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Rights and Redistribution in the Welfare System

William H. Simon

Columbia Law School, wsimon@law.columbia.edu

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Rights and Redistribution in the Welfare System

William H. Simon*

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The term "right" has a wide variety of connotations. On a very general level, it connotes a social commitment to the dignity and autonomy of the individual, an "affirmation of free human subjectivity against the constraints of group life."¹ On a somewhat more specific level, one can distinguish procedural and substantive connotations. Procedural connotations concern official enforcement institutions. For example, in American legal culture, "right" often connotes judicial enforceability. Substantive connotations concern benefits or powers, such as freedom of speech or ownership of property, in civil society.

This essay is about the substantive connotations of the notion of

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1. Kennedy, *Critical Labor Law Theory*, 4 INDUS. REL. L. J. 503, 506 (1981). On a still more general level, the term connotes any kind of normative claim.

"right" that has dominated liberal discussion of the welfare system for the past fifty years. By liberal, I mean to include officials and academics associated with the center-left politics of the mainstream of the Democratic party. Until very recently, this group has had a near monopoly in setting the terms of establishment discourse about welfare policy and an unusual degree of autonomy in influencing the design of the welfare system. Perhaps the central substantive theme of liberal welfare discourse is the analogy of welfare benefits to traditional private law norms associated with contract and property. The private law analogy is in turn linked to an ideal of individual independence and self-sufficiency and to an ambition to immunize distributive arrangements from collective reassessment and revision. On a practical level, it is linked to an aversion to direct or explicit redistribution, and especially to need-based or means-tested redistribution.

This essay suggests that the substantive rights theme has had a peculiarly conservative influence in liberal welfare discourse: It has tended to inhibit redistribution efforts that otherwise would have been supported by the distributive and humanitarian concerns of the broader liberal program. The substantive rights theme has been advanced as both jurisprudence and political strategy. As jurisprudence, it has replicated some of the problems that the Progressive legal scholars emphasized in the classical legal thought of the substantive due process era. As political strategy, it has suffered from the disadvantage that it succeeds only by virtue of the homage it pays to the order it seeks to change. I will try to illustrate these points with discussions of the two instances in which the rights theme has been most dramatically institutionalized: the Social Security program and the welfare rights movement, by which I mean both the ongoing practice of lawyer-initiated judicial review of administrative welfare decisions and the more ephemeral efforts at recipient mobilization of the late 1960s and early 1970s.

Although this essay is written from a perspective sympathetic to the general humanitarian and distributive concerns of the liberal program, it has been influenced by a variety of perspectives. Part of the argument resembles criticisms of the welfare system which have long been associated with conservatives.² Part of it has been influenced by a few people writing from the left who have recently expressed doubts about some of the long-standing themes of liberal welfare rights discourse.³ Perhaps the strongest influence on it is the work of the New Deal social workers and their disciples, who developed from within the liberal wel-

2. See, e.g., Friedman, *Payroll Taxes, No; General Revenues, Yes*, in *THE CRISIS IN SOCIAL SECURITY* 25 (M. Boskin 2d ed. 1978).

3. See J. CATES, *INSURING INEQUALITY* (1983); Skocpol & Ikenberry, *The Political Formation of the American Welfare State in Historical and Comparative Perspective*, 6 *COMP. SOC. RESEARCH* 87 (1983). I have also been influenced by Theodore Lowi's politically unclassifiable *THE END OF LIBERALISM* (2d ed. 1979).

fare establishment an alternative conception of welfare rights that challenged but lost out to the private law conception.⁴

My purpose is to trace a particular set of jurisprudential themes through the liberal welfare discourse, not to provide a comprehensive account of the welfare system. In social insurance, the substantive rights themes have been widely influential, but they are far from the only influence, and a full assessment of social insurance would require a variety of political and economic analyses that I do not intend to provide here. In public assistance, the greatest influence of ideas of right has been in terms of procedure.⁵ Substantive rights themes have played a narrow role. Accordingly, my remarks about public assistance concern only a narrow dimension of the development of these programs.

I. PRIVATE LAW WELFARE JURISPRUDENCE

The dominant substantive notion of right in liberal welfare doctrine arose from the Progressive critique of the notion of right in the classical legal doctrine of the turn of the century, the era of "mechanical jurisprudence" and "substantive due process."⁶

A. *Classical Legalism*

The classical notion of right was animated by a Utopian ideal of individual independence. Independence meant invulnerability to the wants and needs of others and not having to depend on their good will or solidarity. Rights served independence by creating zones of autonomy. The classical notion connoted an image of autarky, a universe of self-sufficient monads, each free to pursue its subjective goals without interference from or dependence on others. The principal exception was the family, where dependence (of wives and children) was regarded as normal rather than degrading and where the (husband's) obligation to share was regarded as legitimate rather than oppressive.

The preeminent goal of a legal system inspired by the goal of independence is security. Security is identified with the principles of prospectivity and neutrality. Prospectivity secures to people the fruits of their efforts and exchanges. It treats the most important results of past

4. See C. TOWLE, *COMMON HUMAN NEEDS* (1945). For an analysis of this and other works in the social work tradition, see Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

5. See Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

6. Among the best known examples of classical legal thought are the majority opinion in *Lochner v. New York*, 198 U.S. 45 (1905), and J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1916). My discussion of the classical notion of right relies on Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation From Vested to Substantive Rights*, 31 BUFFALO L. REV. 381 (1982); Kennedy, *Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RESEARCH L. & SOC. 3 (1980); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

efforts and exchanges as "vested" and hence immune to revision and reassessment. Neutrality constrains the extent to which rules confer advantage on particular groups and individuals rather than on the society as a whole; it requires that the rules meet a minimal requisite of generality. The paradigmatic violation of the security norms is a rule that takes from *A* to give to *B*.⁷ Such a rule violates prospectivity by permitting those who have done poorly to undo the results of past efforts and shift to themselves the benefits earned by those who have done well. It violates neutrality by benefiting an identifiable person rather than society as a whole.

Of course prospectivity and neutrality could be enforced only if it were possible to distinguish prospective from retroactive rules (or rules impairing "vested" rights from those impairing "mere" expectations) and neutral from class-biased rules. The classicists developed a set of rules they thought satisfied the conditions of prospectivity and neutrality. These included variations on the turn-of-the-century private law rules that defined the market economy. Classicism portrayed these rules as constituting a self-regulating process of interaction in which the individual was free to pursue goals without interference by or dependence on others. One could interpret this view to preclude public welfare activities on the ground that they would require the expropriation of private rights in order to make a class-biased transfer. However, the more widely accepted interpretation had enough play in the private law regime and enough of an acknowledgment of a residual public interest in the alleviation of severe economic distress to permit some welfare activities.⁸ But even on this interpretation, it was hard to see welfare benefits in terms of rights. Welfare, which institutionalized a form of dependence, was at best a prudential activity foreign to the core value of individual independence. Welfare connoted the morally inferior status of reliance on income not acquired through effort and exchange. Moreover, because need was to a large extent a matter of unpredictable contingency, welfare resisted specification in terms of the certain, immutable ground rules with which classicism associated the idea of right.

The classicists could not deny that the underlying vision of autarkic independence was Utopian. The market regime did not obviate relations with other people. Nor did it immunize the individual from misfortune or surprise. The independence and security it promised were more attenuated. The classical rights regime regulated interaction by an impersonal process. It thus protected the individual from the experience of dependence upon the wills of particular individuals or groups. Moreover, it purported to secure for the individual the benefits of her

7. *See* *Loan Ass'n v. Topeka*, 87 U.S. (1 Wall.) 655, 663 (1874).

8. *Compare* *Auditor of Lucas County v. State ex rel. Boyles*, 75 Ohio St. 114, 78 N.E. 955 (1906) (relief for the blind struck down) *with* *Jennings v. City of St. Louis*, 332 Mo. 173, 58 S.W.2d 979 (1933) (unemployment relief upheld).

own efforts and exchanges. The security the system offered was freedom from subjection to the unmediated wills of others and from the expropriation of the fruits of one's efforts and exchanges.

Thus, the classical notion of right had strongly antiredistributive implications. Right was a term to be invoked *against* redistribution. Redistribution suggested a breach of the morally fundamental distribution accomplished through the workings of the private law regime of the self-regulating market.

B. *The Progressive Critique*

The Progressives produced a variety of critiques of this vision.⁹ A basic theme of many was that the classical private rights regime did not promote general independence and security; rather, it promoted these qualities for some only at the direct expense of others. The classical vision of the self-regulating market as a universe of self-sufficient monads was a formalist fantasy divorced from social reality as most people experienced it. For those who lacked wealth and power, the private rights regime implemented a frightening dependence on the arbitrary wills of those who had them. The classical labor contract enforced a wide-ranging arbitrary power in the employer over the life of the worker. When the worker became unemployable for economic or health reasons, the classical regime left him at the legally unconstrained mercy of neighbors, charities, or the state. Every safeguard of security in the classical regime corresponded to a form of insecurity. For example, in protecting employers against claims for worker injuries or unemployment, it left workers vulnerable to the unpredictable contingencies of ill health and the business cycle. In securing the property and contract rights of workers and entrepreneurs, it made these same rights vulnerable to destruction in the competitive process of the market. Both workers and capitalists would periodically find the value of their skills and capital reduced or destroyed through innovation or price-cutting by competitors exercising their own rights of property and contract.

The Progressives undermined the principle of prospectivity by attacking the distinction between prospective and retroactive rules. They showed that rules were necessarily indeterminate and must be elaborated in the course of application. Because of this indeterminacy, rules could not fully set the terms of interaction in advance; they would emerge, in part, in the course of interaction. Moreover, the Progressives argued, those who do best initially under any given regime of rules acquire a potentially cumulative advantage over others, since they can use their initially acquired wealth to influence the content of new

9. See, e.g., J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924); A. EPSTEIN, *INSECURITY: A CHALLENGE TO AMERICA* (2d ed. 1938); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

rules in ways that favor them. Thus, rules can never be fully prospective because decisions in particular cases involve new or previously unformulated rules, and new rules reflect a balance of advantage acquired through the application of past rules.

The Progressives undermined the principle of neutrality by attacking the distinction between individual and social interests. They argued that many of the private law rules that the classicists considered neutral favored the special interests of identifiable groups at the expense of others. The classical contract rules, for example, favored employers at the expense of employees by giving the former wide-ranging arbitrary power over the life of the latter. At the same time, they argued that many of the rules that the classicists had considered nonneutral could benefit a general social interest. For example, laws subsidizing particular interests or businesses might contribute to a general scheme of economic development or recovery; laws facilitating organization by workers might reduce labor disputes and hence promote a general prosperity.

The Progressives attempted to portray the economic and medical contingencies that determined material well-being as functions, not of a self-regulating process of individual interaction, but of conscious, purposive collective activity. Once one recognized the inevitable influence of public fiscal, monetary, and regulatory policy on economic well-being, they asserted, it was simply untenable to suggest that the economic process was impersonal or that an individual's fortunes were the product of his own efforts and exchanges. Moreover, the Progressives argued again and again that a variety of types of collective intervention in the private rights regime could only enhance security. A famous example arose from the effect of inflation and deflation on the payment terms of contracts.¹⁰ In circumstances such as the German hyperinflation of the 1920s or the American deflation of the 1930s, it was quite plausible to suggest that security required intervention by legislatures or courts to undo the results of the contract process and relieve identifiable classes of people who had been disadvantaged by them (creditors in the first case, debtors in the second).

C. *Welfare Rights After the Progressive Critique*

The Progressive critique was animated by redistributive and humanitarian concerns. These concerns were evident in the way some Progressives sought to shift the focus of jurisprudential debate from concern about the ability of those who did well in the economy to hang on to their gains to concern about protecting those who did poorly from suffering too much. And they were further reflected in the Progressives' insistence, against the individualistic premises of classi-

10. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); Dawson, *Effects of Inflation on Private Contracts*, 33 MICH. L. REV. 171 (1934).

cism, that some of the most valuable and practical forms of security arise from the ability to rely on others for assistance in the event of misfortune. From these common starting points the Progressives proceeded to develop two quite different views of welfare rights.

The view that departed most drastically from classicism, and which proved least influential, was developed by social workers during and after the New Deal. The social workers repudiated the classical ideal of independence in favor of what they called "interdependence"¹¹ and sought to develop a jurisprudence that did justice to the values of both autonomy and solidarity. They portrayed mutual dependence, not only as an inescapable reality, but also as a morally valuable and fulfilling aspect of the human condition. They argued for a kind of security that might be enhanced by the willingness of individuals to become vulnerable to each other and by the openness of the social process to collective reassessment and revision. They opposed any strong prospectivity requirement because it disabled society from confronting the unpredictable contingencies of economics and health. They rejected any strong neutrality requirement on the ground that it would unnecessarily hamper society in responding to particular distributive concerns. The most fundamental distributive premise of the social workers was need, and the major focus of their reform efforts was public assistance. Need was not only a legitimate principle of distribution, but also a more fundamental one than the classical principles of effort and exchange, since some minimal level of material welfare was a prerequisite to the kind of autonomy presupposed by the classical principles. The social workers interpreted poverty as a social failure. They invoked the term "right" to express their view that a responsible society should guarantee its members a minimally adequate income and that it should teach them to regard this minimum as a matter of entitlement.

Unlike this social work doctrine, the approach that most influenced liberal welfare discourse attempted to accommodate itself to the rhetoric and premises of classicism. It accepted the Progressive critique that the classical private rights regime did not really serve the ideal of independence, but it continued to appeal to the classical ideal, with its Utopian connotations of autarkic self-sufficiency and immunity from collective reassessment and revision, as a fundamental governing norm. It defined its mission as the construction of a program that would better vindicate the classical ideal than the classical rights regime. Or to put it somewhat differently, it sought to marshal the individualist moral rhetoric of classicism to support the welfare-regulatory program of the New Deal and subsequent Democratic administrations.

Perhaps the central rhetorical trait of this second approach in the welfare context was its attempt to defend welfare benefits by analogizing them to private law norms. This private law approach sought to

11. C. TOWLE, *supra* note 4, at 59; see Simon, *supra* note 4.

devise a program that, while rectifying the inadequacies of the market, would nevertheless maintain the greatest possible continuity with the form and substance of private law norms. Among other things, this approach paid homage to the principles of prospectivity and neutrality. It aspired to construct the welfare system as a set of fixed ground rules with the results of interaction under them immune from reassessment and undoing. The ground rules were to be as broadly inclusive as possible and were not to focus on identifiable individuals and groups. Having imbibed the Progressive critique of classicism, the proponents of the private law approach could not insist on any rigid application of prospectivity and neutrality, but they appealed to them as governing ideals. They tended to assume that the status of welfare benefits as "rights" became more plausible as these principles were more fully honored.

The private law approach was at best uncomfortable with, and at worst, hostile to, need-based or means-tested distribution. With their explicit premise of need, means tests were considered incompatible with the individualist moral premises of the private law vision. They were an open acknowledgment of dependence. They involved distribution of income to people who could not claim it through their own efforts or exchanges. They were thus both dubious in principle and degrading in practice. They conferred a "stigma" of indignity on the claimant. Moreover, means-tested benefits were difficult to square with the principles of prospectivity and neutrality. They required constant revision to respond to unexpected contingencies of need; and they necessarily singled out particular identifiable individuals and groups.

There are two variations on the private law approach. The first, which is especially identified with the New Deal labor economists and the administrative and legislative sponsors of the social insurance programs over the past 50 years, analogizes welfare benefits to contracts.¹² Those who appealed to the contract analogy tended to urge that social insurance benefits be regarded as "earned" by the beneficiary and that, in order to facilitate this view, the programs maintain a prominent relation between "contributions" (their word for what others called "taxes") and benefits. They wanted the programs designed in terms of fixed ground rules to remain relatively immune from revision. They wanted the eligibility rules to maximize coverage and avoid focusing on the poor. They believed that "a program for the poor is a poor program."¹³ In some moods, the contractualists insisted that only social insurance, and not public assistance, bore the requisite resemblance to private law norms to qualify as a matter of right. In other moods, they

12. See, e.g., E. BURNS, *TOWARD SOCIAL SECURITY* 14-53 (1936); Ball, *The American System of Social Security*, J. COM., June 15, 1964, at 17; Brown, *The American Philosophy of Social Insurance*, 30 SOC. SERV. REV. 1 (1956).

13. M. DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* 217 (1979) (reporting views of Social Security Administration officials).

conceded that public assistance might also create rights but insisted that such rights had a lower normative status than those created by social insurance. They sometimes explained their low regard for public assistance by expressing the hope that, with the help of macroeconomic policies securing growth and full employment, the social insurance programs might expand to provide sufficient protection against adverse economic and medical contingency that public assistance would become superfluous and "wither away."¹⁴ For the most part, however, the contractualists did not themselves propose macroeconomic or social insurance policies that had any likelihood of accomplishing this result, nor did any national administration commit itself to policies that could have been expected plausibly, even in the long run, to obviate reliance on public assistance.

The second variation is identified with the liberal lawyers of the 1960s and 1970s, and particularly with Charles Reich's seminal article, *The New Property*.¹⁵ In this variation, the analogy shifts from contract to property. Reich wrote at a time when the vision of the "withering away" of public assistance in favor of social insurance was no longer viable. Decades of growth had increased the size and salience of an urban underclass with only a marginal foothold in the labor market and the social insurance programs. The critical innovation of the New Property jurisprudence was to blur the distinction between social insurance and public assistance and to extend the notion of right to the latter. Reich accomplished this by increasing the abstraction of the private law analogy. As the contractualists had abstracted the distributive premises of effort and exchange from the specific classical private right regime, Reich abstracted the classical value of individual independence from both the classical rights regime and the distributive premises of effort and exchange. He replaced the contract analogy and its connotation of exchange with a notion of property, defined as security for the individual against the state, that embraced almost every material interest of any significance. He portrayed old (private law) property, social insurance, and public assistance as different varieties of security.

In developing this encompassing notion of security, Reich evoked the principles of prospectivity and neutrality. He prescribed that property, once acquired in accordance with established ground rules, should be deemed vested.¹⁶ His approach to neutrality was more complex. There was no way of bringing public assistance into the realm of right without accepting eligibility rules that singled out the poor. But Reich's rhetoric deemphasized the peculiar focus of public assistance on the poor by viewing it, not as a distinctive category, but as one com-

14. G. STEINER, *SOCIAL INSECURITY* 18-26 (1966).

15. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

16. *Id.* at 785. For a more extended analysis of Reich's article, see Simon, *supra* note 4, at 23-37.

ponent of a larger system of material security that embraced the entire population.

A distinctive influence of the private rights approach on liberal welfare discourse has been to deemphasize, and even to discourage, redistributive rhetoric and goals in liberal discussions of the welfare system. Although the proponents of the private law approach have clearly shared the redistributive goals of the general liberal program, their rhetoric of welfare rights rarely argues directly for redistribution. On the surface, it tends to proceed as if the classical prohibitions against the *post hoc* expropriation of gains acquired in the self-regulating market and against "taking from *A* to give to *B*" still applied. The private law approach tends to argue, not for redistribution from rich to poor, but for the downward expansion of the kind of security afforded to the rich by traditional private law norms to the disadvantaged. Welfare rights are portrayed as complementing, rather than competing with, traditional private law rights.

In the contractualist rhetoric, the antiredistributive tendency is reflected in the practice of distinguishing social insurance from public assistance benefits on the ground that the former are "earned," in the sense that they represent a return of the beneficiary's contributions, an argument that implicitly asserts that such benefits do not involve redistribution. It is further reflected in ambivalence toward the aspects of social insurance programs that undeniably do involve redistribution. In the New Property rhetoric, the antiredistributive thrust is less prominent. Nevertheless, as I illustrate below, it has been reflected in a tendency to interpret the notion of right to require the prevention or policing of redistribution *among* the poor.¹⁷

Of course, the private law jurists expected both the welfare policies they proposed and other government economic policies to play only a supplementary role in the distribution of income; the primary role would continue to be that of the private market. Moreover, aside from their often vague and usually halfhearted commitment to macroeconomic full-employment policy, neither private law welfare jurisprudence nor the broader liberal program of which it was a part contemplated any drastic alterations of the private market mechanisms of distribution.¹⁸

17. See notes 201-224 *infra* and accompanying text.

18. In the area of labor relations, the private law approach to welfare corresponds to the contractualist approach to labor regulation. See Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 293-310 (1978). In the contractualist approach, the state adopts a posture of neutrality toward worker organization and the various distributive results of such organization and purports merely to regulate the process of organization and bargaining.

In the area of race relations, the private law welfare notion corresponds to a tort-like view of antidiscrimination law that limits the state to policing specific current acts of discrimination but permits the beneficiaries of social structures arising from past discrimination to retain their advantages. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

Private law welfare jurisprudence has been more a set of themes and rhetoric than a doctrine. It is ambiguous in many respects. For one thing, the commitment to private law norms is susceptible to a variety of interpretations. The same Progressive critique that made room for welfare rights also transformed the understanding of private law. It made the image of the self-regulating market untenable, and it showed that no single set of private law rules could be derived from the bare notions of market, property, or contract. These notions might be defined in a variety of ways, and the choice among them depended on the same kinds of considerations that underlay welfare and regulatory policies. Moreover, the reference to private law was only an analogy; the welfare system was expected to depart from private law concepts in ways that were never systematically or comprehensively specified.

Another type of ambiguity arises from the fact that, while to some extent the private law jurists embraced the ideal of independence and the private law analogy as a matter of moral conviction, to some extent they did so as a matter of political strategy. Some of the private law jurists shared the solidaristic and communitarian moral premises of the social workers but thought that the individualistic premises of classical liberalism were too deeply ingrained in American culture and politics for an explicitly solidaristic and redistributive program to be viable. When these reformers spoke of the means test as degrading, they did not mean that they themselves found it so, but that this view of the means test was so pervasive in the culture it had to be taken for granted. When they said that "a program for the poor is a poor program," they didn't mean that they found singling out the poor for special treatment morally dubious; they meant that a program whose primary constituency was the poor would be politically vulnerable. By classifying people in accordance with poverty, need-based programs isolated the poor in ways that facilitated redistribution away from as well as toward them. Social insurance had the strategic advantages both of paying homage to the idea of independence and of integrating the poor into a broader political base.

D. *The Insurance State*

The portrayal of American government as a kind of insurance state by critics such as Theodore Lowi emphasizes the way government has institutionalized principles that closely resemble those of private law welfare jurisprudence.¹⁹ The basic characteristic of the insurance state is the commitment of the national government to guarantee all the significant elements of the economic status quo. The insurance state is thus the fulfillment of the goal enunciated in Reich's *The New Property* of turning all forms of material welfare into entitlements.

19. See T. LOWI, *supra* note 3, at 273-94; see also M. CROZIER, *THE TROUBLE WITH AMERICA* (1984); King, *Overload: Problems of Governing in the 1970s*, 23 *POL. STUD.* 284 (1975).

The insurance state also institutionalizes the principles of prospectivity and neutrality. Prospectivity is expressed in the strong deference paid to the distributive status quo and in the concern for achieved status at the expense of denied opportunity. Where assisting those who have not achieved benefits would jeopardize the gains of those who have, the insurance state tends to sacrifice the interests of the former to those of the latter. Thus, it is relatively sensitive to the claims of those threatened with loss of current economic status and relatively insensitive to the claims of those who feel entitled to benefits they have not yet achieved. Preserving jobs for current job holders takes precedence over creating jobs for those who do not have them; securing interests of current tenants or welfare recipients takes precedence over the interests of those who have yet to find housing or establish welfare eligibility. The principle of neutrality is expressed in the preference of the insurance state for indirect, trickle-down, or pie-expanding approaches to helping the disadvantaged at the expense of directly redistributive approaches. The insurance state thus has an affinity for the private law welfare jurisprudence notion of the downward expansion of security as opposed to direct redistribution.

The insurance state has depended on the premise that steady and substantial economic growth could be achieved through macro-economic policy. With the stalling and fluctuation of economic growth in recent years, it has come under intense pressure. Yet, the critics suggest that, even with economic growth, the insurance state is prone to basic problems. Two such problems are of particular importance to the assessment of liberal welfare reform. The first is that the kind of security to which the insurance state is committed threatens to rigidify the society in ways that inhibit desirable reform and experimentation. A strategy that turns all incidents of material welfare into rights tends to constitutionalize inefficiency and perverse distribution.

This contemporary criticism of the insurance state parallels a criticism that the Progressives made of classical legalism and that the private law welfare jurisprudes tended to ignore. The Progressives argued that many forms of individual and collective material welfare depended on the capacity of the society to revise its institutions in response to new knowledge and changing values and that this capacity depended on the willingness of people to make their economic positions vulnerable to politics. Classicism's refusal to risk this type of vulnerability precluded a variety of reforms with general long run benefits.²⁰

The second problem is that the security afforded by the insurance state has not been distributed uniformly. More fundamentally, much of it has been created only at the cost of corresponding insecurity. The insurance state has reduced only marginally, at best, the economic privileges of the wealthy. It has afforded an important degree of security to

20. See J. DEWEY, *LIBERALISM AND SOCIAL ACTION* 90-91 (1935).

a substantial segment of the working class, but to an important extent this security has been achieved at the expense of a more disadvantaged sector. The insurance state has created a situation very much like the one some of its proponents most sought to avoid—the social and political isolation of the poor. Under its auspices, the liberal constituency has been fragmented between a relatively organized sector, with relatively dignified and secure employment and favorable working conditions and compensation, and a relatively unorganized sector, with relatively low status, irregular work, and unfavorable working conditions and compensation.²¹ The welfare programs rationalized by the private law welfare jurisprudence have played an important role in this fragmentation.

Like the first, this second objection to the insurance state parallels a strand of the Progressive critique of classical legalism. The Progressives had suggested that implicit but unrecognized in classicism was a Law of Conservation of Security: You could not enlarge the amount of security in society but only redistribute it. Rights protected the rightholder only by making someone else vulnerable to her.²² This conclusion assumes that society is a zero-sum affair in which the rightholder's gains represent losses to others. It denies that rights might effectuate shared values or mutually beneficial cooperation. The Progressives did not share this view of society themselves. Their point was that this view of society is implicit in the classical notion of right. The premise of independence and the Utopian image of autarky suggest a world without shared values and spontaneous cooperation, and the function of rights in the classical view is precisely to protect the individual from having to rely on the values or willingness to cooperate of others.

The designers of the insurance state and of private law welfare jurisprudence sometimes appeared to think that economic regulation and growth would make the Law of Conservation of Security obsolete. Regulation would smooth out the business cycle and reduce the amount of unforeseeable contingency. Growth would make it possible to increase the material welfare of the least advantaged without direct redistribution. But this expectation proved Utopian. First, it overestimated the extent to which regulation could reduce unforeseeable contingency, and it underestimated the extent to which such reduction would require inefficiently constraining the economy. Second, it ignored the extent to which judgments of economic welfare depend on relative as well as absolute positions. Third, it paid insufficient attention to the possibility that economic regulation might increase the political power of some

21. See C. SABEL, *WORK AND POLITICS* 31-77 (1982).

22. The Law of Conservation of Security has been derived by Duncan Kennedy and Frank Michelman from the Progressive jurisprudence of Wesley Hohfeld, Robert Hale, Arthur Corbin, and Walter Wheeler Cook. See Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711, 751-58 (1980).

beneficiaries in ways that might be used to the detriment of the less advantaged.

