, at 26.

[FN173]. ABBOTT, *supra* note 152, at 141-47; NRPB, *supra* note 155, at 26-27.

[FN174]. NRPB, *supra* note 155, at 27; BURNS & WILLIAMS, *supra* note 153, at 12-13.

[FN175]. A policy of breaking up families was often intentionally followed with the avowed purpose of removing children from the presumed pauperizing influence of living with pauper parents. *See* KATZ, *supra* note 101, at 107-13. A majority of the children residing in orphanages in the early twentieth century were not actually orphans. They were children whose widowed or "deserted" mothers could not support them. *See* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY

OF WELFARE 1890-1935, at 23 (1994). Poor law administrators also frequently had the authority to bind children in their care as apprentices. In *Ackley v. Tinker,* the Supreme Court of Kansas held that the superintendent of a county poor farm had the authority to bind a six year old child as an apprentice until the age of eighteen without the knowledge or consent of the child or his parents. 26 Kan. 485 (1881). The family owned a small farm. In the winter and spring of 1879, following a crop failure, the child's mother and father both fell temporarily ill and sought public assistance from the county for themselves and their two children. Aid was provided at the county poor farm. When the father recovered his health, he obtained work by the month and left his wife and children at the poor farm intending to reestablish a home for them as quickly as possible. After the father left, and without the knowledge or consent of either parent, the superintendent of the farm, with probate court approval, bound the child out as an apprentice until the age of eighteen. After reestablishing themselves on their farm, the parents filed a habeas corpus petition to regain custody of their child. The court denied the petition, noting that the state's poor law did not require either parental notice or consent in such cases. "It contemplates independent action by the superintendent of the poor-house whenever any child becomes a county charge, and the validity of the court's action in such a case in no manner depends upon the wishes or knowledge of the parents." *Ackley*, 26 Kan. at 489.

[FN176]. BURNS & WILLIAMS, *supra* note 153, at 12.

[FN177]. SAMUEL MENCHER, POOR LAW TO POVERTY PROGRAM 144-49 (1967); *see also* Mohl, *supra* note 95, at 7-10.

[FN178]. "Outdoor relief" is public assistance provided, either in cash or in kind, to people living independently in the community. It is distinguished from "indoor relief" which is public assistance provided to people in poorhouses or other residential institutions.

[FN179]. *See* ROTHMAN, *supra* note 98, at 165-205; *see also* KATZ, *supra* note 101, at 60-87; AXINN & LEVIN, *supra* note 97, at 42-54.

[FN180]. *See* KATZ, *supra* note 101, at 15; *see also* Ely, *supra* note 166, at 853-55.

[FN181]. Mohl, *supra* note 95, at 8-9.

[FN182]. KATZ, *supra* note 101, at 95.

[FN183]. *See* EDWARD WARREN CAPEN, THE HISTORICAL DEVELOPMENT OF THE POOR LAW OF CONNECTICUT (AMS Press 1968) (1905).

[FN184]. *Id.* at 37-38, 80, 115, 125-26, 144-45. A similar obligation was imposed on slave owners, their executors and heirs with respect to the support of former slaves who became needy following the abolition of slavery in Connecticut in 1848. *See id.* at 201.

[FN185]. *Id.* at 183, 287-88.

[FN186]. *Id.* at 36-37, 125, 199-201, 306-09, 457-58.

[FN187]. *See, e.g.*, CREECH, *supra* note 99; KELSO, *supra* note 102; SOPHONISBA P. BRECKINRIDGE, THE ILLINOIS POOR LAW AND ITS ADMINISTRA-

TION (1939); SCHNEIDER, *supra* note 104; MARTHA BRANSCOMBE, THE COURTS AND THE POOR LAWS IN NEW YORK STATE 1784-1929 (1943).

[FN188]. BRANSCOMBE, *supra* note 187, at 163 (stating that public officials in New York State "had no authority to expend public funds for relief of the able-bodied unemployed," even though they commonly did so during recessions or depressions); Ely, *supra* note 166, at 875 (noting that relief was statutorily limited to unemployables in some states).

[FN189]. KATZ, *supra* note 101, at 95-97.

[FN190]. *Id.* at 97-99.