As the political analogue of private law welfare jurisprudence is the insurance state, the political analogue of the alternative approach to welfare entitlement of the New Deal social workers would have been a much different set of institutions. This set of institutions would have focused on the type of security afforded by the guarantee of a minimally adequate standard of material welfare and would have sought to guarantee such a standard even at the expense of other material interests. In focusing on minimal needs rather than security in general, it would not have committed itself to turning the economic status quo into a mass of entitlements.

Moreover, contrary to the assumptions of private law welfare jurisprudence, this approach would not necessarily have isolated the poor politically. Instead of trying to expand downward the type of security afforded to the privileged by traditional private rights, it would have tried to expand upward a fair share of the insecurity incident to economic development that is disproportionately visited on the poor. Such a program might have involved both a more vigorous assault on economic privilege and a more generous provision of means-tested benefits than the program that emerged in the insurance state. The redistribution of insecurity would have tended to reduce the number of people immune from the prospect of having to call on public assistance to meet their needs. The loosening of need standards would have made for a much larger class of people eligible for means-tested distribution at any given time. Both effects would have worked against the social and political isolation of the poor, not by minimizing the possibility of having to seek need-based assistance, but by increasing and more fairly distributing it.

As the private law approach triumphed over social work jurisprudence, so the institutions of the insurance state triumphed over this alternative structure which, had the name not been misappropriated, I would have called the *welfare* state. Yet, although the dominant welfare institutions of the society correspond to the insurance state, one can see in more marginal and transitory developments, for example, the Federal Emergency Relief Act of the 1930s and the Community Action Program of the 1960s, glimmers of both the possibilities and problems of the alternative program.

II. THE NEW CONTRACT

"No form [of government largess] is more clearly earned by the recipient," Reich wrote of Social Security in his 1964 article.²³ This was not a controversial statement at the time, but two decades later a substantial literature disputed it. Some writers made efforts to separate

23. Reich, *supra* note 15, at 769.

out the earned or insurance component of Social Security from the unearned or welfare component. One such analysis concluded that the unearned or welfare component of the benefits due people retiring at the time Reich wrote exceeded 70 percent.²⁴ Both Reich's claim and the economist's rebuttal exemplify the predominance of the private law analogy in discussion of the Social Security system.

A. *Ambiguities of Redistribution*

Private law jurisprudence has found in the notion of social insurance an appealing ambiguity that has helped accommodate the individualist premises of classical legal rhetoric with the modern welfare state. The ambiguity concerns the extent to which social insurance aims at and engages in redistribution.

One aspect of this ambiguity concerns the basic idea of insurance. People often think of insurance as redistributive in the sense that it transfers resources from those with relatively small losses to those with relatively large ones. However, insurers think this view naive. They insist that the proper way to look at the matter is prospectively—at the time terms are agreed to and the actual pattern of losses is known only probabilistically. From this perspective, premium payments by the insured, adjusted by an interest factor, should be compared to the amount of coverage, discounted for both interest and the probability of nonoccurrence of the events on which payment is contingent. In the paradigmatic, or “actuarially fair,” insurance contract, there is no redistribution because the present value of each insured's premium payments equals the present value of the insurer's liability.²⁵ Insurance professionals consider insurance redistributive only where it provides benefits that, prospectively, exceed or fall below payments. Another way to put it is that redistribution occurs where some individuals are charged higher premiums relative to the risk of loss they present (to the extent that such risk is efficiently determinable) than others. In this case, those who are overcharged relative to risk subsidize the others. Nevertheless, the looser popular notion of insurance as redistributive has made it easier to invoke the insurance analogy to rationalize redistributive features of Social Security that insurance professionals would consider anomalous or improper in private insurance.

Another aspect of the ambiguity concerns the practical circumstances under which insurance is marketed. Some people understand the insurance analogy to connote, not the theoretical norm of actuarial fairness, but some comparable insurance that is actually sold in the private market (or that would be sold in the absence of the social insurance program). Thus, a common procedure in assessing the redistribu-

24. See Parsons & Munro, *Intergenerational Transfers in Social Security*, in *THE CRISIS IN SOCIAL SECURITY* 65, 76 (M. Boskin 2d ed. 1978).

25. See Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403 (1985); Kimball, *Reverse Sex Discrimination*: Manhart, 1979 AM. B. FOUND. RESEARCH J. 83.

tive component of Social Security is to compare the returns to Social Security contributions with the returns to premiums on a comparable private insurance contract. One problem with this notion is that some social insurance benefits, notably the indexing of Social Security payments to the cost of living, have no counterparts in the private market. A more general problem is that, because of the variety of circumstances under which insurance is marketed and regulated, there is no obvious way to define the appropriate private insurance baseline for assessing social insurance. Government regulatory regimes impose widely varying disclosure and procedural requirements on insurance markets that have varying effects on consumer choices. Such regimes also contain a variety of substantive restrictions, such as limitations on the use of race and gender criteria in rate-setting, based on noneconomic or nonactuarial concerns.²⁶

More importantly, the design of private insurance varies with the circumstances of the purchaser. Much private insurance is purchased on behalf of groups by buyers who insist that the insurance accommodate collective concerns. When employees bargain for insurance collectively, they often seek arrangements that flatten out differences in individual contributions or benefits. For example, when a new pension benefit is inaugurated, unions will sometimes insist that workers nearing retirement be accorded larger benefits than these workers could purchase individually (or than could be actuarially justified) with the contributions made on their behalf.²⁷ When economic events such as runaway inflation unexpectedly reduce the value of previously bargained-for pension benefits to current or imminent retirees, unions sometimes bargain to increase these benefits in ways that would not be warranted by contributions allocable to these workers. Where employees are not organized, employers often take account of such collective concerns in designing insurance benefits. They would regard an actuarially fair program as bad personnel policy.²⁸

Still a further dimension of ambiguity concerns the implications of the idea of compulsory, government-sponsored insurance. Although such programs present many opportunities for redistribution, there are nonredistributive rationales for them as well. The nonredistributive rationales for social insurance are market failure and paternalism.

Consider the market failure rationales for Social Security.²⁹ First,

26. See R. KEETON, *INSURANCE LAW* 1-86, 341-439 (1971).

27. If the relatively large pension benefits allotted older workers were balanced by proportionate reductions in current pay (which older workers might accept because of a greater preference for pension benefits), such benefits would be consistent with wage determination on an individualistic (marginal productivity) basis. It seems likely, however, that in many jobs at least some of the difference is attributable to the collective normative significance of seniority. See R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 122-35 (1984).

28. D. MCGILL, *FUNDAMENTALS OF PRIVATE PENSIONS* 94-95, 101, 193-94 (1975). For a discussion of an economic model of wage determination that integrates collective norms, see *UNEMPLOYMENT AND INFLATION* 61-149 (M. Piore ed. 1979).

29. See Diamond, *A Framework for Social Security Analysis*, 8 J. PUB. ECON. 275, 279-81

private insurers have a limited ability to offer safe, secure pensions. Many people learned this brutally in the depression when their pension claims were wiped out by insurer bankruptcies. Regulation and new investment practices have since reduced such risk, but it remains true that government can offer a greater degree of security than private insurers. Second, private insurers have been unable to offer a pension with benefits that keep pace with inflation.³⁰ Third, because pension arrangements are necessarily complex and technical, the costs and difficulty of acquiring information about them are large. Moreover, sales and administrative costs are often high in private insurance arrangements, and because of the problem of consumer understanding and information, the market may not work reliably to minimize them. Government pension programs may be able to achieve economies of scale in information and administration that individuals could not achieve privately.

Fourth, there is a variation on the problem of adverse selection. To the extent that there are factors from which risk can be predicted that can be ascertained by consumers but not by insurers (e.g., smoking habits), high risk consumers will tend to opt into voluntary arrangements and low risk people will tend to opt out. Because the insurer cannot reliably identify the low risk people, it will be unable to offer them insurance at an appropriate premium. This variation of the adverse selection problem is one reason why group insurance, usually employment-related, often offers more favorable premiums, even to low risk people, than individual insurance. Compulsory social insurance is a kind of mass-base group insurance.

There is also a paternalist rationale for Social Security: People may be inclined to excessively discount the future and thus fail to make adequate provision for it. Or if they try to make provision, they are likely to be confused by the highly technical considerations on which rational choice depends. Mistaken choices in this area tend to be more severe and less reversible than in other areas. Forcing people to save in a well-designed pension program is one way of protecting them from such mistakes.³¹

None of these rationales alone would be an adequate justification for a compulsory social insurance program, but together they provide a

(1977); Feldstein, *Social Insurance*, 25 PUB. POL'Y 81, 91-92 (1977); Merton, *On Consumption-Indexed Public Pension Plans*, in FINANCIAL ASPECTS OF THE UNITED STATES PENSION SYSTEM 259, 260-61 (Z. Bodie & J. Shoven ed. 1983) [hereinafter cited as FINANCIAL ASPECTS].

30. Some dispute whether the absence of private indexed plans should be attributed to market failure. See Feldstein, *Should Private Pensions Be Indexed?*, in FINANCIAL ASPECTS, *supra* note 29, at 211-27 (private market could offer full indexing, but there would be little demand because such indexing is not optimal for most savers).

31. Diamond, *supra* note 29, at 281-96. A further rationale combines market failure and paternalism, as well as redistribution: If the society guarantees the elderly a minimal level of subsistence through its welfare system, even a far-sighted person may decide not to save in the expectation that he will be able to rely on welfare. Compulsory saving is a way of undercutting this type of moral hazard. Feldstein, *supra* note 30, at 92-93.

reasonable justification. Of course, there are also redistributive rationales for Social Security: Prior to the maturation of Social Security, poverty correlated strongly with old age. By 1983, the poverty rate among the aged had been reduced to about 14 percent—slightly below the rate for the rest of the population. If public transfer income were disregarded, slightly more than half of the aged would be in poverty.³² Redistributive rationales have always had some influence on the supporters of the system. However, the fact that the general outlines of the system could be justified without reference to redistribution has made it easier to accommodate it with the classical rhetorical themes of private law welfare jurisprudence.

B. *Contributions and Benefits*

The evolution of the distributive premises of Social Security can be usefully considered in three periods: from 1933 to 1939, a period that begins with the inauguration of the New Deal, includes the enactment of the Social Security Act in 1935, and ends with the transformation of the program by the 1939 amendments to the Act; from 1939 to 1977, a period of, for the most part, steady economic growth and uninterrupted expansion of the program culminating in the indexation of benefits to the cost of living; and from 1977 to the present, a period of stagflation in the national economy, of the first major retrenchments in the program, and of a general sense of anxiety about it. In each of these periods, private law rhetoric has played an important role in discussion of the program that has tended to inhibit direct redistribution.

1. *1933–1939: The repression of redistribution.*

The New Deal's first welfare initiative was the Federal Emergency Relief Act (FERA), proposed, enacted, and implemented with breathtaking speed in the early months of the administration. The initial appropriation was \$500 million, a staggering amount by the standards of the time. During 1933, 1934, and 1935, FERA spent slightly more than \$4 billion dollars.³³ In 1934, FERA and other relief expenditures exceeded a third of the entire federal budget.³⁴

FERA-funded programs were administered by the states under federal supervision. These programs provided a panoply of benefits, including cash grants, in-kind grants for food, clothing, and medical assistance, work relief, and financial assistance to farmers and small producers. Originally intended for unemployed workers and their families, it was extended by the states to "unemployables": the aged, dis-

32. See S. LEVITAN, *PROGRAMS IN AID OF THE POOR* 10 (5th ed. 1985); Martin, *Public Assurance of an Adequate Income in Old Age: The Erratic Partnership Between Social Insurance and Public Assistance*, 64 CORNELL L. REV. 437, 449 (1979).

33. J. BROWN, *PUBLIC RELIEF 1929–1939*, at 149 (1940).

34. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 341, 1124 (1975).

abled, and single parents. By the end of 1934, perhaps 15 percent of the nation was receiving some form of relief. Many of the recipients were previously secure middle-strata workers who never before had relied on public assistance. Nearly all FERA assistance was means-tested.³⁵

From the beginning, Roosevelt was wary of FERA, and he seems to have been appalled by it as its scale grew. At his insistence, FERA was abandoned in favor of an expanded, non-means-tested public works program and the Social Security Act programs. In ending FERA, Roosevelt appears to have been primarily motivated by a horror of need-based assistance. In one of many denunciations of public assistance, he asserted, "continued dependence upon relief induces a spiritual and moral disintegration fundamentally destructive to the national fibre. To dole out relief in this way is to administer a subtle narcotic destroyer of the human spirit. It is in violation of the traditions of America."³⁶

The primary foci of the Social Security Act were two social insurance programs: an unemployment insurance program to be administered by the states under federal supervision and funded by payroll taxes collected from employers (and, if the states so chose, employees), and an old age insurance program administered by the federal government and funded by a payroll tax shared equally by employer and employee. Appended to these programs were three categorical public assistance programs: Old Age Assistance, Aid to the Blind, and Aid to Dependent Children, which were structured as federal grant-in-aid programs reimbursing the states for expenditures made on means-tested benefits for these groups.

A critical influence on the structure of these programs was Roosevelt's insistence that the social insurance programs be self-supporting from payroll taxes. He rejected out of hand a variety of relatively radical non-social-insurance plans. One of these was the Townsend plan, supported by a nationwide grass roots movement of the elderly, that would have paid a flat grant, financed by a tax on commercial and financial transactions, to every citizen over 60.³⁷ Another was FERA administrator Harry Hopkins' proposal for a kind of expanded, long term FERA in which "relief and social insurance [would] be lumped together [and] relief payments . . . [would] be called social insurance."³⁸ Moreover, Roosevelt rejected proposals from a variety of sources that in both the Unemployment Insurance and the Social Security programs a portion of the benefits be financed through govern-

35. See J. BROWN, *supra* note 33, at 218-72; A. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 266-73 (1958).

36. J. BROWN, *supra* note 33, at 165 (quoting Franklin Delano Roosevelt).

37. The payments originally proposed—\$200 per month—might have amounted to a third of the earned income in the entire economy, but Roosevelt's objection went as much to the flat grant concept as to the amount. M. DERTHICK, *supra* note 13, at 193-94.

38. F. PERKINS, *THE ROOSEVELT I KNEW* 284 (1946).

ment general revenue contributions. This was the practice in European social insurance programs and would have made possible larger early benefit payments.³⁹

As enacted,⁴⁰ the Social Security program provided for an annual payroll tax of one percent each on employer and employee based on the employee's wages up to \$3,000. (The drafters recognized that at least a substantial portion of the employer's tax would ultimately be borne by the employee in the form of lower wages and considered the entire tax as part of the employee's compensation.) The taxes were to be accumulated in a fund to be invested in government securities and ultimately used to pay benefits. At 65, a retired contributor would become eligible for a monthly pension calculated as a fraction of the amount of earnings on which he had previously paid taxes. The actuarial practices of private insurers were used to match taxes to benefits.⁴¹ For financial and legal reasons, the program departed from insurance practices in many details, but aside from its compulsory and public aspects, only two provisions struck contemporaries as inconsistent with the spirit of private insurance principles. First, the benefit rate was progressive. Benefits for low earners were calculated on a higher percentage of earnings than for high earners.⁴² Second, the "retirement test" required the beneficiary to stop working in order to collect benefits.

If the Federal Emergency Relief Act was daring, experimental, redistributive, and disrespectful of the lines that separated workers from nonworkers, the Social Security program was none of these. From a Keynesian perspective, it was a disaster. The payroll taxes threatened to soak up purchasing power for decades before substantial benefits would be returned to the economy. From a welfare perspective, it was little better. The taxes were regressive, and although the payout was progressive, it would take decades before retirees would have been in the system long enough to build up a benefit entitlement of even the size of public assistance standards. Only a third of the working age population, and much lower fractions of women and blacks, were covered.⁴³

The drafters of the Act sought to draw a firm line between benefits payable on the basis of earnings and benefits payable on the basis of need. They spoke of the social insurance benefits as a matter of "con-

39. A. SCHLESINGER, JR., *supra* note 35, at 301-11.

40. Social Security Act, Pub. L. No. 74-271, §§ 201-210, 49 Stat. 620, 622 (1935) (codified as amended at 42 U.S.C. §§ 401-410 (1982)); *id.* §§ 801-811, 49 Stat. 620, 636 (repealed by Internal Revenue Code Act of Feb. 10, 1939, ch. 1, § 4, 53 Stat. 1).

41. See E. WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 147-52 (1962).

42. The monthly benefit formula was a half percent of the first \$3,000 in cumulative earnings, plus one-twelfth of a percent of the next \$42,000, plus one twenty-fourth of a percent of the rest, up to a maximum of \$85 per month. Social Security Act, Pub. L. No. 74-271, § 202, 49 Stat. 620, 623 (codified as amended at 42 U.S.C. § 402 (1982)).

43. E. BURNS, *supra* note 12, at 26-27.

tract" as opposed to need,⁴⁴ and they used explicit entitlement language in the Social Security title but not in the public assistance ones.⁴⁵

Considered on their own, the public assistance titles were meager and ineffectual. They covered only the aged, the blind, single parent families, and families with an incapacitated parent. They thus ignored many of the nonaged poor who could not be helped by unemployment insurance because they were either unemployable for reasons other than blindness, because they had yet to acquire a sufficient labor force connection to be entitled to benefits, or because they had exhausted their benefits. The massive public employment program by no means helped all of the employable poor and made no provision for the unemployable. Many on the FERA rolls were left without any federally supported assistance at its termination.⁴⁶ (Some of these were helped by state and private programs, though usually with very meager benefits.) Even with the categories of people it included, the public assistance titles were ungenerous. By designing the programs as grant-in-aid programs in which the federal government would reimburse about half of state costs, the statute left financing of the remainder to the relatively regressive state tax systems.⁴⁷ The maximum grant for which reimbursement would be available was set at a level welfare professionals regarded as low; a provision that would have set a minimum grant level affording "a reasonable subsistence compatible with decency and health" was eliminated in Congress. Federal administrators regarded many of the resulting state standards as inadequate.⁴⁸

The dominant influence on the Act was Roosevelt, and the dominant influence on Roosevelt was a commitment to private law analogies and a concomitant distaste for public assistance.⁴⁹ After the inauguration of FERA, Roosevelt consistently sought to minimize federal involvement in public assistance and to extirpate any resemblance to public assistance from the social insurance programs. The Social Security plan initially recommended by Roosevelt's Committee on Eco-

44. See, e.g., *Preliminary Report of the Committee on Economic Security*, Sept. 1934, reprinted in *STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY* 72, 73 (R. Stevens ed. 1970).

45. Social Security Act, Pub. L. No. 74-271, § 202, 49 Stat. 620, 623 ("Every qualified individual . . . shall be entitled to receive . . .") (codified as amended at 42 U.S.C. § 402(a) (1982)).

46. See D. HOWARD, *THE WPA AND FEDERAL RELIEF POLICY* 854-57 (1943); E. WILLIAMS, *FEDERAL AID FOR RELIEF* 255-56 (1939).

47. See E. PATTERSON, *THE NEW DEAL AND THE STATES* 87, 92-99 (1969).

48. See A. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* 59-60 (1966); E. WITTE, *supra* note 41, at 144.

49. A. SCHLESINGER, JR., *supra* note 35, at 308 ("[Roosevelt] believed that public insurance should be built upon the same principles as private insurance."). Some advisors, such as Edwin Witte, Executive Director of the Committee on Economic Security, shared this view. See Letter from Edwin Witte to the Honorable Carl Curtis (Dec. 16, 1953), reprinted in *Analysis of the Social Security System: Hearings Before a Subcomm. of the Comm. on Ways and Means*, 83d Cong., 1st Sess. 913 (1953) ("It has always been my view . . . that the more the insurance features of the old-age and survivor's insurance system are stressed, the less likelihood there is of abuses in the national program. I have favored, and still do, financing the system on as nearly actuarial a basis as possible.").

conomic Security would have paid those retiring in the early years of the program more than the value of their contributions, since, as Frances Perkins put it, "otherwise some would receive ridiculously low benefits," and would have made up for the consequent long run deficit by supplemental general revenue funding in later decades. Roosevelt rejected this plan as a "dole under another name."⁵⁰

Roosevelt's hostility to departure from private insurance principles was based on both distributive and political notions central to private law welfare jurisprudence. He condemned the redistributive features of his advisors' proposal as degrading. At the same time, he viewed the private law norm as a safeguard against the exposure of the system to politics. After the Act was past, he explained to a critic who repeated the Keynesian and welfare objections to the 1935 Act:

I guess you're right on the economics, but those taxes were never a problem of economics. They are politics all the way through. We put those payroll contributions there so as to give contributors a legal, moral, and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program.⁵¹

The basic premise of the Roosevelt view—that a program creates rights and secures immunity from politics to the extent that it does not redistribute—was made explicit in the New Deal literature on the statute. An early influential example is the 1936 book, *Toward Social Security* by Eveline Burns, an economist who had consulted for the Committee on Economic Security. Her chapter on Social Security was entitled "Old Age Security as a Right." The chapter on old age assistance was entitled "Old Age Assistance as a Concession." "It is very important to be clear about the difference between the two methods," she wrote. That difference lies in the character of the relation between contributions and benefits in Social Security, which makes it "a contract between the contributing worker and the federal government."⁵² Burns emphasized the actuarial premises that social security and private insur-

50. F. PERKINS, *supra* note 38, at 293-94.

51. A. SCHLESINGER, JR., *supra* note 35, at 308-09. Martha Derthick has captured a related dimension of this attitude in her explanation of the early Social Security administrators' hostility to flat grants:

Flat pensions . . . would intensify the politics of old age support. Movements of the aged—witness the Townsend phenomenon—would bring irresistible pressure to bear on the elected politicians in the legislature. In the face of such pressures, pensions would get "too big." Spending would get out of control and disrupt the economy and society. By contrast, a contributory program financed with earmarked payroll taxes would impose its own discipline by limiting expenditures to whatever payroll-taxpayers would tolerate. The public would be taught the salutary lesson that benefit payments depend on revenue from "contributions."

M. DERTHICK, *supra* note 13, at 218-219.

Of course, a flat pension system would also depend on the willingness of taxpayers to fund benefits. The "discipline" imposed by the contributory system arose from its refusal to legitimate overt redistribution; from its implicit message to the citizen that she should not expect to get back any more than she paid in.

52. E. BURNS, *supra* note 12, at 14.

ance shared. When she came to one of the redistributive features of the Act (the "retirement test"), she criticized it, noting that because of it "these annuities are not exactly similar to those which people could obtain by paying contributions to a private company."⁵³

Burns's interpretation, though following from Roosevelt's vision, was not compelled by the terms of the statute. The statute uses entitlement language in connection with social security, but it does not use contract rhetoric. Because the constitutionality of an explicit social insurance program was in doubt, the drafters separated social security into a tax title providing for the collection of the payroll tax and a spending title providing for the payment of benefits. The connection between the two titles is not explicit; although work in employment subject to the tax is a condition of entitlement to benefits, so that as a practical matter beneficiaries will have been taxpayers, payment of the tax is not an explicit condition of benefits. Moreover, the Act explicitly reserves Congress's power to withdraw benefits.⁵⁴

Just as it would have been possible to interpret the Social Security title in terms other than those of contractual entitlement, it also would have been possible to interpret the public assistance titles in terms other than those of "concession." This was demonstrated by the New Deal social workers who did not adopt the private law analogy. At the social workers' behest, the public assistance titles of the Act included two provisions specifically designed to protect the autonomy of recipients: a requirement that claimants denied benefits be afforded an administrative hearing and a requirement that benefits be paid in cash rather than in kind.⁵⁵ In the years following the passage of the Act, the social workers appealed to these provisions as evidence that Congress had adopted their notion that need-based assistance should be regarded as a "right."⁵⁶

In refusing to adopt the social workers' interpretation, Burns was reflecting the dominant views of the Roosevelt administration. However, Burns seems not to have shared Roosevelt's distaste for public assistance. One gets the impression that her insistence on the distinction between social insurance and public assistance was prompted less by a desire to denigrate public assistance than to rescue social insurance from the negative popular attitudes toward welfare. Nevertheless,

53. *Id.* at 19. Burns passes over the anomalous (from a private insurance point of view) progressive payout formula without comment. *Id.* at 16.

54. Social Security Act, Pub. L. No. 74-271, § 1104, 49 Stat. 620, 648 (codified as amended at 42 U.S.C. § 1304 (1982)).

55. Social Security Act, Pub. L. No. 74-271, §§ 2(a)(4), 303(a)(3), 1002(a)(4), 49 Stat. 620, 626, 645 (codified as amended at 42 U.S.C. §§ 302(a)(4), 503(a)(3), 1202(a)(4) (1982)) (hearing provision); *id.* §§ 406(b), 1006, 49 Stat. at 629, 647 (codified as amended at 42 U.S.C. §§ 606(b), 1206 (1982)) (money provision).

56. See C. TOWLE, *supra* note 4, at 10, 24, 31; Hoey, *The Significance of the Money Payment in Public Assistance*, SOC. SECURITY BULL., Sept. 1944, at 3.

the cost of this rhetorical strategy was to reinforce the notion that public assistance occupied a lower normative status than social insurance.

Upon passage of the Social Security Act, custody of the new programs went to the Federal Security Agency, which was staffed with people militantly committed to private law welfare jurisprudence. The New Deal appointees, many of whom remained in office for decades, established an ideological and practical commitment to the private law analogy that prevailed through the 1970s. In the late 1930s, and after, they devoted a great deal of effort to defending the social insurance approach against proposals to dilute or replace Social Security with a Townsend-style flat grant program or with an expanded Old Age Assistance scheme. A variety of such proposals were put forward within the Roosevelt administration, often inspired by Keynesian desire to increase purchasing power. In each case, the nascent Social Security establishment argued against such programs on the ground that by divorcing benefits from contributions and subjecting funding to the political vicissitudes of general revenue financing, they would undermine its status as a legal right.⁵⁷

2. 1939–1977: *The sublimation of redistribution.*

Beginning in 1939, Congress enacted a series of amendments that modified the original premises of the Social Security program. The general tendency of these revisions up to 1977 was to attenuate the private insurance analogy by loosening the connection between contributions and benefits. Congress transformed the system from the original one in which the taxes of each cohort were accumulated during its working life to fund the benefits of that cohort on retirement to a current cost or “pay-as-you-go” program in which taxes of currently working cohorts were paid out to current retirees.⁵⁸

During this period, the program became a central and well-established part of the economic and political system. Its annual expenditures grew from \$37 million to \$105 billion; from a negligible fraction of the nation's economy and the federal budget to more than five percent of the gross national product and more than 20 percent of the federal budget; from a negligible portion of the income of the aged to about a third of it.⁵⁹ In the course of this development, social insur-

57. J. CATES, *supra* note 3, at 50–85 (1983).

58. For interpretive accounts of the evolution of the program, see generally M. DERTHICK, *supra* note 13; Martin, *supra* note 32. The tax and benefit provisions of the program since 1935 are set out in SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., HISTORY OF THE PROVISIONS OF THE OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE PROGRAM, SOC. SECURITY BULL., ANN. STATISTICAL SUPP., 1982, at 2–25 [hereinafter cited as 1982 ANN. STATISTICAL SUPP.].

59. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMM., HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 340 (1975); SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., SOC. SECURITY BULL., ANN. STATISTICAL SUPP., 1977–1979, at 53–54 (Sept. 1980) [hereinafter cited as 1977–79 ANN. STATISTICAL SUPP.]; Hurd & Shoven,

ance passed public assistance as the most important form of income transfer. While public assistance in no sense "withered away," social insurance gradually passed and ultimately dwarfed it in size and importance. At the beginning of the period, public assistance expenditures were about three times social insurance expenditures; by the end of the period the ratio had been reversed.⁶⁰

In some respects, the career of the private law approach during this period was a triumph. The ambitions to immunize the program from politics and to protect recipients from stigma were largely fulfilled. The modified private law conception went largely unchallenged among informed observers in government and the academy, and the program acquired a degree of bipartisan political support sometimes characterized as sanctity. Moreover, the redistributive achievements of the program were substantial. By the end of the middle period, social insurance contributed more than three times as much as cash public assistance to the lowest quintile in the income distribution, and Social Security represented more than three-quarters of social insurance expenditures.⁶¹ Yet, the private law approach also seems to have continued to play a role in limiting redistribution or in diverting it along paths that seem somewhat perverse. In the remainder of this subsection, I summarize how the reforms of the middle period attenuated the insurance analogy, and then suggest how the attenuated analogy influenced the distributive design of the program.

Attenuating the insurance analogy. The reforms departed from the strict private insurance principles, on which Roosevelt had initially insisted, in two general ways. The first involved the relation between age cohorts. Those who retired early in the system's history received larger benefits, relative to their contributions, than did those retiring later. Under the original 1935 program, those who retired when the system was scheduled to begin paying benefits in 1942 would have been contributing to the system for only a short time and hence would have built up only a small amount of contributions. Meanwhile, most of the taxes collected from the great mass of the working population would have been simply accumulated to pay benefits to these workers in the distant future. The shift to "pay-as-you-go" principles made it possible to use the tax payments of the large number of covered workers to increase benefits of the comparatively small number of early retirees far beyond what their contributions would have warranted under the original statutory design.

Congress repeatedly increased the rates applied to the wage base in the benefit formula, often without any tax increases. The effect was

The Economic Status of the Elderly, in FINANCIAL ASPECTS OF THE U.S. PENSION SYSTEM 359, 363 (Z. Bodie & J. Shoven ed. 1983).

60. See 1977-79 ANN. STATISTICAL SUPP., *supra* note 59, at 54.

61. See *id.*; CONGRESSIONAL BUDGET OFFICE, BACKGROUND PAPER NO. 17, POVERTY STATUS OF FAMILIES UNDER ALTERNATIVE DEFINITIONS OF INCOME 26 (1977).

both to enlarge payments to beneficiaries who had ceased contributing to the system at all and to increase the prospective benefits of workers beyond what could have been actuarially warranted by tax payments.⁶² In 1973 through adjustments to both the benefit rates and the wage averaging formula, Congress indexed benefits to the consumer price index, thereby providing, at no cost to current beneficiaries, protection that no private insurer offered.

The second general way in which the designers of the program attenuated private insurance premises concerned relations within cohorts. The Act increased coverage and benefits in ways that benefited what private insurers would regard as relatively high-risk individuals without increasing their contributions relative to low-risk individuals. The 1939 amendments created benefits for the dependent or surviving spouse and children of a retired or deceased worker. In 1956, coverage was extended to disabled workers, as were benefits for their dependents.⁶³ Throughout the middle period, Congress repeatedly expanded derivative benefits both by relaxing the eligibility conditions (for example, lowering the age at which widows might qualify), and by increasing the portion of primary benefits on which the derivative ones were calculated. Since all workers pay taxes at the same rates, regardless of how many dependents they have, those with dependents received more extensive coverage relative to contributions than those without, and those with more dependents received more extensive coverage than those with few.⁶⁴

The designers also extended the major intracohort departure from

62. Beginning with the 1939 amendments, the base to which the rates were applied became, not the total amount of wages subject to tax earned by the applicant, but the average monthly wages subject to tax. The benefit formula was adjusted in ways that tended to overstate actual earnings. Workers, for instance, were permitted to drop a number of the lowest earning years. Furthermore, in the 1950s, in connection with the extension of Social Security coverage to several categories of previously excluded workers, all workers were given a "new start"—the option of averaging only the number of years elapsed between 1950 and retirement. The purpose was to "blanket in" the new workers, in effect, treating them as if they had been in the system from the beginning by ignoring the pre-1950 "zero" years in which they had earned no wages subject to tax. The "new start" gave all workers a gradually declining advantage.

63. When a covered worker retires or becomes disabled, his wife—if elderly or caring for a minor child—and each minor child become entitled to benefits equaling 50 percent of the worker's benefit, subject to a family maximum. When a worker dies, his widow—if elderly or caring for a minor child—and each minor child receive a benefit based on what his benefits would be if he were alive, again subject to a family maximum. A typical worker with dependents can thus expect much higher payments on his account than a single worker with the same earnings history. For example, in 1960, the average monthly benefit awarded disabled workers without dependents was \$91.16. On the same earnings record, the family of a disabled worker with two dependents would receive about \$171 (the family maximum), nearly twice as much. See 1977-79 ANN. STATISTICAL SUPP., *supra* note 59 at 18, 24, 111. While no benefits would be paid on the account of the single worker after his death, benefits would continue for a deceased worker's survivors.

64. Another intracohort departure from private insurance principles was the "blanketing in" of new workers, which awarded them benefits identical to those of people who had been in the system making contributions for much longer. See *id.* at 16-17; note 62 *supra*.

private insurance principles in the original legislation—the payout rates that gave low wage workers a higher return on contributions than high wage workers. Successive revisions of the benefit formula increased its progressivity.⁶⁵ In addition, the 1939 amendments established a “minimum benefit,” unrelated to earnings, for the lowest wage worker that was periodically increased in following years. The amendments also continued the “retirement test” that reduced benefits at the rate of 50 percent of earnings above a minimum amount.

In the rhetoric of the program’s designers, the rationale of Social Security shifted from “equity” to a “balance of equity and adequacy.”⁶⁶ “Equity” meant justice to the individual wage earner, which in turn meant fidelity to private insurance norms. “Adequacy” meant the collective goal of assuring a minimally decent income. The reforms that loosened the relation between contributions and benefits, and increased benefits for low wage workers and workers with dependents and survivors, were explained by their sponsors as steps toward adequacy.⁶⁷

Proponents of this line of development continued to insist that the character of social insurance as a right depended on the analogy to private insurance, but they argued that the analogy could tolerate some departure from strict insurance principles, so long as benefits were predominantly wage-related.⁶⁸ Especially in the early years, the liberals differed among themselves about how far the departure from strict private norms could proceed without degrading the program to suben-

65. One measure of this development is the change, during the middle period, in relative replacement rates—the percentages of immediate preretirement earnings replaced by the Social Security benefit. Between 1955 and 1975, the replacement rate rose from 45 to 56 percent for a typical low wage worker, rose from 31 to 43 percent for a typical worker with average earnings, but remained at about 30 percent for a worker with maximum taxable earnings. See STAFF OF SUBCOMM. ON SOC. SEC. OF HOUSE COMM. ON WAYS & MEANS, 95th Cong., 1st Sess., BACKGROUND MATERIALS FOR HEARINGS ON SOCIAL SECURITY 16 (Comm. Print 1977), cited in Martin, *supra* note 32, at 482 n.155.

66. M. DERTHICK, *supra* note 13, at 213–27; J. PECHMAN, H. AARON & M. TAUSSIG, SOCIAL SECURITY: PERSPECTIVES FOR REFORM 55–66 (1968) [hereinafter cited as PERSPECTIVES FOR REFORM]; Ball, *supra* note 12; Brown, *supra* note 12, at 4–6.

67. Social Security rhetoric of the middle period occasionally referred to a third ideal that might be called the replacement norm. See PERSPECTIVES FOR REFORM, *supra* note 66, at 65–66, 82–87. The replacement norm was the percentage of preretirement income that would enable the worker to maintain his preretirement standard of living. The amount was assumed to be less than 100 percent because the worker would have the benefit in retirement of a variety of tax advantages, savings in work expenses, and perhaps reduced consumption needs for some items. The replacement norm differed from “equity” in that it did not relate benefits to contributions. It differed from “adequacy” in that it did not refer to *minimal* need, but rather to whatever standard of living the worker had achieved prior to retirement. The replacement norm could be used to support the practice of paying actuarially unearned benefits in proportion to past earnings. It seems, however, to have played a role subordinate to “equity” and “adequacy” in the rhetoric of the middle period, and I have not been able to find an explicit defense of it anywhere. The replacement norm expresses quite strikingly the tendency of what I have called the insurance state to turn all the incidents of the status quo into entitlements, a tendency that reached its most developed form in the New Property rhetoric discussed in Part III.

68. Brown, *supra* note 12, at 4–5.

titlement status. In the 1940s and 1950s, the New Dealers on the Social Security Board opposed congressional initiatives to loosen the tax-benefit relation on the ground that they would stretch the analogy too far.⁶⁹ But as time passed and the program became more secure, the liberals became more daring. Eventually, for many, the mere fact that benefits were funded by the payroll tax, were formally computed on past wages, and reflected, at least to some extent, past wage differentials, constituted sufficient wage relation. The liberals stood most firm in opposition to general revenue financing, and they successfully resisted the proposals for such financing that were made in the early decades of the program.

Some critics suggest that the liberals were trying to fool the public into thinking that benefits were earned in private insurance terms.⁷⁰ This seems unfair, however. The liberals thought that conditioning benefits on work, and relating them to wages, would be enough to invoke among the public the liberal distributive values of effort and exchange and, in particular, to deter association with need-based redistribution.⁷¹

An indication of the success of the liberal strategy during this period is that, until recently, hardly anyone showed any interest in estimating the "equity" and the "adequacy" components. This is not an easy task, since it requires controversial assumptions about such matters as whether to count the employer's share of the payroll tax as part of the employee's contribution, what interest rate to apply to contributions, the proper discount rate to apply to future benefits, how wage earners are to be grouped for actuarial purposes, and how one evaluates unique Social Security features such as the indexation of benefits.

Although the recent efforts to separate out the equity and adequacy components of Social Security depend on challengeable assumptions about such matters, they suggest convincingly that the unearned or "adequacy" portion of Social Security payments throughout the middle period was very large. One study estimates that the "earned" or insurance component of retirement and spouse benefits at the beginning of the middle period was only about five percent, and that it had increased to only about 35 percent by 1970. The remainder, from 95 to 65 percent, constituted what the study calls the "welfare" component.⁷² A more focused study puts the welfare component of 1972 retirement benefits at 73 percent.⁷³ Although the welfare component has declined as each successive cohort of retirees has been in the system longer and paid more taxes, it remains substantial and will continue to be substan-

69. See J. CATES, *supra* note 3, at 70-79; see also M. DERTHICK, *supra* note 13, at 216 (administrators' opposition to "blanketing in" new workers in 1950).

70. Friedman, *supra* note 2, at 25-30.

71. See Brown, *supra* note 12; Ball, *supra* note 12.

72. See Parsons & Munro, *supra* note 24, at 76.

73. Burkhauser & Warlick, *Disentangling the Annuity from the Redistributive Aspects of Social Security in the United States*, 27 REV. OF INCOME & WEALTH 401, 407 (1981).

tial throughout this century.⁷⁴

Influencing redistribution. From the point of view of traditional liberal redistributive values, the developments of the middle period had considerable success. Poverty decreased significantly, especially among the aged. The poverty rate was 22.4 percent overall and 37.7 percent for the aged in 1959; it was 11.6 percent overall and 14.1 percent for the aged in 1977.⁷⁵ (A few years later the rate for the aged had fallen slightly below the overall rate.)⁷⁶ Social Security played the most critical role in this change. By the end of the 1970s, it provided about a third of the income of the aged.⁷⁷ Ninety-six percent of retirees were eligible for some benefits; one seventh of the entire population and one fourth of poor families received benefits.⁷⁸ The indexing of benefits in 1972, together with the in-kind medical programs that grew rapidly after 1965, immunized recipients from much of the ravages of the inflation of the 1970s.

Yet the liberal social insurance strategy also involved significant disadvantages. From a welfare or need-based perspective, it had perverse distributive consequences. A basic problem is that social insurance targets benefits poorly with regard to need. This is a less serious problem with the aged than with most other groups, since old age is associated strongly with pretransfer poverty. Slightly more than half of the elderly would have been in poverty during the 1970s without government transfers.⁷⁹ Thus, even imprecisely targeted benefits are likely to reach the needy in substantial proportions.⁸⁰ But the size of Social Security is such that the remaining expenditures by themselves exceed the size of any other income maintenance program.⁸¹ It is thus a matter of

74. Hurd & Shoven, *The Distributional Impact of Social Security*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER No. 1155, at 29-31 (June 1983).

75. 1977-79 ANN. STATISTICAL SUPP., *supra* note 59, at 60.

76. 1982 ANN. STATISTICAL SUPP., *supra* note 58, at 64.

77. Hurd & Shoven, *supra* note 59, at 363.

78. S. LEVITAN, PROGRAMS IN AID OF THE POOR FOR THE 1980s, at 23-24 (4th Ed. 1980).

79. Martin, *supra* note 32, at 449 (precash transfer poverty rate for elderly in 1975 was 53 percent).

80. By one estimate, 58 percent of Social Security benefits went to the pretransfer poor in 1974. S. Danziger, R. Haveman, & R. Plotnick, *Income Transfer Programs In the United States: An Analysis of Their Structure and Impact* (1979) (unpublished manuscript) *discussed in* B. PAGE, WHO GETS WHAT FROM GOVERNMENT 63-66 (1983) [hereinafter cited as B. PAGE].

81. I do not know of any estimates of the magnitude of unearned Social Security transfers to the nonpoor, but consider: Burkhauser and Warlick estimate unearned 1972 retirement expenditures at \$19.7 billion. Burkhauser and Warlick, *supra* note 73, at 407. In addition, 1972 survivor's expenditures, which they didn't consider and which are unearned in a strict insurance sense, were \$9.4 billion. SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., SOC. SEC. BULL., ANN. STATISTICAL SUPP. 1972, at 122 [hereinafter cited as 1972 ANN. STATISTICAL SUPP.]. According to one estimate, 36 percent of retired couples and 18 percent of surviving women beneficiaries in 1972 were not poor before transfers. Holden, *Supplemental OASI Benefits to Homemakers Through Current Spouse Benefits, a Homemaker Credit, and Child-Care Drop-Out Years*, in A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY 41, 47, 50 (R. Burkhauser & K. Holden ed. 1982). If these percentages are applied to the unearned expenditures, the result is \$9.7 billion in retirement and \$1.7 billion in survivors' benefits, or a total of \$11.4 billion as a (crude) estimate of

concern that an indeterminate, but substantial, portion of these expenditures cannot be justified in terms of either "equity" or "adequacy." This portion is "the price of rejecting the welfare method of dealing with the aged poor."⁸²

From the need-based perspective, the most distinctive feature of the benefit structure—earnings relation—is also the most perverse. It tends to give larger benefits to people with larger preretirement incomes, who tend to be relatively wealthy retirees. The regressive tendency of earnings relation is partially offset by other features, notably the payout rates that replace relatively large percentages of average earnings for relatively low earners, the "minimum benefit" that until 1981 paid the lowest earners even more than the general rates would warrant, and the "retirement test," which tends to burden the relatively wealthy. In addition, the shorter life expectancy and poorer health of the relatively poor means that more disability and survivors' benefits are paid on their accounts. On the other hand, other aspects of the system seem to intensify the regressive tendency of earnings relation. The averaging formula that drops out low earning years, in combination with aspects of the pre-1977 formula that gave disproportionate weight to late career earnings, tended to benefit workers with career patterns (late entry to the labor market followed by steadily rising earnings) especially characteristic of the relatively wealthy. The fact that the wealthy tend to have longer life expectancies means that they tend to collect retirement benefits longer.⁸³ Although the net effect of these conflicting tendencies cannot be precisely determined, there is good reason to believe that during the middle period the larger unearned transfers went to people who were not poor. In a study of people retiring in 1975, Michael Hurd and John Shoven found that unearned lifetime transfers increased fairly steadily with wealth. Unearned transfers to the wealthiest quartile were between 60 and 100 percent (depending on how they were calculated) more than transfers to the poorest quartile.⁸⁴

unearned transfers to the nonpoor. This is more than the total amount—\$11.2 billion—of cash public assistance (excluding veterans' programs) paid out in 1972. 1972 ANN. STATISTICAL SUPP., *supra*, at 146.

This procedure is embarrassingly crude. Among other things, the percentages are based on smaller groups than the payment figures, and the comparison assumes that average unearned transfers were the same for the poor and nonpoor, although the studies indicate that they are larger for the nonpoor. Still, it is sufficient to indicate that the magnitude of Social Security expenditures unjustified by considerations of adequacy or equity was large.

82. PERSPECTIVES FOR REFORM, *supra* note 66, at 59-60.

83. See H. AARON, ECONOMIC EFFECTS OF SOCIAL SECURITY 78-80 (1982). To the extent that relatively low wage workers are less steadily employed, "drop out" years benefit them, but this effect may be weaker than the one associated with upper class career patterns. See Aaron, *Demographic Effects on the Equity of Social Security Benefits*, in THE ECONOMICS OF PUBLIC SERVICES 151-73 (M. Feldstein & R. Inman ed. 1977).

84. Hurd & Shoven, *supra* note 74, at 20. The 60 percent estimate was derived from an analysis that considered contributions and benefits on an individual basis. The 100 percent figure was based on an analysis that classified workers by income and apportioned the taxes of

Moreover, reliance on Social Security, rather than means-tested benefits, to insure minimally adequate income has reduced the progressivity of the tax system. While federal public assistance expenditures are funded from general revenues, derived principally from the progressive income tax, Social Security is financed from a payroll tax that taxes wages regressively and leaves unearned income untouched. As the Social Security payroll tax grew from a negligible portion of federal revenues in 1939 to more than one quarter of them in 1977,⁸⁵ the tax system became less progressive. This distributional tendency has been compounded by the income tax exemption for Social Security benefits—a regressive tax expenditure estimated for 1977 at \$5.1 billion.⁸⁶

The success of the social insurance approach in securing a minimally adequate income for the elderly, while substantial, has been incomplete. Fourteen percent of the elderly remained poor after cash transfers in 1977.⁸⁷ Most of these people received some Social Security income, but not enough to remove them from poverty. For millions of old people, social security had not obviated reliance on public assistance. The principal option available to them has been the Supplemental Security Income program (SSI), which replaced the state grant-in-aid program for the elderly in 1974. While more generous than its predecessor, SSI is not munificent. The federal SSI benefit levels were set at 85 percent of the poverty line for couples, and 71 percent for individuals. These fractions declined somewhat in the late 1970s because of incomplete indexing for inflation. Some states supplemented the benefit levels, and the program increased benefits for most recipients by a small disregard for Social Security income, but in only 17 states did the program purport to guarantee recipients a poverty level income in 1978.⁸⁸

workers who died before reaching eligibility among beneficiaries in the relevant group. The greater difference between high and low income transfers reflects the greater life expectancies of high income earners.

Burkhauser and Warlick's study, which considered workers individually, found that the unearned component of 1972 retirement payments was highest for middle income workers, although the highest income workers received larger transfers than the lowest income workers. Burkhauser & Warlick, *supra* note 73, at 408.

If one considers transfers relative to contributions, rather than in absolute terms, there is evidence that rates of return vary progressively, at least if contribution records are considered individually. Freidan, Leimer & Hoffman, *Internal Rates of Return to Retired Worker-Only Beneficiaries under Social Security, 1967-1970*, in 18 OFFICE OF RESEARCH AND STATISTICS, SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., STUDIES IN INCOME DISTRIBUTION No. 5 (1976). In Hurd and Shoven's group-based analysis, rates of return are fairly constant across income levels. See Hurd & Shoven, *supra* note 74, at 17. These studies do not consider derivative or disability benefits. Including them would probably increase the progressivity of the results.

85. See OFFICE OF MANAGEMENT & BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1979, at 476-77.

86. See OFFICE OF MANAGEMENT & BUDGET, SPECIAL ANALYSIS, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1979, at 159.

87. 1977-79 ANN. STATISTICAL SUPP., *supra* note 59, at 60.

88. SENATE SPECIAL COMM. ON AGING, 98TH CONG., 2D SESS., THE SUPPLEMENTAL SECURITY INCOME PROGRAM: A 10-YEAR OVERVIEW 105-07 (Comm. Print 1984) [hereinafter

More harmful than the incompleteness of the response to aged poverty has been the slowness of the response. Well over a third of the elderly remained poor until the 1960s, and as recently as 1970 poverty among the elderly was nearly twice the rate among the nonelderly. Prior to the federalization of old age public assistance, state benefit levels varied widely, and most were far below any plausible notion of adequacy. In the early part of the middle period, the commitment to

cited as THE SSI PROGRAM]. If one considers that the aged poor might have at least the minimal amount of Social Security income disregarded in determining SSI eligibility (very likely) and that they might be eligible for Food Stamps (likely), then an elderly couple without earnings would be guaranteed an income close to the poverty line since 1975 even in states without supplements. An individual, however, would be left from 9 to 14 percent below the line even with these additional benefits. SUBCOMM. ON OVERSIGHT AND SUBCOMM. ON PUB. ASSISTANCE AND UNEMPLOYMENT COMPENSATION, HOUSE COMM. ON WAYS & MEANS, 98TH CONG., 1ST SESS., BACKGROUND MATERIAL ON POVERTY 94-95 (Comm. Print 1983) [hereinafter cited as BACKGROUND MATERIAL ON POVERTY].

The persistence of poverty among the aged is a function of both the benefit levels and the large percentage—about 50% for SSI—of eligible people who fail to apply. The low participation rates stem, in varying proportions, from lack of information, administrative inconvenience, and cultural inhibitions about accepting welfare. See Menefee, Edwards & Schieber, *Analysis of Nonparticipation in the SSI Program*, SOC. SECURITY BULL., June 1981, at 3.

I refer to the official poverty measure because it is the closest thing we have to a generally accepted standard of minimal adequacy. Nevertheless, the standard has become increasingly controversial. Some contend that it understates need; others that it overstates need. Compare NATIONAL FOR SOCIAL SCIENCE AND LAW CENTER, *Measuring Poverty*, 15 CLEARINGHOUSE REV. 648 (1981) with M. ANDERSON, *WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES 19-27* (1978).

My view is that, while there is substance to the argument for overstatement, it is more than offset by the argument for understatement. While I cannot review the controversy here, I will mention the two most prominent objections to the current practice.

The most prominent argument for the understatement claim is that the poverty line fails to take account of improvements in general standards of living since the early 1960s when it was formulated. The current standards reflect the inflation-adjusted cost of living standard deemed minimally adequate more than two decades ago when real per capita national income was substantially lower. It has been strongly argued, both that a plausible notion of minimal adequacy must acknowledge changes in the general economic standards of the society, P. TOWNSEND, *POVERTY IN THE UNITED KINGDOM 50-52* (1979), and that the views of minimal adequacy most widely held by Americans do in fact reflect such standards. L. RAINWATER, *WHAT MONEY BUYS: THE SOCIAL MEANINGS OF INCOME 64-93* (1974).

The most prominent argument for overstatement is that the customary application of the poverty measures excludes in-kind transfers. The point has some validity, especially with respect to Food Stamps, which can be exchanged for cash at only a small discount. However, with most other in-kind benefits, the critics' favorite remedy—imputing income to recipients in the amount of the cost of the in-kind benefits—does not seem plausible. For one thing, since many in-kind benefits are ineffectively delivered, their cost overstates their value to recipients. Moreover, because most in-kind benefits cannot be exchanged, they can be used to meet only a single element of need. Cashing out an expensive in-kind benefit can thus obscure the extent to which a recipient may be unable to meet other elements of need. These objections are especially strong with regard to medical care, the most important in-kind transfer to the elderly. In-kind medical transfers have become large since the enactment of Medicare and Medicaid in 1965. Yet few believe that these expenditures have efficiently served the health care needs of the elderly. Moreover, medical costs have so increased that, on the average, old people now spend more (in constant dollars) of their cash income for medical care than they did before the programs were enacted (though the amount is probably lower for the elderly poor who qualify for Medicaid). See S. CRYSTAL, *AMERICA'S OLD AGE CRISIS 33-37* (1982); V. FUCHS, *HOW WE LIVE 198-99* (1983). Thus, the cost of these transfers overstates their effectiveness in meeting need, and cashing them out, even at a reduced value, would probably lower the implicit allowances for nonmedical need in the poverty standard.

the primacy of social insurance in private law welfare jurisprudence seems to have played a role in holding down both benefit levels and accessibility of old age public assistance. Senior Social Security officials repeatedly opposed initiatives by progressive states, congressional leaders, and the social workers in the federal Bureau of Public Assistance to expand Old Age Assistance benefits and streamline financial eligibility procedures for fear that liberalized Old Age Assistance "would [place] the retirement system [Social Security] in an unfavorable light and [hold] the threat that the assistance program will continue as the primary income maintenance program for the aged."⁸⁹ Jerry Cates argues that these efforts turned the private law welfare jurisprudence premise, that means-tested programs are necessarily miserly and degrading, into a "self-fulfilling prophecy."⁹⁰

When one looks beyond the elderly to the more comprehensive income maintenance goals of the New Dealers, more extensive failures appear. At their most ambitious, the New Dealers expected the two social insurance programs—Unemployment Insurance and Social Security—to evolve to the point where they would provide minimal income protection for everyone. Unemployment Insurance would provide coverage for those in the labor market and Social Security would provide for those outside the labor market (with Worker's Compensation filling gaps in both programs).⁹¹ But fifty years later, there were huge gaps in social insurance coverage. In the mid-1970s, Unemployment Insurance provided no benefits to between 30 and 50 percent of unemployed workers, including many of the poorest.⁹² If a person could not work because of a disability arising from employment, if he was totally and permanently disabled, or if he had the requisite military connection, he might be eligible for worker's compensation, Social Security disability, or veterans' benefits. But if he were healthy, or had a partial or short-term disability, and no service connection, his only resource for cash assistance in most states was Aid to Families with Dependent Children (AFDC) or General Relief.