[FN191]. *Id.* at 99-101; FEDER, *supra* note 114, at 64-67, 73, 93, 100, 162-70, 211-12, 235, 267, 270, 272, 315, 317-18, 351-52.

[FN192]. *See* RADOMSKI, *supra* note 161, at 6; JOHN CHARNOW, WORK RELIEF EXPERIENCE IN THE UNITED STATES 57, 64 (1943); KEYSSAR, *supra* note 108, at 253-54.

[FN193]. Frederic Almy, *The Problem of Charity*, CHARITIES REVIEW, Feb. 1895, at 174, *quoted in* FEDER, *supra* note 114, at 169.

[FN194]. *See supra* Part III.B.1.

[FN195]. *See* FEDER, *supra* note 114, at 24, 41, 87-88, 90, 111.

[FN196]. N.Y. ASS'N FOR IMPROVING THE CONDITION OF THE POOR, THIRTY-SECOND ANNUAL REPORT 33 (1875), *quoted in* FEDER, *supra* note 114, at 41.

[FN197]. REPORT OF THE MASSACHUSETTS BOARD TO INVESTIGATE THE SUBJECT OF THE UNEMPLOYED (1895), *quoted in* FEDER, *supra* note 114, at 41.

[FN198]. *See* KATZ, *supra* note 101, at 54-59.

[FN199]. KEYSSAR, *supra* note 108, at 31-36.

[FN200]. FEDER, *supra* note 114, at 114.

[FN201]. *Id.*

[FN202]. KEYSSAR, *supra* note 108, at 150-55.

[FN203]. *Id.* at 152.

[FN204]. *Id.* at 346-47.

[FN205]. BOSTON OVERSEERS OF THE POOR, TENTH ANNUAL REPORT, at 6 (1874), *quoted in* FEDER *supra* note 114, at 111.

[FN206]. *See, e.g.*, FEDER, *supra* note 114, at 68-70, 169-70, 180.

[FN207]. For a description of "workfare" today, see DAVE M. O'NEILL & JUNE ELLENOFF O'NEILL, LESSONS FOR WELFARE REFORM: AN ANALYSIS OF THE AFDC CASELOAD AND PAST WELFARE-TO-WORK PROGRAMS 76-83 (1997).

[FN208]. *See* NRPB, *supra* note 155, at 27 n.13.

[FN209]. *See, e.g.*, FEDER, *supra* note 114, at 170, 283 (describing the Boston practice of requiring two days of wood-cutting by registered paupers to entitle them to receive either a ton of coal or two dollars worth of groceries and the Minneapolis program requiring charity recipients to work clearing lumber from a dam site in exchange for in-kind assistance and continued eligibility for relief).

[FN210]. *See* RADOMSKI, *supra* note 161, at 38-48; FEDER, *supra* note 114, at 31 n.3.

[FN211]. *See, e.g.*, NRPB, *supra* note 155, at 42-45.

[FN212]. *See* FEDER, *supra* note 114, at 31-34, 67-70, 170-85, 214, 278-87, 320-23, 352-53.

[FN213]. *Id.*

[FN214]. *See* FEDER, *supra* note 114, at 34, 42-43, 52, 94-97; KEYSSAR, *supra* note 108, at 224.

[FN215]. FEDER, *supra* note 114, at 31-34, 44-45, 67-68, 73, 171, 185-88, 217, 287-91, 323-24.

[FN216]. *See generally* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 102-51 (1996) (discussing the origins and growth of the Civil War pension system).

[FN217]. KATZ, *supra* note 101, at 128-34; *see also* BURNS & WILLIAM, *supra* note 153, at 13-14; GEDDES, *supra* note 150, at 2-5.

[FN218]. BURNS & WILLIAMS, *supra* note 153, at 13-14.

[FN219]. *Id.* at 14.

[FN220]. SKOCPOL, *supra* note 216, at 148-50.

[FN221]. In 1932, Wisconsin was the first and only state to establish such a system before federal legislation became imminent in 1935. ARTHUR SCHLESINGER, THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 301-02 (1959).

[FN222]. An Act Concerning Punishment of Beggars and Vagabonds, 1531, 22 Hen. 8, ch. 3, § 3 (Eng.).