AFDC is available only to households with children and is hedged by eligibility restrictions that exclude most two-parent families. Benefit levels in even the more generous states have been low by the standards

89. J. CATES, *supra* note 3, at 134 (quoting Wilbur Mills). For example, the Social Security Board insisted on intrusive eligibility procedures, such as "home visits" and personal investigations, rather than the declaration system favored by the social workers. The Board also disapproved state efforts to exempt a variety of forms of income and assets in determining eligibility, rejected the social workers' proposals for "family" rather than individual budgeting procedures that would take account of the needs of nonelderly spouses and children living with elderly claimants, and declined to press states with exceptionally low need standards to raise them. See *id.* at 104-05; A. ALTMAYER, *supra* note 48, at 61.

90. J. CATES, *supra* note 3, at 108.

91. *Preliminary Report of the Staff of the Comm. on Economic Security* (Sept. 1934), reprinted in *STATUTORY HISTORY OF THE UNITED STATES, INCOME SECURITY* 72-74 (R. Stevens Ed. 1970).

92. *BACKGROUND MATERIAL ON POVERTY*, *supra* note 88, at 100-03. In the 1980s, the percentage climbed well above half. S. LEVITAN, *supra* note 32, at 46-49.

of several European child welfare programs.⁹³ Only a few states have guaranteed beneficiaries a poverty level income. In the early 1970s, when benefit levels were at their highest real value in the program's history, the guarantee for a family of four in the median state was about 55 percent of the poverty line, with Food Stamps, available to most beneficiaries, bringing them to about 70 percent. Guarantees in the least generous states have sometimes been below 25 percent of the poverty line.⁹⁴

Poor people who fail to satisfy the categorical requirements of the federally aided programs are left without any cash public assistance in many states; in others they are remitted to General Relief programs that almost universally provide benefits far below the poverty line.⁹⁵

One manifestation of the commitment to the primacy of social insurance is that for many years expenditures on Social Security derivative benefits, a "welfare" expenditure by any strict private insurance analogy, have exceeded combined expenditures on AFDC, SSI, and General Assistance. In 1977, Social Security made payments averaging \$129.11 per month to five million children of retired, deceased, or disabled wage earners, many of whom were not poor, while AFDC made payments averaging \$79.97 per month to 7.7 million children, all of whom were poor.⁹⁶

Moreover, demographic trends during this period exacerbated a regressive feature of the structure of Social Security derivative benefits. Mimicking private insurance norms, Social Security provides benefits for aged married partners and legitimate minor children automatically on the death, disability, or retirement of the wage earner, but provides no benefits for spouses divorced within 10 years of the marriage (20 years prior to 1977) or for unmarried partners. It provides benefits to illegitimate children only when they are actually supported by the wage earner at the time of his death, disability, or retirement.⁹⁷ The middle period saw a sharp increase in divorce, unmarried cohabitation, and illegitimacy.⁹⁸ These trends had the strongest impact among the rela-

93. A. KAHN & S. KAMERMAN, *INCOME TRANSFERS FOR FAMILIES WITH CHILDREN: AN EIGHT-COUNTRY STUDY* 17-38 (1983).

94. BACKGROUND MATERIAL ON POVERTY, *supra* note 88, at 77-85. Families with earnings could have supplemented the grant to a higher level, but few AFDC families had any earnings. See OFFICE OF RESEARCH AND STATISTICS, OFFICE OF POLICY, SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., *AID TO FAMILIES WITH DEPENDENT CHILDREN; DEMOGRAPHIC & PROGRAM STATISTICS, 1979 RECIPIENT CHARACTERISTICS STUDY* 2-3 (1982) (14 percent of AFDC mothers and over 11 percent of fathers employed).

95. See S. LEVITAN, *supra* note 32, at 38.

96. 1977-79 ANN. STATISTICAL SUPP., *supra* note 59, at 129, 176, 235, 248, 250.

97. The Supreme Court rejected a series of equal protection challenges to these provisions made on behalf of divorced wives, unmarried mothers and illegitimate children. See *Califano v. Boles*, 443 U.S. 282 (1979), *Mathews v. DeCastro*, 429 U.S. 181 (1976); *Mathews v. Lucas*, 427 U.S. 495 (1976).

98. Between the 1940s and the 1970s, the divorce rate doubled to nearly 50 percent; a quarter of the marriages contracted in 1970 ended within seven years. Between 1960 and

tively poor and among blacks.⁹⁹ Thus, the number of people disadvantaged by the program's discrimination in favor of conventional family structure has grown, and the burden of the discrimination has been concentrated disproportionately on the relatively poor and blacks.¹⁰⁰

By the 1960s, liberal welfare administrators ceased to regard public assistance as a threat to the primacy of social insurance. Moreover, the exceptional economic growth of the 1960s and the "peace dividend" from the end of the Vietnam War made it possible to expand both social insurance and public assistance dramatically. The "zero sum," stagflation society that emerged in the mid-1970s, however, was far less hospitable to public assistance. In this period of fiscal crisis, public assistance programs repeatedly lost ground relative to social insurance, even though they accounted for a smaller portion of public expenditure. Social Security benefits increased by 10 percent in 1971, by 20 percent in 1972, and by 7 percent in 1973 and were indexed (effective 1975) by a formula that immunized them from the runaway inflation of the late 1970s.¹⁰¹ Although the federal SSI payment and Food Stamps were also indexed (albeit incompletely), most states allowed their public assistance standards (including state SSI supplements¹⁰²) to erode through inflation. The real value of AFDC payment standards declined by an average of 17 percent during the 1970s.¹⁰³

The tendency to protect social insurance more than public assistance that emerged in the middle period intensified in the following years under the Reagan administration's attack on welfare spending. Despite its professed commitment to the "truly needy," the Administration's first term budgets would have scaled down public assistance programs by more than double the proportion they would have cut social insurance programs. Food stamps would have been cut in half and AFDC by more than a quarter, while Social Security would have been cut by only 10 percent. Although the reductions Congress enacted cut

1979, the illegitimacy rate more than tripled to 17 percent. See A. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 12, 23-4 (1981); V. FUCHS, *supra* note 88, at 27.

99. See A. CHERLIN, *supra* note 98, at 81-82, 94-100; BUREAU OF THE CENSUS, U.S. DEP'T OF COM. STATISTICAL ABSTRACT OF THE UNITED STATES, 1985, at 455.

100. It will probably take several decades for the full effects of these changes to appear. They will continue to be offset somewhat by the tendency of nonwhites to benefit more from survivors' and disability benefits because of shorter life expectancies and poorer health. Blacks are currently overrepresented relative to their proportion in both the population and the workforce among survivors' and disability beneficiaries (including disability dependents'), but underrepresented among retirement beneficiaries. HOUSE COMM. ON WAYS & MEANS, 96TH CONG., 1ST SESS., REPORT OF THE 1979 ADVISORY COUNCIL ON SOCIAL SECURITY 129-31 (Comm. Print 1980). The Advisory Committee, which rejected charges that the program is unfair to blacks after concluding that the ways in which it disadvantaged blacks were reasonably offset by the ways it advantaged them, did not consider the disadvantages arising from the program's family structure norms.

101. M. DERTHICK, *supra* note 13, at 432.

102. THE SSI PROGRAM, *supra* note 88, at 92-93.

103. URBAN SYS. RESEARCH & ENG'G, AFDC STANDARDS OF NEED 304-05 (1980) (report to Social Security Administration). The decline continued in the early 1980s. S. LEVITAN, *supra* note 32, at 32.

heavily into Unemployment Insurance and largely spared SSI, they generally came down more heavily on means-tested programs. Food stamps expenditures were reduced by 13.8 percent, AFDC by 14.3, while Social Security was cut by 4.6 percent.¹⁰⁴

If private law welfare jurisprudence is due credit for the political strength of social insurance, it should also bear responsibility for the political vulnerability of public assistance. In the "zero sum" society, the protection of social insurance seems to have come at the expense of public assistance programs better grounded in traditional liberal humanitarian and redistributive concerns. Private law welfare jurisprudence has encouraged or legitimated this situation in two respects. First, it has insisted on the normative priority of social insurance and interpreted its status as a right to imply immunity from reassessment and revision. By thus sanctifying programs that constitute about three-quarters of the income maintenance system, it restricts the ability of the system to shift resources to unanticipated or newly perceived need and pushes the brunt of budget cutting initiatives on public assistance. Second, it has contributed to the political isolation of the poor—precisely the result it sought to avoid. Partly because high unemployment and wage inequality persisted, partly because of increased divorce and illegitimacy, and partly because social insurance never expanded to cover a variety of circumstances, public assistance did not wither away. But earnings-related social insurance programs did grow to obviate reliance on public assistance for a substantial segment of the working class, particularly those with relatively secure employment and relatively stable families. In doing so, it split the income maintenance constituency, leaving only the weakest with a strong stake in public assistance.¹⁰⁵

104. Bawden & Palmer, *Social Policy: Challenging the Welfare State*, in *THE REAGAN RECORD* 177, 184-87 (J. Palmer & I. Sawhill ed. 1984). Overall, social insurance expenditures were reduced by 6.5 percent, and means-tested programs by 8.2 percent. *Id.*

105. The association of superior normative status and perverse distribution, emphasized above in the evolution of Social Security, can also be seen in the other major social insurance program, Unemployment Insurance. Like Social Security, Unemployment Insurance usually has been protected and sometimes even expanded during the period of public assistance erosion and cutbacks since the early 1970s. Yet, Unemployment Insurance is far less targeted to need than Social Security. According to an analysis by Sheldon Danziger, Robert Haveman, and Robert Plotnick, only 20.8 percent of unemployment benefits were paid to the pre-transfer poor in 1974. B. PAGE, *supra* note 80, at 65-66; see also Feldstein, *Unemployment Compensation: Adverse Incentives and Distributional Anomalies*, 27 NAT'L TAX J. 231, 238-39 (1974) (only 17 percent of benefits paid to poorest 28 percent of families in 1966).

There probably has been a much closer relation between contributions (taxes) and benefits in Unemployment Insurance than in Social Security. Still, there are several senses in which some Unemployment Insurance benefits might be said to be "unearned." First, there are large interindustry cross subsidies, notably from industries with relatively stable demand for labor to those with unstable or cyclical demand. See D. HAMERMESH, *JOBLESS PAY AND THE ECONOMY* 64-69 (1977). Second, in the late 1970s and 1980s, federal general revenues have been used to fund some benefits in the program, and there have been proposals to expand general revenue funding. See TAX FOUND. INC., *RESEARCH PUB. NO. 35, UNEMPLOYMENT INSURANCE: TRENDS AND ISSUES* 65-77 (1982). Third, recipients benefited, until 1979, from a total federal income tax exemption for benefits and continue to benefit from a partial exemp-

3. 1977-present: the "crisis" of redistribution.

Prior to the 1970s, "[b]asic choices about the distribution of costs and benefits [in the system] were treated as if they were settled for all eternity."¹⁰⁶ After 1939, most change took the form of expanding coverage and benefits within the original framework. In particular, with only a few exceptions of small financial magnitude,¹⁰⁷ benefits once enacted were not diminished or eliminated. Private law jurisprudence considered this immunity from diminution of enacted, or "promised," benefits an essential implication of the private law analogy.¹⁰⁸ It saw diminution as an impairment of contract or a deprivation of a vested right. Some argued that such actions should be held unconstitutional—a claim that the Supreme Court rejected in the 1960 case of *Flemming v. Nestor*.¹⁰⁹ All thought that such actions would be bad policy that would undermine the status of the program's benefits as entitlements.

Since the 1970s, however, the private law vision has been threatened by a growing perception that the system will be unable to continue to provide benefits in accordance with the enacted scheme. There have been repeated projections of short term and long term deficits. During the 1970s, steady economic growth came to an end; runaway inflation repeatedly threatened, and Social Security deficit projections came to be linked to the problems of the stagflation economy. Although bipartisan Congressional and popular support remained strong, the liberal supporters lost their near monopoly of expertise about the program. A largely conservative counter-establishment of policy professionals emerged and produced a well-informed and influential literature attacking its basic premises.

The changed circumstances of the program were expressed in 1977 and again in 1981 and 1983, when Congress, for the first time in history, legislated broad scale reductions of previously enacted benefits, twice adding substantial tax increases. The 1977 and 1983 changes narrowly averted imminent large deficits in the Social Security trust

tion. The advantages of the exemption are weighted toward relatively high income families. Feldstein, *supra*, at 240-43 (over half tax savings went to top 40 percent of families in 1966).

106. M. DERTHICK, *supra* note 13, at 381.

107. See Wollenberg, *Tested Rights in Social Security Benefits*, 37 OR. L. REV. 299 (1958).

108. See, for example, the following exchange recorded in *Analysis of the Social Security System: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways & Means*, 83d Cong., 1st Sess. 878 (1953):

Mr. [Representative] Curtis: If the millions and millions of American people who have paid the social security tax through the years have an insurance contract, there is nothing that I can say that will take it away from them

Mr. [Representative] Eberharter: Is it conceivable to you that Congress would abolish any statutory rights now existing in those people who have wage credits for social security purposes?

Mr. [Social Security Commissioner] Altmeyer: No, sir.
Id. at 919, 924.

109. 363 U.S. 603 (1960). The best known argument against the case is in Reich, *supra* note 15, at 769-71.

funds. The 1977 change revised the 1972 cost-of-living indexing formula to eliminate its unanticipated tendency, in the surprising stagflation economy of the mid-1970s, to raise benefits by more than increases in the consumer price index. The 1981 amendments made several cutbacks, including elimination of the minimum benefit and of children's benefits for students over 18. The 1983 amendments made a panoply of changes including a revision in the cost-of-living procedure that reduced benefits, partial repeal of the income tax exemption for benefits, and a long term increase of two years in the retirement eligibility age to be phased in between 2009 and 2027.¹¹⁰

President Reagan paid homage to the private law ideal when he retreated from his 1981 proposals for larger cuts than those enacted and appointed a commission with the charge to "remove Social Security once and for all from politics."¹¹¹ It seems clear, however, that the 1983 revisions enacted on the recommendation of the commission breached the norms of the contract analogy.¹¹² Yet, the liberal Social Security establishment supported the amendments. It did so in the belief that changing social circumstances had created problems that could only be resolved through benefit reductions. Many critics contend that the amendments have not solved the problems of the system. They insist that the system is still in a crisis involving threatened deficits and damage to the surrounding economy. Such charges have aroused popular anxiety about the system and have created a high profile policy debate about the program's basic purposes for the first time since the 1930s.¹¹³

110. See Martin, *The Art of Decoupling: Keeping Social Security's Promise Up-to-Date*, 65 CORNELL L. REV. 748 (1980) (analyzing the 1977 revisions); Svahn, *Omnibus Reconciliation Act of 1981: Legislative History and Summary of OASDI and Medicare Provisions*, 44 SOC. SECURITY BULL., Oct. 1981, at 3; Svahn & Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SECURITY BULL., July 1983, at 3.

111. 46 SOC. SECURITY BULL., July 1983, at 6.

112. One indication of this breach is the fate of analogous amendments to statutory public pension programs in the 1960s and 1970s. These amendments, which were designed either to eliminate unintended distributional anomalies or to reduce fiscal pressures arising from unexpected economic change or tax revolts, were struck down by some state courts under fairly rigorous applications of state constitutional provisions against impairing contracts. See, e.g., *Kleinfeldt v. New York City Employees' Retirement Sys.*, 36 N.Y.2d 95, 324 N.E.2d 865, 365 N.Y.S.2d 500 (1975). Typically, the courts assumed that the characterization of these benefits as contracts mandated the conclusion that no enacted provision could be modified to the disadvantage of employees who had entered the program at the time the provision was in effect. Of course, there are a variety of contract principles that could support arguments for different results. See, e.g., *Spalding v. Rosa*, 71 N.Y. 40 (1877) (impossibility); *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887) (mistake); see also *Yeazell v. Copins*, 98 Ariz. 109, 116-17, 402 P.2d 541, 546 (1965) (discussing applicability of mistake doctrine to public pensions). But the cases reflect the general association common to private law welfare jurisprudence of right and contract and in turn with immunity from revision.

113. My characterization of the conservative critique is based on THE CRISIS IN SOCIAL SECURITY (M. Boskin ed. 1978); A. H. ROBERTSON, THE COMING REVOLUTION IN SOCIAL SECURITY (1981); Derthick, *How Easy Votes On Social Security Came To An End*, PUB. INTEREST, Winter 1979, at 94; Peterson, *The Salvation of Social Security*, N.Y. REV. BOOKS, Dec. 16, 1982, at 50-57; Peterson, *A Reply to Critics*, N.Y. REV. BOOKS, Mar. 17, 1983, at 48-57.

My characterization of the liberal defense is based on Kuttner, *The Social Security Hysteria*,

The defenders of the program suggest that the crisis is an artifact of conservative ideology rather than of changes in social circumstances. They argue that the post-1983 system is viable in terms of its original and still widely shared goals and that allegations of crisis simply reflect the repudiation of these goals by a conservative minority. While there is much to be said for this response, I think that the program as conceived by private law welfare jurisprudence is under serious pressure from recent social developments emphasized in the crisis literature. I also think that the viability of the private law approach as a liberal and legal strategy is further threatened by an important development that has played a subordinate role in the crisis debate—the growth of employee pensions. In the remainder of this subsection, I first summarize the issues in the crisis debate and then focus on the pension phenomenon.

The crisis debate. The claim that the system is in crisis rests on four arguments. The first argument is that political support for the system is being eroded by the decline of the “start up” phenomenon. This argument interprets the political support for the system in past decades as a kind of pyramid scheme that is about to reach its limits and collapse. In this view, individuals were willing to pay taxes and support the system because they thought that they were accumulating funds for themselves in old age. Either they did not understand that their taxes were going to pay current beneficiaries or they shortsightedly failed to think about it. In the early years retirees paid taxes only a short while and hence had fairly modest expectations. As long as the “start up” phenomenon persisted, the ratio of taxpayers to beneficiaries was high. The “start up” phenomenon was prolonged by the gradual incorporation of the workforce into the system. As new workers were brought in, new revenues became available that, under a “pay-as-you-go” system, could be used to pay benefits to present beneficiaries.

The “start up” phenomenon is becoming exhausted. There are hardly any new recruits to bring into the system, and people retiring now have made relatively large tax payments and consequently have relatively high expectations. The tax burden on current workers has become much larger. Moreover, the growing strain imposed by this burden has increased awareness of the “pay-as-you-go” nature of the system. According to this argument, realization by current workers that their claims to future benefits depend on “the willingness of future generations” to pay for them has generated anxiety about the system that may lead younger workers to withdraw support. Of course, under any economic arrangement, the claims of future beneficiaries depend on

NEW REPUBLIC, Dec. 27, 1982, at 17; Munnell, *A Calmer Look at Social Security*, N.Y. REV. BOOKS, Mar. 17, 1983, at 41–48; R. Ball, *Protecting Social Security* (n.d.) (unpublished pamphlet on file with author).

See generally Thompson, *The Social Security Reform Debate*, 21 J. ECON. LITERATURE 1425 (1983) (a valuable survey of the entire literature).

the willingness of the rest of the society to honor those claims. The conservative argument thus assumes that the greatest security is afforded by strict traditional private law norms and that the attenuation of the private law analogy by the "pay-as-you-go" method has stretched the private law analogy too far.

The second argument focuses on demographic factors. The declining ratio of contributors to beneficiaries resulting from the maturing of the system is being exacerbated by declining fertility and mortality rates. The fertility rate fell more than forty percent between the mid-1950s and 1980. At the same time, life expectancy of the elderly increased steadily.¹¹⁴ The two trends suggest that the number of workers contributing relative to the number of elderly beneficiaries will continue to decline. This prospect is not an immediate one. Retirees for the remainder of this century will be members of the relatively small cohorts born in the low-fertility rate periods of the 1920s and 1930s. However, beginning about 2015, when the large and increasingly long-lived "baby boom" cohorts begin to retire, the contributor/beneficiary ratio may fall drastically. In 1980, there were 3.3 workers per beneficiary.¹¹⁵ The 1983 Social Security Trustees' report on which the 1983 legislative revision was based estimated that by 2060 the ratio will have fallen to between 2.7 and 1.3, and the conservative argument insists that the lower estimates are the more plausible.

The third argument focuses on the change during the 1970s from the steady-growth Keynesian economy of the prior postwar period to the "zero sum," stagflation economy in which growth seems more problematic. The postwar designers of Social Security assumed that the basic problems of economic management had been solved and that the economy would proceed permanently within the basic parameters of that period.¹¹⁶ One of these parameters was wage rates that increased ahead of prices, so that the system could soundly tie revenues to wages and benefits to prices. Another parameter was steady and substantial growth, so that future generations could finance benefits to current workers out of an expanded pool of resources. These parameters were threatened in the 1970s. The historical relation of wage and price growth reversed, requiring the 1977 revision of the indexing formula and creating long-term problems that remained even after the revision.¹¹⁷ Growth declined, then disappeared, and then re-emerged in the 1980s in circumstances in which it seemed less secure and more problematic. The more pessimistic projections of economic growth suggest that future workers will have to support a benefit structure guaranteeing retirees a constant level of purchasing power from a

114. See V. FUCHS, *supra* note 88, at 21, 186-88, 196.

115. See Thompson, *supra* note 113, at 1432.

116. See, e.g., M. DERTHICK, *supra* note 13, at 392-93 (views of Robert Meyers).

117. See *id.* at 391-410; Martin, *supra* note 110.

shrinking resource pool, or at least from one that will grow much more slowly than it did during the period of program expansion.

The fourth argument asserts that a "pay-as-you-go" Social Security system reduces savings and investment by encouraging workers to reduce retirement savings in reliance on expected (but unfunded) Social Security benefits and, in the current fiscal situation, by aggravating the government deficit. This is a variation on the third argument, since the objection to reduced investment is that it will lead to reduced growth, though the variation makes Social Security a culprit as well as a victim of the problems of reduced growth.

These arguments have fueled a variety of proposals ranging from modest cutbacks to complete dismantling. Most of these proposals are premised on the idea that the private law analogy has become untenable.

The defenders of the system have responded forcefully to these arguments. First, they point out that while there is a good deal of anxiety about Social Security, there is no evidence that the passing of the "start-up" phenomenon is jeopardizing political support for the system. After President Reagan proposed radical cuts in 1981, he was rebuked, 96-0, by the Republican Senate¹¹⁸ and had to spend much of the 1984 campaign dissociating himself from such proposals. When polled, most people have indicated that they understand the system and support it, even at the cost of tax increases.¹¹⁹ Although the conservative argument assumes that current workers support Social Security only to the extent they expect to profit individually as future beneficiaries, it seems quite plausible that workers favor it because it benefits people they care about or whom they would otherwise have to support themselves.

The response to the demographic argument emphasizes how speculative the projections are. For example, Lawrence Thompson points out that the recent course of population growth has been entirely

118. 127 CONG. REC. 10,426 (1981).

119. In a 1979 national survey of 1,549 adults conducted for the National Commission on Social Security, 43 percent responded that they "object not at all" to the Social Security tax, as compared to 26 percent for the federal income tax and 21 percent for the gasoline tax. Only 15 percent responded that they "object a great deal" to the Social Security tax. Sixty-nine percent would have opposed lowering retirement benefits even if it were necessary to avoid a tax increase. The strength of this response was almost as great for younger age groups (65-70 percent) as among older groups (70-74 percent). PETER HART RESEARCH ASSOCS., INC., A NATIONWIDE SURVEY OF ATTITUDES TOWARD SOCIAL SECURITY 64, 72 (n.d.) (report prepared for the National Commission on Social Security); See also Taylor, *American Politics, Public Opinion, and Social Security Financing*, in *SOCIAL SECURITY FINANCING* 235, 248-49 (F. Skidmore ed. 1981) (summarizing polls suggesting "that the public is willing, in principle, to pay additional payroll taxes to finance increased social security benefits for retired workers"). A 1981 New York Times/CBS poll shows lower support than earlier ones but still does not confirm predictions of large-scale defection. Weaver, *Poll Shows Americans Losing Faith In Future of Social Security*, N.Y. Times, July 17, 1981, at 12, col. 5 (respondents would prefer reducing benefits to increasing taxes, 46 to 26%, but would favor tax increases "if necessary to keep Social Security going," 66 to 27%).

outside the range of projections made by the Census Bureau in the 1940s and 1950s.¹²⁰ The recent trend in fertility rates could be reversed quickly by changes in the attitudes of young adults toward children, government pro-natalist policy, or more liberal immigration policy.¹²¹

Increasing life expectancy seems a more secure projection, but the 1983 amendments have responded to that contingency moderately and effectively by providing for the phasing in of a somewhat later retirement eligibility age in the next century. Moreover, the defenders suggest that one should look, not just to the worker/retired ratio, but to the "total dependency ratio," that is, to the ratio of workers to retired persons plus children. The same demographic projections that indicate an increasing number of elderly relative to workers indicate a decreasing number of children relative to workers and a moderately favorable trend in the total dependency ratio. The additional costs of supporting a larger group of retired people thus may be offset by the reduced costs of supporting a smaller group of children.¹²²

The defenders assert that the arguments about the economy are unsupported and in some respects non sequiturs. Most economists doubted that inflation would continue to outpace wage growth as it did in the late 1970s, and inflation has fallen relative to wage growth in the early 1980s. Most of the evidence adduced for the claims that Social Security reduces savings has been found flawed or ambiguous.¹²³ American tax burdens are generally lower than those of European countries, some of which had higher investment rates and more productive economies in the 1970s.¹²⁴ Moreover, even if Social Security were depressing savings, it would not follow that program cutbacks would be an appropriate response. Shifting to a funded program by *raising* the tax to accumulate a reserve would be a more reliable means of increasing savings than tax cuts (which might be spent instead of saved).¹²⁵

The defense has drawn comfort from the apparent political and fiscal success of the 1983 reforms. The reforms have averted deficits so far and seem likely to continue to do so throughout the remainder of the decade. Thereafter, the fund is expected to accumulate a large surplus until the "baby boom" generation begins to retire in about 2015. With the help of the reserve thus accumulated, the currently scheduled

120. Thompson, *supra* note 113, at 1434 n.25.

121. See V. FUCHS, *supra* note 88, at 42-44, 85-87.

122. R. Ball, *supra* note 113, at 20-21.

123. See H. AARON, *supra* note 83, at 40-52; Thompson, *supra* note 113, at 1442-46.

124. See R. KUTTNER, *THE ECONOMIC ILLUSION* 66-71, 187-91 (1984).

125. Thompson notes that "any other method of increasing the unified budget surplus will have the same effect on saving as the accumulation of Social Security reserves." Thompson, *supra* note 113, at 1444-45. Reserve funding has been occasionally urged from the left, and often feared from the right as an entree for intense government supervision of investment allocation, but there is no economic reason why funding should entail this consequence.

taxes (under the Social Security fund trustees' most often cited "intermediate" economic and demographic projections) are expected to balance until well past mid-century.¹²⁶ After that point, an "intermediate" projection shows a small deficit, though the "optimistic" projection does not.¹²⁷ It would be foolish, the defenders assert, to radically alter the system now in order to deal with a deficit as remote and speculative as this.

Although the liberal arguments are strong, recent events have nevertheless seriously undermined the portrayal of the system in private law welfare jurisprudence. This has happened for two reasons. First, the contract analogy has depended on a kind of economic certainty that no longer seems plausible. Private law jurisprudence, with its commitment to prospectivity, prescribes that benefits be certain and irrevocable. Throughout most of the middle period, this commitment precluded any major revocation of previously promised benefits. The 1977, 1981, and 1983 amendments stand as ineradicable testimony to the implausibility of such a commitment. In retrospect, it appears that the success of the program and the private law analogy in the middle period depended not only on the favorable economic performance but on the relative stability of economic parameters. As this stability has diminished in the past decade, economists have lost confidence in their ability to forecast,¹²⁸ and the public has come to see forecasts as both unreliable and manipulatable. During 1981, the Reagan administration used a gloomy economic forecast in support of proposals to reduce Social Security benefits and a different optimistic forecast in support of proposals to cut income taxes.¹²⁹ No sooner had the 1983 amendments appeared to put the Social Security fund in balance well into the next century, even under the most "pessimistic" of the trustees' four sets of projections, than the trustees, without any new evidence, began to speculate that things might get even worse than their prior "pessimistic" projection.¹³⁰

In these circumstances, the defenders have downplayed the importance of future certainty. During the New Deal and the middle period, the administration expressed its commitment to private law principles by projecting and attempting to balance revenues and expenditures into perpetuity. In 1965, the administration stopped attempting to project beyond 75 years.¹³¹ In 1982, Robert Ball, a doyen of the liberal Social Security establishment, responding to predictions of large defi-

126. *Id.* at 1435.

127. *Id.*; Ballantyne, *Actuarial Status of the OASI and DI Trust Funds*, 47 SOC. SECURITY BULL., May 1984, at 3.

128. See L. THURLOW, DANGEROUS CURRENTS 104-23 (1983).

129. *Prestidigitation*, NEW REPUBLIC, March 21, 1981, at 2; Weaver, *Democrats Assail Cutbacks in Social Security As Unnecessary*, N.Y. TIMES, July 8, 1981, at A14, col. 1.

130. Ballantyne, *Actuarial Status of the Old-Age and Survivors' Insurance and Disability Insurance Trust Funds*, 46 SOC. SECURITY BULL., Oct. 1983, at 3.

131. M. DERTHICK, *supra* note 13, at 385.

cits in the mid-twenty first century, noted that only four other countries attempt to make Social Security estimates for as long as even 50 years; the rest believe "that so much is unknowable that far ahead that they base current policy decisions on much shorter projections." He urged that long range estimates not be taken "too seriously."¹³² By the time discussion reaches this point, the private law fantasy of a zone of independence secured by "vested" benefits immune from collective reassessment seems no longer viable.

The second reason why the private law vision is breaking down is that the evolution of the system has strained its individualist premises. The original 1935 scheme was based on a vision in which a worker need have been concerned only with his own welfare. The addition of derivative benefits in 1939 broadened this notion by assuming that he would also be willing to pay for the welfare of his spouse and children, but this remained within traditional private law individualist premises. But the shift to a "pay-as-you-go" system was different. If the liberals were serious about their individualist rhetoric, then, as the conservatives repeatedly pointed out, the shift to current cost financing made the system a fraud. The conservatives' prediction that younger workers would rebel as the system matured and their prospective returns diminished was solidly grounded in the individualist premises of the designers. Social Security would be a bad deal for today's younger workers if they were concerned only about themselves, their spouses, and their children. The fact that the revolt has not occurred, even though workers generally have a good understanding of how the system works, thus suggests that the individualist premises may have been mistaken. Support for Social Security may rest in substantial part on a basically altruistic, need-based concern on the part of current workers for the welfare of older people—older relatives certainly, but also perhaps older people in general. And when the private law jurisprude comes to argue that workers in the next century will tolerate a vastly increased tax burden without any corresponding increase in their own expected benefits in order to support old people because the workers will have fewer children to support, he seems to assume a fairly generalized altruism. By now the rhetorical distinctions between individualism and altruism that have been used to fence off social insurance from welfare in private law welfare jurisprudence are nearly collapsed. It is much harder than it was in the 1930s to see why the principle of need should not be more directly incorporated into the system.

Competition from pensions. The second source of strain on the private law vision has remained generally unacknowledged within liberal welfare jurisprudence, but it seems likely to become increasingly important. This is the emergence of private pensions as a tacit competitor of Social Security, a competitor capable of co-opting much of the rhetoric

132. R. Ball, *supra* note 113, at 18.

of private law welfare jurisprudence in ways that thwart the redistributive and humanitarian aims of the general liberal program.¹³³

Coverage of private employee pensions plans grew sharply in the 1940s and 1950s and then tapered off in the following decades. Funding and benefit payments of these plans increased most strikingly in the 1960s and 1970s, partly under the impetus of the Employee Retirement Income Security Act of 1974 (ERISA), and continue to grow rapidly. These plans now play a large role in the income support of the elderly. In 1960, private pension payments amounted to about 15 percent of Social Security payments; in 1980 they amounted to about 30 percent of them.¹³⁴ Pension expenditures will continue to increase at a faster rate than Social Security for several decades.¹³⁵

Since 1921, these plans have benefited from tax provisions that permit the employee to defer taxation on contributions and earnings until retirement (when they are likely to be taxed at a lower rate).¹³⁶ In 1962, the provisions were broadened to permit the self-employed to establish exempt retirement plans, and in 1974, they were broadened again to permit other workers not covered by a plan to establish Individual Retirement Accounts (IRAs).

Liberal welfare jurisprudence has long considered pensions as a complement to Social Security, and the same groups have supported extension of both Social Security and tax subsidies for pensions. Yet, it seems clear in the Reagan era that pensions have become a competitor of Social Security. In 1981, the Reagan administration, invoking the rhetoric of fiscal crisis, proposed massive Social Security cuts (most of which went unenacted). At the same time, it proposed (and Congress enacted) an increase in the tax expenditure for pensions through a higher ceiling on IRA contributions and a provision that permitted people already covered by an employer plan to open tax exempt IRAs. In

133. Though public pension plans have also grown dramatically in recent decades, I focus on private plans for two reasons. First, because of the greater size of the private workforce and the less extensive pension coverage in the private sector, future growth seems likely to be greatest there. Second, the recent tendency in public sector reform has been to subordinate pension policy to Social Security policy, for example by including previously exempt public workers in the Social Security system and offsetting some Social Security derivative benefits by the amount of public pension receipts. 42 U.S.C. §§ 402(B)(4)(a), 402(C)(2)(a) (1982). As I suggest in the text, the tendency in private sector reform has been in the opposite direction, toward the subordination of Social Security to pension norms. Nevertheless, the very large unfunded liability in the public sector will require substantial appropriations as claims mature. B. STEIN, *SOCIAL SECURITY AND PENSIONS IN TRANSITION* 113 (1980), and in an atmosphere of fiscal scarcity might well turn out to be in competition with Social Security. See generally *id.* at 107-15 (briefly reviewing public sector pension plans and comparing them to private pensions).

134. A. MUNELL, *supra* note 134, at 10-13; *Monthly Tables*, 48 SOC. SECURITY BULL., June 1985, at 42.

135. A. MUNELL, *supra* note 134, at 10-13.

136. The tax subsidy benefits the worker both by deferring taxes until the rate is likely to be lower and by giving him the use of the money, interest free, during deferral. See Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419, 421-34 (1984).

1982, Congress liberalized the ceilings on Keogh plans. By the time Social Security was subjected to the most dramatic set of benefit reductions in its history in 1983, the pension subsidy was the largest item in the Treasury's tax expenditure analysis. Totalling \$56.9 billion, this subsidy equalled more than a third of Social Security expenditures for that year.¹³⁷ The administration's rationale for expanding the pension subsidy was to induce savings and investment, although it seems clear that accumulating a Social Security surplus (or indeed any reduction in the federal deficit) would have been a more reliable means of accomplishing this goal, and the 1981 expansion appears to have been largely ineffective in doing so.¹³⁸

While some dispute the Treasury's estimate, it is widely agreed that the pension subsidy is substantial and that most of its benefits go to higher income workers. According to a 1977 estimate, "66 percent of the tax benefits for employer plans went to 16 percent of employees with incomes over \$20,000" and "those with incomes above \$20,000 earned an even larger share of the tax benefits—almost 84 percent—from IRA and Keogh plans."¹³⁹

There are three reasons for the regressive incidence of the pension subsidy. First, in order to benefit from the tax exemption, one needs to have a pension, which the relatively wealthy are far more likely to have than the relatively poor. Slightly less than half of private sector workers are covered by pension plans; less than a quarter have "vested" benefits in such plans.¹⁴⁰ The 1981 report of the President's Commission on Pension Policy estimates that 70 percent of people with family incomes above \$20,000 have some pension coverage but only about 30 percent of people with incomes below \$10,000 have coverage. According to the Commission, by 1977 more than half of the people eligible for IRAs with incomes above \$50,000 made use of them, while only 3.3 percent of the eligible group with incomes between \$10,000 and \$15,000 made use of them.¹⁴¹ Second, progressive tax rates mean regressive tax expenditure rates. "Deferral is equivalent to an interest-free loan from the Treasury to the employee: the higher the tax bracket, the greater the loan."¹⁴² Third, pursuant to explicit authoriza-

137. OFFICE OF MANAGEMENT & BUDGET, SPECIAL ANALYSIS, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1985, at G46-47 (1985).

138. See DeMagistris & Palash, *Impact of IRAs on Saving*, FED. RESERVE BANK OF N.Y. Q. REV., Winter 1982-83, at 24; Thompson, *supra* note 113, at 1444-45.

139. A. MUNNELL, *supra* note 134, at 45-46. *But see id.*, at 40-43 (summarizing and rejecting arguments that pension provisions should not be considered a tax expenditure).

140. PRESIDENT'S COMM. ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT POLICY 13, 30 (1981). Hurd & Shoven, *supra* note 59, at 372, found that pension benefits accounted for only 2.4 percent of the wealth of the poorest 10 percent of the elderly while accounting for 11.4 percent of the wealth of the richest 10 percent (which was 12.5 times that of the poorest group). By contrast, Social Security represented nearly half the wealth of the bottom 10 percent but only 14 percent of the wealth of the richest.

141. PRESIDENT'S COMM. ON PENSION POLICY, *supra* note 140, at 35.

142. A. MUNNELL, *supra* note 134, at 49.

tion in the tax law, many employers "integrate" Social Security with pension benefits so as to reduce their total contributions by some portion of Social Security taxes they pay or to reduce pension benefits by some portion of Social Security benefits the employee receives.¹⁴³ Integration tends to reduce benefits relative to wages heavily for low income workers but to have a comparatively light effect on high income workers.¹⁴⁴ The general tendency of tax policy is thus to undermine—and quite possibly to nullify—the progressive tendency of Social Security. Moreover, if pensions continue to grow in relation to Social Security, the regressive tendency of the tax subsidy will be intensified.

Private law welfare jurisprudence seems handicapped in coping with the distributive issues raised by this development. In the first place, rhetorically, the insurance analogy seems to favor pensions. They have more of the conventional attributes of private insurance than Social Security, and in the post-ERISA era, they have fewer of the disadvantages that arise from market failure than they did during the New Deal. To be sure, the large gaps in coverage create a strong paternalist objection to the present pension system, but these could be filled, as many now propose, by compulsory private pension coverage.¹⁴⁵ The most important reason why liberals might favor social insurance over pensions is redistributive. Yet private law welfare jurisprudence portrays entitlement as in tension with redistribution and resists direct commitment to redistributive goals.

In the second place, pension policy seems to be undermining the political coalition envisioned in private law welfare jurisprudence. The embrace of private law norms and the repudiation of the means test was supposed to facilitate the formation of an income maintenance coalition that would unite the poor, the working class, and the upper middle income groups. Yet, just as the continued need for public assistance has fragmented the coalition toward the bottom, the rising preeminence of the pension has fragmented it from the top. As the social insurance system has tended to marginalize the poor in ways that make them vulnerable, the pension subsidy has permitted the well-off to marginalize themselves in ways that enable them to escape even the attenuated redistributive thrust of Social Security.

C. *Sex Discrimination*

During the 1970s, the premises of private law welfare jurisprudence played a significant role in debates over the relative treatment of men

143. The percentage of private workers with pension coverage who are in plans with integration provisions has been estimated at 25 to 30, but some evidence suggests that these figures are too low. See Logue, *How Social Security May Undermine the Private Industrial Pension System*, in *FINANCING SOCIAL SECURITY* 265, 273-80 (C. Campbell ed. 1979) (summarizing studies).

144. See Wolk, *supra* note 136, at 445-49.

145. See, e.g., *PRESIDENT'S COMM. ON PENSION POLICY*, *supra* note 140, at 42-44.

and women in Social Security. The participants in these debates rarely referred explicitly to the private law premises, but they usually relied on them tacitly. Again, the influence of the premises seems to have been to inhibit direct redistribution and to encourage reforms with perverse redistributive effects. This influence can be seen, first, in the constitutional challenges to Social Security gender classifications, and second, in proposals for statutory reform intended to achieve gender equality.

The constitutional challenges involved derivative benefit rules prescribing more restrictive eligibility conditions for male spouses of qualifying wage earners than for female spouses.¹⁴⁶ The federal courts struck them down as denials of equal protection under the fifth amendment.¹⁴⁷ In mounting and determining these challenges, litigants and the courts were confronted with the basic jurisprudential issue of the nature of the program.

The issue was framed most strikingly in *Califano v. Goldfarb*, the 1977 case in which the Supreme Court held it unconstitutional to require that a widower be dependent on his deceased wife in order to qualify for survivor's benefits on the wife's account, when a widow could qualify for survivor's benefits on her husband's account without regard to dependence. The entire weight of the decision (or at least of the plurality opinion) rests more or less explicitly on its characterization of the discrimination in question as against female wage earners. The plaintiff and the Court viewed the provision as affording women a lower return on their contributions than men: "[The classification] results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men. . . ."¹⁴⁸

Once this perspective was adopted, the provision was doomed. The only defense the government could offer for the discrimination was administrative convenience: Given the undisputed fact that the vast majority of female survivors were dependent and nearly all male survivors were not, the blanket inclusion of females obviated a large number of evidentiary determinations at the cost of a relatively small amount of overinclusion.¹⁴⁹ But the rationale of administrative convenience is

146. See Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789, 802-09 (1978).

147. *Califano v. Jablon*, 430 U.S. 924 (1977), *aff'g mem.* 399 F. Supp. 118 (D. Md. 1975); *Califano v. Silbowitz*, 430 U.S. 924 (1977), *aff'g mem.* 397 F. Supp. 862 (S.D. Fla. 1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

148. *Goldfarb*, 430 U.S. at 206-07. The mother's benefit provisions at issue in *Wiesenfeld* differed significantly from both the widow's benefit at issue in *Goldfarb* and the spouses' benefits at issue in *Jablon* and *Silbowitz*. Men were simply excluded from parents' benefits and could not, as with the other benefits, establish eligibility by showing dependence. Thus, the *Wiesenfeld* classification was underinclusive with respect to male beneficiaries as well as overinclusive with respect to female ones.

149. In the course of rejecting the administrative convenience rationale, Justice Stevens' concurrence grossly exaggerates the cost of overinclusion. The opinion takes the dissenters' estimate of the percentage of nondependent elderly women in the population (ten percent), and

generally an unacceptable basis for a "suspect classification" such as one disadvantaging women.¹⁵⁰

Another way to interpret the classification is as *favoring* women *beneficiaries*. From the point of view of beneficiaries, those disfavored by the classification are nondependent men. Accepting this characterization would not necessarily save the classification. As Justice Stevens pointed out, even under this view, the provision would not constitute a "benign" (and therefore constitutionally permissible¹⁵¹) discrimination designed to remedy a gender-linked social disadvantage.¹⁵² Nondependent women would simply be windfall beneficiaries of the overbreadth of an imprecise (but arguably efficient) classification. But under this view, the provision might plausibly be subjected to a lighter burden of justification, and indeed the four dissenters who adopted this view would have upheld the classification as a permissible administrative convenience.¹⁵³

The plurality explicitly rejected the beneficiary characterization, but in a conclusory fashion. Justice Brennan's opinion noted that "[f]rom its inception, the social security system has been a program of social insurance," that benefits were paid from "a fund administered distinct from the general federal revenues," that "Mrs. Goldfarb worked and paid social security taxes for 25 years at the same rate as her male colleagues," and concluded that "[p]lainly then" the classification of derivative benefits should be assessed from the perspective of its effect on the rates of return to tax payments.¹⁵⁴ But, of course, this is a non sequitur. As we have seen, from its inception the Social Security Act has separated its tax provisions, which contain no gender classification, from its benefit provisions; it makes no promise of affording a fair return on tax payments. Since the shift to current cost financing, the relation of contributions and benefits had become so attenuated that, by the time of Mrs. Goldfarb's death, by one estimate, about 70 percent of Social Security payments to her cohort represented actuarially

applies that percentage to the number of recipients of widow's benefits to derive an estimate of the number of nondependent women *receiving widow's benefits*. It then multiplies that number by the average annual survivor's benefit to get a \$784 million estimate for the cost of including nondependent women. *Id.* at 220 n.5 (Stevens, J., concurring). The estimate is overstated because it ignores that a spouse's derivative benefits are offset against benefits on her own account. 42 U.S.C. § 402(k)(3)(A) (1982). Thus, a nondependent widow with a primary entitlement exceeding her husband's would receive no derivative benefits at all, and a widow with a lower primary entitlement would benefit (and the program would incur costs) only to the extent of the difference. Since nondependent women tend to have much higher earnings than dependent ones, their average derivative benefits would be much lower than the average for dependent women.

150. *See, e.g., City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

151. *See Califano v. Webster*, 430 U.S. 313 (1977).

152. *Goldfarb*, 430 U.S. at 221 (Stevens, J., concurring).

153. *Id.* at 224-42 (Rehnquist, J., dissenting).

154. *Id.* at 208.

unearned transfers from younger workers.¹⁵⁵

Moreover, while the program generally has been termed (though not in the statute itself) social insurance, since 1939 that term has had at least two different sets of connotations: the "equity" connotations of actuarial fairness for contributors and the "adequacy" connotations of need-based distribution to beneficiaries. The two sets are so entwined that no aspect of the program can be adequately characterized in terms of only one or the other, but derivative benefits present the strongest argument for emphasizing beneficiary connotations. The 1939 inauguration of derivative benefits was an explicit move away from actuarial concerns toward beneficiary adequacy concerns, and most of the subsequent legislative discussion of derivative benefits has been in adequacy terms. Moreover, in strictly private insurance terms, derivative benefits are a gratuitous return since wage earners with dependents receive this coverage for the same payment as wage earners without dependents.

If the characterization of the classification as discrimination against women seems problematic, the practical distributive effects of its elimination seem bizarre. Under the *Goldfarb* classification, a surviving husband was considered "dependent" only when the wife was providing at least three-quarters of the couple's income at the time she died or retired.¹⁵⁶ However, dependence alone was not sufficient for benefits. The husband could only benefit as a survivor to the extent that benefits derived from his wife's account exceeded benefits to which he would be entitled under his own account.¹⁵⁷ The latter requirement was unaffected by the *Goldfarb* decision. Thus, the same income which had disqualified widowers pre-*Goldfarb* by preventing them from establishing dependence continued to disqualify most of them afterward because it entitled them to Social Security benefits on their own accounts in amounts sufficient to preclude them from benefiting from their wives' accounts.

There was, however, one substantial group of distinctively situated men who were neither dependent on their wives nor entitled to large enough Social Security benefits on their own account to disqualify them from derivative benefits. These were government employees (of whom *Goldfarb* was one¹⁵⁸) who, until 1983, were outside the Social Security system but who benefited from a parallel and relatively generous public pension system. These men were the principal beneficiaries of *Goldfarb*.¹⁵⁹ Thus, a decision designed to vindicate the rights of women, or

155. Parsons & Munro, *supra* note 24, at 76. Mrs. *Goldfarb* died in 1968. *Goldfarb*, 430 U.S. at 203.

156. *Goldfarb*, 430 U.S. at 203 n.3.

157. 42 U.S.C. § 402(k)(3)(A) (1982).

158. *Goldfarb*, 430 U.S. at 203.

159.

The principal effect of the March 1977 Supreme Court decisions granting benefits to husbands and widowers under the same conditions as those previously applicable to wives and widows (that is, [without regard to] dependency) is to make eligible for

more particularly, families with working women, actually affected only a small and adventitiously defined subset of such families. Even this effect was largely short-lived. Congress promptly eliminated it with a 1977 amendment requiring that Social Security benefits be offset by public pension benefits.¹⁶⁰

The redistributive effect of *Goldfarb* was thus initially perverse and ultimately negligible. However, there is another dimension to the case. It surfaces in both the passing distasteful reference in the plurality opinion to "‘archaic and overbroad’ generalizations" that link women and dependence,¹⁶¹ and throughout Justice Stevens' concurrence. Justice Stevens recognized that the classification could plausibly be viewed as overincluding women beneficiaries rather than underincluding women contributors but nevertheless voted to strike it down. Although he characterized the discrimination as "against a group of males," he seems to have found it objectionable, not because it disadvantaged men, but because it perpetuated "a traditional way of thinking about females," one that would "equate the terms 'widow' and 'dependent surviving spouse.'" ¹⁶² Thus, aside from its distributive effects, the classification injured women by flaunting an image that associates them with dependence.

This view seems to proceed from the premises of private law welfare jurisprudence. It extends within the family the perspective that classical legal thought applied outside it: the one that identifies moral worth with a Utopian image of autarkic independence and sees dependence as a state of unworthiness or degradation. By emphasizing women's status as contributors who earn their benefits through work and tax payments, it pays homage to the principles of effort and exchange. It impliedly links the entitlement status of Social Security to the aspects that resemble insurance rather than the aspects that resemble public assistance.

The private law approach is also implicit in discussions of gender equity that have generated a variety of proposals for statutory reform of Social Security in recent years. One recurrent complaint is that the post-*Goldfarb* scheme continues to give married women a lower return on their contributions than it gives to married men. The reason is that derivative benefits are offset against benefits due a worker on her own account. Women whose derivative entitlements are higher than their entitlements on their own account get no benefit at all from their con-

social security benefits a substantial number of men who have worked for the federal government . . . and whose wives have worked under social security.

Social Security Financing Proposals: Hearings Before the Subcomm. on Social Security of the Senate Comm. on Finance, 95th Cong., 1st Sess. 117 (1977) (statement of Social Security Commissioner Robert Ball).

160. 42 U.S.C. §§ 402(b)(4)(A), 402(c)(2)(A) (1982); see also *Heckler v. Mathews*, 104 S. Ct. 1387 (1984) (holding offset constitutional).

161. *Goldfarb*, 430 U.S. at 207.

162. *Id.* at 222-23 (Stevens, J., concurring).

tributions as workers; they would get the same amounts they receive on their husbands' accounts if they had never worked. Even women with primary benefits that exceed their derivative entitlements benefit only to the extent of the difference.¹⁶³

Now to view this situation as disadvantaging women requires taking the contributor perspective. From almost any version of the beneficiary perspective, Social Security is massively redistributive in favor of women. Women benefit because they have a longer life expectancy than men and hence collect benefits longer (without having to make larger contributions in proportion to this actuarial difference), because they receive most adult derivative benefits, and because, since their earnings tend to be lower than men's, they benefit more from the progressive pay-out formula. One Social Security Administration analysis suggests that 54 percent of benefits are paid to women, while only 28 percent of contributions are received from them.¹⁶⁴

Those who adopt the contributor perspective propose reforms designed to equalize the return to men's and women's tax payments in one of two ways. One would eliminate or scale down derivative benefits while increasing primary benefits. In effect, this would reduce dependence as an eligibility factor and make contributions correspondingly more preeminent.¹⁶⁵ Another approach would eliminate derivative benefits in favor of a system that apportioned credit for contributions during the working life of the wage earner, in the way that pension credits are treated in community property states.¹⁶⁶ These "earning sharing" plans would apportion wage credits so that each spouse would receive Social Security credit for half of the total earnings of both (up to the taxable maximum) during each year of the marriage. Each spouse would then receive benefits on the individual account determined in this manner. With earnings sharing, the lower earning spouse would benefit both from the higher earning spouse's income and from her own work and contributions.

The private law perspective recurs in a more diluted form in proposals for "homemaker's insurance" and "child care credits."¹⁶⁷ Such proposals arise from concern that an earnings-linked social insurance program disadvantages women whose earnings are lowered because of time spent caring for children. Such a system gives women no credit for the socially valuable time spent with children. Moreover, even with derivative benefits, the system is ungenerous to women with children

163. For a good summary of the literature on this and other issues of gender equality, see Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233 (1980).

164. Munnell & Stiglin, *Women and a Two-Tier Social Security System*, in *A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY* 101, 106 (R. Burkhauser & K. Holden ed. 1982) [hereinafter cited as *A CHALLENGE TO SOCIAL SECURITY*].

165. See Blumberg, *supra* note 163, at 264-71 (summarizing proposals).

166. See *id.* at 277-90.

167. See *id.* at 271-76.

who do not marry, those whose marriage does not last the ten years necessary to qualify for divorced spouse benefits, or those who become disabled before the age (50) when they can qualify for disabled spouse benefits. The proposed reforms are designed to help such women by providing wage credits, funded by contributions from the beneficiary, by cross-subsidy within the Social Security fund, or by general revenues, for parents engaged in child care. The credits would be based on some legislatively specified hypothetical wage base, for example, the market wage for homemaker services of the sort provided by the parent or some approximation of the wage the parent might earn if she were in the labor market.

Such proposals arise from adequacy concerns about beneficiaries rather than equity concerns about contributors, and they drastically attenuate the private law premises of the system. Nevertheless, they address their concerns in a manner that seems designed to preserve private law forms. They assimilate childcare to services produced for exchange in the labor market, and they proportion benefits, not directly to need, but to the effort made by the beneficiary.

The feminist version of private law welfare jurisprudence has two limitations that correspond to those of the more general version. The first limitation is that the private law perspective tends to inhibit redistributions that are beneficial to many women. To the extent that women are, in fact, economically dependent, resort to "traditional" stereotypical images may facilitate the effective direction of resources to respond to their needs. Many feminists acknowledge this fact when they support "benign" gender classifications designed to compensate women for gender-linked disadvantages.¹⁶⁸ The Supreme Court acknowledged it in *Califano v. Webster*¹⁶⁹ when it upheld against equal protection challenge a "benign" classification designed to compensate women for labor market disadvantages with a more favorable formula for deriving benefits from wages than the one applied to men.

Yet the private law analogy sometimes encourages proposals, in the name of fairness to women, that sacrifice the interests of women who depend on male incomes to those of financially independent women. This is true of some proposed reforms of derivative benefits that would more nearly equalize returns on contributions to men and women. Without a significant increase in the system's revenues, proposals to scale back or eliminate derivative benefits to enhance primary ones entail a large transfer of benefits from dependent women to independent men and women. The effect of "earnings sharing" proposals is harder to estimate, but it appears that such plans, while benefitting women as a

168. Compare C. MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979) (feminist argument supporting gender classifications that tend to remedy practical conditions of female subordination) with Taub, *Book Review*, 80 COLUM. L. REV. 1686 (1980) (feminist argument against gender classification).

169. 430 U.S. 313 (1977).

class, would substantially redirect benefits away from many of the neediest women. Earnings sharing plans tend to lower the value of survivors' benefits for formerly dependent widows. While, under the present system, such widows receive benefits equal to their deceased husband's primary entitlement, under earnings sharing they would receive a benefit based only on the fraction of the husband's entitlement attributed to her (plus any entitlement based on earnings of her own). Surviving spouse benefits are the derivative benefits best targeted in terms of need; the vast majority of such benefits are paid to the pre-transfer poor.¹⁷⁰ Thus, the reallocation of benefits under earnings sharing is likely to be severely regressive. The effect of earnings sharing reforms on benefits to spouses during the lifetime of the wage earner is harder to estimate, but here, too, the net effect may prove substantially regressive.¹⁷¹

These effects could be mitigated under any of the proposed reforms if present law beneficiaries could be grandfathered and expanded benefits financed by new resources.¹⁷² But this route is unlikely to prove satisfactory. First, to the extent that grandfathering serves its purpose of cushioning current law beneficiaries, it undermines the basic purpose of the reform to equalize rates of return to contributors. Second, any substantial increase over currently anticipated revenues seems politically implausible at a time when the system's current revenue demands are widely seen as overwhelming. Third, while the ultimate distributive effects of such measures on women and on the poor are hard to assess, it is quite likely that they would be dubious by feminist or liberal standards. Funding reform through the payroll tax would increase the regressivity of the tax system. While it is hard to segregate out the effect on women, it is clear that women would be hurt both as

170. Holden, *Supplemental OASI Benefits to Homemakers through Current Spouse Benefits, a Homemaker Credit, and Child-care Drop-out Years*, in *A CHALLENGE TO SOCIAL SECURITY*, *supra* note 164, at 41, 50.

171. The effect of earnings sharing in eliminating the 50 percent additional return on the primary earner's account is at least partially compensated, not only by the opportunity of the second earner to increase benefits by earnings on her own account, but by the apportionment of earnings between two people so as to put a larger amount of average earnings under the higher initial 90 percent step of the progressive pay-out rates. *See id.* at 46-50. The net effect of these competing tendencies depends on how earnings sharing is implemented. The House Ways and Means Committee's recent elaborate study of one of the more plausible earnings sharing proposals suggests that the net effect is regressive. The report finds that in the long run "couples with the highest present law benefits would have the best chance of getting increased benefits under the generic [earnings sharing] plan, while couples with the lowest present benefits will have the least chance of getting increased benefits under earnings sharing." SUBCOMM. ON SOCIAL SECURITY OF THE HOUSE COMM. ON WAYS AND MEANS, 99TH CONG., 1ST SESS., REPORT ON EARNINGS SHARING IMPLEMENTATION STUDY 40 (Comm. Print 1985) [hereinafter cited as REPORT ON EARNINGS SHARING]. It estimates that 44 percent of couples in the lowest quartile of present law benefits would lose by the simulated earnings sharing plan. *Id.* at 41. High benefits do not correspond precisely to high pre-transfer wealth, but, in absolute terms, wealthier people tend to receive higher benefits. *See Hurd & Shoven, supra* note 59, at 17.

172. *See* REPORT ON EARNINGS SHARING, *supra* note 171, at 95-107.

relatively low wage earners and as dependents of male low wage earners.

Some reform proposals would introduce general revenue funding.¹⁷³ Using general revenues would promote more progressive distributive effects. It would require, however, the abandonment of a principle traditionally considered essential to the private law analogy—special purpose fund financing. The distributive effects with respect to increased primary benefits or earning sharing would be, at worst, inversely related and, at best, unrelated to need. The distributive effects of homemakers' insurance and child care credits would relate to need only in a very indirect and imprecise way. Such reforms would provide substantial benefits to wealthy homemakers, but probably would not benefit women who chose both to work and to raise children, and would provide no benefits to needy women without children. The reforms would not assist needy nondisabled women younger than retirement age. Although the incidence of poverty is greater and average income is lower among the nonelderly than the elderly,¹⁷⁴ the proposed reforms would require large imprecisely targeted transfers from the former to the latter.

The second limitation of the feminist version of private law welfare jurisprudence is that it tends to measure gender discrimination in terms of criteria about which many feminists are dubious. To many feminists, the individualist premises of this jurisprudence are not so much a measure of male domination as an artifact of it. These feminists conceive of their project, not as enforcing this moral vision in the areas of family relations that traditionally have been exempted from it, but as criticizing and transforming the vision. In the course of this more ambitious project, they have sought to develop an alternative moral vision that repudiates the utopian image of independence, that denies the primacy of the distributive principles of effort and exchange, and that emphasizes dependence, or rather interdependence, not as a state of moral degradation, but as a pervasive, inescapable, and potentially fulfilling aspect of the human condition.¹⁷⁵

This recent feminist literature in many ways complements the welfare jurisprudence of the New Deal social workers (mostly women) who lost out decades ago to private law welfare jurists (mostly men).¹⁷⁶ Proceeding from premises similar to those of these feminists, the social workers developed a program that, contrary to private law welfare jurisprudence, argued that need was the most fundamental distributive principle, and sought to establish need-based, means-tested public assistance as the most secure pillar of the income maintenance system.

Many of the feminist participants in the Social Security gender de-

173. See, e.g., Blumberg, *supra* note 163, at 272-75.

174. Hurd & Shoven, *supra* note 59, at 361-63.

175. See C. GILLIGAN, IN A DIFFERENT VOICE (1982).

176. See Simon, *supra* note 4.

bate embrace the private law norms self-consciously and wholeheartedly. But others seem to experience an ambivalence similar to that of some of the earlier proponents of the private law analogy. On the one hand, they acknowledge that the individualist perspective denies or obscures important aspects of moral life, and they suspect that this failing may be integrally related to the gender domination that they are struggling against. On the other hand, they feel that their practical options are severely constrained by the social structure, and they see opportunities for appeals on behalf of women in this ethic. Moreover, they fear that in a society in which the dominant ethic is an individualist one they will be defenseless if they repudiate such an ethic.¹⁷⁷ They thus appeal to the private law norms for strategic reasons of a sort similar to those that led the New Deal liberals to embrace them. But, as with the earlier reformers, the distinction between strategic and ethical commitments tends to get lost in their rhetoric. Moreover, as with the earlier reformers, the costs of the strategic commitment often seem quite large.

III. THE NEW PROPERTY

In his 1964 article inaugurating the term "New Property," Charles Reich ignored the long tradition of rights rhetoric associated with the New Deal social insurance programs. He described his goal as the extension of the notion of right to interests in "government largess."¹⁷⁸ In fact, the distinctive thrust of the piece was more specific: It extended the classical notion of rights as zones of immunity from state power, which was already conventional in the social insurance context,¹⁷⁹ to public assistance. In doing so, it shifted the private law analogy from contract to property. It is not hard to see why making public assistance an entitlement had become important to the liberal program by the 1960s. By this time, it was clear that the New Deal hope that macroeconomic employment policy and social insurance would so successfully respond to economic need that public assistance could "wither away" would not be fulfilled. While the Old Age Assistance rolls did

177. See Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 8 WOMEN'S RTS. C. REP. 175 (1982). For a summary and analysis of these issues, see Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

178. Reich, *supra* note 15, at 785.

179. *Flemming v. Nestor*, 363 U.S. 603 (1960), which Reich used to exemplify the disease that the New Property was designed to cure, was in fact an anomaly in the income maintenance context. The case rejected a substantive due process challenge to a statutory withdrawal of Social Security benefits to aliens deported for being members of the Communist Party. However typical this statute was of anticommunist persecution in the 1950s, it was atypical of Congress' treatment of Social Security entitlements. Even without constitutional protection, Social Security benefits were consistently regarded as rights by all three branches, were afforded elaborate procedural protections, and were more secure against substantive impairment than most forms of private law property.

That *Nestor* was argued as a taking of property rather than as an impairment of freedom of expression is due to an anomaly of first amendment doctrine—the amendment is held not to protect aliens against important sanctions for the exercise of rights of speech and association. See, e.g., *Galvan v. Press*, 347 U.S. 522 (1952).

decline with the growth of Social Security (though never to the point of withering away), other public assistance programs, most notably AFDC, expanded rapidly through the early 1970s.¹⁸⁰ The liberals confronted a large underclass, much of it composed of single mothers with only a precarious foothold in the labor market and the social insurance programs.

Reich's move from contract to property seems related to the goal of turning public assistance benefits into rights. The move was unnecessary for the other two forms of government "largess" that he sought to protect: social insurance benefits and occupational interests, both of which had been defended under the contract analogy.¹⁸¹ But public assistance benefits were hard to square with contract connotations of consideration, exchange, and reciprocity. This is not to say that there were not theoretical arguments available that derived rights to public assistance from liberty and even contract.¹⁸² But a theorist who took such a route in the 1960s would have been arguing in the teeth of three decades of liberal welfare rhetoric distinguishing between Social Security as contractual and therefore a right and public assistance as noncontractual and therefore not a right.

The New Property is a curious product. While it sought to transform the classical idea of right more drastically than the liberal Social Security jurisprudence had, it diluted the classical rhetoric much less. As in classicism, the dominant image of right was a sanctuary for the independent individual against the dangerous power of the state.¹⁸³ In order to expand the classical category of specific rights, Reich pushed the classical property notion to a higher level of abstraction. At this level, almost every material interest of the individual could be seen as a potential right, since all potentially afford independence and all, unless turned into rights, remain vulnerable to state power. Thus, Reich proposed that all substantial interests in "economic status" be regarded as rights.¹⁸⁴

In retrospect, Reich's analysis involves a paradox. Although it was clearly designed to legitimate the redistributive activities of the then expanding welfare state, and in particular to incorporate public assistance into the liberal rights catalogue, it had curiously conservative and antiredistributive implications. Reich's analysis tended to legitimate all

180. S. LEVITAN, *supra* note 92, at 27, 34; Martin, *supra* note 32, at 464-66.

181. On the defense of occupational interests, see Friedman, *Freedom of Contract and Occupational Licensing: 1890-1910*, 53 CAL. L. REV. 487 (1965).

182. See Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659 (1979).

183.

Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference.

Reich, *supra* note 15, at 771.

184. *Id.* at 785.

the established economic practices constituting the prevailing distribution of wealth, but precisely for that reason, it seemed to preclude any further redistribution. If all forms of "economic status" were to be turned into entitlements, there could be no subsequent redistribution. In Reich's analysis, as in classicism, the idea of right serves as a defense against redistribution.

This situation results from Reich's refusal to address the issue of distribution directly. He dispensed with classicism's insistence on the primacy of the distributive principles of effort and exchange, but unlike the New Deal social workers and the natural rights lawyers of the 1970s, Reich did not argue in favor of need as a distributive principle. He simply ignored the distributive issue entirely. The rhetorical advantage of doing so was to make it easier to appropriate the individualist rhetoric of classicism. To defend need against the primacy of effort and exchange would have required acknowledging conflicts within the liberal tradition. It would have made the analysis more clearly political and controversial. Through bypassing distributive concerns, Reich created the impression of a distinctively legal program that stood above political conflict.¹⁸⁵

Despite its problems, Reich's rhetoric and imagery, rather than that of the social workers or the natural law lawyers, came to dominate liberal discourse about welfare reform. Part of the reason the paradoxical nature of his analysis was not perceived may relate to the economic circumstances of the decade of welfare expansion that followed the publication of the article in 1964. This was a period of large and sustained economic growth followed by inflationary public finance. Both phenomena tended to facilitate the sublimation of distributive issues by permitting welfare expansion in ways that did not require explicit forms of redistribution through tax increases. It was only with the advent of the stagflation or "zero sum" society of the later 1970s that the rhetorical power of *The New Property* diminished. Once the New Property rights of welfare recipients were perceived to conflict drastically with the old property rights of investors and taxpayers, the distributive issue returned with a vengeance. Having nothing to say about the issue, Reich's analysis was impotent against conservative arguments that the welfare rights had to yield to old property rights.

Given its silence on what is, after all, the basic issue, one might have expected Reich's analysis to have little substantive impact on welfare. In fact, the largest impact of the article was surely in the area of procedural or administrative reform where the article's argument that "right" entailed the control of discretion was widely influential.¹⁸⁶ Nevertheless, *The New Property* did have a substantive influence. The influence was less prominent and less important than either the sub-

185. For an extended version of this analysis of Reich, see Simon, *supra* note 4, at 23-24.

186. See Simon, *supra* note 5.

stantive influence of contract rhetoric on Social Security or the procedural influence of the New Property on public assistance, but it was significant. Rhetorically, the substantive influence was expressed in the tendency of welfare jurisprudence to focus on the policing of redistribution *among* welfare recipients. On occasions, this rhetoric tended to sublimate or repress explicit redistribution in ways analogous to that of the contract rhetoric.

Before tracing the New Property theme in the welfare rights jurisprudence, I take note of the far less prominent, and largely unsuccessful, career of an alternative approach to welfare jurisprudence.

A. *The Failure of a Need-Focused Jurisprudence*

The alternative approach was the one suggested by the New Deal social workers and the later natural rights lawyers. It would have found a source of entitlement in the notion of minimum need. It would have sought to develop minimum need as a sufficiently determinate standard to appraise and reform the system.

We get some idea of what such a jurisprudence might have involved from the discussion about the poverty line that developed in the 1960s and 1970s largely outside the legal profession. In the early 1960s Mollie Orshansky of the Social Security Administration proposed a methodology combining estimates of the costs of a nutritious diet with consumer expenditure surveys of other needs for deriving an economic measure of minimal need.¹⁸⁷ With subsequent revisions, notably the annual indexation of standards by changes in the consumer price index, this methodology became the principal public standard of income adequacy. It was adopted as an eligibility standard in a variety of public benefit programs, such as Low Income Energy Assistance, Comprehensive Employment and Training Act job subsidies, subsidized legal services, and Elementary and Secondary Education Act grants.¹⁸⁸

The poverty line has not been adopted as the eligibility norm in the major public assistance programs, with the qualified exception of the Food Stamps program.¹⁸⁹ However, it has been used as a standard for evaluating and criticizing public assistance norms and, more generally, it has become a broadly accepted measure of the efficacy and fairness of government economic policy. During the 1960s and 1970s, the poverty line played an important role in promoting and legitimating the expansion of government redistribution to the disadvantaged,¹⁹⁰ and more

187. Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, 28 SOC. SECURITY BULL., Jan. 1965, at 3.

188. See U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *THE MEASURE OF POVERTY* 14-17 (1976).

189. See 7 C.F.R. § 273.9 (poverty line methodology used in Food Stamp benefit formula).

190. It is impossible to measure the practical effect of the poverty line, but an interesting argument that need standards had an important progressive effect on public assistance standards is made in URBAN SYSTEMS RESEARCH AND ENGINEERING, *AFDC STANDARDS OF NEED*

recently it has played an important role in the criticisms of the Reagan administration's redistribution away from the disadvantaged. The Orshansky scale poverty standards have been subjected to a variety of criticisms,¹⁹¹ and few believe them ideal, but they seem to have played a useful role in raising issues of distribution and focusing debate around them.

Efforts to bring this need-focused discussion into the mainstream legal approaches to welfare were largely unsuccessful. At the constitutional level, these efforts were inspired by the liberal jurisprudence of the Warren Court and in particular by *Sherbert v. Verner*,¹⁹² where the Court held invalid under the first amendment a denial of Unemployment Insurance benefits on the basis of a claimant's religiously motivated refusal to accept employment on Saturday, and *Shapiro v. Thompson*,¹⁹³ where it held invalid AFDC durational residency requirements as infringing upon the right to travel. The liberals sought to develop such doctrine beyond the areas of traditionally protected interests such as travel and religion, toward, first, the acknowledgement of welfare as a fundamental right and the subjection of welfare classifications to "strict scrutiny," and, ultimately, the establishment of a right to the satisfaction of minimum needs that would warrant judicial review of the substantive adequacy of welfare efforts.¹⁹⁴ This program came to grief in the 1970 case of *Dandridge v. Williams*,¹⁹⁵ where the Warren Court declined to acknowledge welfare as a fundamental right and announced a policy of nonintervention in substantive welfare legislation not implicating a limited number of "suspect classifications" or explicitly protected constitutional interests.

At the statutory level, the effort to develop a need-based jurispru-

247-84 (report to the Social Security Administration, August 1980) (on file with author). The report studies the relation between "need standards" (normative standards of need) and "payment standards" (amounts guaranteed to recipients, which are often some fraction of need standards) in state AFDC programs during the 1970s. Both the standards and the relations between them vary enormously among the 50 states. However, the study found a strong positive correlation between the size of increases in payments and the size of the gap between need and payment standards. In both states with relatively generous benefits and those with relatively ungenerous benefits, benefits tended to increase faster where there was a significant distance between the need and payment standards. The authors speculate that, while need standards are highly manipulable, some states took them seriously, and good faith efforts to estimate need often resulted in standards above program payments. These standards in turn, the authors further speculate, exercised a kind of normative pressure on legislators that prompted benefit increases.

Of course, need standards can be invoked against, as well as in favor of, welfare expansion. See, e.g., M. ANDERSON, *supra* note 88, at 15-43 (arguing that poverty had been "virtually eliminated" as of the late 1970s and that welfare expansion should stop).

191. See note 88 *supra*.

192. 374 U.S. 398 (1963).

193. 394 U.S. 618 (1969).

194. See Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211 (1973); Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

195. 397 U.S. 471 (1970).

dence came to grief in *Rosado v. Wyman*.¹⁹⁶ Public assistance financial need standards are often legislatively specified in a way that leaves little room for judicial interpretation. In AFDC, which is structured as a federal grant-in-aid program, the states could specify eligibility standards subject to federal statutory and administrative constraints. The AFDC title of the Social Security Act traditionally had been interpreted to leave the states wide discretion with respect to the level of financial eligibility standards.¹⁹⁷ In 1968, however, Congress made a rare intervention in this area.

In the late 1960s, some states reacted to sharp increases in welfare applications by cutting financial standards, or more frequently, by allowing inflation to erode the real value of welfare payments. Congress responded with an amendment requiring that "by 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established."¹⁹⁸ Because of the prior practice in some states of distinguishing between need and payment standards and setting the latter as a fraction of the former, the amendment was ambiguous as to whether it required an actual increase in payments proportionate to increases in the cost-of-living or simply an adjustment in the need standards with the states retaining discretion to pay whatever fractions of need they chose. On the former interpretation, the statute created an opportunity for judicial development of a jurisprudence of need. In *Rosado v. Wyman*, the Supreme Court rejected this interpretation and held that the amendment did not require an adjustment of payment standards.¹⁹⁹ Since then, need-focussed norms have not played an impor-

196. 397 U.S. 397 (1970).

197. URBAN SYSTEMS RESEARCH & ENGINEERING, *supra* note 190, at 5-9.

198. 42 U.S.C. § 602(a)(23) (1982) (effective July 1, 1969).

199. The decision was supported, though not conclusively, by legislative history. See Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration*, 118 U. PA. L. REV. 1143, 1146-49 (1970).

The Court's holding that the statute did not affect payment standards did not quite end the matter, since the court also held that the adequacy of the adjustment of the need standards was judicially reviewable. A successful challenge to a need standard revision could have a limited impact on payments because some states paid the full amount of need and those that paid less expressed their payment standards as a fraction of their need standards. Although a state ordered to revise its need standards upward was free to maintain the same payment level by a corresponding downward revision in its payment rate, this might not be politically feasible. Moreover, a state might be required to compensate recipients retroactively for past underpayments made in accordance with an erroneously low need standard. In this situation, a substantial volume of litigation followed in which recipients challenged the need adjustment. The cases were often factually complex, both because, given the casualness with which need determinations often were made prior to 1968, it was difficult to reconstruct the precise basis of the prior standard, and because the methodology of adjustment was often complicated and controversial. Thus, well into the 1970s, litigants argued at a level of considerable detail about the accuracy of the adjustment to 1968 prices. See, e.g., *Johnson v. White*, 528 F.2d 1228 (2d Cir. 1975); *Roselli v. Affleck*, 508 F.2d 1277 (1st Cir. 1974); *Illinois Welfare Rights Org. v. Trainer*, 438 F. Supp. 269 (N.D. Ill. 1977).

The approach to need in these cases is quite different from the social work or natural law approaches and shows the influence of private law norms. The approach might be called

tant role in federal substantive welfare jurisprudence.²⁰⁰

B. *Welfare Rights and the Sublimation of Redistribution*

The substantive welfare doctrine that most reflects the New Property view of entitlement arose out of *King v. Smith*,²⁰¹ the 1968 case in which the Supreme Court first upheld a federal statutory challenge by a recipient to a state AFDC provision. The *King* doctrine began as a challenge to an oppressively moralistic and racist practice and ended as a highly technical financial analysis. The influence of the New Property premises did not become apparent until the later stage of this peculiar evolution, but in order to appreciate its significance, it is necessary to follow the course of the doctrine from its beginning.

As enacted in 1935, the AFDC title of the Social Security Act authorizes a federal subsidy for state programs providing aid to a "dependent child," defined in section 406(a) of the Act as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, . . . or physical or mental incapacity of a parent. . . ." ²⁰² AFDC was modeled on the "mother's pension" programs of the Progressive era that were designed to enable widows to stay home and take care of their children rather than being forced into the labor market. These programs were conceived and administered with a heavy overlay of moralism that favored the "deserving" poor, which in practice meant the sexually ascetic, monogamous, frugal, tidy, and white. In 1935, the beneficiaries envisioned for the program were a small group of largely white widows. In the post-war

"vested need." Instead of considering whether the adjusted standard reflected a plausible estimate of recipients' needs, the courts simply considered whether each of the elements considered in the prior estimate had been increased by a plausible inflation factor. The basic inquiry was an historical one to find out how need had been defined in the past. Once discovered, the definition was taken as a kind of entitlement largely immune from reassessment except to account for inflation. As with some of the New Property rhetoric I discuss below, the "vested needs" cases that followed *Rosado* interpreted rights in a way that tended to freeze the status quo.

Of course, the focus on inflation was encouraged by the language and history of the statute, but it would have taken a far less heroic construction of the statute than the one described in the following subsection that the Court actually adopted to find some warrant for review of the underlying need standards.

200. Recent developments around homelessness and General Assistance in a few states raise the question of whether we may yet see the emergence of a need-focused welfare jurisprudence in the state courts.

A few state courts have exercised limited review under state statutes or constitutions of local general assistance grant levels. See *Boehm v. County of Merced*, 163 Cal. App. 3d 447, 209 Cal. Rptr. 530 (1985); Neiman, *General Assistance: A Preliminary Legal Analysis*, 13 CLEARINGHOUSE REV. 145, 151-54 (1979). There are currently about a half-dozen such challenges pending in the lower courts in California.

At the same time, a few state courts have exercised review under the same or similar statutes of the adequacy of local responses to the homeless, and, in a few instances, have mandated extensive relief. See Werner, *Homelessness: A Litigation Roundup*, 18 CLEARINGHOUSE REV. 1255 (1985).

201. 392 U.S. 309 (1968).

202. 42 U.S.C. § 606(a) (1982).

era, AFDC rolls mushroomed as they came to be an important source of support for a growing underclass prominently populated by black women with illegitimate children. In these circumstances, several states adopted measures excluding all or some of this new group from eligibility.²⁰³

The measure at issue in *King* was an Alabama rule that excluded children whose mother was "cohabiting" with a man. Cohabitation was defined broadly to include the named plaintiff in the case, whose relationship consisted of periodic sexual relations with a man who resided elsewhere. There was a wide variety of grounds on which the Court might have struck down this rule. The plaintiffs had litigated below on the theory that the exclusion was a racially motivated denial of equal protection, and the lower court seemed to think this claim supported by the evidence, though it ruled on broader and vaguer equal protection grounds.²⁰⁴ Justice Douglas, concurring in *King*, would have invalidated the rule under the equal protection clause as discrimination against the "suspect class" of illegitimate children.²⁰⁵ The privacy doctrine established three years earlier in *Griswold v. Connecticut*²⁰⁶ might have afforded still another basis.

The Supreme Court, however, ruled on two statutory grounds. First, the Court held that the Social Security Act did not permit a state to restrict AFDC eligibility on the basis of the propriety of the mother's sexual conduct. This conclusion, plainly contrary to the 1935 legislative history,²⁰⁷ rested on a somewhat tortured reading of the subsequent legislative history. Once reached, however, it responded to some of the same concerns as the constitutional theories, and it was adequate to support the Court's holding. Nevertheless, the court felt obliged to add a second statutory ground.

Alabama argued that its exclusion of families with a "man in the house" was an appropriate exercise of state discretion under the statute because such families were comparably situated to conventional two-parent families, which were clearly ineligible. The "man in the house," the state urged, should be regarded as a "substitute father" who prevents the statutory eligibility condition of "absence of a parent" from being fulfilled.²⁰⁸ The Court might have dismissed this argument as a disingenuous rationalization for a rule that the record indicated had other, impermissible purposes, or as arbitrarily conflating situations that were in fact quite different. Instead, it construed the statute to deny states discretion to exclude categorically any child within the defi-

203. See W. BELL, AID TO DEPENDENT CHILDREN 60-151 (1965).

204. *Smith v. King*, 277 F. Supp. 31 (N.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968); M. GARBUS, READY FOR THE DEFENSE 157-69 (1971).

205. *King*, 392 U.S. at 336.

206. 381 U.S. 479 (1965).

207. See H.R. REP. NO. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. NO. 628, 74th Cong., 1st Sess. 36 (1935).

208. *King*, 392 U.S. at 327.

nition of section 406(a), and it construed the term "parent" in the phrase "absence of a parent" in section 406(a) to refer only to "an individual who owed to the child a state-imposed legal duty of support."²⁰⁹ Thus, a "man in the house" without such a duty of support could not be a "parent," and a child whose natural father was absent had to be included. Had the Court been more responsive to the moralistic origins of the program, it could have responded to the Alabama argument by reading "absence of . . . a parent" to refer to absence of a natural parent and to reflect a concern with the presumed emotional and moral vulnerabilities of children deprived of a natural parent, even where they have a "substitute" (or step) one.²¹⁰ Instead, however, it interpreted the eligibility limitation to single parent families as a proxy, not for moral and emotional vulnerabilities, but for financial deprivation. It then reasoned that, since only a person legally obliged to do so could plausibly be presumed to support a child, excluding a child because of the presence of someone not so obliged would undermine the statutory purpose.²¹¹ Although both gratuitous and mistaken,²¹² this interpretation was to prove influential.

The next step in the evolution of *King* was the 1970 case of *Lewis v. Martin*.²¹³ California, inspired by the Court's second ground in *King*, passed a statute imposing a duty on stepfathers and other men residing in AFDC households to support the children, and then counted the

209. *Id.* at 327-32.

210. See W. BELL, *supra* note 203, at 3-19 (on moralistic background of AFDC).

211. *King*, 392 U.S. at 330.

212. The basic mistaken premise of the Court's argument was that the Act was intended to provide benefits under one program or another for all financially needy children. See *King*, 392 U.S. at 327-28. It was this premise that led the Court to interpret the focus on single parent families as a proxy for financial deprivation, and to assume that any interpretation of the categorical eligibility definition that would leave many financially deprived children without coverage under the Act's programs would be contrary to Congress's intent.

It is true that some of those responsible for the Act fantasized that expanded employment and social insurance would eventually displace public assistance, but they also contemplated that, insofar as there was a need for public assistance, that need would not be filled entirely by the categorical programs of the Act. The primary responsibility for the nonelderly poor was to remain with the states. AFDC was a specialized program for a select subgroup. See W. BELL, *supra* note 203, at 20-24.

The Court's approach ignores that the most distinctive feature of "categorical" public assistance programs like AFDC is precisely that they exclude people who are just as financially deprived as the people they include but who fail to meet the status ("categorical") eligibility criteria. If Congress had really intended AFDC to meet the needs of children "unmet by programs . . . for breadwinners," *King*, 392 U.S. at 328, it could have done so very simply by dispensing with categorical criteria entirely, or by broadening them to include all families with children. The financial eligibility criteria would then have functioned to identify people whose needs were "unmet by programs . . . for breadwinners." *Id.*

Moreover, the modeling of the AFDC on the mother's pension programs suggests that single-parent families were singled out, not so much because they were likely to be financially deprived (a condition well measured by financial eligibility criteria) but because children in such families were considered morally and emotionally vulnerable. Cf. W. BELL, *supra* note 203, at 3-19, 27-29 (background of categorical limitation in moralistic "Mother's Pensions" tradition).

213. 397 U.S. 552 (1970).

men's income in determining the financial eligibility of the children for AFDC. The state argued that the men involved here clearly met the test set out in *King*—they were legally obligated to support the children. The state's position was bolstered by the fact that the rule challenged here concerned financial rather than categorical eligibility. Unlike the situation in *King*, where the presence of the man disqualified the family regardless of its income, the California rule simply required consideration of his income. Moreover, the *King* holding was based on the federal statutory definition of categorical eligibility. The federal statute traditionally had been interpreted to leave the states broad discretion with respect to financial eligibility.²¹⁴ The Department of Health, Education, and Welfare (HEW), however, disagreed and found the California rule invalid. The Act gives HEW broad supervisory authority over state programs,²¹⁵ and HEW's position might have been upheld on a variety of discretionary policy grounds. For example, forcing stepfathers to contribute to child support might hurt the mother's chances of remarriage or cause tension between the married spouses which might adversely affect the children. But the issue was framed by both HEW and the Court in terms of the *King* interpretation of parenthood as evidence of the likelihood of support: "HEW might reasonably conclude that only he who is as near as a real or adoptive father would be has that consensual relation to the family which makes it reliably certain that his income is actually available for support of the children in the household."²¹⁶ In accepting HEW's position, the Court tacitly extended the *King* analysis from categorical to financial eligibility rules.

The last stage in the Supreme Court's development of the *King* doctrine came with *Van Lare v. Hurley* in 1975.²¹⁷ Here *King* was applied to a New York practice that reduced the grant when an unrelated and ineligible person was living with the AFDC family. While the *Lewis* rule involved the treatment of income in the financial eligibility determination, the New York rule involved the need side of the budget. New York reduced the shelter component of the need standard when outsiders were present to account for the presumed economies of scale of larger households. While the *Lewis* rule presumed contributions for the benefit of the child, this rule presumed only that the outsider was contributing his own share of the expenses. The Court carried the logic of the second *King* ground to a sweeping conclusion: The economies of scale presumed in the New York rule would in fact be present only if the lodger actually contributed his share of the shelter expenses. To presume that he would do so would be tantamount to presuming that a person not legally liable for the support of the children was in fact mak-

214. See W. BELL, *supra* note 203, at 21.

215. 42 U.S.C. §§ 602(a)(5)-(6) (1982); See *Burns v. Alcala*, 420 U.S. 575 (1975).

216. *Lewis*, 397 U.S. at 558.

217. 421 U.S. 338 (1975).

ing expenditures that benefitted them, and such presumption was forbidden under *King*.

Van Lare prompted a substantial body of litigation challenging state efforts to take account of the benefit (lower need) arising from shared living arrangements. Provisions were repeatedly struck down on the theory that they illicitly presumed the availability of income from people not legally liable for the support of the children.²¹⁸ Consider, for example, the "three generation household" problem. When an AFDC mother lives with her parents and her children, should they be considered as one or two households? Since the need standards are structured in declining increments to account for economies of scale, two households would receive much higher benefits than one. Under the *King-Lewis-Van Lare* doctrine, the claimant could argue that there had to be two households. If she was 18 or over, then her parents usually were not legally obliged to support her or her child and hence they had to be treated as separate from them. To treat them all together would be tantamount to presuming that nonlegally-obliged people were making contributions beneficial to others. If the mother was under 18, her parents still were not legally obliged to support her child (their grandchild), so the child had to be treated separately from her and her parents.²¹⁹

The objection to presuming support in these cases is usually framed as an empirical one: It is not plausible to think that people support each other without a legal obligation. But one also senses a normative dimension to the objection, a notion that people *shouldn't* support each other or feel compelled to do so except in the narrowly confined cases of legal obligation. The normative dimension is most apparent in cases dealing with children's income. Suppose a mother has two children by different fathers, and the first child has income from a support payment from the father or from Social Security payments on the father's account. Should the first child simply be excluded from the grant and the mother and the remaining child given a full two-person grant? Or should the family be treated as a three-person household with all of the first child's income deducted from the three-person need standard? The latter approach results in a lower grant, albeit a grant of the same size as that received by families where the same amount of outside income comes to the mother in her own right.

Under *King-Lewis-Van Lare*, the latter approach was impermissible. Since siblings are not legally liable to support each other or their parents, the income of a child may not be treated as available to his sib-

218. See, e.g., *Gurley v. Wohlgemuth*, 421 F. Supp. 1337 (E.D. Pa. 1976); *Boucher v. Minter*, 349 F. Supp. 1240 (D. Mass. 1972); *Gaither v. Sterrett*, 346 F. Supp. 1095 (N.D. Ind. 1972), *aff'd*, 409 U.S. 1070 (1972).

219. See *Haggard v. Idaho Dep't of Health & Welfare*, 98 Idaho 55, 558 P.2d 84 (1979); *Snowberger v. Toia*, 60 A.D.2d 783, 400 N.Y.S.2d 648 (1977), *aff'd*, 46 N.Y.2d 803, 386 N.E.2d 833, 413 N.Y.S.2d 922 (1978).

lings or parents.²²⁰ But here the rationale cannot be the factual improbability that the child's income will be unavailable to the mother and sibling. For here, the child's income is fully within the control of the mother, who in most cases will receive it as a check made out to her for the benefit of the child.²²¹ The mother of course, being legally obliged to support both children, can be presumed to do so. The objection, then, must be normative. To treat the first child's income as available to the family is to deprive him of the full advantage of something that belongs to him. It is to bring about a redistribution of his wealth to other family members.

Much of the logic of this curious line of cases replicates, in necessarily distorted form, the characteristics of the classical rights notion of the private law analogy. There is the basic image of the autarkic individual responsible to, and dependent on, no one with the exception (an afterthought in classicism, prominent here) of his spouse and children. There is the corresponding notion of a few relations among immediate family members as the only natural form of dependence. Finally, there is the notion of right or legal entitlement as in tension with need. Although these cases address need, they do so in an indirect way. They focus on relative need among the poor, rather than on the needs of the poor relative to the nonpoor.

And there is the theme of right or entitlement as something to be invoked against redistribution. Formally, these cases are concerned with redistribution among, rather than to, the poor. They are concerned with protecting AFDC recipients from the danger that other poor people with whom they live will illegitimately redistribute toward themselves. They protect against poor friends who exploit their housemates by refusing to pay their share of expenses, from grandmothers who refuse to help their grandchildren, and from children who appropriate from their siblings.

If we assumed that these cases did not expand benefits but merely affected the relative treatment of different kinds of households, which is all they purport to do, their value would be dubious. This seems particularly so of the child-income cases which leave families in which some children receive independent income better off than equally needy families by virtue of an ethical premise—that a child should not be expected to share “his” income with his family—which in my experience

220. See *Leone v. Blum*, 73 A.D.2d 252, 425 N.Y.S.2d 836 (1980); see also *Swifter v. Toia*, 450 F. Supp. 983 (S.D.N.Y. 1978); *Swoap v. Superior Court*, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973).

221. The mother may be legally obliged to use the outside money “only for the use and benefit” of the first child. *E.g.*, 42 U.S.C. § 605 (1982) (Social Security rule). But even if we ignore the practical unenforceability of such regulations and the fact that it is impossible to segregate expenditures for many needs of siblings who live together, such a law would prevent the use of outside income for needs of the mother and second child only if we were to assume that meeting the needs of his mother and sibling would be of no benefit to the first child.

most poor people find bewildering or repugnant. The joint living arrangement cases are perhaps more defensible but still dubious. By preventing programs from taking account of the economies of joint living arrangements, they give larger benefits to recipients who share living arrangements than to those with identical needs who do not. The only rationale for doing this is the danger that any other rule would harm families with joint living arrangements in which the outsiders do not pay their share. There is no systematic evidence of how serious a danger this is, but the sociological literature that emphasizes the extensive degree of sharing among the poor both within and beyond households suggests that the cases exaggerate it.²²² The most strongly defensible of these cases are those that refuse to presume that relatives other than natural or adoptive parents are contributing to the support of the children.²²³ However, even here neither evidence nor intuition indicates clearly whether or not such presumptions would be warranted.

On the other hand, the post-*King* cases seem considerably more valuable from a liberal point of view if one assumes that they did not merely shift benefits around among the poor, but effectively increased welfare expenditures to the poor. In the late 1960s and early 1970s, when most state programs were expanding, cases that formally concerned only the relative position of recipients probably encouraged expansion. Rather than funding new benefits to successful plaintiffs by reducing those to others, the states expanded the program. Judicial decisions like those in the post-*King* cases, simply by drawing attention to welfare beneficiaries, may well have contributed to more general normative pressures for expansion. But as the 1970s progressed and expansion slowed and reversed, this type of pressure became more difficult to sustain. Under the Reagan administration, when AFDC reform became a negative sum proposition, Congress in a series of statutes reversed the post-*King* line of cases.²²⁴ Given the fact of cutbacks, these changes may well be justified.

Viewed in the context of the expansion of the 1960s and early 1970s, the post-*King* presumption-of-income cases stand as monuments to a particular style of liberal argument inspired by the New Property vision of entitlement. Its most basic trait is to argue for reforms whose principal value lies in their tendency to increase redistribution to the

222. See, e.g., C. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974).

223. Although the cases do not forbid contributions by nonlegally-liable relatives or householders, their practical effect is to eliminate them. If the nonrecipient contributes, the grant is reduced dollar-for-dollar; if the nonrecipient does not contribute, the grant makes up the loss.

224. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2640(a), 98 Stat. 494, 1145 (amending 42 U.S.C. § 602(a)) (reversing sibling income cases); Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2640(a), 98 Stat. 494, 1145 (reversing multi-generation household cases); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 155(a), 96 Stat. 324, 397 (amending 42 U.S.C. § 612) (reversing *Van Lare*).

poor in language that focuses on the dangers of redistribution *among* the poor. More broadly, the style is distinguished by its tendency to advance altruistic redistributive goals with rhetoric designed to evoke the individualistic, antiredistributive vision of classical legalism.

C. *Welfare Rights and the Repression of Redistribution*

For a brief period in the late 1960s and early 1970s, AFDC recipients mobilized under the slogan of welfare rights. At the local level, the welfare rights movement consisted of groups of recipients in cities throughout the country, but particularly in the Northeast, with membership totalling in the tens and perhaps hundreds of thousands. These groups employed a variety of forms of advocacy and demonstration to pressure state and especially local welfare officials to provide benefits to their members. At the national level, the movement took the form of the National Welfare Rights Organization (NWRO), with perhaps 20,000 members, links to the local groups, and a Washington staff able to command the attention and respect of the liberal establishment. The national organization's most important activities turned out to be lobbying the Congress about welfare legislation.

The welfare rights movement had notable accomplishments, particularly at the local level, but all of its broader and longer term ambitions were frustrated. The local groups expired by late 1970; the national organization by late 1972. The movement has been interpreted from a variety of political perspectives, but there is a remarkable consistency among these interpretations.²²⁵ A few of the recurring themes resonate with those of private law welfare jurisprudence. The themes are most prominent in the two aspects of the movement that most preoccupy the interpreters: the special needs campaigns at the local level and the opposition to the Nixon Family Assistance Plan at the national level.

The strategy of the middle class activists who initiated most of the local organizing efforts focused on special needs grants. Many state AFDC programs provided for one-time grants for a variety of items such as furniture, clothing, and household utensils, as well as recurring grants for people in special situations requiring special diets, laundry arrangements, telephones, and other things. Although such grants were formally available to anyone meeting the eligibility conditions, and most recipients were eligible for some of them, few in fact received them. Few recipients knew enough to request them or to appeal if a request were denied, and the local officials informally rationed the grants. The activists' strategy focused on special needs as an organizing tool. They used these grants as an individual material incentive for

225. See L. BAILIS, *BREAD OR JUSTICE* (1974); D. P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME* 327-45 (1973); F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 264-361 (1977).

recipients to join the organization. Since they were able to get benefits for many people quickly with a small amount of information and assistance, they recruited members rapidly.

The problem with the strategy is that it proved difficult to sustain. The trick of producing benefits through appeals to unenforced norms could not be repeated indefinitely. Inevitably, the gap between prescription and enforcement was narrowed both by the success of advocacy efforts and by substantive reforms that eliminated prescribed benefits. Members who had been prompted to join by the prospect of the special needs grants had no incentive to remain once they received these benefits. The activists and the recipient leaders who emerged in the organizing drives tried to engage members in activities involving mutual help and political efforts for long range or collective benefits. But as the organizations ceased to produce short term individual material benefits, they were unable to hold their members. The organizations declined as quickly as they emerged.²²⁶

At the national level, the movement's efforts focused on the Family Assistance Plan (FAP) proposed in 1969 and revised in 1971 by the Nixon Administration.²²⁷ This Plan would have replaced AFDC with a federally administered and financed program of benefits available to all families with children who met its financial eligibility standards. It would thus have made benefits available to two to three million two-parent families excluded by AFDC's categorical eligibility restrictions. It would have established a national minimum schedule of benefits that would have raised benefits in the eight states, mostly in the South, with the lowest AFDC levels. High benefit states would have been required to supplement the federal minimum up to their pre-reform standards. The shifting of primary financing responsibility to the federal level would have at least temporarily reduced the pressure on benefit levels arising from fiscal crisis in several states and might have led to the indexing of benefits for inflation. (The categorical benefits for the aged, blind, and disabled, which were federalized into the SSI program in 1972 on a model that paralleled the one proposed for AFDC, were indexed for inflation in 1974.) The shift in administrative responsibility to the federal level would probably have brought a more humane and responsible administration to many states. The eligibility rules provided for an increase in the percentage of earned income to be disregarded as a work incentive.²²⁸

The reform would have involved some disadvantages for recipients in states with benefits above the federal minimum. A cap on allowance

226. See L. BAILIS, *supra* note 225, at 55-76; F. PIVEN & R. CLOWARD, *supra* note 225, at 297-309.

227. See *Social Security and Welfare Proposals: Hearings Before the House Comm. on Ways and Means*, 91st Cong., 1st Sess. 118-29 (1969).

228. The description refers to the 1969 version. The 1971 revision was somewhat less favorable. See V. BURKE & V. BURKE, *NIXON'S GOOD DEED: WELFARE REFORM 165-72* (1974).

for work-related expenses would have lowered benefits for a few recipients with exceptionally high expenses (but the increase in the percentage of net income disregarded probably would have increased benefits for a larger number). In some states, the procedure for state supplementation might not have entirely protected some working beneficiaries. The reform involved a work requirement which, while formally no more demanding than the established one, reasonably could have been regarded by beneficiaries as intended for harsher enforcement.

These disadvantages were magnified for many by the fact that the reform was sponsored by a president generally considered unsympathetic to welfare and the poor and was introduced by the administration with a barrage of misleadingly antipoor and antiwelfare rhetoric.²²⁹ Nevertheless, the principal provisions of the reform—the elimination of categorical restrictions, the national minimum, the federalization of finance and administration—had been the most prominent goals of liberal welfare reform for decades. Despite the efforts of its sponsors to portray it otherwise, the Family Assistance Plan was the most progressive welfare reform theretofore proposed by an American president.

Nevertheless, the National Welfare Rights Organization devoted itself to mobilizing the liberal establishment against the reform and, along with other constituencies, contributed to its defeat. NWRO objected that the reform would deprive some current recipients of advantages under the unreformed system. They argued that under the current system they had a “right to refuse work” that the work requirements would abridge. (This was a questionable interpretation of both the existing and reformed work requirements, but the Nixon administration encouraged it.) They emphasized the few cases in which recipients with high work expenses would suffer reductions under the reforms and portrayed these reductions as denials of vested rights. They also expressed concern that the reform would make benefit increases more difficult in the future because, once the system was expanded to include more people, benefit increases would become more expensive.²³⁰

The widely shared political interpretation of the NWRO’s opposition has been expressed bluntly (and bitterly) by Daniel Patrick Moynihan, a draftsman of the reform:

The nominal objective of NWRO was a “guaranteed adequate income for everyone.” . . . Be that as it might, the actual membership of NWRO was (by all reports) made up overwhelmingly of black AFDC mothers. In a familiar organizational pattern, it is *their* interests that NWRO ultimately spoke for. These interests were not those of the working poor. Nor were they those of the dependent poor in poor states. Like the early trade unionists, the NWRO represented the aristocracy of welfare recipients. However bad their circumstances, those

229. *Id.* at 108–20.

230. *Id.* at 129–49.

elsewhere were worse. Nearly a quarter of its membership was from New York, with two thirds from nine industrial states. . . .

. . . The organizational interest of the NWRO was to improve the circumstances of this constituency, preferably in steady increments associated with crisis bargaining. Any large allocation of limited disposable resources to a new system and new recipients could not serve the interests of NWRO, especially when this was not to be accompanied by any guarantee of a rise in benefits for its membership. . . . At the time of the President's address, AFDC covered only 35 percent of the poor children in the nation: FAP would cover them all. NWRO represented children already covered, and could spare little concern for those not.²³¹

Both the special needs campaign and the FAP campaign exemplify characteristic themes of the New Property. First, there is the underlying premise of independent individualism. In both instances, the theme of welfare rights was invoked as part of an organizing strategy designed to mobilize people by holding out the prospect of short term individual material gain. In both instances, the strategy failed because it could not enlist people to work for longer term and more collective goals. Second, there is the tendency to identify entitlement with the status quo. This was quite explicit in the anti-FAP campaign where the relatively marginal advantages of the unreformed system were treated as vested rights, while the very substantial advantages of the reform were treated as relatively unconvincing. Although one might have thought that it would have been next to impossible for the ideal of right to play its classical role of opposing redistribution in a vision of welfare rights, that is literally what happened in the anti-FAP campaign. The bias toward the status quo is implicit in the special needs campaigns as well. The organizing strategy of these campaigns was limited to appeals to enacted rights. Once the gap between enactment and enforcement was closed, it collapsed. The movement proved unable to mobilize in support of benefits not already prescribed by the system.

The New Property themes of independence and of the normative priority of the status quo are reflected in the dominant political interpretation of the welfare rights movement. According to this interpretation, efforts to mobilize the poor are caught between the Scylla of the logic of collective action and the Charybdis of the iron law of oligarchy. The logic of collective action asserts that people can be readily mobilized only through the prospect of individual gain. The more that prospective gain will have to be shared with others, the less likely that mobilization will occur in the absence of some means of collective coercion to prevent "free riding" or strategic behavior. But the introduction of collective coercion triggers the iron law of oligarchy. Where

231. D. P. MOYNIHAN, *supra* note 225, at 334. Although they take a very different political perspective and although they refuse to acknowledge the advantages of FAP, Piven and Cloward's interpretation of the failure of NWRO is quite similar. See F. PIVEN & R. CLOWARD, *supra* note 225, at 309-31.

there is an apparatus of collective coercion, those who control it will treat it as a means to further their own individual material goals either by exploiting the other group members directly or by selling them out to their adversaries.²³² Both the logic of collective action and the iron law of oligarchy are positive analogues of the classical normative premise of independence. They assume that individuals seek a state of autarky, as the classical view suggests they should, that they join with others only as a means to individual goals, and that they treat power simply as a means to such goals.

This view of politics also has an implication that parallels the New Property premise of the normative priority of the status quo. The logic of collective action seems to presuppose a relatively established structure of material entitlement, and the iron law of oligarchy seems to presuppose a relatively settled distribution of organizational power. This presupposition arises in the logic of collective action because the interests best secured to the individual are those defined by the normative status quo. The more prospective change contemplates a revision of the status quo, the more uncertain the ultimate distribution gain becomes, and the less sure the individual can be that she will not have to share the fruits of her effort. The presupposition appears in the iron law of oligarchy because the leader's ability to treat the apparatus of collective coercion as a means to individual gain requires that the leader have a fairly secure and well-defined range of discretion. Where the established distribution of organizational power is unsettled, either because of differences within the organization or because of the need to remobilize the organization against new external challenges, leaders will find themselves compelled to appeal credibly to interests that they share with others in order to secure the support they need.²³³ Thus, the themes of individual independence and the normative priority of the status quo are bound quite closely in the dominant political interpretation of the welfare rights movement.

A somewhat different (but not necessarily inconsistent) way of interpreting the failure of the movement emphasizes its inability to create alliances between people of even marginally different interests and circumstances. The local organizers failed to sustain alliances between people who had unenforced entitlements to special need grants and those who did not. At the national level, FAP, by incorporating the

232. The locus classicus of the logic of collective action is M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); the locus classicus of the iron law of oligarchy is R. MICHELS, *POLITICAL PARTIES* 342-56 (E. Paul & C. Paul trans. 1949). Although they don't use these terms, Bailis, Moynihan, Piven, and Cloward all argue, with various refinements and qualifications, within the framework of the two principles as I have described (and admittedly, oversimplified) them above.

233. See Sabel, *The Internal Politics of Trade Unions*, in *ORGANIZING INTERESTS IN WESTERN EUROPE: PLURALISM, CORPORATISM, AND THE TRANSFORMATION OF POLITICS* 209 (S. Berger ed. 1981) (showing how oligarchy is liable to become unsettled from the need to remobilize group members in response to economic and political change) [hereinafter cited as *ORGANIZING INTERESTS*].

working poor and two-parent families into the welfare system, created opportunities for political alliances between these groups and welfare recipients. But NWRO proved unwilling to risk the relatively marginal benefits of the status quo for the potentially great but more speculative gains such alliances might involve. The welfare rights movement thus involves an irony similar to the one I emphasized in the development of Social Security: The appeal to private law notions of right, which originates in a desire to avoid isolating the poor by associating their interests with those of the broader population, became implicated in strategies that had precisely the effect it was intended to preclude—the marginalization of the poor.

The dominant account suggests that the failure of the movement was a matter of inexorable logic or iron law.²³⁴ If such a logic or law were always applicable, then the rights theme in the welfare rights movement would have to be seen as an expression of it. But there are reasons to doubt that such a logic or law applies as widely as some interpreters assume. For one thing, such a logic or law can only operate in a politics that takes for granted a more or less established distribution. To the extent that politics calls into question the established order, its outcome is uncertain, and it increases the risks that those who engage in it, even if successful, will have to share the benefits of their activities. Such politics can also push leaders to make new or more credible commitments to collective goals.

Although this kind of politics defies the logic of collective action and the iron law of oligarchy, it happens nevertheless.²³⁵ The civil rights movement, especially in the South in the late 1950s and early 1960s, is a notable recent example. The movement produced a mobilization in support of essentially collective goals, such as desegregation and voting rights, that required enormous risks and complex coordination without either strong individual material incentives or oligarchic organization. From this perspective, one might interpret the failure of the welfare rights movement less in terms of a fatal logic or law of politics, than in terms of an unnecessarily narrow political vision, a narrowness paralleled, and perhaps encouraged, by the individualist premises of the New Property notion of welfare rights.

IV. JURISPRUDENCE, POLICY, AND POLITICS

Private law welfare jurisprudence can be criticized from at least two perspectives. First, there is a jurisprudential critique which challenges the classical portrayal of private law norms as constituting a realm of autarkic freedom and the corresponding association of public law

234. Bailis comes closest to this position. See L. BAILIS, *supra* note 225.

235. For an analysis of some of the ways in which changing moral visions and collective goals shape possibilities of mobilization and create sometimes surprising alliances, see C. SABEL, *WORK AND POLITICS* 127-93 (1982). The classic work from this perspective is E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1964).

norms with collective coercion, a portrayal adopted with modification by private law welfare jurisprudence. This jurisprudence emphasizes the pervasiveness of collective coercion in private law and the ways in which public norms can be understood as serving autonomy. It also challenges the ethical connotations of the the private law rhetoric. It suggests that the rhetoric arbitrarily privileges a single dimension of the self, that it ignores the extent to which interdependence is not only practically inescapable, but also a vital aspect of human fulfillment.

I do not intend to pursue this critique here, since it has been developed in the liberal jurisprudence of the Progressive/New Deal periods,²³⁶ the New Deal social workers' theories of welfare entitlement,²³⁷ and contemporary feminist theory.²³⁸ Instead, I want to pursue some themes of a second critique, one that views private law welfare jurisprudence as a political strategy to advance the redistributive and humanitarian goals of the general liberal program.

The liberal welfare jurisprudes have often recognized the jurisprudential and ethical deficiencies of the private law vision but argued that they were compensated by the advantages of the vision as a ideology. In this view, they have underestimated important limitations of the private law approach. First, the private law approach devalues means testing, and means testing is considerably more useful than the liberals have tended to acknowledge. Second, private law rhetoric has tended to discourage the integration of welfare reform with political organization and with work.

A. *The Utility of Means Testing*

There are three general approaches to determining income transfer benefits: earnings relation, flat grants, and means testing. The advantage of means testing over the other two is that it targets benefits most efficiently in terms of need. Since earnings do not correlate directly with need and since flat grants go to everyone in the same categorical circumstances regardless of income or wealth, these modes of transfers are expensive and wasteful relative to need.

How expensive and wasteful they are depends on the pretransfer distribution of income. With a relatively high degree of pretransfer equality, earnings related benefits and flat grants involve less inefficiency than they do with relatively low pretransfer equality. In their enthusiasm for the extensive nonmeans tested benefits of some European welfare systems, liberal welfare reformers have occasionally ignored the widely varying effects of pretransfer distributions on such programs. For example, in Sweden, due substantially to government and union income and full employment policy, earnings are relatively

236. See Pound, *supra* note 9; Hale, *supra* note 9; Cohen, *supra* note 9.

237. See C. TOWLE, *supra* note 4.

238. See C. GILLIGAN, *supra* note 175.

equally distributed. In this situation, earnings-related and flat grant transfers are not grossly overbroad with respect to need, and a fairly egalitarian post-transfer distribution can be achieved with minimal reliance on means testing. By contrast, in France, which is sometimes admired for dispensing almost completely with means testing, things are quite different. The pretransfer distribution is relatively unequal, and in consequence, a massive nonmeans tested welfare system contributes to a post-transfer distribution that is perhaps the least equal of all the wealthy European countries.²³⁹

The pretransfer distribution in America has been relatively unequal and has been getting more so in recent years.²⁴⁰ It has never been part of the mainstream liberal program to reduce this inequality directly through an income policy. Unionization and full employment, which have been on the liberal agenda, might have reduced it indirectly, but compared to the wealthier European countries, neither policy has been pursued vigorously enough to have a dramatic distributive effect.²⁴¹ Thus, the burden of achieving distributive goals has been placed largely on the tax and welfare systems. In these circumstances, the costs of dispensing with means testing have been exceptionally high.²⁴²

A central effect of the aversion to means testing expressed in private law welfare jurisprudence has been to encourage the overdevelopment of social insurance relative to public assistance. A strong case can be made, supported by European comparisons, that both social insurance and public assistance are underdeveloped in America.²⁴³ But whatever the proper size of the entire system, public assistance should have played a relatively larger role than it has.

Hypothesizing about alternative courses of development entails the speculative difficulties of all counterfactual theorizing. Moreover, the course of development that has occurred has limited to a substantial extent the possible scope of current reform. Nevertheless, a broad range of reforms that remain plausible illustrates the virtues of a perspective less constrained by aversion to means testing than private law

239. N. FURNISS AND T. TILTON, *THE CASE FOR THE WELFARE STATE: FROM SOCIAL SECURITY TO SOCIAL EQUALITY* 128-44 (1977) (on Sweden); A. KAHN AND S. KAMERMAN, *INCOME TRANSFERS FOR FAMILIES WITH CHILDREN: AN EIGHT COUNTRY STUDY* 312-13 (1983); Sinfield, *Poverty and Inequality In France*, in *POVERTY AND INEQUALITY IN COMMON MARKET COUNTRIES* 92, 101, 114-17 (V. George & R. Lawson ed. 1980).

240. See Moon & Sawhill, *Family Incomes: Winners and Losers*, in *THE REAGAN RECORD* 317, 319-20 (J. Palmer & I. Sawhill ed. 1984); Sawyer, *Income Distribution in OECD Countries*, in *OECD ECON. OUTLOOK OCCASIONAL STUD.*, 1976, at 12-20.

241. See Hibbs, *Inflation, Political Support, and Macroeconomic Policy*, in *THE POLITICS OF INFLATION AND ECONOMIC STAGNATION* 174-83 (L. Lindberg & C. Maier ed. 1985).

242. The redistributive inefficiency of flat grants in the American context, while substantial, would be less than that of earnings related benefits. For elaborate but inconclusive efforts to compare flat grants and means tested benefits in terms of several dimensions of efficiency, including labor supply effects, see the essays in *INCOME-TESTED TRANSFER PROGRAMS: THE CASE FOR AND AGAINST* 175-324 (I. Garfinkel ed. 1982).

243. See OECD, *PUBLIC EXPENDITURE ON INCOME MAINTENANCE PROGRAMS* 17-33 (1976).

welfare jurisprudence. Take, for example, a recent proposal by Alicia Munnell and Laura Stiglin for the joint reform of Social Security and SSI.²⁴⁴ The proposal is a useful illustration because it would not require any changes outside the income maintenance system, and it seems subject to few objections other than those that arise from the central premises of private law welfare jurisprudence.

Munnell and Stiglin would scale down Social Security by eliminating derivative benefits, replace the progressive payout rates with a uniform percentage of average earnings, and institute an earnings sharing procedure that would credit each member of a couple with half the couple's total earnings. At the same time, they would scale up the SSI program by raising benefit levels to at least the poverty line and by providing for a 25 percent disregard of Social Security income (so that SSI benefits would be reduced by only 75 cents for each dollar of Social Security income). Their preliminary calculations suggest that the reforms would leave substantially unchanged the rates at which primary benefits replace average wages for both high and medium income range wage earners and would substantially raise the joint Social Security/SSI replacement rate for low range earners, in the case of single people, by nearly 50 percent. Most of the losers would be women, but given the high incidence of poverty among aged women, a large majority of the gainers would also be women, and all of the gainers would be poorer than the losers. Divorced women would benefit from the earnings sharing feature because it would enable them to retain their attributed earnings credits after divorce. The earnings sharing feature would also rectify the anomaly of the current system whereby one-earner couples receive higher benefits than two-earner couples with the same total income.²⁴⁵

The liberal critics of this proposal have invoked the traditional themes of private law welfare jurisprudence.²⁴⁶ They object, first, that the expanded means testing will bring increased degradation to the poor; second, that increased reliance on public assistance will exacerbate the marginalization of the poor, and third, that the reform will deprive beneficiaries of the current system of what should be regarded as vested rights.

The first claim—that the means test, because of its explicit connotations of dependence, is necessarily degrading—strikes me as simply wrong. To begin with, the claim has to be qualified to recognize that many of the degrading practices traditionally associated with public assistance were a function of the way the programs were administered.

244. *Munnell & Stiglin*, *supra* note 164, at 107–20.

245. The elimination of parents' and children's benefits would entail an expansion of the AFDC program, even under current standards, since AFDC financial eligibility would increase as derivative benefits declined. Munnell and Stiglin do not address the financial effect of this change.

246. Aaron, *Discussion*, in Burkhauser & Holden, *supra* note 164, at 124, 126–28.

The punitive moralism, the routine invasion of privacy, and the unrestrained discretion emphasized in the critiques of welfare administration are not inherent in the idea of means-tested assistance. Properly administered—for example, on the model of the federal income tax system (which involves an inverted means test)—a means-tested welfare program could eliminate them. Private law welfare jurisprudence has sometimes recognized this, but it has still insisted that dependence is culturally linked to connotations of contempt and degradation too strong to be neutralized by administrative reform.

It seems to me that this claim takes a distorted view of American culture and even of the contemporary welfare system. The New Deal jurists tended to characterize the cultural parameters they faced in the terms of classical legalism and Social Darwinism.²⁴⁷ In doing so, they ignored a variety of competing traditions in which altruistic concerns figured prominently, for example, the tradition of cooperative worker association expressed in the 19th century “mutual aid” societies,²⁴⁸ the agrarian cooperative movement,²⁴⁹ and the big city political machine.²⁵⁰ Each of these movements was associated with social visions that emphasized solidarity and need-based distribution. This was particularly true of the mutual aid societies, which operated insurance plans that defied actuarial conventions in order to redistribute to the needy with minimal regard to contributions, and the political machines, which regarded the provision of need-based public assistance as one of their central functions. Each of these traditions survived at the time of the New Deal, and constituencies associated with each formed part of the New Deal electoral coalition. A welfare program committed to more explicit redistribution would have had considerably more cultural resources to draw upon than the private law jurists acknowledged.

Moreover, the history of American welfare contradicts the claim that dependence and degradation are inextricably linked. If dependence were considered inherently degrading, one would expect the most dependent welfare recipients to be treated worst, but, in fact, the opposite has generally been the case. The most dependent beneficiaries have generally been treated best, in terms of both generosity of benefits and manner of administration. Among adults, for example, the blind usually have been treated best, followed first by the elderly and disabled, and then, usually at a great distance by able-bodied, working-age people.²⁵¹ There has been strong support, especially in recent years, for relatively generous and humanely administered programs for such obviously dependent people as those with severe physical handicaps and

247. See, e.g., Brown, *supra* note 12 at 4.

248. 2 J. COMMONS, *HISTORY OF LABOR IN THE UNITED STATES* 39–41, 430–38 (1918).

249. L. GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1975).

250. 2 M. OSTROGORSKII, *DEMOCRACY AND THE ORGANIZATION OF POLITICAL PARTIES* 367–440 (1902).

251. See *Jefferson v. Hackney*, 406 U.S. 535 (1972) (rejecting equal protection challenge to varying benefit levels); S. LEVITAN, *supra* note 92, at 31–42.

learning disabilities.²⁵² These facts suggest that *unambiguous dependence* is not regarded as degrading or contemptible per se. Popular contempt for beneficiaries has focused largely on able-bodied, working-age adults, and it seems to be based, not on dependence, but on two related factors.

One factor is the widespread sense that the dependence of many welfare claimants is unreal or exaggerated, that the claimant could be self-supporting but for a failure of will or integrity. This concern is generally not applicable to the elderly, since the culture tends to excuse them from work. Thus, it ought not to be an objection to proposals such as Munnell's and Stiglin's for the reform of old age benefits. The concern does apply to working-age claimants, but it applies in social insurance as well as public assistance, and there are plausible programmatic responses to it, such as work incentives and requirements. The other factor that seems to underlie the attitudes usually attributed to contempt for dependence is racial, ethnic, and class prejudice against the kinds of people who happen to be poor. But this is not a factor that a liberal political strategy can afford to take for granted.

The second objection to the relative expansion of public assistance asserts that it increases reliance on the most politically insecure type of program. Yet, the political insecurity of public assistance is in substantial part an artifact of the private law strategy itself. The liberal attempt to avoid marginalizing the poor by integrating them into a social insurance constituency with the middle class backfired. The social insurance programs never grew to obviate reliance on public assistance, but they have provided many with a substantially unearned immunity from some vicissitudes of need that has permitted them to remain indifferent to public assistance. Welfare jurisprudence has encouraged in social insurance beneficiaries a smugness toward their economic position and an aloofness from those who depend on public assistance.

In these circumstances, the most promising approach to remedying the marginalization of those who depend on public assistance is not to shrink this constituency but to expand it, to require that transfers grounded on considerations of need be accomplished through an explicitly need-based program. As Munnell and Stiglin suggest, a dramatic increase in the number of public assistance recipients might increase the social acceptability of receiving welfare.²⁵³ It might also increase the political support for it.

The third liberal objection to reforms such as Munnell's and Stiglin's is that they deprive beneficiaries of what should be regarded as a vested right. Any major reform should take account, through transitional or grandfathering provisions, of the extent to which people may

252. See, e.g., *Children With Special Needs*, 48 LAW & CONTEMP. PROBS. (Winter, Spring 1985) (symposium); Goldman, *Architectural Barriers: A Perspective on Progress*, 5 W. NEW ENG. L. REV. 465 (1983).

253. Munnell & Stiglin, *supra* note 164, at 115.

have actually relied to their detriment on expectations based on the rules in force. But the objection goes far beyond concern about actual reliance to suggest that all the elements of the status quo should be regarded as having an important moral status. Yet, once one separates out concerns about reliance and recognizes how weakly grounded much social insurance is in distributive principles, the argument for vested entitlement seems to rest on an indiscriminate and quite conservative attachment to the status quo. That liberals should object to reforms consistent with traditional liberal distributive principles on the basis of such an attachment seems ironically inappropriate.

Finally, we should consider another objection to the expansion of public assistance that has not figured prominently in liberal welfare discourse but has been prominent in the writings of conservative critics of the welfare system.²⁵⁴ The concern is that public assistance creates strong work disincentives. A program that counts earnings fully against financial eligibility standards creates an implicit 100 percent tax on earnings; a program that lowers the tax by disregarding a portion of earned income is proportionately more expensive and less efficient in targeting benefits in relation to need. Although there are strong non-financial incentives to work, elaborate experiments with negative income tax proposals in the 1970s convinced many that the financial disincentives were strong enough that a large portion of the cost of expanded public assistance would be required either to fund income disregards to avoid decreased work effort or to replace income lost as a result of decreased work effort.

Most people do not regard such concerns as applicable to programs for the elderly; thus, they are not a strong objection to the Munnell-Stiglin proposal. The extent of the disincentive effects of expanding public assistance for the non-elderly is far less clear than many recent critics of the welfare system have asserted.²⁵⁵ But insofar as work disincentives are a likely problem, the best response, as the Carter administration's welfare reform proposal recognized, is to rely less on income disregards and more on work requirements, preferably supplemented by a job creation program.²⁵⁶

254. *E.g.*, M. ANDERSON, *supra* note 88, at 87-132.

255. *See* Bishop, *The Welfare Brief* (Book Review), 53 PUB. INTEREST 169 (1978) (criticizing M. ANDERSON, *supra* note 88). The conclusions drawn from the negative income tax experiments will have to be reconsidered in light of the surprisingly small work reduction effect of the sharp increase in implicit tax rates resulting from the 1981 cuts in AFDC initiated by the Reagan administration. *See* U.S. GEN. ACCOUNTING OFFICE, AN EVALUATION OF THE 1981 AFDC CHANGES: INITIAL ANALYSIS (April 2, 1984) (GAO/PEMD-84-6). While the recent events are not directly comparable to the experiments, they contradict many expectations drawn from those experiments.

256. *See* Lurie, *Work Requirements In Income-Conditioned Transfer Programs*, 52 SOC. SERV. REV. 551, 561-63 (1978). Some commentators doubt that work requirements, in the absence of a jobs program, are viable. *See, e.g.*, Goodwin, *The Case Against Work Requirements*, 36 PUB. WELFARE 39 (1978). However, most prior experience with them in public assistance has involved populations with more limited employment potential than the one involved in the negative income tax experiments. In any event, whatever the labor disincentive effects of public

B. *Organizing and Work*

In the 1960s and early 1970s, the theme of welfare rights was associated with a distinctive approach to politics. The essence of this approach is disruptive protest in support of demands for benefits from the state.²⁵⁷ In retrospect, this approach has severe limitations. At its most successful, it leads to the expansion of the state without giving the protesters participation in, or control over, it (or any obligation to submit their indirect influence to the discipline of democratic procedure). Moreover, such success is likely to be temporary, since welfare expansion unaccompanied by changes in the rest of the economy is liable to create fiscal crisis and backlash. Although a full critique of this approach to politics is beyond the scope of this paper, I want to suggest briefly some ways in which the jurisprudential deficiencies of private law welfare jurisprudence parallel and contribute to the two principal deficiencies of this political approach: its failure to integrate the politics of welfare expansion with broader forms of politics and its failure to integrate welfare reforms with reforms in the system of production, and in particular, with work.

1. *Organizing.*

Consider an alternative approach to poor people's politics. Instead of simply making demands on the state for benefits, it would seek direct influence over it. Instead of relying solely on disruptive protest and appeals to the courts, it would try to link these activities to political organizing and electoral politics. One element of this approach would be the bartering of electoral support for representation within the state and state assistance in strengthening popular organization. We get some idea of the advantages and disadvantages of this approach from the corporatist political institutions of Europe and Latin America.²⁵⁸ But we need not look so far. The pre-New Deal urban political machine had some of the qualities of this style of politics. And, in the liberal reform proposals of the 1960s, there was at least one model, albeit an ambiguous and unrealized one, for a politics of this kind—the Community Action Programs sponsored by the Economic Opportunity Act of 1964.

The Community Action Programs (CAPs) were federally sponsored organizations in low income communities. Although the CAPs represented different things to different people, they were widely understood as intended to increase access to, and participation in, the local

assistance, they are unlikely to be a basis for preferring social insurance to public assistance, since the former also has labor disincentive problems. See S. Danziger, R. Haveman & R. Plotnick, *supra* note 80, at 988–93.

257. Piven and Cloward explicitly defend this vision of poor people's politics. F. PIVEN & R. CLOWARD, *supra* note 225.

258. See ORGANIZING INTERESTS, *supra* note 233; A. STEPAN, THE STATE AND SOCIETY (1978).

political process by the poor. This was the connotation of the phrase "maximum feasible participation" incorporated in the legislation.²⁵⁹ Most of the programs were established with at least a partially elected leadership. Whether the leadership was to be seen as part of or parallel to the established local government structure was unresolved. But the programs were expected to increase the influence of the poor both by serving as a vehicle for pressuring established local elites and by directly administering federally funded programs. It was also never clear whether the programs were intended to act as bridges to electoral politics at either the local or national level. In comparing the Economic Opportunity Act to the National Labor Relations Act of 1935, and the CAPs to labor unions, Sargent Shriver, the first director of the Office of Economic Opportunity, suggested one model that linked organizing to electoral politics.²⁶⁰

None of the diverse hopes for the CAPs were fulfilled. CAPs were organized throughout the country in a burst of activity in the mid-1960s, generated a good deal of energy, hope, and frustration for a brief period, and then quickly lost support and died a lingering death.²⁶¹ Although some of the programs were charged with mismanagement and corruption, the activities that most undermined their support were the ones most consistent with the more ambitious interpretations of the programs' political mission. When the CAPs mobilized lower class pressure against unresponsive municipal governments that were part of the Democratic establishment, the national Democratic leadership withdrew support. Although many of the founders of the programs never shared a political conception of the CAPs, and the Johnson administration abandoned them when they became effectively political, the question remains whether the political conception, if adequately implemented and supported, would have been a good idea.²⁶²

Perhaps the most vigorous objection to the political conception at the time the fate of the CAPs was being debated was that it tended to antagonize working class members of the established Democratic constituency with strong representation in urban municipal government and thus lead either to their defection or to debilitating divisions within

259. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 202, 78 Stat. 508, 516 (omitted by Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, § 104, 81 Stat. 672, 690).

260. R. KRAMER, PARTICIPATION OF THE POOR: COMPARATIVE COMMUNITY CASE STUDIES IN THE WAR ON POVERTY 14 (1969) (quoting Sargent Shriver).

261. See *id.*; P. MARRIS & M. REIN, DILEMMAS OF SOCIAL REFORM: POVERTY AND COMMUNITY ACTION IN THE UNITED STATES (2d ed. 1973); A. MATUSOW, THE UNRAVELING OF AMERICA (1984).

262. Community organizing efforts have continued with varying degrees of success since the CAP era. For an account of one of the most successful efforts, the Communities Organized for Public Service organization in San Antonio, see Skerry, *Neighborhood COPS*, 190 NEW REPUBLIC 21 (1984).

the constituency.²⁶³ Today, however, when the Democrats suffer from both working class defection and from the mass electoral nonparticipation of the poor, this objection ought to be reassessed. It is widely recognized that the New Deal coalition has been hurt by a failure of institutions both to mobilize its members and to mediate among them.²⁶⁴ The CAP idea was potentially responsive to both needs.

A second set of objections arose from the fear that the experiment would not lead to genuine political participation.²⁶⁵ It might, for example, produce a new class of officeholders purporting to speak for people to whom they were not accountable. Or it might mobilize people only to submit them to the control of an entrenched government bureaucracy. Of course, these are the types of problems associated with the logic of collective action and the iron law of oligarchy. They are real dangers, but it is not clear that they are insuperable. There are a variety of ways of structuring the programs to reduce them. (For example, federally provided resources and delegated authority could be made proportional to the number of residents who vote or otherwise participate in the program; procedural guarantees of an open electoral process could be stipulated, and responsibility for enforcing them could be diffused among a variety of institutions.)

For the purposes of the present essay, the important point is that private law welfare jurisprudence is at best indifferent, and at worst hostile, to considerations of mobilization and organization among the poor. It tends to portray all forms of collective activity other than that of the rights enforcing state as a threat to the basic goal of independence. It also, especially in the New Property version, tends to accord normative priority to the status quo and thus to divert attention from the process by which the status quo comes to be defined and by which it might be changed. Even at its most adventurous—when it tries to integrate organizing concerns, as in the welfare rights movement—it has an affinity for precisely the kinds of strategies that are most likely to founder on the logic of collective action and iron law of oligarchy—strategies based on appeals to purely individual interests.

2. *Work.*

The welfare activists of the 1960s and 1970s tended not to integrate claims of rights to minimally decent jobs into either their pronouncements or their strategies,²⁶⁶ and they usually resisted attempts to re-

263. See D. P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY* x (paperback ed. 1969).

264. See T. EDSALL, *THE NEW POLITICS OF INEQUALITY* 23–66 (1984); N. POLSBY, *CONSEQUENCES OF PARTY REFORM* 131–56 (1983).

265. See, e.g., Alinsky, *The War on Poverty: Political Pornography*, 21 J. SOC. ISSUES 41 (1965).

266. Important exceptions are the relatively recent efforts by Peter Anderson and Sylvia Law to extend the focus of welfare jurisprudence to job creation and training. See Anderson,

quire jobs as a condition of, or an alternative to, welfare.²⁶⁷

To a significant extent, the indifference to job rights and hostility to work requirements seems to have been influenced by private law welfare jurisprudence. First, work requirements were portrayed as contradicting the basic value of independence with its connotations of autarky. Welfare rights proponents suggested that the essence of right was an "unconditional" quality that would be violated by work requirements.²⁶⁸ Of course, contract exemplified a category of classical rights that was typically conditional, but having jettisoned the contract analogy along with the classical distributive premises of effort and exchange, the activists were able to invoke a more extreme form of independence, one that would require welfare benefits to be secured to the claimant without any corresponding obligations. Second, as we have seen, the New Property rhetoric was better equipped to defend the normative status quo than to argue for its alteration. The provision of welfare benefits to a substantial sector of the poor (often without work requirements) was a well established part of the status quo; the demand for decent jobs, while hardly new, was much farther away from being grounded in established institutions.

This is not to say that opposition to work requirements was simply the product of the New Property vision. To a large extent, opposition was grounded in strategic concerns about the likelihood of abuse of work requirements. Such requirements could turn out to increase the demands on recipients of bureaucratic paper-pushing and hoop-jumping without substantially increasing their chances of getting a job. Or the requirements might force recipients to accept jobs that lacked the minimal requisites of decency and fairness on which nonwelfare recipients would be entitled to insist (e.g., sub-minimum wage jobs). Such concerns, however, could have been dealt with through efforts to shape the design and administration of job requirements, or, better yet, through a job creation program, rather than through blanket opposi-

WIN: *From Both Sides Now*, 13 CLEARINGHOUSE REV. 584 (1979); *Law, Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983).

267.

Because of my background and those of the social work and organizing professionals on the staff of NWRO with whom I talked about [the Work Incentive Program], I concentrated on learning about and developing strategies to beat the coercive aspects of the program I was able to outline a strategy of delays and appeals which virtually assured a recipient a way out of WIP

It took a long time for me to learn that because WIP was decidedly underfunded, the officials administering it were, by and large, more likely to deny people entrance to and services in WIP than to force people to enter it. I ignored the real problems of the recipients actually involved with WIP in favor of the problems which I was disposed to see

Wexler, *Practicing Law For Poor People*, 79 YALE L.J. 1049, 1066 (1970); see also V. BURKE & V. BURKE, *supra* note 228, at 161-62 (opposition to work requirements by welfare rights activists).

268. Reich, *supra* note 15, at 779-85 (arguing that absence of conditions is a key element of right).

tion.²⁶⁹ To the extent that activists tended toward blanket opposition or simply indifference to the whole job issue, they seem to have been partly influenced by New Property themes.²⁷⁰

In retrospect, this failure to integrate concerns about work and job creation into the welfare rights movement has been a major liability in several respects. First, a political campaign focused only on welfare was likely to exacerbate the political marginalization of the poor. It had relatively little appeal to the large segment of the working class that had become relatively immune to the risk of having to rely on public assistance. Second, focusing on welfare rights limited the appeal of the movement to recipients themselves. Many, perhaps most, welfare recipients would prefer a minimally decent job to public assistance.²⁷¹ Most recipients receive public assistance for only short periods between intermittent employment, and few think of themselves as long-term recipients.²⁷² Moreover, most recipients share the conventional belief that people with a reasonable opportunity to do so ought to work in return for their living. A movement focused solely on protecting and expanding benefits had a limited appeal to people who thought of welfare as a temporary aspect of their lives and who would be likely to reserve most of their energies for activities that might get them into the mainstream of the economy. Finally, the exclusive focus on welfare risked exacerbating the negative stereotype among the nonpoor of the poor as people seeking to be cared for by society without making any contribution to it.

269. See Law, *supra* note 266, and Anderson, *supra* note 266, for examples of this approach. For an economic analysis of the possibilities of job creation programs, see *CREATING JOBS* (J. Palmer ed. 1978).

270. My remarks about work overlap the critique of welfare liberalism in recent studies such as C. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY: 1950-1980* (1984), and L. MEAD, *BEYOND ENTITLEMENT* (1986) that object to the connotations of irresponsible self-seeking and indifference to work in the liberal notion of welfare entitlement. Although I agree with some of the arguments in these works, I differ with them in many respects, including two particularly important ones.

First, these works make very extravagant and often unsupported claims about the influence of the liberal notion of entitlement on the underclass. In contrast, my argument claims only that this notion has influenced professional academics, policy-makers, and activists, and I try to document my claim with references to their writings and policy output.

Second, while these works are critical of the liberal notion of welfare entitlement and of the smug and irresponsible attitudes among the poor they associate with this notion, they are uncritical and indeed sentimental about the liberal notion of entitlement to private wealth and the smug and irresponsible attitudes among the nonpoor that could more plausibly be associated with this notion. (Using any reasonable measure, the moral and social costs of middle and upper class tax chiseling dwarf those of welfare abuse, but you would never guess that from these works.) In contrast, the Progressive critique I draw on emphasizes the pervasiveness of interdependence and collective phenomena throughout the economy.

271. See L. GOODWIN, *DO THE POOR WANT TO WORK?: A SOCIAL-PSYCHOLOGICAL STUDY OF WORK ORIENTATIONS* 32-52 (1972).

272. See S. LEVITAN, M. REIN, & D. MARWICK, *WORK AND WELFARE GO TOGETHER* 49-69 (1972).

V. CONCLUSION

Private law welfare jurisprudence has encouraged and legitimated a set of priorities in the American system of income distribution that, in terms of almost any version of the general liberal program, seems perverse. In the New Contract version, it accords the highest and most secure status to nominally private wealth, such as pensions, the second highest to social insurance, and the lowest to public assistance. How objectionable this vision is depends on how far one goes with the New Deal social workers and the natural law lawyers in embracing need as the most fundamental distributive principle. But even one who insists on the primacy of effort and exchange should have strong reservations about the New Contract. Private income and wealth and social insurance are riven with elements of transfer and subsidy that cannot be justified in terms of any plausible measure of effort or exchange. The private law approach deliberately obscures this fact to encourage a sense of smugness among the beneficiaries of such transfers and subsidies and to immunize their interests from reassessment and revision. At the same time, it has, at best, left untouched and, at worst, exacerbated the degraded moral status and the political vulnerability of need-focused transfers.

While the New Property tries to endow public assistance with some normative status, it provides little basis for attacking the conventional distributive priorities. Moreover, its individualist premises and rhetoric seem inimical to the more plausible political or policy responses to poverty.